ORGANIZATION OF AMERICAN STATES

INTER-AMERICAN JURIDICAL COMMITTEE

CJI

ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE GENERAL ASSEMBLY

2023

GENERAL SECRETARIAT
ORGANIZATION OF AMERICAN STATES
WASHINGTON, D.C.

CHARTER OF THE ORGANIZATION OF AMERICAN STATES*

Chapter XIV
THE INTER-AMERICAN JURIDICAL COMMITTEE

Article 99

The purpose of the Inter-American Juridical Committee is to serve the Organization as an advisory body on juridical matters; to promote the progressive development and the codification of international law; and to study juridical problems related to the integration of the developing countries of the Hemisphere and, insofar as may appear desirable, the possibility of attaining uniformity in their legislation.

Article 100

The Inter-American Juridical Committee shall undertake the studies and preparatory work assigned to it by the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, or the Councils of the Organization. It may also, on its own initiative, undertake such studies and preparatory work as it considers advisable, and suggest the holding of specialized juridical conferences.

Article 101

The Inter-American Juridical Committee shall be composed of eleven jurists, nationals of Member States, elected by the General Assembly for a period of four years from panels of three candidates presented by Member States. In the election, a system shall be used that takes into account partial replacement of membership and, insofar as possible, equitable geographic representation. No two Members of the Committee may be nationals of the same State.

Vacancies that occur for reasons other than normal expiration of the terms of office of the Members of the Committee shall be filled by the Permanent Council of the Organization in accordance with the criteria set forth in the preceding paragraph.

Article 102

The Inter-American Juridical Committee represents all of the Member States of the Organization, and has the broadest possible technical autonomy.

Article 103

The Inter-American Juridical Committee shall establish cooperative relations with universities, institutes, and other teaching centers, as well as with national and international committees and entities devoted to study, research, teaching, or dissemination of information on juridical matters of international interest.

Article 104

The Inter-American Juridical Committee shall draft its statutes, which shall be submitted to the General Assembly for approval.

The Committee shall adopt its own rules of procedure.

Article 105

The seat of the Inter-American Juridical Committee shall be the city of Rio de Janeiro, but in special cases the Committee may meet at any other place that may be designated, after consultation with the Member State concerned.

* Amended by the “Protocol of Buenos Aires” in 1967, by the “Protocol of Cartagena de Indias” in 1985, by the “Protocol of Washington” in 1992, and by the “Protocol of Managua” in 1993.

ORGANIZATION OF AMERICAN STATES

INTER-AMERICAN JURIDICAL COMMITTEE

CJI

IV SPECIAL SESSION
December, 12, 2023
Virtual session

OEA/Ser. Q
CJI/doc. 707/23
December 12, 2023
Original: Spanish

ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE GENERAL ASSEMBLY

2023

General Secretariat
Organization of American States
www.oas.org/cji

EXPLANATORY NOTE

Until 1990, the OAS General Secretariat published the “Final Acts” and “Annual Reports of the Inter-American Juridical Committee” under the series classified as “Reports and Recommendations”. In 1997, the Department of International Law of the Secretariat for Legal Affairs began to publish those documents under the title “Annual Report of the Inter-American Juridical Committee to the General Assembly.”

According to the “Classification Manual for the OAS official records series”, the Inter-American Juridical Committee is assigned the classification code OEA/Ser. Q, followed by CJI, to signify documents issued by this body (see attached lists of Resolutions and documents).

TABLE OF CONTENTS

Page

RESOLUTIONS ADOPTED BY THE INTER-AMERICAN JURIDICAL COMMITTEE

Page

* * *

DOCUMENTS INCLUDED IN THE ANNUAL REPORT

Page

INTRODUCTION

The Inter-American Juridical Committee is honored to submit to the General Assembly of the Organization of American States its Annual Report on the activities carried out during 2023, in accordance Articles 91(f) of the Charter of the Organization of American States and 13 of the Committee's Statutes, and with mandates from the General Assembly concerning the preparation of annual reports by the organs, agencies, and entities of the Organization, including those contained in resolutions taken in recent years AG/RES. 2930 (XLIX-O/19), AG/RES. 2959 (L-O/20), AG/RES. 2974 (LI-O/21) and AG/RES. 2990 (LII-O/22) and AG/RES. 3005 (LIII-O/23), adopted in recent years.

In 2023, the Inter-American Juridical Committee held two regular meetings and one special meeting: the first, its one hundred-second regular session, was held session from March 6 to 10, 2023 whereas the one hundred-third regular session was held from August 2 to 11 2023, both took place face-to-face at its headquarters in Rio de Janeiro, Brazil. Exceptionally, the Juridical Committee held a special meeting, corresponding to its Fourth Special Meeting, on December 12, 2023. The event, which was held virtually, brought together members of the Committee to analyze the final version of the report on the "Guide to the law applicable to foreign investments" and "Contracts between traders with contractually stupid parties", presented by Dr. Moreno Rodriguez and Dr. Fresnedo, respectively.

During the period covered by this report, the Committee adopted the following documents which have been forwarded to the OAS General Assembly for consideration:

- *The Declaration of Inter-American Principles on Neurosciences, Neurotechnologies, and Human Rights* puts forward a set of proposals that seek to link advances in neuroscience and neurotechnologies to human rights protection measures, such as dignity, identity, the right to privacy and intimacy, physical and mental health, as well as the prohibition of torture and cruel, inhuman, and degrading treatment, among others.
- *The Declaration of principles on the legal regime for the creation, operation*, financing and dissolution of civil nonprofit entities, a report intended to facilitate such entities' life cycle based on domestic and international standards and best practices, including the relevant legislation in the OAS member states. This CJI document systematizes, updates, and consolidates the standards developed in the region by means of an exhaustive study that is reflected in the comments on each principle.
- *The report on compulsory primary education* urges OAS member states to ensure the full enjoyment of primary education and to reaffirm this "fundamental human right" as free, compulsory, and universal. The CJI resolution adopting this report also recommends finding alternative means of rendering technical and financial assistance to states experiencing problems implementing it.
- The *Guide to best practices in jurisdictional cooperation for the Americas* recommends mechanisms to make cooperation procedures under the inter-American conventions in force more effective through the use of information and communication technologies.
- *The report on Party autonomy in international commercial contracts with a weak bargaining party: inherent challenges and possible solutions* contains recommendations on good practices urges legislators and judges to ensure that contracts are balanced, in a context in which private international law is called upon to protect the contractually weaker party, avoiding abuses. This proposal offers a variety of formulas for contracts that exclude the autonomy regime, notably: regulation of unfair competition; respect for public order and the principle of equality of the parties before the law; exclusion of abusive clauses or clauses that are not freely consented to by all parties; Application of the UNIDROIT principles.

The CJI added six new topics to its agenda: "Legal implications of sea level rise in the inter-American regional context"; "Corporate responsibility of manufacturers and sellers of weapons in the area of human rights;" "Updating of the 2020 Model Inter-American Law 2.0 on Access to Public Information," "Approach to the new law of outer space," "Impact of artificial intelligence-based technologies on human rights, with a special focus on children and adolescents,", and "Recognition and enforcement of foreign judgements and

awards." The last three correspond to initiatives by members of the Committee. At the end of its Special Session in December, the Committee's agenda consisted of twelve items.

This Annual Report contains the studies on the aforementioned topics and has three chapters. The first explains the origins, legal grounds, and structure of the InterAmerican Juridical Committee and provides information on the sessions held during the year. The second describes the items discussed by the Juridical Committee and includes the text of the resolutions adopted and specific documents. Lastly, the third chapter discusses the activities of the Committee and its members over the past year. As usual, the Report presents a detailed list of the resolutions and documents approved.

The 2023 Annual Report has been approved by Dr. Jose Antonio Moreno Rodríguez in his capacity as Chair of the Inter-American Juridical Committee.

This information can be found on the Inter-American Juridical Committee's website: https://www.oas.org/en/sla/iajc/inter-american_juridical_committee.asp.

* * *

CHAPTER I

1. The Inter-American Juridical Committee: its origin, legal bases, structure and purposes

The forerunner of the Inter-American Juridical Committee was the International Board of Jurists in Rio de Janeiro, created by the Third International Conference of American States in 1906. Its first meeting was in 1912, although the most important was in 1927. There, it approved twelve draft conventions on public international law and the Bustamante Code in the field of private international law.

Then in 1933, the Seventh International Conference of American States, held in Montevideo, created the National Commissions on Codification of International Law and the Inter-American Committee of Experts. The latter's first meeting was in Washington, D.C. in April 1937.

The First Meeting of Consultation of Ministers of Foreign Affairs of the American Republics, held in Panama, September 26 through October 3, 1939, established the Inter-American Neutrality Committee, which was active for more than two years. Then in 1942, the Third Meeting of Consultation of Ministers of Foreign Affairs, held in Rio de Janeiro, adopted Resolution XXVI, wherein it transformed the Inter-American Neutrality Committee into the Inter-American Juridical Committee. It was decided that the seat of the Committee would be in Rio de Janeiro.

In 1948, the Ninth International Conference of American States, convened in Bogotá, adopted the Charter of the Organization of American States, which *inter alia* created the Inter-American Council of Jurists, with one representative for each member state, with advisory functions, and the mission to promote legal matters within the OAS. Its permanent committee would be the Inter-American Juridical Committee, consisting of nine jurists from the member states. It enjoyed widespread technical autonomy to undertake the studies and preparatory work that certain organs of the Organization entrusted to it.

Almost 20 years later, in 1967, the Third Special Inter-American Conference convened in Buenos Aires, Argentina, adopted the Protocol of Amendments to the Charter of the Organization of American States or Protocol of Buenos Aires, which eliminated the Inter-American Council of Jurists. The latter's functions passed to the Inter-American Juridical Committee. Accordingly, the Committee was promoted as one of the principal organs of the OAS.

Under Article 99 of the Charter, the purpose of the Inter-American Juridical Committee is as follows:

> ... to serve the Organization as an advisory body on juridical matters; to promote the progressive development and the codification of international law; and to study juridical problems related to the integration of the developing countries of the Hemisphere and, insofar as may appear desirable, the possibility of attaining uniformity in their legislation.

Under Article 100 of the Charter, the Inter-American Juridical Committee is to:

> ... undertake the studies and preparatory work assigned to it by the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, or the Councils of the Organization. It may also, on its own initiative, undertake such studies and preparatory work as it considers advisable, and suggest the holding of specialized juridical conferences.

Although the seat of the Inter-American Juridical Committee is in Rio de Janeiro, it may meet elsewhere after consulting the member state concerned. This advisory body of the Organization on legal affairs consists of eleven jurists who are nationals of the member states of the Organization. Together, those jurists represent all the States and enjoy as much technical autonomy as possible.

2. Period covered by the Annual Report of the Inter-American Juridical Committee

A. Hundredth Regular Session

The 102nd Regular Session of the Inter-American Juridical Committee took place on March 6-10, 2023 at its headquarters in Rio de Janeiro, Brazil.

The members of the Inter-American Juridical Committee present for that Regular Session were the following, listed in the order of precedence determined by the lots drawn at the session's first meeting and in accordance with Article 28.b of the "Rules of Procedure of the Inter-American Juridical Committee":

- Martha del Carmen Luna Véliz (Panamá)
- Eric P. Rudge (Surinam)
- George Rodrigo Bandeira Galindo (Brazil)
- José Luis Moreno Guerra (Ecuador)
- Alejandro Alday Gonzalez (Mexico)
- Julio José Rojas Báez (Dominican Republic)
- José Antonio Moreno Rodríguez (Paraguay)
- Luis García-Corrochano Moyano (Peru)
- Cecilia Fresnedo de Aguirre (Uruguay)
- Ramiro Gastón Orias Arredondo (Bolivia)

Was absent Dr. Stephen Larson (United States), who was unable to travel to Brazil for personal reasons.

The Chairman greeted all members and he welcomed the presence of the two new members of the Committee: Julio José Rojas Báez (Dominican Republic) and Alejandro Alday Gonzalez (Mexico), who were elected by the General Assembly at its Fifty-second Regular Session in October 2022, for a four-year term. In addition, he also welcomed the re-election of Dr. George Bandeira Galindo (Brazil).

Representing the General Secretariat, technical and administrative support was provided by Dr. Jean-Michel Arrighi, Secretary for Legal Affairs; Dante Negro, Director of the Department of International Law, Luis Toro Utillano, Senior Legal Officer at the Department of International Law; Maria C. de Souza Gomes and Amalia Ruiz from the Secretariat of the Inter-American Juridical Committee.

The Inter-American Juridical Committee had before it the following agenda, adopted by resolution "Agenda for the hundred-second regular session of the Inter-American Juridical Committee CJI/RES. 276 (CI-O/22):

CJI/RES. 276 (CI-O/22)

AGENDA FOR THE HUNDREDTH SECOND REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

(Rio de Janeiro, Brazil – March 6- 10, 2023)

Current topics:

1. Particular customary international law in the context of the Americas
   Rapporteur: Dr. George Rodrigo Bandeira Galindo
2. Guide on the law applicable to foreign investments
   Rapporteur: Dr. José Antonio Moreno Rodríguez

3. Development of inter-American principles on the legal regime for the creation, operation, financing, and dissolution of non-profit civil entities
   Rapporteur: Dr. Ramiro Orias Arredondo
4. Development of inter-American guidelines on the participation of victims in criminal proceedings against acts of corruption
   Rapporteur: Dr. Ramiro Orias Arredondo
5. Development of international standards on neurorights
   Rapporteur: Dr. Ramiro Orias Arredondo
6. Right to education
   Rapporteur: Dr. Eric P. Rudge
7. Contracts between merchands with a contractual weak party
   Rapporteur: Dr. Cecilia Fresnedo de Aguirre
8. New technologies and their relevance to legal cooperation
   Rapporteur: Dr. Cecilia Fresnedo de Aguirre
9. The exceptional use of force in the inter-American context
   Rapporteur: Dr. Luis García-Corrochano Moyano
10. The inviolability of diplomatic premises as a principle of international relations and its relationship to the concept of diplomatic asylum
    Rapporteur: Dr. George Rodrigo Bandeira Galindo
11. The principles of international law on which the inter-American System is founded, as the normative framework that governs the work of the Organization of American States and relations among member states
    Rapporteur: Dr. George Rodrigo Bandeira Galindo
12. Strengthening the accountability regime in the use of information and communication technologies
    Rapporteur: Dr. Martha del Carmen Luna Véliz

This resolution was unanimously approved at the regular session held on August 9, 2022, by the following members: Drs. José Luis Moreno Guerra, José Antonio Moreno Rodríguez, Cecilia Fresnedo de Aguirre, Ramiro Gastón Orias Arredondo, Martha del Carmen Luna Véliz, Mariana Salazar Albornoz, Eric P. Rudge and George Rodrigo Bandeira Galindo

* * *

It should be mentioned that establishment of the "Dates and venue of the one hundred-second and one hundred-third regular sessions of the Inter-American Juridical Committee" was determined on August 5, 2022, by resolution CJI/RES. 273 (CI-O/22):

CJI/RES. 273 (CI-O/22)

DATES AND VENUES FOR THE 102ND AND 103RD REGULAR SESSIONS OF THE INTER-AMERICAN JURIDICAL COMMITTEE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS Article 15 of the Statutes establishes that regular sessions must take place twice in the year;

BEARING IN MIND that Article 14 of the Statutes establishes that the Inter-American Juridical Committee is headquartered in the city of Rio de Janeiro, Brazil;

It RESOLVES to hold its 102nd Regular Session from March 6 to 10, 2023 and the 103rd regular session from August 2 to 11 2023, at its headquarters in the city of Rio de Janeiro, Brazil.

This resolution was unanimously approved at the regular session held on August 5, 2022, by the following members: Drs. José Luis Moreno Guerra, Luis García-Corrochano Moyano, José Antonio Moreno Rodríguez, Cecilia Fresnedo de Aguirre, Ramiro Gastón Orias Arredondo, Martha del Carmen Luna Véliz, Mariana Salazar Albornoz, Eric P. Rudge and George Rodrigo Bandeira Galindo.

* * *

On the occasion, the plenary adopted a resolution that pays posthumous tribute to Dr. Eduardo Vio Grossi, a member of the Committee from 1992 to 2007 who passed away in December 2022:

CJI/RES. 280 (CII-O/23)

TRIBUTE TO THE MEMORY OF DR. EDUARDO VIO GROSSI

THE INTER-AMERICAN JURIDICAL COMMITTEE,

GRIEVED by the death of Dr. Eduardo Vio Grossi, the distinguished Chilean jurist, professor, and judge, who passed away in Santiago, Chile, on December 3, 2022;

CONSIDERING his eminent career in the service of his country, where he served as a legal advisor to the Chilean foreign ministry; within the inter-American system, as a judge of the Inter-American Court of Human Rights; and his brilliant performance at the Inter-American Juridical Committee from 1992 to 2007, where he served as Chair with skill and judgment, demonstrating his gifts as a jurist and his diplomatic abilities;

HAVING earned the respect and appreciation of the members of the Inter-American Juridical Committee for his wisdom, vocation, commitment, and adherence to the rules of international law,

RESOLVES:

1. To express its most deeply felt homage and recognition to the memory of Dr. Eduardo Vio Grossi.

2. To convey this resolution as an expression of the condolences of the Inter-American Juridical Committee to the Government of Chile and Dr. Eduardo Vio Grossi's family.

This resolution was adopted by acclamation at the regular session held on March 10, 2023, by the following members: Drs. Eric P. Rudge, George Rodrigo Bandeira Galindo, José Luis Moreno Guerra, Alejandro Alday González, Julio José Rojas Báez, José Antonio Moreno Rodríguez, Luis García-Corrochano Moyano, Cecilia Fresnedo de Aguirre, and Ramiro Gastón Orias Arredondo.

* * *

B. Hundred-third Regular Session

The 103rd Regular Session of the Inter-American Juridical Committee took place on August 2-11, 2023, at its headquarters in Rio de Janeiro, Brazil.

The order of precedence determined by the lots drawn at the session's first meeting and in accordance with Article 28.b of the Rules of Procedure of the Inter-American Juridical Committee was the following:

- Martha del Carmen Luna Véliz (Panama)
- George Rodrigo Bandeira Galindo (Brazil)
- Cecilia Fresnedo de Aguirre (Uruguay)
- Julio José Rojas Báez (Dominican Republic)
- José Antonio Moreno Rodríguez (Paraguay)

- Ramiro Gastón Orias Arredondo (Bolivia)
- Eric P. Rudge (Surinam)
- Alejandro Alday González (Mexico)
- José Luis Moreno Guerra (Ecuador)
- Luis García-Corrochano Moyano (Peru)

Was absent Dr. Stephen Larson (United States), who was unable to travel to Brazil for personal reasons.

Representing the General Secretariat, technical and administrative support was provided by Dr. Jean-Michel Arrighi, Secretary for Legal Affairs; Dante Negro, Director of the Department of International Law, Luis Toro Utillano, Senior Legal Officer at the Department of International Law; Maria C. de Souza Gomes and Amalia Ruiz from the Secretariat of the Inter-American Juridical Committee.

During the 103rd Regular Session, the Inter-American Juridical Committee has before it the following agenda, document adopted on March 10, 2023, by resolution "Agenda for the hundred-third Regular Session of the Inter-American Juridical Committee", resolution CJI/RES. 278 (CII-O/23).

CJI/RES. 278 (CII-O/23)

AGENDA FOR THE HUNDREDTH THIRD REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

(Rio de Janeiro, Brazil – August 2 – 11, 2023)

Current topics:

1. Particular customary international law in the context of the Americas
   Rapporteur: Dr. George Rodrigo Bandeira Galindo
2. Guide on the law applicable to foreign investments
   Rapporteur: Dr. José Antonio Moreno Rodríguez
3. Development of inter-American guidelines on the participation of victims in criminal proceedings against acts of corruption
   Rapporteur: Dr. Ramiro Orias Arredondo
4. Contracts between merchands with a contractual weak party
   Rapporteur: Dr. Cecilia Fresnedo de Aguirre
5. New technologies and their relevance to legal cooperation
   Rapporteur: Dr. Cecilia Fresnedo de Aguirre
6. The exceptional use of force in the inter-American context
   Rapporteur: Dr. Luis García-Corrochano Moyano
7. The principles of international law on which the inter-American System is founded, as the normative framework that governs the work of the OAS and relations among member states
   Rapporteur: Dr. George Rodrigo Bandeira Galindo
8. Strengthening the accountability regime in the use of information and communication technologies
   Rapporteur: Dr. Martha del Carmen Luna Véliz
9. Legal implications of the sea level rise in the Inter-American regional context
   Rapporteur: Dr. Julio José Rojas-Báez
10. Corporate responsibility of manufacturers and sellers of weapons in the area of human rights
    Rapporteur: Dr. Alejandro Alday González

11. Approach to the new outer space law
Rapporteur: Dr. José Luis Moreno Guerra

This resolution was unanimously approved at the regular session held on March 10, 2023, by the following members: Drs. Eric P. Rudge, George Rodrigo Bandeira Galindo, José Luis Moreno Guerra, Alejandro Alday González, Julio José Rojas Báez, José Antonio Moreno Rodríguez, Luis García-Corrochano Moyano, Cecilia Fresnedo de Aguirre and Ramiro Gastón Orias Arredondo.

* * *

During the session under review, the Committee paid tribute to the memory of Dr. João Clemente Baena Soares, who was its President and passed away in June of this year (CJI/RES. 285 (CIII-O/23).

A tribute was also paid to Dr. João Baena Soares during the closing of the 48th Course by the Secretary for Legal Affairs, Dr. Jean-Michel Arrighi, and the Vice President of the CJI, Dr. George Rodrigo Bandeira Galindo.

CJI/RES. 285 (CIII-O/23)

TRIBUTE TO DR. JOÃO CLEMENTE BAENA SOARES

THE INTER-AMERICAN JURIDICAL COMMITTEE,

GRIEVED by the death of Dr. João Clemente Baena Soares, distinguished diplomat, jurist, and former Secretary General of the Organization of American States (OAS), who passed away in Rio de Janeiro, Brazil, on June 7, 2023;

HIGHLIGHTING his eminent diplomatic career having served his country as Ambassador in different destinations, reaching the position of Secretary General of the Ministry of Foreign Affairs. In the international arena, he was elected Secretary General of the OAS for two consecutive terms (1984-1994). He was also a member of the United Nations International Law Commission and the Inter-American Juridical Committee, where he served as Vice-Chairman and Chairman of this body and in that capacity represented the Committee in various international forums;

AWARE of the valuable contributions to the work of the Inter-American Juridical Committee by Dr. João Clemente Baena Soares, having earned the respect and appreciation of its members for his wisdom, leadership, experience, commitment, and adherence to the rules of international law,

RESOLVES:

1. To express its most deeply felt homage and recognition to the memory of Dr. João Clemente Baena Soares.

2. To convey this resolution as an expression of the condolences of the Inter-American Juridical Committee to the Government of Brasil and to the family of Dr. João Clemente Baena Soares.

This resolution was adopted by acclamation at the regular session held on August 8, 2023, by the following members: Drs. Martha del Carmen Luna Véliz, George Rodrigo Bandeira Galindo, Cecilia Fresnedo de Aguirre, Julio José Rojas Báez, José Antonio Moreno Rodríguez, Ramiro Gastón Orias Arredondo, Eric P. Rudge, Alejandro Alday González, José Luis Moreno Guerra and Luis García-Corrochano Moyano.

* * *

C. IV special meeting (December 12, 2023) - virtual meeting

On December 12, 2023, the plenary of the Inter-American Juridical Committee held a special meeting, that took place virtually, corresponding to the IV Special Meeting, in accordance with Article 15 of the Statute of the Committee.

It should be noted that the convocation included the analysis of of the Guide to the Law Applicable to Foreign Investments, document CJI/doc.686/23 rev. 1, under the responsibility of Dr. José Antonio Moreno Rodríguez and the report by Dr. Cecilia Fresnedo on "party autonomy in international commercial contracts with a weak bargaining party: inherent challenges and possible solutions report and recommendations on good practices," document CJI/doc.683/23 rev. 2. As described in the second chapter, the report under the rapporteurship of Dr. Fresnedo de Aguirre was adopted, while the report presented by Dr. Moreno Rodríguez will be subject to a final review for approval at the March 2024 session.

The order of precedence determined by the drawn identified at the session's first item on the order of business in accordance with Article 28.b of the Rules of Procedure of the Inter-American Juridical Committee was the following:

- Luis García-Corrochano Moyano (Peru)
- George Rodrigo Bandeira Galindo (Brazil)
- Ramiro Gastón Orias Arredondo (Bolivia)
- Eric P. Rudge (Suriname)
- Cecilia Fresnedo de Aguirre (Uruguay)
- Alejandro Alday González (Mexico)
- José Antonio Moreno Rodríguez (Paraguay)
- Martha del Carmen Luna Véliz (Panama)
- José Luis Moreno Guerra (Ecuador)
- Julio José Rojas Báez (Dominican Republic)

The agenda for the hundred and fourth regular session of the Committee to be held in Panama City, Panama, from March 11 to 15, 2024, was also reviewed and the final version is reflected on resolution CJI/RES. 283 rev. 1.

CJI/RES. 283 (CIII-O/23) REV.1

AGENDA FOR THE HUNDREDTH FOURTH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

(Panama City, Panama - March 11 - 15, 2024)

Current topics:

1. Particular customary international law in the context of the Americas
   Rapporteur: Dr. George Rodrigo Bandeira Galindo
2. Guide on the law applicable to foreign investments
   Rapporteur: Dr. José Antonio Moreno Rodríguez
3. Development of inter-American guidelines on the participation of victims in criminal proceedings against acts of corruption
   Rapporteur: Dr. Ramiro Gastón Orias Arredondo
4. The exceptional use of force in the inter-American context
   Rapporteur: Dr. Luis García-Corrochano Moyano
5. The principles of international law on which the inter-American System is founded, as the normative framework that governs the work of the Organization of American States and relations among member states
   Rapporteur: Dr. George Rodrigo Bandeira Galindo

6. Strengthening the accountability regime in the use of information and communication technologies
   Rapporteur: Dr. Martha del Carmen Luna Véliz
7. Legal implications of the sea level rise in the inter-American regional context
   Rapporteur: Dr. Julio José Rojas Báez
8. Corporate responsibility of manufacturers and sellers of weapons in the area of human rights
   Rapporteur: Dr. Alejandro Alday González
9. Approach to the new outer space law
   Rapporteur: Dr. José Luis Moreno Guerra
10 Impact of technologies based on Artificial Intelligence on human rights, with a special focus on children and adolescents
   Rapporteur: Dr. Ramiro Gastón Orias Arredondo
11. Updating of the 2020 Inter-American Model Law 2.0 on Access to Public Information
   Rapporteur: Dr. Luis García-Corrochano Moyano
12. Recognition and enforcement of foreign judgements
   Rapporteur: Dr. Cecilia Fresnedo de Aguirre

This resolution was unanimously approved at the special session held on December 12, 2023, by the following members: Drs. Luis García-Corrochano Moyano, George Rodrigo Bandeira Galindo, Ramiro Gastón Orias Arredondo, Eric P. Rudge, Cecilia Fresnedo de Aguirre, Alejandro Alday González, José Antonio Moreno Rodríguez, Martha del Carmen Luna Véliz, José Luis Moreno Guerra and Julio José Rojas-Báez.

* * *

Elections of Chair and Vice-Chair

It should be noted that on Friday, August 11, 2023, the CJI elected its new authorities, selecting as its Chair Dr. George Rodrigo Bandeira Galindo from Brazil and as Vice-Chair, Dr. Cecilia Fresnedo de Aguirre, from Uruguay, who will serve in said capacities from January 1, 2024, for a two-year term.

*** * ***

CHAPTER II

TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE AT ITS SESSIONS HELD IN 2023

THEMES UNDER CONSIDERATION

Following is a presentation of the topics addressed by the Committee during the year 2023, along with, where applicable, documents prepared and approved by the Inter-American Juridical Committee.

*** * ***

1. International customary law in the context of the American Continent

Document

CJI/doc.688/23 rev.1 Fifth report on particular customary international law in the context of the Americas
(Presented by Dr. George Rodrigo Bandeira Galindo

*** * ***

During the 95th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, July 31 to August 9, 2019), the rapporteur for the topic, Dr. George Galindo presented a new proposal to be included in the Committee's agenda, entitled “Regional Customary International Law,” document CJI/doc. 587/19. The rapporteur explained the three main motivations for the subject:

- that the CJI reflect on what it means to belong to the American hemisphere;
- to consider the advisory opinion of the Inter-American Court of Human Rights of May 30, 2018, Advisory Opinion OC-25/18 on "The Institution of Asylum, and Its Recognition as a Human Right under the Inter-American System of Protection," and
- to analyze the pronouncement of the International Law Commission on identification of customary international law, notably Conclusion 16 (of which the General Assembly took note):

  Conclusion 16

  Particular customary international law

  1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States

  2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves.”

Among the elements that will be considered in his study, Dr. Bandeira Galindo, proposed the following topics:

- The "delimitation of customary rules", in the light of doctrine proposals that limit it to a number of States that make it up.
- The consent, its express or tacit character. Need to investigate the issue of silence in the restricted environment imposed by the regional system.
- The relationship between regional and universal custom.
- The principle of persistent objection, in particular to a customary rule requiring consent.
- The existence of a regional *jus cogens*.
- The determination of a concept of region that is "legally relevant."

As a methodology, he proposed identifying the customary rules that currently exist in the Hemisphere (general primary rules in the area of regional custom) through a study of the decisions of international tribunals, doctrinal contributions, and a survey in OAS member states.

Dr. Iñigo Salvador supported Dr. George Galindo's proposal and, as a way to enrich his consideration of the topic, proposed reflecting both aspects of the concept under study-regional as well as universal, including the particular versus general aspect, in order to include the opinions of the International Court of Justice in the invocation of custom. With regard to the relationship between this topic and asylum (for which he is rapporteur), he suggested including the cross-referencing of sources (elements from conventions and customary international law).

Dr. Luis García Corrochano also supported the proposal presented. He referred to the generating effect of custom of Judge Jiménez de Aréchaga. Being a hemispheric unit, one would have to ascertain where custom begins and ends. A case-by-case analysis should be done. Finally, he proposed to refer to the passage from customary norm to peremptory norm, independently of its questioning.

Dr. Milenko Bertrand referred to the revitalizing challenge that the proposal entailed. He advised including in the analysis the "bilateral custom" (its point of connection and differentiation with estoppel); value aspects in relation to the practice of the Inter-American Court of Human Rights following the Atala case, for example; issues related to silence in consent, in particular the effect of the declarations of international organizations of a political order that are not voted on because it favors consensus.

Dr. Jean-Michel Arrighi recommended referring to the existence or absence of a custom of a regional nature in relation to democracy, based on the OAS Democratic Charter, a text adopted as a resolution.

During the 96th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2020), the rapporteur of this topic, Dr. George Galindo, presented his report on this issue, document CJI/doc. 602/20. He stated that the most appropriate methodology is the inductive option, as it allows an even balance with the case law laid down by the International Court of Justice on the topic under study.

The case law developments presented in his report encompass decisions on a variety of themes, such as on asylum; the rights of United States nationals in Morocco; the right of passage over the territory of India ("The Court sees no reason why a prolonged practice between two States that accept it as a regulatory element of their relations cannot serve as a basis for mutual rights and obligations between both States"); military and paramilitary activities in Nicaragua and against Nicaragua (Nicaragua against the United States of America); the border dispute (Burkina Faso against the Republic of Mali) that brings up the issue of *uti possidetis*; the dispute over navigation rights and related rights (Costa Rica vs. Nicaragua), where the Court makes an assumption on the existence of a customary practice in favor of Costa Rica; the right to subsistence fishing by the riverside fishermen along the San Juan river, thus reversing the burden of proof regarding asylum cases.

Dr. Luis García-Corrochano referred to regional customs and bilateral customs and the type of evidence required in each case (i.e. testing the custom and after the specific claim).

Dr. Salazar praised the rapporteur for the methodology used and for having integrated the dissenting or separate opinions of judges. She asked the rapporteur whether regional custom would impose stricter requirements for the expression of the will of States, as would appear to be the case in the early cases heard by the Court, a trend that seems to have been reversed in the latest decision mentioned in his report, for cases where there is acquiescence to a rule. Finally, she asked the rapporteur if he intended to draw up a list of rules that are regional custom in the Americas, which she felt would be advisable and useful. The rapporteur explained that the shift in the position of the Court should be investigated in greater depth. In relation to the classification, whether regional or particular, he requested more time for further reflection. He suggested looking at the possibility of including the distinction between primary and secondary rules; or perhaps identifying how the rule arises and then seeing if it would be worthwhile to analyze some issues that constitute regional custom.

Dr. Milenko Bertrand urged the rapporteur to draw up a list of particular areas where a custom exists today, outside the Latin American system (and even in the region, including the Caribbean). This proposal was supported by Dr. Eric Rudge, who considered the inclusion of the practices of the entire region as an important move.

Dr. José Moreno asked the rapporteur about preparing a list that could address the topic of investments.

The Chair, Dr. Ruth Correa, thanked the rapporteur for his work, and invited him to take the necessary time to advance in his reflections.

During the 97th Regular Session of the Inter-American Juridical Committee (Virtual session, August, 2020), this issue was not considered.

During the 98th Regular Session of the Inter-American Juridical Committee (Virtual session, April 2021), the rapporteur on the subject, Dr. George Rodrigo Bandeira Galindo presented the document entitled "Second report on particular customary international law in the context of the American continent", document CJI/doc. 627/21, which sets out to systematize the doctrine on the matter and the jurisprudence, principally the jurisprudence of the International Court of Justice (ICJ), but including that of the Inter-American Court of Human Rights (I/A Court H.R.), by identifying the possibilities and limitations of its application in the region.

The assessment of the position taken by international jurisprudence with respect to customary international law took into account six decisions made by the ICJ:

- The case relating to the Colombian-Peruvian right to asylum (judgment of November 20, 1950: CIJ, Reports, 1950, p. 266), which addresses issues related to the granting of diplomatic asylum by the Government of Colombia to the Peruvian citizen Víctor Raúl Haya de la Torre. Dr. Bandeira stressed that this case is what started the ICJ's analysis of customary international law.
- The case relating to the rights of nationals of the United States of America in Morocco (judgment of August 27, 1952: Reports, ICJ, 1952), dealing with the continuity of certain privileges granted to US citizens in Moroccan territory.
- The case relating to the right of passage through the territory of India, of 1960 (judgment of April 12, 1960: Reports ICJ, 1960, p. 6), which refers to a practice that authorized Portugal's right of passage in the territory of India, maintained even when the latter country acquired its independence.
- The case relating to military and paramilitary activities in and against (Nicaragua v. United States of America). Merits, Judgment. Reports, CIJ, 1986, p. 14), case that refers to "particular customary international law [...] of the inter-American legal system[1]."
- The case related to the border dispute between Burkina Faso and the Republic of Mali (Reports, ICJ, 1986, p. 554), which applies the principle of *uti possidetis* in Africa by stating that it is a general customary rule.
- The case related to the controversy over navigation and other related rights filed by Costa Rica against Nicaragua (Reports, ICJ, 2009, p. 213), in which recognition is granted to a bilateral custom in the matter of subsistence fishing of the riparian population of the San Juan River.

Likewise, the rapporteur carried out an analysis of individual opinions of ICJ judges concerning the case of the continental shelf of the North Sea, as well as the case regarding jurisdiction in matters of fisheries (United Kingdom v. Iceland). With regard to the I/A Court H.R., the same exercise was carried out on the basis of the Advisory Opinion on the Institution of Asylum and its Recognition as a Human Right in the

[1] International Court of Justice. *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America*. Merits, Judgment. ICJ Reports 1986, p. 14).

Inter-American Protection System (OC-25/18)). At the end of his report, the rapporteur presented an overview in light of certain elements that enable identification of regional custom, such as the burden of proof, the general collective interests at stake, and even the protection of the human rights of certain groups of individuals (as can be seen in the case of Costa Rica v. Nicaragua). For the next stage, the rapporteur undertook to systematize the main doctrine on the matter and consulted the plenary session on the relevance of preparing a questionnaire to be sent to the States.

Dr. Mariana Salazar thanked the rapporteur for his report, which, she said, would be of great use in academic circles. She urged him to continue updating the document. As regards consulting the States, she said that could have disadvantages since it is highly theoretical and might remain un-answered. She proposed sending the States a list of specific elements that could assist them in the matter. Finally, she asked the rapporteur to take into account the possible "decoding effect" when addressing the relationship between custom and treaty, so as not to water down something that was already mandatory.

Dr. Miguel Angel Espeche congratulated the rapporteur on his work. Regarding the consultation proposal, he said there was a certain reluctance on the part of the States to express an opinion on issues of this nature aimed at setting out the criteria to be used in adopting an international custom. He therefore suggested consulting the academies of international law of the different States, as well as taking this issue to the joint meeting with Legal Advisors.

Dr. Eric P. Rudge invited the rapporteur to continue working on this topic, which will be of great use to students. He suggested including summaries of the decisions cited. On page 2 in English, he asked for clarification of the name of the institution in question, whether ICJ or I/A Court H.R. He also asked that a footnote be included indicating whether the particular customs that are cited are reflected in other cases. Finally, he supported the solution provided by Dr. Espeche-Gil of consulting academies, including law schools, rather than governments.

The Chairman congratulated Dr. George Bandeira on his rich analysis of the American tradition in contrast to the scant generosity shown by ICJ jurisprudence, clarifying that custom is a practice, not the test of practice. He had found several cases where the ICJ does not present an analysis that demonstrates the existence of the norm. He supported Dr. Espeche-Gil's proposal to consult academic circles before submitting the matter to governments, without prejudice to any discussions with legal advisers.

Dr. Milenko Bertrand suggested investigating in greater depth the statement of the I/A Court H.R. which tends to avoid ruling on "suspicious categories" that are not enunciated in the Convention, citing in this respect the Atala-Riffo and daughters *v.* Chile Case and the discussion on the existence of a common understanding that condemned discrimination based on sexual orientation. The I/A Court H.R. interpreted that there was a regional practice, based on practical antecedents of views in Europe and not necessarily of the States Parties to the Convention. This will make it possible to review issues where the I/A Court H.R. has come up against dichotomies about continental practices that have a lower standard of proof than they may have in the international arena (death penalty, discrimination, etc.).

The rapporteur of the topic, Dr. George Galindo thanked the commentators for their very pertinent observations. He acknowledged the remarks made by Drs. Salazar and Espeche-Gil on the reluctance of governments to answer abstract questions about customary practices. He explained that the Committee was not set on looking into the existence of a rule, but rather on investigating the methods that serve to create a regional customary practice. Therefore, no consultation would be made for the time being. At the same time, in his next report he intended to include more cross-cutting considerations on regional custom, notably the decoding effect mentioned by Dr. Salazar. Following the suggestion made by Dr. Espeche-Gil to take this matter to a meeting with the legal advisors in order to obtain their impressions on the issue (including general observations on regional custom), Dr. Galindo suggested that a decision be taken at the meeting on who should be sent the questionnaire, that is, governments and/or academic centers. In response to Dr. Rudge, he promised to include a summary of each case to ensure better understanding of the topics mentioned. He clarified that on page 2 the reference corresponds to the Inter-American Court of Human Rights (I/A Court H.R.).

Finally, he mentioned that his reflections on inter-relationships among asylum cases to be incomplete, and he would therefore make the necessary amendments. In response to Dr. Milenko Bertrand, he explained that the jurisprudence of the I/A Court H.R. would allow liaising with the work of the United Nations International Law Commission regarding the subsequent practice of treaties (which is not necessarily to the same as a custom). In this regard, he agreed that the I/A Court of H.R. should take into consideration the practice of the States regarding the American Convention on Human Rights. At the end of his presentation, he referred to the webinar to take place two weeks later on the status of his rapporteurship, which could contribute to a wider dissemination of the issue.

During the 99th Regular Session of the Inter-American Juridical Committee (Virtual session, August 2021), the rapporteur on the subject, Dr. George Rodrigo Bandeira Galindo, presented his third report on "particular customary international law in the context of the American continent", document CJI/doc.645/21, in which he analyzes the pronouncements of the doctrine in the matter of the particular custom. At a later stage, it is hoped to present the practice of the States and eventually to be able to focus on regional customs.

He explained that his report presents a detailed examination of jurisprudence from three perspectives: decisions of the International Court of Justice, individual opinions of judges of the same court that refer to custom, and decisions of other courts, including the Inter-American Court of Human Rights, benefiting from what was developed in his previous report.

The rapporteur next explained that the novelty of his report lies in his analysis of the doctrine, highlighting the vision of four authors who have worked on the subject and pointing out that although in the middle of the 20th century the existence of customary norms was admitted, this was an area that stirred up little interest until the 1960s. Various explanations are proposed in this regard:

- The universalization of international law was quickly associated with the idea of unity of the international legal system;
- The codification movements and exponential growth of treaties were made to the detriment of the customary source;
- The doctrine began to pay attention to the subject in the light of jurisprudential decisions.

He highlighted the article by Jonathan Kohen on *La coutume locale*, considered to be an influential doctrinal work that approached custom from a voluntarist perspective, a methodology that is replicated in other studies.

The rapporteur said that his study of regional custom was offered a concrete response to a broader theoretical question, so it is linked to a voluntarist or non-voluntarist doctrine. In this sense, his proposal is to include in his next report authors who are not so closely linked to this theoretical debate.

He ended his presentation by indicating his intention to comment with the legal advisers should there be a need to examine state practices. This would require consulting Member States through questionnaires, or else do nothing about it.

The Chairman thanked the rapporteur, explaining that the formulation of questionnaires is always possible, but that this is a decision belonging to the rapporteur. In relation to the report, he requested clarification of his statement regarding the analysis of the doctrine following the jurisprudential developments, since in many cases it is the other way around, with the doctrine playing a very important role in the formation of the law or else as an analytical and systematizing contributor. The rapporteur expressed his agreement with the Chairman but said that his explanation sought to respond to the interest of the doctrine for the particular custom from a chronological point of view, adding that in this case he noticed that it expands in the wake of the judicial cases. Nonetheless, in all cases the doctrine plays an essential role even in the processes of identifying customary norms.

Dr. José Moreno Rodríguez thanked the rapporteur, whom he urged to successfully expand the work carried out by the International Law Commission. He considered that this project will be a relevant

contribution from the Committee. The rapporteur explained that the general principles of law have a very close relationship with customary norms as they are part of the sources of law, especially their application in specific situations such as the concept that may exist in a region or sub-region.

Dr. Mariana Salazar emphasized the meticulous nature of the rapporteur's work and supported the idea of consulting the legal rapporteurs on the relevance of finding out the views of the States. The rapporteur confirmed that one of the challenges of the subject is the absence of a considerable doctrine, which implies reflecting on the elements that are at stake when working on the particular custom.

Dr. Ramiro Orias found that classical texts focus greatly on jurisprudence, but also provide added value. He suggested proposing clear axes with very specific questions about what is to be gathered from the practice of the States. The rapporteur appreciated the suggestion, specifying that the questionnaire will be prepared in such a way as to obtain a maximum number of elements that allow the identification of customary norms specific to the region, given the considerable difficulty of discerning the material existence of a norm.

The Chairman asked the rapporteur to continue with his work.

During the 100th Regular Session of the Inter-American Juridical Committee (Lima, May 2022), the rapporteur for the topic, Dr. George Galindo Bandeira, presented his fourth report on "Customary international law in the context of the American continent", document CJI/doc.663/22, in a text that consolidates the previous reports, submitting additional considerations, whose original purpose was to analyze cases heard by the International Court of Justice and the Inter-American Court of Human Rights (although the treatment is rather incidental).

He thanked the meeting with the legal advisors of the Ministries of Foreign Affairs of the OAS member states who allowed him to clarify terminological and substantive considerations. He explained that this version includes a doctrinal analysis, in a context in which the jurisprudential cases influence the doctrine. Although the doctrine was initially influenced by theoretical options, in the current century it is possible to note a distancing in which the authors tend to seek a practical and dynamic application to these issues, allowing them to observe potentialities with respect to particular customs (which are not considered as acts of the States, but that could be formed by individuals).

The recognition of particular customs comes mainly from the International Court of Justice, in particular its view on the burden of proof which in the past imposed a strict rule of identification of the norm which implies verifying that the States accept it. In more recent cases, it is possible to observe that the criterion for the burden of proof has become more flexible. In this regard, a recent decision on Nicaragua vs Colombia (2022) on small-scale fishing, make it clear that the burden of proof can be flexible.

Regarding the methodology to be followed, the rapporteur considered it pertinent to examine the practices of the States to obtain their comments, without using a questionnaire; this would allow him to have the three dimensions in his report. He asked the plenary for its opinion on the pertinence of distributing it among the OAS Member States.

Dr. José Moreno Rodríguez thanked Dr. Galindo for the development of this topic. He asked him if he had perceived a conflict in the reports on the fragmentation of the International Law Commission. Additionally, he asked if there are other topics that could be used to advance in this matter. According to the rapporteur for the topic, there is a contradictory position in relation to regional custom. In the ILC report on the identification of customary norms, there was no openness, upholding the restricted application, without being aligned with what the Court had stated, which had made advanced decisions on this issue.

In this regard, the rapporteur explained that his study is not intended to answer practical questions. It is a purely instrumental study that could serve and have practical repercussions for the future. It responds to the need for the CJI to issue pronouncements on issues related or specific to the continent. However, he hoped that it could stimulate practical and important issues for the inter-American system.

Furthermore, Dr. Moreno Rodríguez asked to consider a meeting with the legal advisors of the foreign ministries on various topics on the CJI agenda. The rapporteur of the topic supported the idea, but

expressed his interest that, as an initial stage, the document be distributed to the States and, based on this, address the idea of organizing a virtual meeting with legal advisors at a subsequent stage.

Dr. Mariana Salazar invited the rapporteur to work on the final version of the report for the next session and asked if there would be any dissemination of his report or activities planned with member States once it is submitted for consultation.

Dr. Eric Rudge thanked and congratulated the rapporteur and asked him about his expectations in relation to the consultation with the States, noting the bad experience he had had as rapporteur for the issue of the right to education. For the rapporteur, it would be very interesting to have the positions of the States, since he is aware that they have already expressed their views in other fora, citing in this respect the comments made before the CDI when dealing with these issues.

The Chair joined in the thanks for the progress of the work and noted that the criteria of general and specific practice must be clarified, since they are different.

Dr. Arrighi proposed a reflection in relation to the issue raised by the separation of a country from the OAS, namely, whether such country remains subject to the inter-American system through other types of sources. This is something that could help to put Dr. George Galindo's report on firm ground. The rapporteur explained that the response of States could clarify Dr. Arrighi's queries.

In addition to thanking the rapporteur, Dr. Ramiro Orias asked him if he had investigated the practice within international organizations.

The rapporteur replied that he had not conducted any studies in this field, but that he could look for the experience of the OAS. In all cases it is something that would imply investigating whether the international organization is a forum that deals with the particular custom, in order to discover whether the rule has been confirmed within.

Dr. José Luis Moreno Guerra expressed his appreciation for the work of the rapporteur and, following up on Dr. Arrighi's query, he reflected on the attitude of the States that sign a treaty without ratifying it and whether this could be assimilated to the situation of States that withdraw from a treaty, thus giving rise to an obligation not to execute actions that go against the treaty. In this respect, the rapporteur of the topic considered that what was said was very relevant and together with what was proposed by Dr. Arrighi could be a topic to reflect on with member States.

The rapporteur proposed that the document be sent for the opinion and comments of the States, establishing a deadline for July, with the possibility of an extension.

During the 101st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2022), the rapporteur for the topic, Dr. George Galindo Bandeira, delivered an oral report, noting that comments from the States were pending. He said he had only received comments from El Salvador, while Costa Rica and Paraguay had asked for more time.

In light of this situation, the rapporteur proposed that the States be sent a reminder specifying January 15, 2023 as the deadline for submission. He committed to presenting a new report at the Committee's next session, which would include all of the comments submitted to him and insofar as the General Assembly so decides. He explained that this was neither a questionnaire nor a survey, but rather that the request to the States was to elicit general comments in order to understand the practice in this area.

Dr. José Moreno urged the Committee members to press their respective ministries of foreign affairs to answer the questionnaire.

During the 102nd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2023), the rapporteur for the topic, George Galindo Bandeira, presented the document "Fifth report on particular customary international law in the context of the Americas", document CJI/doc.688/23 rev.1.

He explained that from the outset, his intention as rapporteur had been to present three bases for the topic under consideration— jurisprudence, doctrine, and state practice—and that he had so far conducted an analysis of the first two.

Upon completion of the fourth report, the text was sent to the states for review; however, he noted that initiative was not very fruitful since not all of them responded, and some of them that did failed to contribute in a concrete manner.

Accordingly, the new version incorporates the answers provided but also includes both global and hemispheric developments related to methodological considerations on the subject. Thus, the last section deals with practice in the states of Latin America. However, given the dearth of responses on the issue of state practice, he suggested preparing a questionnaire with specific questions.

He then read out the questions he proposed to ask, which were included as an annex to his document.

The rapporteur was aware that not all the states would respond to the questionnaire, but the exercise was important to obtain a better grasp of state practice.

The rapporteur also explained that he had updated some of the document's sections: specifically, as regards recent developments in international jurisprudence; an advisory opinion of the Inter-American Court of Human Rights on reelection; and two arbitration cases discussing the existence of regional customs. These recent new cases demonstrated the significance of the issue, he said. It was therefore essential to have a more accurate idea of the states' views.

Dr. Luis García-Corrochano thanked the rapporteur for his input, but he requested additional time to review the questionnaire to ensure that the states were able to respond concretely. Due to the enormous range and changeability of this topic, which in some cases led to "unexpected outcomes," there were challenges in pinning down custom at a given time. The rapporteur agreed with the explosive nature of certain questions but, at the same time, he understood that some states might be interested in answering them. There were OAS member states that had been involved in cases before international courts in connection with this issue. A greater number of responses would make the Committee's work more useful for the states themselves, even if not all the questions were answered.

Dr. Ramiro Orias said that the work presented so far provided the basis for a publication that could provide foreign ministries and international courts with guidance. It should therefore be disseminated as widely as possible.

Dr. Julio Rojas-Báez supported the rapporteur's initiative to identify practices, because of the importance of having clear rules in order—in particular—to reveal the mechanisms or elements for determining the doctrine.

The Chair agreed with Dr. Ramiro Orias on the incalculable value of the current state of the work. In relation to the lack of responses, he invited the members to follow up directly with their own foreign ministries. An alternative option would be to bring together a group of foreign ministries at a forum or seminar. Thus, he proposed that this issue be one of the topics to be discussed at the Meeting with the Legal Advisors and that they be informed of its treatment in advance of that meeting. He also recommended that the responses received for his arbitration topic could be included in the rapporteur's work.

In light of the revision made, the rapporteur explained that he had reduced the number of questions to five, requesting at the end of the questionnaire additional elements to better understand state's practice regarding the issue at hand. With respect to the deadline for the States, he suggested to obtain the answers by July of this year.

Dr. Luis García-Corrochano expressed his appreciation for the new, more generic proposal and suggested to modify the reference to the verb "to accept" to "to adopt" to clarifying the second question, all of which was agreed upon.

During the 103rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2023), this topic was not considered within the Committee, however its rapporteur doctor George Galindo Bandeira made a presentation at the XI Joint Meeting of the CJI with legal advisers of the Ministries of Foreign Affairs of member states of the OAS. At the event, explained the motivation for this

topic, which was intended to clarify how customary norms arise within the Hemisphere by identifying the regional customary norm.

Dr. George Galindo, the Committee's rapporteur for the topic of particular customary international law in the context of the Americas, explained the motivation for this topic, which was intended to clarify how customary norms arise within the Hemisphere. The aim of the project was to identify a regional customary norm.

His reports are structured along three axes:

- The first reveals the way in which international courts understand this issue, particularly the International Court of Justice from the perspective of regional law;
- The second refers to the way in which the subject has been developed by doctrine;
- The third is about the practice of States (the understanding of States in their practice of this specific type of custom).

In terms of the working methodology, in a first instance the report was distributed among member states in order to obtain comments from them. However, lately a questionnaire with specific questions was sent to the States. On that point, he invited those who have not done so to return their replies, particularly regarding the questions on State practice.

As agreed by the Committee, the Technical Secretariat was requested to send the questionnaire to the Member States that have yet not responded, with the request to respond to it before December 1, 2023.

The document presented by the rapporteur for the topic, Dr. George Rodrigo Bandeira Galindo at the March in 2023 session, held in Rio de Janeiro, is reproduced below:

CJI/doc.688/23 rev.1

FIFTH REPORT ON PARTICULAR CUSTOMARY INTERNATIONAL LAW IN THE CONTEXT OF THE AMERICAS

(Presented by Dr. George Rodrigo Bandeira Galindo)

PART I. INTRODUCTION

At its 95th Regular Session, held in Rio de Janeiro from July 31 to August 9, 2019, the Inter-American Juridical Committee included in its agenda the topic of Particular Customary International Law in the Context of the Americas. On that occasion I had the honor to be selected rapporteur on the topic.

At the 96th Regular Session, held in Rio de Janeiro from March 2 to 6, 2020, I presented my first report.

The issue was not considered at the 97th Regular Session, held in Rio de Janeiro in 2020, from August 3 to 7, 2020.

On that occasion I sought to begin the approach to the topic from the perspective of the international case-law. I examined the judgments of the International Court of Justice that explicitly addressed particular custom in one or another of its forms (bilateral custom, local custom, and regional custom).

At the 98th Regular Session, which took place April 5 to 9, 2021, held virtually due to the covid-19 pandemic, I submitted my second report to the other members of the Committee. In it I completed the analysis of the relevant international case-law, looking at the individual opinions of the judges in the judgments in which there was no explicit reference to the particular custom. Decisions were also

analyzed from other international courts, specifically from the Inter-American Court of Human Rights, on the matter, and a general summary of judicial practice in relation to particular custom was drawn up.

Later on, at the 99th Regular Session, held in Rio de Janeiro from August 2 to 11, 2021 – virtually as well – I delivered my third report on the subject. On that occasion, I began my analysis of the specialized doctrine on private custom, focusing on work whose inquiry is primarily private custom in its various forms (bilateral custom, local custom, or regional custom).

The Eighth Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the OAS member states was held during that session, on August 9, 2021, when, several representatives of the states made comments on this subject, which provided essential elements for a better approach to the issues discussed.

In my fourth report, presented at the 100th Regular Session held in Lima, May 2-6, 2022, I completed the analysis of the doctrine on the subject. At the same session, the Inter-American Juridical Committee decided to send the Member States the fourth report – which also incorporated the earlier reports – for comments.

At the 101st Session held in Rio de Janeiro, August 1-10, 2022, there was no discussion of the subject, while anticipating receipt of the comments from the States.

This report presents and analyzes the comments received and the American States' limited experience with the subject, updates the analysis of decisions from international courts, in addition to consolidating the earlier reports and proposing a questionnaire to be submitted to the OAS Member States.

***

A significant part of the doctrine on particular international law takes as its first reference a series of cases decided by the International Court of Justice (hereinafter ICJ, or Court) over more than 50 years, that addressed the issue, sometimes more carefully, other times less so.

That approach, which could be classified as preponderantly inductive, based on the cases decided by the ICJ, has clear advantages, yet it also faces risks.

The greatest advantage is connecting the study of particular customary international law to the relevant judicial practice – thereby avoiding theoretical debates with little practical application.

On the other hand, the great risk of such an approach is presupposing a coherence among the cases decided by the ICJ over a long time, and abstracted from the characteristics of the specific cases.

Actually, as will be see below, the criteria used by the ICJ to identify a particular customary rule are not uniform. In addition, several argumentative elements found in the decisions give rise to difficulties or have glaring omissions.

The beginning of the analysis of judicial practice in this area, set out in the report, was aimed precisely at understanding the cases decided by the ICJ in greater depth, so as to reveal their possibilities, and also their limits when it comes to applying particular customary international law in the context of the Americas.

In that report, I began the analysis with those cases in which the ICJ, in its judgments, ruled in one way or another on particular customary international law. I also analyzed some individual positions of the judges, put forth in those cases, to better grasp the context of the decision.

In the second report I investigated the cases in which the reference to particular customary international law is found in the individual opinions of the ICJ and in the few decisions of other courts that address the same matter. The same report also takes stock, generally, of the position of the international case-law on particular customary international law.

The analysis of individual opinions is not as compelling as establishing international case-law. However, such opinions have served as an important interpretive benchmark not only in other cases

decided by international courts, but also for understanding the approach adopted in and the scope of the very judgments in relation to which the individual opinions were issued.[1]

As regards analyzing the decisions of other international courts, it was found that only the Inter-American Court of Human Rights had ruled specifically on particular custom, and that as part of its advisory jurisdiction.

In the third this report I undertook an assessment of the specialized doctrine on the issue. I observed that specialized writings constantly gravitate around two issues raised by the international case-law. Moreover, the first writings that dealt in a more in-depth manner with the subject were constantly treated as an element within a larger debate, which opposed voluntarist and non-voluntarist perspectives in international law.

In my fourth report, I completed analysis of the doctrine on the subject, not only in the oldest works on the subject but in the most recent as well, gradually changing the focus of the earlier theoretical discussion. I also sought to present the International Law Commission's treatment of the subject in at least two agenda items from recent years.

Having completed the analysis of the *res judicata* and the doctrinal discussion, I felt it useful to explore the experience of the countries on the American continent on the subject of particular customary international law. To achieve this objective, I suggested that the fourth report (as well as the earlier ones as additional input) be submitted to the Member States of the Organization of American States for comment. Few States submitted comments and an even smaller number contributed substantive considerations on the subject. I sought evidence of governmental experience in the aforementioned OAS Eighth Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs and statements the countries made to the Sixth United Nations Commission and the observations submitted to the International Law Commission when the subject of particular customary international law was considered by those organizations. Even so, this compilation of the States' experience proved to be quite insufficient.

Given that this study seeks to integrate the legal and doctrinal perspective with the governmental perspective on particular customary international law, it is considered advisable to have responses to the questionnaire to be submitted to the OAS Member States. Only with such responses will it be possible to have a clearer overview of particular customary international law in the context of the American continent. This report includes an annex with a proposed questionnaire containing ten questions.

PART II. ON THE INTERNATIONAL JUDICIAL PRACTICE

2.1. On the judgments of the ICJ that explicitly address customary international law (and on the individual opinions that address it)

2.1.1 The Asylum Case

The *Asylum Case* (Colombian-Peruvian asylum case, Judgment of November 20th, 1950: I.C.J. Reports 1950, p. 266) was the first opportunity the ICJ had to rule on the possible existence of particular customary international law norms. The case is of great importance because it very significantly set the stage for the doctrinal debates and subsequent case-law of the Court.

The case had to do with a series of issues involved in the granting of diplomatic asylum, by the Government of Colombia, to Peruvian citizen Víctor Raúl Haya de la Torre.

The issue of particular customary international law was addressed in light of the argument by Colombia, which, on invoking inter-American international law in the subject involving diplomatic asylum, relied on the existence of a regional or local custom particular to the Latin American states. Specifically, the court was called on to decide on the rule that it is up to the state granting asylum to characterize, unilaterally and definitively, the offense that rendered diplomatic asylum viable.

[1] As recognized by even the International Court of Justice in: INTERNATIONAL COURT OF JUSTICE. Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, Advisory Opinion, *I.C.J. Reports 1987*, p. 18.

For the Court, the party that alleges the existence of such a custom must prove that it is binding on the other party. It is worth recalling the relevant excerpt, which is constantly cited by the literature on particular customary international law:

> The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law.'[2]

It is relevant to note that the Court invoked Article 38 of its Statute – which says nothing about particular custom – to argue that such a rule would result from constant and uniform use as an expression of a right belonging to the state granting asylum, and a duty incumbent on the territorial state.

The two levels of arguments presented by Colombia were dismissed. In the first, even though several treaties have been raised as proof of the existence of a practice, the Court considered that they either were not relevant to the case or had been ratified by few states in the Latin American context. In the second, even though Colombia had submitted several cases in which diplomatic asylum was granted, according to the ICJ they presented "uncertainty and contradiction," in addition to being influenced by "political convenience," such that said practice would not show the existence of a customary rule.[3]

The Court also understood that even though Colombia had proven the existence of a customary rule on characterization, it could not be invoked against Peru, which had repudiated it. That would be confirmed by the fact that Peru did not ratify the 1933 or 1939 Montevideo Conventions, which were the first instruments to include rules regarding characterization of the offense in cases of diplomatic asylum. Official communications from the Ministry of Foreign Relations of Peru were dismissed; they had been introduced by Colombia as proof of acceptance of the particular customary rule.[4]

In one excerpt from the judgment the ICJ also addressed non-intervention as a Latin American tradition, though it did not explain whether that tradition constitutes a customary rule.[5]

Various issues arise from the case. Four of them merit special attention here.

The argument regarding identification of the custom is very much based on the perception that treaties are component elements of state practice. The position of Peru's opposing position on this issue is based first on the non-ratification by Peru of any treaty on asylum. That argument has consequences for identifying the role of silence in the formation of the customary rule, which would hardly be taken into account or might even be dismissed in the case of a particular custom – for the absence of ratification does not imply any statement of express will.

Second: It is not clear whether the requirement that Colombia had to have proven that the particular custom was binding on Peru was a procedural or a substantive question. In that context the question remains: Can regional international custom only be applied when a party to a proceeding has introduced evidence that it is binding on the other party? Or can the Court itself, at its own initiative, recognize it?

It seems reasonable to believe that the demand directed to Colombia arises as a procedural question because the Court itself analyzes elements of practice – albeit insufficiently – and finds that there was no particular customary rule to regulate or issue to be debated. Moreover, one could also argue that proof of custom is a condition for identifying it, which would make it, in some respects, a substantive issue.

The ICJ was very specific in assigning great weight to the fact that Peru had not ratified the first treaty on the right of the asylum-granting state to characterize the offense. The reference to the "first"

---

[2]. INTERNATIONAL COURT OF JUSTICE. *Colombian-Peruvian asylum case*, Judgment of November 20th, 1950: I.C.J. Reports 1950, p. 276-277.
[3]. *Id.*, p. 277.
[4] . *Id.*, p. 277-278.
[5] *Id.*, p. 285.

one may be related to the principle of acquiescence, or even what would come to be known as the doctrine of the persistent objector – which requires, as is known, that the objection have taken place at the moment when the customary rule came into being.

The dissenting opinion of Judge Álvarez is of great interest, considering that even before he joined the Court he had written and reflected considerably on the role of regionalism in international law. Álvarez's positions on particular custom, however, do not appear to be very clear.

Before getting into the question of diplomatic asylum as a particular custom Álvarez summarizes some of his ideas on the international law of the Americas. For him, a custom does not need to be accepted by all the states of the New World to be considered as part of the international law of the Americas. He also conceived of the possibility of subdivisions in the international law of the Americas, such as a Latin American international law. And as for the relationship between general international law and the international law of the Americas, he argues that it is not characterized by subordination but rather by correlation.[6]

Even with a position favorable to particularity in international law, Álvarez concludes that there is no customary American law on asylum because there is no uniformity of practice of the respective governments on the matter. He admits, however, that there are certain practices and methods in applying asylum that are followed by the Latin American states. Yet there is no explanation of those practices and methods that would be endowed with some degree of legal force and, therefore, would be binding in the Latin American context.[7]

Other members of the Court, such as Judge Read, were express in that even though Colombia had not proven that there is a unilateral right to characterization and a right of safe-conduct based on customary law, there would be no doubt but that diplomatic asylum is an international custom. That statement helps one understand that the Court is capable of verifying the existence of particular custom without one of the parties needing to prove that it was binding on the other.[8]

Judge Azevedo, in addition to taking issue with the Court regarding the existence of a particular custom concerning diplomatic asylum, questioned how it is that the failure to ratify it would have the effect of excluding a state from the group in relation to which the custom is respected.[9]

2.1.2 Case related to the rights of nationals of the United States of America in Morocco

The *Case concerning rights of nationals of the United States of America in Morocco* (Judgment of August 27th, 1952: I.C.J. Reports 1952) involved the question of the continuity of certain privileges granted to U.S. citizens in Moroccan territory.

One of the arguments presented by the United States was formulated so as to supports the exercise of its consular jurisdiction and other capitulatory rights would be founded on "custom and usage." It should be noted that at no time is the expression "bilateral custom" used. The argument had to do with two different temporal frameworks: first, from 1787 and 1937, and second, as from 1937, at the time the action in question was judged.[10]

The Court understood that the U.S. argument related to the two temporal frameworks was not in order, for various reasons.

As for the first period, the Court presented two grounds. First, the consular jurisdiction of the United States was based not on custom or usage, but on rights that emanated from a treaty. On this point, the reasons presented by the Court do not appear to be sufficiently strong. Even though it argues that most states have rights arising from treaties, it also recognizes that certain states exercised consular jurisdiction with the "consent or acquiescence" of Morocco. For the Court, however, that element would not suffice to conclude that the United States had the right to consular jurisdiction based on "custom

---

[6] *Id.*, p. 294.
[7] .*Id.*, p. 295.
[8] . *Id.*, p. 321.
[9] . *Id.*, p. 338.
[10] . INTERNATIONAL COURT OF JUSTICE. *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952: I.C. J. Reports 1952, p. 199.

and usage." It should be noted that the judgment does not equate "consent and acquiescence," albeit in relation to those other states, to a particular custom.[11]

In this case, and in contrast to the general position adopted in the *Asylum Case*, the Court appears here to adopt a very strict distinction between treaty norms and customary norms, so as to impede the concomitant application of both sources. This is done based on a dichotomy between those states that had consular jurisdiction based on treaties and those that had it based on the "consent and acquiescence" of Morocco. What is not properly explained is how "consent and acquiescence" can be separated from the treaty if it is a clear form of express consent.

The second ground presented is based on the burden of proof. After transcribing from the *Asylum Case*, the Court understood that there is not "sufficient proof" to conclude that the exercise of consular jurisdiction was enshrined in custom and usage. Nonetheless, there is no careful reasoning to lead to that conclusion.[12]

As regards the second period, which begins as of the 1937 convention between France and the United Kingdom[13], the Court undertook an analysis of diplomatic correspondence exchanged between France and the United States to evaluate whether it would be possible to find therein elements such as to consider custom and usage to exist. Its conclusion, however, is that the purpose of that exchange of correspondence indicates that both states sought a solution to the question, with neither party claiming to let go of their legal positions. It so happens that even during that negotiation the United States continued exercising consular jurisdiction. The Court explained the maintenance of said state of affairs in light of a provisional situation to which the Moroccan authorities acquiesced.[14]

The judgment clarifies the difference between "custom and usage" and "acquiescence." This last concept, however, refers to the explanation, with respect to the first temporal framework, that the Court gave of the conduct of those states that exercised consular jurisdiction not based on a treaty. Nonetheless, it is not clear whether, for the Court, said acquiescence would occur in the presence or in the absence of a treaty making possible the exercise of consular jurisdiction.

In the case, therefore, the ICJ did not identify any customary rule to which the parties were bound.

The dissenting opinion of Judges Hackworth, Badawi, Carneiro, and Rau addressed the question of "custom and usage" and took issue with the majority position.

The basic methodological premise of the dissent is that treaty law, on the one hand, and custom and usage (what they call "usage and sufferance"), on the other, can coexist. That appears to be the most appropriate line for following the *Asylum Case* which, as already seen, establishes a close relationship between treaty and custom. In contrast to the majority, the dissenting opinion raises several factors that it says show a relatively prolonged exercise of the consular jurisdiction by the United States.[15]

2.1.3 Case concerning Right of Passage through Indian Territory

The judgment on the merits in the *Case concerning Right of Passage over Indian Territory* (Merits) (Judgment of 12 April 1960: ICJ Reports 1960, p. 6) was the first occasion on which the ICJ found the existence of a norm of particular customary international law. In the case, the norm in question was applicable to India and Portugal.

---

[11]. *Id.,* p. 199-200.
[12]. *Id.,* p. 200.
[13]. The relevance of that treaty to the case has to do with the application of the most favored national principle. Pursuant to that treaty, the last state that enjoyed privileges in Morocco – the United Kingdom – ceased to have them. That would have an impact precisely on U.S. rights, but as the United States could not argue application of the principle.
[14]. INTERNATIONAL COURT OF JUSTICE. *Case concerning rights of nationals of the United States of America in Morocco, op. cit.*, p. 200-201.
[15]. *Id.,* p. 219-221.

To reach that conclusion the Court established an initial framework for finding the existence of a practice that authorized Portugal's right of passage over Indian territory. That framework resulted from the beginning of British colonization and subsisted after the independence of the Indian State.[16]

India's defense questioned the possibility of the existence of a custom between two states. The Court refuted that argument in a passage that is a compulsory reference in the literature on particular customary international law:

With regard to Portugal's claim of a right of passage as formulated by it on the basis of local custom, it is objected on behalf of India that no local custom could be established between only two States. It is difficult to see why the number of States between which a local custom may be established on the basis of long practice must necessarily be larger than two. The Court sees no reason why long continued practice between two States accepted by them as regulating their relations should not form the basis of mutual rights and obligations between the two States.[17]

The ICJ found, based on the arguments presented by the parties, that there was sufficient practice to show that, in relation to private persons, civilian public servants, and property in general there ~~was~~ (would have been - teria havido) a "constant and uniform" practice so as to allow the right of passage of the Portuguese State. The Court also noted that such a practice persisted for more than 125 years without alterations with the change in regime after India gained independence.[18]

It is important to note that the finding of the local customary norm – the right of passage – resulted from the fact that it made it viable for Portugal "to exercise its sovereignty over the conclaves, and subject to the regulation and control of India." The customary norm, therefore, existed as the result of a right that Portugal possessed since it was recognized as the sovereign.

Regardless, the Court's analysis of the practice of the two states is generic, not getting into the various acts said to have constituted it.

The judgment considered that there was not a Portuguese right, based on local custom, to passage of armed forces, armed police, weapons, or munitions. In relation to those hypotheses, the ICJ considered that passage was regulated on the basis of reciprocity, and not as a right.[19] That is because Portugal would always need to request authorization, under those hypotheses, to be able to engage in passage over Indian territory. Mindful of the considerations in the case, the Court understood that "this necessity for authorization before passage could take place constitutes, in the view of the Court, a negation of passage as of right."[20]

On that point, the distinction made in the judgment between rights and reciprocity does not appear to be very clear, considering that rights are commonly based on reciprocity. Reciprocity made be part and parcel of any norm, be it conventional or customary. Nor is it clear why the Court considered, on finding that even though the British always authorized passage, that it would be based on reciprocity and not on acquiescence. Following that line, one possible contradiction of this argument arises if one takes the *Case related to the rights of nationals of the United States of America in Morocco* as a reference. As seen above, in that case the ICJ accorded great importance to the principle of acquiescence to the detriment of a possible particular custom.

Even the judgement denying the existence a local custom, in the case of such latest assumptions, two important elements of the judgment stand out: (1) the Court renders an analysis of the practice that is much more detailed than in the first hypothesis of the same case. Various examples from practice are raised that would constitute, in its view, reciprocity, and not a right – with a correlate obligation of passage. (2) The way in which the Court addresses the relationship between treaty and custom is much more dynamic than in the *Case related to the rights of nationals of the United States of America in Morocco*. Basically, the Court tries to perceive how established treaties can give rise to a practice among states. Accordingly, even if one had not found sufficient practice to constitute a custom in relation to

---

[16]. INTERNATIONAL COURT OF JUSTICE. *Case concerning Right of Passage over Indian Territory (Merits)*, Judgment of 12 April 1960: ICJ Reports 1960, p. 37.
[17]. *Id.*, p. 37.
[18]. *Id.*, p. 40.
[19]. *Id.*, p. 40-41.
[20]. *Id.*, p. 40.

those hypotheses, the methodological procedure for dealing with the relationships between treaty and custom appear to have changed significantly, insofar as treaties are considered elements for verifying the practice, together with the subsequent practice in relation to those treaties. Actually, the methodology may not have changed, while there may have been a return to the precedent established in the *Asylum Case*. In its analysis of Portugal's argument that right of passage is also based on general international law, the Court came to an important finding, when it determined that particular practice takes precedence ("prevails") over general rules. That passage is worth citing:

> The Court is here dealing with a concrete case having special features. Historically the case goes back to a period when, and relates to a region in which, the relations between neighbouring States were not regulated by precisely formulated rules but were governed largely by practice. Where therefore the Court finds a practice clearly established between two States which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules.[21]

Regarding that passage, one remaining doubt is whether the prevalence of that particular practice over general rules is established as a principle or just for the concrete case at hand, given the long-standing ties between Portugal and India with regard to this disputed matter. The latter hypothesis is more likely, especially because of the specific reference to a concrete case. Nevertheless, that does not preclude the possibility that that Court reached a conclusion that the particular custom prevails over the general on logical grounds.

The dissenting opinions in this case are interesting with regard to the question of particular custom.

Judge V.K. Wellington Koo's opinion dissents from the majority view in that, for him, there was also a Portuguese right with regard to the passage of armed forces, armed police, weapons, and ammunition. That opinion is extensively substantiated as regards the analysis of the elements constituting the practice, and concrete examples are cited. However, the methodology with regard to the relation between custom and treaty appears not to differ from that of the majority opinion: that treaties may be regarded as a part of practice and subsequent practice may also refer to those treaties. In this view, treaties may "formalize" a customary practice.[22]

The way Judge Koo addresses the characterization of right of passage incorporates reciprocity as part of the practice itself. For him, "A practice had been established for such passage on a basis of reciprocity."[23]

Judge Armand-Ugon associates the effectiveness principle with the constitution of the local customary norm. For him, effective exercise (practice) of passage has the unique quality of constituting the right to such passage itself.[24]

Judge Moreno Quintana appears to perceive a more hermetic relation between treaty and custom. For him, Portugal's request, basing right of passage simultaneously on treaty, custom, principles, and doctrine, is inconsistent.[25] On this point, he appears to diverge from the methodology espoused by the majority, including the majority of the dissenting votes. Moreno Quintana came to the conclusion that there was not enough practice to justify talking about the existence of a local custom.[26]

For Judge Percy Spender, the treaty came in as part of the process of forging a local customary rule.[27]

---

[21]. *Id.*, p. 44.
[22]. *Id.*, p. 60.
[23]. *Id.*, p. 54.
[24]. *Id.*, p. 82-83.
[25]. *Id.*, p. 90.
[26]. *Id.*, p. 95.
[27]. *Id*., p. 106.

Judge Fernandes did not agree to compare and contrast right and reciprocity, because "Most of the rights recognized between nations rest on a basis of reciprocity."[28]

Worth noting is Judge Fernandes's treatment of the matter of the prevalence of *jus cogens* over special rules.[29] However, the argument is not developed sufficiently with

regard to the contrasting of peremptory norms with particular custom.

2.1.4 Case of Military and Paramilitary Activities in and against Nicaragua

In the case *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America). (Merits, Judgment. ICJ Reports 1986, p. 14), the Court very briefly addressed the issue of regional custom. In the case at hand, such custom would affect all the Americas: "customary international law ... particular to the inter-American legal system."[30]

With that, the Court sought to argue that in customary international law particular to the inter-American system there is no rule permitting the exercise of legitimate collective defense without a request for it by the State that considers itself the victim of an armed attack.[31]

However, the reference to regional customary law is made without going into regional practice. Reference is made to treaties in the Americas that address the issue of legitimate collective defense but nothing is said about the process of interaction between treaty norms and regional customary rules and regulations[32], as is done in lengthy sections of the judgment regarding the relationship between treaties and general custom.

The strict criterion for identifying particular customary rules – such as that found in the *Asylum Case* – would appear to be unknown in this case. It is also worth noting that the Court did not proceed to identify the regional customary norm based on any evidence adduced by one of the litigating parties to the case. The ICJ appears to have made that identification on its own initiative, which reinforces the thesis that the burden of proof for identifying a custom would appear to be more procedural than substantive, as already pointed out in our comments on the *Asylum Case*.

2.1.5 Frontier Dispute Case

In 1986, the Court Division constituted to hear the Frontier Dispute case involving Burkina Faso and the Republic of Mali (Frontier Dispute, Judgment, I.C.J. Reports 1986, p. 554) handed down its judgment, which is also relevant when it comes to identifying particular customary rules.

The importance of the judgment stems not so much from the fact that the Division of the Court based its judgment on a particular customary rule, as from its recognition that such rules exist in international law.

In order to establish the borders to be adjudicated by the interested states, the Division of the Court invoked the principle of *uti possidetis*. The Division found that the principle was essentially customary and initially applied almost exclusively in Latin America. It had, however, been generalized, so that African practice with respect to the principle now meant that it was a practice of "a rule general in scope." Thus:

> The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope.[33]

The Court expressly pointed out that the practice of African states did not constitute the custom but was more of a statement of it. In other words, it did not come about in order to create or extend to

---

[28]. *Id*., p. 134.
[29]. *Id*., p. 135.
[30]. INTERNATIONAL COURT OF JUSTICE. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). Merits*, Judgment. I.C.J. Reports 1986, p. 14.
[31]. *Id.*, p. 105.
[32]. *Id.*, p. 104-105.
[33]. INTERNATIONAL COURT OF JUSTICE. *Frontier Dispute*, Judgment: I.C.J. Reports 1986, p. 565.

Africa a principle that already existed in Latin America. Rather, it was the recognition of a pre-existing customary rule of a general nature.[34]

What is not clear in the judgment, regarding this last-mentioned aspect, is that not enough practice is adduced to corroborate that generalization process. There is no reasonable way of knowing, for instance, when the "rule general in scope" arose. It might be supposed that the general customary rule crystallized after the decolonization of the Latin American states but, of necessity prior to the decolonization of the African states. Furthermore, the practice referred to is limited to Latin American and African states. Even though the customary rule may derive from the practice of the interested states, it would not be reasonable to believe that the practice of states in other parts of the world – including states under the yoke of the large colonial empires – is to be ignored.

2.1.6 Dispute regarding Navigational and Related Rights

In the *Dispute regarding Navigational and Related Rights* (Costa Rica v. Nicaragua), (Judgment, I.C.J. Reports 2009, p. 213), the Court recognized one of the requests of Costa Rica based exclusively on a particular customary – in this case bilateral –rule. The case is also of paramount importance because the ICJ appears to have adopted more flexible criteria for proving the existence of a particular custom.

Nevertheless, prior to recognizing Costa Rica's application, the Court expressly abstained from pronouncing on the existence of rules governing navigation of international rivers based on regional customary international law.[35] As is well known, there are several doctrines maintaining the existence, at least in South America, of a regional customary rule on freedom of navigation.[36]

As regards Costa Rica's application for recognition of a bilateral custom relating to fishing as a means of subsistence for persons living near the San Juan river, the Court embraced it wholeheartedly. The ICJ found that both parties were in agreement in recognizing an established practice of fishing for a livelihood. The difference between them had to do with whether the practice was mandatory. In a particularly succinct passage in its ruling, the Court established the existence of a customary rule applicable to Costa Rica and Nicaragua, as follows:

> The Court observes that the practice, by its very nature, especially given the remoteness of the area and the small, thinly spread population, is not likely to be documented in any formal way in any official record. For the Court, the failure of Nicaragua to deny the existence of a right arising from the practice which had continued undisturbed and unquestioned over a very long period, is particularly significant. The Court accordingly concludes that Costa Rica has a customary right. That right would be subject to any Nicaraguan regulatory measures relating to fishing adopted for proper purposes, particularly for the protection of resources and the environment.

That stance, if adopted in all its extremes, signifies a reversal of the previous position regarding proof of the particular custom set forth, as we saw above, in the *Asylum Case*. On that occasion, the Court determined that a state alleging the existence of a regional custom must prove that the other party is bound by that same norm. In the *Case concerning the Dispute Regarding Navigational and Related Rights*, the Court appears to have presumed the existence of *opinio juris*, as the practice is not being documented in any formal way in any official record. That would place the burden of proof on Nicaragua, for not having denied the existence of a right derived from the practice of guaranteeing subsistence fishing.

Albeit in relation to a very limited practice, the ICJ really does appear to have changed its position on proving particular customary international law. It is important to note that that shift was not noticed by the International Law Commission which, in our comments on the conclusions regarding

---

[34] *Id.*, p. 566.

[35]. INTERNATIONAL COURT OF JUSTICE. *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment: I.C.J. Reports 2009, p. 233.

[36] See, for example, BARBERIS, Julio. Les règles specifiques du droit international en Amérique Latine. *Recueil des Cours de l'Académie de Droit International de la Haye*. Volume 235, 1992, p. 176-184.

identification of customary international law, cites the *Asylum Case* in the section on proving a particular custom with no mention of any subsequent development in the case-law.[37]

Among the dissenting votes, the only member of the Court who noticed the change in position vis-à-vis the *Asylum Case* was Judge Sepúlveda-Amor.

For him, Costa Rica had not proved that the customary right to subsistence fishing had become mandatory for Nicaragua, as the *Asylum Case* required. For him, also, Costa Rica's invoking of the customary norm was not supported with respect to the time needed to forge the custom, because it was only in the petition to the Court in 2006 that the existence of the customary norm was alleged. Another relevant point made in the judge's dissenting opinion is that for him the practice in question had been carried on by the local riverine community in Costa Rica and not by the Costa Rican state, which would be necessary for the forging of the custom.[38]

For his part, *ad hoc* Judge Guillaume, despite not having opposed observance of the customary norm on subsistence fishing, declared that there was no freedom of navigation right in Latin America based on custom.[39]

2.1.7 Case of Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea

Recently, the Court again turned to a discussion of the existence of particular practice also related to artisanal fishing in the *Case of Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (Nicaragua v. Colombia), Judgment of 21 April 2022). Specifically, Colombia sought to assert the right to traditional fishing in areas that later came to belong to Nicaragua's Exclusive Economic Zone.

Unlike the *Dispute regarding Navigational and Related Rights*, the Court explicitly determined that the burden of proof fell to Colombia, in that it alleged the existence of local custom.[40]

Although Colombia submitted eleven sworn statements (affidavits) from inhabitants of the San Andrés Archipelago, the Court did not consider them definitive proof identifying the local customary rule. The principal reason for this was that not all of the statements were precise regarding the period when artisanal fishing developed. Some statements specified the years 1980 and 1990, but this period was not deemed sufficient to characterize a local customary international law.[41]

The Court recognized, specifically citing the *Dispute regarding Navigational and Related Rights*, the need for flexibility in considering the probative value of the statements in that traditional fishing that allegedly occurred for decades may not have been formally or officially documented. However, it deemed that the eleven sworn statements did not demonstrate a long-established practice of artisanal fishing.[42]

The Court does not provide a quantitative measure or at least a parameter defining a long-established practice. In a separate declaration, Judge Xue touches on the question and maintains that the practice has to be "sufficiently long to reflect the existence" of a tradition and culture supporting artisanal fishing.[43] That assessment only shows that judging the criteria for measuring the time requirement remains highly subjective.

---

[37]. INTERNATIONAL LAW COMMISSION. *Draft Conclusions on Identification of Customary International Law, with Commentaries*. A/73/10, p. 155-156. Available at:
< http://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf>

[38]. *Id.*, pp. 279-280.

[39]. *Id.*, p. 291.

[40] INTERNATIONAL COURT OF JUSTICE. Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment of 21 April 2022, para. 214.

[41] *Idem*, paras. 219-220.

[42] *Ibidem*, para. 221.

[43] Declaration of Judge Xue. Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Judgment of 21 April 2022, para 16.

In the judgment, the argument on local custom is combined with the question as to whether Nicaragua may have unilaterally recognized the right to artisanal fishing. After analyzing evidence of practice from both Colombia and Nicaragua, the Court reached a negative conclusion on this question.[44]

Although the case can be read as a diminution of the position taken by the Court itself in the *Dispute regarding Navigational and Related Rights* – to the extent that the burden of proof was specifically directed to the party alleging particular customary international law, as in the *Asylum Case* – it reinforces the centrality of the role the burden of proof plays in the issue and the possibility of its being relativized under certain circumstances.

2.2 On the individual opinions of ICJ judges who explicitly address particular custom

2.2.1 North Sea Continental Shelf Cases

In the *North Sea Continental Shelf Cases* (Judgment, I.C.J. Reports 1969), which involved, by special agreement, the Federal Republic of Germany, Denmark, and the Netherlands, the ICJ had nothing to say regarding regional custom in the judgment on the merits. Nonetheless, the separate opinion by Judge Fouad Ammoun, which concurs with the majority result but adopts different reasoning, addressed the issue.

The case had to do with the delimitation of the continental shelf in areas adjacent to the North Sea region, and specifically the possibility of applying the equidistance method.

In his separate opinion Judge Ammoun engaged in a detailed analysis on the possible existence of a regional custom peculiar to the North Sea in relation to delimiting the continental shelf.

As he sees it, there's a difference between general and regional custom. In the case of general consent, the consent of all states would not be required, but at least the consent of those which, aware of the general practice and opposing it, fail to do so. The way in which the rule of regional customary international law would work would be different mindful of the small number of states to which any effort would be made to apply the rule. Absent express or tacit consent, the regional custom could not be imposed on the states that reject it. He cites, in support of his position, a part of the judgment in the *Asylum Case* that provides that the party relying on a regional or local custom must prove that said custom is binding on the parties.[45]

Addressing the issue from the perspective of the specific case, Judge Ammoun held that the Federal Republic of Germany could not be obligated by a hypothetical regional customary norm because it rejects it. In this vein, he lists acts of government that would expressly be at odds with such a rule.[46]

At least three issues arise from this statement.

First, the way the judge generally addresses the very idea of customary law is based on the reference to consent, which is very controversial, as is known, when it comes to explaining custom.

Second, and still in relation to the role of consent, Judge Ammoun allows for the possibility of the regional particular custom being formed on the basis of tacit consent. Although he doesn't explain what situations would constitute this type of consent, one cannot rule out an intent on his part to refer to the silence of a given group of states. This being the case, he could be inverting the order that the methodology applied by the Court in the *Asylum Case* inaugurated: that one does not presume particular custom. Accordingly, he always states that it must be proven. In the final analysis, his interpretation of the *Asylum Case* – which he cites to support his position – may not be in line with the terms of the judgment itself.

It is also important to highlight how he addressed the issue of the burden of proof. The examples he raises from the Federal Republic of Germany are not to establish proof of the existence of the regional custom, but to establish proof of its non-existence. It was not exactly the non-existence of a regional

[44] *Ibidem*, paras. 222-231.
[45]. Separate Opinion of Judge Fouad Ammoun. *North Sea Continental Shelf (Federal Republic of Germany v. Denmark / Federal Republic of Germany v. Netherlands)*, Judgment, I.C.J. Reports 1969, p. 131-132.
[46]. *Id.*, p. 132.

custom that was proven, but just that such a custom could not be invoked against the Federal Republic of Germany.

2.2.2 Fisheries Jurisdiction Case (United Kingdom v. Iceland)

The *Fisheries Jurisdiction Case*, which involved the United Kingdom and Iceland (Merits, Judgment, I.C.J. Reports 1974, p. 3), was another in which the judgment on the merits of the International Court of Justice specifically addressed the question of particular custom. However, in the separate opinion of Judge de Castro, he does so, albeit in an ancillary and instrumental manner in the analysis for identifying a general customary norm of international law.

The case involved the issue of whether Iceland's extension of its fisheries jurisdiction was contrary to international law.

Having concurred with the majority, Judge Federico de Castro sought to emphasize his own reasons for aligning with the Court's majority.

The separate opinion addresses several aspects of the judgment. The reference to particular customary international law comes exactly when the judge seeks to analyze the question of proving international custom.

Using English law as a reference Judge de Castro establishes the existence of two categories of custom, "general customs" and "particular customs". Customary norms of the second type, albeit exceptions, "applicable to the inhabitants of certain regions," would have to be proven. General customary norms – which would constitute common law –would not need to be proven.[47]

Based on this analogy, de Castro argues that customary international law – which is general in nature and founded on the general belief in its validity (*opinio iuris*) – would not need to be proven. The Court would apply it at its own initiative. Only "regional customs or practices, as well as special customs, would have to be proven."[48]

At least three issues are relevant in light of the pronouncement by Judge de Castro.

First, he makes it clear – and this did not happen in the *Asylum Case* – why particular custom must be proven. This would be by virtue of a clear analogy with how custom operates in the domestic law. Thus, in light of how certain domestic legal systems developed – in the example he provides, English law – a delimitation is promoted both in relation to space ("certain regions") and in relation to persons ("inhabitants") in respect of whom the law is valid. de This delimitation would have an impact on proof, since particular customs would be exceptions, not the rule.

Second, given how the judge structures his argument, there would be no distinction between particular custom and general custom in terms of their nature. The fact that particular custom is exceptional does not render it any less of a custom nor a second-tier custom, it would just impact the "burden of proof" issue. And that is the title of section II of his separate opinion. In other words, particular custom would be capable of shifting the burden of proof, not exactly to make it different from the general custom.

One can also perceive the use of expressions that are not duly broken down, even though they go to the question of the need for proof: "regional customs," "practices," and "special customs." The first expression appears self-evident, for it refers to the geographic factor. The other two are more obscure. As regards "practices," perhaps the judge did not even refer to a customary norm; and "special customs" may indicate a custom delimited by the subject matter – that would render it "special" – but it is not known with certainty what he meant in using these terms.

It should be noted that the separate opinion contains another reference to regional custom. On rejecting a customary rule on the establishment of fishery zones at 200 miles, Judge de Castro thus understands it to mean not enjoying "uniformity or general acceptance." The lack of these elements would be the deciding factor even if it were considered a customary rule, "even one of regional scope."[49]

---

[47]. INTERNATIONAL COURT OF JUSTICE. *Fisheries Jurisdiction (United Kingdom v. Iceland), Merits, Judgment*, Separate Opinion of Judge de Castro, I.C.J. Reports 1974, p. 80.
[48]. *Id.*, p. 80.
[49]. *Id.*, p. 95.

Even though uniformity may be required for general custom and particular custom, general acceptance, in the case of particular custom, has to be seen contextually, i.e. based on a group of a certain number of states – which is not explained by the separate opinion. Even so, the judge appears, albeit indirectly, to emphasize once again in that section that there is no difference in the nature of general and particular custom – their differences having implications just for mastering, as a procedural matter, the principle of the burden of proof. This is why uniformity and general acceptance apply to both general and regional (particular) custom.

2.3 On the decisions of other international courts

2.3.1 OC-25/18 (Inter-American Court of Human Rights)

Regionally, the Inter-American Court of Human Rights already had the opportunity to rule on the question of regional custom in due course.

In Advisory Opinion OC-25/18, on the *Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22(7) and 22(8), in relation to Article 1(1) of the American Convention on Human Rights)*, the Court ruled, albeit tersely, on the characterization of diplomatic asylum as a regional custom.

For the Inter-American Court, even though the International Court of Justice had held in the Asylum Case that a regional custom can only be constituted when one has proven the "existence of a uniform and constant use as an expression of a right of the state granting asylum," mindful of the broad nature of the advisory jurisdiction, the framework for verifying the existence of a regional custom would be the 35 member states of the OAS. That interpretation was rendered so that the scope of its advisory opinions would not be limited to only some states.[50]

The analysis on the *opinio juris* of a supposed regional custom on diplomatic asylum was undertaken based on three main elements. First, not all of the OAS member states are parties to the conventions on diplomatic asylum, plus the texts of those treaties are not uniform in their terminology or in their provisions. Second, some states that took part in the advisory procedure stated that there does not appear to be a uniform position even in the Latin American subregion so as to be able to conclude that diplomatic asylum is a regional custom. Moreover, most of the states that participated in the proceeding argued that there is not a legal obligation to grant diplomatic asylum. Third, the United States of America persistently opposed a regional customary norm on diplomatic asylum.[51]

The Inter-American Court concluded that the element of *opinio juris*, necessary to identify a regional customary norm, was not present, yet it did recognize the practice of the states of granting diplomatic asylum or protection for individuals in their diplomatic legations.[52]

The case is really significant because for the first time an international court was able to address the issue outside the context of a contentious case – in which burden-of-proof issues are relevant.

Independent of the Court's conclusion, it is important to perceive that the Americas were considered a whole for the test as to the existence of a regional custom. Even when the Latin American subregion was considered, the Court took into account just the pronouncements of those states that participated in the advisory procedure to argue that there was a "uniform position" on the customary nature of diplomatic asylum. It was not considered a general practice, taking into account the entire subregional group. In addition, even more delimited subgroups, within the Latin American subregion, were not considered, though it is understandable that the exercise of the advisory jurisdiction, in the matter, made it difficult to take a position on the issue in relation to a very specific group of Latin American states.

Some elements are murky when it comes to inferring the non-existence of a regional custom on diplomatic asylum, such as the argument that there is not a legal obligation to grant it. That argument

---

[50]. INTER-AMERICAN COURT OF HUMAN RIGHTS. *Advisory Opinion OC-25/18, May 30, 2018, requested by the Republic of Ecuador. Institution of Asylum and its Recognition as a Human Right in the Inter-American System of Protection (Interpretation and Scope of Articles 5, 22(7) and 22(8), in relation to Article 1(1) of the American Convention on Human Rights)*, para. 158.
[51]. *Id.*, paras. 159-161.
[52]. *Id.*, para. 162.

appears to be much more about a primary rule on granting asylum. The identification of a customary norm – which could be verified without the obligation to grant diplomatic asylum, but as a prerogative of the state – appears to be much more in the realm of a secondary rule; because it would be a rule about a rule; a rule to identify the existence of another rule.

One more important piece of information with respect to the advisory opinion: the question of persistent objector is analyzed in light of regional custom – an issue that was addressed by the International Law Commission in its study on identifying particular custom and, in general, it is absent in the doctrinal analysis of the specific topic. Based on its analysis of the conduct of the United States, the Inter-American Court appears to conclude that the principle would apply to regional custom.

Extending the notion of the persistent objector to regional custom reinforces the understanding that the regional customary norm does not require unanimous acceptance by the states, for one could consider a specific group of them. In addition, that conclusion had a significant impact on the issue of burden of proof, as it suggests that in certain situations one must prove that a custom cannot be invoked against a certain state, not that it can be.

2.3.2 Advisory Opinion OC-28/21 (Inter-American Court of Human Rights)

While in much less depth, the Inter-American Court of Human Rights had another opportunity to debate the matter being examined here.

In Advisory Opinion OC-28/21 on *Presidential Reelection without Term Limits in the Context of the Inter-American Human Rights System (Interpretation and scope of Articles 1, 23, 24, and 32 of the American Convention on Human Rights, XX of the American Declaration of the Rights and Duties of Man, 3(d) of the Charter of the Organization of American States and of the Inter-American Democratic Charter),* the Inter-American Court examined the alleged existence of a regional customary international law establishing indefinite presidential reelection as an autonomous human right.

As for proof of the practice, the Inter-American Court made use of domestic legislation and jurisprudence to reach its conclusion – which demonstrates the importance of domestic laws and decisions for the identification of customary law. And the question, as formulated in the request for an advisory opinion, was relevant to the response regarding the existence of a particular customary international law, as it sought to know whether a human right to indefinite presidential reelection existed, and not exactly a restriction on that right.[53]

Based on this premise, the Inter-American Court determined that in the constitutional texts of the OAS Member States only four would permit reelection, with jurisprudential support in three of them. Such State practice would be insufficient to recognize the existence of a human right to indefinite presidential reelection based on a regional custom.[54]

Also in this case, the Inter-American Court took the entire continent as a reference and did not undertake to analyze the possible existence of a customary international law restricted to some States in the American regional context.

2.4 On the Decisions of International Arbitration Courts

On occasion, arbitration courts have also referred to particular customary international law.

In its 1965 judgment, the Tribunal constituted to judge the *Indo-Pakistan Western Boundary Case* considered that bilateral custom (sometimes called regional custom but in relation to only two States) would be applicable for purposes of drawing the border between the two States. The Tribunal

[53] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Advisory Opinion OC-28/21, of June 7, 2021, requested by the Republic of Colombia. Presidential reelection without term limits in the context of the inter-American human rights system (Interpretation and scope of Articles 1, 23, 24, and 32 of the Inter-American Convention on Human Rights, XX of the American Declaration on the Rights and Duties of Man, 3(d) of the Charter of the Organization of American States and the Inter-American Democratic Charter),* para. 98.

[54] *Idem*, para. 99.

particularly took into account certain authorities' exercise of jurisdiction over certain territories as evidence for the identification of customary law.[55]

Although the case does not clearly develop how particular custom can be identified, it does provide a relevant precedent to confirm the possible existence of particular customary international laws.

In the 2015 arbitration award on the *Chagos Marine Protected Area* the Tribunal constituted on the basis of Annex VII of the United Nations Convention on the Law of the Sea understood that the International Law Commission's comments on the Draft Articles on the Law of the Sea with regard to a specific article (Art. 1(2)) derived from the expression "sovereignty is exercised subject to the provisions of these articles and to other rules of international law" to the effect that States may possess particular rights in the territorial sea by virtue of local custom.[56]

This consideration clearly seems to be an *obiter dictum*, although it does signify clear recognition of the existence of local customs.

2.5 Taking stock of the actions of international courts in relation to particular international custom

The first cases of the ICJ on particular custom revolved around the *Asylum Case*, decided in 1950. Nonetheless, in recent years the Court's decisions on the matter have shown a significant modification, culminating in the *Case Concerning the Dispute Regarding Navigational and Related Rights*, although aspects of the judgment in the *Case of Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* also demonstrate attractive force in the *Asylum Case*.

The restrictive view that the ICJ developed in the *Asylum Case*, especially in relation to the need for a state that alleges the existence of the particular custom to prove that the other party is bound by it, set the standard for several other cases that followed. That is what happened in the *Case related to the rights of nationals of the United States of America in Morocco*, of 1952 – albeit without much foundation – and in the *Case concerning Right of Passage through Indian Territory*, of 1960 – even though the identification of the element of international practice, in relation to one point in the decision, was done generically. The separate opinions, in the cases in which the judgment was silent on the particular custom, reinforce that restrictive view, even though they do show some openings. The separate opinion by Judge Ammoun in the *North Sea Continental Shelf Cases*, of 1969, emphasizes the need to prove the particular custom, but holds that its acceptance may be tacit. Already in the *Fisheries Jurisdiction Case*, of 1974, Judge de Castro, on highlighting the need for proof of regional custom, clearly indicated that the question of proof has to do with the burden of proof in a given case, and is not necessarily a characteristic intrinsic to regional custom as compared to general custom.

As of the case of *Military and Paramilitary Activities in and against Nicaragua*, of 1986, the position of the International Court of Justice appears to have gradually shifted. Generic references, without even a minimal analysis of proof – in favor or against – of the existence of a regional customary international norm are beginning to rear their head. The same type of generic consideration occurs in the *Frontier Dispute*, also from 1986.

The taking of distance from the *Asylum Case* intensified further in the *Dispute regarding Navigational and Related Rights*, of 2009. On that occasion the Court found there to be a particular custom – bilateral, in this case – due to the fact that the opposing party, Nicaragua, had failed to deny its existence. In other words, the burden of proof was shifted. It is not ruled out that this change in position occurred by virtue of the issue being discussed, which involved a sensitive human rights issue, affecting the very survival of riverine populations. Regardless, that position expresses a trend to loosen up the rigorous test ushered in by the *Asylum Case*.

---

[55] THE INDO-PAKISTAN WESTERN BOUNDARY CASE TRIBUNAL (Constituted pursuant to the Agreements of 30 June 1965). Award of 19 February 1965. *Reports of International Arbitral Awards*. Vol. XVII, 2006, p. 508, 252, 554, 564.

[56] PERMANENT COURT OF ARBITRATION. ARBITRAL TRIBUNAL CONSTITUTED UNDER ANNEX VII OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA. Chagos Marine Protected Area (The Republic of Mauritius vs. The United Kingdom of Great Britain and Northern Ireland). Award of 18 March 2015, para 516.

Inversion of the burden of proof no longer occurs in the *Case of Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, wherein the Court required Columbia to prove the existence of a local customs on subsistence fishing in Nicaragua's exclusive economic zone. However, discussion on identifying such customs focuses, to a large extent, in the case, on questions related to the burden of proof. There is also explicit recognition that there should be flexibility regarding the probative nature of practices that are not formally or officially documented.

Since the *Asylum Case* itself, the ICJ did not explicitly answer the question as to whether it is necessary to that the regional custom is a substantive or a procedural issue. If it is a substantive problem, the very existence of a particular custom is conditioned on proof that certain states are bound by it. If the need for proof is a procedural issue, the existence of the custom would not necessarily be at stake, but just the ability of one of the parties to oppose it, within the bounds of the contentious case being adjudged.

One indication suggesting that proof of the regional custom is a procedural issue has to do with the possible inadmissibility of an argument based on a regional customary norm. In none of the cases above did the ICJ address proof was an admissibility issue. In addition, it is striking that in various decisions evidence is characterized as an issue referring to the "burden" that one of the parties will have in a judicial case; in other words, a typical procedural issue. That is very clear in the way in which the ICJ requires, in the Asylum Case, that Colombia prove that Peru is bound by the particular customary norm. In the *Case concerning the Right of Passage through Indian Territory*, individual opinions engage in a careful analysis of evidence introduced by Portugal to show that the existence of a bilateral custom. Judge de Castro also identifies the difference between general and particular custom expressly in an item called "burden of proof." In the *Dispute regarding Navigational and Related Rights*, the issue was resolved due to the shifting of the burden of proof from the applicant to the respondent. Finally, in the *Case of Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea*, the discussion regarding local custom becomes a discussion regarding proof and the onus that would fall on Colombia.

The first cases ruled on by the ICJ take into account aspects which, over the years, have gone unnoticed in more recent decisions.

The relationship between treaty and custom was sometimes accorded greater weight – as in the *Asylum Case* and in the *Case concerning Right of Passage through Indian Territory* – whereas in others it was not considered sufficiently relevant – as in the *Case related to the rights of nationals of the United States of America in Morocco*.

Reciprocity – *Case concerning Right of Passage through Indian Territory* – and acquiescence – *Asylum Case*, *Case related to the rights of nationals of the United States of America in Morocco*, and *Case concerning Right of Passage through Indian Territory* – were also considered elements for identifying – or not identifying – a particular customary international norm. Subsequently, they were not present in other cases. That may be due to the gradual decline – albeit not total disappearance – in the use, by the ICJ, of analogies from the private sphere in its interpretation of international law.

Beginning with the case *Military and Paramilitary Activities in and against Nicaragua* it appears to affect identification of the regional custom (and even the burden of proof) with the existence of general collective interests. Accordingly, particularizing the custom could contribute to – and not oppose – such general collective interests. And so it was that in the above-mentioned case, norms on the use of force were identified at the regional level for the Americas region that coincided with the universal norms. And in the *Frontier Dispute Case*, the interest in stabilizing world borders, especially mindful of the decolonization process, was crucial for identifying *uti possidetis* as being regional in origin, but also that subsequently it was embraced universally. Finally, in the *Dispute regarding Navigational and Related Rights*, the bilateral customary norm was found in the human rights framework and, even more so, rights related to the survival of riverine populations. Protection of human rights locally would not clash with, but rather would complement, universal human rights. The weight of a human rights reading in the identification of local customary international law also makes itself felt in the *Case of Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* since, despite its negative response to Colombia's claim, the Court insisted that proof, in the area of traditional fishing, is a matter that must be analyzed with flexibility.

It should be noted that the context in which the ICJ decided the first cases on regional custom required it have a conception of international law that saw opposition between the dimensions of localism (sometimes in the guise of regionalism) and universalism. Hence the criteria established for identifying customary norms are quite strict.

In addition one cannot rule out that more flexible criteria for identifying the regional customary norm has been a consequence of the gradually looser methodology that the ICJ, over the years, has come to apply when it comes to identifying even general custom.

Outside the purview of the CIJ, the Inter-American Court of Human Rights clearly sought to interact with the former by citing the *Asylum Case* – while disregarding other more recent cases.

In Advisory Opinion OC-25/18, the Inter-American Court took into account the strict criterion for proof of regional custom. Though it is not a contentious case, but rather an advisory opinion, the verification of the *opinio juris* gave strong consideration to the position of the states who made the view known in the advisory proceeding. Even though the threshold for identifying a possible regional customary norm has been the 35 member states of the OAS, an evaluation of the positions of each one was not done.

Like the ICJ in the *Asylum Case*, the Inter-American Court placed great weight, for identifying *opinio juris*, on the terms of the regional treaties that include rules on diplomatic asylum.

The Inter-American Court took a position that the principle of persistent objector should not be incompatible with a particular custom when it described the position of the United States of America.

Regardless, it is perceived that while the Inter-American Court could rule on issues regarding particular custom outside the scope of a contentious case, there were also clear limits for doing so. Indeed, it would not be reasonable, mindful of the large group of 35 member states of the OAS, for the Inter-American Court to delimit subregions to categorically affirm the existence of a regional custom. If that idea were to move forward, the Inter-American Court could send a mistaken signal on the unnecessary need to consider, from a legal standpoint, the inter-American human rights system as a whole, and analyse it in fragmented way from a sub-regional standpont. In the case, the very definition of a large group of states in which a supposed regional custom was operating affected, from the outset, the conclusion of the Inter-American Court on identifying that regional custom.

The refusal to identify subregions in the American continent was also adopted in Advisory Opinion OC-28/21, when the Inter-American Court took the dissenting position of four States within the broader context of the American region. This case is important in that it reveals that the identification of the practical proof of particular customary international law may use domestic legislation and jurisprudence as a reference.

Arbitration tribunals were able to identify particular customary international laws. However, they did not innovate with respect to the aspects that the decisions of permanent international courts had already posited for understanding the question.

PART III : REGARDING THE DOCTRINE ON PARTICULAR CUSTOMARY INTERNATIONAL LAW

3.1 Introduction

The issue of particular customary international law is far from being a recent one in the international law literature.

Already in the first half of the 20th century experts in the doctrine explicitly allowed for the possibility of the existence of customary norms that would attach only to a certain group of states.

A good example of that position is Jules Basdevant, in the general course he gave at the Hague Academy of International Law, in 1936.

Basdevant allowed for the possibility of what he called “relative customary rule,” specifically in light of the practice of the states that evolved in that direction. The examples he raised, albeit without much depth in terms of treaties, referred to bilateral customary rules on the extent of the territorial sea, diplomatic asylum among the states of South America, and even immunity from visit of ships in a convoy. The possibility of this type of custom had been silenced by Article 38 of the Statute of the Permanent Court of International Justice, whose drafting the author considered “all told, quite vague.”

He argued that if the Court were called upon to rule on a relative custom – which, he understood, was a matter it had not yet addressed – and a matter on which, in his understanding, it had not yet addressed – one should not adhere to the text of Article 38.[57]

Most striking in Basdevant's treatment of the issue is that he clearly places it in a dichotomy between the general and the particular. Such considerations were inserted in the First Chapter of his Course, which was suggestively called "Universal Conception and Relativism in International Law" ("*Conception Universelle et Relativisme en droit international*"). The argument of the French jurist, even if he considered relative international law fully legitimate (not just customary, but also treaty-based), placed it in him in a clearly exceptional mindset. International law, given its own historical foundations, is universal, yielding space for states to establish particular (or relative) rules among themselves.[58]

One significant concern with the universalist nature of international law – as shown by Basdevant – appears to be one of the reasons why the doctrine did not take more consistent interest in particular customary international law. Indeed, the idea of universalism in international law – which has its origins in the historical moment of expansion of the international legal system to the world beyond Europe, is that it is grounded in a colonialist conception not only of the law, but also of international politics[59] – created little space for the discussion of a custom that is binding only on a specific group of states. The universalization of international law was rapidly associated with the idea of the unity of the international legal system[60]; particular custom brought many more questions than solutions to the idea of a universal international law.

Yet there also appears to be a reason, more technical in nature, that explains the scant interest in particular customary international law.

As of the second half of the 19th century, international custom gradually came to occupy a place of less primacy, as a source of international law, in the writings of experts in international law. Movements for codification and the exponential growth of treaties for regulating international legal relations occurred clearly to the detriment of customary law as a source.[61] In that context, research into custom, and more specifically on particular custom, was relegated to a secondary role.

It cannot be denied that in tandem with the universalist trend defended by most of the international law doctrine, a consciousness of regional identity –legally speaking – was forming, also as of the 19th century, in some places. In the Americas, specifically, and in the Latin American subcontinent, a notion of legal regionalism was gaining strengthen so as to encompass not only the drafting of treaties among the states of the region, but also the identification of general principles and

---

[57]. BASDEVANT, Jules. Règles générales du droit de la paix. *Recueil des Cours de l'Académie de Droit International*. Tome 58, 1936, p. 486-487.

[58]. *Id*., p. 483-491.

[59]. On such a process of "universalization," with its contradiction and internal tensions, see BECKER LORCA, Arnulf. Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation. *Harvard International Law Journal*. Vol. 51. No. 2, 2010, p. 475-552.

[60]. Based on how it disseminated among several international law experts, the very conception of formal unity of the international legal system is intrinsically associated with its own universality, as described by P.M. Dupuy, who also emphasizes the role of the state in that relationship: "What is it that gives the general international legal order, whose scope by definition is universal, the unity of its forms, i.e. first of all, its modes for producing and applying norms? One can, from the outset provide a simple answer to this question: it is the state. From its origins, noted above, it is by reason of the particular nature of its primary subjects that this original legal order owes its unity." DUPUY, Pierre-Marie. L'Unité de l'ordre juridique international. *Recueil des Cours de l'Académie de Droit International de la Haye*. Tome 297, 2002, p. 93.

[61] Several international law scholars of the period, such as, for example, Ernest Nys, based on resource to a domestic law analogy, saw custom be gradually replaced by conventional sources in international law. Though one could not the risk of immobility of the system – which would no longer have the flexibility of custom – the judiciary and international arbitration would round out and develop the international codes. See NYS, Ernest. Codification of international law. *American Journal of International Law*. Vol. 5. No. 4, 1911, p. 871-900.

customary rules applied locally. Nonetheless, during the 19th century and the first half of the 20th century specific studies on particular custom were rare or non-existent. The issue was commonly addressed in generic term, reflecting on the existence of an international law of the Americas or, at least, a special application of international law in the Americas, or in the Latin American subcontinent.[62]

Notwithstanding the absence of systematic studies on the matter, the International Court of Justice was first called on to rule on particular custom in a case involving two states of the Americas. The Americas were the ideal setting – albeit not yet fully developed systematically, from the standpoint of international law doctrine – for a more in-depth discussion on particular customary international law.

Even so, the International Court of Justice's judgment in the *Asylum Case*, in 1950, did not immediately spark an interest in the matter due to the more influential doctrine. It is highly likely that this can be explained because, as noted, the International Court of Justice, in addition to not identifying the existence of a particular customary norm, regional in nature, established a very rigorous test for identifying it – that in the future would split the doctrine as to whether it was inherent to particular custom, or could be extended to general custom.

In one of the first commentaries on the *Asylum Case*, by Herbert Briggs, the question of proof of customary international law was brought up, rather than the particularity of the context by virtue of its regional or subregional context in the Americas. Briggs apparently supported the Court's conclusion because one could not identify a "uniform and constant usage, accepted as law" in relation to the rule on unilateral and definitive characterization of asylum. The facts that had been brought before the Court revealed much "uncertainty and contradiction, much fluctuation and discrepancy in the practice of diplomatic asylum."[63]

In other words, Briggs was not so interested in analyzing the case from the perspective of a custom binding on just a certain number of states, but in the method used by the Court to identify a customary norm – which, by the way, would not vary with the number of countries where the norm would be applied –universally or regionally. The particularity of the international legal system was also engulfed by a rigidly universal perspective.

Other commentaries were more sympathetic to the argument that the International Court of Justice should have more carefully addressed the question of regionalism in international law, but likewise they did not get involved specifically in the question of the formation of a particular customary norm.[64]

It was only in the early 1960s that more systematic analyses of particular custom began to appear. Clearly this is because after the *Asylum Case* the International Court of Justice heard and decided, in 1952, the *Case related to the rights of nationals of the United States of America in Morocco*, and, in 1960, the *Case concerning Right of Passage through Indian Territory*.

It was especially the last case, in which the International Court of Justice explicitly recognized the possibility of the existence of a particular custom (a bilateral one, in the case), that appears to have been the major stimulus for the doctrine to seek, more carefully and more systematically, to understand particular custom in international law.

Nonetheless, the more systematic approach to the topic also resulted in a discussion in the context of a more drawn-out debate between voluntarists and non-voluntarists. The authors would constantly

---

[62]. The basic references for the issue are the works of Álvarez and Sá Vianna that show not only the somewhat abstract nature – to the detriment, for example, of a more specific and systematic discussion on the sources of the system – of the debate on the existence of an international law of the Americas, but the possibilities – and difficulties – of approaching international law from a regional perspective. See ÁLVAREZ, Alejandro. *Le droit international Américain*. Paris: Pedone, 1910 and SÁ VIANNA, Manoel Álvaro de Souza. *De la non-existence d'un droit international américain*. Rio de Janeiro: L. Figueiredo, 1912.

[63] BRIGGS, Herbert W. The Colombian–Peruvian asylum case and proof of customary international law. *American Journal of International Law*. Vol. 45, No. 4, 1951, p.731.

[64]. For example, VAN ESSEN, J. L. F. Some reflections on the Judgments of the International Court of Justice in the Asylum and Haya de la Torre Cases. *International and Comparative Law Quarterly*. Vol. 1. No. 4, 1952, p. 533-539.

return to the question of the proof of particular custom and understanding it as an expression of the state's consent. It is likely that the publication of a cutting-edge article by Cohen-Jonathan contributed significantly to the way custom was treated in that debate. However, the judgment itself in the *Asylum Case*, in 1950, was also an incentive for such an endeavor. Over the years, the debate on voluntarism lost ground to the approach that considered private customary international law as a built-in element of the international legal system – albeit sometimes uncomfortably so. One recurrent feature of the doctrinal debate, however, is that it is almost always guided by decisions taken by international tribunals. The doctrine assumes a distinctly defensive posture, rather than an innovative one on the issue.

In the next section I will seek to present a critical analysis of writings that set out to analyze particular custom systematically, and which in one way or another have inserted it in the debate between voluntarists and non-voluntarists. With that I seek to set forth the choices that the doctrinal currents made to address the issue at the time. Next, I will analyze the works that were gradually able to free themselves from this debate by recognizing – even if timidly – the potential of private customary international law. And this exposition, I think, may open the way for new possibilities for analyzing particular custom, especially in the Americas.

3.2. Particular custom between voluntarism and non-voluntarism

The 1960s saw an explosion in the number of publications on private customary international law, especially its bilateral component. Undoubtedly, the 1960 judgment in the *Right of Passage over Indian Territory Case* was the main reason behind the plethora of publications in the period. That case therefore marked the first time that the International Court of Justice unequivocally recognized the existence of particular customary international norms.

The article by Cohen-Jonathan, entitled "La Coutume Locale," is the first major effort to understand particular custom in an orderly and systematic manner. Originally published in 1961, in the *Annuaire Française de Droit International*, it is most likely – especially in light of the subsequent references made to it – the most influential doctrinal work on particular customary international law to date.

The first lines of that article clearly situate his ideas in the tension between universalism and particularism. In that sense, his first reference is to the Álvarez/Sá Vianna debate on the existence of an international law of the Americas. That debate would reveal that international society allowed for legal relativism, albeit tempered.[65] As the universal and the particular are capable of coexisting, a more systematic investigation into particular international law would not pose risks to the unity of the international legal system.

The article, divided into two main parts, sought first to analyze the existence of local custom as a source of international law – discussing doctrinal controversies on the matter and the enshrining of local custom in the case-law of the ICJ – and then turned immediately to aspects referring to the legal nature of local custom – which sought to distinguish it from general custom and tacit agreement.

The author's strategy was clear: to show the errors of the doctrinal writers who argued the non-existence of local custom, using logical arguments and the very case-law of the ICJ. He also sought to enshrine a specific place for local custom in the face of similar rules such as tacit agreement and estoppel. Yet the backdrop, properly speaking, of the article was a defense of non-voluntarist arguments to justify international custom – and local custom, specifically – as a source of international law.

His own definition of local custom – based on the limited number of states, was relational, i.e. it was posited in contraposition to universal custom. It contrasted, as well, with the notion of special custom, based on the object of the rule, and not on the size of the group it governs – which is the criterion he sought to emphasize.[66]

Analyzing the doctrinal positioning on this issue, the author identified those who denied the existence of local custom – describing it as a tacit agreement, i.e. an unwritten treaty –and the positivist

[65]. COHEN-JONATHAN, Gérard. La coutume locale. *Annuaire français de droit international*. Vol. 7, 1961, p. 119.
[66]. *Id*., p. 120.

current, incorporated by Soviet doctrine, which could only justify local custom by having recourse to the idea of tacit consent.[67]

The two types of positions, in his perspective, were insufficient for understanding local custom, and should give way to a non-voluntarist approach to the matter.[68] Just like a general customary norm, a local customary norm would also be endowed with both elements, objective and subjective. It would be characterized by its existence as an emanation of a particular legal society. And a restricted legal community would be characterized by the common awareness between two or more persons at law of a certain social need, which finds expression in concordant conduct.[69] Not even Article 38 of the Statute of the International Court of Justice would stand in the way of recognizing local custom. That article, itself defective and vague, on referring to the term "general," does not necessarily refer to the spatial element, but to the continuous application over time.[70] With that, Cohen-Jonathan dodged the most obvious criticism – based on the literal meaning of the terms of the norm – made by those who deny the local custom, at the same time as he removed from Article 38 exclusivity in defining the extent of the elements that make up any customary norms. The author also made a point of noting that the existence of a given region did not exhaust the local nature of the custom, which could be manifested at lower levels, for example sub-regionally, thus dispensing with a predetermined territorial seat.[71]

The analysis was then based on studying the cases, beginning with the *Asylum Case*, before the International Court of Justice.[72]

His non-voluntarist position clearly expanded the possibilities of some judgments of the ICJ. In the *Asylum Case*, even though the Court had not identified a regional customary norm concerning asylum, the judgment held that more local customs more restricted to regional custom could arise or even that in that judgment it had been understood that the lack of an act of non-recognition of a given local custom by a state could be considered tacit recognition of that custom.[73] In the *Fisheries Jurisdiction Case*, even though the ICJ did not, anywhere in its judgment, make use of the term "particular custom" or its correlates, Cohen-Jonathan understood that there had been implicit recognition of a local custom between Norway and the United Kingdom, constituted by the positive action of the first and the abstention of the second.[74]

The non-voluntarist presupposition of the author, however, gave rise to clear internal tensions in his argument, as in the case of the distinction he sought to develop between local custom and general custom. To that end, local custom could be understood by analogy to a restricted agreement: the norm binds the parties who participated in its formation, and only them.

Citing the *Asylum Case*, he understood that local custom could not be extended to a state that has repudiated it or that has not recognized it expressly or tacitly, adhering thereto by its attitude (which, beyond mere silence, would require a positive statement of will or a qualified abstention).[75] However, such a strict analogy between custom and treaty (restricted agreement) gives rise to important inquiries, on better approximating the idea of local custom than that of a tacit agreement. Seen in that light, would it not be easier, following the line of authors who Cohen-Jonathan had criticized, to completely associate local custom with a tacit agreement?

On one specific topic the author goes over what he sees as the differences between local custom and tacit agreement: (1) repetition is present in the first but not the second – because of that criterion, in the two advisory opinions of the PCIJ – *Danzig* and *Jurisdiction of the European Commission on the Danube* – there was a finding of local custom, thus they were grounded in the idea of continuity; (2) in local custom there is *opinio juris*, which is formed from a slow process that gradually finds expression,

---

[67]. *Id*., p. 121-123.
[68]. *Id*., p. 125.
[69] *Id*., p. 126.
[70]. *Id*., p. 122.
[71]. *Id*., p. 122.
[72]. *Id*., p. 128.
[73] *Id*., p. 129.
[74] *Id*., p. 131.
[75] *Id*., p. 133.

not as a matter of obligation at that moment, and not always with the same degree of intensity; and (3) the *treaty-making power* is necessary for tacit agreement but not for local custom.[76]

Nonetheless, except for the first difference – which, in itself, is a controversial reading of the advisory opinions – the other reasons for separating local custom from tacit agreement were more conceptual than based on the practice of states or the case-law of international courts. The fact is that the limit between the two was very much shaped by the theoretical position defended by the author. Depending on the adoption of other theoretical presuppositions, confusion could arise between local custom and tacit agreement. It would be easier to allow that the case-law of the International Court of Justice resolved the problem by defining that local custom is recognized in international law – despite the doctrinal opinions that may be at odds with this finding by the Court.

Cohen-Jonathan agreed with the rigorous test developed by the ICJ in the *Asylum Case*, that the party that alleges particular custom must show that the opposing party accepts it. He approaches that requirement as a burden-of-proof issue. It is borne by the one who alleges the particular custom, because a state that bases its right on a particular practice must show why that right corresponds to the limitation on the sovereignty of the territorial state.[77] However, that association of particular custom with a limitation on the sovereignty of a certain state results exclusively from the cases decided by the ICJ. It is not shown how a local custom would always be associated with a matter entailing a limitation of sovereignty – unless it is understood that each and every norm of international law constitutes a limitation on state sovereignty.

In the last pages of the article Cohen-Jonathan analyzed the interactions between general custom and local custom. In the event of a conflict, he gave preference to local custom, based on the *Case concerning Right of Passage*. Also, he did not agree with the thesis that local customs may only arise to fill caps in general custom.[78]

At the end, though he did not see local customs as capable of attacking the unity of international law – for they addressed particular social exigencies – he called attention to local customs whose purpose was more general and that bound a large number of states. In that situation, it was his understanding that the special law should always be based on the general law, lest the international legal system become fragmented.[79] Here, Cohen-Jonathan clearly indicated that particularism in international law could not exist autonomously from its universalism. In the final analysis, particularism was somehow subordinated to universalism.

In 1961 as well, Paul Guggenheim published an article, *Lokales Gewohnheitsrecht*, which sought to give doctrinal expression to the arguments he had already advanced in the 1960 *Right of Passage Over Indian Territory Case*, when he served as an agent for the Government of India.[80] That is perhaps why the article does not delve into deeper theoretical considerations, nor is it sufficiently systematic. Rather, it seeks to challenge the arguments that led the International Court of Justice to recognize a bilateral customary rule between Portugal and India.

Guggenheim was not opposed to there being any particular type of customary international rule, just those that were purely bilateral – which he associated, terminologically, with local customary international law. He expressly recognizes – and citing the *Asylum Case* – the possibility of a regional customary international law.[81]

In his view, when an international court recognized that a bilateral practice of two states was binding, this could go back to a unanimous declaration of intention by the parties - and thus to a contractual aspect. And he cites, to that end, the Advisory Opinion of the Permanent Court of International Justice on the Free City of Danzig and the International Labour Organization.[82]

---

[76] *Id*., p. 137-139.
[77] *Id*., p. 134-135.
[78] *Id*., p. 135-137.
[79] *Id*., p. 140.
[80] The written and oral proceedings of the case can be found at https://www.icj-cij.org/en/case/32.
[81] GUGGENHEIM, Paul. Lokales Gewohnheitsrecht. *Österreichische Zeitschrift für öffentliches Recht*, Vol. 11, 1961, p. 329.
[82] *Ibid*, p. 330.

And the crux of his argument was that if it could not be reduced to a general international customary norm, a bilateral international customary rule, would necessarily be reduced to an unwritten agreement.[83] This is because, in order to exist, a bilateral custom would need the consent of both parties – a unanimity – and this would lead it to be considered an agreement.[84]

Given the few references in the writings of other authors, Guggenheim's article had no significant impact on the doctrine of private customary international law, most likely because it ran in direct opposition to the conclusion reached by the Court in the *Right of Passage over Indian Territory Case.* He does offer an interesting line of argument, however, because he finds the basis for his refutation of the existence of bilateral customary international norms precisely in the strict distinction drawn between treaty and custom. For him, one of the essential features of custom is that it is enforceable without the need for a unanimous consent – something not feasible under bilateral customary international law. This has two consequences:

First of all, an anti-voluntarist argument is apparently used to refute bilateral customary international law. Secondly, by its very argument, regional customary international norms without unanimity are possible - because that is precisely what makes them customary: the absence of unanimity. The paradox in such outcomes is that denying the existence of a bilateral customary international norm was usually associated with a voluntarist argument. Guggenheim's article thus envisaged a tension between voluntarism and anti-voluntarism, which could sometimes bring about a coming together or switching around of positions, the voluntarist arguing for such a custom and the anti-voluntarist for it not to be – as will occur with subsequent doctrinal works.

In 1962, Christian Domincé set himself the task of checking whether there were any bilateral customs between Switzerland and Germany and between Switzerland and Italy governing the right of passage over the landlocked territories of Büsingen and Campione. The reason for such an exercise was the ruling in the *Right of Passage over Indian Territory Case*, which, as everyone knows, was handed down the previous year. In his article *Coutume Bilatérale et Droit de Passage sur Territoire Suisse*, Dominicé demonstrates a remarkable grasp of various international legal concepts, but seems to have written it with a predetermined conclusion, since none of the hypotheses it advanced – and the article is based on successively alternative arguments – could justify the existence of a bilateral customary rule. As the article was inspired by the Court's unambiguous finding that bilateral customs exist, he could not deny this fact; he could, however, remove the practical relevance of this type of custom when he made an empirical analysis and found that the elements he thought necessary for bilateral custom to arise had not been fulfilled.[85]

The conclusions of the article seem to be predetermined because Dominicé's negative responses concerning the identification of bilateral customary international norms were based on a very fixed notion of the relationship between treaty and custom. The author made little or even no room for understanding that these sources could overlap in regulating certain conduct – which seems to depart from the logic on which the Court drew in ruling in the case that inspired the article, wherein a dynamic approach was taken to the relationship between treaty and custom. He holds the view, for example, that Switzerland's practice prior to the treaties that established the right of passage over its territory, even if stemming from a bilateral custom, could not be reestablished. The eventual expiry of the treaties would create a situation of anomie in this regard.[86]

Although an empirically narrow study, it drew general conclusions about bilateral custom, such as: there can be no deviation from general rules; general regulations had to be taken into account when setting conditions for its proof; a practice pursued under the umbrella of a treaty could not lead to the creation of a bilateral custom; a treaty that codifies a bilateral custom voids the latter, unless this was expressly excluded from its text; and the same regulation of a given matter in several treaties cannot give rise to a bilateral custom.[87]

---

[83] *Ibid*, p. 330- 331.
[84] *Ibid*, p. 333.
[85] DOMINICÉ, Christian. Coutume Bilatérale et Droit de Passage sur Territoire Suisse. *Swiss Yearbook of International* Law. Vol. 19, 1962, p. 71-102.
[86] *Ibid*, p. 89.
[87] *Ibid*, p. 102.

He concluded that the ruling in the *Right of Passage over Indian Territory Case* gave the illusion that there were many avenues for bilateral custom to be applied; these avenues, however, were in fact quite modest.[88]

Although Dominicé does not explicitly subscribe to voluntarism, his view of the restricted existence of bilateral custom coupled with a clear preponderance of the conventional source at the level of bilateral relations between states led him to practically deny that this specific type of custom exists. The reason for this denial had to do with the difficulty of linking the strict consent of states to be bound at the international legal level by a customary rule.

Within the Americas, the first and most consistent reflection on the particular customary international law after the International Court of Justice ruling in the *Right of Passage over Indian Territory Case* was the article by Julio Barberis, published in 1962, *La Costumbre Bilateral en Derecho Internacional Público*.

The paper itself was clearly structured from an inductive perspective. To answer the question as to whether the bilateral customary norm was instituted by the general customary norm formation procedure or by the treaty-making procedure, the author initially resorted to arbitration, Permanent Court of International Justice, and International Court of Justice jurisprudence.[89]

Barberis traces recognition of bilateral custom back to cases earlier than other authors did, thus radicalizing the strategy already adopted by Cohen-Jonathan to give legitimacy to the past. His view was that the first time this type of custom was recognized was in the 1905 Permanent Court of Arbitration ruling in the *Matter of Perpetual Leases in Japan*, when several agreements between Japan and European states engendered the creation of a bilateral custom. He understood that the Permanent Court of International Justice had also recognized the bilateral custom in the *Case of the Free City of Danzig and the International Labour Organization,* but that this was not the case in the same Court's *Advisory Opinion on the European Danube Commission*. As he understood it at that time, the PCIJ had only recognized a practice that later became a right embodied in a conventional instrument.[90]

The analysis, especially of the 1960 *Right of Passage over Indian Territory Case*, led the author to conclude that the bilateral custom was, in fact, customary international law. He therefore examined the issue in terms of three elements that make a distinction between a treaty and a custom: (a) unlike a treaty, a custom may be established via the activity of organs that are not necessarily competent to represent the state at the international level, as happened with a bilateral custom; (b) the standard that a feature of the customary rule is to make it binding on third parties would be impossible to apply to bilateral customs, since the need for the consent of both parties would not provide elements to make it distinguishable from an implicit agreement; Nevertheless, he stressed that he disagreed with Guggenheim, who holds that the customary rule could hardly be binding on third parties as a matter of necessity, whereas for Barberis, it could only be binding on third parties; (c) the need for uninterrupted, ongoing repetition of actions, unlike a treaty, which stems from an agreement of wills, would be present in a bilateral custom, and it could be classified as a customary rule.

Although his article is short and make no major theoretical inroads in bilateral custom or other forms of private customary international law, Barberis' intention was clearly to combine efforts to argue for the possibility of bilateral custom with recourse to the authority of cases adjudicated by international arbitration and permanent tribunals. In that regard, as the International Court of Justice seemed at the time of the 1960 case, to lean more towards a stance that departed from strict voluntarism in recognizing the possibility of bilateral custom, Barberis also seemed to join in such an effort.

In the late 1960s, Anthony D'Amato published an article in the *American Journal of International Law* called "The Concept of Special Custom in International Law."

At the same time as the author affirmed the existence of particular custom, which he preferred to call "special custom," his main objective was, based on the ICJ case-law, to isolate the need to comply

---

[88] *Ibid*, p. 102.
[89] BARBERIS, Julio. La Costumbre Biltareal en Derecho Internacional Público. *Revista Jurídica de Buenos Aires*. Vol. 2. Nº 1, 1962, p. 313-324.
[90] *Ibid*, p. 314 - 318.

with the requirement of consent for this type of custom. Therefore, it is also an attempt to address the matter within the perspective of a non-voluntarist theoretical position.

The first datum that stands out, in the article, is the author's defense of a different object for the special custom. For him, such custom addressed issues that cannot be generalized, such as titles or rights to specific parts of "world real estate," cases of adverse possession, border disputes, and so-called international easements. In addition, special custom could establish rules expressly limited to countries of a certain region, as is the case of the right to asylum in Latin America.[91] The distinction is not based on rigorous criteria. As for the first part, it addresses issues referring to territorial titles, the second further expands the object of special custom. It appears that here D'Amato took as the starting point cases already decided by the ICJ on particular custom, then expanded them to a horizon of more general questions, without ceasing to open up very broad possibilities, relative to his object, with the example of the right to asylum.

It was in the Roman law and in the English common law that D'Amato discerned the origins of special custom, its differentiation from general custom, and, moreover, the requirement that it be proven. Having recourse to Blackstone, he recalled that the rules on the need for proof of custom were stricter because these were derogations from the common law or general custom.[92] International law was said to have absorbed that idea, notwithstanding the wording of Article 38 of the ICJ Statute – which he argued, like Basdevant, should not be read literally.[93]

Such recourse to history only reinforced the core of his argument: that the ICJ had used the strictest test of consent to identify the existence of that special custom, and not of the general custom. On thus isolating that type of custom, it sought to maintain the argumentative coherence of the ICJ at the same time as he attacked the voluntarist currents.

Nonetheless, the author does not let go of an escape value should the ICJ, in the future, come to adopt a looser test for consent even for special custom. Hence his admission that, depending on the type of case analyzed, the requirements for proving special custom could vary – in the case of prescription, borders, regional law, or whatever may be at issue.[94] This appears to show that the way in which he approached special custom – on allowing for flexibility in the tests to determine what constitutes it – depended on a larger thesis, which sought to reject voluntarist arguments in international law. This procedure is not so different from that adopted by Cohen-Jonathan.

It is also important to recall that D'Amato was not advocating the idea that special custom should prevail over general custom in all cases. Analyzing the *Case concerning Right of Passage*, he recalled that the prevalence of special custom had not been fully established, whereas the general custom was not duly proven by Portugal.[95]

In the early 1970s, when very little specific study of private customary international law was done, Francesco Francioni published what is perhaps the most comprehensive article on the subject. Entitled *La Consuetudine Locale nel Diritto Internazionale*, the article was not exactly original in its approach - for it was rather reminiscent of the scheme Cohen-Jonathan introduced on the subject, using International Court of Justice jurisprudence to refute doctrinal arguments, the more theoretical as well as the more practice-oriented. However, Francioni's arguments are more thorough than Cohen-Jonathan's because, by applying sophisticated reasoning grounded in the dogma of international law, he challenges point by point the positions opposed to local custom – a category which, in his terminology, encompassed all private customary international law – or those that sought to link it with other principles of international law, such as implicit agreement, *estoppel*, or acquiescence.

Francioni correctly observed a discrepancy between a flawed doctrinal analysis of the issue and, on the other hand, a thorough analysis using international jurisprudence, especially by the International

---

[91] D'AMATO, Anthony. The Concept of Special Custom in International Law. *American Journal of International Law*. Vol 63. No. 2, 1969, p. 212-213.
[92] *Id*., p. 213.
[93] *Id*., p. 217-218.
[94] *Id*., p. 223.
[95] *Id*., p. 219.

Court of Justice and, earlier on, by the Permanent Court of International Justice itself.[96] His proposal was precisely to fix that discrepancy.

Art. 38 (1) (b) of the Statute of the International Court of Justice was not an obstacle to discussing particular customary international law, either because a treaty cannot limit the scope of another source – in this case, custom – or because the general nature of the provision could be applied on a smaller scale, such as regional, or with reference not to space but to time.[97]

Francioni is far more generous than other authors – except possibly Barberis – in noting the recognition of private customary international law in cases that other internationalists did not see so clearly, such as the 1951 *Fisheries Case* involving the United Kingdom and Norway, and the Permanent Court of International Justice Advisory Opinions on Danzig and on the European Danube Commission – decisions which, as Cohen-Jonathan had already noted, recognized private customary international law, albeit not expressly.[98] The argumentative strategy here was very clear. With a consistent body of jurisprudence dating back to the 1920s, international jurisprudence had already settled a problem that doctrinaires insisted on wanting to leave open. He never hid his clear opposition to voluntarist positions that sought to reduce the particular customary international law to an implied agreement. He thus demonstrated that, in his view, such reductionism was not only theoretically mistaken, but also at odds with the position of international jurisprudence. The need for a uniform behavior to be repeated for this kind of customary international rule already made it different from an implied agreement, which conveyed a specific declaration of will with respect to a particular rule or set of rules.[99]

Particular customary international law could not be *estoppel* because it involves a question of substance, whereas the latter would serve as a procedural exception in court. Neither could it be confused with acquiescence, which is merely an outward expression of a psychological or volitional attitude of an international subject that may take the form of an implied agreement or a custom, and should therefore not be confused with the latter, being only one aspect of *opinio juris* rather than the customary rule in its entirety.[100]

Particular customary international law should not be confused with general international law either, because, to be enforceable, the state in question must have participated in the creation of the customary rule itself. Thus, Francioni strictly follows the criterion that the Court originally established in the *Asylum Case* and therefore removes any possibility of affording regionalism legal status by admitting that within a specific group a rule of particular customary international law may be enforceable upon states that are part of a region or sub-region but had no hand in the creation of the customary rule.[101]

Also strictly following the most widely disseminated reading of the *Asylum Case*, the author understood that the burden of proof in particular customary international law falls entirely on the state so claiming, unlike what obtains under general international law, where it is shared between the judge and the parties involved.[102] Yet for the author, it is quite typical for burden of proof issues in private customary international law to get confused with its very existence. In his own words:

> "In that connection, it is worth pointing out that, given the relative nature of local custom, such burden of proof necessarily involves a twin set of facts: first of all, the very existence of the local custom with its own two elements, that is, uniform practice and *opinio juris*; secondly, actual involvement by the state it is intended to challenge in the customary practice."[103]

---

[96] FRANCIONI, Francesco. La Consuetudine Locale nel Diritto Internazionale. *Rivista di Diritto Internazionale*. Vol. 54, Fasc 3, 1971, p. 398.
[97] *Ibid*, p. 399 - 400.
[98] *Ibid*, p. 402 - 405.
[99] *Ibid*, p. 407- 409.
[100] *Ibid*, p. 414- 415.
[101] *Ibid*, p. 415- 419.
[102] *Ibid*, p. 420- 421.
[103] *Ibid*, p. 421.

Francioni's article delivered a clear message that international jurisprudence should shape doctrine both to dispel the doubts that some doctrinaires still had about the existence of this type of customary rule and to demonstrate that voluntarist explanations to deny or dismiss its autonomy were easily refutable. The author deftly constructs his article with strong arguments for (international judicial) authority to continue supporting the existence of the particular customary international law. And he himself relied on that authority to advance his own arguments.

In the 1990s, the theoretical affiliation with voluntarism – or opposition to it – still informed doctrinal positions and ways of thinking about particular custom. Two good examples of these positions, which led to antagonistic and even counterposed understandings, are the essay by José María Gamio, "Costumbre universal y particular," and the article by Olufemi Elias, "The relationship between general and particular customary international law."

As for the first, Gamio did not deny that the case-law of the ICJ focused, when it had occasion to exam particular custom, on the need to show the consent to the rule by the state in question. Nonetheless, in his view in such cases one would not be in the presence of custom, but of other sources of international law.[104]

Like D'Amato, Gamio understood that those cases in which the ICJ required consent were the ones in which issues regarding particular custom would have been considered. As regards general custom, the position of the Court would clearly be inclined towards the idea of consent.[105] However, unlike D'Amato, he draws another conclusion from that finding.

Gamio reads the case-law of the ICJ on particular custom based on the presupposition that each time it has faced the issue, it could have reached the conclusion that particular custom – local, bilateral, or regional – should be approached as related to a source other than custom.

It is in that regard that the author criticizes the *Case concerning Right of Passage* insofar as, in his understanding, the Court could have reached the same conclusion drawing on the idea of titles that revert in adverse possession or even estoppel. In the *Case related to the rights of nationals of the United States of America in Morocco*, he suggests that the dispute could have been decided drawing support from the idea of tacit agreement, based on the dissenting vote of four judges in the case. Along the same lines, the PCIJ was talking about tacit agreement when it handed down its Advisory Opinion in *Danzig*.[106]

Nor would regional custom exist as an autonomous category. Even if he allowed that in the *Asylum Case* the Court recognized the existence of a practice among states of the Americas, he was not able to see a necessary relationship between that finding and the existence of a customary norm binding on a limited universe of states. That practice would be the substratum by which some other source of international law would be affirmed in the case, but not a custom particular to a region. Gamio sees the idea of "specially affected states" developed in the case-law of the ICJ as a specific way to designate what some prefer to call particular custom.[107] Instead of constituting a formal source of law or even a legal rule, regional custom would merely describe a way of externalizing (in a more restricted manner, as regards the number of participants) a well-defined formal source, properly speaking, or a well-defined legal rule.

As regards the process in which a particular custom becomes general, he understood that, in the case, there would be a transformation that was not only quantitative – in the number of states bound by a norm – but also qualitative – for what was initially a mere partial agreement, among a given number of states, would be transformed into a custom.[108]

In the final analysis, the rejection of the particular custom by Gamio was owing to a strong association of the authority with an anti-voluntarist conception of international law. The requirement of

---

[104]. GAMIO, José María. Costumbre universal y particular. In: RAMA-MONTALDO, Manuel (ed.). *El derecho internacional en un mundo en transformación. Liber amicorum: en homenaje al profesor Eduardo Jiménez de Aréchaga. Vol 1*. Montevideo: Fundación de Cultura Universitaria, 1994, p. 79.
[105] *.Id*., p. 80.
[106] *Id*., p. 86 - 87.
[107]. *Id*., p. 88 - 89.
[108] *Id*., p. 98.

consent for identifying the particular custom was simply inadequate for explaining custom, which does not require such consent. At a given moment the author does not hide his objective, i.e. to deny the particular custom. Recognizing it would end up "upsetting the whole purpose of developing a coherent theory of custom as a source of international law."[109]

Actually, the author appears to dissociate particular custom from custom as a source of international law because its characteristics differentiate it markedly from an effort to understand custom organically. Yet certainly that position is subject to criticism because it makes custom, as a source, depend on a theory, not the other way around. That position clashes even more so with the practice of international courts, which do not distinguish particular custom from general custom.

This being the case, the theoretical debate, all the more intense, finds a confrontation between voluntarists and anti-voluntarists resonate with great vigor in Gamio's assessment of particular custom in international law, even in his reading of the cases decided by the ICJ.

The article by Olufemi Elias, "The Relationship between General and Particular Customary International Law," was, in various ways, a counterpoint to the essay by Gamio, though it is likely that Elias was unaware of that essay.

Based on a vigorous defense of the role of consent in customary international law, Elias did not reach the conclusion that the particular custom did not exist. Rather, he maintained its conceptual autonomy on not drawing a fundamental distinction between it and general custom.

He rejects all the criteria for distinguishing particular custom from general custom, such as the existence of a special interest, geography, or even the number of participants in the formation of the custom. Indeed, in the last criterion he saw circularity, thus, on relating the terms "general"/"particular" to the number of participants in the formation of the custom, one was simply reaffirming that they *are* two categories, instead of explaining *why* they are, indeed, two categories. If every custom were based on the consent of the states, then every custom would be particular.[110]

Elias also rejects the idea that the difference between general custom and particular custom turns on the burden of proof, which is definitive, for other authors, in relation to particular custom.

He was not able to see how, rationally, a distinction should exist between the burden of proof required to establish a particular customary norm and that needed to show a general customary norm. To that end, he relied either on the fact that a particular custom is as much law as is a general custom, or on the judgments of the ICJ, which never properly established that there was a distinction in the burden of proof for a particular custom compared to a general custom.[111]

And he put forward the argument that even if there were such a distinction, it would not be about what needs to be proven, but who must prove it, which would not affect the conclusion that the *probandum* is the same for general custom as for particular custom.[112]

While the article clearly intends to advance theoretical considerations, he reaches a conclusion similar to that of Gamio, but with the signal switched: the practice, especially judicial, would explain his theory. Even so, particular custom – insofar as it is similar to general custom – may only be understood by having recourse to a type of voluntarist theory that reinforces the role of the states' consent. In other words, particular custom should be understood as no different from general custom to justify a theory based on consent; particular custom serves such a theory, and not the contrary position.

3.3 Particular custom between doctrinal recognition and the potential for its application

The 2010s saw renewed interest in the issue of doctrine. Although there were echoes of the voluntarist-non-voluntarist debate, the arguments challenging the very existence of particular customary international law lost steam. From that point on, new issues began to emerge, that produced deeper reflection on the possibilities for this specific type of customary rule.

---

[109] *Id.*, p. 92.

[110] ELIAS, Olufemi. The relationship between general and particular customary international law. *African Journal of International & Comparative Law*. Vol. 8. No 1, 1996, p. 68-72.

[111] . *Id.*, p. 82.

[112] . *Id.*, p. 84.

One reason for such a shift likely had to do with the growing debate on fragmentation of international law, which once again brought the issue of regionalism to the forefront of international legal debates. Furthermore, a reassessment of issues concerning expansion of international subjectivity, and the possibility of subjects other than the state influencing the formation of customary international norms, also came into prominence during this period.

A good example of an approach that no longer emphasized the debate between voluntarists and non-voluntarists is the article by Miguel Galvão Teles, published in Portuguese, entitled "Costume bilateral em Direito Internacional Público."

Part I was dedicated to revisiting the *Right of Passage over Indian Territory* case, especially from the perspective of the petitioning state, Portugal, and emphasizing the role of Inocêncio Galvão Telles, that country's agent in the case and the author's father. Part II dealt, however, with particular customary international law, taking the position that, following the ICJ decision in that case, and notwithstanding the insistence of certain authors in denying the possibility of particular customary international law, it was now generally accepted.[113] This idea of moving beyond the doctrinal debate on the very existence of this type of customary international rule enabled the author to adopt a more pragmatic and even conciliatory tone on the matter.

Galvão Teles offered explanations on the suitability of the idea of generality to particular international law – which has to do with a state's unique practice, rather than with the number of states that engage in the practice, since no action is taken based on the belief that third parties should also be bound by the same practice. This is even why he could label particular customary international law as "limited custom," which is associated with situations that are localized and specific. He also refuted any connection between this type of custom and implied agreement – because he found there were such agreements that were not the result of a repeated practice and customary rules applicable to states not involved in creating them. This latter is an interesting point, because he seems to be admitting that for a given group of states, a particular customary international rule may be enforceable *erga omnes*. But the author does not develop this argument any further.[114]

The author admits that while there is room in the formation of custom for elements of consent – such as acquiescence, reciprocity, and the admission of the persistent objector principle itself – this consent need not be couched in the form of a "statement of law internationally constitutive (or so deemed)."[115]

The way he viewed it, the discussion about bilateral custom as implicit agreement would be settled based on the fact that treaty and custom are constantly interacting. Thus, the same facts could give rise to both a customary rule formation process and an implicit agreement. In other words, his argument could be read as saying that, since international practice has removed any strict dichotomy between treaty and custom, there would no point insisting on the need to strictly distinguish between bilateral custom and implicit agreement on a theoretical level.[116]

This approach that emphasizes pragmatism over theoretical consistency of a bilateral customary international rule.

In 2010 as well, Andreas Buss published his article "The Preah Vihear Case and Regional Customary International Law," the main purpose of which was to revisit, from the perspective of regional customary international law, the classic case decided by the International Court of Justice in 1962.

While its title emphasized the issue of regional customary rules, the article itself is more focused on analyzing the case and the criticisms leveled against it, in particular, a history of the facts and law that led to the case.[117]

---

[113] TELES, Miguel Galvão. Costume bilateral em Direito Internacional Público. *O Direito*. Vol. 142. Nº II, 2010, p. 362-363.
[114] *Ibid*, p. 363- 364.
[115] *Ibid*, p. 364.
[116] *Ibid*, p. 365- 366.
[117] BUSS, Andreas. The Preah Vihear Case and Regional Costumary Law. *Chinese Journal of International Law*. Vol. 9. Nº 1, 2010, p. 112-120.

But the major trend of the time period, which the article incorporates, was to reflect on customary international law from the perspective of the practice of non-state actors. Drawing on a concept dating back to certain theoretical lines supporting legal pluralism, Buss provides elements to demonstrate that the borders between Cambodia and Thailand were marked by "fluidity and flexibilities," so that "territorial jurisdiction could not be strictly defined by permanent boundaries." This was due to the fact that alongside official law, unofficial law made by non-state groups and religiously based rules and concepts were also in operation in the region. Thus, the sovereign gave up his right to own land donated to monks to build a monastery, which at that time was considered inviolable, endowed with its own jurisdiction. It could, for example, grant asylum and did enjoy immunity from taxation. In his view, in order to better understand how concepts such as territory and jurisdiction were applied the International Court of Justice should have taken into account regional customary law before France settled in the region. The author goes so far as to suggest that taking into account factors such as regional customary law would help minimize Third World skepticism towards international law.[118]

Although the article does not expressly refer to the *Case Concerning Navigational and Related Rights,* involving Costa Rica and Nicaragua and decided in 2009, the previous year, and considered the conduct of coastal populations on the border river between the two states, it is clear that it incorporates the tendency to assign non-state actors a more relevant role in the process of shaping the particular customary international rule. Here again, the question is no longer whether this particular type of customary international law exists, but rather whether it is in keeping with the developments of the historical moment that would compel international law to transcend a purely state-centric character.

Three years later, a powerful commentary on the aforementioned International Court of Justice case was published from the specific perspective of particular customary international law. In "The 'Right Mix' and 'Ambiguities' in Particular Customs: A Few Remarks on the Navigational and Related Rights Case," Luigi Crema explores what can be considered the two main developments in the case: the relationship between private customary international law and non-state actors and the question of burden of proof in this specific type of customary rule. As with other studies from the 21st century onward, his starting point is the assumption that "among scholars it is indisputable that international law also admits particular custom."[119]

Probably because he acknowledges this indisputable feature, Crema is more careful to verify that particular customary international law is recognized in the jurisprudence of the Permanent Court of International Justice. There would no longer be any need to look to the distant past for such recognition. That is why, for him, what that court would have recognized in the *Case of the European Danube Commission* and in the *Case of the Free City of Danzig and the International Labor Organization* would be something closer to a subsequent practice modifying a treaty.[120]

In considering the relationship between non-state actors and particular customary international law, the author downplayed the impact of the ruling in the *Case Concerning Navigational and Related Rights*. In his opinion, the Court did not properly consider the practice of non-state actors, but observed state practice by looking at the practice of private individuals. This recourse occurred in exceptional and residual cases, when the specific circumstances so required. Thus, absence any clear evidence of state conduct, to identify a particular customary international rule the Court would have looked at the behavior of individuals and the corresponding lack of reaction by the state. In an effort to ensure consistency in the International Court of Justice jurisprudence, the author even saw a connection between this procedure and the Court's assessment of practice in the case concerning *Kasikili/Sedudi Island*, in which conduct by state officials at the highest levels was taken as the starting point and then came the conduct of private individuals.[121]

---

[118] *Ibid*, p. 120- 126.

[119] CREMA, Luigi. The 'Right Mix' and 'Ambiguities' in Particular Customs: A Few Remarks on the Navigational and Related Rights Case. In: BOSCHIERO, Nerina et al (eds.). *International Courts and the Development of International Law: Essays in Honour of Tullio Treves*. The Hague; Heidelberg: T.M.C. Asser Press; Springer, 2013, p. 66.

[120] *Ibid*, p. 67.

[121] *Ibid*, p. 71- 72.

On the matter of burden of proof in particular customary international law, he held that only in appearance did the Court deviate from the precedent set in the *Asylum Case*. Firstly, because in more recent times the criteria the Court uses to identify international customary rules have become looser than those in place at the time of the ruling in the *Asylum Case*. Secondly, the issue of proof in the case was not controversial, because during the trial both Nicaragua and Costa Rica had agreed on the practice that formed the basis of the local customary rule. That is to say, the Court had duly taken into consideration the consent of both states in order to conclude that there was a particular international customary norm in the situation it was examining. But Crema felt that the case demonstrated something distinctive about a bilateral custom as compared to a general custom. The practice observed in the former is broader than in the latter, because it is carried out in the context of a closer bilateral relationship; hence the practice of individuals is observed – which would be impossible in a custom that is general in nature.[122]

While also intended to ensure the reasoning behind the Court's ruling remained consistent, the arguments were not entirely convincing – first of all, because the fact that the parties agree on the existence of a practice underlying a customary rule is not the same as agreeing that the customary rule itself exists. Such a practice could lead to the situation being framed as acquiescence or implicit agreement, for example. Secondly, investigating the conduct of non-state actors bears no relation *per se* to investigating a closer bilateral relationship between two states. A practice that is unofficial in nature (because it is conducted by private actors) reveals the question of attribution of an action, not the closer link (as a matter of mutual interest) between two states.

In the end, Crema may be perceived as striving to find answers to an innovative feature of the International Court of Justice's judgment in that court's own jurisprudence. But this may well be explained by an oddity stemming from new developments that have affected the Court's perception of matters of the particular customary international law. The fact is that the Court may really have sought to be innovation in its own jurisprudence in the face of an ever-changing international reality.

More recently, a number of doctrinal exercises have shown not only that the clash between voluntarists and non-voluntarists is less intense in the debate over the existence of particular customary international law, but also that a more flexible and pragmatic view offers potential for application of this specific type of custom. This holds true of Khagani Guliyev's article, "Local Custom in International Law: Something in between General Custom and Treaty."

The author recognized that the existence of local custom had been widely accepted in international law since at least the time of the *Right of Passage over Indian Territory case*. However, he also maintains that international judges were reluctant to recognize it because of problems surrounding its formation, identification, and duration.[123]

These problems stemmed from the specificities of local custom, such as there being a universal, rather than general, custom; a practice that needs to be repeated over a long period of time – a requirement he drew (very indirectly and certainly not explicitly) from the cases the ICJ heard, involving this type of custom and dealing with practices that extended over a long period of time; *opinio juris* identified in all of the states involved in this type of custom, not just most. These characteristics enabled the author to draw the conclusion that local custom took on a clearly consensualist bias, unlike general customary international law.[124]

Because of its consensualist nature, local custom could be compared – but not equated – with implied agreements. The difference between the two had relates to the fact that in local custom there is practice, whereas with implied agreement there is a contractual logic to its formation. Time for formation, required for the former and not for the latter; the need for several state bodies to be involved in the case of local custom, and for bodies vested with full powers in the case of an implied agreement, were two more reasons for making the distinction.[125]

---

[122] *Ibid*, p. 72- 73.
[123] GULIYEV, Khagani. Local Custom in International Law: Something in between General Custom and Treaty. *International Community Law Review*. Vol. 19. Nº 1, 2017, p. 49-50.
[124] *Ibid*, p. 50- 55.
[125] *Ibid*, p. 56- 58.

This movement of closeness and separation – which can also be understood as a movement between voluntarism and non-voluntarism – is explained in the second part of the article, in which the international rules on state succession are used as a means to illustrate the changing nature of local custom.

Guliyev's view is that, unlike general custom, local custom is not binding on new states that emerge from succession processes. By not regulating common issues agreed on by the international community – respect for which would be expected for the international system to be stable – local customary rules are not enforceable against new states. The need for universal practice does not carry over to the new state, but rather requires its specific acceptance. The author even – implicitly – draws this conclusion from the *Right of Passage over Indian Territory Case*, insofar as the International Court of Justice analysis of the practice covered both the period of British colonial rule and the period of Indian independence. This means that the Court needed to establish whether the practice that existed prior to independence continued post-independence. While this was an inference bordering on conjecture – because the Court is not the least bit forthright in linking the analysis of practice to a supposed feature of local custom with respect to state succession – it did lead the author to conclude that, at least for the case of state succession, local custom followed the logic of a treaty.[126]

However, following the logic of the treaty the author would, by logical consequence, also argue that if few treaties – concerning territorial boundaries and territorial regimes – are imposed on the new states that emerged from a succession, even without their consent, the same way local customs dealing with those matters are imposed on the latter.[127] In other words, if the issue of territorial limits and territorial regimes calls consensualism in treaty law into question, it would also call it into question in customary international law. The consensualist basis of local custom is, in other words, made to uphold the idea that, in specific situations, it will be enforceable against a state even without its consent.

The article therefore allows an appreciation of the potential of particular customary international law to regulate certain situations – rules on succession – without necessarily getting fixated on a voluntarist or non-voluntarist argument in international law. Its *sui generis* character, "something between general custom and treaty," affords it the flexibility to regulate matters in the international legal arena.

3.5 Overview of the doctrinal debate on particular customary international law

There is little doubt that the doctrinal debate on the subject of particular customary international law was basically influenced by the decisions rendered in cases judged by the International Court of Justice especially. Although some authors read it retroactively, in the sense that the Permanent Court of International Justice or even the Arbitration Tribunals had already accepted this type of custom as a category of international law, the truth is that only after the *Asylum Case* did scholars truly begin to take an interest in the subject; and interest grew substantially after the *Right of Passage over Indian Territory* case, which was the first time that a bilateral custom was being recognized explicitly.

The problems some authors had in accepting particular customary international law related mostly to its bilateral form. The reason for such resistance certainly has to do with the lack of a strict separation between a bilateral custom and an implied agreement between states. In many respects, these difficulties were based on the theoretical concepts defended by authors of the post-World War II period, especially those that could be considered voluntarist, and their anti-voluntarist counterpoint. Generally speaking, authors more closely associated with voluntarist schools of thought dismissed, or even denied, any relevance of the existence of particular customary international law – usually only its bilateral aspect – whereas anti-voluntarist authors, usually upheld by the authority of International Court of Justice rulings, defended its existence.

Up until the end of the 20th century, much of the specific doctrine on the subject remained influenced by the theoretical debate between voluntarists and non-voluntarists, which may have given rise to at least three major problems: (1) the studies, by repeatedly fixating on rigid theoretical positions, escaped potential regulation under private customary international law of various subjects; (2) probably because of the influence of the Right of Passage over Indian Territory Case, the debate was often focused

[126] *Ibid*, p. 59- 61.
[127] *Ibid*, p. 61- 65.

on bilateral customary international law, to the detriment of other types, such as regional law; as a result, more in-depth reflections on the value and legal relevance of regionalism for international law were practically non-existent during that period; (3) the debates reflected only slightly on proposals for the International Court of Justice to advance its jurisprudence on the subject matter; positions applauding the Court's decisions or not accepting the Court's recognition of particular customary international law, especially in its bilateral form, obscured important issues such as the burden of proof in all forms of particular customary international law or potential interaction between treaty and custom in order to identify it.

Beginning in 2000, approaches that were more pragmatic and less influenced by the theoretical debate between voluntarists and anti-voluntarists gradually emerged. For certain authors, the fact that the particular customary international rule approaches or departs from consent could be seen not necessarily as a problem, but as an advantage. Moreover, discussion began to emerge as to whether the practice of non-state actors could be taken into consideration for the purpose of identifying the particular customary international law. Positions that were less state-centric in terms of the concept of the law itself found space during this period as well. However, reflections on the role of regionalism in international law and how it relates to customary international law were hardly nurtured. Little has been explored in terms of the ruling in the *Case Concerning Navigational and Related Rights*, which introduced new elements to at least propose a more thorough reflection on particular customary international law, even though, as noted earlier, their potential to trigger a re-examination of the majority reading that has been done of *Asylum Case* by doctrine is not so negligible.

PART IV - THE INTERNATIONAL LAW COMMISSION AND PARTICULAR CUSTOMARY INTERNATIONAL LAW

For more than five years, the United Nations International Law Commission has devoted itself to the subject of identifying customary international law. The designated Rapporteur, Sir Michael Wood, produced five distinguished reports dealing with the "methodology for identifying rules of customary international law."[128]

In 2018, the Commission adopted the "Draft Conclusions on Identification of Customary International Law" that was referred to the UN General Assembly, which, in turn, took note of the Draft in Resolution 73/203 of December 20, 2018. The last of the Conclusion in said Draft dealt exactly with regional customary international law and was stated as follows:

"Conclusion 16 Particular customary international law

1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States.

2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (*opinio juris*) among themselves."

In the Draft, such a conclusion appears last not only because the other conclusions apply to particular customary international law, unless otherwise identified, but because, as the Special Rapporteur asserts, this type of customary rule is regarded as "exceptional." Hence, the term "customary international law" denotes that which is general in nature – that is, the rule; the adjective "particular" is always needed, in order to denote a customary international law that is not general.[129]

For the Rapporteur, even if "not often to be found," private customary international law "can fulfill a significant role in interstate relations by accommodating different interests and values that are peculiar to only a few states."[130] But in a limited number of states such interests and values need to be verified, because it is the quantitative, rather than qualitative, standard that characterizes this type of

---

[128] INTERNATIONAL LAW COMMISSION. *Draft Conclusions on Identification of Customary International Law, with Commentaries*. A/73/10, p. 122. Available at:
< http://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf>.

[129] *Ibid*, p. 123, 155.

[130] *Ibid*, p. 154.

customary international norm, as paragraph 1 of Conclusion 16 ("among a limited number of states") makes clear.

From a terminology standpoint, the clear option for the ILC was to choose the term private international law as a category, of which "regional, local, or other" customary international norms would be a species. In the ILC's own reasoning, the term "particular" fulfills two important functions: (a) to demonstrate relational nature as opposed to general customary international law; (b) to point out that closeness between states (as the term regional or local would imply) is not a prerequisite for identification of this type of customary rule.[131]

The two elements (practice and *opinio juris*) are also needed for the identification of particular customary international law, but paragraph 2 of Conclusion 16 emphasizes that such elements must be identified among the states concerned. Although the wording of the provision is unclear, the comments establish that a "stricter" approach is taken to the two elements in matters of particular customary international law[132]– in other words, the ILC has clearly adopted the widespread understanding established at the time of the International Court of Justice ruling in the *Asylum Case* that all states involved must accept the particular customary rule in question.[133] However, the arguments introduced by the International Court of Justice in the *Case Concerning Navigational and Related Rights* are not developed by the International Law Commission, not even from the perspective of a reversal of the burden of proof or the presumption of proof of the customary rule.

It is important to draw a contrast between defense of the stricter standard and what was stated in the Commission's 2006 Report on the Fragmentation of International Law. At that time, the final report inquired about the normative meaning of regionalism under international law. The answer was clear, in that international law did not support regionalism in any "stronger sense" to support a rule or principle with a regional sphere of application or a regional limitation awaiting the application of a rule or principle that is universal in scope.[134]

The report maintained, however, that there was no normative basis for regionalism, except insofar as the issue concerns regional customary practice accompanied by *opinio juris* of the relevant states. The report only rules out the possibility of states outside the region being bound by customary norm – although they may still be so bound, expressly or implicitly. But it does not necessarily exclude the possibility that states in the same region may be bound by a regional customary norm. Unlike what many authors argue, the report holds that, "[i]n the Asylum case, the Court itself did not specifically pronounce on the conceptual possibility of there being specifically regional rules of international law in the above, strong sense (i.e. rules automatically binding on States of a region and binding others in their relationship with those States)."[135] That is, there is no such acceptance that the case heard by the Court necessarily required the consent of the state on which the regional custom of origin is invoked. Moreover, it is at least understandable that such a finding would mean that what was being at issue in the *Asylum Case* was not so much a question of whether the regional customary rule existed, but rather the burden of proving it.

In any event, although the ILC's Conclusions on Identification of Customary International Law added nothing new on the subject of private customary international law, notwithstanding the fact that the implications of the entire jurisprudence of the International Court of Justice on the subject are not sufficiently addressed – neither are even its previous considerations in the study of other issues, such as the Fragmentation of International Law – they contributed a great deal to firmly establish this type of

---

[131] *Ibid*, p. 154- 155.

[132] *Ibid*, p. 156.

[133] In the rather brief discussions within the Commission, nevertheless, some members did signal that they did not agree with following the "stricter" approach in gauging the two elements in so far as the particular customary international law was concerned. See INTERNATIONAL LAW COMMISSION. *Yearbook of the International Law Commission*, Vol. II (2), 2015, p. 31.

[134] INTERNATIONAL LAW COMMISSION, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission*. UN Doc A/CN.4/L.682, p. 108-109. Available at:
< https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf >

[135] *Ibid*, p. 110- 111.

custom. To that end, the Commission considered its existence to be "incontrovertible," especially in view of the various rulings of the International Court of Justice on the subject.[136]

PART V – ON THE PRACTICE OF THE STATES ON THE AMERICAN CONTINENT

Valuable contributions were made in light of the reports this rapporteur presented at the Eighth Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States, held on August 9, 2021 during the 99th Regular Session of the Committee.

While some comments were general or related to suggestions regarding the approach or expanding the scope of this study, some positions were expressed that are relevant for identifying the practices of the States regarding this matter. I will highlight some of them.

Guatemala emphasized the importance of analyzing the practice of the States and their domestic courts, as well as resolutions of the OAS General Assembly and the decisions of regional courts in identifying particular international custom.[137]

Colombia also considered the resolutions of the OAS General Assembly important for identifying a regional customary law on the defense and promotion of democracy.[138]

Mexico emphasizes that the rules applied to general international custom also apply to particular international custom, such as identification of the practical element and the *opinio juris*.[139]

Ecuador stressed the difficulty of identifying aspects that would make it possible to observe State practice with respect to a particular customary international law, including in cases like that in Advisory Opinion OC-25/18 of the Inter-American Court.[140]

At the 100th Session of the Committee, it was decided that the Fourth Report would be sent to the States for comments. The purpose was to gather State practice in this area. At the 101th Session, it was decided to extend the deadline so that other States would have the opportunity to present their comments.

Only six States formally expressed an opinion regarding the Fourth Report.

Bolivia's mission to the OAS (Note No. MPB-OEA-NV121-22, August 11, 2022) and the Letter from the Interim Legal Advisor to the U.S. State Department, dated February 6, 2023, said they had no comments to make regarding the report. Paraguay's mission to the OAS (Note No. 860-22/MPP/OEA, August 8, 2022) said it was still awaiting the position of internal agencies regarding the matter and sent the document "*Protocolo de Actuación para uma Justicia Intercultural*," which showed the special treatment of indigenous customary law at the domestic level, which was only remotely related to the content of the Fourth Report.

Via e-mail, the Coordinator of Costa Rica's Legal Directorate of International Law and Human Rights, dated June 22, 2022, stressed points he had made at the Eighth Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States, held on August 9, 2021, during the 99th Regular Session of the Committee, in which he emphasized the importance of custom as a source of international law and stressed that it is not limited to geographic affinity among the States but refers also to common causes, interests, or activities.

El Salvador's Permanent Mission to the OAS (Note No. MPOEA-OEA-0105/2022, dated June 6, 2022) presented comments referring to Conclusion 16 of the Draft Conclusions on Identification of Customary International Law of the International Law Commission. It specifically called attention to the fact that the concept of "the States concerned" contained in paragraph 2 of Conclusion 16 needs additional clarification. The Note understands that regional international custom is formed on the basis

---

[136] INTERNATIONAL LAW COMMISSION. *Draft Conclusions on Identification of Customary International Law, with Commentaries*. A/73/10, p. 154. Available at:
< http://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf>.

[137] INTER-AMERICAN JURIDICAL COMMITTEE. 99th Regular Session. Summary minutes 6. (Corresponding to meeting of Monday, August 9, 2021) Virtual meeting, p. 8.

[138] *Idem*, p. 8-9.

[139] *Ibidem*, p. 9.

[140] *Ibidem*, p. 9.

of a legal conviction that States with their own characteristics have with respect to a customary practice, an aspect that goes beyond a mere expression of interest.

Brazil's commentary was sent by e-mail from the Deputy Chief of the General Coordinating Office for the Organization of American States of the Ministry of Foreign Affairs, on February 6, 2023. It explains that Brazil accepts certain customary international laws at the regional level. In the case of diplomatic asylum, Brazil recalls that provision is made for it in the country's own Constitution, which establishes the "granting of political asylum" as a principle that governs the international relations of the Federative Republic of Brazil. It cites opinions from Legal Advisors of the Ministry of Foreign Affairs, a speech at an international conference, and a public note recognizing, from the Brazilian perspective, the existence of a regional international custom on diplomatic asylum. It also mentions that Brazil accepts a South American regional practice related to freedom of navigation on rivers shared by coastal states. The commentary also states that Brazil recognizes the possibility that a particular international custom will become a universal international custom, there being no intrinsic distinction between the two. It collates practice to corroborate that position. Finally, it emphasizes the disparity in terms of space and resources among the different States, which affects the production of evidence of customary rules and may lead to overestimating the role of certain States compared to others. That disparity leads to the adoption of caution in response to the possibility of reversing the burden of proof on the subject of particular customary international law.

During the work of the International Law Commission on Identification of Customary International Law, some States on the continent made specific statements on particular customary international law.

El Salvador submitted comments on the Report of the International Law Commission at its 69th session. On that occasion, it emphasized that, although it would consider the term "particular" unclear for defining this type of customary international law, it agreed with the definition established in Art. 16 (1) of the Draft Conclusions of the International Law Commission. Moreover, it noted the customary nature of the rule on the *Pro Tempore* Presidency of the Central American Integration System. Finally, it understood that the expression "the States concerned" appearing in Art. 16 (2) of the Draft Conclusions of the International Law Commission did not seem appropriate because the regional customary international rule emerges on the basis of the legal conviction regarding it, which means more than just an expression of interest.[141]

The United States also produced comments regarding the Draft Conclusions of the International Law Commission and emphasized two points. First, Art. 16 (1) does not make clear the nature of *opinio juris*, which must be supported by the States in question. Specifically, it is not clear whether the *opinio juris* would take shape if the States erroneously believe that a rule is a general customary international rule or if they correctly understand that said rule applies only to specific States. Second, the comments on the draft would not prove the existence of practice regarding the existence of bilateral customary international law or another particular customary international law that is not the regional law. For the United States, other forms of particular customary international law would not yet be recognized parts of international law.[142]

During the discussions on the Annual Reports of the International Law Commission at the Sixth United Nations Commission, at least two of the continent's States made statements on particular customary international law.

In 2016, Chile welcomed the inclusion in the Draft of the International Law Commission of a provision on particular customary international law. In its view, in a diverse world, it would be natural for there to be rules of this type encompassing geographic regions and different peoples, even those sharing similar interests. This type of customary international law would have been recognized not only by the Commission but also by the International Court of Justice.[143]

[141] http://legal.un.org/docs/?path=../ilc/sessions/70/pdfs/spanish/icil_el_salvador.pdf&lang=S
[142] http://legal.un.org/docs/?path=../ilc/sessions/70/pdfs/english/icil_usa.pdf&lang=E
[143] https://www.un.org/en/ga/sixth/71/pdfs/statements/ilc/chile_1e.pdf

At the same session and a later session, El Salvador repeated the arguments it had already sent relating specifically to the Draft of the International Law Commission – comments that have already been referenced.[144]

* * *

ANNEX

Questionnaire for OAS Member States – Particular Customary International Law in the Context of the American Continent

1. Does your state's practice make a distinction as regards the elements that constitute particular customary international law and those that constitute general customary international law (practice and *opinio juris*)?

2. Does your state's practice deem it necessary for three or more states to adopt a particular customary international law in order for it to be enforceable?

3. In your state's practice, does proof of particular customary international law differ from that of general customary international law?

4. How does your state's practice assess the actions of individuals who are not acting in the name of or under the control of the state with respect to particular customary international law?

5. Is there any difference in your state's practice in the way issues relating to proof of particular customary international law are manifested in specific fields of international law?

Please provide any other additional elements that could help better understand your state's practice regarding the issue at hand.

*** * ***

2. Guide on the law applicable to foreign investments

During the 97th Regular Session of the Inter-American Juridical Committee (Virtual session, August, 2020), Dr. José Antonio Moreno Rodríguez gave a formal presentation requesting inclusion of the item: "Guide on the law applicable to foreign investments," whose purpose would be to discuss issues affecting investments that have resulted in conflicting decisions. He pledged to work on developing a guide with best practices. The plenary of the Committee endorsed the proposal, and the item was added to the agenda, with Dr. Moreno Rodríguez designated as rapporteur.

During the 98th Regular Session of the Inter-American Juridical Committee (Virtual session, April, 2021), this issue was not considered.

During the 99th Regular Session of the Inter-American Juridical Committee (Virtual session, August 2021), the rapporteur, Dr. José Moreno Rodríguez, presented his first report, document CJI/doc. 644/21. He explained that he had enjoyed the privilege of giving a course at The Hague Academy in July of this year on this complex subject.

In connection with his topic, he proposed using the tools offered by both private legislation and private international law to resolve issues related to investment law in general and investment contracts in particular.

The rapporteur said he had noticed numerous gaps in the current system applicable to lawsuits related to foreign investments, and that these gaps could lead to uncertainties regarding the enforcement of

[144] https://www.un.org/en/ga/sixth/71/pdfs/statements/ilc/el_salvador_1.pdf ; https://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/el_salvador_1.pdf

contracts or in potential disputes. This can be explained by the lack of substantive standards in treaties, national laws, and even in customary international law, which might be useful in regulating disputes.

While there have been attempts to address the substantive concerns of applicable law, there is currently no global initiative to create a comprehensive corpus, such as that established by the General Agreement on Tariffs and Trade (GATT) through the World Trade Organization (WTO).

At present, the protection of investors' rights is mainly included in bilateral, regional, and multilateral agreements, even though this was adopted by customary law in the past. According to the United Nations Conference on Trade and Development (UNCTAD), by the end of December 2020 there were 2,659 international investment agreements containing provisions related to "TIP" investments.

Considering that the standards of bilateral treaties are based on texts elaborated by the "capital-exporting nations," the existing treaties have a high degree of uniformity. They are divided into three parts: scope, substantive protection, and resolution of disputes. All this has led to the standardization of this type of clause at the regional and universal level. Additionally, foreign investment contracts may be governed by norms of public international law or other norms that exist outside the legislation of the host State, which may give rise to obligations of public international law regarding the treatment given to investors.

The rapporteur also recognized a lower degree of intervention by the International Court of Justice and even in the investment arbitration cases of the ICSID ruled on the matter.

Therefore, more clarity is being sought to possibly provide a response to substantive issues of the law applicable to foreign investment, demonstrating the existence of instruments that already address this type of claim. This would be instrumental in providing accuracy to the issue, even within the inter-American system. The rapporteur requested the support of the DIL in his work and reflected on the relevance of preparing a questionnaire considering that there is already substantial information available online. He also proposed seeking the opinion of specialists and government officials through informal meetings.

Dr. George Galindo congratulated the rapporteur for the quality of his report and for the topic under discussion, considering the interest in the issue that exists in the Hemisphere. Regarding the rapporteur's statement on the absence of responses found in the Public International Legislation, he explained that this is something that is related to the historical evolution of the study of the rules on international responsibility, since the International Law Commission decided not to continue with the study of liabilities for damages caused to foreigners, which would include the infringement of international contracts, focusing only on secondary rules. In addition, he confirmed that this decision responded to the criticism made by the decolonization movement regarding the damage caused to foreigners (which for some could privilege the richest States). In this regard, Dr. Galindo suggested that the rapporteur bear in mind the political dimension of the decision not to provide answers to questions such as damages caused to foreigners, which shows how politicized the issue of liability is at present. Secondly, he suggested that the rapporteur take into consideration that sharing common principles can represent a great challenge due to the diversity of instruments on the matter. This situation relates to the approach to the subject, since it is mainly a conventional right, meaning that the answers will be very diverse, given the large number of treaties.

Dr. Cecilia Fresnedo agreed with the relevance of working on this issue in addition to the relationship it may have with public international law. In this regard, the rapporteur urged the members of the Committee to work together on this issue.

Dr. Eric P. Rudge asked the rapporteur if the European Court had given answers to the investment issue. The rapporteur explained that there are several ongoing cases and discussions in Europe and that incorporating them in the report would prove very helpful; he encouraged the inclusion of cases from Africa and Asia as well, along with a series of new generation agreements.

At the end of the analysis of the topic, Dr. José Moreno Rodríguez thanked Dr. Galindo for his comments regarding the political dimension of the issue. He said that something of this was reflected in the decision of Judge Dupuis in the Texaco case. In this sense, he expressed his intention to clarify in his next report the reason for avoiding controversial issues, but instead aiming to provide clarity when the judges or

the parties have to deal with them. Regarding the abundance of treaties, he explained that in certain circumstances, arbitration decisions end up impacting developing countries negatively. In view of all this, he expressed his interest in framing these situations based on what already exists in OAS instruments, hoping that the contribution of the Guide will allow demonstrations based on the currently existing resources.

During the 100th Regular Session of the Inter-American Juridical Committee (Lima, May, 2022), the rapporteur for the topic, Dr. José Moreno Rodríguez, presented a progress report on the Guide to the Law Applicable to Foreign Investments, document CJI/doc.667/22 rev.1, which is expected to be used in regard to claims for violation of foreign investments and thus clarify contradictory pronouncements that are the subject of uncertainty.

He referred to the relevance and impact of the Guide to International Contracts, prepared by the CJI, within the most important organizations dealing with the subject and which has served as an illustration for reform initiatives in several States, such as Guatemala, Uruguay, and Chile.

He noted that UNCITRAL is working on the settlement of disputes in the foreign investment field. However, the discussion focuses on the subject of the forum, rather than substantive law applicable to claims regarding the violation of foreign investments. He also noted that there have been discussions within the OECD that have not been successful. There are important standards with which the contracting parties must deal, such as fair and equitable treatment, but which have not been defined, since there is no universal corpus. In the absence of a source of authority, there are various options and alternatives.

The rapporteur proposed to follow the examples of the construction of Roman private law on the protection of foreign investment as applied in public international law. He explained that what does exist is very brief, citing as an example Article 42 of the ICSID, which is actually a rule that comes from the private international law addressed in the OAS Guide on International Commercial Contracts. In this regard, he noted the need for a guide to clarify and indicate the path for the litigants and arbitrators to follow when facing diverse solutions, with regulations that are sparse or even non-existent. To address these efforts, he proposed something similar to what has been done in the area of international contracts, which would provide context (explaining how the current state of affairs was reached and the existing developments in soft law) and then explain the usefulness of the instruments generated by the OAS, such as the Mexico Convention and the uniform law instruments.

He suggested that it should be noted that the solution is already contained in these instruments. In this context, he requested the approval of the plenary to carry out this project, which will allow him to prepare the work with the support of the Department of International Law. It will also involve a liaison with key actors and institutions in international law.

Dr. Mariana Salazar thanked him for the profound and well-founded introduction and, noting the usefulness of the Guide to International Contracts, urged him to continue with this new project. She asked whether the added value of arbitration is not related to its *ad hoc* nature. She also asked the rapporteur about the lack of ratifications of binding instruments on the subject, which preparing a guide all the more relevant.

In this regard, the rapporteur pointed out the importance of arbitration in commercial law as an effective means for settling disputes, instead of the courts, but stressed that in investment matters there is an important political component. In relation to the nature of the instruments, he explained that the consolidation of national states highlighted dissimilar norms as well as the need for treaties pursuing uniform solutions, but that in practice must respond to the interests of States. Consequently, soft law instruments end up being higher quality and thus more useful. The additional explanation in the case of the Mexican Convention is due to inconsistencies in the English translation, as well as some concessions that do not provide the clarity expected of a text of such quality. In this context, the OAS Guide and The Hague Principles provide an interpretation of these unclear issues and, in his view, no further ratification of the Mexican Convention is required at this time. Instead, national legislations should be encouraged to use the OAS Guide.

Dr. George Galindo supported this approach to the topic, which seeks to identify existing instruments, in order to assist States in investment matters. He did not recommend going further, as the origin of investment law is rooted on a politicized context. Due to the importance of the political context, he supported the initiative as described above.

The rapporteur agreed with Dr. Galindo's statement of not entering into sensitive issues and that the text to be worked on should be as neutral as possible. It is important to identify all useful writings on the topic that could strengthen the OAS instruments.

Dr. Eric Rudge thanked the rapporteur and supported this initiative, which will influence foreign investments. It is necessary that the rules and regulations be formulated in the image of the region and not imposed from outside.

In the rapporteur's understanding of the subject, this proposal should also serve national legislators, since these instruments are incorporating issues related to second-generation rights, such as human rights and environmental law.

The Chairman of the CJI thanked him for the explanation and noted the important challenge it raises. He thus asked him to draw up a list of relevant topics that would allow the plenary to select those of greatest relevance at a later date.

Replying to the Chairman, the rapporteur explained that his intention is to continue with the same methodology and the same outline of the guide on international contracts, and he may also present a summarized table.

During the 101st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2022), the rapporteur for the topic, Dr. José Moreno Rodríguez, delivered an oral report stating his intention to submit a finished draft at the next session, along the lines of what was done in the Guide on International Contracts, bearing in mind that many of the topics related to issues were already being addressed. He said the Investment Guide should serve multiple purposes, among them:

- educational;
- guidance for States and negotiators when signing multilateral treaties (to prevent the State from facing frivolous claims);
- reference for investors regarding the consequences of multilateral investment treaties;
- useful for trial lawyers;
- valuable for adjudicators, arbitrators, etc.

He observed there had already been six failed attempts, hence the hope was to develop a body of laws reflecting what existed – the aim being to put forward proposals based on what is available and to explain their application in relation to the existing instruments; and also to report on whether they were in conformity with the uniform law instruments, the Unidroi5 principles, and even the Committee's Guide on Commercial Contracts.

The rapporteur pointed out that this was a topic that produced a multidisciplinary dialogue and was the fruit of more than seven years of research on the subject. The proposal relied on input from relevant stakeholders from the public and private sectors, academia, arbitration, and the judiciary. This does not involve a new regulation or a strict legal instrument being drafted.

Dr. José Moreno Guerra asked the rapporteur whether, in foreign investment negotiations, the relationship between developing countries and big corporations – using a variety of means, including bribery, to exert their power of persuasion – was still lopsided. The rapporteur explained that his report was neither intended to, nor could, solve many of the problems in the system, such as those involving corruption or poor arbitrators. Rather, it sought to remedy the dearth of information on the applicable law on foreign investments, and the hope is for it to be able to help both negotiators and States, and that it would even allow for conflict resolution mechanisms to be applied. This would also take into account the interaction of

public and private international law as regards the reasonable expectations of investors and the best use of OAS legal instruments.

He cited work that UNIDROIT was undertaking with the International Chamber of Commerce institute, seeking a balance between companies and hoping to bring consistency in this regard.

Dr. Cecilia Fresnedo commended the rapporteur on the practical importance of the issue, which raises elements of public and private law, and asked him whether issues relating to the compatibility of material rules of bilateral investment agreements and domestic laws in the receiving country would be included, for example, as regards issues of indirect expropriation using administrative rules, including rules that violate constitutional norms.

Following Dr. Fresnedo's query, Dr. Ramiro Orias asked the rapporteur about investments conflicting with a set of sector-specific norms that included the right to the environment and indigenous peoples, for example, to see whether concerns of that nature would be included in the discussion about the investments Guide.

On that score, the rapporteur observed that efforts were made by UNIDROIT in the area of agricultural investments involving various segments of civil society and big corporations, producing a balanced text. Explaining that there would be no formal launch, he said some of the issues would be put on the table, and that attention could even be drawn to matters involving disputes and that they should be taken into consideration as they often went unnoticed. There should be a call to consider said issues and standards as they relate to expropriation, most favored nation, etc., by pointing out to the States that there are differences and drawing their attention to the need to avoid litigation.

During the 102nd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2023), the rapporteur for the topic, Dr. José Moreno Rodríguez, presented the report, document CJI/doc.686/23, which was currently available only in English; it is expected to be translated into Spanish in time for the next session.

This was a challenging document to compress it, since it was the fruit of research that took him seven years and, in fact, was used to prepare the Hague Academy course. In spite of that, it remains almost 200 pages long.

The rapporteur's aim is to produce a document that simplifies complex issues but is also instructive, as was the case with the Guide to International Contracts, of which this new work can be considered the continuation. The proposal is intended to assist judicial operators in dealing with the law applicable to foreign investments.

He said that it demonstrated the strong influence of Roman private law in shaping public international law. Closer to the present day, the 20th century saw unsuccessful attempts to regulate foreign investment law comprehensively, with even the United Nations failing to reach consensus. Since the 1990s, bilateral investment treaties have included broad and abstract rules on the topic. As a result, there is currently no compendium of the law applicable to foreign investments, something that the Committee's contribution will hopefully address to some extent. This is also relevant because the issue currently sees a large amount of litigation.

Both the OECD and UNIDROIT appear to be interested in revisiting the issue. The challenge for the OECD in reaching a binding consensus-based document will impose additional deadlines for both negotiation and ratification, and so a compendium on the subject will not be available.

The proposed guide is intended to facilitate the work of lawyers, arbitrators, and operators, as well as to clarify the situation with respect to foreign investments in the existing body of law, which contains an impressive amount of information. In fact, the proposed guide could even eventually avoid conflicts.

Many issues are included in investment contracts, and many times in fact the problems do not come from the field of public international law but from private law. The proposal sees great potential for

implementation in line with existing instruments of the inter-American system as well as with the UNIDROIT and Hague principles (in particular with respect to to the sources used by arbitrators).

The rapporteur's intention at this stage is also to socialize the document prior to the next period of sessions, both through virtual means and in person during the trips he has planned (Washington DC, Chile, and the Dominican Republic).

He concluded by clarifying that he did not want to take sides in favor of anyone, but rather to present what exists in a neutral manner to benefit as many stakeholders as possible.

Dr. Luis García-Corrochano appreciated the bringing together of public and private international law, which have international law as their common denominator. He called for the work to be enriched with the perspective of both areas of law.

On that point, the rapporteur agreed that the boundaries between the two realms were blurred, and he called on the public international law specialists to enrich it.

Dr. Eric P. Rudge said that this was an issue that could be beneficial in the Caribbean, particularly in the context of oil and gas exploration. He requested the inclusion of a table of contents to facilitate access to the imposing text. On page 170, it appeared that something was missing. He agreed to socialize the report within his government and in the agencies that deal with investments. The rapporteur said that his contribution would be very useful for the Caribbean since there were not many developments in the region, particularly in those countries that do not receive many cases of litigation.

Dr. Julio Rojas-Báez congratulated the rapporteur on his document, which he said would be a very useful tool for those working in the area of investments. He inquired about the possibility of presenting it to UNCITRAL at a meeting to be held in the Dominican Republic in the near future. The rapporteur explained that he had made a presentation at UNCITRAL the previous year and that its authorities had ruled out the viability of dealing with this issue due to the difficulties in building consensus.

Dr. Alejandro Alday congratulated the rapporteur for his work and said it was an important contribution for all the parties involved. It could even have an impact on the arbitration mechanisms within UNCITRAL as well as on the "permanent" dispute settlement mechanisms adopted by the European Union and on developments in the free trade agreements treaties in force in North America. He supported the idea of disseminating the document to law schools, governments, and practitioners as soon as the Spanish version became available. He also said it was a valuable contribution for the member states, in that it provides a clear basis for guiding negotiations and principles in the area of investments. He proposed that initially, a manual for students and people less versed in the subject should be prepared.

The rapporteur agreed that the proposed Guide could help judges and arbitrators with procedural and substantive issues. Regarding its dissemination, he noted that the Guide to International Contracts was being used in some of the Hemisphere's law schools.

Dr. Ramiro Orias said that the work represented the state of the art on this complex topic. From the formal point of view, he agreed with Dr. Eric Rudge on the inclusion of an index. He also proposed that an official publication be produced as a product of the Committee to be assessed by the member states. From the substantive point of view, he suggested making a final assessment of developments with the inter-American instruments and of the region's challenges that exist in this area.

The rapporteur agreed on the need to include a chapter on developments in the inter-American system. He explained that he intended to include a summary of the subject matter at the beginning of the document, as had been done with the Guide to International Contracts.

The Vice Chair described the proposal as a very important contribution to international law by the Committee because of its innovative nature, and he said he would not be surprised if it were to be replicated worldwide by organizations specializing in private international law.

The rapporteur agreed on the importance of previous Committee's work that have been replicated at the universal level. At the end of his presentation, he asked the secretariat to distribute the table of contents of the document and undertook to disseminate it.

During the 103rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2023), the rapporteur on the topic, Dr. José Moreno Rodríguez, made a verbal report that reflects his interest in continuing to receive suggestions from experts from various countries while expressing his gratitude to those who had the diligence to present their respective contributions, including case law and experiences in the hemisphere. He also referred to the comments sent by the Hague Conference and UNIDROIT, as well as the extensions of the deadline for responding submitted by representatives of the governments of Canada and the United States. He explained that his objective was to finalize the text before the end of the year and, to that end, a virtual meeting of the CJI would be organized to adopt both the Guide on this issue and the report prepared by Dr. Cecilia Fresnedo on "contracts between merchants with a contractual weak party."

In addition to sending information to States, international organizations, and experts in the field, the rapporteur had had the opportunity to present his draft in several OAS member States, including Chile, at a meeting attended by experts; in the United States, on the occasion of the OAS General Assembly, with the participation of former CJI member Dr. David P. Stewart (United States); in Mexico, at an event that brought together such leading jurists as Professor Leonel Pérez Nieto; and in Panama, where the rapporteur was able to meet with arbitration litigation specialists. He was also to make a presentation at ASADIP in Rio de Janeiro the following week, and another in Lima, Peru, at the end of August.

Following the historical evolution noted by Dr. Luis García-Corrochano, the rapporteur explained that the trend going forward would be to use investment contracts with detailed and predictable rules rather than general treaties. Thus, CJI's Guide offered great promise for the future.

Dr. Julio Rojas-Báez as and States with clarity. These new tools also sought to establish clear guidelines to avoid the conflicts between treaties and contracts. Dr. Rojas-Báez applauded the rapporteur's work to bring issues that are confidential and on occasions manipulated to public light, due to speculations that occur through leaks of information that in principle is supposed "to be confidential. The rapporteur for the topic explained that in his personal opinion, awards should be public; the Guide did not deal with procedural issues, however, although it did cast light on the difficulties in current practice. In fact, he noted that arbitration had worked very well until the 19th century, and in the 20th century courts of arbitration were created. In the 1950s, cases involving oil gave rise to the heyday of arbitration in non-confidential cases involving large amounts of money.

Dr. Alejandro Alday underscored the importance of presenting work of this kind to specialized groups in order to provide the rapporteur with direct feedback, as had happened at the meeting in Mexico attended by Dr. Moreno Rodríguez.

Dr. Cecilia Fresnedo congratulated the rapporteur on his outreach work and asked him about the next steps to be taken with the UNIDROIT investment project and whether the aim was to draft some sort of framework contract.

The rapporteur explained that the ultimate goal was not known, although it should lead to the production of a Guide; one alternative option would be to extend the work on investment contracts to the UNIDROIT principles. Finally, another option would be to establish standard clauses.

It should be noted that the rapporteur made a presentation at the XVI ASADIP Conference, organized in Rio de Janeiro on August 2023, an event attended by all members of the Committee.

During the Special Meeting of the Inter-American Juridical Committee (Virtual Session of December 12, 2023), the rapporteur for the topic, Dr. José Moreno Rodriguez, delivered his report, entitled "Guide to the Law Applicable to Foreign Investment," document CJI/doc.686/23 rev. 1, that had originally been produced in English because of previous experience in drafting the Guide to International Contracts with most of the experts involved in the consultations being English-speaking and the exercise of translating into English delayed progress in that endeavor. Based on that text in English, the Spanish version was adjusted

with assistance from the technical secretary to the Committee. The rapporteur noted that the text includes input provided by representatives of a number of states, arbitrators, and experts, who would be identified in the final version of the document. He stressed that all the contributions were positive, with none of the suggestions seeking to impose any conceptual changes. At the beginning, the revised version of the Guide features a summary of specific recommendations that outline the main ideas. The substantive part of the work would be completed, with formal adjustments of style pending. He said a foreign investment expert and editor-in-chief of the Yearbook of Commercial Arbitration, Professor Stephan Schill, had offered comments in recent days. Against that backdrop, more time was needed to finish making the necessary adjustments to get feedback from the Permanent Court of Arbitration at The Hague and from the International Centre for Settlement of Investment Disputes (ICSID) – bodies that also handle dissemination and implementation of the completed work of the Committee. He therefore felt that, for the sake of transparency, the best thing would be to have more time to work on these adjustments over the coming months, with support from the Secretariat (from Dante Negro, Jaime Moreno-Ovalle, and even Jeannette Tramhel), and for the document to be presented at the session in March with him attending virtually. The intention is not to make any substantive change. He referred to the presentations he had made in various forums in different countries, demonstrating his extensive outreach. In concluding he inquired as to whether there were any objections to the substance of the text submitted

Dr. George Bandeira Galindo seconded the motion to approve the report now and defer revision for the next session for editorial changes in March. Describing the report as an important one for the Americas, he offered two proposals: to use of verb tense “should” in urging stakeholders in points 5.1, 11.2, and 14.2; then suggested including a clarifying footnote regarding the reference to “general principles,” a concept that was handled differently throughout the report. This is because of the dispute over the expression "general principles of law" both within the International Law Commission and among some states; the disagreement concerns whether or not the concept of "general principles of law" would include the expression "international law," which traditionally mainly involves concepts of domestic or local law being incorporated into international law.

Dr. Cecilia Fresnedo applauded the rapporteur for the work he had done. She endorsed the motion to approve the report in its preliminary form, subject to amended approval in March. She agreed with Dr. George Bandeira Galindo as regards the need for clarification on the "general principles"; she understood such principles to be specific to certain branches of law, not to all of them.

Dr. Eric P. Rudge, also praising the rapporteur's work, urged him to ensure this report is publicized extensively at the regional and the international levels given how highly useful it is. He asked whether the recommendations could be listed in a particular format (in bold or italics) at the beginning in the summary and whether a list of abbreviations or acronyms could be included at the beginning of the document. He observed that page 105 in English did not have the corresponding footnote at the end.

Dr. Alejandro Alday also commented on the quality of the work carried out, saying it added to the existing pool of solutions. He acknowledged that it was a comprehensive and very well-structured document, which had been the object of intense consultations and that he hoped it would be of practical use. He called for it to be distributed to parliaments, academia, and specialists as a regional input for resolving disputes in this area. He endorsed Dr. George Bandeira Galindo's suggestion about the explanatory note and suggested that a finished document should be adopted at the next session, although he would have no difficulty in approving at the current time.

Dr. Martha Luna joined in applauding both this work and Cecilia Fresnedo's report, given that both were documents of the highest quality, which included input from the experts, and could be adopted at the present time.

The rapporteur for the topic, Dr. José Moreno Rodríguez, expressed gratitude for the appreciation of his work. Regarding specific observations, he agreed with Dr. George Bandeira Galindo that the verb tenses in the Spanish version needed to be amended and would therefore require a final reading to be done. On the general principles, he said he was fully aware of the ongoing discussion within the International Law

Commission – a discussion especially relevant to the issue of foreign investments – and that this would be reflected in the Guide, without taking sides considering it is a highly controversial issue. Responding to Dr. Rudge, the rapporteur said editorial adjustments would be made, as was done with international contracts, and that the summary should not be presented as Part I. He revealed that the formal review process was being pursued thoroughly under the direction of Prof. Magdalena Coulic (affiliated with the Faculty of Political Science in Paris).

For his part, the Technical Secretariat's Dr. Luis Toro Utillano first of all clarified that Dr. Dante Negro had to leave the meeting to accept an award that is the highest honor that can be bestowed upon a General Secretariat staff member, in recognition of the values associated with "collaboration, solidarity, and the bringing together of the nations of the Americas" – the Leo S. Rowe Award.

As regards follow-up on the issue, Dr. Toro Utillano commented on the difference between the document under consideration and the document adopted under the previous item. He noted that there was no opposition to the substance of the matter, and in view of the option taken by the rapporteur, who, although he would not be a member of the Committee, would be able to give a virtual presentation during the Committee's session in Panama. For practical reasons, approved documents are referred to the governing bodies and subsequently covered by press releases and distributed. The current decision should therefore enable the rapporteur for the subject to deliver the report in March, based on his expertise, knowledge, and experience.

Thanking Dr. Toro Utillano for the explanation, the Chair conveyed the sentiments of the meeting to congratulate Dr. Dante Negro and to acknowledge the distinction he was awarded that day.

Dr. Alejandro Alday asked Dr. Luis Toro Utillano about the options for approving the report in March if it is to be adopted by the General Assembly. He urged the Committee members to work internally with their governments to facilitate getting it approved by the OAS.

Accordingly, Dr. Toro Utillano explained that the timing was perfect, since the regular session of the General Assembly was scheduled to be held in June 2024 in Suriname, and based on that interest, a resolution could be drafted in March by the CJI, requesting that the report be referred to the General Assembly for adoption by the policy-making bodies.

Dr. George Bandeira Galindo urged the CJI to follow the United Nations example on the occasion of the "Agreement to conserve marine biodiversity on the high seas," when consensus was reached to adopt the document, but signing it was subject to other languages being adjusted, under an agreement not to make substantive changes. He therefore requested that it be adopted at that time and that the decision on approval be made in March, with a commitment that any changes made should be strictly editorial.

Dr. Luis Toro Utillano felt that the Vice Chair's proposal was similar to an "informal agreement" that was being promoted. He stressed the importance of language being clear as to what was going to be presented that day and the course of action to follow. He was of the view that priority should be given to the decision to approve the agreement already reached in the plenary and to adopt the report in March.

Dr. Julio Rojas-Báez joined in congratulating the rapporteur for his excellent work, saying it had set him an example in his own work. Like Dr. Bandeira Galindo, he supported the proposition to approve the document that same day, for it to reflect the work of the rapporteur that day, on condition that only changes of style would be made along with the comments made at this meeting.

He joined in congratulating Dr. Dante Negro on his award, remarking further that a tribute was also offered in memory of Dr. Mario López Garelli, a former OAS official and Paraguayan national who had passed away the previous year.

Dr. Cecilia Fresnedo endorsed Dr. Bandeira Galindo's two suggestions to approve the report at this special session, without prejudice to a final approval in March. She, too, joined in congratulating Dr. Dante Negro, and stated that she had to leave the session. Dr. Toro Utillano clarified that even so, the quorum would still be satisfied.

Dr. Rudge supported the procedure of adopting the report at this meeting as changes would not be substantive, with the rapporteur still a member of the Committee. Raising his concern about the month of March, when there would be two new members, he asked the Chair whether he could submit the text before the end of the year. Lastly, he supported the motion to include congratulations to Dr. Dante Negro in the Committee's minutes.

The Chair, noting that the concern had to do with making the document public once it is approved, asked whether the document could be approved but not distributed until March.

Dr. Toro Utillano argued that the whole point of this session was to deal with these two reports as they were advanced and ready, bearing in mind that the Chair's term as rapporteur for one of them was coming to an end. He observed an interest and concern on the part of the plenary in ensuring the report respect the rapporteur's authorship, in which regard he proposed that the resolution should mention the work put in by Dr. Moreno Rodríguez, who had been involved from beginning to end. The fear concerned making exceptions by approving it that day and not immediately referring it to the policy-making bodies. But at the end of the day, what will be done is what the Committee deems best.

The Chair explained his preference for the option of adopting it in March, even though it ran contrary to the majority sentiment and even with the risk that there would be in having new members. He expressed appreciation for the compliments given him and for the endorsement of his work and effort.

The Chair requested to have the minutes reflect the understanding that was reached. In the view of the foregoing, the Committee agreed to the following course of action:

1. These minutes would reflect the fact that the substance of the report submitted that day was approved by the plenary; and,
2. Minor stylistic adjustments would be made so they can be submitted in March, after which it would be referred to the Permanent Council for consideration.

* * *

3. Development of inter-American guidelines on the participation of victims in criminal proceedings against acts of corruption

During the 98th Regular Session of the Inter-American Juridical Committee (Virtual session, April, 2021), Dr. Ramiro Orias, recently elected as a member of the Committee, proposed a new topic for the agenda aiming at the "development of an inter-American guidelines on the participation of victims in criminal proceedings against corrupt practices," document CJI/doc. 630/21. He explained that this issue has acquired great importance at the UN, but not all countries have a regime that offers help to victims of criminal proceedings. Among the background information, he observed that there is a mandate of the VIII Summit of the Americas, held in Peru in April 2018 (Lima Commitment – Democratic governance against corruption).

Several members of the Committee thanked Dr. Orias for his presentation of this topic and the plenary supported its inclusion in the agenda. Dr. Espeche-Gil suggested drafting an addendum to the Inter-American Convention Against Corruption referring to victims. Dr. Milenko Bertrand-Galindo advised, as a first step, consulting the various bodies in the inter-American system that have worked on the issue, particularly on human rights and the misappropriation of resources (the social and cultural domain).

At the end of the presentation, Dr. Orias was appointed as the rapporteur on this issue.

During the 99th Regular Session of the Inter-American Juridical Committee (Virtual session, August, 2021), this issue was not considered by the plenary. The rapporteur for the topic, Dr. Ramiro Orias Arredondo, reported that a questionnaire had been prepared and was being distributed to the attorneys of the Pro-Bono Network of the Americas, which is collaborating in his endeavors to identify the legal frameworks in member States. The initiative is intended to provide, among other matters, a broader knowledge about the role of victims in criminal proceedings. He said that this questionnaire is expected to

be circulated among the members of the CJI in the first place and then to the OAS member States, as soon as is available in both English and Spanish. He undertook to present a first report with national laws and practices on the issue at the next regular session.

During the 100th Regular Session of the Inter-American Juridical Committee (Lima, May, 2022), the rapporteur for the topic, Dr. Ramiro Orias, presented a verbal report of his study that aim at draw attention to the situation of the affected communities that are victims of corruption, such as people with no access to healthcare services. To that end, he explained that a questionnaire has been elaborated and responses have been received from Canada, Costa Rica, Panama, Peru and Suriname. Faced with this not very encouraging result, the rapporteur forwarded the questionnaire to members of the Pro Bono Network, which resulted in seventeen responses. His intention is to present a new report in August and, in this regard, he asked the Secretariat if it would be convenient to send a further reminder of the questionnaire to countries that have not responded.

Dr. Jean-Michel Arrighi referred to the challenge raised by this topic in terms of the rules for the recovery of assets, as there is no clarity regarding their distribution. He explained that in many cases these go to lost funds (national budget, auctions and even burned) and therefore do not take into account the interest of the victims.

Dr. Martha Luna alluded to the situation in Panama regarding the treatment of the figure of the recovery of funds. Focused on tax issues, this shows the abusive use of defenses based on the statute of limitations, with no reimbursement of funds.

Dr. Eric Rudge referred to international standards on the reuse of funds from illegal activities, which can be deployed to combat money laundering and corruption. In this sense, States should play a central role, but in practice they do not do so in an active manner.

Dr. Moreno Guerra mentioned to the situation of a national authority of his country that accepted bribes and tried to launder the money obtained illegally in the United States and was caught committing the crime. In this regard, he asked the rapporteur if such amounts of money originating in Ecuador should be returned to the country of origin.

The rapporteur for the topic agreed on the lack of clarity regarding the redistribution of such funds, with a lack of uniformity. He cited as an illustration the US rule that the Prosecutor's Office can initiate a process at the international level on cases that have some connection with that country, but there is no similar regulation or implementation in other countries. In many countries, reparatory agreements are applied, where the corrupt person agrees to shorter sentences with returning the full amount. In this sense, the participation of civil society could help to promote the advancement of cases to facilitate reparations. Some countries have amended their criminal procedures, striving to block these loopholes, as is the case in Costa Rica and Brazil. Thus, the UN Convention against Corruption confronts this type of situation in terms of compensation for the victims of crimes. He also referred to the developments of the International Criminal Court that allows for the seizure of funds used to commit the crimes, which may be used to compensate their main victims.

The Chair considered it appropriate to fall another request to the States, seeking responses to the questionnaire.

During the 101st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2022) this topic was not considered.

During the 102nd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2023), this topic was not considered.

During the 103rd Regular Session of the Inter-American Juridical Committee (August, 2023), the rapporteur on the topic, Dr. Ramiro Gastón Orias Arredondo, made a verbal report on the progress of its work. He observed that efforts had been made to identify different models for the opportunities that national legislations make available to victims, the role given to civil associations acting on their behalf, and the work of civil society organizations that can lodge accusations regarding crimes committed by public

officials (a model primarily found in El Salvador and Guatemala). He cited as an example the case of Costa Rica, which establishes the concept of damage to society, as a collective interest. The clearest legislation is that of the Dominican Republic, where any person may become a party at trial. Stated that with the support of the *ProBono* Network, information had been obtained from 15 States on the role that direct victims can play in corruption cases.

Also found that this issue is not directly addressed by the Inter-American Convention against Corruption, which does not define the scope of civil society participation or indicate whether it should include participation in proceedings.

Finally, he spoke of Spain's legislation, which provides for "popular action" in civil and criminal cases, through which any organization can denounce offenses of the public order.

Dr. Luis García-Corrochano Moyano thanked the rapporteur and asked about how the victims were to be identified, whether a specific group and local or central governments could be included, and who could define their legitimate standing.

Dr. Martha Luna Véliz asked the rapporteur for additional explanations on how victims were identified based on what happened in her country, in a context in which it was very difficult to determine who would be entitled to make a claim.

The rapporteur explained that the central theme of his work is precisely to determine the victims in such matters. He spoke about the situation experienced in a Member State where several companies acted in collusion to raise the price of their products for years, we obligated by tribunals to pay compensation to consumers. It is expected that the report under study be able to identify the victims as those persons who have suffered mental or physical harm, according to the criminal legislation in force. The concept of victims is linked to that of harm, and the challenge is to determine the causal link between the punishable act and that harm.

At the end of his presentation, the rapporteur said that he would be presenting a report at the next regular session.

* * *

4. The exceptional use of force in the inter-American context

During the 99th Regular Session of the Inter-American Juridical Committee (Virtual session, August, 2021), the President announced that the General Assembly had requested the Committee address two new mandates that follow the same methodology and involved the organization of a reflection session that had taken place within the Committee on Juridical and Political Affairs.

In the first case, the session took place virtually on April 22, 2021, in accordance with resolution AG/RES. 2959 (L-O/20), International Law, section i, "Inter-American Program for the Development of International Law," which establishes:

> 7. To instruct the CAJP to hold, prior to the fifty-first regular session of the General Assembly, a meeting to reflect collectively on the exceptional use of force in the inter-American context and instruct the Department of International Law to later prepare a report on its main outcomes and provide it to the CJI.

At the end of the meeting, the Department of International Law produced a report that has been sent to the members of the Committee, document DDI/doc. 7/21.

Dr. Eric P. Rudge asked DDI to summarize the content of the report. Accordingly, Dr. Negro verified the different positions and points of view of the positions that were presented at the time. For fear of leaving out elements proposed by the States, Dr. Negro revealed the background that led to the development of these issues. He explained that both this topic and the one that will be analyzed in the next point correspond to issues that traditionally make up the Organization's agenda, and that the delegation of Mexico, with the support of several other delegations, had considered it appropriate to bring them up through a mandate from the General Assembly, due to the importance they have recently acquired. At the end of his presentation, he suggested that the members study

each of the reports, taking into account the abundance of opinions submitted in each session, together with the need to identify a rapporteur so that the Committee can provide the follow-up that each mandate requires.

The Chairman referred to the historical-legal antecedents of the prohibition of the use of force, underlining how the Kellogg-Briand Pact is enshrined in the UN Charter, an instrument that proscribes the use of force, except for certain exceptions. He confirmed that the collective reflection on the use of force led to a discussion on the compatibility of the TIAR within the framework of the UN. He shared the opinion of Dr. Negro that the States offered various points of view at the end of the session of reflection of the CAJP.

In turn, Dr. Galindo highlighted a certain consensus among the States in relation to the exceptional nature of the use of force, the need to respect the UN mechanisms, and the complementarity of the TIAR with the UN Charter.

Dr. Mariana Salazar thanked DDI for the preparation of these reports, and the interventions of those who preceded her. She asked if a rapporteur is required for each of the issues and, in the case of the use of force, what its content would be.

In this regard, the Chairman explained a rapporteur should be elected for each topic, and Dr. Negro added that the limits of said mandate are to be determined by the Committee. He also clarified that in each session there were experts who expressed academic points of view, whereas the positions of the States expressed their political positions. Thus, the Committee is expected to comment on each issue.

Dr. Salazar proposed preparing a report containing legal elements to reaffirm the exceptionality of the matter, without necessarily consulting the States.

Dr. Galindo explained that in both sessions there was important consensus, even among the States. In his understanding, in both cases the Committee could issue a pronouncement by means of a resolution or declaration.

The Chairman suggested analyzing the central elements and concluding with the regional and universal position on the basis of the exceptionality of the use of force.

Dr. Eric P. Rudge found that the document provides a broad vision on each of the issues, but the opinions of the Caribbean States are absent.

The Chairman confirmed that each session had the regulatory *quorum* of the CAJP, and was chaired by the Ambassador of the Dominican Republic.

Dr. Negro explained that the absence of interventions by representatives of the Caribbean is explained by the fact that they did not intervene or were not present within a Committee in which all member states participate.

The Chairman asked if anyone who would be interested in assuming the rapporteurship on this issue.

In this regard, Dr. Mariana Salazar asked whether the intention is to issue a statement by the Committee, which could be done by means of a resolution or statement, or if the issue deserves a more complex study, and whether appointing a rapporteur was commissioned.

The Chairman explained that the study of each topic would imply the appointment of a rapporteur in order to grant both mandates a similar treatment.

Dr. Galindo suggested appointing two people to study this topic, and that the next session should decide on the way forward.

Dr. Salazar expressed her fear of politicizing the issue, in addition to offering to work together with another person. She considered that what was discussed and presented in the session is abundant enough for someone to work on and present something at the end of this session.

The Chairman agreed with what Dr. Salazar said and clarified that the Committee should express itself observing the strictly legal sphere.

Dr. Eric P. Rudge agreed with Dr. Salazar's proposal to indicate the position of the Committee through a resolution.

Dr. Galindo urged not to decide as yet on the second topic, since it requires further reflection, regardless of the fact that the end result will be a reflection of the consensus of the meeting. He added that since this topic is to be presented at the next session, the most appropriate format should be decided on that occasion.

Dr. Salazar clarified that her proposal refers only to the first topic.

Dr. Arrighi explained that the issue related to the use of force is systematically the subject of renewed debate, mentioning in this respect the work of the *Institut de Droit International* under the rapporteurship of Dr. Vinuesa and referring to previous pronouncements of the CJI. He clarified that this topic has recently come up in the OAS in discussions around the TIAR. Therefore, he considered that an updated reflection of the Committee in light of recent developments would be very pertinent.

Dr. Salazar consulted Dr. Arrighi on the form of the pronouncement that the Committee should make on the matter.

In this regard, Dr. Arrighi explained that the intention of the General Assembly is to establish a framework that involves new modalities regarding the application of sanctions, such as, for example, if coercive measures are modalities included in the use of force or if certain laws have extraterritorial effect. A response that contributes nothing to the situation should not be precipitated by the OAS advisory body, a political organization. The idea is to study the recent manifestations of the States in the face of new nuances and debates in the inter-American and universal system (blockades, coercive measures, responsibility to protect, humanitarian interference, relationship with regional treaties — TIAR and the OAS Charter — and so on). And finally, reflect on how the Committee can make new contributions.

Dr. Espeche-Gil thanked Dr. Arrighi for expressing the need to give a categorical answer, even if it is not urgent. He found that the issue of legitimate defense today presents enormous challenges in the face of the difficulty of identifying the aggressor.

Prior to the conclusion of the session, the President, Dr. Luis García-Corrochano Moyano, offered himself as rapporteur for the topic.

During the 100th Regular Session of the Inter-American Juridical Committee (Lima, May, 2022), this topic was not considered.

During the 101st Regular Session the Inter-American Juridical Committee (Rio de Janeiro, August, 2022), the rapporteur for the topic, Dr. Luis García-Corrochano, gave an oral report outlining his work, which will have various aspects with regard to a subject that has become a topical issue.

The rapporteur maintained that the exceptional nature of the subject matter should be viewed in a universal context and its definition restricted to existing rules, such as legitimate self-defense, for example. In the same vein, certain criteria would need to be determined with respect to admissible or tolerable force without breaching the legal norm. This means developing such concepts as retaliation, containment, economic measures, military measures that stop short of confrontation, preventive measures, etc., all in a context of state actors. The rapporteur did acknowledge that such endeavors ran counter to efforts to prohibit the use of force by peaceful means, which can be appreciated from examining the rulemaking efforts under the inter-American system of the 19th century Conferences and in the 20th century rules. After asserting that the regional Pact was solely defensive in nature, he took issue with those who questioned the validity of the doctrine of prohibition on the use of force. Among his preliminary conclusions, the rapporteur stated his opinion that, compared to other regions, the inter-American regional system was the most effective in terms of reducing international conflicts. In addition, the reflection on exceptionality from a prohibition standpoint should determine whether there is room for a certain level of openness or whether the prevailing rule forbidding the use of force should be enhanced.

Dr. José Moreno Guerra noted that the question of use of force without any legal basis still remained part of the reality worldwide. Against that backdrop, he explained that the doctrine of legitimate self-defense required three criteria:

1. Aggression (the preventive self-defense doctrine not being valid).
2. Respect for the principle of proportionality, depending on the intensity of the aggression.
3. Temporality (acting until the aggression ends).

He also identified the UN Security Council as the only entity empowered to use force and no organization or State is allowed to use force to respond to aggression. Dr. Moreno Guerra also dismissed the legitimate collective defense provided for under the Inter-American Treaty of Reciprocal Assistance (TIAR), an obsolete instrument he felt had been rendered useless. This treaty obliges all States Parties to participate, but they have not always all respond with the required solidarity. Here, he cited the case of the Malvinas and the United States position. The rapporteur agreed that the conditions that should prevail in this matter were important, remarking that certain countries had used force against non-state actors. The Security Council plays a vital role in making use-of-force decisions. Even though TIAR is important, he does not feel it appropriate for it to be cited in his report. Much like the treaty establishing NATO, these instruments' effectiveness is highly questionable.

Dr. Mariana Salazar asked the rapporteur whether the focus of the report should refer to the use of force between states or with respect to law enforcement actors.

The rapporteur replied that his report referred to the former.

Dr. Ramiro Orias noted how collective self-defense was distorted, in light of Russia's invasion of Ukraine and the alleged genocide of the Russian population in Ukraine. He described proportionality as an essential principle of self-defense in terms of determining that the Security Council's actions were ineffective. He also urged the rapporteur to elaborate on the question of peaceful settlement of disputes in his report. The rapporteur thanked him for the observations, which were in line with the course of action taken in our Hemisphere.

Dr. George Bandeira Galindo noted his participation in the meeting of the Committee on Juridical and Political Affairs (CAJP) that discussed this issue and invited the rapporteur to make use the report prepared then. Although not precise, exceptionality as a concept should be considered and understood as a matter of logic and within the bounds of the UN Charter, and therefore no new exceptions should ever be established. He also stated that the discussion addressed the way in which the regional system was incorporated into the universal system. In this context, the UN Charter shows cases in which force can be used and highlights the understanding as to how it should be complemented by regional systems. Conflicts between such systems should therefore not be encouraged. But, invoking the words of the American constitutionalist Jeremy Waldom to the subject under review, where the UN system and its complementarity with other regional systems is taken as a baseline, if the ban on the use of force is affected or reduced, other structural components of the system would be affected. Therefore, as responsible jurists, it was worth reiterating that prohibiting the use of force is structurally important to international and inter-American law.

The rapporteur agreed that the prohibition message was worth reiterating. He noted specifically that exceptionality must always be within the scope of the UN Charter while reaffirming all this, even in view of the doctrine that at times seems to justify situations of passivity on the part of the academic community. He also supported the notion of complementarity between the system and the effects of a violation or breach of a principle, striking at the entire legal system, eliminating the foundations of the entire system on which it rests.

Dr. Eric P. Rudge reflected on the use of force and the definition of the act of aggression in cyber-attacks for the purpose of the issue under discussion. If one state attacks the financial system of another, such an act of aggression could meet the criteria for being considered an act of aggression and would thus allow the victim state to act in self-defense.

Besides, when asked about the procedure to be followed, the rapporteur underscored the importance of moving forward on cyberspace development, including situations like these, within the scope of the law, avoiding tolerance thresholds that were too high and could trigger conflicts, even if not resulting in death or material damage. Likewise, the rapporteur promised to submit a written report for the next meeting, the final output of which would be a report that would lead to discussions taking a strictly legal approach.

Dr. Mariana Salazar supported the idea that Dr. George Galindo's message about the complementarity of the systems ought to be reiterated. As regards the use of force in the case of cyber operations, debate was still ongoing: for some states, some sort of comparison should be made between cyber operations and the effects of kinetic operations resulting in death or damage, whereas for other states, if there is no death, this would not give rise to the use of force. She suggested including the issue of the responsibility to protect as an attempt to justify the use of force, making it clear that this must always be within the context of the Security Council and that it was not an extension of scenarios for the use of force. She also urged him to raise the issue of the disparity in the criteria they use when claiming or notifying the Council about the use of force. The rapporteur supported Dr. Salazar's proposal regarding the responsibility to protect, noting how inefficient it had been in both Rwanda and the Balkans.

Concluding his thoughts on the subject, Dr. García-Corrochano added that any clarification of the scope of the Charter obligation should be established via a UN resolution.

During the 102nd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2023), Luis García-Corrochano, the rapporteur for the topic, presented his preliminary report on the exceptional nature of the use of force in the inter-American context, document CJI/doc.692/23, which corresponds to a mandate from the General Assembly. He noted that this topic had been the subject of a discussion within the Committee on Juridical and Political Affairs, in which Dr. George Galindo Bandeira had also participated in his capacity as legal advisor to the Brazilian Ministry of Foreign Affairs.

The rapporteur explained that as a general rule force cannot be used, but in practice it has been treated as lawful for settling disputes.

In his explanation, the rapporteur gave a historical overview of the subject. He made it clear that the keystone of classical international law was the right to peace and the progressive development of the regulation of the use of force. In 20th century Latin America, an approach emerged that sought to limit the use of force, initially focused on debt collection. In short, the aim was to regulate its use and not to prohibit it.

He then spoke of the efforts of the League of Nations at the end of the First World War, when the use of force was restricted to cases of legitimate defense and the execution of a right, considered as a broad concept. In this regard, he highlighted the progress made with its proscription by the Briand-Kellogg Pact of 1928, which establishes the renunciation of war as an instrument of foreign policy, despite the fact that it has no power to impose sanctions. At the end of the Second World War exceptions to the non-use of force were allowed in cases of legitimate defense or under collective security measures established in the UN Charter.

He noted that although international law no longer admits or permits the use of force, war is not absolutely outlawed. In this context, he referred to various regional normative efforts that prohibit war and the instruments adopted to that end: the OAS Charter, the Inter-American Treaty of Reciprocal Assistance (TIAR), and the American Treaty on Pacific Settlement (Pact of Bogotá). Within the regional system, the exceptional nature of the use of force must be interpreted within the framework and in strict accordance with the rules of the universal system.

Dr. José Luis Moreno Guerra spoke of the use of force as a monopoly of the Security Council, subject to certain exceptions: in the event of a veto in the Security Council, the UN can decide through its General Assembly and in cases of legitimate defense (within certain limits); He precised that cases of collective legitimate defense enshrined in the American Treaty of Reciprocal Assistance called to be careful because

is an obsolete, dangerous, and inadequate instrument. Finally, he noted that international humanitarian law was shaped by the existence of war.

Dr. Jean-Michel Arrighi referred to the prohibition of the use of force in current state practice, particularly in Europe. He further explained that collective legitimate defense was a Latin American idea that sought to reduce the monopolistic power of the UN Security Council and that in some way led to the emergence of regional mechanisms, such as the TIAR in the Americas and the Warsaw Pact in Europe. In his view, the TIAR had been of use at some point in the settlement of disputes when the Pact of Bogotá was not used, but there had been cases in which it is was used correctly and others when it was used wrongly.

Dr. García-Corrochano noted that since this was an initial presentation, the topic would be followed up on in August.

During the 103rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2023), the rapporteur on the topic, Dr. Luis García Corrochano explained that the first part of his work consisted of a historical overview. He noted that the Hemisphere was a pioneer on the question of the use of force, having promoted concepts such as the peaceful settlement of disputes and collective security. The central part of his report then examined the two exceptions provided for in the United Nations Charter: legitimate defense and collective security. In that context, he noted the emergence of a series of ideas that sought to be placed under the umbrella of those exceptions, such as legitimate preventive defense and humanitarian intervention (or the responsibility to protect). Thus, his work sought to determine whether those new interpretations fit or apply in the inter-American context or whether the Hemisphere should continue to abide by the earlier principles. At the end of his presentation, he undertook to submit a written proposal at the next period of sessions.

Dr. George Galindo Bandeira expressed his pleasure at being back on the Committee. He asked the rapporteur if he intended to include cyber activities, which could also involve issues relating to the preventive use of force. In response, the rapporteur said that the mandate referred to the use of force or the threatened use of force; it would therefore be necessary to determine whether a cyber-attack could constitute an illegitimate aggression (autonomous and remote control that responds to the assumptions of the traditional use of force).

Dr. Alejandro Alday referred to the concept of the responsibility to protect, which has received at the United Nations a three-stage treatment for its inclusion into the rules of Chapter VII of the UN Charter.

In the rapporteur's view, the objective was to determine the scope of that concept, the purpose of which is preventive and is intended for interventions in situations that could lead to conflict (or to a wider conflict). The decision to be made was whether or not that responsibility required going beyond "reporting" or whether considerations of control did not apply. There would be legal issues, but political ones should not be excluded.

Dr. José Luis Moreno Guerra spoke of the general prohibition of coercive measures, both those that involved and did not involve the use of force. Legitimate defense cannot be preventive, since that would make the victim the aggressor.

The rapporteur agreed with Dr. Moreno Guerra's explanation, and that threats were included in the prohibition of the use of force.

Dr. Eric P. Rudge asked the rapporteur whether the issue of the use of coercive preventive measures was relevant in an inter-American analysis.

Dr. Alday noted the debate surrounding Art. 51 of the Charter on their preventive use against non-state actors threatening the security of a State.

The rapporteur reiterated the mandate of the General Assembly, which limits its work to the legal context established by the UN and must therefore go from the universal to the regional level. No specific situations are examined; instead, it seeks to determine if any type of exception can be applied at the regional level. He observed that Dr. Alday's comments about non-state actors highlighted a different situation: one

that could be considered debatable, since such a defense has a greater possibility of being invoked when the non-state actor carries out the attack or threat from within a fractured or collapsed State, and therefore the victim State is unable to tackle groups of that kind.

Dr. Jean-Michel Arrighi called for a fresh perspective on a subject that had historically received a great deal of attention. In that regard, two considerations could be of relevance: whether the new manifestations of force (new technologies, cyberattacks, drones, etc.) require respecting existing norms or not; and second, whether or not it is necessary to include the Hemisphere's non-state actors. With reference to the latter point, he cited a resolution on the occasion of Colombia's attack on terrorist groups located on the border with Ecuador. In this regard, the footnote that the United States placed on the occasion of that decision is very interesting (although is not part of the consensus decision), since it stated that the FARC base in Ecuador was considered a threat that justified the use of force.

For the rapporteur, the issue itself is not new, but it is constrained by the OAS General Assembly's mandate, the purpose of which is to examine the use of force against certain Latin American regimes, a situation that entailed political considerations. As the situation had changed, it should be noted that gaps existed and there was a need to reflect on new developments that serve as prevention.

* * *

5. The principles of international law on which the inter-American system is founded, as the normative framework that governs the work of the OAS and relations among member States

During the 101st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2022) the Technical Secretariat provided the Committee with a report of a collective brainstorming session held by the Committee on Juridical and Political Affairs on "the principles of international law on which the inter-American System is founded, as the normative framework that governs the work of the OAS and relations between member states," document DDI/doc.4/22.

The brainstorming session on this topic was held virtually on April 7, 2022, pursuant to resolution, AG/RES. 2959 (L-O/20) International Law, section i, operative paragraph 5; Inter-American Program for the Development of International Law, states:

> 5. To instruct the CAJP to hold, prior to the fifty-second regular session of the General Assembly, a meeting to reflect collectively on the principles of international law on which the inter-American System is founded, as the normative framework that governs the work of the OAS and relations between member states, and to instruct the Department of International Law subsequently to prepare a report on the main outcomes of that meeting to be presented to the Inter-American Juridical Committee (CJI).

The Committee elected Dr. George Rodrigo Bandeira Galindo as rapporteur for the topic. He promised to present something for the August session next year, bearing in mind the other rapporteurships under his purview.

During the 102nd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2023), this topic was not considered.

During the 103rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2023), this topic was not considered.

*** * ***

6. Strengthening the accountability regime in the use of information and communication technologies

During the 101st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2022) the Technical Secretariat provided the Committee with a report of a brainstorming session held by the Committee on Juridical and Political Affairs on "Strengthening the accountability regime in the use of information and communication technologies", document DDI/doc.5/22.

The brainstorming session on this topic was held virtually on June 2, 2022, pursuant to resolution, AG/RES. 2959 (L-O/20) International Law, section i, operative paragraph 6; Inter-American Program for the Development of International Law, states:

> To instruct the CAJP to hold, prior to the fifty-second regular session of the General Assembly, a meeting to reflect collectively on strengthening the accountability regime in the use of information and communication technologies, and to instruct the Department of International Law to later prepare a report on its main outcomes and present it to the CJI.

The Committee elected Dr. Martha Luna Véliz as rapporteur for the topic. Dr. Mariana Salazar explained that the event at the Committee on Juridical and Political Affairs (CAJP) was the focus of a Department of International Law report on the subject, which the rapporteur would find very useful.

During the 102nd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2023), this topic was not considered.

During the 103rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2023), this topic was not considered.

*** * ***

7. Legal implications of the sea level rise in the inter-American regional context

Document	
CJI/doc.698/23 rev.1	Legal implications of sea-level rise in the inter-american Regional context: questionnaire for Member states of the Organization of American States (OAS) (Presented by Dr. Julio José Rojas-Báez)

*** * ***

During the 102nd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2023), Dr. Julio Rojas-Báez submitted a new topic for the plenary's consideration and, depending on the members' capacity to take up the initiative, for inclusion on the Committee's agenda.

Dr. Rojas-Báez spoke of the wide-ranging adverse effects of sea level rise and its relevance to the study of international law (total or partial loss of territory, human migration, etc.).

He proposed that the Committee work on the issue based on the Hemisphere's particularities, which would allow the legal consequences to be addressed through the identification of practice and *opinio juris*. Such a study could cover different aspects than those that the Inter-American Court on Human Rights might deal with at the "advisory opinion on Climate Emergency and Human Rights" that has been requested by the Republic of Colombia and the Republic of Chile.

Dr. Eric P. Rudge supported the initiative and urged the Committee to take it into consideration.

Dr. Luis García-Corrochano observed that it is an issue that is being under consideration by the UN International Law Commission. He also spoke of a class given at the International Law Course that had dealt with the subject. He referred to the multiple implications that the issue could have in the areas of maritime and land border delimitations, population displacements, and changes in employment and the economy. Accordingly, he considered efforts at the regional level to be a pertinent matter.

Dr. Alejandro Alday congratulated Dr. Rojas-Báez and supported him in the initiative. He said that it warranted a thorough region-wide analysis, given the situations of certain OAS member states and the impact it could have in the region. In addition, he said that a regional analysis would offer the advantage that it could be prepared more swiftly.

Dr. José Moreno Guerra endorsed the validity and urgency of the proposal made by Dr. Julio Rojas-Báez. He specified that the Committee must try to prepare a response from the American continent to this inevitable calamity in a new area.

Dr. Ramiro Orias joined the general support for the proposal. He said that the Committee's contribution could enrich the request for an advisory opinion on "Climate Emergency and Human Rights" that Chile and Colombia had lodged with the Inter-American Court on Human Rights.

Dr. George Galindo congratulated Dr. Julio Rojas-Báez on a vitally important issue for humanity, regardless of the initiatives underway in other forums that have significant support. He recommended taking into account the work of other agencies, so that the Committee's efforts could offer added value from its own perspective. A decision should be made on whether to identify and address particular aspects (migration, law of the sea, etc.) or, if it were decided to deal with all the maximum number of issues involved, to select priority topics. Finally, work should be conducted on the Hemisphere's particularities. He therefore proposed that before beginning the study, a questionnaire be presented on the topics that the states considered problematic for them, or that a seminar be held to obtain information on how this affected the region.

Dr. Julio Rojas-Báez agreed with the need to consult with the states on the most important issues before beginning the work.

Dr. Dante Negro said that this topic was part of a mandate from the General Assembly that required the holding of a special meeting of the CAJP, an event that will provide information on relevant topics for the states and will produce a report for the Committee's use. He explained that there was also a mandate for the DIL to organize a seminar on the subject, which would create synergies with the Committee.

The Chair thanked the speakers for their comments and proposed designating Dr. Julio Rojas-Báez as rapporteur, an appointment that was not opposed.

During the 103rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2023), the rapporteur on the topic, Dr. Julio Rojas-Báez, presented an oral report on the progress of his work. Firs of all, he referred to the Special Session at the CAJP on May 23, 2023, which was attended by experts in the field, event that was the subject of a report prepared by the Department of International Law, document DDI/doc. 6/23.

He then referred to the questionnaire he had prepared to send to member States.

He admitted that this issue is being examined by the Law of the Sea Tribunal, the Inter-American Court of Human Rights, and the International Court of Justice. In addition to being part of the agenda of the United Nations International Law Commission that is also studying the question.

In that context, he noted that the Committee's work would provide an overview of the inter-American system in this area from the perspectives of the law of the sea, human rights, and statehood.

He explained that he had not decided on the final nature of the document resulting from the treatment of this item, indicating that it could be a report, a resolution, or both.

He then reviewed the questions he had prepared for distribution to the States and submitted them for the Committee's consideration:

1. Are there visible direct or indirect effects of climate change on marine-coastal areas and ecosystems in the territory of your State? If so, please name those effects and describe what they consist of, how they are manifested, and whether they are differentiated.

2. Please indicate whether those effects have been corroborated by scientific sources and cite those sources.

3. Are there any studies or maps on sea-level rise and its effects on your State?

4. Please establish with a medium or low level of probability how the effects of climate change on marine-coastal zones and ecosystems, as well as sea-level rise, impact people, ecosystems, livelihoods, and relations with other States.

5. Please characterize and identify your State, if possible, within one of the following groups of countries.

(a) Small island countries.

(b) Countries with low-lying coastal areas.

(c) Countries with arid and semi-arid areas, forested areas, and areas liable to forest decay.

(d) Countries with areas prone to natural disasters.

(e) Countries with areas liable to drought and desertification.

(f) Countries with areas of high urban atmospheric pollution.

(g) Countries with areas with fragile ecosystems, including mountainous ecosystems.

(h) Countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products.

(i) Landlocked and transit countries.

6. Is the population of your State specifically affected directly or indirectly by the effects of climate change? If so, please describe what they consist of and how they are manifested.

7. Is your State a party to international treaties intended to protect the environment or respond to the above-identified effects? If so, which?

8. Does your State have laws or other types of regulations that legally respond to the above-identified adverse effects of climate change and how is the relevant international legal framework integrated? If so, please describe that domestic legal or regulatory framework.

9. Does your State have laws or other regulations that govern its relationship with the law of the sea? If so, please describe that legal or regulatory framework.

10. Does your State have a legal or customary position on baselines? If so, please describe that legal or customary position.

11. Does your State have relevant case law on the subject matter of this questionnaire? If so, please describe it.

12. Does your State have a plan to address sea-level rise and mitigate its effects on human rights, statehood, and the law of the sea? If so, please describe how it is applied and indicate if there are any cooperation mechanisms in that regard.

13. How does your State view the possibility of future human mobility as a result of sea-level rise? Is there a legal framework in place to address climate or environmental migration?

14. Has your State determined the number of people whose livelihoods depend directly or indirectly on the sea? If so, what is that number?

15. Does your State have any suggestions or a technical baseline regarding elements that should be addressed in a legal report on sea-level rise and its implications for the inter-American legal system?

Dr. Arrighi spoke about the background to the topic and the importance of this subject for the Committee. He observed possible common actions that can be done with the International Law Commission. This is a situation that affects CARICOM States in particular and presents a good opportunity to work with this entity and address topics of interest to that region.

The Chair referred to the length of some questionnaires and the foreign ministries' willingness to answer them, and he urged the rapporteur to reduce the number of questions for their review over the coming days. ON the same vein, Dr. Alejandro Alday spoke about the foreign ministries' work overload as well as the need to involve other national authorities in complex cases, which also poses a major challenge.

Similarly, Dr. Eric P. Rudge urged the rapporteur to reduce the number of questions and even to modify some of them to give the option of yes/no answers. Regarding the transfer of queries to other agencies, he recommended that this should include a period for response. In addition, queries such as

question 5 should be avoided considering they may give rise to varied answers,. In question 12, invited the rapporteur to include other entities and not only state entities in the preparation of plans to address the problem or mitigate its effects, such as universities.

Dr. Cecilia Fresnedo thought that the first six questions, as well as numbers. 13 and 14, did not involve the foreign ministries' legal areas and should be directed to other ministries. She requested the rapporteur on the pertinence of dividing the questionnaire into technical and legal questions and for the CJI to directly address them to the corresponding authorities.

Dr. Martha Luna agreed with dividing the issues within the foreign ministries.

Dr. Jean-Michel Arrighi explained that the CJI's contacts were the ministries of foreign affairs, through the OAS Permanent Missions. In this case, with a subject that is dealt with by several international organizations, it is essential to explain the relevance or added value of the regional review had to be explained.

The Chair urged the rapporteur to determine the final version of the questionnaire following the Ninth Joint Meeting with the legal advisors.

The Chair urged the rapporteur to work on the questionnaire following the Ninth Joint Meeting with the legal advisors.

Dr. Ramiro Orias described his experience with sending out questionnaires and said that when complex issues were involved, some States made use of national experts. Thus, the background paragraph should include an explanation about the use of the questionnaire and organize the questions in blocks or groups to facilitate the work of the foreign ministries in assigning them to different respondents. In question 5, he asked the rapporteur not to refer to transit countries but to identify what that situation meant. Regarding the effects, he instills the rapporteur to direct questions to the most affected groups. As for the impact, verify if there is any borderline effect due to baseline movements should be investigated.

Dr. Luis García-Corrochano Moyano noted the cross-cutting nature of this topic. He invited the rapporteur to consider the usefulness of asking for elements that could contribute to a regional agreement on the effects of climate change among neighboring States. He agreed with the proposal to review the questionnaire after the Meeting with Legal advisers.

The topic's rapporteur thanked the Committee for its ideas and comments. Although he was aware of the consultations made by other institutions, he explained that the length of the questionnaire would allow the exact identification of what is happening with these issues that involve various aspects and specialist actors from different areas. Some questions could be rephrased, particularly number five. He appreciated Dr. Rudge's suggestion regarding state and other plans. In question 15, he said he would prefer to keep the underlying idea that allows States to include topics or comments. He expressed his appreciation for the collaboration with the members of the International Law Commission. Finally, the rapporteur agreed with the suggestion to work on the questionnaire following the Ninth Meeting with the advisors.

The Chair explained that a time would be assigned on Friday, August 11, for reviewing the questionnaire and other outcomes of that meeting.

The rapporteur committed to send a clean version of his questionnaire that would incorporate the suggestions to send it to the States along with the other two questionnaires. The final version of the questionnaire appears in document CJI/doc. 698/23 rev.1. The questionnaire was sent to member states by the Technical Secretariat of the Committee, the Department of International Law, with the request to respond to it before December 1, 2023.

The document presented by the rapporteur for the topic, Dr. Julio Rojas-Báez at the August Session, in 2023, celebrated in Rio de Janeiro, is reproduced below:

CJI/doc.698/23 rev.1

LEGAL IMPLICATIONS OF SEA-LEVEL RISE IN THE INTER-AMERICAN REGIONAL CONTEXT

Questionnaire for Member states of the Organization of American States (OAS)

(Presented by Dr. Julio José Rojas-Báez)

The objective of this questionnaire is to gather legal and technical information from member states of the Organization of American States as part of a study on the legal implications of sea-level rise in the inter-American regional context. All information provided will be used solely for that purpose.

1. Are there visible direct or indirect adverse effects of climate change, including sea-level rise, on marine-coastal areas and ecosystems in the territory of your State? If so, please name those effects and describe what they comprise, how they are manifested, and whether they are differentiated.

2. Please indicate the national and international scientific sources that describe and corroborate those effects in the marine-coastal areas and ecosystems of your State, indicating the methods used by those sources to carry out their respective studies.

3. Are there any studies or maps on sea-level rise and its effects on your State? What state agencies are involved in the preparation of those studies and updated cartographic material?

4. Please establish with a medium or low level of probability how the effects of climate change on marine-coastal zones and ecosystems, including sea-level rise, impact (i) territory and ecosystems, (ii) populations, (iii) relations with other States, and (iv), as appropriate, the subsistence of the international legal personality of your State.

5. Please characterize and identify your State, if possible, within one of the following groups of countries.

(a) Small, low-lying island countries;

(b) Countries with low-lying coastal areas;

(c) Countries with arid and semi-arid areas, forested areas, and areas liable to forest decay;

(d) Countries with areas prone to natural disasters;

(e) Countries with areas liable to drought and desertification;

(f) Countries with areas of high urban atmospheric pollution;

(g) Countries with areas with fragile ecosystems, including mountainous ecosystems;

(h) Countries whose economies are highly dependent on income generated from the production, processing and export, and/or on consumption of fossil fuels and associated energy-intensive products;

(i) Landlocked and transit countries.

6. Is the population of your State specifically affected directly or indirectly by the effects of climate change (e.g., internal or cross-border displacement, food insecurity, health vulnerability, etc.)? If so, please describe what they comprise and how they are manifested.

7. Is your State a party to international treaties intended to protect the environment or respond to the above-identified effects? If so, which?

8. Does your State have laws or other types of regulations that legally respond to the above-identified adverse effects of climate change and how is the relevant international legal framework integrated? If so, please describe that legal or regulatory framework.

9. Does your State have laws or other regulations that govern its relationship with the law of the sea? If so, please describe that legal or regulatory framework.

10. Does your State have a legal or customary position on the nature (ambulatory or otherwise) of baselines? If so, please describe that legal or customary position.

11. Does your State have relevant case law on the subject matter of this questionnaire? If so, please describe it.

12. Does your State have plans—developed either by the State itself or by civil society or academia—to address sea-level rise and mitigate its effects on human rights, statehood, and the law of the sea? If so, please describe how they are applied and indicate if there are any cooperation mechanisms between state agencies and/or at the domestic/international level in that regard.

13. How does your State view the problem of human mobility resulting from sea-level rise? Are there legal and/or institutional instruments in its national legal framework to address this issue?

14. Has your State determined the number of people whose livelihoods depend directly or indirectly on the sea? If so, what is that number?

15. Do you want to add any information to this questionnaire?

* * *

8. Corporate responsibility of manufacturers and sellers of weapons in the area of human rights

Document

CJI/doc. 706/23 rev.1 – Questionnaire. Corporate responsability of manufacturers and sellers of weapons in the area of human rights
(Presented by Dr. Alejandro Alday González)

* * *

During the 102nd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2023), Dr. Alejandro Alday inquired about the status of the mandate on the issue of corporate responsibility of manufacturers and sellers of weapons in the region.

In this regard, Dr. Dante Negro explained that a special session is planned for the coming months within the Permanent Council, the results of which will be forwarded to the Committee. He proposed that a rapporteur on the subject be elected within the Committee to participate in said session.

Dr. Alday expressed his interest in acting as rapporteur on this topic, a proposal that was supported by the plenary of the Committee.

During the 103rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2023), the rapporteur on the topic, Dr. Alejandro Alday, presented the mandate from the General Assembly, which addresses a very delicate since it associates corporate responsibility with human rights, which makes it complex. He also thanked the Department of International Law for the report summarizing the "special meeting" of the Permanent Council.

The proposed working methodology identify some fundamental aspects: firearms violence in the hemisphere and the context in which it arises 'which can be documented based on information from open sources; and identification of commercial companies that produce weapons on the continent and those that market them there (whether they have continental or extracontinental ramifications). This second aspect could involve the preparation of a questionnaire.

His aim was to conduct a study of the legal framework governing the activities of companies that produce and market weapons to determine whether they comply with Inter-American and international rules and operate in accordance with human rights. In that context, he would seek to examine the issue of sales: under what rules they are sold, to whom they are sold. One of the aspects of the report is to know how well States are oriented toward fulfilling their duties to respect and guarantee human rights, according to their regulatory framework.

The rapporteur noted the challenge involves addressing questions of corporate responsibility. He noted that in his opinion, today it is difficult to argue that companies in general are not responsible for possible violations of human rights. This is based on the important body of international and inter-American literature available to support this study.

- In that undertaking, the UN Guiding Principles on Business and Human Rights identify how business and human rights should impact the daily lives of companies. The CJI has previous elaborated principles in the area of business that could also be useful.
- Likewise, the Inter-American Court of Human Rights has received a consultation from Mexico on "the activities of private arms companies and their effects on human rights," submitted in accordance with Article 64.1 of the American Convention on Human Rights, which could be of assistance in his work.
- The criteria, jurisprudence and standards of the Inter-American Court and Commission regarding the conduct of companies (adopted in the case of extractive activities that affect - mainly territorial and environmental - indigenous communities).
- The IACHR's REDESCA report on "Business and Human Rights: International Standards".
- The observation of good practices in the States and recent legislative reforms, such as those mentioned in the special session of the Permanent Council.

On the other hand, the Rapporteur emphasized that when dealing with the issue of arms and the law, two main arguments are put forward, derived from the political, social and legal contexts of each society:

a.-The access to weapons based on the right to keep and bear arms as a fundamental aspect to freedom of defense or individual liberty.

b.- The rigid control of arms as a condition to avoid an increase in violence or, even worse, to prevent them from being used by repressive governments or non-state actors to commit human rights violations.

Therefore, the intention of its work will be to guide the activities of arms companies towards respect for regulations that guarantee the greatest protection of human rights, to encourage cooperation and to propose guidelines for activities that are inherently risky for human rights. Self-regulation is a failure and access to arms in the region by organized crime takes lives and destroys environments that could otherwise be avoided.

Dr. Cecilia Fresnedo welcomed the approach and spoke of the business-related issues highlighted by instruments such as the Treaty of Montevideo and the ASADIP Transjus Principles, which could serve as a model or a source of specific rules.

Dr. Martha Luna referred to the situation of criminal groups that handle high caliber weapons despite a legislation that imposes strict requirements to acquire them legally. One possible solution would be to increase the penalties.

The rapporteur noted that in general selling and using weapons is legal in our countries, but the problem is the large volumes of illicit trafficking. Corruption is another issue, which should be addressed in the analysis of the problem.{

Dr. Julio Rojas-Báez highlighted the issue of corruption, citing cases where an illegal trade has emerged. He spoke of the discussions taking place on the appropriateness of providing consumers with lethal weapons, regardless of the volume, and about the fact that they are acquired by people who do not meet the minimum requirements. He invited the rapporteur to include references to the type of lethal weapons that should not end up in the hands of civilians. The rapporteur explained that many of the companies did not respect international standards in which certain activities are permitted or not punished.

Dr. Luis García-Corrochano Moyano asked the rapporteur whether he would make a distinction between civilian weapons and weapons of war (or for police use) and about the lack of compatibility between domestic laws governing the availability of lethal weapons to civilian consumers.

The rapporteur welcomed the proposal and explained that he was aware of the existence of high-powered weapons in the hands of civilians.

The Chair urged the rapporteur to make use of the comments in his challenging report and to make any change he considered pertinent to his proposal for review by the members prior to the closing, despite the fact that questionnaires do not require approval by the plenary. On Friday, August 8, the rapporteur submitted a revised proposal that received suggestions from the members and whose final version of the questionnaire appears in document CJI/doc. 706/23 rev.1. The questionnaire was sent to member sates by the Technical Secretariat of the Committee, the Department of International Law, with the request to respond to it before December 1, 2023.

The document presented by the rapporteur for the topic, Dr. Alejandro Alday at the August Session in 2023, held in Rio de Janeiro, is reproduced below:

CJI/doc.706/23 rev.1

QUESTIONNAIRE

CORPORATE RESPONSIBILITY OF MANUFACTURERS AND SELLERS OF WEAPONS IN THE AREA OF HUMAN RIGHTS

(Presented by Dr. Alejandro Alday González)

1. Are there any companies that manufacture firearms established in your country?

   Yes

   No

2. Do any foreign and domestic companies sell firearms in your country?

   Yes

   No

3. Please indicate the legal framework, laws and specific norms in your country that govern the operations of the companies referred to in questions 1 and 2 above.

4. Is there a central authority in your country that regulates the companies referred to in questions 1 and 2 above? If so, please identify it and describe the scope of its powers.

* * *

9. Approach to the new outer space law

During the 102nd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2023), Dr. José Moreno Guerra brought up a topic that he had originally explained at the August 2022 session and requested if it could be included in the Committee's agenda, the "approach to the new law of outer space", a proposal that was accepted by all members.

During the 103rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2023), the rapporteur on the topic, Dr. José Luis Moreno Guerra, submitted to the plenary the report entitled “Approaching the new outer space law,” document CJI/doc. 695/23. At the occasion, he gave a PowerPoint presentation on the evolution of the initiatives carried out for the exploration—and not the exploitation—of airspace and outer space, in a context where sovereignty does not apply to the new outer space law.

As to the sources of outer space law, he explained that the main ones were the treaties concluded through the United Nations, which additionally were considered *jus cogens*. He then spoke about authorizations for the use of outer space, its beneficiaries, the ways space can be polluted, and the available corrective measures, in which the UN Committee should have a privileged role and should participate in the oversight of activities in outer space. He explained some of the ways in which outer space is been abused by private companies.

He also discussed about the geostationary orbit belt, how satellites move, and the benefits they offer and reported on actions taken at the regional level, including the Simón Bolívar initiative through which a satellite was placed in orbit in 2017. In his research he found no work on the subject by the Committee or by the OAS General Assembly.

As regards extraterrestrial civilizations, he said that logic dictated that it would be pretentious to assume that planet Earth was unique.

At the end of his presentation, he explained that his proposal consists on a statement of principles to support the development, codification, and dissemination of the new outer space law.

Dr. Julio José Rojas-Báez asked the rapporteur about the role of custom among the sources of outer space law, given that four countries had access to outer space.

The rapporteur explained that incipient custom had its limits and that therefore treaties could offer solutions; in that regard, he cited the UN's Outer Space Treaty, which covers everything that humans do in space, including the maintenance of satellites. In his view, the CJI could take a lead on universal concerns regarding those endeavors.

Dr. Ramiro Orias spoke about the progressive development of international law and the coordination of foreign policies in the region considering the new phenomena that are emerging in this area and were setting an agenda that involved new challenges. He invited the rapporteur to identify national practices in this area.

The rapporteur for the topic said it would be unwise to use a questionnaire because the States would not reply.

Dr. Alejandro Alday asked the rapporteur about the purpose of the declaration expected from the Committee on a subject that was both interesting and broad. He noted the sophistication of autonomous weapons and the use of space by some States that are creating a nuclear waste zone.

The rapporteur explained the difficulties posed by the absence of coercive power with respect to the misuse of space by States or private companies, despite all the technological advances.

Dr. Arrighi identified the positive aspects of technological progress and of the commercial use of space, and he explained the role of the Inter-American Telecommunication Commission (CITEL) in regulating the use of space in the region. He called on the CJI to adopt a view of all the elements involved, taking into consideration both the good and the bad aspects of this issue.

In response to the Chair's question about the ultimate goal of the report to be presented to the States, the rapporteur said it was necessary for the CJI to adopt a declaration of principles, in light of the existing UN treaties on the subject, for there to be no contradictions, and for the States to cooperate through a call of collective concern. He invited his colleagues to submit their ideas to him expressing their concerns.

Dr. Ramiro Orias suggested focusing the report on the private use of outer space. The rapporteur said that was among his concerns but that, in his opinion, the biggest violators were States. His intention, he said, was not to attack any State in particular, but to emphasize that actions should be taken for the benefit of humankind.

The Chair asked the rapporteur to approach the entities that were working on the issue, within both the OAS and the UN, to continue the discussion and determine the type of outcome that was expected.

The rapporteur said that if a recommendation was not made, a reminder should be given.

* * *

10. Impact of technologies based on Artificial Intelligence on human rights, with a special focus on children and adolescents

During the 103rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2023), doctor Ramiro Orias submitted a new topic for the Committee agenda relating to "the impact of technologies based on Artificial Intelligence on human rights, with a special focus on children and adolescents," document CJI/doc. 701/23.

He explained that his goal was to evaluate the impact that Artificial Intelligence could have on children and adolescents through a study of comparative law, including global developments. He revealed that a proposal on artificial intelligence already existed at the European level. In the development of the topic, he hopes to present a questionnaire to OAS member States to explore their domestic laws and experiences. He suggested also to systematize the state of the art in this area to establish guidelines for furthering the protection of human rights.

The Chair thanked him for the proposal and, noting the absence of objections, asked that it be included on the agenda, with Dr. Orias as the rapporteur.

* * *

11. Updating of the 2020 Inter-American Model Law 2.0 on Access to Public Information

During the 103rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2023), a new mandate from the General Assembly was included in the Committee's agenda that requires updating the Inter-American Model Law 2.0 on Access to Public Information of 2020. In this regard, Dr. Luis García-Corrochano Moyano proposed himself as rapporteur on the topic, which was endorsed by the plenary.

* * *

12. Recognition and enforcement of foreign judgements

During the 103rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2023), Dr. Cecilia Fresnedo requested the inclusion of a new item on the Committee's agenda, which follows up on developments that the Committee has carried out in relation to the effectiveness of sentences.

The President consulted the plenary and, as there were no interventions, he offered a comment on the matter, congratulating Dr. Fresnedo for the choice of the topic, taking into account, among others, the serious problems in the matter of execution of sentences, and asked her to work on the issue without worrying about the nature of the final product for now.

Dr. Fresnedo was appointed as rapporteur.

*** * ***

OTHER MATTERS

- **UNIDROIT-UNCITRAL Draft Model Law on Electronic Warehouse Receipts**

At its August 2023 Session, the plenary of the CJI took note and adopted a resolution recognizing the value of the *UNIDROIT-UNCITRAL Model Law on Electronic Warehouse Receipts*, which, like the Committee's efforts in this area in 2006, contributes to access of credit in the agricultural sector. The following is the resolution adopted by the Committee:

CJI/RES. 287 (CIII-O/23)

ACKNOWLEDGMENT OF THE UNIDROIT- UNCITRAL DRAFT MODEL LAW ON ELECTRONIC WAREHOUSE RECEIPTS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING the obstacles in obtaining financing often faced by agricultural producers in the Americas, particularly small and medium-sized producers who often have no option but to sell their products immediately after harvesting, thereby losing the opportunity to delay their sale until more favorable market prices are available;

CONSIDERING ALSO that electronic warehouse receipt systems are financial instruments that enable producers to apply for credit by putting up products in storage as collateral, which can contribute directly to growth and economic development in the agricultural sector;

RECALLING that, in an effort to contribute to the identification of a modern and harmonized approach to appropriate legislation to facilitate equitable access to credit, at its eighty-first regular session of the Inter-American Juridical Committee (CJI) held in August 2012, the members of the CJI decided by consensus to include in the body's agenda the study of electronic warehouse receipts for agricultural products in order to determine the advisability of developing a set of principles or a model law, as stated in resolution CJI/RES. 196 (LXXXI-O/12);

TAKING INTO ACCOUNT that, at the eighty-second regular session of the CJI held in March 2013, Dr. David P. Stewart, the rapporteur on the subject, submitted a document entitled "Electronic Warehouse Receipts for Agricultural Products" (CJI/doc.427/13) and at subsequent session presented the documents "Proposed Principles For Electronic Warehouse Receipts" (CJI/doc.437/13) and "Electronic Warehouse Receipts" (CJI/doc.452/14); and that at the eighty-ninth regular session held in October 2016, Dr. Stewart submitted the document "Electronic Warehouse Receipts for Agricultural Products" (CJI/doc.497/16), which includes nine annotated principles, as a means to foster development in this area;

RECALLING that the General Assembly, by resolution AG/RES. 2926 (XLVIII-O/18), requested the CJI "to update its 2016 report on principles for electronic warehouse receipts for agricultural products in light of the new developments, since those principles were adopted, in connection with access to credit in the agricultural sector";

RECALLING ALSO that, due to the highly technical and complex nature of this topic, it was necessary to obtain input for drafting the aforementioned principles through consultations and meetings with experts on the subject and with various organizations involved with this topic, including Working Group IV (Electronic Commerce) of the United Nations Commission on International Trade Law (UNCITRAL), the Food and Agriculture Organization of the United Nations (FAO), the European Bank for Reconstruction and Development, the World Bank, the International Institute for the Unification of Law (UNIDROIT), the International Fund for Agricultural Development, and the Kozolchyk National Law Center; and

NOTING that UNCITRAL and UNIDROIT established a working group that met between 2020 and 2023 for the purpose of developing a model law on electronic warehouse receipts, and that the documents prepared by the CJI under the rapporteurship of Dr. Stewart were an important contribution to that effort,

RESOLVES:

1. To take note of the Draft Model Law on Warehouse Receipts unanimously adopted by the UNIDROIT Governing Council at its 102nd session held in May 2023.

2. To acknowledge the technical richness and great intrinsic value of this project as a milestone in the development of the subject at a global level.

3. To encourage member states of the Organization of American States (OAS) that are also members of UNCITRAL to give favorable consideration to this instrument in the discussions taking place within that Commission.

4. To urge OAS member states to give this Draft Model Law on Warehouse Receipts the greatest possible consideration and dissemination as an input for their respective processes for promoting access to credit.

This resolution was unanimously approved at the regular session held on August 3, 2023, by the following members: Drs. Martha del Carmen Luna Véliz, Cecilia Fresnedo de Aguirre, Julio José Rojas Báez, José Antonio Moreno Rodríguez, Ramiro Gastón Orias Arredondo, Alejandro Alday González, José Luis Moreno Guerra and Luis García-Corrochano Moyano.

* * *

CONCLUDED TOPICS

In 2023, the plenary of the Inter-American Juridical Committee decided to conclude the treatment of the following agenda topics because it considered them to have been fulfilled:

1. Development of Inter-American principles on the legal regime for the creation, operation, financing and dissolution of non-profit civil entities
2. Development of international standards on neuro-rights
3. Right to education
4. New technologies and their relevance to legal cooperation
5. Contracts between merchands with a contractual weak party

* * *

1. Development of Inter-American principles on the legal regime for the creation, operation, financing and dissolution of non-profit civil entities

Document	
CJI/RES.282 (CIII-O-23) corr.3	Declaration of Inter-American principles on the creation, operation, financing, and dissolution of nonprofit civil entities

*** * ***

During the 98th Regular Session of the Inter-American Juridical Committee (Virtual session, April, 2021), Dr. Ramiro Orias, recently elected as a member of the Committee, suggested including in the Committee's agenda a set of "standards on the legal system for the creation, operation, financing and dissolution of civil non-profit-making civil entities", document CJI/doc. 629/21.

With respect to the background information, he drew attention to a 2011 resolution of the General Assembly requesting the OAS Permanent Council to prepare and convene a "special session to exchange

experiences and good practices that serve to promote the right to freedom of assembly and association". He also noted that the inter-American human-rights system has not come up with material lending added support and content to the right of association. Thus, in a domain in which national laws are not homogeneous in the region, the idea is to craft a set of principles to contribute to the adoption of "inter-American standards" shaped by international norms and practice.

Like the other two topics proposed by Dr. Orias, this one received broad support from the members of the Committee, in particular Dr. Fresnedo and Dr. Rudge, and was included on the agenda. Dr. Orias was appointed as the rapporteur on the issue.

During the 99th Regular Session of the Inter-American Juridical Committee (Virtual session, August, 2021), this issue was not considered by the plenary. The rapporteur for the topic, Dr. Ramiro Orias Arredondo, explained that he had initiated a dialogue with the Organization for Security and Co-operation in Europe (OSCE), which specializes in non-profit civil organizations. He said that work is being done on a primary mapping that will facilitate identifying the practices in the non-profit activities' regulation processes. Likewise, he announced his intention to take into consideration the work of the United Nations Special Rapporteur for the Freedom of Peaceful Assembly and Association and of the IACHR's rapporteurship for human-rights defenders.

During the 100th Regular Session of the Inter-American Juridical Committee (Lima, Peru, May, 2022), the rapporteur for the topic, Dr. Ramiro Orias, presented a progress report on his work, document CJI/doc.661/22, whose purpose is to draw up a set of principles for the operation, financing and dissolution of civil non-profit entities. This task has been the subject of two rounds of initial consultations with experts, who submitted materials that made it possible to include recent legislation, in addition to two rounds with experts in April this year.

The study reveals the existence of significant regulatory dispersion and profuse administration that is restrictive in most cases.

In view of the state of the situation, recommendations are presented on various topics:

- That the legal framework establishes it is the right of all people to associate or organize themselves for engagement in non-profit activities.
- That the life cycle of civil society organizations (CSOs) be regulated mainly by rules approved by Congress, avoiding regulatory dispersion.
- That registration procedures be simple, timely, clear, non-discriminatory and non-discretionary.
- That principles of contractual freedom, self-regulation and autonomy of will be guaranteed.
- Facilitate the registration and recognition of their legal standing.
- That a registry of entities under the responsibility of autonomous agencies be set up, avoiding the duplication of agencies in charge of registration.
- That the law specifies the requirements and documents for obtaining and maintaining the recognition of legal standing, establishing in detail the steps, terms and costs of such procedures.
- Include the requirement of certificates, periodic records of information, or certificates of an administrative nature.
- That there be no government influence on the functions of CSOs, allowing them to fulfill their functions, with no constraints other than the pursuit of lawful purposes.
- That CSO regulation of illicit financial activities should be clearly identified and based on international human rights treaties; and without limiting the legitimate work of the sector.

- CSOs have the right to seek and access funding for attaining their goals, whether public or private, domestic or international.
- That access to funds be governed by general standards of government accountability and control.
- That CSOs may access income or profit tax exemptions without discrimination or further restrictions.
- That sanctions against civil organizations be imposed by impartial, independent and competent courts.
- That the dissolution of CSOs be carried out in compliance with their own bylaws.

In brief, the rapporteur for the topic explained that he is striving to develop guidelines that will assist in the harmonization process.

Dr. George Galindo congratulated the rapporteur for his interesting work and asked him about the format used, reflecting on whether harmonization is the most appropriate path. He pointed out that in Brazil, as in many countries, these topics are politicized, with domestic discussions on how to deal with this type of entity. He considered it necessary to propose recommendations or objectives to be achieved instead of prioritizing harmonization, since he fears that this would involve many conflicts among national stakeholders regarding the work of the Committee.

The rapporteur for the topic agreed with the need to think about the format for presenting the conclusions. He considered that the motivation responds to the interest in working on a classic topic of the Committee within the scope of a conventional text, the Inter-American Convention on Juridical Personality and Capacity of Legal Persons in Private International Law, an instrument that proposes the law of the place of incorporation as the point of reference for determining the incorporation of legal persons. To some extent, this has been responsible for the regulatory dispersion.

Dr. Moreno Rodríguez, in line with what was mentioned by Dr. Galindo, referred to Conclusion 5 on the request for authorization for registration. He also agreed that this is a topic that generates a lot of passions due to its high political content and therefore it is important to identify the relevant actors in a participatory consultation process.

In this regard, the rapporteur explained that there have already been rounds of work with experts, and a third round is expected for June of this year.

Dr. Martha Luna Véliz congratulated the rapporteur for his work and asked about the inclusion of two Panamanian norms that do not necessarily refer to the topic under study. She suggested that among the recommendations, reference be made to the regulator and that, among others, greater accountability be urged.

Dr. Mariana Salazar congratulated the rapporteur for his thorough work and the consultations, and noted the relevance of the topic in a trend where this is limited to regulating the financing or actions of organizations. She expressed her concern regarding the role of the Committee for studies containing provisions that have not been consulted with the States. Finally, she asked if the study refers to the topic of freedom of expression.

The rapporteur confirmed the need to involve States in the consultation process, and in this context the current inventory allows for the identification of the standard independent of its implementation. Not having found norms that limit freedom of expression, she indicated that the limitations are found in stigmas or indirect means, where NGOs are required to align themselves with State policies.

Dr. Moreno Guerra referred to his national experience where the registration of NGOs was done at the Ministry of Foreign Affairs, with no specific control over the funds they managed and the multiple abuses due to fiscal privileges granted to them, having even seen political and religious proselytism. He urged the rapporteur to analyze the purposes and practices of NGOs, which impose control over the way in

which funds coming from abroad are being used and squandered, in order to avoid these deviations. For the rapporteur, the topic of regulation lends itself to abuse, and for this reason, the main control should be to ensure compliance with lawful purposes.

The Chair of the Committee referred to transparency topics regarding organizations that receive public funds, and thus highlight the individual responsibility of managers, in a context aligned with the Committee's Model Law 2.0 on access to public information. In this regard, the rapporteur agreed on the importance of the topic of board accountability, and even alluded to the UN Convention against Corruption, which makes provision for criminal liability.

Dr. Eric Rudge noted that the legal system in Suriname, influenced by the Netherlands and France, allows the creation of organizations with little complexity, since this takes place in the presence of a notary and within 24 hours. In his country, the Attorney General's Office is in charge of setting up NGOs. There is no control of such entities, as they are in principle established on a non-profit basis, which highlights complex topics of abuse of tax and investment privileges. He urged the rapporteur to include the experience of Suriname in particular and the Caribbean in general.

The rapporteur noted that the system is based on notifications, with no prior authorization, as the case of Surinam has been acknowledged as cutting-edge. He also noted that the Mexican and Chilean models are very relevant, as they deal with the establishment and promotion of NGOs (Chile has a decentralized system where registration is handled at the municipal level and is closer to citizens).

During the 101st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2022), the rapporteur for the topic, Dr. Ramiro Orias Arredondo, delivered the "Second progress report. Legal regime for the creation, operation, financing, and dissolution of nonprofit civil entities in the member countries of the Organization of American States", document CJI/doc.672/22. On that occasion, he gave a broad outline of the first report on the subject, which included a comprehensive collection of the different models governing how civil society is organized (the type of entities, their operation, financing, and dissolution). This report also included international guidelines on the subject and served as the basis for a preliminary analysis. In this instance, the new report did not identify the specific situation in the countries but instead focused on aspects of principle. This is an issue on which the OAS has been placing increasing importance, in which connection he cited a resolution on the "promotion and protection of human rights" that calls upon member states "to respect and fully protect the rights of all individuals to assemble peacefully and associate freely, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association are in accordance with applicable domestic law and international human rights obligations." He referenced, as well, the commitment made by the States at the most recent Summit of the Americas, held June 8-10, 2022, to "Protect press freedom and the full exercise of civil rights, including freedom of association, freedom of peaceful assembly, and freedom of expression... as fundamental principles of representative and participatory democracies, in keeping with international human rights treaties...." (Inter-American Action Plan on Democratic Governance (CA-IX/doc.5/22).

He indicated that the text consists of twelve annotated principles based on current standards and existing practice, noting that it was not intended to establish new rights.

He then gave an outline of each principle:

- Principle 1 (Freedom of association);
- Principle 2 (Autonomy of choice). CSOs are born out of the will of their founders, associates, or members, exercised freely and autonomously;
- Principle 3 (Principles of legality and necessity). CSOs' life cycle should be regulated primarily by laws or codes approved by the legislative body;
- Principle 4 (Simple and transparent registration procedures). Establishment and registration procedures should be simple, timely, clear, non-discriminatory, and not left to discretion;

- Principle 5 (Recognition and regulation by an independent and autonomous agency of the State). State agencies that recognize and regulate the legal personality of CSOs shall be independent and autonomous;
- Principle 6 (Freedom of operation). CSOs can pursue their broad, intended roles in the public interest and/or for the mutual benefit of their members, with no restrictions other than those permissible under the American Convention;
- Principle 7 (Access to funding). CSOs have the right to seek, access, and use funding for the achievement of their social objectives, from public and private, as well as domestic and foreign sources;
- Principle 8 (Appropriate control of illicit financing). A State's responsibility to regulate illicit financial activities must be discharged in accordance with the obligations set forth in the American Convention, including as regards freedom of association;
- Principle 9 (Access to public funding). CSOs have the right to apply for and to receive public funds, which should be granted through transparent and fair systems;
- Principle 10 (Special tax regime. CSOs shall have access to tax benefits in accordance with their nonprofit status, without discrimination;
- Principle 11 (Commensurate punishment and due process). Sanctions imposed by States on CSOs shall only be applied in limited and pre-established circumstances;
- Principle 12 (Dissolution). Dissolution of CSOs should be applied only in the most serious cases and the disposal of their assets should follow the provisions laid out in their bylaws;

On a concluding note, the rapporteur pointed to the challenges of our times, in which individuals' rights to freedom of assembly and association as enshrined in the OAS Charter and even the Inter-American Democratic Charter were being called into question.

Dr. José Moreno Guerra made an observation about the section on dissolution, regarding the term "for serious reasons," explaining that such an action may be taken for reasons other than seriousness, such as when the purpose is fulfilled (voluntary dissolution).

The rapporteur for the topic thanked Dr. Moreno Guerra for his proposal, a principle that was originally included and later removed, but should clearly be reinstated.

Dr. Cecilia Fresnedo, in congratulating Dr. Orias, remarked on the importance of reference to the 1940 "Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law" as a supplementary rule (which requires compliance with the laws of the place where they were incorporated, as well as extraterritorial recognition of their existence, etc.). This is in line with the requirement that nonprofit civil society entities must adopt a legal personality.

Seizing the opportunity, the Vice Chair asked Dr. Fresnedo why this instrument had not been ratified, compared to other conventions of the era, and how States could be approached with a view to demonstrating the benefits of this instrument.

In her response, Dr. Cecilia Fresnedo identified bureaucracy as one of the main reasons. Another possible reason, compared to what she had seen in her country, was the separation between scholars and the legislative branch back then. Dr. Fresnedo felt it would be useful to resurrect this convention during the presentation of Dr. Orias' document. For his part, the rapporteur for the topic explained that his ideas were based on the aforementioned Convention. He proposed restoring the section of the first report with further development thereon. He explained that other reasons for the failure to ratify the Convention had to do with the lack of lobbying. Many NGOs come from other countries, and it is difficult for local organizations in our countries to open offices or branches in other neighboring countries. Dr. Fresnedo referred to the 1889 Montevideo International Civil Law Treaty ratified by Uruguay, which applies to several States and which,

along with the 1940 instrument, advances solutions similar to the "Inter-American Convention on Personality and Capacity of Legal Persons in Private International Law."

The Vice Chair concluded that this situation makes it easier to encourage States to ratify the inter-American instrument.

The rapporteur welcomed the proposals, promising to make the necessary adjustments.

Dr. Dante Negro outlined the challenges posed by the lack of response from the States about the appointment of central authorities for ratified instruments.

Dr. George Galindo Bandeira asked for the language be examined to avoid any appearance of it being a binding instrument, and even to standardize the report. The rapporteur promised to do a thorough review in order to be absolutely sure as to what had been stated.

The Vice Chair pointed to the negative perception about the management of NGOs that serve as political vehicles or to advance the agenda of certain people and benefit others. He further underscored the importance of combating money laundering. He felt that the rapporteur's report should not be changed but should include the concerns that were raised.

While noting there was a stigma attached to NGOs for being critical entities of governments in power, the rapporteur nevertheless agreed with the Vice Chair about needing to include the issues that were raised, which could organize the institutional work of organizations with weaknesses. NGOs are regulated in most cases and must meet the requirements of good governance and accountability under domestic laws and under their own internal regulations.

During the 102nd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2023), Mr. Eduardo Szazi, at the invitation of Dr. Ramiro Orias in his capacity as the rapporteur for the topic, made a presentation on the region's legal regimes for the creation, operation, financing, and dissolution of nonprofit civil entities.

He explained that work had been conducted on a study of the legal framework in Latin America, through which a number of trends had been identified, such as regards the figure of legal personality. In Latin American countries, legal personality requires authorization from the state. The most recent legislative changes are linked to administrative requirements governing controls over money laundering and the fight against terrorism. Restrictions on foreign funding have also been seen, which may involve some degree of competition with local governments, and this can have an impact on the funds of nonprofit organizations. In short, the outcome of the changes is a restriction of freedom of expression; hence the importance of adopting principles that ensure free expression is respected.

Dr. Rudge inquired about the involvement of governments and, in particular, about the timing of the adoption of those laws. He also asked about rulings issued by domestic courts.

In response, Mr. Szazi explained that associations are a matter of civil law that has its origin in the colonial system; it was therefore older than the recent laws referred to.

Dr. Martha Luna pointed out that the role of the state is in conflict with associations established to provide assistance in areas that historically should be under state responsibility. She noted the importance of streamlining the way in which donations are delivered.

Mr. Szazi expressed his dissatisfaction with obstacles imposed on the granting of permits or the creation of legal personality.

Dr. Luis García-Corrochano explained that the associations of the colonial era were more similar to contemporary lobbying, and that the figure as we know it comes from French influence through the Napoleonic Code. He agreed with the assertion that the creation of nonprofit entities may be more challenging than for-profit ones, which seemed to assume that the organization of former was unlawful.

Mr. Szazi criticized government control, particularly when organizations are seen as competitors of the state, in contrast to for-profit companies.

Dr. Cecilia Fresnedo spoke of the 1899 Treaty of Montevideo, which is binding on six OAS countries and which recognizes legal entities as full legal persons, provided they are incorporated under local law.

Mr. Szazi said that precisely such control by local laws could be harmful; hence the importance of promoting the adoption of a set of principles that do not leave organizations unprotected.

Dr. Julio Rojas-Báez spoke of the regulations in place in the Dominican Republic, which hampered the operation of certain entities. As a way of reassuring the states, he suggested subjecting both for-profit and nonprofit entities to tax regulations or incorporation requirements.

Mr. Szazi observed positive aspects to the nonprofit nature of these organizations. At present, however, they are limited in the funding they can receive from foreign sources and even from international cooperation agencies. With regard to forced dissolution, some very vague issues relating to moral customs or customs that fluctuate according to the government in power have been identified.

On that point, Dr. Báez called for reference to be made to justified grounds based on respect for due process, particularly as regards dissolution issues.

The Chair asked about how the inter-American principles would be made compatible for the common-law countries.

Mr. Szazi said that the principles would be compatible with common law countries, and that this had already been endorsed in the decisions of international courts.

At the end of the dialogue, the Committee thanked Mr. Szazi for his presence and continued discussions on the subject.

The rapporteur for the topic, Dr. Ramiro Orias, explained that the comparative study covered the situation in 35 countries and was used as the basis for the development of the 10 principles as essential elements that should guide the inter-American system on the creation, operation, financing, and dissolution of nonprofit civil entities. He noted that more than 3,000 civil society organizations had been dissolved in Nicaragua. He pointed out that the comparative study examines models based on both civil codes and common law and that the principles could therefore be used by all OAS member states. As regards taxation matters, the main distinction of these entities is their nonprofit nature, which grants them an exception from business tax.

The rapporteur then proceeded to review the principles.

Dr. Rudge asked about rulings handed down by the inter-American and international courts. He expressed his concern regarding the imposition of state sanctions on organizations, because that was not common in his country. In connection with Principle 5, states should not be granted a right to interfere. Recognizing a specific entity does not reflect the situation in Suriname, where the state only registers the entity but is not responsible for issues related to its recognition. On principle 7 fund raising should be subject to both national and international law. Regarding Principle 12, in his country dissolution issues are the responsibility of the Attorney General; therefore, in the Committee's document, those prerogatives should not be left in the hands of the state. Creation and operation must always be under the control of the entity and not of its members, who are subordinate to it.

The rapporteur said that the study contained relevant case law on several topics. With regard to the analysis of Principle 5, the Committee's text refers to both public registers and agencies.

Dr. Galindo congratulated Dr. Ramiro Orias on the quality of his work. He asked about the format of what was planned. Since it is a declaration, the verbs must be in the present tense and not the future. If the future tense is kept, then a recommendation would be more appropriate. In addition, the use of the verb "must" in the English version gives it a more binding character. If the aim is to influence states' behavior, a softer, more appropriate wording should be chosen. The wording of Principle 7 was that of a declaration, but the wording of Principle 9 was not. In addition, the reference to the American Convention should be omitted, since not all the OAS member states are parties to it.

In response, the rapporteur explained that modifications had already been made but that he would modify the pending verb phrases. Dr. Galindo recommended adopting a document in the form of recommendations or guidelines. In Principle 5, more freedom could be given if it were drafted in the conditional tense and took the form of a recommendation.

The Chair congratulated the rapporteur on his work, which he said would be a document of reference thanks to the study conducted into the state of the issue. As for its nature, it should be a set of guidelines of principles addressed to operators in general. His experience in private international law organizations had, he said, taught him the importance of consulting with states in order to increase legitimacy and to allow future operators to be heard. Accordingly, he called for it to be submitted to the states for consultation, considering that there was no rush; that, of course, was without prejudice to the adjustments to be made in the coming days in light of what was said this week.

The rapporteur thanked the Chair for his remarks and requested that the Committee adopt the document at this session.

Dr. Alejandro Alday said that a change in the nature of the document would be advisable, considering that some countries lacked a favorable climate that would allow its implementation in the terms it was currently set out.

The Chair requested that the topic be taken up again during the following days, once the changes based on the comments made today had been incorporated.

Dr. Ramiro Orias, the rapporteur for the topic, presented the modifications made to the final version of the report, document CJI/doc.685/23 rev.1, outlining among others that:

- Principle 5, on registration services, now contains the proposal made by Dr. Eric P. Rudge.
- Both Principle 6 and Principle 8 now omit the reference to the American Convention on Human Rights.
- There were also modifications to the usage of the verbs “should” and “shall.”
- Finally, format changes were made to standardize the text.

With regard to the discussion on the nature of the document, the rapporteur preferred that it take the form of a declaration and not referring to it as “guidelines”. He also suggested not sending the current version of the document to the governments. In the current hemispheric context, he said, there was a vacuum in this area and it would be better to present the principles in the form in which they were developed. Thus, he suggested following the same road map as used for data protection, but without closing the topic. Ultimately, the aim is for these principles to serve as a guideline for discussions at the political level.

The Chair explained that version 2.0 of the Model Law on Data Protection was reviewed by the states prior to its adoption by the Committee.

There was a discussion on the wording of the principle of "registration", in order to incorporate both the figure of registration and that of the recognition of the legal personality, and it was finally captured as follows:

Registration and recognition by an independent and autonomous agency

Member states should, in keeping with their constitutional and administrative structures and in all applicable cases, establish registration services or independent and autonomous public agencies for the registration and recognition of the legal personality of civil entities and ensure that those bodies provide their services with professionalism, impartiality, and transparency, pursuant to these principles.

Dr. Alejandro Alday recommended switching the order of Principles 4 and 5, to make it more logical: their creation would be addressed first, and then reference would be made to their operation. The rapporteur endorsed his suggestion.

The Chair said that he felt the plenary was inclined to approve the document and the Declaration was adopted unanimously. The rapporteur expressed his gratitude and satisfaction at being able to present the document in its current form, which would allow it to set a political line.

On March 9, 2023, the Inter-American Juridical Committee adopted a Declaration of Inter-American Principles on the Legal Regime for the Creation, Operation, Financing and Dissolution of Civil Non-Profit Entities, resolution CJI/RES. 282 (CII-O/23) corr. 3. The Declaration of Principles was submitted to the Permanent Council on March 29, 2023 and can be viewed at the website of the CJI under the section themes concluded: OAS :: Inter-American Juridical Committee (IAJC) :: Themes Recently Concluded

During the Special Meeting of the Inter-American Juridical Committee (Virtual Session of December 12, 2023), Dr. Ramiro Orias expressed his interest in amending the report that the Committee adopted, based on the recommendations he received from certain states in the course of his outreach to OAS bodies. In that connection, he brought up a couple of ideas shared with him by the delegations of the United States and Chile, respectively, which he believed may improve the text.

The Chair asked for the matter be taken up in March 2024 so that adjustments can be incorporated, and the Committee can reach consensus.

Dr. Ramiro Orias confirmed that he had forwarded the corrected version to the secretariat for the plenary to deal with and subsequently consideration.

The following is the report adopted by the Committee at its March 2023 session, held in Rio de Janeiro, Brazil:

CJI/RES. 282 (CII-O/23) CORR.3

DECLARATION OF INTER-AMERICAN PRINCIPLES ON THE CREATION, OPERATION, FINANCING, AND DISSOLUTION OF NONPROFIT CIVIL ENTITIES

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING:

That according to Article 16 of the American Convention on Human Rights, everyone has the right to associate freely for ideological, religious, political, economic, labor, social, cultural, sports, or other purposes. The exercise of this right shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others;

That the General Assembly of the Organization of American States (OAS) in June 2021 adopted a resolution on *Promotion and Protection of Human Rights* in which it calls on member states to: "respect and fully protect the rights of all individuals to assemble peacefully and associate freely, and to take all necessary measures to ensure that any restrictions on the free exercise of the rights to freedom of peaceful assembly and of association, including on the internet, are in accordance with domestic legislation and international human rights obligations, as applicable";

That the Ninth Summit of the Americas – held from June 8 to 10, 2022 – adopted the *Inter-American Action Plan on Democratic Governance* (CA-IX/doc.5/22), whereby the Heads of State of the Hemisphere commit to safeguarding the full exercise of civil rights, including freedom of association, freedom of peaceful assembly, and freedom of expression as fundamental principles of representative and participatory democracies, in keeping with international human rights treaties, and

TAKING INTO ACCOUNT:

That at its 98th regular session (April 5-9, 2021), the Inter-American Juridical Committee (CJI) of the Organization of American States (OAS) approved to include in its agenda the following topic:

Inter-American principles on the legal regime for the creation, operation, financing and dissolution of civil nonprofit entities (document CJI/doc.629/21), for the purpose of systematizing inter-American standards and best practices for the legal regime for the creation, operation, financing, and dissolution of nonprofit civil entities in the members states of the Organization of American States.

That for the 100th regular session of the CJI, held in Lima (May 2-6, 2022), the Rapporteur for the topic delivered the report: *Legal Regime for the Creation, Operation, Financing, and Dissolution of Nonprofit Civil Entities in the Member Countries of the Organization of American States* (CJI/doc.661/22), which included an in-depth study and comparison of domestic laws and practices related to the life cycle – i.e., the creation, operation, financing, and dissolution – of civil society organizations in the 35 countries of the region, identifying international standards in this area, at both the regional and global levels.

That said study revealed that, in the practice and implementation of the domestic legislative frameworks regulating freedom of association, particularly with regard to the creation, operation, financing, and dissolution of non-profit civil entities, civil society organizations in the Americas tend to run into restrictions and legal obstacles throughout their life cycle.

That, specific international standards on this field have been adopted at the universal and regional levels, namely those developed by the *UN Special Rapporteur on the Freedoms of Peaceful Assembly and of Association*, and at the regional level, the *Joint Guidelines on Freedom of Association of the Organization for Security and Co-operation in Europe (OSCE/ODIHR) and the Venice Commission*, as well as the *Principles on the rights to freedom of peaceful assembly and association,* approved by the *African Commission on Human and Peoples' Rights*.

That, as part of its work in harmonizing, codifying, and developing private international law the Inter-American Juridical Committee promoted adoption of the *1984 Convention on Personality and Capacity of Juridical Persons in Private International Law*, which establishes that the existence, capacity to hold rights and obligations, operation, dissolution, and merger of a private juridical person are governed by the laws of the place where it was incorporated and that, however, no progress has been made in developing inter-American guidelines to orient the content and approach that the laws regulating nonprofit civil legal entities should have, thus leaving the inter-American system somewhat lagging behind these global advances and needing a process for systematizing, modernizing, and consolidating the standards developed in the Americas.

RESOLVES:

1. To approve the "*Declaration of Inter-American Principles on the Legal Regime for the Creation, Operation, Financing, and Dissolution of Nonprofit Civil Entities, with annotations*," which is appended to this resolution.

2. To refer this resolution along with the Declaration of Principles contained in the accompanying document to the Permanent Council of the Organization of American States and to the General Assembly for due attention and consideration.

3. To request the Department of International Law, in its capacity as Technical Secretariat to the Inter-American Juridical Committee, to disseminate this Declaration of Principles as widely as possible among various stakeholders.

This resolution was adopted unanimously at the regular session held on March 9, 2023, by the following members: Drs. Martha Luna Véliz, Eric P. Rudge, George Rodrigo Bandeira Galindo, José Luis Moreno Guerra, Alejandro Alday González, Julio José Rojas Báez, José Antonio Moreno Rodríguez, Luis García-Corrochano Moyano, Cecilia Fresnedo de Aguirre, and Ramiro Gastón Orias Arredondo.

* * *

Annex I

Declaration of Inter-American Principles on the Legal Framework for the Creation, Operation, Financing, and Dissolution of Nonprofit Civil Entities

Principle 1

Exercise of freedom of association

The exercise of freedom of association includes the right to participate in the creation, operation, financing, and dissolution of nonprofit civil entities.

Principle 2

Autonomy of will

Nonprofit civil entities are born and governed by the will of their founders, associates, or members, exercised freely and autonomously.

Principle 3

Principle of legality

The life cycle of nonprofit civil entities should be governed mainly by laws or codes adopted by the legislative body, in all that which is necessary and reasonable for a democratic society.

Principle 4

Registration and recognition by an independent and autonomous agency

Member states should, in keeping with their constitutional and administrative structures and in all applicable cases, establish registration services or independent and autonomous public agencies for the registration and recognition of the legal personality of civil entities and ensure that those bodies provide their services with professionalism, impartiality, and transparency, pursuant to these principles

Principle 5

Simple and transparent registration procedures

Establishment and registration procedures should be simple, prompt, clear, non-discriminatory, and non-discretionary. The law should establish precisely the requirements and documents to be submitted for obtaining and maintaining recognition of legal personality, as well as the procedures, deadlines, and costs of that process.

Principle 6

Freedom of operation

Nonprofit civil entities may carry out their functions with a broad purpose in areas of public interest and/or for the mutual benefit of their members, with only those constraints that are permitted by international human rights instruments and without unlawful or arbitrary interference.

Principle 7

Freedom to seek, obtain, and use funds

Nonprofit civil entities are free to seek, request, obtain, and use financing for the achievement of their social aims from public and private sources, both domestic and foreign.

Principle 8

Appropriate control of illicit financing

The State should discharge its responsibility to regulate illicit financial activities in accordance with its obligations under international human rights instruments. Restrictions applied to civil nonprofit entities should be proportionate to the risk identified, evidence-based, and implemented without limiting the legitimate work of the sector.

Principle 9

Access to public financing under equal conditions and without discrimination

Civil nonprofit entities may have access to public funds through transparent, equitable and non-discriminatory systems, being subject to the general rules of accountability and responsibility of their legal representatives.

Principle 10

Special tax regime

Nonprofit civil entities should have access to tax benefits in accordance with their nonprofit nature without discrimination.

Principle 11

Proportional penalties and due process

Sanctions imposed by States on nonprofit civil entities shall only be applied in limited circumstances established by law in advance. They shall be progressive, necessary and strictly proportional; and be applied on reasonable, reasoned and proven grounds within a judicial process, with all the guarantees of due process.

Principle 12

Voluntary and forced dissolution

The dissolution of nonprofit civil entities, their liquidation and the disposal of their assets should follow the provisions contained in their bylaws, as expressed by the will of their members. Members should not distribute the entity's assets among themselves. Compulsory dissolution, as a legal penalty, should be appropriate only in exceptional circumstances and in the most serious cases that entail the infringement of a legitimate interest recognized by international human rights instruments and where less restrictive measures would not be sufficient to protect such an interest.

* * *

Annex II

Annotations to the Declaration of Inter-American principles on the legal framework for the creation, operation, financing, and dissolution of nonprofit civil entities

Introduction

The right to freedom of association is largely guaranteed in most of the constitutions of the countries of the Americas region. Nevertheless, in terms of regulating the life cycle of civil society organizations (CSOs) in their legislative evolution, domestic laws have introduced varying models of civil nonprofit entities, through regulations that are usually vague and ambiguous.

Similarly, methods of implementation tend to be diverse as well, depending especially on political contexts, the strength of democratic institutions, and the full force of the rule of law. Accordingly, there are cases in which political context and administrative practices have proven to be restrictive to the operation of CSOs, contrary to international human rights standards and despite a legal framework conducive to creating them, including some based on a notification system. The studies also revealed a wide variety of regulations that affect different aspects of the CSO life cycle, that is: income tax laws, anti-money laundering and anti-terrorist financing laws, charities laws, promotion laws, foreign agent registration laws, etc. Any analysis of the legal environment for CSOs in a given country must take into account this cluster of rules, and not just the law governing their creation and dissolution.

Most domestic laws – particularly in codification in Latin American countries – traditionally defined the formal and substantive requirements for the creation of such private entities, as well as other aspects of their operation and dissolution under their ordinary civil laws, by establishing a neutral legal framework. The same holds true for Caribbean countries, Canada, and the United States, among others that inherited the common law system. But the region has been undergoing a process of transforming those regulatory frameworks beginning almost two decades ago, shifting from civil law to

administrative law – with the Executive bodies in some countries imposing undue restrictions, excessive controls, and vague and arbitrary requirements, while also invoking ambiguous and arbitrary powers – all of which have had a particular impact on the legal regime governing the different life-cycle phases of nonprofit civil organizations in particular, and CSOs in general.

Against such a backdrop, steps must be taken to systematize and develop inter-American principles and standards in this area, to facilitate the harmonization of domestic laws across the region. To that end, under the direction of the Inter-American Juridical Committee (CJI) Rapporteur for this topic and with support and technical assistance from the International Center for Not-for-Profit Law (ICNL), extensive work has been undertaken to compile, survey, analyze, and compare – in the light of international standards – the domestic laws established in 35 countries of the region, with specific information on the life cycle of civil society organizations: (a) formation and registration of organizations; (b) operation; (c) access to funding; and (d) dissolution.

In an effort to validate the information received, and to contrast rules with practices, on December 1 and 2, 2021, two virtual consultation events were held with academics and leaders of civil society organizations, to develop Inter-American Principles on the Legal Regime for the Creation, Operation, Financing, and Dissolution of Nonprofit Civil Entities, under the academic auspices of the Center for Advanced Studies of the Third Sector of the Pontifical Catholic University of São Paulo, Brazil, the Bolivian Catholic University (UCB) of La Paz, Bolivia, and the ORT University of Mexico. Furthermore, this document was reviewed in early April 2022, during three sub-regional consultations that drew experts and specialists from Mexico and Central America, South America, and Caribbean countries. This text was again revised, commented on, and discussed at a July 14, 2022 regional meeting of experts, with ICNL support and technical assistance.

These annotations expand upon and support development of the proposed inter-American principles on the legal regime for the creation, operation, financing and dissolution of civil nonprofit entities, based on the international standards established with respect to the right to freedom of association. The text proposes twelve general principles, each with supporting notes that explain in greater detail its basis, scope, and justification, illustrating some of the terms as to how specific situations may be addressed. For each principle, there is also a statement of the international standard on which it is based, whether it was issued by an international body or authority for the protection of human rights at the inter-American or universal level, or from another source. These principles are therefore based on current rules and existing domestic practice at the regional and international levels. Lastly, it is useful for note to be made of the contribution that this study has made to the important efforts being made by other Organization of American States bodies in terms of the participation of organized civil society, as well as in strengthening civic spaces, a vital component of any democratic society.

Principle 1 (Exercise of freedom of association)

The exercise of freedom of association includes the right to participate in the creation, operation, financing, and dissolution of nonprofit civil entities.

Rationale for the Principle Everyone has the right to associate freely for legitimate public interest or mutual benefit purposes on a non-profit basis. The exercise of freedom of association consists of the power to create civil society organizations (CSOs) and to set up their internal structure, activities, and action program, independently, without intervention by authorities that unduly limits or hinders the exercise of this right. States must guarantee an enabling and safe environment for exercising this right, in conformity with existing international human rights instruments.

The great majority of Organization of American States (OAS) member countries recognize freedom of association as a constitutional right consistent with Article 16 of the American Convention. Nevertheless, a comprehensive review of the norms of the countries in this region reflects a wide range of laws and implementation practices that limit the enjoyment of the freedom at key moments in the lifecycle of associations. Freedom of association can be promoted through legal reforms that conform to these Principles, along with Article 2 of the American Convention, which requires States to adopt, in accordance with their constitutional procedures, domestic law provisions, legislative or otherwise, as may be necessary to give effect to those rights and freedoms. Consequently, States have the duty to

adopt an enabling and appropriate legal, political, and administrative framework to ensure the development of CSOs throughout their lifecycle, in accordance with the values of a democratic society.

Applicable international standards: "The Inter-American Court has established that the right to associate protected by Article 16 of the American Convention protects two dimensions. The first dimension encompasses the right and freedom to associate freely with other persons, without the intervention of the public authorities limiting or encumbering the exercise of this right, which represents, therefore, a right of each individual. The second recognizes and protects the right and the freedom to seek the common attainment of a lawful purpose, without pressure or meddling that could alter or thwart their aim."[145]

At the international level "[t]he right to freedom of association ranges from the creation to the termination of an association, and includes the rights to form and to join an association, to operate freely and to be protected from undue interference, to access funding and resources and to take part in the conduct of public affairs."[146] At the regional level, in Europe, the Venice Commission[147] has held that "domestic laws should be drafted with a view to facilitating the creation of associations and enabling them to pursue their objectives."[148] The European Court of Human Rights has similarly ruled that "[p]rotection afforded to freedom of association lasted for an association's entire life."[149]

Principle 2 (Autonomy of will)

Nonprofit civil entities are born and governed by the will of their founders, associates, or members, exercised freely and autonomously.

Rationale for the Principle:

CSOs are created by the free and autonomous will of their founders, associates or members. Members should determine the structure, internal governance, and activities of associations through their statutes, consistent with the principles of contractual freedom, self-regulation, and self-determination of their mandates. Freedom of association presumes that each person may determine whether she or he wishes to be part of an association without arbitrary interference or coercion.

Ambiguous rules that limit the permissibility of CSO decisions based on State interests not recognized in the American Convention allow interference by public officials in organizations' internal governance. When the discretionary criteria of regulatory bodies replace the will of an association's members, they restrict the associations' autonomy as well as limit the usefulness and legitimacy of the statutes for both members and officials. The autonomy of founders and members can be guaranteed through unambiguous norms with closed lists of minimal grounds for limiting the decisions of members regarding their objectives, activities, and internal structure.

Applicable international standards: In the Americas, "the right to associate freely without interference requires that States ensure that those legal requirements not impede, delay, or limit the creation or functioning of these organizations."[150] "On the other hand, under such freedom it is possible to assume that each person may determine, without any pressure, whether or not she or he wishes to

---

[145] Inter-American Commission on Human Rights, *Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II. March 7, 2006, par. 71 (quotes omitted).*

[146] Human Rights Council, *Report of the Special Rapporteur on the rights of freedom of peaceful assembly and of association, Maina Kiai*, A/HRC/20/27, 24 April 2013, p. 1 (summary).

[147] Comprising the Organisation for Security and Co-operation in Europe and the European Commission for Democracy through Law.

[148] Organisation for Security and Co-operation in Europe and the European Commission for Democracy through Law (Venice Commission), *Joint Guidelines on Freedom of Association,* Warsaw, 2015, ISBN 978-92-9234-906-6, par. 53.

[149] See European Court of Human Rights, *United Communist Party et al v.* Turkey, No. 19392/92, par. 33.

[150] *Ibid*., *Second Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II. December 31, 2011, par. 163.

form part of the association. This matter, therefore, is about the basic right to constitute a group for the pursuit of a lawful goal, without pressure or interference that may alter or denature its objective."[151]

At the global level, "only 'certain' restrictions may be applied, which clearly means that freedom is to be considered the rule and its restriction the exception. ...'in adopting laws providing for restrictions … States should always be guided by the principle that the restrictions must not impair the essence of the right ... the relation between right and restriction, between norm and exception, must not be reversed.'"[152] As the Venice Commission views it in that region, "freedom of association encompasses the right to found an association, to join an existing association and to have the association perform its function without any unlawful interference by the state or by other individuals. Freedom of association entails both the positive right to enter and form an association and the negative right not to be compelled to join an association that has been established pursuant to civil law."[153]

Principle 3 (Principle of legality)

The life cycle of nonprofit civil entities should be governed mainly by laws or codes adopted by the legislative body, in all that which is necessary and reasonable for a democratic society.

Rationale for the Principle: Norms must be precise, comprehensive, and published in advance, avoiding to the extent possible dispersion across and overregulation. Moreover, legislation must be reasonable, proportionate, and necessary in a democratic society, in the interest of national security, public security or order, or to protect public health or morals or the rights and freedoms of others. Aside from permissible limitations recognized by international human rights instruments, norms must be compatible with the positive duty of the State to promote and guarantee the exercise of freedom of association.

In several countries in the region, CSOs and public officials of good faith seek to comply with and implement the law correctly but face severe barriers due to requirements that are so ambiguous, contradictory, or extensive that they require human and financial resources beyond the reach of many public organizations and agencies. Often, these problematic requirements arise due to the use of executive decrees and administrative orders issued in a rushed and *ad hoc* manner to regulate CSOs rather than passing laws that have been adequately debated in the legislature. The result is disproportionate dedication of scarce resources to compliance and enforcement, leaving CSOs less equipped to fulfill their public benefit missions and public officials unable to respond to cases most worthy of their attention. Compliance with the principles of legality and necessity can be promoted through legislation that is drafted unambiguously with the participation of the CSO sector and appropriately debated and approved by the legislature.

Applicable international standards: At the inter-American level, "the general conditions and circumstances under which a restriction to the exercise of a particular human right is authorized must be clearly established by law in a formal and substantial sense, that is, by a law passed by the legislature in accordance with the Constitution."[154]

At the international level, any limitation of "these rights… must be expressly provided and narrowly worded in precise and clear language by a formally and materially approved law. In that regard, it is not enough that the restrictions be formally approved by the competent organ of the state, but that the law must be adopted in accordance with the process required by the domestic law of the State, it must be 'accessible to the public' and 'be formulated with enough precision so that a person

---

[151] Inter-American Court of Human Rights, *Baena Ricardo et al v. Panama. Judgment on Merits, Reparations and Costs. February 2, 2001, par. 156.*

[152] *Id., Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, 21 May 2012, para.* 16 (quote omitted).

[153] Venice Commission, *Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan* (14-15 October 2011) CDL-AD (2011)035, para. 42.

[154] Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II*. December 31, 2011, par. 61.

may act accordingly.'"[155] At the regional level, the African Commission on Human and Peoples' Rights (The African Commission) has established that, "[n]ational legislation on freedom of association, where necessary, shall be drafted with the aim of facilitating and encouraging the establishment of associations and promoting their ability to pursue their objectives. Such legislation shall be drafted and amended on the basis of broad and inclusive processes including dialogue and meaningful consultation with civil society."[156]

Principle 4 (Registration and recognition by an independent and autonomous agency)

Member states should, in keeping with their constitutional and administrative structures and in all applicable cases, establish registration services or independent and autonomous public agencies for the registration and recognition of the legal personality of civil entities and ensure that those bodies provide their services with professionalism, impartiality, and transparency, pursuant to these principles

Rationale for the Principle In some countries in the region, the laws for CSO registration and regulation are perceived to be implemented selectively, particularly in the case of organizations unaligned with the government or those representing marginalized groups. As a practical matter, registration and oversight procedures tend to be more expensive, intrusive, and time-consuming for such organizations as well as for those located in areas far from the oversight agency. Independent and autonomous agencies can be promoted through professionalization, with adequate human and technological resources, as well as training in freedom of association and best practices in CSO regulation. *State agencies or public services that register, recognize, or oversee the legal personality of CSOs must be independent and autonomous. Such agencies must work impartially, transparently, and equitably, and they must motivate and publish their decisions. Selection of agency personnel must be merit-based and in accordance with stable civil service rules. When possible, consistent with constitutional and administrative regimes of each State, an integrated, simple, coherent system with decentralized services within easier reach of citizens is recommended. If CSOs are required to register with or report to other State bodies, such requirements should not undermine a registered CSO's legal personality.*

Applicable international standards: Under the inter-American system, "[s]tates that have bodies responsible for handling the registration of associations should ensure that neither these bodies nor the authorities in charge of regulating the laws governing registration have broad discretion or provisions containing vague or ambiguous language that might create a risk that the law could be interpreted to restrict the exercise of the right of association."[157]

At the international level, "where procedures governing the registration of civil society organizations exist, that these are transparent, accessible, non-discriminatory, expeditious and inexpensive, allow for the possibility to appeal and avoid requiring re-registration, in accordance with national legislation, and are in conformity with international human rights law."[158] Regionally, in Europe, "[l]egislation should make the process of notification or registration as simple as possible and, in any case, not more cumbersome than the process created for other entities, such as businesses."[159]

---

[155] Mandates of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan; and the Special Rapporteur on the situation of human rights defenders, Mary Lawlor; *Comments on national legislation, regulations and policies to El Salvador, Ref*: OL SLV 8/2021 (30 November 2021), item 2(a), p. 4.

[156] African Commission on Human and Peoples' Rights, *Guidelines on Freedom of Association and Assembly in Africa,* November 10, 2017.

[157] *Id., Second Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II. December 31, 2011, par. 172.

[158] Human Rights Council, *Protecting Human Rights Defenders* (Resolution) A/HRC/RES/22/6), 12 April 2013, para. 8.

[159] *Id., Guidelines on Freedom of Association, Warsaw, 2015, ISBN 978-92-9234-906-6, para.* 156.

Principle 5 (Simple and transparent registration procedures)

Establishment and registration procedures should be simple, prompt, clear, non-discriminatory, and non-discretionary. The law should establish precisely the requirements and documents to be submitted for obtaining and maintaining recognition of legal personality, as well as the procedures, deadlines, and costs of that process.

Rationale for the Principle: Many countries in the region have prior authorization systems with complex information requirements and redundant registries that obstruct the creation and operation of CSOs. Simple and transparent registration procedures are attainable through adoption of notification systems. Alternatively, prior authorization systems can be simplified and decentralized, with clearly defined requirements and procedures along with explicit criteria for limited review of applications. Procedures for the creation of CSOs must be simple, timely, clear, non-discriminatory, and non-discretionary. Registration systems based on notification favor the exercise of freedom of association more than those based on prior authorization. The law must state all requirements and documents needed to obtain and maintain recognition of legal personality, and must establish clear procedures, deadlines, and costs. Any registration costs must be reasonable and proportionate to those applicable to for-profit private entities. The State may reject a request for registration only on reasonable, specific, and limited grounds. Any rejection must be open to challenge and judicial review with sufficient due process guarantees. When States adopt a new law, registered CSOs should not be subject to adaptation or re-registration procedures. The law should also guarantee establishment of de facto associations, which can have legal rights and obligations and their members are legally responsible for the association's action in relation to third parties.

Applicable international standards: In the Americas, "[t]he States must ensure that the registration of organizations 'is a rapid process, requiring only the documents necessary to obtain the information necessary for registration purposes.'"[160] "The registration... should have a declaratory and not constitutive effect.'"[161] "National laws should prescribe the maximum time periods for the State authorities to act on registration applications."[162]

"The [UN] Special Rapporteur [for Freedom of Expression] considers as best practice procedures which are simple, non-onerous or even free of charge and expeditious. A "notification procedure," rather than a "prior authorization procedure" that requests the approval of the authorities to establish an association as a legal entity, complies better with international human rights law and should be implemented by States. Under this notification procedure, associations are automatically granted legal personality as soon as the authorities are notified by the founders that an organization was created. It is rather a submission through which the administration records the establishment of the said association."[163] For the regional level, the African Commission has stipulated that "[r]egistration shall be governed by a notification rather than an authorization regime, such that legal status is presumed upon receipt of notification. Registration procedures shall be simple, clear, non-discriminatory and non-burdensome, without discretionary components. Should the law authorize the registration authorities to reject applications, it must do so on the basis of a limited number of clear legal grounds, in compliance with regional and international human rights law."[164]

Principle 6 (Freedom of operation)

Nonprofit civil entities may carry out their functions with a broad purpose in areas of public interest and/or for the mutual benefit of their members, with only those constraints that are permitted by international human rights instruments and without unlawful or arbitrary interference.

Rationale for the Principle: The freedom of action includes the right to participate in forming and tracking public policies, and to express opinions and ideas in public spheres through any means,

---

[160] *Id., Second Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II. December 31, 2011, par. 541 (Recommendation 18.)
[161] *Id.*, par. 171.
[162] *Id.*, par. 541 (Recommendation 18.)
[163] *Id., Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/20/27, 21 May 2012, paras.* 57 and 58.
[164] *Id., Guidelines on Freedom of Association and Assembly in Africa*, 10 November 2017, para. 13.

including in digital space. States shall guarantee the right to privacy of CSO information, especially for sensitive institutional information that needs special protection and added safeguards. States may request CSO institutional information for statistical purposes but may not compromise their independence. Ambiguous or restrictive legislation in several countries gives authorities wide discretion to limit the legitimate activities of CSOs, for instance, by characterizing them as "political activities" reserved for political parties. Other problematic legislation grants authorities excessive powers to scrutinize and disclose private information belonging to organizations and their members. To guarantee freedom of action, States must establish criteria that avoid inappropriate meddling, which compromises the critical and independent role that CSOs must play in a democratic society.

Applicable international standards:

The inter-American system has established that freedom of association includes the right "to set into motion their internal structure, activities and action program, without any intervention by the public authorities that could limit or impair the exercise of the respective right."[165]

At the international level, "among other liberties, associations have the freedom to advocate for electoral and broader policy reforms; to discuss issues of public concern and contribute to public debate; to monitor and observe election processes...."[166] At the regional level, according to the African Commission, "[a]ssociations shall be able to engage in the political, social and cultural life of their societies, and to be involved in all matters pertaining to public policy and public affairs, including, *inter alia*, human rights, democratic governance, and economic affairs, at the national, regional and international levels."[167]

Principle 7 (Freedom to seek, obtain, and use funds)

Nonprofit civil entities are free to seek, request, obtain, and use financing for the achievement of their social aims from public and private sources, both domestic and foreign.

Rationale for the Principle: Increasingly, CSOs face laws blocking access to funding from legitimate sources that are grounded in arguments, such as the need to protect national sovereignty. Additionally, misguided practices treat CSOs as if they were for-profit entities, solely because they engage in economic activities, even when they invest income earned towards their missions. *To promote access to funding, legal obstacles that hinder access to resources from diverse sources must be identified and mitigated. Similarly, they may generate their own income and dedicate the earnings to their mission without restriction other than compliance with each country's applicable tax law. States should promote financing for CSOs from diverse sources to ensure their sustainability and independence.*

Applicable international standards: The Inter-American Commission on Human Rights (IACHR)] reiterates that, as part of freedom of association, "[s]tates should allow and facilitate human rights organizations' access to foreign funds in the context of international cooperation." Based on this logic, organizations that are created to coordinate or monitor the receipt and management of funds at the state level should be geared towards promoting rather than restricting the funding opportunities for human rights non-governmental organizations.[168]

At the international level, "[t]he [UN] Special Rapporteur [for Freedom of Association] has repeatedly underlined that the ability to seek, secure and use resources — from domestic, foreign and international sources — is essential to the existence and effective operations of any association, no matter how small."[169] On a regional level, the African Commission has determined, meanwhile, that "[i]ncome generated shall not be distributed as profits to the members of not-for-profit associations.

---

[165] *Id*., *Second Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II. December 31, 2011, para. 175 (citation omitted).

[166] United Nations General Assembly, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/68/299, 7 August 2013, para.* 43.

[167] *Id*., *Guidelines on Freedom of Association and Assembly in Africa,* 10 November 2017, para. 25.

[168] *Id*., *Second Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II. December 31, 2011, par. 179.

[169] United Nations General Assembly, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/70/266, 4 August 2015, para.* 67.

Associations shall however be able to use their income to fund staff and reimburse expenses pertaining to the activities of the association and for purposes of sustainability."[170]

Principle 8 (Appropriate control of illicit financing)

The State should discharge its responsibility to regulate illicit financial activities in accordance with its obligations under international human rights instruments. Restrictions applied to civil nonprofit entities should be proportionate to the risk identified, evidence-based, and implemented without limiting the legitimate work of the sector.

Rationale for the Principle: States frequently cite Financial Action Task Force (FATF) global standards for countering the financing of terrorism and money laundering to justify enhanced legal requirements on all or most non-profit organizations. This type of disproportionate requirement, lacking a foundation in evidence of risk of a violation of a state interest, is inconsistent with both freedom of association and FATF standards, and carries unintended negative consequences. To promote appropriate control of financial crimes, States should correctly implement FATF standards through laws proportionate to actual evidence of risk that CSOs will be misused for financial crimes, including evidence of risk mitigation provided by the sector. Constraints on CSOs to counter terrorism financing must be based on actual evidence of risk and focused on those organizations identified as being high-risk due to their characteristics or activities. Restrictions on CSOs must be proportionate to the risk identified, implemented in accordance with Article 16 of the American Convention, and avoid limiting legitimate CSO activities.

Applicable international standards: In the Americas, "[i]n the case of organizations dedicated to the defense of human rights, in invoking national security it is not legitimate to use security or anti-terrorism legislation to suppress activities aimed at the promotion and protection of human rights."[171]

The UN Special Rapporteur for Freedom of Association has observed that "undue restrictions on resources available to associations impact the enjoyment of the right to freedom of association and also undermine civil, cultural, economic, political and social rights as a whole."[172] Likewise, he has further stated that "[s]tates have a responsibility to address money-laundering and terrorism, but this should never be used as a justification to undermine the credibility of the concerned association, nor to unduly impede its legitimate work."[173] It is the view of the Financial Action Task Force (FATF) that "[m]easures to protect non-profit organizations (NPOs) from potential terrorist financing abuse should be targeted and in line with the risk-based approach. It is also important for such measures to be implemented in a manner which respects countries' obligations under the Charter of the United Nations and international human rights law."[174]

Principle 9 (Access to public financing under equal conditions and without discrimination)

Civil nonprofit entities may have access to public funds through transparent, equitable and non-discriminatory systems, being subject to the general rules of accountability and responsibility of their legal representatives.

Rationale for the Principle: CSOs have the right to solicit and receive public funds, which should be awarded through transparent, fair and non-discriminatory procedures. When private non-profit entities receive public funding, they also assume responsibility for the transparent and accountable use of those funds awarded. General rules of government accountability and control should govern the use of public funds by CSOs; requirements should not be more burdensome than those applied to for-profit entities. Receipt of public funding does not transform a CSO into a public entity subject to access

[170] *Id*., *Guidelines on Freedom of Association and Assembly in Africa*, 10 November 2017, para. 40.
[171] *Id*., *Second Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II. December 31, 2011, para. 167.
[172] Human Rights Council, *Report of the Special Rapporteur on the rights of freedom of peaceful assembly and of association, Maina Kiai*, A/HRC/23/39, 24 April 2013, para. 9.
[173] *Id*., *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, A/HRC/20/27, 21 May 2012, para. 70.
[174] Financial Action Task Force (FATF), *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, Interpretative Note to Recommendation 8*, para. A.2, February 2012 (updated in October 2021 and March 2022).

to public information laws. Laws that permit CSOs to solicit, receive, and use public funds without transparent and fair criteria reduce access to resources and may damage the reputation of the entire sector. Laws governing the use of public funds that treat recipient CSOs as public entities undermine their non-profit and non-governmental character and subject them to excessive meddling. To promote access to public funding, States should establish systems with fair criteria and transparent procedures that lend credibility and legitimacy to CSOs that use public funding.

Applicable international standards: "The IACHR reiterates that the right of access to information obligates civil society organizations to turn over information exclusively on the handling of public funds, the provision of services for which they are responsible, and the performance of public functions that may be entrusted to them."[175]

At the global level, "[w]hile States are encouraged to facilitate public funding to civil society organizations working in development and poverty eradication, State funding schemes should preserve civil society independence, by being transparent, fair and accessible to all organizations, including informal groups."[176] At the regional level, the African Commission has established that "[s]tates should provide tax benefits, and public support where possible, to not-for-profit associations. Public support includes not only direct financial support, but rather all forms of support, including material support, in-kind benefits, exemptions, and other forms of non-direct support."[177]

Principle 10 (Special tax regime)

Nonprofit civil entities should have access to tax benefits in accordance with their nonprofit nature without discrimination.

Rationale for the Principle States worldwide tend to fulfill their duty to promote freedom of association by granting preferential tax treatment to CSOs and donors. Tax exemptions and deductions for public benefit CSOs and their donors are good practices for the efficient use of the public treasury. In some countries in the region, however, disproportionate requirements and selective implementation impede access to these benefits. To implement an enabling special fiscal regime, States should enact simplified requirements with tangible benefits, justified by the CSO sector's valuable public benefit contributions. Fiscal regimes should provide an enabling framework for non-profit entities that promotes freedom of association through tax incentives for donations and other sources of income. States should establish clear and transparent procedures and deadlines, as well as appeals mechanisms.

Applicable international standards: "[T]he IACHR has considered that one way to comply with this obligation is through tax exemptions to organizations dedicated to protecting human rights."[178]

At the global level, "[s]tates' positive obligation to establish and maintain an enabling environment for associations extends to fostering the ability to solicit, receive and utilize resources. Some States do this by extending tax privileges to associations registered as non-profit entities."[179] At the regional level, the African Commission has ruled that "[s]tates that provide public support to associations, including in the form of tax benefits, shall ensure that funds and benefits are distributed in an impartial, nonpartisan and transparent manner, on the basis of clear and objective criteria, and that

---

[175] *Id., Second Report on the Situation of Human the Rights Defenders in the Americas, para.* 182 (text in box at end). *See also, IACHR, Office of the Special Rapporteur for Freedom of Expression, The right of access to information in the inter-American legal framework,* 30 December 2009, para. 19.

[176] United Nations General Assembly, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Clément Nyaletsossi Voule, A/74/349, 11 November 2019, para.* 53.

[177] *Id., Guidelines on Freedom of Association and Assembly in Africa,* 10 November 2017, para. 41 (includes the footnote text) (Spanish translation unofficial).

[178] *Id., Second Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II. December 31, 2011, para. 187.

[179] *Id., Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/70/266, 4 August 2015, para.* 79.

the granting of funds or benefits is not used as a means to undermine the independence of civil society sphere."[180]

Principle 11 (Proportional penalties and due process)

Sanctions imposed by States on nonprofit civil entities shall only be applied in limited circumstances established by law in advance. They shall be progressive, necessary and strictly proportional; and be applied on reasonable, reasoned and proven grounds within a judicial process, with all the guarantees of due process.

Rationale for the Principle: The FATF, among other bodies, has noted a trend of misapplying money laundering and financing of terrorism laws to impose disproportionate sanctions on CSOs without due process guarantees. In many States, this tendency is limiting the capacity of CSOs to achieve their public benefit missions, with grave consequences. States should follow the FATF recommendations to identify and mitigate inappropriate restrictions that limit the legitimate work of CSOs, establishing only proportionate sanctions, with due process guarantees, that are based on a prior risk assessment and not applied generally to the entire sector. When authorities impose sanctions that are subsequently ruled illegal, CSOs shall have the right to seek restitution for damages and guarantees of non-repetition.

Applicable international standards: Within the inter-American system, it has been established that "[s]tates have the obligation to take all necessary measures to avoid having State investigations lead to unjust or groundless trials for individuals who legitimately claim the respect and protection of human rights."[181]

At the global level, as the FATF is of the view that "[a] risk-based approach applying focused measures in dealing with identified threats of terrorist financing abuse to protect not-for-profit organizations is essential given the diversity within individual national sectors.... Focused measures adopted by countries to protect not-for-profit organizations from terrorist financing abuse should not disrupt or discourage legitimate charitable activities."[182] For its region, the African Commission has established that "[s]tates shall not impose criminal sanctions in the context of laws governing not-for-profit associations. All criminal sanctions shall be specified within the penal code and not elsewhere. Sanctions shall be applied only in narrow and lawfully prescribed circumstances, shall be strictly proportionate to the gravity of the misconduct in question, and shall only be applied by an impartial, independent and regularly constituted court, following a full trial and appeal process."[183]

Principle 12 (Voluntary and forced dissolution)

The dissolution of nonprofit civil entities, their liquidation and the disposal of their assets should follow the provisions contained in their bylaws, as expressed by the will of their members. Members should not distribute the entity's assets among themselves. Compulsory dissolution, as a legal penalty, should be appropriate only in exceptional circumstances and in the most serious cases that entail the infringement of a legitimate interest recognized by international human rights instruments and where less restrictive measures would not be sufficient to protect such an interest.

Rationale for the Principle: Dissolutions of CSOs have increased markedly in some countries in the region. The growing number of confiscations of assets from dissolved organizations is also a

---

[180] *Id*., *Guidelines on Freedom of Association and Assembly in Africa,* 10 November 2017, para. 42 (Spanish translation unofficial).

[181] *Ibid*., *Second Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II. December 31, 2011, par. 76.

[182] *Id*., *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation, Interpretative Note to Recommendation 8*, Secs. B(4)(a) and (d), February 2012 (updated in October 2021 and March 2022). *See also*: FATF, *High-Level Synopsis of the Stocktake of the Unintended Consequences of the FATF Standards*, October 27, 2021 ["The revised Recommendation 8 aims to protect nonprofit organizations from potential terrorism financing abuse while also ensuring that focused risk-based measures do not unduly disrupt or discourage legitimate charitable activities." (Spanish translation unofficial)].

[183] *Id*., *Guidelines on Freedom of Association and Assembly in Africa,* 10 November 2017, paras. 55 and 56 (unofficial translation).

worrisome trend. These tendencies represent an alarming threat to exercising freedom of association in the region; in some cases, CSOs denounce that confiscations are imposed as political punishment, inconsistent with the right to property under the American Convention. To promote compliance with the American Convention regarding dissolution of CSOs, States should enact regimes with sanctions that are appropriate to the legitimate state interest in question and respect the intentions expressed in an organization's statutes.

Applicable international standards: Under the inter-American system, [t]he States should... ensure an impartial remedy for situations in which organizations' registration is suspended or the organization dissolved."[184]

At the global level, "[i]nvoluntary dissolution and suspension are perhaps the most serious sanctions that the authorities can impose on an organization. They should be used only when other, less restrictive measures would be insufficient and should be guided by the principles of proportionality and necessity. Moreover, associations should have the right to appeal decisions regarding suspension or dissolution before an independent and impartial court."[185] At the regional level, the Venice Commission has determined that "[t]he existence of an association may be terminated by decision of its members or by way of a court decision. Voluntary termination of an association may occur when the association has met its goals and objectives, or, for example, when it wishes to merge with another association or no longer wishes to operate. Involuntary termination... may take the form of dissolution...may only occur following a decision by an independent and impartial court."[186] The African Commission, meanwhile, has held that "dissolution of an association by the state may only be applied where there has been a serious violation of national law, in compliance with regional and international human rights law and as a matter of last resort. The requisite level of gravity is only reached in cases involving the pursuit of illegitimate purposes, such as where the association in question aims at large-scale, coordinated intimidation of members of the general population, for instance on the basis of a racially-motivated position."[187]

* * *

2. Development of international standards on neurorights

Document

CJI/RES. 281 (CII-O/23) corr.1 Inter-American Declaration of principles regarding neuroscience, neurotechnologies, and human rights

*** * ***

During the 98th Regular Session of the Inter-American Juridical Committee (Virtual session, April, 2021), Dr. Ramiro Orias, recently elected as a member of the Committee, submitted a new issue to be added to the agenda of the Committee, the "Development of international standards on neuro-rights", document CJI/doc. 631/21.

He noted that it is a cutting-edge topic that has not been regulated, so that the idea is to contribute to a better understanding of neurotechnology and artificial intelligence through the development of a set of inter-American principles aimed at protecting the mental privacy of individuals, that clearly establishes the possibilities and limits of people's rights, including their right to self-determination (while seeking to avoid abuses).

---

[184] *Id., Second Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II. December 31, 2011, p. 243, rec. 20.

[185] *Id., Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, A/HRC/70/266, 4 August 2015, para.* 38.

[186] *Id., Guidelines on Freedom of Association, Warsaw*, 2015, ISBN 978-92-9234-906-6, paras. 242-244.

[187] *Id., Guidelines on Freedom of Association and Assembly in Africa,* 10 November 2017, para. 58 (includes the text of the footnote) (unofficial translation).

Both Drs. Rudge and Larson agreed to the proposal regarding neuro-rights, and the plenary of Committee supported its inclusion in the agenda. Dr. Orias confirmed his interest in being the rapporteur responsible for this issue.

During the 99th Regular Session of the Inter-American Juridical Committee (Virtual session, August, 2021), the topic's rapporteur, Dr. Ramiro Orias Arredondo, presented his first report on the subject, document CJI/doc. 641/21, the result of the work of a group composed of the Neurorights Initiative of Columbia University (chaired by Dr. Rafael Yuste), the Pro Bono Network of the Americas, and the Kamanau Foundation. Although originally it was intended to develop a proposal of principles, the final decision was to produce a proposal for a declaration expressing concerns on several issues arising from the impacts of neurotechnologies.

As a normative framework, the rapporteur proposes to adopt in the first instance a draft declaration that would be made up of six main sections through which the OAS would subsequently be requested to draft a group of "inter-American principles on neurotechnologies and human rights designed to guide national legislation."

Dr. Eric P. Rudge applauded the quality of the document and asked about the challenges confronted by States and international organizations that are already dealing with this issue. He proposed adding a reference to education. He also requested additional information on the role of private companies and the determination of the duration and the time to carry out the project. In response, the rapporteur explained that the introductory paragraph refers to the need to address the risks and concerns posed by neuroscience; this does not seek to limit scientific progress, but rather to stimulate new and responsible practices that are respectful of human rights. He explained that the OECD adopted a resolution on the matter in 2009, while UNESCO has a draft on ethical issues dating from 2020. In turn, he said that both Chile and Brazil are working on bills on this issue. Something not mentioned in the report is a report published recently by the Council of Europe indicating that it was to undertake the preparation of a draft Framework Convention on Artificial Intelligence. Regarding the lack of regulation, the concern is related to the fact that private groups are advancing without taking into account the human-rights factor. He recalled that the American Convention on Human Rights recognizes the people's right to mental and physical integrity.

Dr. Milenko Bertrand congratulated the rapporteur on the document he presented, which initiates an avant-garde path in the technological field of the Hemisphere's legal reflection on technologies. It is an effort in which the Committee will be able to anticipate discussions on these very advanced topics. Furthermore, it will be possible to have a predetermined collective position that could give us a more solid bargaining power or standing in our countries to protect the rights exposed against the most advanced countries. He consulted the rapporteur on the path to pursue from now on.

The rapporteur confirmed that the CJI could play a leadership role, generating notions that contribute to the development of international law. The next step would be to develop principles, as was done in the area of personal data privacy.

Dr. George Galindo confirmed the importance of the subject, which inaugurates a very interesting space for the Committee's work, considering the quality of our jurists in the Hemisphere. He proposed condensing the principles and including comments in each case, along with a division between the introduction and the section containing the declarations. This study is considered something essential and vital in our times.

The rapporteur expressed his satisfaction with these proposals, which will help to increase the clarity of the document.

Dr. Mariana Salazar agreed with the comments already made and underscored this issue's close relationship with the report on personal data and the law applicable to cyberspace. She asked the rapporteur on the entity that would be responsible for developing the principles. She also asked about the relevance of having a mandate of the General Assembly, in a context in which the Committee has its own competencies. The rapporteur thanked Dr. Salazar and promised to make an adjustment in the title so that the document

of principles could be developed by the Committee. According to him, the involvement of the General Assembly responds to the need to give the issue greater legitimacy.

The Chairman noted the important aspects of international law proposed by the report on an issue of this nature, with contributions of the utmost importance.

On Tuesday, August 10, 2021, the rapporteur submitted a revised version consistent with comments that were presented by the members and after having made an effort to refine the report to focus on the more general reflections regarding legal principles and concerns. The introductory part recalls the inter-American legal framework and the reflections on the five topics are summarized in two or three paragraphs in each case.

1. **Conditioning of the personality and loss of autonomy:** presents the normative framework for addressing risks that could arise in neuronal activity.

2. **Legitimate interventions in matters of health, physical, and mental integrity:** deals with respect for personal integrity and specifies the principles developed within the framework of the right to health, such as informed consent and medical secrecy.

3. **Mental privacy and protection of neural data obtained from the use of neurotechnologies:** examines the legitimate purposes that should guide the collection of personal data, including the protection of the most sensitive data.

4. **Equal access and non-discrimination in the use of neurotechnologies:** suggests measures that prevent arbitrary treatment and the search for conditions of substantive equality of historically excluded and discriminated groups.

5. **Freedom of expression and access to public information:** examines concerns regarding control and monitoring, and the importance of transparency and informed public debate.

6. **Involvement of the States, the private sector, academia, the scientific world, the OAS, and the inter-American human-rights system:** proposes measures and safeguards to contribute to the development and promotion of technology, within a framework that respects the principles set forth. An appeal is made to various actors: States, the private sector, academia, and the scientific world.

Dr. Eric P. Rudge asked if it was possible to abstain from the use of interface-based technologies, or to limit their use, considering that in certain circumstances it may be necessary to lift the ban on the State.

The rapporteur explained that the monitoring risks present the possibility of social control by the State, and there would be room to improve the wording to define that the interface be used for legitimate purposes and so avoid drawing up a list, and in this way specify the concept.

The Chairman considered that establishing respect for human rights as a limit would be to limit the issue and suggested also including respect for the dignity of the human being. This proposal was accepted by the rapporteur, who suggested including it in the introductory part.

Dr. Eric P. Rudge reiterated his request regarding the appeal to the States in section d) of numeral 8 since abstaining is not a very extreme measure. He suggested to clearly state that this applies only when the State has the sole purpose of social control, and this may change depending on the circumstances.

The rapporteur confirmed that a specific adaptation will be made in response to Dr. Rudge’s suggestion.

The Chair also requested the support of the Technical Secretariat in drafting the text in the form of a statement to maintain consistency.

Dr. George Galindo proposed to continue studying the subject, and to include the presentation of experts involved in this subject in the next meeting.

The Chairman attested to the existence of a multidisciplinary group.

In turn, the rapporteur accepted Dr. Galindo's suggestion and indicated that the Group of Experts would be willing to meet with the plenary session of the CJI in order to resolve doubts and offer clarifications. He proposed holding a virtual meeting one week prior to the CJI session. As for the rest, he reported that the same group had requested to make a presentation to the Inter-American Commission on Human Rights at a thematic session. Regarding the next stage, responses to the concerns raised in this first version of the document are expected in the next session.

Prior to the end of the session, the rapporteur for the topic, Dr. Ramiro Orias Arredondo, explained that Dr. Dante Negro had assisted him in a revision of the text reflecting the proposals received from several members of the Committee, including suggestions on interface from Dr. Eric P. Rudge and the Chairman on the compatibility with human dignity. A new revision version has been delivered: document CJI/doc. 641/21 rev. 2.

Dr. Milenko Bertrand highlighted the relevance of this document on a topic in which the CJI may play a pioneer role and expressed his agreement with the report's current wording. This comment was shared by Dr. Eric P. Rudge, who also congratulated the rapporteur on his work.

The Chairman urged the rapporteur to modify the title, taking into consideration that as it had the support of the plenary, the document would become a declaration, and asked that the document be distributed among the States. His suggestion was confirmed by the rapporteur. He also undertook to present a version on the principles applicable to this topic during the forthcoming session of the Committee, together with the initiative of organizing a meeting with the working group.

During the 100th Regular Session of the Inter-American Juridical Committee (Lima, May, 2022), the rapporteur for the topic, Dr. Ramiro Orias, presented a progress report on the subject, document CJI/doc.662/22. He reiterated that he is looking to establish the foundation for a declaration of principles that has been prepared with the support of a group of experts and specialists and has been the subject of several meetings and discussion activities.

He reported on important recent precedents in different forums, such as the report adopted at UNESCO entitled "Ethical Issues of New Technologies," which explores ethical and legal issues that may be raised thereby and urges that international regimes and national rules be established to address the effects that may appear. He also referred to a report by the UN Special Rapporteur on Freedom of Expression, which deals with individual autonomy, and another by the UN High Commissioner for Human Rights, which addresses the issue of the influence of new technologies on decision-making. Finally, he addressed the September 2021 report by the UN Secretary-General, which calls for addressing cutting-edge considerations, such as new technologies, from a human rights perspective. In light of these developments, the rapporteur considered it pertinent to involve the private sector in the development of the topic.

This version of the proposed declaration would be composed of 15 principles:

1. Identity and autonomy
2. Protection of human rights by design
3. Sensitive personal data. Neuro-privacy
4. Security and Mastery of Neuronal Data
5. Informed Consent
6. Confidentiality and guarantee of non-intrusiveness.
7. Equality and non-discrimination [neurodiscrimination]
8. Equal access to neurotechnologies
9. Transparency and proactive accountability.
10. Data Governance
11. Control over the enhancement of cognitive capabilities.

12. Development of neurosciences and neurotechnologies
13. Neurocognitive integrity, safeguards, and moratoria.
14. Supervision and oversight
15. Access to effective guardianship of the neurocognitive substrate.

Dr. George Bandeira expressed his appreciation to the rapporteur for the choice of topic and the way it was approached, a subject that is innovative and places the Committee at the forefront, compared to other institutions. As this is a document that should not be binding on States, he suggested revising the texts to ensure that the terminology is more neutral, mentioning Principles 6, 9, and 10 as examples.

The rapporteur welcomed these ideas and undertook to carry out a style review, clarifying that in the discussion of the group of experts supporting him in this report, as well as the debates taking place within UNESCO in the context of bioethics and even those taking place within the States, they have not yet been able to determine the nature of the international obligations for the States.

Dr. José Moreno Rodríguez congratulated the rapporteur on a very successful work. Like Dr. Galindo, he proposed evaluating the use of terminology, leaving the decision to determine the nature of the report in the hands of the rapporteur, taking into consideration that this is a new topic, which requires more time to observe how it develops. He also asked the rapporteur if the treatment of this topic does not conflict with others that are being generated at the international level, and therefore if it is being duplicated, and whether efforts are underway in other organizations, ensuring our hemisphere is keeping pace with the rest of the world.

The rapporteur for the topic explained that the leadership on the part of the OAS can be compared to the work developed in this organization in the fight against corruption, when a binding instrument is presented and followed by the rest of the world. In fact, in the subject under study, binding instruments on neuro-rights are being proposed in some instances worldwide.

Dr. Eric Rudge congratulated the rapporteur and asked whether Principle 7 conflicts with Principle 8, in relation to non-discrimination.

Dr. Mariana Salazar joined in the congratulations for the quality of the work and its rapid progress. She suggested that the seventh paragraph of the preamble refer to the adoption of the principles on privacy and data protection adopted by the OAS General Assembly. In agreement with the members who have spoken previously, she asked him to base the rules that are presented on the basis of the existing regulations (to the extent that they exist), and therefore to follow a little of what was done in the area of cybersecurity with the Tallinn Manuals.

The topic rapporteur offered his thanks for the comments and emphasized that this is a new topic that does not have a particularly large body of literature, in an area that is advancing in line with developments in the medical field, with a regulatory gap. The rapporteur undertook to present a new version for the August session.

During the 101st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2022), the rapporteur for the topic, Dr. Ramiro Orias, delivered the "Second progress report. Draft Inter-American principles on neurosciences, neurotechnologies, and human rights," (document CJI/doc.673/22 rev.1). The rapporteur declared the intention to continue revising the proposal and the respective foundations, without creating new principles but rather to apply the current standard. He observed that there was a legal vacuum in the Congresses of our countries. Furthermore, he pointed to the Secretary General's presentation, which reveals a gap between the rules and the practice at the global level – a situation that calls for the regime covering this issue to be strengthened. Dr. Orias revealed that two new principles were included, making ten elements altogether:

Principle 1: Identity, autonomy, and privacy of neural activity

Principle 2: Human Rights Protection via neurotechnology design.

Principle 3: Neural data as sensitive personal data.

Principle 4: Informed consent on neural data.

Principle 5: Equality, Non-Discrimination, and Equal Access to neurotechnologies.

Principle 6: Exclusive therapeutic application to enhance cognitive ability.

Principle 7: Neurocognitive integrity.

Principle 8: Neurotechnology transparency and governance.

Principle 9: Oversight and control of neurotechnologies.

Principle 10: Access to due process and access to remedies associated with the development and use of neurotechnologies.

Closing out his presentation, the rapporteur explained that this document reflected the latest findings on the subject and that he had had opportunity to disseminate it during Department of International Law training activities. He added that it would soon be the focus of a presentation at the University of Fortaleza in Brazil.

Dr. Mariana Salazar asked the rapporteur to include in preamble 6 a reference to the adoption of these principles by the General Assembly.

Dr. George Galindo Bandeira offered suggestions to establish that the text was non-binding, as stated with reference to "should be" in principle 6.

Dr. Eric P. Rudge asked the rapporteur whether the Caribbean could help promote the document and take part in forums with experts from the Caribbean. In reply, the rapporteur explained that his participation in Brazil was an academic exercise, stemming from contact made with interdisciplinary communities of study in different States. He stated that any participation would be very useful.

The Vice Chair thanked the rapporteur. This being a groundbreaking report on the subject and one that will be of international interest, he suggested sending it to the states to hear their opinions before the next session and to give it added legitimacy while making the States more empowered in terms of the report. The rapporteur concurred that it should be sent to the OAS member states. He then asked for more time to make the changes suggested that day, prior to sending it to the states.

Dr. Dante Negro explained that in its capacity as Technical Secretariat, the Department of International Law, would circulate the report with a deadline for replies to be received.

During the 102nd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2023), the rapporteur for the topic, Dr. Ramiro Orias, presented a draft Declaration, document CJI/doc.689/23, which included the ten proposed principles, along with an explanation of each.

In his presentation, he noted that he had taken on board the comments submitted by Ecuador and Panama, since the proposals from the United States had arrived very late.

The rapporteur then reviewed the proposed principles.

At the end of his presentation, he explained that the draft declaration aims at adopting the principles and submitting them to the Organization's political bodies for their information and consideration. He also asked the Department of International Law to ensure their distribution among the states, the private sector, academia, and the scientific world. Finally, he called for the topic to remain on the Committee's work agenda to "further develop and explore the implications of immersive and digital technologies, as well as emerging technologies based on artificial intelligence."

Dr. George Galindo noted that the academic community was already aware of these developments, as he had participated in a forum on the subject. From the formal point of view, he requested that the Spanish

text of Principle 1 use a plural form. Echoing the words used by the rapporteur, he concluded that this was an issue that should be "considered essential for humanity."

Dr. Eric P. Rudge congratulated the rapporteur. In operative paragraph 4, he asked on the pertinence to refer to older people in the list of vulnerable persons along with the references to children and adolescents. He also noted an issue of form in the English version of Principle 3.

Dr. José Luis Moreno Guerra reflected on the practical applications of advances in technology, which allowed for applications but were sometimes invasive. He also said that neuroscience had much to offer human beings in the way of help, provided that this was done in a respectful manner. He supported the adoption of the document and its widest possible dissemination.

Dr. Luis García-Corrochano supported the proposal presented by the rapporteur. He suggested that in the last principle, on effective protection, a "responsible national authority" should be designated, thus giving the state a degree of involvement. The rapporteur agreed with the proposal.

Dr. Julio Rojas-Báez invoked a remark by Judge Cançado Trindade stating that "the law always responds"; in this case, the Committee's work was "responding" with this first step on an extremely new topic. He also supported the recommendation made by Dr. García-Corrochano.

Dr. Cecilia Fresnedo congratulated the rapporteur and expressed her support for the recommendation he had presented.

Dr. Martha Luna congratulated both the rapporteurs of this topic, Dr. Orias, and of the previous topic, Dr. José A. Moreno Rodríguez.

The Chair congratulated the rapporteur on his work and asked him about the comments submitted by the United States. In response, the rapporteur explained that they were very specific observations.

The Vice Chair noted that the ideas shared by the United States could be easily included, and it could even be put on record that it was a task that will be assumed by the Committee. He suggested incorporating a summary of the U.S. position—or a note with the main points in that position—in the report, without publishing the position itself. That would be very important for indicating the country's position.

The rapporteur thought it best to follow the model used with the contributions of Ecuador and Panama. At the end of the presentation, he undertook to present the next day a final version incorporating the suggestions made by the Committee's members and the comments from the United States, where 95% of the industrial developments in this field are based.

Accordingly, the rapporteur for the topic, Dr. Ramiro Orias, submitted revised version of his report with explanation of the case, document CJI/doc.689/23 rev.1:

- He stated that he had included older persons in the group of vulnerable persons, both in the preamble and in the operative paragraphs.
- The references proposed by the delegation of the United States— such as good practices and the non-binding nature of the document—had also been added to the final paragraph of the preamble.
- In item 9, reference had been made to the establishment of a competent national authority, following the suggestion made by Dr. Luis García-Corrochano.

Dr. George Galindo suggested omitting the country's name and including only the texts of the comments, particularly in footnote 1; the rapporteur agreed with this suggestion.

Echoing the feeling of the plenary, the Chair expressed his congratulations for this document, which marks a course for the Committee in a new area.

The rapporteur thanked the members and explained that this report would also serve as an input for the universal system, in light of recent developments in the United Nations where a working group for the subject had been established.

On March 9, 2023, the Inter-American Juridical Committee adopted a Declaration of Inter-American Principles on Neurosciences, Neurotechnologies and Human Rights, through (resolution CJI/RES. 281 (CII-O/23) corr.1) and submitted it to the Permanent Council on March 29, 2023. The Declaration of Principles can be consulted on the CJI website in the section on culminated topics at the following link: OAS :: Inter-American Juridical Committee (IAJC) :: Themes Recently Concluded

The following is the report adopted by the Committee at its March 2023 session, held in Rio de Janeiro, Brazil:

CJI/RES. 281 (CII-O/23) CORR.1

INTER-AMERICAN DECLARATION OF PRINCIPLES REGARDING NEUROSCIENCE, NEUROTECHNOLOGIES, AND HUMAN RIGHTS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

TAKEN INTO ACCOUNT:

That in recent times there has been an accelerated development of research in neuroscience and neurotechnologies, vastly increasing, inter alia, knowledge of the human being, the study of the brain, and the prevention and cure of diseases for the benefit of humanity.

That this progress could also encourage unwise uses or applications that could impair or meddle with the brain activity of individuals, possibly affecting the essence of their personality and identity, thereby posing important ethical-legal challenges with respect to guarantees for already established human rights. This makes it necessary to have inter-American principles that link the advances in neurotechnology with the existing framework for protecting human rights, including dignity, non-discrimination, identity, the right to privacy and intimacy, physical and mental health, the prohibition of torture and cruel, inhuman, and degrading treatment, and access to judicial remedies, among others;

GIVEN that the Charter of the Organization of American States (OAS) maintains that scientific and technological development should strengthen the fundamental rights of people, seeking the overall improvement of the individual and social justice and progress as the foundation of democracy; and that the Social Charter of the Americas approved by the OAS establishes that scientific and technological development should help to improve people's living standards and achieve their integral development, so that it is necessary to take steps to ensure that the application of innovations benefits everyone;

RECALLING that, according to the *American Declaration of the Rights and Duties of Man*, all men are born free and equal, in dignity and in rights, and, being endowed by nature with reason and conscience, they should conduct themselves as brothers one to another; Likewise, and in accordance with the *American Convention on Human Rights* (Pact of San José), States Parties have the obligation to respect the rights and freedoms recognized therein, to ensure the free and full exercise thereof to all persons, and to commit to adopt specific measures with a view to achieving the progressive development and full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the *Charter of the Organization of American States* (OAS);

RECALLING ALSO the *Additional Protocol to the American Convention on Economic, Social, and Cultural Rights* (Protocol of San Salvador) recognizes the right of every person to enjoy the benefits of scientific and technological progress; and also that the Inter-American Convention on the Rights of Older Persons establishes that those persons have the right to their cultural identity and to the enjoyment of the benefits of scientific and technological progress, to which end the

States Parties shall promote the necessary measures to ensure them preferential access under affordable conditions.

RECALLING that the *Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities* calls upon States Parties to undertake to collaborate effectively in scientific and technological research related to prevention, treatment, and rehabilitation, as well as the development of means and resources designed to facilitate or promote the independence and self-sufficiency of persons with disabilities, in order to promote those persons' full integration into society on an equal footing.

BEARING IN MIND that the General Assembly of the Organization of American States, at its 51st regular session, approved the *Updated Principles on Privacy and Personal Data Protection*, prepared by the Inter-American Juridical Committee, through resolution AG/RES. 2974 (LI-O/21), in November 2021; and that the Inter-American Juridical Committee adopted the *Declaration on Neuroscience, Neurotechnologies, and Human Rights: New Legal Challenges for the Americas* (CJI/DEC. 01 (XCIX-O/21), in August 2021;

RESOLVES:

1. To approve the *Inter-American Declaration of Principles on Neurosciences, Neurotechnologies, and Human Rights, with annotations,* annexed to this resolution as a guideline so that people can take full advantage of the benefits of scientific advances and their applications in the field of neuroscience and the development of neurotechnologies in the certainty that their human rights will not be undermined, thus establishing international standards that help to guide and harmonize the necessary national regulations in this area

2. To transmit this resolution and the Declaration of Principles contained in the annexed document to the Permanent Council of the Organization of American States and to the General Assembly for their due knowledge and consideration.

3. To request the Department of International Law, in its capacity as Technical Secretariat of the Inter-American Juridical Committee, to disseminate this Declaration of Principles as widely as possible among the various stakeholders, in particular, to draw the attention of the States, the private sector, academia, and the scientific world, to the need to make possible the full and safe enjoyment of the benefits of scientific advances and their applications, ensuring respect for human rights, while urging them to participate in the process of adopting concrete measures that will allow these innovations to contribute to the well-being of individuals and communities.

4. Keep the treatment of this issue in its work agenda, considering the special impacts of neurotechnologies on the most vulnerable groups of society and bearing in mind that there is a need to deepen and further explore the implications of immersive and digital technologies, as well as emerging technologies based on artificial intelligence, particularly in relation to the rights of children and adolescents, as well as persons with disabilities, older adults, and persons deprived of liberty, who require special protection.

This resolution was adopted unanimously at the regular session held on March 9, 2023, by the following members: Drs. Martha Luna Véliz, Eric P. Rudge, George Rodrigo Bandeira Galindo, José Luis Moreno Guerra, Alejandro Alday González, Julio José Rojas Báez, José Antonio Moreno Rodríguez, Luis García-Corrochano Moyano, Cecilia Fresnedo de Aguirre, and Ramiro Gastón Orias Arredondo.

* * *

Appendix I

Inter-American Declaration of Principles on Neuroscience, Neurotechnologies, and Human rights

Principle 1: Identity, autonomy, and privacy of neural activity*. The development and use of neurotechnologies will seek to contribute to the right of every person to enjoy a dignified life, together with the benefits of scientific and technological progress, preserving the rights of identity, autonomy, and the free development of personality. Neural activity generates the totality of the mental and cognitive activities of human beings, and therefore forms part of the essence of a person's very being, identity and privacy, and is therefore protected by human rights norms. It is essential to preserve and guarantee each person's control over his or her own individual identity, as well as to ensure people's self-determination and freedom of thought.*

Principle 2: Protection of Human Rights in the design of neurotechnologies. *States shall promote a human rights-based approach in the development of neurotechnologies, seeking to ensure comprehensive protection and respect for human rights in the design of neurotechnologies, their research methods, as well as in their implementation, commercialization, evaluation, and use.*

Principle 3: Neural data are sensitive personal data. *Neural data are highly sensitive personal data. Those responsible for the processing and use of neural data must adopt enhanced privacy and security measures and ensure limits on the use of decoding techniques that allow a person to be identified or made identifiable, especially with databases or sets of information that are shared with third parties. States shall foster measures to ensure control, security, confidentiality, and integrity of neural data.*

Principle 4: Express and informed consent regarding neural data*. The consent of the person to whom the neural data belongs is a prerequisite for access to the collection of brain information. It is vital to guarantee free, informed, express, specific, unequivocal, and flawless consent when it comes to access to or processing of neural activity. The consent given must be revocable at any time. Special protection is required in the case of children and adolescents, as well as persons with disabilities, older persons, and persons deprived of liberty.*

Principle 5: Equality, Non-Discrimination, and Equal Access to Neurotechnologies*. The goal is to promote the development and use of neurotechnologies, accessible to all people in accordance with the characteristics of the generation concerned based on the principle of equality and non-discrimination. States shall guarantee equitable access to neurotechnologies, while respecting customs and traditions, and to develop public policies for responsible innovation, seeking to narrow inequality and discrimination gaps, especially with respect to the most vulnerable groups.*

Principle 6: Exclusive therapeutic application with respect to the enhancement of cognitive abilities. *The main purpose of these scientific and technological developments in medical assistance is to preserve or improve people's autonomy and thus promote their overall wellbeing, helping them to lead a dignified, healthy, productive, and autonomous life. States shall endeavor to exercise particular caution in regulating the use of neurotechnologies to increase the cognitive abilities of individuals, and shall establish clear limits and enhanced control, while taking special care and precautions with provisions that, apart from their therapeutic or health application, seek to study neurotechnologies and use them to enhance or improve cognitive skills for other purposes.*

Principle 7: Neurocognitive integrity*. It is essential to guarantee protection of the neurocognitive integrity of all persons and to prevent the use of neurotechnologies for malicious purposes that could result in procedures aimed at harming or impairing brain activity or impairing the exercise of human rights. Access to brain activity may never impair freedom of thought and conscience, making a person dependent on a third party, affecting her or his ideas, security, and independence. Every person has the right not to suffer violations, alterations, manipulations, and/or modifications of his or her neurocognitive integrity and intimacy that jeopardize or impair personal integrity; clauses ruling out or limiting liability shall not be permitted.. The protection of neurocognitive integrity is guaranteed in neurotechnological treatments; compulsive or forced*

application mechanisms, as well as their use as a method of torture or cruel, inhuman, or degrading treatment, are prohibited.

Principle 8: Transparent governance of neurotechnologies. *States shall ensure that all state and non-state actors involved in the development, use, and/or marketing of neurotechnologies guarantee the transparency of neurotechnological advances. This encompasses not only the way in which neurotechnologies are studied, developed, and applied, and the way they function, but also the impact they have on human rights and the accountability of all actors involved for the use made of neural data in their possession.*

Principle 9: Supervision and control of neurotechnologies*. It is incumbent upon States to exercise a supervisory/oversight role by establishing a competent, technically specialized, financially autonomous, and independent national authority to ensure that neurotechnologies are used and applied in accordance with international human rights standards, so as to avoid and prevent risks and negative impacts on people's rights and pay special attention to the rights of children and adolescents, persons with disabilities, and person deprived of liberty.*

Principle 10: Access to effective protection and access to remedies associated with the development and use of neurotechnologies*. States shall promote and ensure mechanisms for the effective protection of the rights associated with the development and use of neurotechnologies. It is also necessary to ensure access to judicial remedies and comprehensive reparation in the case of human rights violations, in order to promote effective protection of these guarantees, in accordance with these Principles.*

*** * ***

Appendix II

"Notes to the Inter-American Declaration of Principles on Neuroscience, Neurotechnologies, and Human Rights"

Background:

These notes expand on the concepts underlying the "Inter-American Declaration of Principles on Neuroscience, Neurotechnologies, and Human Rights" adopted by the Inter-American Juridical Committee of the OAS.

The Inter-American Juridical Committee adopted the "Declaration on Neuroscience, Neurotechnologies, and Human Rights: New Legal Challenges for the Americas" (CJI/DEC. 01 (XCIX-O/21)) in August 2021, initiating a process of reflection and confrontation with a variety of actors that included substantive input and specialized recommendations from an interdisciplinary Committee of Experts composed of scientists and jurists with expertise in fields related to the principles addressed herein.[1]

The notes to this document reflect the most recent discussions on this subject, notably the adoption of the report of the International Bioethics Committee of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on "Ethical Issues in Neurotechnology", published in December 2021; as well as recent international initiatives on the ethical, social, and human rights challenges of neuroscience and neurotechnologies, such as the "Recommendation on Responsible Innovation in Neurotechnology" adopted in December 2019 by the Organization for Economic Cooperation and Development (OECD); the Report of the Council of Europe on "Common Human Rights challenges raised by different applications of neurotechnologies in the biomedical field," adopted in October 2021; as well as the Declaration that - in June 2022 - was

[1] The Committee of Experts comprises: Eduardo Bertoni, Ciro Colombara, Francesca Fanucci, Verónica Hinestroza, Amelie Kim Cheang, Tomás de la Quadra Salcedo, Moisés Sánchez, Silvia Serrano Guzmán, and Rafael Yuste. This document also contains the comments submitted by the States of Ecuador and Panama, which were duly sent to the OAS Department of International Law. In addition, it contains suggestions made by other experts consulted via a written questionnaire.

approved by the Latin American and Caribbean Parliament (Parlatino), recommending the need to legislate on this matter.

The Inter-American Juridical Committee of the Organization of American States hereby adopts the following document as an important but nonbinding[2] guide to human rights dilemmas that may arise with advances in neuroscience and the development of neurotechnologies. The notes take existing international human rights standards into account and apply them by adapting them to address neurotechnological concerns. These principles are the product of analysis of international norms and standards that can be applied to the development of neurotechnologies with a view to making progress with good practices and countering any situation that may tend to violate human rights:

Notes and comments on the principles

Principle 1: Identity, autonomy, and privacy of neural activity*. The development and use of neurotechnologies shall seek to contribute to the right of every person to enjoy a life of dignity, together with the benefits of scientific and technological progress, by preserving the rights of identity, autonomy, and the free development of personality. Neural activity generates the totality of the mental and cognitive activities of human beings, and therefore forms part of the essence of a person's very being, identity and privacy. For that reason, it is protected by human rights norms. It is essential to preserve and guarantee each person's control over his or her own individual identity, as well as to ensure people's self-determination and freedom of thought.*

Concepts and comments: For the purposes of this document, neurotechnology is construed to mean any mechanism by which it is possible to observe or modify brain activity. This includes technological devices that allow direct or indirect connection to a person's nervous system. They may be invasive mechanisms, such as the implantation of devices or microchips in the brain (or any other part of the body),[3] as well as non-invasive methods, such as functional magnetic resonance imaging (fMRI). This definition of neurotechnologies encompasses the use of deep brain, electrical, and magnetic stimulation mechanisms, as well as the use of brain-computer interfaces or neural interfaces. The latter involve direct communication and transmission of information between a technological device and a person's nervous system.

Neuroscience is a recent discipline that is making it possible to expand current understanding of the human brain. The use of neurotechnologies in a clinical setting involves connecting a person's nervous system to electronic devices that make it possible to fully or partially restore the functioning of a given neurological faculty. For people with motor disabilities to people with neurodegenerative diseases such as Parkinson's or Alzheimer's, the development of neurotechnologies is significantly boosting research in the field of health, offering favorable scenarios for people suffering from neurological diseases that until recently were thought to be incurable. Notwithstanding its benefits for the well-being of human beings, the linking of the human brain to electronic devices and artificial intelligence mechanisms poses significant challenges to human rights and to the very essence of the individual.

Neurotechnologies should contribute to guaranteeing the right to a dignified life, free from all forms of violence, torture, and cruel, inhuman, or degrading treatment or punishment, as well as to the enjoyment of the highest attainable level of health, especially for those people who are in situations of vulnerability and risk, such as people with disabilities, persons deprived from their liberty, the elderly, indigenous peoples, Afro-descendants, and women, children, and adolescents who require comprehensive health care.[4]

The improper use of neurotechnologies may, in certain cases, lead a person to behave in a way that is not consistent with her or his personality. Thus, this principle has as a fundamental premise the preservation of individual identity against any neurotechnological interference. Since

[2] See note presented by the delegation of the United States, "Views from the United States on 'Second Progress Report: Draft Inter-American Principles on Neuroscience, Neurotechnologies and Human Rights'," March 2, 2023.

[3] Addition suggested by the State of Panama in its presentation on January 13, 2023.

[4] Addition suggested by the State of Ecuador in its presentation on January 17, 2023.

the human brain coordinates all an individual's vital processes, including behavior and decision making, and even generates the very essence of their personality, any modification to brain activity could entail risks associated with the impairment of personal identity, autonomy, and the free development of personality. Changes in neural architecture may affect a person's capacity to act or his or her ability to remain autonomous. Accordingly, neuronal activity generates the totality of mental and cognitive activities of human beings. It is therefore key to the preservation of privacy and must be protected by human rights norms related to it.

If an individual's capacity to act is not preserved, he or she could be at the mercy of third parties, companies, and even States or governments that may have an interest in modifying the personality or behavior of a given person, including, in cases involving public security, efforts to combat crime and impunity. That capacity includes the power of a person to make his or her own decisions regarding any intervention involving the use of neurotechnologies. Thus, according to this principle, cognitive freedom can never be impaired by compulsive or forced mechanisms (*mecanismos compulsivos o forzosos*).

In principle, one of the issues in relation to the rights under discussion is knowing what the right to identity is. The right to identity is indissolubly linked to the individual as such and, consequently, to the recognition of his or her legal personality, as well as to entitlement to rights and obligations. Personal identity is a human right that is conceived of as a highly complex construct, intimately linked to self-perception of personality and comprising anthropological, cultural, and social elements that are a vital part of a person's individuality and true identity.

In that sense, we understand that the right to identification is a right that allows the exercise of other rights. Indeed, it is the right of every person to have his or her birth registered and to receive a name and a nationality; the responsibilities of the State in that regard are also underpinned by other international human rights standards.[5] Identification is construed to mean the activity by which the State records a series of particular, essential, and distinctive attributes, and other circumstances pertaining to a person's identity that allow them to be individually identified in a unique, unequivocal, and differentiable way from the other members of a community, in order to guarantee the exercise of their rights and the fulfillment of their obligations. Hence the importance of ensuring that this identity is not impaired by the use of neurotechnologies. The possibility of neurotechnologies altering or modifying a person's neuronal activity may modify the essence and free development of his or her personality, which must be preserved at all times. For these reasons, the principle calls for preserving and guaranteeing each person's control over his or her own individual identity.

Article 11.2 of the American Convention on Human Rights (ACHR) establishes the right to privacy: "No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation." Regarding the scope of that right, the Inter-American Court of Human Rights (I/A Court H.R.) has written that "The sphere of privacy is characterized by being exempt from, and immune to, abusive and arbitrary invasion or attack by third parties or public authorities."[6]

However, neurotechnologies are pushing the very concept of privacy to the limit. Neuroimaging techniques have the ability to record brain activity. Research in this field will be

[5] Article 6 of the Universal Declaration of Human Rights states that "everyone has the right to recognition everywhere as a person before the law." Article 24 (2) of the International Covenant on Civil and Political Rights establishes that: "The child shall be registered immediately after birth and shall the right from birth to a name." Article 7 of the Convention on the Rights of the Child states that: "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents. States Parties shall ensure the implementation of these rights..." and Article 8 states: "States Parties undertake to respect the right of the child to preserve his or her identity ...."

[6] I/A Court H.R. Case of the Ituango Massacres v. Colombia. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 1, 2006. Series C No. 148, par.194.

justified by the principle of doing good (*beneficencia*)- treatment of disabling mental illnesses - and the principle of not doing harm, (*maleficiencia*)- not endangering people and the human species -.[7] Therefore, illegitimate and unlawful use of brain information and neural data governance are two key issues today. Although neurotechnologies do not currently allow "mind reading," they can reveal information that individuals consider highly sensitive, such as personality traits and information about an individual's internal mental activity. Accordingly, neural data are construed to mean those data derived from the activity of the nervous system of a person that constitute highly sensitive personal information because they reveal aspects of her or his internal mental activity. This internal mental activity is the essence of their personality, so that protection of that inner core is inseparable from the protection of human dignity and, therefore, also from the protection of human rights.

It should also be noted that the I/A Court H.R. has expressed its opinion on the concept of privacy and autonomy (ACHR, Article 11). Regarding an alleged violation of Article 11 of the American Convention, the Court has specified that the content of that provision includes, inter alia, the protection of privacy. For its part, the concept of privacy is a broad term that cannot be defined exhaustively, but includes, among other protected spheres, the right to establish and develop relationships with other human beings. For example, in the *El Mozote* case, the Inter-American Court considered that the rape of the young women violated essential values and aspects of their private lives and meant that they lost all control over their most personal and intimate decisions, and over their basic bodily functions. [8]

For its part, the Convention on the Rights of Persons with Disabilities[9]establishes that States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health and, furthermore, states that all appropriate measures shall be taken to promote the physical, cognitive, and psychological recovery, rehabilitation, and social reintegration of persons with disabilities, always in an environment that is conducive to the health, well-being, self-esteem, dignity, and autonomy of the person and that takes into account specific gender and age-related needs. [10] The above-mentioned instruments are binding on States when it comes to protecting the rights of persons with disabilities against the misuse of new technologies.

Principle 2: Protection of Human Rights in the design of neurotechnologies. *States shall promote a human rights-based approach in the development of neurotechnologies, seeking to ensure comprehensive protection and respect for human rights in the design of neurotechnologies, their research methods, as well as in their implementation, marketing, evaluation, and use.*

Concepts and comments: For the purposes of this principle, it is understood that the neurocognitive core (*sustrato*) of an individual is the product of his or her brain activity, which constitutes the essence of that individual's personality. Since neurotechnologies make it possible to modify a person's neural activity, under this principle it is fundamental to ensure full protection of human rights at every phase of the neurotechnology development cycle.

In other words, when emphasizing the importance of protecting and respecting human rights in the design of neurotechnologies, all the necessary technical and technological measures must be taken to comply with international treaties and instruments on human rights from the moment those

---

[7] Addition suggested by the State of Panama in its presentation on January 13, 2023.

[8] Inter-American Court of Human Rights, Judgment in the *Case of El Mozote and Nearby Places v. El Salvador.* Merits, Reparations, and Costs, Judgment of October 25, 2012, par. 166.

[9] Convention on the Rights of Persons with Disabilities, adopted by General Assembly resolution 61/106 of December 13, 2006, A/RES/61/106, Articles 16, 22ff.

[10] According to the aforementioned Convention (Article 22), respect for the privacy of persons with disabilities is geared to ensuring that: 1. No person with disabilities, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication or to unlawful attacks on his or her honor and reputation Persons with disabilities have the right to the protection of the law against such interference or attacks. 2. States Parties shall protect the privacy of personal, health, and rehabilitation information of persons with disabilities on an equal basis with others.

technologies are designed through to their final deployment and use. States shall also ensure that the development, use, and/or marketing of neurotechnologies are subject to human rights impact and risk assessments throughout their life cycle and that such assessments are conducted with the meaningful participation of persons entitled to human rights that are potentially impaired by such technologies.

Furthermore, the development of neurotechnology, in a manner that does not violate human dignity, must be based on ethical, social, and democratic principles, adopted by the States in their domestic legislation and reflected in the norms, public policies, and measures established, in accordance with Article 2 of the American Convention.[11]

Principle 3: Neural data as sensitive personal data. *Neural data are highly sensitive personal data. Those responsible for the processing and use of neural data must adopt enhanced privacy and security measures and ensure limits on the use of decoding techniques that allow a person to be identified or made identifiable, especially with databases or sets of information that are shared with third parties. States shall foster measures to ensure control, security, confidentiality, and integrity of neural data.*

Concepts and comments: The term "neural data" refers to data resulting from the use of new technologies for the identification and coding of the human brain's own biosignals. For the purposes of this principle, a dataset is defined as a set or collection of information treated as a single unit by a neurotechnological device. Likewise, sensitive personal data are construed to mean data referring to the private sphere of their owner whose misuse may lead to discrimination or place the person concerned at grave risk. By way of example, personal data are considered sensitive if they might reveal aspects such as racial or ethnic origin; religious, philosophical and moral beliefs or convictions; union membership; political opinions; information related to health, life, sexual preference or orientation, and genetic, neurological, or biometric data aimed at definitively identifying a natural person.

This is consistent with the Updated Principles on Privacy and Personal Data Protection.[12] One of the principles deals exclusively with this kind of data that "given its sensitivity in particular contexts, are especially likely to cause material harm to individuals if misused." Neural data are particularly likely to cause considerable harm to individuals if misused. Using artificial intelligence algorithms, neurotechnologies can recognize and decode neural information. This makes it possible to interpret (albeit in a limited way) the electrical parameters generated in the brain. That, in turn, allows correlations to be made between the decoded neural information and certain personality traits of an individual: information that can be used for non-medical or research-related purposes. Neural data may also be used for biometric identification, because a person's brain activity is unique, identifiable, and distinguishable from others, making it the most reliable means of biometric identification available to date. For these reasons, this principle seeks to protect brain information from intrusion by any individual, organization, or government that seeks to use neural data in a manner not consented to by the individual. It is for this reason that those responsible for the processing and use of neural data must adopt privacy and security measures commensurate with the sensitivity of those data and their ability to harm the owner of the data.

Principle 4: Express and informed consent regarding neural data*. The consent of the person to whom the neural data belong is a prerequisite for access to the collection of brain information. It is vital to guarantee free, informed, express, specific, unequivocal, and flawless consent when it comes to access to or processing of neural activity. The consent given must be revocable at any time. Special protection is required in the case of children and adolescents, as well as persons with disabilities and persons deprived of liberty.*

[11] Addition suggested by the State of Ecuador in its presentation on January 17, 2023.

[12] Updated Principles on Privacy and Personal Data Protection (CJI/doc. 638/21) adopted by the Inter-American Juridical Committee in April 2021 and approved by the General Assembly of the Organization of American States (OAS) by means of resolution AG/RES. 2974 (LI-O/21) of November 2021.

Concepts and comments: Informed consent is an essential requirement for clinical practice. It is based on the notion of personality. Accordingly, it is the basis of legitimacy for a neurotechnological procedure and, therefore, any person who for any reason undergoes such a procedure must have the ability to express in a conscious, deliberate, and informed manner whether or not he or she authorizes that neurotechnological procedure. In the case of persons who cannot give their consent, the protection measures shall be extreme, guaranteeing the consent of third parties recognized by law.[13] Consequently, a neurotechnological procedure would not be acceptable if it violated this principle.

Thus, individuals who give their consent must be able to revoke it and have the right to request that neural data stored at any time are not processed, to which end the party responsible for processing neural data must establish simple, prompt, effective, and free mechanisms. Likewise, the rules governing the processing of neural data extend to security and full control and disposal of the data.

Consent shall be obtained after a process that ensures that relevant information is transmitted in simple language, with an intercultural and gender approach, to make sure that it is understood so that a decision can be taken, expressly and in writing. Coercion, deception, or domination by any means would definitively vitiate any consent.[14]

Thus, bearing in mind the provisions set forth in the Updated Principles on the Privacy and Protection of Personal Data,[15] those who are responsible for the processing of neural data must adopt enhanced measures to ensure their privacy and security in accordance with the sensitivity of those data, as well as establish and maintain for any kind of processing clear management plans and strict protection, security and control guidelines for the collection, storage and organization of neural data, and for access to them.

Principle 5: Equality, Non-Discrimination, and Equal Access to Neurotechnologies*. The goal is to promote the development and use of neurotechnologies, accessible to all people in accordance with the characteristics of the generation concerned [16] based on the principle of equality and non-discrimination. States shall guarantee equitable access to neurotechnologies, while respecting customs and traditions, and to develop public policies for responsible innovation, seeking to narrow inequality and discrimination gaps, especially with respect to the most vulnerable groups.*

Concepts and comments: The principle of equality and non-discrimination is one of the core pillars of the inter-American system for protection of human rights. It is recognized both in Article 24 of the American Convention on Human Rights and in Article 3 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights ("Protocol of San Salvador"). For its part, the Inter-American Court of Human Rights has also reaffirmed on multiple occasions that the notion of equality springs directly from human nature, making it inseparable from the essential dignity of the individual. This therefore also applies to the development and use of neurotechnologies, which must be equally accessible to all people, including the right to obtain protection against, inter alia, acts of discrimination based on race, color, gender, nationality, religion, and social status.

Special attention shall be given to vulnerable age groups. It is estimated that the human brain does not fully develop until after the age of 20. Without adequate regulation, the use of neurotechnologies can lead to significant age bias. It is necessary to provide special protection against such vulnerability, taking into account the best interest of the persons concerned and guaranteeing sound neurocognitive development following the creation, marketing, and use of neurotechnologies and other immersive technologies.

Likewise, ethnic minorities, indigenous peoples, and Afro-descendants must be taken into account, in accordance with the International Convention on the Elimination of All Forms of Racial

[13] Addition suggested by the State of Panama in its presentation on January 13, 2023.
[14] Addition suggested by the State of Ecuador in its presentation on January 17, 2023.
[15] Op. Cit.
[16] Addition suggested by the State of Ecuador in its presentation on January 17, 2023.

Discrimination, which provides for the adoption by States of special measures exclusively designed to ensure the adequate advancement of certain racial or ethnic groups or individuals requiring such protection in order to guarantee them, on an equal footing, the enjoyment or exercise of human rights and fundamental freedoms.[17]

By the same token, in accordance with the Principles and best practices on the protection of persons deprived of liberty in the Americas (OEA/Ser/L/V/II.131 doc. 26), under no circumstances shall neurotechnologies be used to categorize, separate, or transfer persons deprived of their liberty; nor shall they be used to justify discrimination, the use of torture, cruel, inhuman, or degrading treatment or punishment, or the imposition of harsher or less adequate conditions on a particular group of people.

Thus, this principle seeks to guarantee access to neurotechnologies, as well as to any scientific development aimed not only at avoiding the "increase of inequalities", but also at narrowing inequality gaps. States should consider equality as an achievable goal and develop appropriate policies to that end: a perspective geared to enhancing the scope of public policies.[18]

Thus, States Parties should guarantee equitable access to neurotechnologies and develop public policies for responsible innovation with a view to avoiding any increase in inequality or exacerbation of discrimination. This entails refraining from acts that in any way generate situations of discrimination on the basis of, inter alia, race, color, sex, language, religion, or social status. Based on Article 29 of the American Convention, it could be construed that access to neurotechnology is part of the right to health and the right to life and personal integrity, in their progressive, individual, and collective dimension, whereby vulnerability and poverty should also be taken into account as obstacles to be overcome in order to avoid discrimination.[19]

It is relevant at this point to consider the Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities, [20]the main objective of which is the prevention and elimination of all forms of discrimination against persons with disabilities and to promote their full integration into society.

Equality and non-discrimination in the development, access, marketing, and use of neurotechnologies also provides protection against discrimination by algorithms linked to artificial intelligence systems that use neurotechnological interfaces. This Principle also seeks to prevent neurotechnologies from allowing some human beings to be considered superior to others, which would make them a new source of discrimination.

Principle 6: Exclusive therapeutic application with respect to the enhancement of cognitive abilities. *The main purpose of these scientific and technological developments in medical assistance is to preserve or improve people's autonomy and thus promote their overall wellbeing, helping them to lead a dignified, healthy, productive, and autonomous life. States shall endeavor to exercise particular caution in regulating the use of neurotechnologies to increase the cognitive abilities of individuals, and shall establish clear limits and enhanced control, while taking special care and precautions with provisions that, apart from their therapeutic or health application, seek to study neurotechnologies and use them to enhance or improve cognitive skills for other purposes.*

Concepts and comments: The use of neurotechnologies for the enhancement of human cognition triggers profound philosophical debate regarding the legal treatment it should have. Currently, all over the world, research projects are being conducted that seek to enhance human cognitive abilities by methods ranging from traditional mechanisms, such as education, to more disruptive means, such as brain stimulation or the implantation of neurotechnologies and artificial intelligence systems in the brain. Likewise, cognitive improvements could condition not only intellectual performance, but also emotional and behavioral improvement. In addition to

[17] Addition suggested by the State of Ecuador in its presentation on January 17, 2023.
[18] Addition suggested by the State of Ecuador in its presentation on January 17, 2023.
[19] Addition suggested by the State of Ecuador in its presentation on January 17, 2023.
[20] Inter-American Convention on the Elimination of All The Forms of Discrimination against Persons with Disabilities Adopted in Guatemala City, on June 7, 1999, entry into force on September 14, 2001.

physiological consequences, cognitive enhancement raises important legal and ethical challenges that need to be considered for effective regulation.

In such scenarios, precautionary needs support the adoption of legislative guidelines to delimit with special care the contexts for the use of neuroenhancement technologies. This includes the adoption of protective legislative measures aimed at establishing limits to potential risks associated with these technologies. Accordingly, the generic principle of non-discrimination, as it is traditionally been defined, does not preclude making distinctions, provided that those distinctions do not pursue persecutory aims or defend undue privileges. The Inter-American Court of Human Rights has stated in various judgments that the general obligation of non-discrimination translates into the prohibition of issuing sweeping laws or of favoring measures and practices by its officials, when enforcing or interpreting the law, that discriminate against a certain group of persons on the basis of their race, gender, color, or other characteristics.[21]

This implies preventing the emergence of a potential social divide between persons who have decided to enhance their cognitive abilities and those who are unable or choose not to do so. This principle needs to be used with caution because an outright ban could trigger its clandestine use and implementation. Therefore, in accordance with that principle, domestic laws should more specifically define the normative and regulatory context of neuroenhancement to ensure that human rights are effectively safeguarded and protected.

It is noted that in the Inter-American Convention on the Elimination of all Forms of Discrimination against Persons with Disabilities,[22] States Parties committed to work to establish the necessary measures to eliminate discrimination against persons with disabilities so as to achieve "(b) Early detection and intervention, treatment, rehabilitation, education, job training, and the provision of comprehensive services to ensure the optimal level of independence and quality of life for persons with disabilities..." Likewise, the UN Convention on the Rights of Persons with Disabilities recognizes the right of access to appropriate supportive devices and technologies, including new technologies, to meet the needs of persons with disabilities, so that they can fully enjoy all human rights. Accordingly, States should strive to ensure equitable access to treatment based on neurotechnological advances and thus prevent only a few privileged groups from benefiting from advances from progress in science and technology, which would give rise to new forms of marginalization and exclusion. Prudence in the development of enhancement technologies implies taking into account the socio-educational context, the progressiveness of the measures, and the ongoing assessment of negative effects and long-term risks.[23] Thus, neurotechnological cognitive enhancement reflects the importance of the aforementioned principle of equality for avoiding deep social inequality gaps.

Principle 7: Neurocognitive integrity. *The protection of the neurocognitive integrity of all persons must be ensured and its use for malicious purposes, resulting in neurotechnological procedures aimed at harming or impairing brain activity or impacting the exercise of human rights, must be prevented. Access to brain activity may never alter freedom of thought and conscience, making it dependent on a third party, thereby undermining people's ideas, security, and independence. Every person has the right not to suffer violations, alterations, manipulations, and/or modifications of his or her neurocognitive integrity and privacy that jeopardize or affect personal integrity, and the imposition of exclusion or limitation of liability clauses is not admissible. The protection of neurocognitive integrity is guaranteed in neurotechnological treatments, and compulsive or forced application mechanisms are prohibited, as well as their use as a method of torture or cruel, inhuman, or degrading treatment.*

Concepts and comments: In addition to their use for medical purposes, neurotechnologies can also be used for malicious purposes to the detriment of people's physical and neurocognitive integrity. This principle is in line with the duty to respect physical integrity enshrined in Articles 3

[21] I/A Court H.R., Advisory Opinion OC-18/2003, "Juridical Condition and Rights of Undocumented Migrants," September 17, 2003.
[22] Op. Cit. 8, Article III.
[23] Addendum suggested by the State of Panama in its presentation on January 13, 2023.

and 5 of the Universal Declaration of Human Rights and Article 5 of the American Convention. Accordingly, the guideline seeks to establish mechanisms to safeguard personal integrity against neurotechnological procedures that entail unauthorized alterations to the functioning of a person's nervous system and result in potential damage to its processing or neural architecture. The main concern about the impacts, benefits, and risks of these new technologies for people's integrity has to do with the right to health, given the intrusive impact that the irresponsible or unwise use of these technological devices can have on the human body. Thus, the WHO has advanced in the development of a set of general guidelines on the use of technological devices medical care purposes, which should always be to maintain or improve people's autonomy and well-being.[24]

It should be noted that the notion of "neurocognitive integrity" is construed in a broad sense to refer to the protection of the neurocognitive substrates of the human being, both in their tangible (physical) and intangible (psychological) dimensions. Attacks against neurocognitive integrity can be carried out in different ways, ranging from the use of disproportionate stimulation to certain areas of the brain to the hacking of neuroprostheses or neural interfaces used by a person. They can also be carried out directly when they are aimed at adversely affecting an individual's neural activity. In addition, they can be performed indirectly when the objective is to cause the prosthesis or neurotechnological device to malfunction. This principle is particularly important given the emergence of new forms of neurocriminality, that is, the use of neurotechnological interventions for criminal purposes. According to this principle, everyone has the right to the protection of the law against alterations, manipulations, and/or modifications of cerebral information. Given such scenarios, it is recommended that States establish legislative mechanisms aimed at safeguarding the neurocognitive integrity of individuals against acts that put their physical or mental integrity at risk by means of brain technologies.

Likewise, the absolute prohibition of torture protects against medical or scientific experimentation. Article 7 of the United Nations International Covenant on Civil and Political Rights protects human beings from pain and suffering caused by or with the acquiescence of state agents for a specific purpose, including obtaining information or a confession, for investigative purposes, as a preventive measure, as a punishment, or for any other purpose. Along the same lines, Article 2 of the Inter-American Convention to Prevent and Punish Torture establishes that: "Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish," so that neurotechnologies should never be used on those deprived of liberty, for criminal investigation purposes, as a means of intimidation, as a personal punishment, as a preventive measure, as a penalty, or for any other control purpose. Accordingly, the use of neurotechnologies should not be ordered or promoted by prosecutors' offices, courts, police authorities, or any kind of center used for deprivation of liberty.

Principle 8: Transparent governance of neurotechnologies. *States shall ensure that all state and non-state actors involved in the development, use, and/or marketing of neurotechnologies guarantee the transparency of neurotechnological advances. This encompasses not only the way in which neurotechnologies are studied, developed, and applied, and the way they function, but also their compatibility with human rights and those actors' accountability for the processing of neural data in their possession.*

Concepts and comments: This principle implies that the development, use, and marketing of neurotechnologies must be carried out in accordance with international standards of transparency and accountability. Transparency requires that sufficient information on the different stages of neurotechnology development be documented and published on a regular basis. Such information should be published in a timely manner.

States shall promote strategies for efficient governance of neurotechnologies in order to minimize the technological risks associated with them. Accordingly, both public authorities and

[24] World Health Organization (WHO), Executive Council, 142. (January 26, 2018). *Improved access to supportive technology (tecnología de asistencia)*. https://apps.who.int/iris/handle/10665/274583

private entities should periodically disclose how decisions have been made to adopt such technologies and the potential risks that they may pose to citizens. This implies audits conducted by entities that specialize in innovation processes in the field of neurotechnologies. It is also recommended that both companies and the public sector should regularly disclose information on the collection and processing of neural data in accordance with these guidelines.

Principle 9: Supervision and control of neurotechnologies*. States should exercise a supervisory/oversight role by establishing a competent, technically specialized, financially autonomous, and independent national authority to ensure that the use and application of neurotechnologies are in accordance with international human rights standards, in order to avoid and prevent risks and negative impacts on people's rights, while taking special care to protect the rights of children and adolescents and persons with disabilities.*

Concepts and comments: It is incumbent upon states to exercise a supervisory/oversight role to ensure the responsible development, marketing, and use of neurotechnologies, consistent with international human rights instruments and treaties. This principle of supervision/oversight implies the creation of specialized, professional, functionally autonomous, and independent entities capable of monitoring and controlling all phases of the life cycle of neurotechnologies, in order to promote responsible and safe neurotechnological innovation that minimizes potential risks and negative impacts of such technologies on the exercise of individuals' human rights. In addition, civil society shall be encouraged to participate in these endeavors, and play a part in the processes of exercising control over neurotechnologies.[25]

Principle 10: Access to effective protection and access to remedies associated with the development and use of neurotechnologies*. States shall promote and ensure mechanisms for the effective protection of the rights associated with the development and use of neurotechnologies. It is also necessary to guarantee access to judicial remedies and comprehensive reparation in the case of human rights violations, in order to promote effective protection of these guarantees in accordance with these Principles.*

Concepts and comments: Access to remedy mechanisms associated with serious injuries caused by neurotechnologies is a fundamental issue, and effective guarantees must be established for the benefit of individuals to prevent or repair serious impairment of fundamental rights related to neurotechnological development.

As part of the protection, it is necessary to ensure access to quick and simple mechanisms to guarantee access to the rights of individuals in the administration of justice and comprehensive reparation measures, in accordance with the provisions of Article 8 of the American Convention. In addition, there must be mechanisms within the administrative sphere that allow for sanctions and reparations to be made to the victim.[26]

This principle highlights the need to demand the protection and guaranteeing of human rights even in jurisdictions other than the State of origin in which the information or harm occurred, bearing in mind the jurisprudence of the Inter-American Court on access to justice in cases of transboundary damage.[27]

In addition, Article 25.1 of the American Convention on Human Rights establishes that all persons have the right to simple and prompt recourse to a competent court or tribunal for protection

[25] Addition suggested by the State of Ecuador in its presentation on January 17, 2023.
[26] Addition suggested by the State of Ecuador in its presentation on January 17, 2023.
[27] "This Tribunal established that, in the case of transboundary damage, it is understood that a person is under the jurisdiction of the State of origin when there is a causal relationship between the project or activity carried out, or to be carried out, in its territory and the affectation of the human rights of persons outside its territory (supra paras. 95 to 103). Therefore, States have the obligation to guarantee access to justice to persons potentially affected by transboundary damage originating in their territory." I/A Court H.R., Advisory Opinion OC-21/17, of November 15, 2017. Series A No.21, par. 238ff.

against acts that violate their fundamental rights as recognized by the constitution or laws of the state concerned or by the Convention.

In this sense, the principle recommends that States establish mechanisms for the effective protection of the rights associated with the development and use of neurotechnologies. This means providing effective judicial protection against the violation of such rights. This principle also calls on States to establish legal procedures for accessing remedies and obtaining comprehensive redress for human rights violations associated with the development and use of neurotechnologies.

* * *

3. Right to education

Document

CJI/RES. 279 (CII-O/23) The right to compulsory primary education

* * *

During the 98th Regular Session of the Inter-American Juridical Committee (Virtual session, April, 2021), Dr. Eric P. Rudge expressed his interest in presenting a new topic to be included on the Committee's agenda referring to the "right to education", document CJI/doc. 635/21. The idea is to determine whether States have a compulsory primary education system, including distance education, and the way in which the mechanisms for fulfillment of that right are implemented. In addition, the proposal includes helping those States that do not have a compulsory educational system to implement effective systems.

He noted the existence of codification on the right to education in various instruments, but he also questioned the degree of effectiveness of both international and national regulations. This initiative could also have an impact on putting an end to the cycle of poverty in member states and prove useful when it comes to advising the General Assembly.

The Chairman commented that education must be guaranteed for both girls and boys and include those with disabilities or handicaps, and that it was important to implement, not just proclaim, those rights.

Dr. Espeche-Gil thanked Dr. Rudge for his initiative on such a fundamental issue. He pointed with concern to moves made in United Nations forums questioning various aspects of the right to education, in particular the right of parents to get involved in the orientation of their children's education.

Dr. Cecilia Fresnedo congratulated Dr. Rudge on the proposed topic that poses major challenges and agreed with the need to observe the right to freedom mentioned by Dr. Espeche-Gil.

Dr. Mariana Salazar encouraged the rapporteur to complement the work being done on these issues in other institutions, such as the Committee on Economic, Social and Cultural Rights (CESCR), UNESCO, and other programs. She confirmed that the International Covenant on Economic, Social and Cultural Rights obliges countries to provide primary education, leaving it up to each country to decide about secondary education, specifying that in Mexico this is already mandatory. She appreciated the comments made by the Chairman on vulnerable groups and added to the list the situation of indigenous peoples. She also mentioned Comments 11 and 13 of the CESRC on overseeing the enforcement of the International Covenant on Economic, Social and Cultural Rights and urged Dr. Rudge to check out the position taken by the inter-American human rights system and the jurisprudence of the I/A Court of H.R. Finally, she invoked the need to address issues related to the quality of the education provided (both the materials used and teacher training).

Professor Stephen Larson referred to problems involving access to education caused by the COVID-19 pandemic, which has accentuated socio-economic differences. He cited the situation in the educational system in Los Angeles (in the USA), where a significant number of children have not been

able to go to school due to the lack of necessary resources. He thanked Dr. Rudge for including such a timely topic on the agenda.

Dr. José Moreno also endorsed the inclusion of this topic in the agenda.

The Chairman noted the support given to the proposal and the interest shown by the plenary in including it on the Committee's agenda, in spite of its being a topic addressed by other organizations. Dr. Eric Rudge was designated as its rapporteur.

During the 99th Regular Session of the Inter-American Juridical Committee (Virtual session, August, 2021), the rapporteur for this topic, Dr. Eric P. Rudge, presented his initial report on the right to (Compulsory) Elementary Education, document CJI/doc. 643/21.

The rapporteur initially reviewed the various legal instruments relating to the right to education — specifically compulsory elementary/primary education — that are applied worldwide and, in the Hemisphere, such as the OAS Charter, the Protocol of San Salvador, and the Inter-American Convention for the Elimination of All Forms of Discrimination against Persons with Disabilities. The analysis allowed him to verify that most of the OAS member States guarantee the right to compulsory primary/elementary education. Moreover, in some member States legislation guarantees secondary and university education for their citizens. The report then describes various factors that contribute to determining the importance of the right to compulsory education, this being the best way to fulfill human development (including its relation to poverty, crime, and child labor.) The rapporteur stated that States should not only impose such right as obligatory but should also enforce and make said obligation effective. The rapporteur observed that despite the existing norms in favor of compulsory education at the primary/elementary level, social risk factors remain high (poverty, high rate of illiteracy, crime, slow or stagnant development). In this context, he proposed declaring the right to compulsory primary/elementary education as a human right, rather than a mere social and cultural right: a right that does not depend on good will alone.

By way of methodology, the rapporteur indicated his intention to prepare a questionnaire to be distributed to member States. The questionnaire would comprise four parts:

1. General information on the international instruments that have been ratified so far.

2. Implementation of international obligations at the domestic level.

3. Other social circumstances that allow an understanding of the relationship between the rate of illiteracy and compulsory education.

4. Finally, the last section of the questionnaire is aimed at seeking suggestions from the States.

Dr. Miguel Angel Espeche appreciated the inclusion of this issue on the Committee's agenda. In his opinion, the right to education is a child's right, but the holders of the obligation are the parents or their legal guardians, together with the State. The State must respect the ethical orientation of parents or their guardians. The rapporteur shared Ambassador Espeche's views.

Dr. Ramiro Orias thanked the rapporteur for both the document and the questionnaire. He proposed to the rapporteur the idea of enriching the report by means of questions to the States in the context of the COVID-19 pandemic (which take into account issues regarding access and connectivity in member States). The rapporteur thanked Dr. Orias for his proposal and said that he would include those situations in the questionnaire.

Dr. Mariana Salazar expressed her thanks for the initiative aimed at improving the situation of the most vulnerable, especially given the situation of poverty that is a reality in several of our countries. She acknowledged the inclusion of universal and regional instruments, and recommended complementing the research with the work carried out by other bodies, such as (i) the UN Committee on Economic, Social and Cultural Rights: both its General Comments 11 and 13 but also its recommendations to States following the review of their periodic reports, which also give rise to the

possibility of studying gender situations; (ii) the reports — thematic and from country visits — from the UN Special Rapporteur on the right to education, also available at the OHCHR webpage; and (iii) the reports of the Inter-American Commission on Human Rights and the jurisprudence of the Inter-American Court on Human Rights, for the purposes of the conceptual analysis of the right in upcoming reports.

Regarding Dr. Salazar's comments, the rapporteur expressed his intention of avoiding duplicating the work carried out by other institutions, while taking into consideration what has been done by the aforesaid agencies, including the jurisprudence of the IACHR. Despite the abundant number of regulations, the rapporteur regretted that children are still seen living on the streets of our countries. In summary, he asked the Committee members to send him their suggestions in writing. He also expressed his intention to finish the questionnaire and distribute it among the States, requesting them to send their answers before the end of the year.

The Chairman thanked the rapporteur for presenting this first advance report; Drs. Fresnedo and Moreno also acknowledged the rapporteur's work.

Prior to the end of the session, the rapporteur for the topic, Dr. Eric P. Rudge, submitted a revised version of the questionnaire, which includes opinions presented by some members, including the suggestions of Drs. Orias and Salazar, document CJI/doc. 643/21 rev. 1. In addition, he asked the technical secretariat to distribute the document among member States, so that their responses might be received by end of December.

The Chairman asked the rapporteur if both the report and the questionnaire were to be distributed, or only the questionnaire; the rapporteur explained that for the time being the intention is to distribute the questionnaire on its own.

There being no additional comments regarding the rapporteur's questionnaire, the technical secretariat was asked to distribute it.

During the 100th Regular Session of the Inter-American Juridical Committee (Lima, May, 2022), the rapporteur for this topic, Dr. Eric Rudge, presented the "First Report: Regional Legislation on the Right to Compulsory Primary Education", document CJI/doc.658/22. He explained that it is about the right to compulsory education, and its connection to other rights (human development, crime, treatment of children, social development).

This new version of his report contains a section on regional norms on the right to education of children and adolescents (up to the age of 9 to 12 years), including the right to access and making this compulsory. In his analysis, jurisprudence (its impact and importance, in reference to relevant decisions on the topic)) and regulations in the region have been introduced. It noted that at present the right to education for children and adolescents is not considered as a fundamental right but rather a social right and in this context, it should be enshrined as an obligation for the States.

He urged not only that agreement be reached on a constitutional or legal statute of priority for this right, which should be agreed and valid nationwide, and to work on its implementation. He cited the example of Curaçao where parents are held responsible for their children attending school (which also implies that children and adolescents receive their proper education). Regretting that he had not received more responses from States, he explained his interest in receiving more information from the Caribbean countries. In fact, noting the lack of replies to other questionnaires, he urged reflection on the methodology.

He reiterated that his motivation is underpinned by his work as a mathematics teacher, and his surprise about the number of street children who do not attend school in so many States.

At the end of this presentation, the rapporteur expressed his interest in integrating the comments and recommendations he received on this occasion.

Dr. Martha Luna explained that Panama has not responded, and that despite not representing any government, she found that the central issue of the current government is education. In Panama, education is compulsory until the ninth grade, although some students drop out and do not return to school once that stage has been completed. She noted progress in relation to children living on the streets, and that during the COVID-19 pandemic, much social work was undertaken that would allow all children to access virtual education. In fact, there is a universal allowance for families in need, which includes food. She highlighted the existence of an important gap in relation to public and private education, in addition to the quality of teachers with little vocation to teach. She also illustrated the situation of children in reserves set aside for indigenous peoples and areas far from urban centers.

The rapporteur for this topic highlighted the importance of implementing political promises and the way in which state budgets fluctuate in the sphere of education.

Dr. Mariana Salazar thanked the rapporteur for his work. She underlined the need to integrate the jurisprudence and the situation regarding the effect of Covid-19 on the right to education, endowing it with added value. She suggested to explore the possibility of presenting the final version of the report to the rapporteur of the IACHR on this matter. In addition, she requested the names of the States that have responded to the questionnaire.

The rapporteur explained that he had included most of the comments of the members in the previous session, with responses were received from the following States: Argentina, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Saint Lucia and Trinidad and Tobago, and (regretted that the Government of Suriname had not responded).

Dr. José Moreno Rodríguez congratulated the rapporteur on his work. With regard to paragraph 70 on discrepancies between the rule and practice, he asked the rapporteur on how he intended to deal with them.

In this regard, the rapporteur undertook to review this situation and present a response in this regard.

Dr. José Moreno Guerra congratulated the rapporteur for his social sensitivity, inviting him to send a message to the States on the importance of investing in the field of education that, moreover, allows people to fulfill their potential and become self-sufficient. In his opinion, a free education is not enough, but also to underline the topic of the quality and cordiality of teachers (making sure about the skills of those who teach, so that they do not represent a risk for children). In addition, school infrastructure and campuses must be taken into account. He ended by encouraging Dr. Rudge to continue his study.

The rapporteur expressed his full agreement with the comments proffered by Dr. Moreno Guerra and Dr. Luna on the importance of the vocational quality of teachers, something that should be pointed out to the States.

Dr. George Galindo thanked the rapporteur for his comprehensive report on such a broad and transcendent topic for the lives of all. He referred to the distinction between progressive obligations, where there are important civil rights that must be taken into account, such as the equal treatment of children, the right to nationality, the right not to be tortured. As these civil rights are linked to the right to education, he urged the rapporteur to work on it as something effective, that could be integrated with other related topics. In this regard, the rapporteur agreed with the need to include related rights in his next report.

The rapporteur for this topic offered his thanks for the comments and suggestions presented to him, and explained that the next stage will include a specific analysis of the States, guided by the questionnaires received. It should not be limited to labeling the right to compulsory education in its social and cultural aspects, but should rather be considered as an obligation for States (an opportunity should be granted that takes into account the best interests of children and adolescents).

Dr. Ramiro Orias noted the historical gaps left by the Covid-19 pandemic, and the importance of digital life underscored by the rapporteur. In his view, the rapporteur's question at the beginning of his report on the fundamental nature of education was very pertinent, but its answer did not appear throughout the text. Among the recommendations, Dr. Orias suggested including public policies that States could implement. This is a document that opens up a new discussion around the right to education in the hemisphere.

Dr. Rudge illustrated the obstacles imposed by the COVID-19 pandemic, and the central role that must be played by the States. The status of the right to education as fundamental is not recognized by the States, but he has been able to discover that there is greater acceptance of the right to compulsory education for children and adolescents in some countries, depending on jurisprudence and regulations. In relation to street children, although efforts are underway in the private sphere, governments must intervene to a greater extent. This is associated with the importance of the work of schools and teachers, who must create an attractive space to keep children in school.

During the 101st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2022) the rapporteur for the topic, Dr. Eric Rudge presented a new version of his paper entitled: "Second report on the right to compulsory primary education", document CJI/doc.670/22. Using the opportunity to offer some background, the rapporteur recalled the primary motivation for his study, which was based on the situation of street children and the connection between poverty and education. Part 1 focuses on the right to education and human development. The second part gives an overview of the legal instruments, covering regional instruments. The third part deals with education in OAS member states, while the last part presents conclusions. The third section offers an analysis of the questionnaire replies based on the replies from thirteen states: Argentina, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Saint Lucia, and Trinidad and Tobago. Suriname, meanwhile, sent in its reply upon completing the report. From an analysis of the questionnaire, the rapporteur identified the following claims made by the States:

- assistance from intergovernmental organizations.
- strategies catering to children in rural areas and in areas with limited access to schooling.
- assistance with access to connectivity and educational devices for all children.

The study also revealed significant impacts the COVID-19 pandemic has had on the right to education, as well as a divide among OAS member states in terms of recognizing the right to education as a fundamental right.

Among the main conclusions were:

- Compulsory primary education should be recognized as a fundamental human right to which all children and those in the OAS countries (from the age of three) are entitled, regardless of where they live within the jurisdiction of each state.
- Within the OAS region, states should stop treating the right to compulsory primary education as an economic, social, and cultural right.
- OAS member states need assistance from intergovernmental organizations to ensure quality compulsory primary education services are delivered free of charge.
- States party to the Protocol of San Salvador are legally obligated to progressively observe the right to other forms and levels of education. They also have an obligation to immediately deliver on the right to compulsory primary education.

The recommendations singled out by the Rapporteur included:

- The General Assembly should identify ways to provide technical and financial assistance to help all states deliver free compulsory primary education for children.

- The General Assembly should establish a special fund to assist member states in this specific area.
- The General Assembly should adopt a resolution recognizing the right to compulsory primary education as a fundamental human right.
- The General Assembly should adopt a resolution calling upon member states to address the issue of compulsory primary education and to ensure that all children are afforded this right.

The General Assembly should adopt a resolution instructing the OAS to help member states implement compulsory primary education and ensure that all children are afforded this right.

Dr. José Moreno Guerra applauded the rapporteur and requested that a section on multilingualism be included, given that 18 ethnic groups were recognized in his country, and 22 in Guatemala; and that the value of each language should not be disregarded, hence the obligation to protect and preserve the linguistic cultural heritage of the mother tongue, including those in remote areas. States should train teachers in those language groups that are different from the dominant languages.

The rapporteur proposed to include this topic in his next report. He explained that in Surinam, education is delivered in the mother tongue the first three years (pre-school), and then at age six, Dutch and English become the dominant languages. To preserve the cultural heritage, families hold on to their original languages (native and even foreign).

Dr. Mariana Salazar thanked the rapporteur for his research, noting the dedication and seriousness it demonstrated. She offered three ideas on what paragraphs 109 to 111, as well as paragraphs 121 and 122, said about recognition of the right to education as a fundamental right and as part of economic, social, and cultural rights, while making a distinction between that recognition and the question of implementing it, which at the same time requires States to adopt measures for both immediate and gradual implementation. Concluding, she agreed with Dr. Moreno Guerra on the value of multicultural, bilingual education and shared her country's own experience.

Thanking the States for their comments, the rapporteur promised to include them in his next report.

Dr. George Bandeira Galindo said he was pleased with the significant number of questionnaire replies received from the States. He argued that the CJI was never meant to implement symbolic laws (in which context differences can be found between what the law says and what the reality is) whereby it seeks to incorporate international norms into domestic laws. However, he warned that institutions engaged in this area could be encouraged to do so. He also requested that the section of paragraph 116 referring to the binding and enforceable nature of the right to compulsory primary education be modified in accordance with customary international law. His understanding was that it was not for the court to determine that whether it is binding or not should be dependent on custom, since it is more closely related to codification. Lastly, Dr. Bandeira Galindo specifically pointed out that the social, economic, and cultural nature of protection should not be seen as hindering its application.

The rapporteur expressed appreciation for the comments, and noted that he would make the necessary changes.

Dr. Ramiro Orias commended the rapporteur and thanked him for including reference to the issue of State policies, along with the valuable addition of international and inter-American jurisprudence. He pointed to two important Inter-American Court of Human Rights cases that should help shed light on what is meant by the right to education in terms of its progressive nature and enforceability: one case on Ecuador dealing with discrimination against a girl with AIDS; and another from Paraguay highlighting issues of discrimination.

The rapporteur asked for details of the aforementioned jurisprudence.

Dr. Cecilia Fresnedo joined in offering congratulations. She lamented that Uruguay had not replied to the questionnaire, and agreed that there were major differences among the OAS member states, even prior to the implementation stage. She noted that in Uruguay, preschool and elementary school education was compulsory, and was in practice implemented in a variety of ways. She also indicated that funding was granted to low-income families on the condition that they send their children to school, and she urged the rapporteur to ensure provision for gradual implementation, further recommending that he recognize the differences among the states, while insisting on the progressive nature of the system.

Dr. Martha Luna thanked the rapporteur, commending him for his report, which she said would be very useful for her country. She also noted the difference between what the rules say and what is done in practice. As with Uruguay, she noted similar monetary incentives in Panama.

On that note, the rapporteur was surprised by practices of this nature offering monetary incentives, as there were none in his country, where education is compulsory and subject to penalties (there is an enforcement mechanism in place). According to the rapporteur, this opens up a new perspective on the subject. He also committed to look into it in greater detail, and underscored the importance of having teachers who pursue this work as a calling.

Dr. José Moreno Rodríguez also joined in extending congratulations, highlighting the significant contribution the CJI had made in this area. He inquired about the relevance of making financial recommendations, bearing in mind the practice of the Committee, whose work is limited to providing legal input.

In that connection, Dr. Dante Negro suggested inserting the financial recommendations in the draft resolution to be approved by the Committee rather than in the body of the report. This would be done once the CJI deems the document to be ready.

Dr. Moreno Rodríguez commented on the last two recommendations and asked about the differences between them. Replying, the rapporteur explained that paragraph 127 instructs the States to address the issue, while the last paragraph referred to implementation.

The rapporteur undertook to submit a draft resolution at the next session, based on the recommendations in his report, the final version of which will be submitted at that time.

During the 102nd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2023), the rapporteur basically explained the changes made in the new version of the report, document CJI/doc.690/23.

In relation to language issues, the suggestion of mother-tongue education for children had been incorporated. In addition, two additional decisions of the Inter-American Court regarding quality primary education within the states—the Xákmok Kásek Indigenous Community v. Paraguay, and the Yakye Axa Indigenous Community v. Paraguay—had been included.

The rapporteur noted that Suriname's comments were included in the most recent version of the report, considering they had arrived after the text had already been distributed to the members. Paragraph 110 had been reformulated to clarify the obligations requiring progressive realization from those requiring immediate realization. Similarly, a distinction had been made between the compulsory nature of primary education and the progressive nature of secondary and tertiary education. At the end of his presentation, the rapporteur asked for the report to be adopted.

Dr. George Galindo Bandeira congratulated the rapporteur and said that the current version was a mature document ready for adoption. He proposed two recommendations: one related to the first recital, in which he suggested referring to a general recognition in a domain where there is no constitutional unanimity. The other suggestion had to do with the translation of the report when it speaks of fundamental human rights, which in English should read "human rights": in his opinion, using "fundamental" to qualify human rights would amount to establishing a hierarchy. Regarding the

first issue, the rapporteur undertook to draft language referring to general recognition. As regards the fundamental nature of human rights, he undertook to investigate the use of this expression in the countries of Latin America.

Dr. Luis García-Corrochano congratulated the rapporteur on his valuable work. In relation to Dr. Bandeira Galindo's second point, he suggested referring to human rights only, without qualifying them as fundamental human rights. It was not the Committee's task to pronounce on the domestic rights of states.

Dr. Alejandro Alday took up the point raised by Dr. Bandeira Galindo and, as an alternative, proposed language that is used by the OAS because it is in some way more inclusive: human rights and fundamental freedoms. That would avoid the exclusion of those states that are not parties to the Convention.

Dr. Julio Rojas-Báez congratulated the rapporteur. He then thanked him for the immediate realization approach that must be adopted for compulsory basic education and called for the reference to invoke an unqualified "human rights." He recommended using similar concepts in the resolution and, in order to standardize it, that the second paragraph indicate "by OAS member states." His proposal was supported by the rapporteur.

Dr. Dante Negro explained that the classification varies according to the perspectives and approaches taken. In the inter-American system, an important distinction is that "fundamental human rights" refers to those that cannot be suspended under any circumstances. In connection with that, he asked the rapporteur about the approach he wanted to adopt for the content of the right.

The rapporteur explained that the interconnectivity of the issues involved with the right to education (poverty, inequality, etc.) requires that the right to primary education be considered a fundamental right. This would not be a progressive state obligation; it would be an obligation of the state, considering also that its purpose is to put an end to the cycle of poverty and inequality. It should therefore be considered a fundamental right.

Dr. Bandeira Galindo said that the rapporteur's vision would not apply to economic and social rights, since they are of progressive implementation. The most important question here was to determine whether they are rights of progressive or immediate application. The fundamental nature had to be explained, perhaps by means of a footnote.

On this point, Dr. Julio Rojas-Báez explained that the right to education was not included in the American Convention, which is a right framed in the Protocol of San Salvador. A distinction could be made between a right of progressive realization and the obligation of the state to take steps today; then, the concept of "human right" would be the correct one, without the "fundamental" qualifier.

The rapporteur supported the idea of including a footnote to avoid confusion. In his understanding, since it belongs to the group of economic and social rights, the right to education depends on progressive implementation by the states, but the right to primary education has a different nature: it is compulsory, requiring immediate state action. That is the terminology used by the Inter-American Court of Human Rights. This would also imply that the states should equip themselves with an effective system to ensure its implementation.

Dr. George Galindo Bandeira suggested that instead of referring to social and cultural rights, the meaning of fundamental human rights within the scope of the report should be explained.

In light of requested modifications the rapporteur on the issue, doctor Eric Rudge worked on a revision of his report, which in its final version includes, among others the following:

- Changes to the table of contents.
- Within the conclusions, the insertion of an explanatory note regarding the understanding of the notion of fundamental human rights as a footnote:

" Explanatory note: Fundamental human right must be seen in the context that the right to compulsory primary education progressed into being an obligation that requires immediate realization by O.A.S. member States".

The Chairman noted that there being no additional opinions, the report and its resolutions were approved.

On March 9, 2023, the Inter-American Juridical Committee adopted the report on "Compulsory primary education", document CJI/doc. 690/23 rev. 1, which urges OAS member states to ensure full enjoyment of primary education and strengthen the free, compulsory, and universal nature of this "fundamental human right." The report was submitted to the Permanent Council on March 29, 2023, and can be viewed at the website of the CJI under the section themes concluded: OAS :: Inter-American Juridical Committee (IAJC) :: Themes Recently Concluded

The following is the report adopted by the Committee at its March 2023 session, held in Rio de Janeiro, Brazil:

CJI/RES. 279 (CII-O/23)

THE RIGHT TO COMPULSORY PRIMARY EDUCATION

THE INTER-AMERICAN JURIDICAL COMMITTEE,

EMPHASIZING THAT the right to education is vitally important for the promotion of equality and for the enhancement of other related rights and freedoms;

AWARE that the right to compulsory primary education is enshrined in regional and universal instruments and has been codified and generally recognized in the constitutions of the member States of the Organization of American States (OAS);

ALSO AWARE that some OAS member States need support to guarantee the provision of quality primary compulsory education, free of cost;

CONSIDERING the importance expressed by the OAS member States to the Inter-American Juridical Committee through their responses to the questionnaire adopted by the Committee at its 99th regular session regarding cooperation and exchange of experiences in education, including teaching material and access to technology for the teaching staff; and,

TAKING INTO ACCOUNT the document "The right to (compulsory) primary education – Fourth report", document CJI/doc. 690/23 rev.1, presented by Dr. Eric P. Rudge, rapporteur of the topic,

RESOLVES:

1. To reiterate that the right of everyone to compulsory primary education is a fundamental human right and to urge the OAS member States to ensure its full enjoyment and to consolidate its compulsory, free of costs and universal nature.

2. To recognize that the right to compulsory primary education is part of the group obligations of immediate realization in member States of OAS.

3. To recommend OAS member States to seek alternatives to provide technical and financial assistance to those States that face problems in ensuring the full enjoyment of such right, particularly with regard to the most vulnerable groups or categories of children, among others, through the establishment of a special fund.

4. To recommend to OAS member States greater cooperation and exchange of experiences, best practices, and technologies in various areas regarding primary education that take into

consideration the needs of boys and girls, teaching methods, materials and a supervisory teaching body.

5. To thank Dr. Eric P. Rudge for his work as rapporteur on the subject within the Inter-American Juridical Committee and for the presentation of the cited report on the issue.

6. To send this resolution and the report "Right to compulsory primary education," document CJI/doc.690/23 rev.1, to the General Assembly of the OAS for its due knowledge and consideration.

7. To request the Department of International Law, acting as Technical Secretariat of the Inter-American Juridical Committee, to disseminating these documents as widely as possible among the various interested stakeholders.

This resolution was unanimously approved at the regular session held on March 10, 2023, by the following members: Drs. Eric P. Rudge, George Rodrigo Bandeira Galindo, José Luis Moreno Guerra, Alejandro Alday González, Julio José Rojas Báez, José Antonio Moreno Rodríguez, Luis García-Corrochano Moyano, Cecilia Fresnedo de Aguirre and Ramiro Gastón Orias Arredondo.

* * *

4. New technologies and their relevance to international legal cooperation

Document

CJI/doc.696/23 rev.1 Inter-American Juridical Committee. New technologies and their relevance to international legal cooperation

*** * ***

During the 98th Regular Session of the Inter-American Juridical Committee (Virtual session, April, 2021), Dr. Cecilia Fresnedo, recently elected as a member of the Committee, proposed including on the Committee's agenda the issue of "new technologies and their relevance to international juridical cooperation," document CJI/doc. 637/21. She recommended mapping the use of technological tools in matters relating to international jurisdictional cooperation to determine areas that might benefit from the use of technology and, on that basis, updating conventional instruments of the inter-American system through soft law solutions. She pointed out that the first evaluation would help the CJI determine the nature of the instrument to be drafted, as well as principles, guides to good practices or other types of instruments. It would also be in line with the mandate of the General Assembly "to promote and study those areas of juridical science that facilitate international cooperation in the inter-American system for the benefit of the societies of the Hemisphere". She concluded her presentation by referring to the need to work in coordination with other codification forums, such as the American Association of Private International Law (ASADIP), The Hague Conference, UNIDROIT, and UNCITRAL.

Dr. Moreno thanked Dr. Fresnedo for her explanation and said he agreed with the initiative to coordinate with universal coding forums and integrating our region with the world, by promoting commercial activities subject to clear and predictable rules. He suggested coordinating closely with Dr. Ruth Correa on this very promising topic. He also mentioned that the ASADIP Principles as well as the work of The Hague Conference on international private law could furnish interesting insights for this proposed project.

Dr. Rudge and Espeche-Gil thanked Dr. Fresnedo for her proposals and invited the plenary to include them on the agenda. Dr. Rudge suggested the possibility of preparing a guide and agreed with the idea of consulting codification bodies.

The Chairman congratulated Dr. Fresnedo on her proposal and, in light of the interest shown in it, ratified the inclusion of this topic on the working agenda and appointed Dr. Fresnedo as its rapporteur.

During the 99th Regular Session of the Inter-American Juridical Committee (Virtual session, August 2021), the rapporteur for the topic, Dr. Cecilia Fresnedo de Aguirre, presented the report entitled "New technologies and their relevance to international legal cooperation", document CJI/doc.647/21, in response to a mandate from the General Assembly that asked the CJI:

> *"To promote and study those areas of legal science that facilitate international cooperation in the inter-American system, for the benefit of the societies of the Hemisphere." AG/RES. 2959, International Law, Item ii. Inter-American Juridical Committee "*

Making a review of the inter-American conventions, the rapporteur observed the description of cooperation mechanisms that could be updated using technological advances, citing in this regard the Inter-American Convention on Letters Rogatory, the Inter-American Convention on the Taking of Evidence Abroad (both approved at CIDIP-I, Panama, 1975), the Inter-American Convention on the Execution of Preventive Measures, and the Inter-American Convention on Extraterritorial Efficacy of Foreign Judgments and Arbitral Awards (both approved at CIDIP-II, Montevideo, 1979). She also referred to the MERCOSUR framework. She found in this regard that none of these instruments refers to the technological mechanisms in use nowadays.

To carry out her task, the rapporteur sent a questionnaire to specialists on the subject who are members of the American Association of Private International Law (ASADIP), considering the cooperation framework established between the CJI and that Association. Responses were received from experts from seven countries: Argentina, Bolivia, Brazil, Cuba, Mexico, Uruguay, and Venezuela.

The questionnaire is made up of nine questions organized in three groups (legislation, practice under the jurisprudence and followed by central authorities, as well as doctrine). The answers received included the following:

- In the field of autonomous national legislation, some countries admit the use of communication and information technologies in certain domestic norms.

• In turn, because of the jurisprudential practice in the States of the experts who answered the questionnaire, it was possible to verify the use of various formulas: digital signatures, electronic forms, digital and electronic signatures, use of electronic platforms, and video conferences.

• Regarding the effects of communications and notifications, in several countries personal and not necessarily institutional emails are used.

• Among the States Parties to the 1975 Inter-American Convention on letters rogatory referring to "favorable practices," it was observed that not all of them make use of favorable practices or even apply the TRANSJUS principles.

• Regarding doctrinal opinions, the rapporteur was able to identify the following situations:

  - New technologies collide with traditional models of cooperation.
  - Existing treaties were adopted before the development of technologies.
  - There is still a long way to go in the use of technologies.
  - Existing cooperation instruments can be quite effective when they make use of technological resources.
  - The use of information technologies has contributed to facilitating and speeding up communication between State authorities.
  - The Hague Conference has facilitated cooperation through the creation of databases, such as INCADAT.
  - Government platforms have been created for the exchange of information between central authorities, such as iSupport.
  - Direct communication between judges facilitates and speeds up the flow of information

- The use of technologies is no longer an option, it has become a necessity.

She then proposed drafting a "Guide of good practices in matters of international jurisdictional cooperation for the Americas" aiming at assisting in the understanding and application of conventions by law operators such as judges, attorneys, lecturers, etc. To this end, mechanisms allowing "prioritizing procedural speed without compromising the security and effectiveness of substantial rights" without amending or replacing the existing texts, during this stage of the work.

Among the conclusions in her analysis, the rapporteur proposed the following ideas:

- New technologies have been used in international jurisdictional cooperation since even before the pandemic. However, since then, their use has rocketed.
- Technology in cooperation will continue to take roots and grow.
- There are distinct situations in different countries, due to the variation in the availability of the necessary technologies, and the different degrees of normative progress.

Following the methodology of her rapporteurship on contracts between merchants and contractually weak parties, Dr. Fresnedo proposed the following steps to carry out her proposal:

- To seek the opinion of the Committee members.
- To collect the responses of the experts who have not yet answered the questionnaire (they have been given a new deadline until the end of the year).
- To investigate the norms, jurisprudence, and doctrine of the countries from which information has not yet been received.
- To analyze in depth the norms, practice, and doctrine of the countries that responded to the questionnaire.
- To analyze the conventional instruments in force in the region, the autonomous norms, and soft-law instruments.
- To make a first draft of the Guide of good practices on international jurisdictional cooperation for the Americas.

Dr. José Moreno Rodríguez thanked Dr. Fresnedo for her work and asked her if there would be any interaction with UNCITRAL, UNIDROIT, and The Hague Conference. The rapporteur on the subject explained that dialogue with other organizations is essential.

Dr. George Galindo thanked the rapporteur for her work and said that it will be very important for the continent. He suggested that the rapporteur consider the differences in access to technologies not only between States but also within them. In this regard, the rapporteur promised to include in her report the issue of the disparity of social, economic, and legal realities. Furthermore, she explained that her proposals and recommendations for implementation will be progressive in nature, depending on the possibilities and availability of technological tools, avoiding shutting the door or hindering the progress of those countries who are more advanced in the use of technology.

During the 100th Regular Session of the Inter-American Juridical Committee (Lima, May, 2022), the rapporteur for this topic, Dr. Cecilia Fresnedo, presented a progress report on the subject, document CJI/doc.659/22, which includes new responses from Foreign Ministries in Argentina, Costa Rica, Panama, Mexico and Uruguay.

The rapporteur explained that the purpose of this work is to use the tools offered by technology today to update existing hard law instruments, motivated in part by the challenges imposed by the lack of ratification to conventions.

The report also includes a draft of the "Guide to good practices in matters of international jurisdictional cooperation for the Americas" that consists of three parts.

The Guide proposes solutions, rather than imposing them, depending on the economic and technological reality of each State, in order to "expedite certain acts of international judicial cooperation, shortening times, maintaining all the necessary guarantees of authenticity and privacy".

The Guide to Good Practice is divided into three parts and includes 33 rules:

Part 1. Purposes and justification

Based on successful experiences, new practices are proposed that are intended to improve and streamline international jurisdictional cooperation among States. The ASADIP Principles on Transnational Access to Justice (TRANSJUS) are used in a supplementary manner.

Part 2. General rules for the interpretation and application of existing conventional and autonomous rules.

- Rule 1. Interpretation and application of the rules.
- Rule 2. Speed and efficiency of cooperation.
- Rule 3. Subjective purpose and legal formalities
- Rule 4. Unknown tools and mechanisms.
- Rule 5. Use of technological means
- Rule 6. Tools and physical supports.
- Rule 7. Analog media and paper documents.
- Rule 8. Advertising of official channels of communication and information.
- Rule 9. Use of technology in general.
- Rule 10. Email.
- Rule 11. Electronic address
- Rule 12. Videoconferencing.
- Rule 13. Electronic files and documents issued by judicial and administrative authorities.
- Rule 14. Direct judicial communications.
- Rule 15. Joint hearings and coordinated decisions.
- Rule 16. Digital, analog mechanical, digitized or scanned signature
- Rule 17. Management systems and computer supports.
- Rule 18. Electronic forms.
- Rule 19. When the standard does not distinguish, the interpreter cannot do so.
- Rule 20. Evolutionary or progressive interpretation of the law.
- Rule 21. Exhortation.

Part 3. Rules for international jurisdictional cooperation

- Rule 22. Most favorable practices
- Rule 23. Ways and means of conveying letters requisitorial or letters rogatory
- Rule 24. Support where the letter requisitorial or letter rogatory is recorded.
- Rule 25. Requirements for compliance with the letter requisitorial.

- Rule 26. Documents accompanying the letter requisitorial or letter rogatory.
- Rule 27. Preparation of letters requisitorial or letters rogatory.
- Rule 28. Transmission and completion of the letter requisitorial or letter rogatory.
- Rule 29. Technical capacity building for Central Authorities.
- Rule 30. Evaluate the possible territorial decentralization of Central Authorities.
- Rule 31. Formalities and special procedures for compliance with evidentiary cooperation measures.
- Rule 32. Videoconferencing.
- Rule 33. Scope of the public policy exception

The Chair asked the rapporteur to place the rule on the training for civil servants among the first few, because of its importance in establishing good standing.

Dr. José Moreno Rodríguez stressed the useful and timely aspect of the proposal. As a way of obtaining more replies, he urged the Secretariat to organize meetings with the relevant national authorities. He feels that the document should be conceptualized as recommendations and good practices, rather not rules. For the rapporteur for this topic expressed his thanks for this suggestion.

Dr. Martha Luna explained the work being done in Panama, with a pending modification to the Commercial Code and the processes for integrating and adapting new technologies. She mentioned examples in the field of business and copyright courts, as well as some civil courts.

The rapporteur asked Dr. Luna to review the information available on Panama, and to explore the possibility of including additional data. In this regard, Dr. Luna expressed her full support with inputs from her country.

Dr. Ramiro Orias congratulated the rapporteur on her report, which encompasses the use of new information and communication technologies, and whose approach is closely aligned with access to digital justice. He proposed including discussions on open justice (which is more comprehensive than digital justice), as it strives to expand the disclosure of decisions. In his experience, the greatest progress in his country has been experienced at the level of the Public Prosecutor's Office, compared to the Courts. In this context, he urged the rapporteur to explore progress in the field of criminal prosecutors' offices.

The rapporteur explained to the plenary that her work is currently limited to civil matters.

In this regard, Dr. Orias requested that the civil aspect be clearly demarcated, leaving the door open for the future for work on criminal aspects.

Dr. Eric Rudge thanked the rapporteur for her report, the relevance of which was highlighted by the COVID-19 pandemic. He explained that he has had to deal with situations in his daily work in the judiciary, as the law does not establish any regulation for addressing witnesses or the use of documents. Training and knowledge of accessible tools are essential. He supported Dr. Moreno Rodriguez's idea that recommendations should be presented. In his personal experience, he referred to China's work in incorporating new technologies into the work of the judiciary, which could serve as a reference for States. He also referred to the experiences of the Caribbean States linked to the Netherlands (Aruba and Curacao). He urged that these issues should be addressed from now on, as their urgency is linked to the need to provide justice now days.

In this regard, the rapporteur offered her thanks for the comments and shared experiences, explaining that her report presents certain elements of her work related to the road sector, but does not abound in details such as the type of transportation.

During the 101st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2022), the topic was not considered.

During the 102nd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2023), this topic was not considered.

During the 103rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2023), the rapporteur for the topic, Dr. Cecilia Fresnedo, presented the final report on the issue that contains a Guide to Best Practices in Jurisdictional Cooperation for the Americas, which recommends mechanisms to make cooperation procedures under the inter-American conventions in force more effective through the use of information and communication technologies, document CJI/doc.696/23. It is non-binding document that take into consideration the social and economic differences existing in the region and seek to identify technically feasible issues that could be implemented "in practice without the need to modify or replace existing treaty texts."

The work includes national rules and developments in regional jurisprudence. The rules are expected to be interpreted in an evolutionary way and not by means of amendments.

She then gave an overview of each of the 21 general rules for interpretation and enforcement.

Rule 1. Interpretation and application of the norms

Rule 2. Speed and efficiency of cooperation

Rule 3. Subjective purpose and legal formalities

Rule 4. Unknown tools and mechanisms

Rule 5. Use of technological means

Rule 6. Tools and hardware

Rule 7. Analog media and hardcopy (paper) documents

Rule 8. Publicizing official communication and information channels

Rule 9. Utilization of technology in general

Rule 10. Electronic mail

Rule 11. Electronic address/domicile

Rule 12. Videoconferencing

Rule 13. Electronic files and documents issued by judicial and administrative authorities

Rule 14. Direct judicial communications

Rule 15. Joint hearings and coordinated decisions

Rule 16. Digital, mechanical analog, digitized, or scanned signature

Rule 17. Management systems and computer support

Rule 18. Electronic forms

Rule 19. When the rule does not distinguish, the interpreter may no do so

Rule 20. Evolutionary or progressive interpretation of the law

Rule 21. Exhortation

Rule 22. Most favorable practices

Rule 23. Ways and means of transmitting letters rogatory

Rule 24. Medium used for the letter rogatory

Rule 25. Requirements for compliance with the letter rogatory

Rule 26. Documents accompanying the letter rogatory

Rule 27. Preparation of letters rogatory

Rule 28. Transmission and processing of the letter rogatory

Rule 29. Technical capacity-building of the central authorities

Rule 30. Evaluate the possible territorial decentralization of central authorities

Rule 31. Special formalities and procedures in the enforcement of evidentiary cooperation measures

Rule 32. Scope of the public order exception

In concluding, the rapporteur noted the existence of hard law and soft law instruments that allow—or at least do not prohibit—the practical use of ICTs. In addition, in response to the Chair, the rapporteur explained that this presentation had been made to the Paraguayan authorities and had been very well received.

Dr. Eric P. Rudge noted a difference between the English and the Spanish title that warranted a revision, and he asked if it would be possible to include a list of abbreviations at the beginning of the report. Regarding Rule 21, which refers to prompt adoption, he suggested that such amendments be made progressively. The rapporteur thanked him for the suggestion and agreed to include it.

The Chair referred to issues where jurisdictions did not have adequate rules and to attacks on States' failures to adapt their regulatory frameworks.

Dr. Martha Luna explained that legislation in favor of digitization was already before Congress, which will allow her country to comply with international standards and practices.

Dr. Ramiro Orias joined in congratulating the rapporteur and asked about the issue of functional analogies, in which the same end is achieved through other means: a concept that could be incorporated into her report.

The Chair thanked the rapporteur for the boldness of her report and explained that this document was to be presented at ASADIP the following week and that if new developments were to arise, they would be included for possible adoption after the meeting, although it may be approved in its current version. On Friday, August 11, the rapporteur submitted the last version and requested to be approved to be submitted to the OAS Permanent Council as Committee report. On August 22, 2023, the technical secretariat submitted to the President of the Permanent Council the report entitled "New technologies and their relevance for international jurisdictional cooperation," document CJI/doc.696/23 rev. 1, and can be viewed at the website of the CJI under the section themes concluded: OAS :: Inter-American Juridical Committee (IAJC) :: Themes Recently Concluded.

The following is the report adopted by the Committee at its August 2023 session, held in Rio de Janeiro:

CJI/doc. 696/23 rev.1

NEW TECHNOLOGIES AND THEIR RELEVANCE FOR INTERNATIONAL JURISDICTIONAL COOPERATION

I. BACKGROUND

At its 98th Regular Session (April 5-9, 2021) the Inter-American Juridical Committee (hereinafter, CJI) approved, for inclusion in the CJI's Agenda, the topic "New technologies and their relevance for international legal cooperation" (OEA/Ser. Q, CJI/doc. 637/21 of April 6, 2021).

The topic proposed and approved falls within the theme "Promotion and study of areas of legal sciences", contained in the mandates of the General Assembly to the American Juridical Committee (see document "Mandatos.AG.ES.2021.pdf"). The summary, operative paragraph 8 provides: "To request the CJI to promote and study those areas of juridical science that facilitate international cooperation in the inter-American system for the benefit of the societies of the Hemisphere."

The objective proposed by the CJI is the preparation of a Guide of good practices in matters of international jurisdictional[1] cooperation for the Americas, which will be useful to law operators (judges, attorneys, etc.) to obtain the maximum possible benefit from the tools offered at present by technology, when enforcing the existing conventional and autonomous instruments in the area.

As a first step in addressing the issue, in my capacity as rapporteur I prepared a questionnaire that, within the cooperation framework established between the CJI and the American Association of Private International Law (ASADIP), was sent to various specialists in the region and to which six responses were received. Those answers were reflected in the first progress report.

At the 99th Regular Session of the CJI, held in August 2021, Dr. Moreno Rodríguez emphasized the need for dialogue with other organizations. He suggested contacting Luca Castellani of UNCITRAL.

Dr. George Galindo mentioned the need to consider the social and economic differences among the various states of the region, an issue taken into account when preparing the First Draft of the Guide to Best Practices in International Jurisdictional Cooperation for the Americas (hereinafter, Guide).

In this sense, this rapporteur considers that the "Guide to Best Practices in International Jurisdictional Cooperation for the Americas" should recommend, propose, suggest taking into account, but not impose the solutions it contains.

The September 16 meeting between the OAS, The Hague Conference on Private International Law, and Legal Advisors of the Foreign Ministries suggested that the OAS member states be invited to answer questionnaires regarding two new topics on the agenda of the Inter-American Juridical Committee, including one referring to "New technologies and their relevance for international legal cooperation." To date, responses have been received from the foreign ministries of Argentina, Canada, Costa Rica (prepared by the Office of Cooperation and International Relations, Area of International Law), Ecuador, Panama (Mr. Otto A. Escartín Romero, Director in Charge of Legal Affairs and Treaties, and Mr. Juan Carlos Arauz Ramos, President of the Panama Bar Association), Mexico, and Uruguay (Dr. Marcos Dotta, Director of International Law Affairs of the Ministry of Foreign Affairs).

II. PRESENTATION OF THE TOPIC

When proposing this theme to the CJI, I explained that it was my belief that we all agree that the pandemic caused by COVID-19 has forced us to resort to technology in order to continue operating in the most diverse aspects of life: familiar, social, professional, teaching areas, among many others. The situation has accelerated the application of technology in the practice of Law, developing some tools already in use and applying them to other areas where the use of technology had not been explored. I am referring to electronic notifications, judicial hearings - and arbitrations - either via Zoom or through the use of other platforms, and electronic communications between judicial authorities, among many others. This has shown that certain acts of international jurisdictional cooperation can be expedited, therefore shortening times while maintaining all the necessary guarantees of authenticity and privacy.

[1] The term "jurisdictional" is used in this report to refer to cooperation between authorities that perform jurisdictional functions on a regular basis, even if they do not belong to the judicial branch *strictu sensu*, as is the case, for example, of the Administrative Contentious Court in Uruguay (*Tribunal de lo Contencioso Administrativo*). International cooperation between administrative authorities is not covered. See in this sense: Didier Opertti Badán, *Exhortos y Embargos de Bienes Extranjeros. Medios de cooperación judicial internacional*, Montevideo, Ediciones Jurídicas Amalio M. Fernández, 1976, particularly p. 29, 38 and 41-43.

I consider that the analysis of this issue would allow updating the mechanisms of international jurisdictional cooperation provided for in several Inter-American Conventions, for example, the Inter-American Convention on Letters Rogatory, the Inter-American Convention on Receipt of Evidence Abroad (both approved by CIDIP-I, Panama, 1975), the Inter-American Convention on the Enforcement of Precautionary Measures, the Inter-American Convention on Extraterritorial Efficacy of Foreign Judgments and Arbitral Awards (both approved in CIDIP-II, Montevideo, 1979), among other inter-American instruments, which, due to chronological reasons, do not refer to the technological mechanisms available today. However, these Conventions do not close the doors to such innovations.

By way of example, note that Art. 15 of the Inter-American Convention on Letters Rogatory establishes that: "This Convention shall not limit any provisions regarding letters rogatory in bilateral or multilateral agreements that may have been signed or may be signed in the future by the States Parties or preclude the continuation of ***more favorable practices in this regard that may be followed by these States***" (emphasis added). The materialization of these practices can be found, for example, in the **ASADIP Principles on Transnational Access to Justice (TRANSJUS)**, which can be applied "where the parties have agreed that procedural aspects of their legal relationship shall be governed by them, unless expressly prohibited by the law of the forum," and also [These Principles may be applied] as long as such application is technically feasible and does not result in an outcome manifestly incompatible with the fundamental principles of the applicable law (art. 1.3).

The idea is to work on the identification of the questions that are technically feasible, and which could be implemented in the practice, without the need to modify or replace the prevailing legal/conventional texts, and on cases lacking conventional standards.

Initially, I proceeded to explore, through the aforementioned questionnaire, among other tools, the current situation of the different countries regarding the use of technological tools in matters of international jurisdictional cooperation, in order to analyze which issues may benefit from the use of technology capable of improving practical enforcement of the aforementioned Conventions, with a view to the **drafting, by the CJI, of a Guide on good practices in international jurisdictional cooperation for the Americas**.

This Guide of good practices could indicate and enable technological mechanisms that allow prioritizing procedural speed without compromising the security and effectiveness of substantial rights over formalities, since latter´s sole reason for existing is to guarantee substantial rights. In the case of notices, for example, the content of the warrant would not be amended, because changes occur in the media on which the information is based, that is, from material hard copies to electronic communications.

In conclusion, I believe that technological progress is here to stay and that we must not only accept it but also use it with a view to improving international jurisdictional cooperation in all matters. Without jeopardizing progress in normative matters, we can use, as far as possible, the instruments that are currently available, such as the inter-American conventions referred to above, but updating them in practice through the Good Practices Guide to be prepared by the CJI.

III. THE QUESTIONNAIRE

The countries that answered the questionnaire have ratified various conventional instruments, both regional and universal.

In general, all the countries that answered the questionnaire have autonomous regulations in force regarding international jurisdictional cooperation.

All the responses received to the questionnaire show the use of technological mechanisms, to a greater or lesser extent. Some do so in compliance with some regulation in force in their countries, usually autonomously, given that the conventional ones, for chronological reasons, do not expressly provide for such mechanisms, although they do not prohibit them.

A. Legislation

1) Is your country a party to the conventional instruments listed below?

a. Inter-American Convention on Letters Rogatory (Approved at CIDIP-I, Panama, 1975) and the 1979 Additional Protocol.

There are 18 States Parties to this Convention: (Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Spain, the United States, Uruguay, and Venezuela) and 15 signatories of its Protocol (Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, El Salvador, Guatemala, Mexico, Panama, Paraguay, Peru, the United States of America, Uruguay, and Venezuela).[2]

b. Inter-American Convention on the Taking of Evidence Abroad (approved at CIDIP-I, Panama, 1975) and its 1984 Additional Protocol.

There are fifteen States Parties to this Convention: Argentina, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, the Dominican Republic, Uruguay, and Venezuela.[3]

The States Parties to the Additional Protocol, on the other hand, are only five: Argentina, Ecuador, Mexico, Uruguay, and Venezuela.[4]

c. Inter-American Convention on Execution of Preventive Measures (approved at CIDIP-II, Montevideo, 1979).

There are seven States Parties to this Convention: Argentina, Colombia, Ecuador, Guatemala, Paraguay, Peru, and Uruguay,[5]

d. Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (approved at CIDIP-II, Montevideo, 1979)

There are ten States Parties to this Convention: Argentina, Bolivia, Brazil, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay, and Venezuela.[6]

e. Protocol of cooperation and jurisdictional assistance in civil, commercial, labor and administrative matters (MERCOSUR, Las Leñas, 1992)

There are four States Parties to this Protocol: Argentina, Brazil, Paraguay, and Uruguay.[7]

f. Supplemental Agreement to the Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor, and Administrative Matters.

There are three States Parties to that Agreement: Argentina, Paraguay, and Uruguay.

g. Agreement on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor, and Administrative Matters between the States Parties of MERCOSUR, the Republic of Bolivia, and the Republic of Chile

There are six States Parties to that Agreement: Argentina, Brazil, Chile, Ecuador, Paraguay, and Peru

h. Convention on Procedural Equality of Treatment and Letters Rogatory.

There are two States Parties to that Agreement: Uruguay and Argentina.

i. Agreement on Mutual Recognition of digital signature certificates of MERCOSUR

There are two States Parties to that Agreement: Argentina and Uruguay.

---

[2] https://www.oas.org/juridico/spanish/firmas/b-46.html (last accessed: July 13, 2021).
[3] http://www.oas.org/juridico/spanish/firmas/b-37.html (last accessed: July 13, 2021).
[4] http://www.oas.org/juridico/spanish/firmas/b-51.html (last accessed: July 13, 2021).
[5] https://www.oas.org/juridico/spanish/firmas/b-42.html (last accessed: July 13, 2021).
[6] http://www.oas.org/juridico/spanish/firmas/b-41.html (last accessed: July 13, 2021).
[7] https://iberred.org/convenios-civil/protocolo-de-las-lenas-de-cooperacion-y-asistencia-jurisdiccional-en-materia-civil (last accessed: July 13, 2021).

j. Other instruments, bilateral and otherwise.

Some relevant Conventions on the topic under study are included herein:

- Agreement of October 5, 1961, Suppressing the Requirement of Legalization of Foreign Public Documents

Several countries in the region are parties to this Agreement.[8]

- The Hague Convention on the Notification or Transfer Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965)

The following countries in the Americas are parties to this convention, among many others from other regions: Argentina, Brazil, Canada, Costa Rica, United States, Mexico, Nicaragua, and Venezuela.[9]

- The Hague Convention to Facilitate International Access to Justice (1980)

Only two countries in the Americas are parties to this convention (Brazil and Costa Rica), among others from other regions.[10]

- Hague Convention of November 23, 2007, on the International Collection of Alimony for Children and other Family Members and Protocol on the Law Applicable to Alimony Obligations

Only one country in the Americas is party to this convention (Brazil), among others from other regions.[11]

- Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters

The following countries in the Americas are parties to this convention, among many others from other regions: Argentina, Brazil, Costa Rica, United States, Mexico, Nicaragua and Venezuela.[12]

- MERCOSUR Protocol on Precautionary Measures

Parties to this Protocol: Argentina, Brazil, Paraguay and Uruguay.

In addition, there are multiple bilateral agreements on topics on international jurisdictional cooperation that bind several States in the region.

2) Does your country have autonomous regulations in force regarding international jurisdictional cooperation? Which are they?[13]

In general, all the countries that answered the questionnaire have autonomous regulations in force regarding international jurisdictional cooperation.

In **Argentina**, María Blanca Noodt Taquela and Julio C. Córdoba report that the autonomous regulations on the matter are contained in arts. 2610, 2611 and 2612 of the Civil and Commercial Code of the Nation, Law No. 26994, which came into force on August 1, 2015. In addition, there are 24 provincial regulations and the City of Buenos Aires on the recognition of foreign judgments; such diversity relies on the federal system of Argentina. In the case of the Civil and Commercial

8. See full list at https://www.hcch.net/es/instruments/conventions/status-table/?cid=41 (last accessed: July 13, 2021).
9. See full list at https://www.hcch.net/es/instruments/conventions/status-table/?cid=17 (last accessed: July 21, 2021).
10. See full list at https://www.hcch.net/es/instruments/conventions/status-table/?cid=91 (Last accessed: July 21, 2021).
11 See full list at https://www.hcch.net/es/instruments/conventions/status-table/?cid=133 (Last accessed: July 21, 2021).
12 See full list at https://www.hcch.net/es/instruments/conventions/status-table/?cid=82 (Last accessed: July 21, 2021).
13 By "autonomous norms" we understand those norms of Private International Law that emanate from the Parliament of a State, that is, that are of internal or national source, and not international, such as treaties and conventions.

Procedural Code of the Nation, Law No. 17454 of 1967, amended in 1981 by Law No. 22434, the matter is regulated in arts. 517 to 519.

The CCCN regulates issues such as equal procedural treatment to foreign litigants, cases in which - in addition to the obligations assumed by international conventions -, Argentine judges must provide broad jurisdictional cooperation in civil, commercial and labor matters and international procedural assistance, among others. The Code of Civil and Commercial Procedure of the Nation regulates issues such as the recognition and execution of foreign judgments.

It should be noted that the express text admits that "Argentine judges are empowered to establish **direct communications with foreign judges** who accept the practice, as long as the guarantees of due process are respected" (art. 2612 CCCN)

In **Bolivia**, José Manuel Canelas refers to the new Civil Procedure Code, promulgated in 2013, which contains a final chapter on "International Judicial Cooperation": an important innovation in the legislation of his country.

In **Brazil**, Valesca Raizer and her team present a very extensive report that synthetically establishes that there is "a substantial set of regulations in force on international legal cooperation", and highlights those contained in the 1988 Constitution of the Federative Republic of Brazil, in the Law of Introduction to the Rules of Brazilian Law - LINDB (Decree-Law No. 4657 of 09/04/1942, amended by Law No. 12376 of 12/30/2010), "compiling various Private International Law norms, including issues related to international legal cooperation), the **Code of Civil Procedure CPC/200**5 (Law No. 13105, of March 16, 2015) that establishes "a systemic regime for international legal cooperation, provided for in Title II "On the Limits of National Jurisdiction and International Legal Cooperation". The primacy of the conventional rules provided for in the International Treaties on international legal cooperation to which Brazil is a party is established, as opposed to the autonomous infra constitutional rules. They also mention Resolution No. 9/2005 of the Superior Court of Justice - STJ, the Internal Regiment of the Supreme Federal Court-STF, and Inter-Ministerial Policy No. 501, of March 21, 2012, between the Ministry of Foreign Affairs and the Ministry of Justice.

In **Colombia**, José Luis Marín reports that the autonomous regulations in force in his country regarding international jurisdictional cooperation are to be found in the General Code of the Process, Law 1564 of 2021 [Article 41].

In addition, the Rapporteur mentions Decree 491 of 2020, which establishes that: "In order to maintain continuity in the provision of alternative justice services, arbitration processes and extrajudicial conciliation procedures, amicable composition and personal insolvency procedures of non-merchant natural persons will be processed through the **use of communication and information technologies**, in accordance with the administrative instructions issued by the arbitration and conciliation centers and the public entities in which they are processed, as the case may be. Said public entities and centers will make available to the parties and proxies, arbitrators, conciliators, amiable compositors, **the electronic and virtual means necessary for the receipt of documents and the holding of meetings and hearings**. This will make available electronic addresses for the receipt of arbitration demands, requests for extrajudicial conciliation, amiable composition, insolvency of a non-merchant natural person, and any document related to their processes or procedures; this will also allow sending **communications and notifications electronically, as well as carrying out virtually all types of meetings and hearings** at any stage of the arbitration process, the conciliation process, the amicable solution or bankruptcy of a non-merchant natural person. In the event of not having sufficient technology to do so, the center or public entity may enter into agreements with other centers or entities to carry out and promote actions, processes and procedures." (art. 10).

Article 11 of Decree 491 of 2020 establishes the following: "During the period of mandatory preventive isolation, the authorities referred to in article 1 of this Decree that do not have a **digital signature**, may validly sign the acts, orders and decisions that they adopt by means of a mechanical autographed signature, digitized or scanned, depending on the availability of these media. Each authority will be responsible for adopting the internal measures necessary to guarantee the security of the documents executed by these means."

Decree 806 of the year 2020 is also mentioned, and Article 1 establishes that: "This decree aims to **implement the use of information and communication technologies in judicial proceedings and to streamline the judicial processes** before the ordinary jurisdiction in civil, labor, family and litigation matters - and also in the administrative, constitutional and disciplinary jurisdiction, as well as the actions of the administrative authorities exercising jurisdictional duties and in **arbitration processes**, during the term of validity of this decree. (…)"

Article 2 of Decree 806 of 2020 refers specifically to the use of information and communication technologies and establishes that "**Information and communication technologies must be used in the management and processing of judicial processes** and ongoing matters, in order to facilitate and expedite access to justice, as well as to protect judicial officers and also the users of this public service.

"Technological means will be used for all actions, hearings and proceedings and the parties in the process will be allowed to act in the suits or procedures through the **digital means** available, avoiding demanding and fulfilling face-to-face or similar formalities that are not strictly necessary. Therefore, the actions will not require handwritten or digital signatures, personal presentations or additional authentications, nor will they be incorporated or presented on physical media.

"Judicial authorities will publish through their websites the official communication and information channels through which they will provide their services, as well as the **technological mechanisms** employed.

"With regard to enforcement of international conventions and treaties, special attention will be paid to rural and remote populations, as well as to ethnic groups and people with disabilities who face **barriers when trying to access information and communication technologies, so as to guarantee that accessibility criteria** are applied. It should also be assessed if any reasonable measure is required, in order to ensure the right to the administration of justice on equal terms with other people."

"PARAGRAPH 1. All necessary measures will be taken to guarantee due process, publicity and the *audi alteram partem* principle in the application of **information and communication technologies**. To this end, the judicial authorities will seek **effective virtual communication** with the users of the administration of justice and will adopt the pertinent measures so that they can become aware of the decisions and exercise their rights."

"PARAGRAPH 2. The municipalities, legal entities and other public agencies will, to the extent of their possibilities, facilitate access to virtual procedures from their own headquarters."

Dr. Marín also mentioned the jurisprudence factor, especially Decision C-420 of 2020 by the Constitutional Court.

In **Cuba**, Taydit Peña Lorenzo informed that the autonomous norms in force in her country as regards international jurisdictional cooperation are contained in the following normative bodies:

- Law No. 7, on Civil Administrative and Labor Procedure, of August 19, 1977. Official Gazette No. 34 of August 20, 1977 (Last update: April 6, 2004), including Decree-Law 241/2006, which incorporates the Fourth Book to the Cuban Procedures Law on the Economic Procedure (hereinafter LPCALE).

- State Notary Public Law, Law No. 50 of December 28, 1984, published in Regular Official Gazette No. 3 of March 1, 1985.

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that the autonomous regulations of Mexico in matters of international jurisdictional cooperation are basically "those contained in the Fourth Book of the Federal Code of Civil Procedures, namely "International Procedural Cooperation" (articles 543 to 577). These provisions are in accordance with the Inter-American Conventions adopted by Mexico on the matter, resulting from 1988 amendments to the civil legislation, thanks to the endeavors of the Mexican Academy of Private and Comparative International Law (AMEDIP). This legislation does not contain express references to the use of any particular technology, precisely in view of when it was enacted."

In **Uruguay**, the autonomous norms on international jurisdictional cooperation are contained in the General Code of Procedures (1988), Articles 91, 126, 143, and 524-543.

The **use of electronic file, electronic document, simple computer encoding, electronic signature, digital signature, electronic communications and the constitution of an electronic address** is hereby authorized **in all judicial and administrative cases that are processed before the Judiciary**, with the same legal effectiveness and probative effect as their conventional equivalents. The Supreme Court of Justice is empowered to regulate such use and order its gradual implementation". Joint Resolution No. 7637 of 9/16/2008 of the Supreme Court of Justice on electronic notifications issued the regulatory norms applicable to this piece of legislation, "the main purpose being to provide security to the new system against possible technical and practical difficulties."

In **Venezuela**, María Alejandra Ruiz mentions the Law of Private International Law, promulgated on August 6, 1998 (Official Gazette 36511).

B. Practice in Jurisprudence and Central Authorities

3) With reference to the compliance with any of the conventional or autonomous regulations in force in your country, does the jurisprudence and/or the Central Authority of your country use technological mechanisms?

All the responses received to the questionnaire show the use of technological mechanisms, to a greater or lesser extent. Some do so in compliance with some regulation in force in their countries, usually autonomously, given that the conventional ones, for chronological reasons, do not expressly provide for such mechanisms, although they do not prohibit them.

In **Argentina**, according to the Foreign Ministry of that country, "the situation triggered by the health emergency caused by the COVID-19 virus prompted the Argentine Central Authority to go paperless and respond digitally to requests for assistance. This entailed an enormous challenge, considering the significant flow of paper documentation received daily."

The report adds, "Fortunately, according to experiences shared at international and regional forums, using technological means for jurisdictional cooperation has been positively received not only in the Argentine Republic but also globally."

Finally, it reports something encouraging about the goals of this work: "...that, in the framework of the last meetings of the Technical Commission of Justice during the meetings of Ministers of Justice of Mercosur and Associated States, the delegations discussed the possibility of adopting an instrument with recommendations for the electronic processing of requests, using videoconferences and electronic signatures, and implementing measures to ensure a high security margin for electronic exchanges."

Perhaps the Guide being prepared by the CJI will be the intended instrument for Mercosur, but with a broader scope of application, covering not only the countries of that economic integration body but all the member countries of the OAS.

In **Bolivia**, according to José Manuel Canelas, the **digital signature** is beginning to be used.[14]

In **Brazil**, according to Valesca Raizer and team, "the Superior Court of Justice - STJ, responsible for the enforcement of Letters Rogatory and for the homologation and execution of Foreign Judgements uses three artificial intelligence tools: **Socrates, Athos and E -Juris. Socrates** is the early identification of legal disputes in special appeals. One of the duties of the tool is to automatically indicate the constitutional permissiveness invoked for the filing of the appeal, the legal provisions questioned, and the paradigms cited that justify the divergence. In turn, **Athos** is meant to locate - even before they are distributed to the judges - the cases that can be assigned for trial under the rule of repetitive appeals. In addition, the platform monitors cases with convergent or divergent opinions between the divisions of the Superior Court of Justice - STJ, cases with notoriously relevant matters and also possible distinctions or annulments of qualified precedents.

[14] See, for example, the website of the digital apostille: https://www.cancilleria.gob.bo/apostilla/node/14

Finally, **E-juris** is used by the STJ Secretariat of Jurisprudence to extract the legislative and jurisprudential references of the decision, in addition to indicating the main successive sentences on the same legal issue. The Superior Court of Justice is developing a fourth tool, the **Unified Table of Issues (Tabela Unificada de Assuntos - TUA)**, which aims to automatically identify the subject of the case for distribution to court sessions, according to the relevant area of law. "

Furthermore, in order to facilitate the preparation of requests for international legal cooperation, the **Central Authority** (Ministry of Justice and Public Security) has adopted **guided electronic forms,** which "provide guidance on the correct compliance with the mandatory information and examples. The applicant must save and print the form, which must follow the normal procedure of a request for cooperation, with the signature of the judicial authorities and physical delivery by mail. In addition, they use the **Electronic Information System**, a document management tool and electronic processes, a system which allows external users to file electronic requests. "

Costa Rica reports, "Although there is no legal impediment, in practice, using technological mechanisms is limited to certain judicial offices, certain issues and certain stages of international legal cooperation procedures, both in matters related to the recognition and enforcement of foreign judgments and awards, as well as active and passive international judicial assistance."

The Report adds, "In most judicial offices, electronic means are used only as a support and/or backup for files. In some, they are used for issuing, signing and notifying resolutions."

"They are also used for communication among offices of the Judiciary and certain public institutions to obtain information (National Registry of movable and immovable property, powers of representation, etc.) and to execute certain judicial decisions (e.g., recording vital and civil events such as divorces or adoptions in the Civil Registry).

"In most cases, submitting original physical documents is required when apostilled or legalized through diplomatic or consular channels."

"In active and passive international judicial assistance (letters rogatory or warrants, obtaining evidence, etc.) issuing physical documents is required, including copies as stated in some international instruments, since they must be transmitted through the General Secretariat of the Supreme Court of Justice and the Ministry of Foreign and Religious Affairs to the different diplomatic and consular representatives in charge of sending requests to the central or competent authority of the other country, or vice versa."

In **Cuba**, Taydit Peña Lorenzo reports that the jurisprudence and the Central Authority of her country adopt technological mechanisms to send documentation via **email and telephone calls**. In view of the C-19 pandemic, **Video calls** are used in the case of notifying initiation of international procedures.

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that the jurisprudence and the Central Authority of their country **use technological mechanisms**, not in compliance with the conventional or autonomous regulations in force in Mexico, since they do not prohibit them either. "As of the pandemic, the process accelerated in some courts of federal entities such as in the State of Mexico, in Nuevo León and now in Mexico City, in addition to the Federation, with the issuance of administrative agreements allowing consultation of and access to electronic files, as well as the release of hearings and proceedings. In certain cases, for example voluntary divorce lawsuits in the State of Mexico, procedures can be solved 100% electronically."

Finally, the informants provide examples of electronic services offered by some courts at the state level.

The Report of the Mexican Permanent Mission to the OAS reaffirms the foregoing and adds further details.

In **Panama**, so far, the jurisprudence and the Central Authority have not used any technological mechanism to comply with any of the conventional or autonomous regulations in force in the country.

In **Uruguay**, Daniel Trecca reports that the judicial and central authorities of his country employ "**institutional email and cloud-based accounts** for the receipt and forwarding of letters

rogatory; **videoconferencing** is also used in the case of statements rendered abroad; **electronic signatures** are also common."

In **Venezuela**, María Alejandra Ruiz reports that "**electronic documents** and **electronic signatures** are frequently used in State agencies," and refers to the *Infogovernment Law* that regulates the **use of information technology** in the Public Administration. Article 26 of said law indicates that "the electronic files and documents issued by the Public Power and the People's Power, containing electronic certifications and signatures, have the same legal validity and probative effect as files and documents in physical form."

4) Are technological instruments, tools or mechanisms, such as those indicated in the following list, or others, used in your country?

All the responses received refer to the use of some of the technological instruments, tools or mechanisms listed in items a) to h) of this question, some more than others, as outlined below.

In **Argentina**, according to its Foreign Ministry, "The International Legal Assistance Department of the Ministry of Foreign Affairs, International Trade and Religion has managed to adapt to the new demands of the current situation, using computer tools in pursuit of efficiency in its activity as a Central Authority. Examples include implementing electronic files, receiving and dispatching electronic documents, electronic communications with Central Authorities and local judicial authorities, incorporating electronic signatures, and others."

According to José Manuel Canelas, in **Bolivia** there is a legal possibility to use technological instruments, tools or mechanisms, "although in practice this currently does not occur."

In **Brazil**, according to Valesca Raizer and her team, "**Law No. 11419**, of December 19, 2006, established **the computerization of judicial processes, communication of orders and transmission of procedural documents** in the country (art. 1). (…) In addition, **the 2015 Code of Civil Procedure**, in Article 193, establishes that **procedural acts may be totally or partially electronic, while** Article 246, Item 1 addresses **the possibility of electronic summons and notifications.** "

In **Colombia**, José Luis Marín informs that in his country electronic files, documents and signatures are being used, as well as electronic communications, notifications and summons of orders, resolutions and sentences (alone or with documents attached), as well as electronic court injunctions. However, neither the digital signature nor the constituted electronic address is currently in use.

In **Cuba**, Taydit Peña Lorenzo reports that in her country electronic documents, digital signatures, electronic communications and notifications and summons of orders, resolutions and sentences (alone or accompanied by documents) are in use.

In **Venezuela**, María Alejandra Ruiz reports that electronic files are not used in her country, but that "physical documents are still in use, although communicating by email is allowed." Electronic documents are used as well as electronic signatures, communications and addresses (although only for tax purposes; according to the Organic Tax Code, the use of an electronic fiscal address can be requested). Similarly, notices and summons of orders, resolutions and sentences (alone or accompanied by documents), as well as judicial summons, can be delivered by electronic means. Digital signatures are not used for the time being.

a. Electronic records/files

In **Argentina**, María Blanca Noodt Taquela and Julio C. Córdoba report that in some jurisdictions **the electronic file system is used, but this is not the case in most situations**. "The Civil and Commercial Code of Procedures of the province of Corrientes, adopted on April 21, 2021, as Law No. 6556/2021, provides for electronic files and notifications, but not in international cases."

In **Bolivia**, José Manuel Canelas reports that Article 99 of the Code of Civil Procedures establishes that: "Case records start with the first presentation or initial brief, subsequent actions are incorporated chronologically and successively, and further **procedures may be electronic**."

In **Brazil**, according to Valesca Raizer and her team, "**electronic files are used in electronic processes, while audio** files, photos, conversations on social networks, among others, can be used

as proof of evidence'. In the case of physical processes, these files can also be used and stored on CDs or pen drives".

Costa Rica reports that electronic files are used "in the vast majority of judicial processes in the so-called Online Management system. Parties can access them using a username and password requested at any judicial office and linked to the identity or residence card number."

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that electronic files are used in some states, such as Nuevo León, the State of Mexico, Mexico City, and the Federal Judicial Branch.

It is starting to be used in **Panama**.

In **Uruguay**, Daniel Trecca informs that electronic files are used and regulated in Law 18237 and in Decree No. 7637 of the Supreme Court of Justice. However, at present, the courts continue to work with the files in paper format, without prejudice to a digital record being kept of file movements.

In **Venezuela**, María Alejandra Ruiz reports that electronic files are not used in her country, since files are still in physical format. However, corresponding by email is allowed.

b. Electronic documents

In **Argentina**, María Blanca Noodt Taquela and Julio C. Córdoba report that electronic documents are being used.

In **Bolivia**, Canelas reports that Article 144 (II) of the Civil Procedure Code states that: "(…) documents and digital signatures and email-generated documents are considered legal means of proof, subject to conditions provided for in the Law."[15]

In turn, Section III states: "The parties may use any other means of proof not expressly prohibited by law, and which they consider conducive to the demonstration of their claims. These means of proof will be promoted and judged applying by analogy the provisions relating to similar means of evidence contemplated in this Code and, failing that, in the manner provided by the judicial authority. "

Law 1173 on the abbreviation of criminal procedures establishes similar provisions in the case of criminal procedures.[16] Telecommunications Law No. 164 of 2011 also indicates that documents in electronic media are considered as valid evidence and proof.[17]

In **Brazil**, according to Valesca Raizer and team, electronic documents are used by the Brazilian judiciary, especially in electronic processes. The certificates and procedures carried out, mainly by notarial clerks, are all done electronically, according to the system adopted by each Court, as indicated above. In relation to the documents prepared by the parties, they are normally digitized and attached to the electronic process or are even produced entirely in digital media. Since 2020, notaries have an online service managed by the Notarial Digital Authentication Center (Cenad), through which documents can be digitally notarized and then forwarded by email or by other forms of online communication. To do so, operators simply need to complete the online registration form on the website https://cenad.e-notariado.org.br/.

In **Costa Rica**, electronic documents are used in the vast majority of judicial processes.

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that electronic documents are used in some states, such as Nuevo León, the State of Mexico, Mexico City and the Judicial Branch of the Federation.

Panama only uses governmental electronic documents because they have their own regulations. However, they must be electronically signed or the entity, through the General Secretary of the legal department, musts sign them as true copies of the original."

---

[15] See also Art. 150 (IV).

[16] See Art. 9 and the Fourth and Ninth Transitory Provisions.

[17] See, among others, Art. 6 (IV).

In **Uruguay**, Daniel Trecca informs that electronic documents are used and that they are regulated by Law No. 18237.

In **Venezuela**, María Alejandra Ruiz reports that electronic documents are used.

c. Electronic signature

In **Argentina**, María Blanca Noodt Taquela and Julio C. Córdoba report that electronic signatures are used.

In **Brazil**, according to Valesca Raizer and team, "the electronic signature has legal validity, being recognized by the legislation. Provisional Measure No. 2200-2 / 2001 establishes the Brazilian Public Keyword Infrastructure (ICP-Brazil) and recognizes digital signatures and other electronic means of proof on the authorship and integrity of documents. Law No. 14063/2020, in turn, deals with the use of electronic signatures in interactions with public entities of the country. In addition, Decree No. 10543 regulates the use of this tool in the federal public administration. It is important to emphasize that in Brazil documents bearing a digital or physical signature enjoy exactly the same validity."

In **Costa Rica**, electronic signatures are used "by judges of the Judicial Power".

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that the electronic signature is used in some states, such as Nuevo León, the State of Mexico, Mexico City and the Judicial Branch of the Federation.

The electronic signature of the Public Registry is recognized in **Panama**.

In **Uruguay**, Daniel Trecca informs that the electronic signature is used and that it is governed by Law 18237. It is becoming increasingly common for international letters rogatory to be issued by Uruguayan Courts in electronic format and electronically signed. They come with a QR code to substantiate their authenticity.

In **Venezuela**, María Alejandra Ruiz reports that the electronic signature is used in her country.

d. Digital signature

In **Argentina**, María Blanca Noodt Taquela and Julio C. Córdoba report that digital signatures are used.

In **Brazil**, according to Valesca Raizer and team, "the digital signature, also known as qualified electronic signature, enjoys high reliability and requires a digital certificate issued by a Certification Authority, in accordance with Provisional Measure No. 2.200-2. Law No. 14.063 / 2020, as mentioned above, establishes that the digital signature is allowed in any electronic interaction with the public."

In **Costa Rica**, digital signatures are used and accessible to all, being regulated by the government.

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that the digital signature is used in some states, such as Nuevo León, the State of Mexico, Mexico City and the Judicial Branch of the Federation.

In **Uruguay**, Daniel Trecca informs that the digital signature is used and that it is regulated by Law 18237.

In **Venezuela**, María Alejandra Ruiz reports that the digital signature is not used in her country.

e. Electronic communications

In **Argentina**, María Blanca Noodt Taquela and Julio C. Córdoba report that electronic communications are being used.

In **Brazil**, according to Valesca Raizer and her team, "both the Code of Civil Procedure and Law No. 11.419 establish the possibility for summonses to be issued electronically. However, it is necessary for the parties to secure registration in the system in which the electronic process is inserted. Accordingly, in Brazil, parties are normally summoned by mail, using the Notice of Receipt (AR) solution. In relation to summons, these are more usually delivered electronically,

given the need for attorneys to register in the systems. Other communications, as well as any clarification, can also be made virtually through institutional emails. However, the possibility of making such communications in person or by phone is not excluded."

In **Costa Rica**, "regular electronic means are used for informational communications, sending and receiving documents for judicial proceedings."

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that electronic communications are used in some states, such as Nuevo León, the State of Mexico, Mexico City, and the Federal Judicial Branch.

In **Panama**, electronic communications "can be verified as genuine before a Notary Public, but information must be managed and authenticated by a suitable computer expert within the Republic of Panama."

In **Uruguay**, Daniel Trecca informs that electronic communications are used and that they are governed by Law 18,237. However, at the judicial level, they are limited to communications with public agencies and persons whose electronic domicile is registered in the file. When a foreign letter rogatory is received, the addressee of the measure is not registered in the system, so all notifications continue to be made in paper format and in person.

In **Venezuela**, María Alejandra Ruiz reports that electronic communications are used in her country.

f. Electronic address for service

In **Argentina**, María Blanca Noodt Taquela and Julio C. Córdoba report that electronic addresses for service are used.

In **Bolivia**, Canelas reports that Article 72 of the Civil Procedure Code indicates that the parties "may also communicate to the judicial authority that they have electronic means (...) such as the address for service, in order to receive notifications and summons."

Law 1173 on the abbreviation of criminal procedures establishes similar provisions in the case of criminal procedures.[18]

In **Brazil**, according to Valesca Raizer and team, "all judges and public servants of the Judiciary working with electronic processes have a registry enabling them to carry out their activities and procedures electronically, as well as communicate with each other. In addition, they also have professional email accounts that allow communication with the parties and their attorneys, exclusively through digital means, with face-to-face and telephonic services. The Public Ministry, the Public Defender's Office and other attorneys must also register in the system to be able to send judicial documents, documents in general, as well as to receive summons. In addition, the Public Ministry has its own system that allows communication between employees."

In **Costa Rica**: "It is possible to give an email address as a "permanent electronic address" for all judicial processes (Article 3 of Judicial Notifications Act No. 8687 of December 4, 2008). It is not mandatory and can be modified or revoked."

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that the electronic address for service is used in some states, such as Nuevo León, the State of Mexico, Mexico City and the Judicial Branch of the Federation.

They are not used in **Panama**.

In **Uruguay**, Daniel Trecca informs that the electronic address for service is used and that it is regulated by Law 18237 and by Decree No. 7648 of the Supreme Court of Justice. Lawyers are required to establish their electronic procedural domicile whenever they file or answer a lawsuit. These electronic domiciles are managed by the judicial branch, which assigns them individually to each lawyer and notary public.

In **Venezuela**, María Alejandra Ruiz reports that in her country the electronic address for service is used, although only for tax purposes. According to the Organic Tax Code, petitioners can request an electronic tax address.

---

[18] See footnote 3.

g. Notifications and summons of orders, resolutions and sentences (alone or accompanied by documents) by electronic means

In **Argentina**, María Blanca Noodt Taquela and Julio C. Córdoba report that Notifications and summons of orders, resolutions and sentences (alone or accompanied by documents) are processed by electronic means, and that:

"The Civil and Commercial Procedure Code of the province of Corrientes, enacted on April 21, 2021, through Law No. 6556/2021, provides for electronic notifications:

Article 108. *Electronic notification. The notification will proceed ex-officio to the electronic address, only for the following resolutions: […]*

However, the Code does not include electronic means in the case of notification to a defendant who is domiciled abroad.

Article 445. *Defendant domiciled abroad. If the defendant resides outside the Republic, the judge will establish the type of notification and the term in which he/she has to appear, taking into account the distances and the available possibility of communication*.

The Civil and Commercial Code of Procedures of the province of Chaco, approved by Law No. 559 of 2016, published on March 8, 2017, refers to the topic:

Article 166: *Notification by electronic means. The Superior Court of Justice will issue the regulations that determine through which virtual means the intervening parties and their legal assistants can be informed of the different procedural acts carried out in the records and will be able to adapt them by the same means according to the technological advances produced*. "

In **Bolivia**, Canelas reports that Article 82 of the Civil Code of Procedures states: "*After the summons with the claim and the counterclaim, the judicial actions in all the instances and phases of the process must be immediately notified to the parties by the Court or Tribunal clerk or by electronic means, pursuant to the provisions in this Section.*"[19]

Law 1173 on the abbreviation of criminal procedures establishes similar provisions in the case of criminal procedures.[20]

In **Brazil**, according to Valesca Raizer and the Brazilian team, "both the Code of Civil Procedures and Law No. 11419 establish the possibility for both summons and subpoena to be made through electronic means. However, it is necessary for the parties to secure registration in the system in which the electronic process is inserted. Accordingly, in Brazil, parties are normally summoned by mail, using the Notice of Receipt (AR) solution. In relation to summons, these are more usually delivered electronically, given the need for attorneys to register in the systems. However, there are some notifications and injunctions of orders, resolutions and judgments that require personal compliance, through the court officer, for example, as in execution processes, so that the debtor's assets are duly registered."

In **Costa Rica**, electronic means are used for "judicial resolutions: rulings, orders and sentences. In some cases (initial transfer of a lawsuit, imputation of charges, and others), legal notification is required in person or at a physical domicile."

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that notifications and intimations of orders, resolutions and sentences (either alone or with documents attached) by electronic means are used in some states, such as Nuevo León, State of Mexico, Mexico City and the Judicial Power of the Federation.

They are not used in **Panama**.

In **Uruguay**, Daniel Trecca informs that notifications and summons of orders, resolutions and decisions (either alone or accompanied by documents) are delivered by electronic means and that they are regulated by the Resolutions of the Supreme Court of Justice Nos. 7637, 7644 and 7648. However, they are only used in cases where the person to be notified has a registered electronic procedural domicile in the file. This is not the case for notifications requested by

[19] See also Article 83.
[20] See footnote 3.

international letters rogatory. In this case, although the international letter rogatory is often received electronically by the Central Authority of Uruguay, which in turn forwards it to the competent court in the same way, the Court then prints it and notifies it in person and in hardcopy. Subsequently, in some cases, the Court sends the proof of notification to the Central Authority electronically. If it does not, the Central Authority digitalizes it and returns it to the foreign Central Authority electronically.

In **Venezuela**, María Alejandra Ruiz reports that in her country, notifications and intimations of orders, resolutions and sentences are delivered (alone or accompanied by documents) by electronic means.

h. Judicial summons

In **Argentina**, María Blanca Noodt Taquela and Julio C. Córdoba report that judicial notifications are made by electronic means.

In **Brazil**, according to Valesca Raizer and team, "all these tools are used to some extent in the judiciary. It must also be said that, due to the Covid-19 pandemic, the use of these tools has intensified enormously, making them accessible to a greater number of people."

In **Costa Rica**, "Personal or physical notification is legally required in most cases (initial transfer of suits, imputation of charges, and others)."

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that judicial injunctions can be notified electronically in some states, such as Nuevo León, the State of Mexico, Mexico City and the Judicial Branch of the Federation, as long as they do not involve judicial proceedings of a coercive nature such as liens or searches, which continue to be filed personally.

They are not used in **Panama**.

In **Uruguay**, Daniel Trecca reports that judicial injunctions are in use and that they are regulated by the Decree No. 7644 of the Supreme Court of Justice. However, in this regard, the same observations made in the answer to item (g) apply.

In **Venezuela**, María Alejandra Ruiz reports on the use of electronic judicial injunctions in her country.

5) For the purposes of communications, notifications, summons and others,

For the purposes of communications, notifications, intimations, etc., the requirements and what is admitted or not vary from one country to another. Personal and institutional emails, an exclusive email system for electronic notifications in judicial processes, and WhatsApp are used. As for electronic addresses and the electronic contractual addresses, some countries have regulated them, but others have not. Regarding management systems and adequate computer support to ensure the minimum requirements to validate notifications, communications, summons and others, differences are also seen among countries, although most of the countries that sent in information have suitable systems. Communications between judicial authorities and/or between central authorities via electronic means generally operate—with exceptions—in all countries for which information was received, albeit with a broader scope in some than in others. Electronic notifications, subpoenas and others by judicial authorities and/or central authorities to the parties are admitted by most but not all of the countries that sent in responses.

a. Are individuals required to have special institutional emails, or are they delivered to their personal email accounts?

In **Argentina**, María Blanca Noodt Taquela and Julio C. Córdoba report that personal emails can be used in such cases.

In **Bolivia**, Canelas reports that the jurisprudence shows that notifications are made by WhatsApp or through personal email accounts.[21]

In **Brazil**, according to Valesca Raizer and team, "the members of the Judiciary must use institutional mail accounts for communications, notifications and judicial summons. However, when it comes to parties in a dispute and attorneys, no special email account is required."

[21] See, for example, Constitutional Sentences 0114/2021-S3, and 0131/2021-S3.

In **Colombia**, José Luis Marín informs that in his country "a private email account is not required, because a notification can be made to personal or institutional email addresses, depending on the interested party, who must provide an email account regardless of whether it is personal or institutional, that is, it all depends on the choice of the party."

In **Costa Rica**, "Almost any email address can be used, as long as it is on the official list of addresses authorized to receive judicial notifications, which can be self-managed at https://pjenlinea3.poder-judicial.go.cr/vcce.userinterface/"

In **Cuba**, Taydit Peña Lorenzo reports that the above communications can be delivered to personal email accounts.

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that "in some states, such as Nuevo León or the State of Mexico the Court provides an institutional email account. In Mexico City and the Judicial Branch of the Federation, this is done through private email accounts."

Panama does not require it.

In **Uruguay**, Daniel Trecca informs that: "In accordance with the provisions of SCJ No. 7637," every person, body, or professional must provide an electronic address, for the judicial matters being processed or to be processed and for the administrative procedures that are aired before and/or linked to the judicial activity." To this end, the Judiciary installed an exclusive electronic mail system for electronic notifications in judicial processes, this being the only means admitted for this purpose."

In **Venezuela**, María Alejandra Ruiz reports that individuals are not required to have special email accounts, they simply need to indicate their personal e-mail addresses.

b. Is the electronic address system regulated in your country, and specifically the electronic contractual address?

In **Brazil**, according to Valesca Raizer and team, "the Electronic Tax Address (DTE) is regulated, which allows the registration of cell phones and email addresses to receive notices. In addition, in some states, such as São Paulo, the Taxpayer's Electronic Address is regulated by Law No. 15406/2011, which establishes the communication between the Municipal Finance Secretariat and the citizen. There is no specific regulation on the electronic contractual address."

In **Costa Rica**, "In the judicial area, it is possible to give an email as a 'permanent electronic address' for all judicial processes (Article 3 of Judicial Notifications Act No. 8687 of December 4, 2008). It is not mandatory and can be modified or revoked." At the contractual level, a contractual domicile can be indicated, but this must be a residence or a real domicile for individuals, or the registered office or real domicile for legal entities (Article 22 of Judicial Notifications Act No. 8687 of December 4, 2008).

In **Cuba**, Taydit Peña Lorenzo informs that in her country the electronic address, and in particular the electronic contractual address, are not regulated.

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that "the courts mentioned allow electronic addresses to be provided for procedural purposes, but coercive proceedings require a physical address. In the legislation, digital means and email addresses are allowed for receiving notifications, but the validity of a transcendent notification, for example a summons, is not yet duly regulated, nor is it duly recognized by jurisprudence."

This is not regulated in **Panama**.

In **Uruguay**, Daniel Trecca informs that: "The electronic address established for processes before the Judiciary is regulated by Law No. 18237 and by various Decisions of the SCJ, among them decisions 7637, 7644 and 7648."

In **Venezuela**, María Alejandra Ruiz reports that the electronic address is not regulated in her country. However, it is possible for the parties to agree to it by virtue of the principle of the autonomy of the will of the parties.

c. Are they carried out at the contractual electronic address established abroad?

In **Argentina**, according to María Blanca Noodt Taquela and Julio C. Córdoba, communications, notices, summons and other notifications can be delivered to the contractual electronic address abroad.

In **Brazil**, according to Valesca Raizer and team, "there is no regulation on the electronic contractual address but, in contracts between absentees, the place of formalization is considered to be the address of the offeror which, in international electronic contracts, for example, is the place where the server of the home-page is situated. In the case of Court procedures, the domicile of the defendant is considered to be the court of jurisdiction."

In **Costa Rica**, "Judicial notifications can only be given using the means authorized in Judicial Notifications Act (No. 8687 of December 4, 2008), so a contractual domicile can be established as long as it is a physical location, inside or outside of the national territory."

In **Cuba**, Taydit Peña Lorenzo informs that communications, notifications, summons and others are not made at contractual electronic addresses established abroad.

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that "According to the enforcement of Mexican regulations, digital media and email addresses are recognized for receiving notifications, but the validity of a transcendent notification, for example a writ of summons, is not yet duly regulated, nor duly developed by the jurisprudence."

They are not used in **Panama**.

In **Uruguay**, Daniel Trecca informs that communications, notifications, summons and others are not made at a contractual electronic address established abroad.

d. Does your country have management systems and adequate computer support to guarantee the minimum requirements that allow validation of notifications, communications, summons and others, such as the authenticity of the documents, the assurance that the document or the warrant comes from the authority they claim they come from, etc.?

In **Bolivia**, Canelas reports that, although he cannot provide a clear answer, he would like to "highlight the creation of the Agency for the Electronic Government and Information and Communication Technologies, which reflects the State's efforts to modernize public administration. This entity must "manage, articulate and update the Electronic Government Implementation Plan"[22] proposed by the Government as an agenda for 2017–2025.[23] Likewise, the Digital Citizenship Legislation (Law No. 1080), approved through a web platform by Congress in 2018[24], for the purpose of advancing e-government and granting digital credentials to citizens,[25] are worthy of mention. This rule states that "documents or applications generated through digital citizenship, or digitally signed, must be accepted or processes by all the public and private institutions that provide public services, with applicable sanctions for "responsibility for the public function."[26]

Between 2017 and 2018, two online portals have been created for procedures involving the State, which should become a substantial improvement in the structure of interoperability between government entities. On the one hand, the "State Procedures Portal" was established, under the direction of <https://www.gob.bo/)>; and, on the other hand, the "Digital Company Platform" <https://empresadigital.gob.bo/>, to constitute a single point of contact for companies and other entities of economic nature.[27]

---

[22] See Article 7 of Supreme Decree 2514 that creates this institution.

[23.] See report available at https://tinyurl.com/e7h74nac

[24] El Deber (national daily), "Diputados aprobaron ley de ciudadanía digital usando plataforma web," Santa Cruz, 2017, https://tinyurl.com/y32zx9ua

[25.] See, for examples, Articles 1 and 8.

[26] Article 8 (II).

[27] Informative Dissemination by AGETIC; https://tinyurl.com/y23tpswh
The AGETIC has informed that the "Digital Enterprise Platform" could include blockchain technology; https://tinyurl.com/y23tpswh

In 2018 the Digital Archive was created,[28] which was set up to be "[a] decentralized registry for data chronological order and integrity and digital documents. (…)." The data stored in the archive "will have full legal validity regarding their integrity and duration in the case of court and administrative matters, including those to be executed and controlled by the Government."[29]

In **Brazil,** according to Valesca Raizer and her team, the mechanisms referred to in the question already exist. "The processing of the request for legal cooperation by the Central Authority has a management system and adequate computer support that guarantee the authenticity of the documents and even allow it to be used as a valid means of evidence in legal proceedings. In Brazil, the Department of Asset Recovery and International Legal Cooperation, an agency of the Ministry of Justice, is the central authority responsible for sending and receiving requests. As of April 5, 2021, this body began to receive requests for international legal cooperation through the use of the digital petition resource in the Electronic Information System - SEI."

"This platform allows external users to send their requests, follow the process, enter petitions, sign and file digital documents and other facilities, thereby contributing to the efficiency of actions taken. The SEI eliminates the physical processing of documents and reinforces precautions related to the protection of information, avoiding risks such as loss of documents and eliminating the use of hard-copies, printers and electricity. Agencies will be able to check the immediate receipt of the document and avoid the uncertainty of receiving the request, and the attachment of documents will also be facilitated. The SEI will also produce records on the progress of the process, allowing consultations, verifications and audits. In addition, it will increase the efficiency of the processing activities, since the system itself automatically makes documents and processes available to the specialized technical area, dispensing filtering and forwarding procedures. "

The Brazilian report adds that "the DRCI also coordinates the National Network of Technology Laboratories against Money Laundering - Rede-Lab.", And that "Brazil approved and promulgated The Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents: The Hague Apostille Convention, a certificate of authenticity issued by the signatory countries of The Hague Convention attached to a public document to certify its origin (signature, position of agent, seal, or stamp of the institution)."

In **Colombia**, José Luis Marín reports that his country has adequate management systems and that computer supports are also provided.

Costa Rica answered in the affirmative.

In **Cuba**, Taydit Peña Lorenzo reports that "the Court, as well as the International Commercial Arbitration Court, enjoy the necessary support for this and for the Registries of branches and foreign representations attached to the Chamber of Commerce of the country."

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that in the states where the use of technologies has been developed (some states, such as Nuevo León, the State of Mexico and Mexico City), the Judicial Branch of the Federation and the Federal Court of Administrative Justice, have adequate management systems in operation, as well as computing aids that guarantee the minimum requirements to validate notifications, communications, summons and other items, such as the authenticity of the documents, thus assuring the claimed origin of the document or the warrant, among other items.

In **Panama** they do exist, but "only government entities and the Government Innovation Authority (AIG from the Spanish) provide support in this regard."

In **Uruguay**, Daniel Trecca informs that his country has management systems and adequate computer supports in operation that guarantee the minimum requirements to allow validating notifications, communications, summons and others, such as the authenticity of the documents, the security that the document or the letter rogatory come from the authority mentioned, etc. He adds that "the judges issue their letters rogatory with electronic signatures, which are verifiable through a QR code."

[28] According to Supreme Decree 3525 of 2018.
[29] Art. 16.

In **Venezuela**, María Alejandra Ruiz reports that her country does not have such a system, although it does have a legal basis encouraging the use of technology. On the other hand, they lack adequate equipment or management systems and computer support.

e. How does communication between judicial authorities and/or between Central Authorities operate by electronic means?

The Foreign Ministry of **Argentina** reports, "The vast majority of letters rogatory issued by the International Legal Assistance Department of the Ministry of Foreign Affairs, International Trade and Religion are received through the institutional email cooperacion-civil@mrecic.gov.ar. Subsequently, upon meeting the requirements of applicable regulations, the letters rogatory are sent—in digital format—to the competent local judicial authorities or to the central authorities for the formalities of style." mailto:cooperacion-civil@mrecic.gov.ar

In **Brazil**, according to Valesca Raizer and her team, the Federal Justice "instituted COOPERA, a program of the Federal Council of Justice, an agency of the Superior Court of Justice, in association with the Department of Asset Recovery and International Legal Cooperation, in turn an Agency of the Ministry of Justice to allow federal judges to send and receive requests for international legal cooperation through guaranteed access by digital means. Based on the request made by the judicial authority, this agreement between the Federal Council of Justice - CJF and DRCI - allows for communications between judicial and central authorities.

In **Colombia**, José Luis Marín reports that this issue is regulated by Law 527 of 1999.

In **Costa Rica**, "In matters of Private Law, communication by electronic means only occurs among judicial offices, consulates and, indirectly, authorities of other countries, in preparing to obtain evidence or other procedural actions. For cooperation to materialize, it is always necessary to send a formal request through diplomatic channels, as described below. In active and passive international judicial assistance (letters rogatory and warrants, obtaining evidence, etc.), issuance of physical documents is required, including the copies indicated by some international instruments, since they must be transmitted through the General Secretariat of the Supreme Court of Justice and the Ministry of Foreign and Religious Affairs to the different diplomatic and consular representatives in charge of sending requests to the central authority or competent authority of the other country, or vice versa."

In **Cuba**, Taydit Peña Lorenzo reports that "Communication is done by email messaging and by telephone. Official authorities do communicate with some computerized Registries, as is the case of Registries for Acts of Last Will and the Registry of criminal records."

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that "It is not yet customary to use electronic means in Mexico for the transmission of letters rogatory, although some courts such as the State of Mexico are already issuing them. When Mexican Foreign Ministry is asked to proceed with communications through electronic means, the response is invariably that they lack internal protocols to do so."

In **Panama**, it operates through the "Document Management System provided by the AIG (Government Innovation Authority)."

In **Uruguay**, Daniel Trecca reports that: "The Central Authority of Uruguay has institutional electronic mailboxes, from which it sends and receives letters rogatory. In the case of civil cooperation, the box used is cooperacioncivil@mec.gub.uy; in the case of criminal cooperation, the box used is cooperacionpenal@mec.gub.uy and for requests for international return of minors, visitation and food benefit, procedures are implemented through menor@mec.gub.uy."

These e-mails are accessible to all lawyers working in each section, which avoids the use of personal e-mail addresses that limit access, should their holder be unable to open it for any reason (leave of absence, resignation, etc.). All of the country's courts have an institutional box, to which we refer all international letters rogatory. Most are subsequently returned to us electronically.

Electronic communication between central authorities is preferable, provided that the foreign central authority so permits. For the purposes of sending abroad letters rogatory issued by Uruguayan courts, or the return of letters rogatory received from abroad, if files exceed the size limit they are uploaded to an institutional "cloud" and a secure download link is sent to the foreign

central authority. It should be noted that an in-house server is used for this purpose, which guarantees the security and confidentiality of the documents stored there.

Uruguay recently ratified the Treaty on the Electronic Transmission of Requests for International Legal Cooperation between Central Authorities. Pursuant to Article 1, this Treaty regulates the use of the lbcr@ electronic platform as a formal and preferential means of transmitting requests for international legal cooperation between central authorities within the framework of treaties in force between the parties that provide for direct communication between said institutions. It has been ratified by Andorra, Cuba, Spain, Portugal and Uruguay, and is currently being implemented. Once implemented, it will be a very useful tool for the electronic transmission of letters rogatory, ensuring security and confidentiality.

f. How do notifications, summons and others, forwarded by judicial authorities and/or Central Authorities to the parties operate through the use of electronic means?

In **Argentina**, María Blanca Noodt Taquela and Julio C. Córdoba report that:

"Cases of jurisprudence in which notifications by electronic means have been admitted:

In a case of unilateral divorce, the Court ordered the notification by email to the spouse domiciled in England, due to the impact of the COVID 19 pandemic and border closures ordered by the Argentine government and other countries. (Family Court No. 1, Tandil (Province of Buenos Aires) 07/29/2020, G., EA v. W., B. r. Unilateral Divorce filing, published by Julio Córdoba in DIPr Argentina and commented by AB Zacur and F. Robledo in RIDII 13, December 2020 and by N. Rubaja and C. Iud in: LL 03/12/2020. http://fallos.diprargentina.com/2020/12/g-e-c-w-b-s-divorcio-por-presentacion.html?m=1

The notification of the divorce claim by unilateral presentation by email or WhatsApp messaging to the defendant domiciled in Spain was also authorized, taking into account the unprecedented health crisis caused by COVID-19 (Chamber of Appeals in Civil and Commercial of Morón (province of Buenos Aires), Panel II, 04/13/2021, MJ-JU-M-132497-AR | MJJ132497 | MJJ132497).

In another case in which the determination of provisional alimony had to be notified to the debtor domiciled in Canada, the National Civil Chamber authorized it to be carried out through a WhatsApp message (N.Civ.Ch., Holiday Panel, 01/25/21, BL, VP and others c. D., CS s. Alimentos: Modification, published by Julio Córdoba in DIPr Argentina in:

http://fallos.diprargentina.com/2021/03/b-l-v-p-y-otros-c-d-c-s-s-alimentos.html?m=1

In **Brazil**, according to Valesca Raizer and her team, "Article 246, V, of the Code of Civil Procedure, establishes that notifications and summons will be made electronically, as regulated by the legislation. Article 246, paragraph 1, of the Code of Civil Procedures of 2015, establishes that, with the exception of micro and small companies, public and private companies are obliged to keep a record in the electronic systems in order to receive summons, which will preferably be made by such means. **Law No. 11419/06 regulates the electronic process** in Brazil. Electronic communication of procedural acts is provided for in Articles 4 to 7 of Law No. 11.419 / 06. The Courts will create Electronic Justice Bulletins, available on the Internet for the publication of their own judicial and administrative acts, as well as for communication in general. Article 9 of the Law establishes that all notifications and summons, even from the Public Treasury, will be made by electronic means. In trials with appointed attorneys, notices and summons are carried out by means of the publication of the act in the electronic newspaper and by the email account previously informed to the Court."

In **Colombia**, José Luis Marín reports that this issue is regulated by Law 527 of 1999.

In **Costa Rica**: "Judicial resolutions are notified to the email indicated by the parties: rulings, orders and sentences, except in cases in which personal notification or a physical address is required by law (initial transfer of the lawsuit, imputation of charges, and others).

"Instant messaging (SMS) is also used to the designated mobile phone to send reminders about court hearings and other procedures, which does not replace notification by email or other means authorized by the regulations."

"Intimations of facts are not given by email. However, communication among central authorities is carried out once it is clear who the authorities are for each State."

In **Cuba**, Taydit Peña Lorenzo reports that "E-mail messaging is generally used. In this case, Instruction No. 207 of the Supreme People's Court of 2011 authorizes the Economic Chambers of the Provincial People's Courts to use email messaging to send the parties the "notice of notification" of Court decisions. Video Calls have been authorized, especially in these times of the COVID 19 Pandemic. We had a specific case of international abduction in which email messages were used."

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that "Notifications can be made electronically in some states, such as Nuevo León, the State of Mexico, Mexico City and the Judicial Branch of the Federation. But in the case of coercive proceedings, such as search and seizures, they continue to be processed personally."

In **Panama**, "Notifications must be given personally according to article 1002 of the Panamanian Judicial Code..."

In **Uruguay**, Daniel Trecca informs that: "Each party, at the time of filing in a legal case, must establish an electronic address, at the electronic address provided by their sponsoring attorney/notary and also provided by the Judiciary. Henceforth, all notifications are made to the aforementioned box.

"If the notification is accompanied by existing hard-copy documentation, following electronic notification the recipient has 3 working days to retrieve the documents in question. If the interested party fails to withdraw the documents within this period, the notification will be deemed to have been made when these three days expire."

However, as already mentioned, since the addressee of the measure has not been previously registered in the file, they continue to be made in person and hardcopy, without prejudice that their return to the requesting State being later done electronically.

In **Venezuela**, María Alejandra Ruiz informs that in her country the notifications, summons and others made by the judicial authorities and/or the Central Authorities to the parties are made through email, text messages or WhatsApp messaging.

6) When the country is a party to the Inter-American Convention on Letters Rogatory:

a. Do judicial authorities and Central Authorities use "the most favorable practices", such as those contained in the TRANSJUS Principles, in accordance with art. 15 of the Convention?

In **Bolivia**, Canelas reports that: "At least in administrative matters, article 4 (j) is worth mentioning, as it refers to the principle of effectiveness, and states that" all administrative procedures must fulfill their purpose by avoiding undue delays." If certain procedures (including Private Law procedures) can achieve the same targets as certain actions of the public administration, then it is worth questioning whether they should not be equally effective in legal terms in Bolivia."

In **Brazil**, according to Valesca Raizer and her team, "among the procedural communication practices with the use of technology provided for in art. 4.7 of the TRANSJUS Principles, telephone calls and videoconferences, electronic messages and any other means of communication can carry out the cooperation requested."

In **Costa Rica**, "There is no evidence of application, in practice, of the TRANSJUS Principles instead of the requirements established by the Convention, but they are not incompatible with current regulations."

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that "Notifications can be made electronically in some states, such as Nuevo León, the State of Mexico, Mexico City and the Judicial Branch of the Federation. But in the case of coercive proceedings, such as search and seizures, they continue to be processed personally."

They are not used in **Panama**.

In **Uruguay**, Daniel Trecca reports that: "The Central Authority of Uruguay has no record that the TRANSJUS Principles have been expressly invoked. Nevertheless, many of the practices established therein are frequently used.

In **Venezuela**, María Alejandra Ruiz provided a negative response.

b. Are electronic means or other technologies applied, for example, in the processing of warrants?

According to the Foreign Ministry of **Argentina**, "With regard to the Inter-American Convention on Letters Rogatory, the International Legal Assistance Department of the Argentine Foreign Ministry—in its capacity as the central authority of said Convention— processes most requests for legal assistance via electronic means. In exceptional cases letters rogatory must be sent in paper format to some countries in the region that do not accept such instruments via digital means."

In **Brazil**, according to Valesca Raizer and her team, the Federal Justice instituted COOPERA, as already explained above, regarding question 5) e.

In **Colombia**, José Luis Marín reports that:

"Indeed, Article 103 of the Code of General Procedures [Law 1564 of 2021] establishes: "USE OF INFORMATION AND COMMUNICATION TECHNOLOGIES. In all judicial proceedings, the use of information and communication technologies should be sought in the management and processing of judicial processes, in order to facilitate and expedite access to justice, as well as to expand its coverage".

"Legal actions may be carried out through data messaging. The judicial authority must have mechanisms that allow generating, filing and communicating data messages.

"Provided they are compatible with the provisions of this Code, the provisions of Law 527 of 1999, and those replacing or modifying it, and its regulations, shall apply."

In **Costa Rica**, "In active and passive international judicial assistance (letters rogatory, warrants, obtaining evidence, etc.) issuing physical documents is required, even with the copies indicated in some international instruments, since they must be transmitted through the General Secretariat of the Supreme Court of Justice and the Ministry of Foreign and Religious Affairs to the various diplomatic and consular representatives in charge of sending requests to the central authority or competent authority of the other country, or vice versa."

In **Cuba**, Taydit Peña Lorenzo reports that:

"On this matter, the Cuban procedural norm in the second paragraph of Article 14 regulates the course of the procedure through the Ministry of Foreign Affairs, adapting its format to the provisions issued by said Ministry. To this end, the Governing Council of the Supreme People's Court, through Instruction No. 214 of March 27, 2012, approved the Methodology for processing requests for Cooperation, by means of which the process and intervention of the judicial body is ordered, regarding the various procedures that may be carried out through International Legal Cooperation and Verbal Notes. The Independent Department of International Relations of the Supreme People's Court is assigned the task of receiving, controlling and promoting all Requests for International Legal Cooperation and Verbal Notes, establishing that in all cases they will be processed through the Ministry of Foreign Affairs or through the designated Central Authority, with due observance of the agreements signed and, failing that, by virtue of the principle of international reciprocity."

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report that "warrants can be transmitted and notifications made electronically in some states, such as Nuevo León, the State of Mexico, Mexico City and the Judicial Branch of the Federation. But in the case of coercive proceedings, such as search and seizures, they continue to be processed personally."

Panama does not use electronic means or other technologies for this purpose. Traditional documents continue to be used, "although due to the pandemic, incomplete progress has been made in this regard."

In **Uruguay**, Daniel Trecca reports affirmatively regarding the use of electronic means.

In **Venezuela**, María Alejandra Ruiz reports that: "Currently the Judiciary is opting for the use of technology; however, this modality having begun due to the pandemic, there is little information regarding the processing of letters rogatory by electronic means."

7) If your country is a party to the Inter-American Convention on the Taking of Evidence Abroad, are electronic means used to receive evidence from abroad, such as holding virtual hearings?

In **Argentina**, María Blanca Noodt Taquela and Julio C. Córdoba report that:

"Yes, they are used for taking evidence, in particular for holding hearings. In the case of international restitution, it is quite usual.

The Civil and Commercial Code of Procedures of the province of Corrientes, approved on April 21, 2021, as Law No.6556/2021 provides the following:

Article 297. *Witnesses domiciled outside the jurisdiction of the Court. In the offer of evidence, it will be indicated if the witness must testify outside the place of the process. In this case, the declaration will be sought by the most suitable technical means*.

A publication in the mass media refers to a case of virtual conciliation:

A young man of Colombian nationality who died in Campo Largo during the first days of last year, had no relatives in Argentina. The young man rented an apartment in town. After successive communications, and through documentaries forwarded in digital form, a virtual conciliation hearing was held (by means of the WhatsApp platform), between the owner of the property, who was domiciled in Campo Largo, and the relatives of the deceased young man in Colombia and Brazil. It was agreed that the delivery of the movable property and personal belongings of the deceased man would be made to a third party. The sentence was released by the Court of Peace and Misdemeanors of Campo Largo, in charge of Judge José Luis Haetel. Note published at: https://www.diariojudicial.com/nota/88828.

For its part, the Argentine Foreign Ministry informs, "In reference to the Inter-American Convention on the Taking of Evidence Abroad, the International Legal Assistance Department of the Argentine Foreign Ministry—in its capacity as the central authority of that Convention—processes most requests for evidentiary measures via electronic means. Notwithstanding this, and as previously reported, letters rogatory must be sent in paper format to some countries in the region that do not accept such instruments via digital means.

As for holding virtual hearings, not all Argentine courts have the necessary infrastructure for this. Consequently, the possibility of holding them by such means will depend on the competent judicial authority."

As reported by Valesca Raizer and her team, "**Brazil**, despite having signed the Inter-American Convention on the Taking of Evidence Abroad in 1975, has so far not ratified it."

In **Colombia**, José Luis Marín reports that:

"Paragraphs 2 and 3 of Article 103 of the General Procedures Code read as follows: SECOND PARAGRAPH. Notwithstanding the provisions of Law 527 of 1999, memorials and other communications between the judicial authorities and the parties or their lawyers are presumed to be authentic, when they originate from the email account provided in the claim or in any other act of the process.

"THIRD PARAGRAPH. When this code refers to the use of email accounts, electronic address, magnetic means or electronic means, it will be understood that other systems for sending, transmitting, accessing and storing data messages may also be used, provided they guarantee the authenticity and integrity of the exchange or access to the information. The Administrative Chamber of the Superior Council of the Judiciary will establish the systems that comply with the previous budgets and will regulate their use".

In **Costa Rica**, electronic means are used for taking evidence abroad, although this "is subject to the requirements of each state, since some authorities deem it sufficient to submit the digital certificate, while other countries request the digital in advance to move forward with the case until they receive the original document."

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report: "We are not aware that electronic means are employed by applying the Inter-American Convention, but such means are used in federal bankruptcy proceedings via the procedures of international cooperation mechanisms contained in Articles 278 to 310 of the Commercial Bankruptcy Law."

Panama does not use electronic means or other technologies for this purpose. Traditional documents continue to be used, "although due to the pandemic, incomplete progress has been made in this regard."

In **Uruguay**, Daniel Trecca reports that electronic means are used to receive evidence produced abroad. The SCJ 7784 Agreements Nos. 7902 and 7815 were given the same value as the obligatory panel decisions (Acordada) to the Ibero-American Agreement on the Use of Videoconferencing.

"Likewise, Article 539 of Law No. 19924 added Article 64-BIS to the General Code of Procedures, which authorizes the use of videoconferencing or other suitable telematic means for holding any judicial hearing."

In **Venezuela**, María Alejandra Ruiz reports that: "Currently the judiciary is opting for virtual hearings; however, as this is a solution that began to be implemented due to the pandemic, there is little information regarding the reception of evidence produced abroad."

8) Are electronic means or technologies used in the enforcement of other Conventions to which your country is a party?

In **Brazil**, according to Valesca Raizer and her team, "within the scope of The Hague Convention on the International Collection of Alimony for the Benefit of Children and Other Family Members, all requests must still be made by physical means, by means of forwarding printed documents, with their respective translations, at the address of the central authority (Ministry of Justice, through the Department of Asset Recovery and International Legal Cooperation - DRCI). The system called *iSupor*t (Electronic Communication System for Process Management and Security) is still being implemented in Brazil, without a defined launching date and/or to what extent it will impact common citizens in the forwarding of the necessary forms (if the possibility of sending forms by digital means becomes real, for example). On the other hand, an email account is made available to the citizen to search for information or to access the necessary forms."

In **Colombia**, José Luis Marín reports that:

"Law 527 of 1999 [By means of which access and use of data messages, electronic commerce and digital signatures are defined and regulated, and certification entities are established, and other provisions issued] provides:

Article 5. LEGAL ACKNOWLEDGMENT OF DATA MESSAGES. The legal effects, the validity or the binding force will not be denied to all types of information for the sole reason that it is presented in the form of a data message.

Article 7. SIGNATURE. If any rule requires the presence of a signature or establishes certain consequences in the absence of such, in a data message, said requirement shall be deemed satisfied if:

A method has been used to identify the initiator of a data message and to indicate that the content has been approved.

a) The method is both reliable and appropriate for the purpose for which the message was generated or communicated.

b) The provisions of this Article shall apply whether the requirement established in any regulation constitutes an obligation, or if the regulations simply foresee consequences in the absence of a signature.

Article 8. ORIGINAL. When the norm requires the information to be presented and preserved in its original form, that requirement will be satisfied with a data message, if:

a) There is some reliable guarantee that the integrity of the information has been preserved, from the moment it was first generated to its final format, as a data message or in some other way;

b) If the information is required to be presented, can it be exhibited to the person whose presence is required.

The provisions of this Article shall apply whether the requirement established in any regulation constitutes an obligation, or if the regulations simply foresee consequences in the event that the information is not presented or preserved in its original format.

Article 10. ADMISSIBILITY AND PROBATORY FORCE OF DATA MESSAGES. Data messages will be admissible as means of proof and their probative force is as granted in the provisions of Chapter VIII of Title XIII, Third Section, Second Book of the Code of Civil Procedure.

In any administrative or judicial action, no efficacy, validity or mandatory or probative force will be denied to all types of information in the form of a data message, given that it is a data message or because it has not been submitted in its original format.

Article 11. CRITERIA FOR PROBATORY ASSESSMENT OF A DATA MESSAGE. For the assessment of the probative force of data messages referred to in this Law, the rules of sound criticism and other legally recognized criteria for the appreciation of evidence will be taken into account. Therefore, the following must be taken into consideration: the reliability in the way in which the message has been generated, archived or communicated; the reliability in the way in which the integrity of the information has been preserved, and the way in which its initiator is identified and any other pertinent factors.

Law 270 of 1996 [Statutory Law of the Administration of Justice]

Article 95. Courts, tribunals and judicial corporations may use any technical, electronic, computer and telematic means to carry out their duties.

The documents issued by the aforementioned media, whatever their support, will enjoy the validity and effectiveness of an original document as long as its authenticity, integrity and compliance with the requirements demanded by procedural laws are guaranteed.

Processes that are handled with computer support will guarantee the identification and exercise of the jurisdictional function by the body exercising it, as well as the confidentiality, privacy, and security of the personal data that they contain, according to the terms established by law.

Law 962 of 2005

Article 25. - Use of mail messages for sending information. Modified by art. 10, Law 962 of 2005. Public Administration entities must facilitate the receipt and delivery of documents or requests and their respective responses by certified mail. In no case can the requests or reports sent by natural or legal persons that have been received by certified mail through the National Postal Administration be considered inadmissible, unless the regulations require their personal presentation. For the purposes of expiration of terms, it will be understood that the petitioner submitted the request or responded to the request of the public entity on the date and time provided by the certified mail company, with indication of date and time and the respective shipping receipt. Likewise, petitioners may request that their documents or required information be sent by mail to the public entity.

Law 1437 of 2011, by which the Code of Administrative Procedure and Administrative Litigation is issued."

In **Costa Rica**, "Electronic means are used for communications among the various central authorities that must work with Costa Rica, bearing in mind that it is an expeditious channel of communication. In this way it is used to send queries, digital advances, and partial or final answers, subject to the remission of the original documents, as tools to simplify and speed up cooperation. It is clarified that Costa Rica is not yet a party to the Medellín Convention on the electronic transmission of requests for international criminal assistance."

Panama does not use electronic means or other technologies for this purpose. Traditional documents continue to be used, "although due to the pandemic, incomplete progress has been made in this regard."

In **Uruguay**, Daniel Trecca reports that in application of the Hague Convention on the Civil Aspects of International Child Abduction and the Inter-American Convention on the International Return of Children, it is very common for the applicant to intervene in a hearing via videoconference.

a. Is Article 4.7 of the TRANSJUS Principles taken into account, for example, as regards favoring the use of new information and communication technologies (ICTs)?

In **Bolivia**, Canelas reports that: "The Constitution, in Article 103, indicates that the State must adopt policies to promote new information and communication technologies."

In **Brazil**, according to Valesca Raizer and her team, "although the ASADIP Principles of Transnational Access to Justice (TRANSJUS) are not yet prevailing in general terms in the Brazilian judicial practice, the facilitation of the use of information and communication technology represents, as stated above, a growing reality. Several tools, such as telephone calls and videoconferences, electronic messages and other means of communication are promoted within the legal limits already mentioned, for the purpose of promoting international legal cooperation and transnational access to Justice by the Brazilian judiciary."

In **Costa Rica**, "There is no evidence of application, in practice, of the TRANSJUS Principles, but they are not incompatible with current regulations."

In **Cuba**, Taydit Peña Lorenzo reports that: "Unfortunately [*Article 4.7 of the TRANSJUS Principles]* is not taken into full consideration, although the pandemic has some what prompted its use; however, we still do not have safe technological means to guarantee their efficacy and safety. We can guarantee that we are working on this. As I mentioned earlier, video calling or video conferencing has been used for notifications and negotiation attempts. Telephone communication has also been used between Central Authorities, as well as between the latter and the judicial authorities, in addition to email messages and diplomatic messaging."

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report: "Although that international instrument is not specifically being enforced, warrants can be transmitted and notifications can be made electronically in some states, such as Nuevo León, State of Mexico, Mexico City, and the Judiciary of the Federation. But in the case of coercive proceedings, such as embargoes/searches, they continue to be processed personally. "

The report of the Permanent Mission to the OAS adds, "Unfortunately, there is currently no general knowledge among lawyers and jurisdictional authorities of the TRANSJUS Principles. That instrument has been analyzed by Mexican doctrine specialized in Private International Law, but there is deemed to be a field of opportunity to disseminate that soft law instrument among the legal community of the country."

In **Panama**, "There is interest in using the new technology, still used for documents, although due to the pandemic, some significant advances have been made and others have not yet materialized in this regard."

In **Uruguay**, Daniel Trecca reports that, although there is no record of these Principles having been invoked, in judicial practice, efforts are made to encourage the use of new ICTs, as established in art. 4.7 of the TRANSJUS Principles.

In **Venezuela**, María Alejandra Ruiz reports that THE PRINCIPLES TRANSJUS is not being taken into consideration.

b. Is the Ibero-American Protocol on International Judicial Cooperation taken into account? (the Protocol was approved at the Plenary Assembly of the XVII Ibero-American Judicial Summit, held in Chile from April 2 to 4, 2014). If so, how and in what cases?

The Foreign Ministry of **Argentina** reports, "When applying the sources of Mercosur, the Organization of American States or the Hague Conference on Private International Law, the International Legal Assistance Department of the Argentine Foreign Ministry primarily uses technological tools. Without prejudice to this, requests for assistance are sent via physical means in cases where the electronic option is not deemed viable.

Implementation of electronic channels in international cooperation has made it possible to fulfill requests for assistance more rapidly, substantially shortening the time it takes to process orders, postal costs, risks of loss and, above all, environmental impacts."

The Foreign Ministry report concludes with some very significant and encouraging final considerations for the work of the CJI, which deserve transcription here:

"In view of the above, we conclude that, although using technology in international legal assistance has derived from a need to adapt to the pandemic, it can also be seen as an opportunity to maximize the efficient performance of the legal duties of central authorities.

Mindful of this, we believe that digitalization has already incorporated into the daily work of international legal cooperation, and we estimate that it will remain in the future, given its positive outcomes.

For these reasons, the Guide to Best Practices for American countries will be a useful tool for collecting experiences and recommendations in this regard, facilitating the use of technologies for both judicial authorities and central authorities."

In **Brazil**, according to Valesca Raizer and her team, "as well as the principles of the ASADIP, the principles established by the Ibero-American Protocol on Judicial Cooperation are not yet being put into recurrent effect by the national judiciary."

In **Costa Rica**, "There is no evidence of application, in practice, of the Ibero-American Protocol on International Judicial Cooperation. However, Costa Rica is a party to the Ibero-American Convention on the Use of Videoconferencing in International Cooperation among Systems of Justice and its Additional Protocol on costs, languages and transmission (Ibero-American Judicial Summit, Mar de Plata, December 3, 2010), which instruments are mentioned in the former."

"In general, videoconferences are held with the help of the consular mission without requiring the intervention of authorities from the host country. However, if that possibility is not available, it is feasible to hold them in accordance with the provisions of the two current instruments just mentioned."

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report: "Although that international instrument is not specifically being enforced, warrants can be transmitted and notifications can be made electronically in some states, such as Nuevo León, State of Mexico, Mexico City, and the Judiciary of the Federation. But in the case of coercive proceedings, such as search and seizures, they continue to be processed personally."

The report of the Permanent Mission to the OAS adds, "We believe there is no general knowledge on the Ibero-American Protocol on International Judicial Cooperation."

In **Uruguay**, Daniel Trecca reports that the Ibero-American Protocol on International Judicial Cooperation is taken into consideration. He adds that "Although Uruguay has not ratified it yet, the SCJ has incorporated it, giving it the value of an obligatory panel decision (Acordada) by means of the 7815 Panel Decision (Acordada).

In **Venezuela**, María Alejandra Ruiz reports that the aforementioned Protocol is not being taken into consideration.

C. Doctrine

9) What are the doctrinal approaches in your country regarding the issue addressed in this questionnaire?

In **Brazil**, according to Valesca Raizer and her team, in the opinion of **Fabrício Polido**, "The reality of the Internet and new technologies in general collides with the traditional models of international legal cooperation between States. This in part is due to the fact that most of the treaties were concluded before the emergence of new information and communication technologies and the spread of the Internet as it is conceived today."[30]

[30] POLIDO, Fabrício Bertini Pasquot. *Direito internacional privado nas fronteiras do trabalho e tecnologias: ensaios e narrativas na era digital.* Rio de Janeiro, Lumen Juris, 2018. p. 76.

"It is in this sense that **Davi Oliveira** and other scholars assert that international cooperation is not necessarily a new phenomenon, given that "Brazil, for example, is a signatory of cooperation agreements in force dating from the 1950s, years before the emergence of the internet, and even before its popularization for civil use)."[31]

"There is still a long way to go regarding the use of networks and technologies in the operation of existing international cooperation mechanisms to assist the courts and administrative bodies of the States in transnational cases. Despite the advances in the implementation of new technologies, many international legal cooperation mechanisms are still mediated by analogical means and notarial instruments."

"It is understood that the interaction of these mechanisms is fundamental for the preservation of the minimum procedural guarantees – for example a broad, contradictory defense, due legal process - in treaties and constitutions. For this reason, the interaction between transnational process and international legal cooperation must be referenced in the consolidation of legal and communicational interoperability mechanisms between States, organizations and players of the Internet, and also in the observance of the values of global justice and transnational due process."[32.]

"With the aim of investigating the influence of the Internet on the reality and practice of international legal cooperation in Brazil, the "IRIS - Instituto de Referência em Internet e Sociedade [Reference Institute for the Internet and Society] carried out a preliminary study evaluating the agreements signed by Brazil on this matter, one of its limits being the agreements that use the Internet to give effect to international legal cooperation measures in transnational litigation". "The studies carried out showed that the influence of this new tool occurs in at least 36 of the cooperation agreements signed by Brazil Observing the high numbers, it can be seen that most of the objects of cooperation measures (48%) have to do with obtaining evidence, while the majority of agreements that provide reciprocity (88.2%) in criminal matters (66.1%) are bilateral. 58.3%), with 9 from the United States and 8 from Switzerland. Provisionally, it can be affirmed that the Brazilian Judicial Power, in matters of international legal cooperation, is still not fully adapted to the new forms of communication and possibilities of interaction offered by the Internet."[33]

"Regarding the data found and their respective analysis, the study indicates that:

"The Internet is conceived, in these agreements, for the purpose of sharing specific information for or about a given case (securing evidence). From the profile, it can be seen that the countries that use the internet mostly in agreements (which allows them to use it in cooperation practices in processes) are countries of the global North, that is, they share a high participation rate in industrialization and financial assets. The interest in criminal matters also predominates, and this opens the hypothesis that perhaps most of the agreements signed refer to this matter in general terms, so that the use of the Internet would be profuse in agreements of this nature. In addition, reciprocity is highly frequent, and this can be seen as a positive aspect, since use of the Internet becomes more effective, that is, a very widespread tool that allows everyone involved the same technical possibility of using it. Considering the effective date, we can conclude that the year with the highest number of agreements was 2008, with 6 agreements; the frequency of agreements in this regard subsequently decreased. Most of the agreements entered into force before that year, with 24 agreements between 1960 and 2008. Thus, the international legal cooperation scenario regarding the use of the Internet in their performances is lacking more up-to-date forecasts."[34]

"In the same sense, author **Carmen Tiburcio**, a reference in the study of Private International Law in Brazil, points out that international legal cooperation instruments can be quite effective when they make use of technological resources.[35] Considering the Brazilian case, national

---

[31] OLIVEIRA, Davi Teófilo Nunes et al. A Internet e suas repercussões sobre a Cooperação Jurídica Internacional: estudo preliminar sobre o tema no Brasil. Instituto de Referência em Internet e Sociedade, Belo Horizonte, 2018. Available at: http://bit.ly/38Dxpt0. Accessed: 09/06/2021. p. 6.
[32] POLIDO, Fabrício Bertini Pasquot. Op. cit. p. 92.
[33] OLIVEIRA, Davi Teófilo Nunes et al. Op. cit. p. 24.
[34] Ibidem, p. 23.
[35] TIBURCIO, Carmen. The current practice of international co-operation in civil matters. Recueil des cours. v. 393 (2018). p. 266.

legislation, despite not being explicit, contains elements that allow us to understand the possibility of using technological resources to serve requests for international legal cooperation. This is due to the fact that the Code of Civil Procedure approved in 2015, which entered into force in 2016, in Article 26, paragraph V, establishes spontaneity in the transmission of information to foreign authorities as a principle applicable to legal cooperation. Therefore, in the Brazilian legal system today there is an open path for legal operators to use technological tools in the fulfillment of requests, whether active or passive, for the benefit of international judicial cooperation."

"Speaking on the transformations in the field of direct communications and their implications for international legal cooperation, **Mônica Sifuentes** considers that:

"It is clear that one of the most vigorous, if not the best advance in terms of technology in recent years is due to the communication field. We live in a world within a network, so that phenomena such as globalization and flexibility of borders in most countries are making the classic forms of international cooperation (the use of letters rogatory) obsolete. The anachronistic mechanism used by judges to request help or cooperation from a foreign authority through diplomatic channels, which took months or years to be fulfilled, seems to have its days numbered. In order to facilitate communication, greater transparency and mutual trust, the scope of international cooperation has ended up promoting the creation of new mechanisms and tools that appear to be more agile and consensual vis-à-vis our new current state of interaction."[36]

"The article by **Inez Lopes** on private international law and information technologies: *Facilitating International Legal Cooperation* addresses international legal cooperation in civil and commercial matters as one of the bases for international access to justice and for the resolution of transnational disputes. One of the effects of globalization is the increased movement of people and goods beyond the borders of the States, which favors the emergence of cross-border disputes. This increases the need for States to cooperate with each other in an environment of mutual trust in order to comply with certain judicial and administrative acts."

"This cooperation constitutes a form of reciprocal legal assistance between the countries, allowing them to enforce a series of measures necessary for the development of processes that are handled in the territory of one State but depend on the fulfillment of certain procedures in another. Legal cooperation is based on bilateral or multilateral treaties, and, in the absence of an international instrument, it can take place on the basis of reciprocity of treatment. To a great extent, the object of cooperation includes the implementation of services abroad, the location of a person or property, the securing of evidence, information on foreign law, precautionary or emergency measures and the recognition of arbitration decisions or foreign judgments."[37]

"The article shows how the use of information technologies has contributed to facilitate and speed up communications between state authorities. Increasingly, electronic media such as videoconferences, email messaging, telephone and Internet networks (Iber-Red) are used as tools for international legal cooperation. These technologies allow the creation of databases on the profile of countries on certain issues of private international law, such as the international kidnapping of minors (INCADAT). The article also analyzes the use of an Internet communication system through a government platform for the exchange of information between central authorities (iSupport)."

"In the framework of transnational family law, international legal cooperation is essential for the recognition and application of transnational family rights. In this specific case, Professor Inez Lopes analyzes the phenomenon of migration and its influence on the formation of

---

[36] SIFUENTES, Mônica. *Uso das comunicações judiciais diretas na Convenção da Haia de 1980: nova ferramenta de cooperação jurídica internacional*. In: RAMOS, André de Carvalho; ARAÚJO, Nadia de (Org.). *A conferência da Haia de direito internacional privado e seus impactos na sociedade: 125 anos (1893-2018)*. Belo Horizonte: Arraes Editores, 2018. p. 180-181.

[37] LOPES, Inez. *Direito Internacional Privado e Tecnologias da Informação: Facilitando a Cooperação Jurídica Internacional* In: 5º Congresso de Direito na Lusofonia, 2018, Braga. Direito e Novas Tecnologias. Braga: Editora Escola de Direito da Universidade do Minho, 2018. p.145 - 154.

transnational families.[38] It shows how international legal cooperation is a fundamental principle that ensures access to transnational justice and facilitates the resolution of disputes arising from issues related to family law as they spread and extend through space, such as in the case of divorce or separation and the collection of alimony/maintenance pensions."

"Lopes briefly studies the importance of international cooperation to guarantee the rights of transnational families and the importance of harmonizing private international law. In international civil procedural matters, the text studies issues relating to international jurisdiction in family matters and the current rules of the Code of Civil Procedure. It presents the main mechanisms of international legal cooperation in general, and their application in family matters such as letters rogatory, direct assistance, the ratification and enforcement of foreign judgments and urgent protection. It analyzes international administrative cooperation and the role of central authorities, international cooperation networks between authorities and the different techniques of international cooperation in family matters, such as techniques of model forms in international agreements, guides to good practices, the Incadat and iSupport."

"In this context, SIFUENTES describes how the facilities that direct communication between judges, with the use of technological mechanisms facilitating the flow of information, can be effective in the context of international legal cooperation in the Hague Convention on International Abduction of Children and Adolescents. It is imperative to highlight that her reflections expose the state of the art in the use of direct communication mechanisms between judicial bodies of the most diverse sovereignties; however, a national doctrinal perspective reveals a position of openness of the Brazilian legal system regarding the acceptance of technological tools designed to improve national cooperative practices. On this point, on the legal bases existing in Brazil for the achievement and promotion of technological mechanisms in direct communication, the author formulates some reflections" that are available in the report.[39]

"In turn, Valesca Raizer Borges Moschen, in an article on international legal cooperation in the matter of transnational families, when explaining the Brazilian procedural system, mentions that the new regime inaugurated by the Code of Civil Procedure meets the advances in the harmonization of the international civil procedure legislation in matters of international legal cooperation in the following:

"The new Brazilian procedural regime legitimized by the search for cumulative global access to justice, based on procedural guarantees and on the principles of effectiveness and promptness of jurisdictional supply, is developed from two dimensions: a) spontaneity of acts of cooperation and the greater performance of the central authority in the management of cooperation; and b) the option for the promotion of direct assistance, as an instrument for revitalizing cooperation proceedings. The characteristics of the spontaneity of the acts of cooperation and the greater performance of the central authorities are related to the search for speed and efficiency in the jurisdictional supply. (...) Regarding both the principle of spontaneity and that of efficiency, two other issues can be incorporated into the debate: a) that of direct communication networks between judges and the consequent use of technology for the speed of the duties of cooperation and b) the promotion of the instrument of direct assistance."[40]

"In relation to the existing legislative sources in Brazilian law for direct judicial communications, the author continues stating that:

"Although direct judicial communications do not find a legislative basis from an internal source in Brazil, in addition to the conventional one that authorizes and regulates their use, their legality is circumscribed in the various principles of the 2015 CPC, such as the *authority of the*

---

[38] LOPES, Inez. *A Família transnacional e a cooperação jurídica internacional* In: Cooperação Jurídica Internacional. ed. São Paulo: Thomson Reuters Brasil, 2018, p. 83-114.

[39] Ibidem. p. 183-185.

[40] MOSCHEN, Valesca Raizer Borges. *El caleidoscopio de la armonización del derecho internacional privado en materia de derecho procesal civil internacional*. In: FRESNEDO, Cecília e LORENZO, Gonzalo (Org.) *130 Aniversario de los Tratados de Montevideo de 1889: Legado y Futuro de sus soluciones en el concierto internacional actual*. Montevideo, Instituto Uruguayo de Derecho Internacional Privado, 2019. p. 470-471.

judge that commands the procedure and collects evidences, according to Article 13; the principle of the *cooperation of the judge*, Article 6, characterizing the new procedural model, which is called "cooperative process", in which greater activism is foreseen in the resolution of the dispute, as well as the lack of the need for strict observance of form; and, of course, the very principle of the spontaneity of transmission of information to foreign authorities of Article 26, which also serves as the basis for the legitimacy and legality in Brazil of the use of modern communication tools, such as the Internet."[41]

"Especially with regard to the use of technological mechanisms to achieve cross-border interjurisdictional dialogue, MOSCHEN states the following:

"As an example of instruments that facilitate access to justice by promoting procedural speed in the field of international legal cooperation, it is still worth mentioning the technique of model electronic forms, encouraged by the harmonization of private international law, in particular that of the legal cooperation in the field of family law, as exemplified by INCADAT and ISUPPORT. Both instruments were developed by The Hague Conference system on Private International Law as examples of digital platforms, in terms of an agile, safe and effective form of cooperation. The first of them focusing on the compilation of legal data on international child abduction available to the operators of the law "to promote a uniform interpretation on the matter", and the second with the aim of facilitating the cross-border collection of maintenance/alimony obligations processed within the scope of the of The Hague Convention on the International Collection of Maintenance of the year 2007."[42]

Finally, the informant highlights the reports from the Asset Recovery and International Legal Cooperation Department (DRCI) on the use of electronic mechanisms in the process of operationalization of cooperation requests.

"In these terms, it should be noted that, in this year (2021), the 7th Civil Chamber of the Tribunal of Justice of the State of São Paulo, in case No. 2071616-69.2021.8.26.0000, authorized the summons, in an alimony collection procedure, of the party residing abroad by means of the WhatsApp application, under the justification of the greater-than-usual delay for Letters Rogatory by virtue of the COVID-19 pandemic. However, it is necessary to affirm that the authorization of notices, summons and notifications by an instant messaging application must be seen as an exception, also from the perspective of the legality of the national legal system, and the possibility of using [the messaging application] refers to the extreme necessity posed by the specific case, in order to avoid delays [that would be caused] by carrying out the notices, summons and/or notification through a Letter Rogatory, by virtue of the COVID 19 pandemic, as this would generate damage that is difficult or impossible to repair."

In **Costa Rica**, "The doctrine on the matter in Costa Rica is still incipient. The large number of legislative creations and reforms in recent years must be considered, as well as the accession of several international instruments, which draws a new, fully-evolving regulatory framework, about which only a few academic discussions are being raised."

"In general, the doctrine has not opposed the use of technological means for international legal cooperation, even without requiring modifications of the national regulations that do not contemplate it or explicitly prohibit it."

"Exceptions are made regarding the legal value of apostilled or legalized documents in physical media, whose authenticity cannot be validly corroborated by means of a digitized document if it is not found on an official platform of the competent authority that has issued, apostilled or authenticated it."

Below, Costa Rica's very comprehensive response to the questionnaire provides a bibliography for that country.

In **Cuba**, Taydit Peña Lorenzo reports that: "In general, the doctrinal positions proposed consider that the use of the information technologies and communications is no longer an option

[41] Ibidem. p. 472-473.
[42] Ibidem. p. 473.

but has become a necessity, a key tool for legal operators and authorities linked to legal activities in general. They are used to increase effectiveness in this field of action.

"Given its nature and its constant development, we consider that the situation of national laws and international conventions adopted to regulate a highly sensitive event on a world scale is insufficient".

"At present, regulations, international assistance and cooperation through electronic means require the integration of the domestic legislation, embracing the most advanced literature on the issue and developing the sphere of information technology and communications in order to grant uniformity and progress in the regulation of the new kinds of relationships developed on a transnational scale".

"Legal relationships in the various areas of private life very often cross Cuban borders, a situation that gives them internationality and considerable increase in people's insecurity. This gives rise to inequality between the legal systems where its effects unfold. Faced with this reality, there is an urgent need to ensure the effectiveness and guarantee people's rights in these relationships. Therefore, international judicial cooperation by electronic means plays an essential role, supporting various key aspects directly linked to security and speeding up these international private processes. Voices have been raised to highlight some elements of analysis that, in our opinion, should be taken into account to rethink and formulate legal solutions that our system is demanding. "

In **Mexico**, Carlos E. Odriozola Mariscal and Nuria González Martín report the following: "In Mexico there were constitutional reforms in 2017 that ordered Congress to issue new legislation on civil and family procedures.

"The Supreme Court of Justice of the Nation has ordered that said regulations must be issued no later than December 15, 2021. Currently, the Commission of Justice of the Senate of the Republic resumed the legislative work aimed at setting up the Exclusive Legislation for Civil and Family Procedural Matters. See http://reformajusticia.senado.gob.mx"

An analysis on the subject can be seen at:

ODRIOZOLA MARISCAL, Carlos Enrique:

"Apuntes en torno a la regulación de la cooperación procesal internacional en el pretendido Código Nacional de Procedimientos Civiles y Familiares" Hacia un Derecho Judicial Internacional. Ponencias al XLII Seminario Nacional de Derecho Internacional Privado y Comparado", Pereznieto Castro, Leonel (Ed.) Poder Judicial del Estado de México y Academia Mexicana de Derecho Internacional Privado y Comparado, A.C., 2019, México, p. 115-131." (Free translation)

In **Uruguay**, Daniel Trecca provides a list of doctrinal articles on the subject, as does Marcos Dotta of the Uruguayan Foreign Ministry.

In **Venezuela**, María Alejandra Ruiz reports that:

"Although since 2001 we have a legal framework that encourages the use of technology, in general terms the use of technology in the Judiciary is incipient. The Decree enacted with Force of Law on Data Messages and Electronic Signatures (2001) was the first instrument that incorporated the notions and basic principles of Law and Technology into the Venezuelan legal system, being inspired by the UNCITRAL Model Law on E-Commerce (1996). In addition to this, the Law on Access and Electronic Exchange of Data, Information and Documents between State Bodies and Entities was enacted, also known as the "Interoperability Law" (2012) and the Law on Info-Government (2014), the latter aimed at regulating the use of technology in the Public Administration. Venezuela seemed to be (normatively) prepared to face advances and the technological acceleration that is being experienced worldwide. However, in practice, there was no significant progress until the pandemic.

"This is partly due to the fact that we do not have i) a technological culture, and ii) adequate computer systems and supports. Thus, author Gabriel Sira Santana (2016) pointed out that "these normative instruments must be accompanied by public policies to facilitate their performance; otherwise, they will only serve as references. That is, they will be "dead-letter legislation" - lacking coercive power - since the rights and duties that they provide will not be enforceable by any of those involved, due to the lack of adequate enforcement mechanisms. This is a common assumption

regarding Venezuelan legislation. "In the same sense, María Alejandra Vásquez Sánchez (2012) concluded that there are sufficient bases for the judicial process to be carried out electronically. However, two elements must be configured to allow the use of electronic tools in court processes in Venezuela, namely: "In the first place, the digital electronic signature system for judicial officials; and secondly, a program allowing the use of electronic notifications, guaranteeing their reception and reading by the notified party." (p. 25)

"The pandemic has forced the authorities to create solutions allowing the application of technological tools in the Judiciary. However, they are limited to the use of email messages for the delivery and receipt of documents, such as proceedings and writs/petitions/briefs, as well as holding virtual hearings. It is important to note that even though documents can be sent and received by email, writs/petitions or briefs have to be submitted in the form of hard copies, so that they may be attached to the records. Therefore, it does not seem to be a very effective solution. The truth is that our progress has been very limited so far.

"As these are changes that only recently have been enforced, little information can be found regarding their efficiency in matters of International Legal Cooperation. Furthermore, so far only a few authors have addressed the subject. However, in matters involving minors, technological tools are used more frequently, due to the importance and urgency of this type of questions."

* * *

Annex

GUIDE TO BEST PRACTICES IN INTERNATIONAL JURISDICTIONAL COOPERATION FOR THE AMERICAS

INTRODUCTION

At its 98th Regular Session (April 5-9, 2021) the Inter-American Juridical Committee (hereinafter, CJI) approved, for inclusion in the CJI's Agenda, the topic "New technologies and their relevance for international legal cooperation" (OEA/Ser. Q, CJI/doc. 637/21 of April 6, 2021), the rapporteurship for which was entrusted to Professor Cecilia Fresnedo de Aguirre, a member of the aforementioned Committee.

The topic falls under "Promotion and study of areas of legal sciences" contained in the mandates of the General Assembly to the American Juridical Committee ("Mandatos.AG.ES.2021.pdf"). The summary, operative paragraph 8 provides: "To request the CJI to promote and study those areas of juridical science that facilitate international cooperation in the inter-American system for the benefit of the societies of the Hemisphere."

As a first step to begin working on the topic, the rapporteur prepared a questionnaire that, within the framework of cooperation established between the CJI and the American Association of Private International Law (ASADIP), was sent to various specialists in the region. Six responses were received and reflected in the first progress report, presented at the 99th Regular Session of the CJI, which took place in August 2021. On that occasion, the issue was discussed in the CJI and comments were received from some of its members.

At the September 16 meeting between the OAS, the Hague Conference on Private International Law, and the Legal Advisors of the Ministries of Foreign Affairs, it was suggested that OAS member states be invited to respond to the above-mentioned questionnaire. Replies have been received from the Ministries of Foreign Affairs of Argentina, Canada, Costa Rica (prepared by the Office of Cooperation and International Relations, Area of International Law), Ecuador, Panama (Mr. Otto A. Escartín Romero, Director in Charge of Legal Affairs and Treaties, and Mr. Juan Carlos Arauz Ramos, President of the Panama Bar Association), Mexico, and Uruguay (Dr. Marcos Dotta, Director of International Law Affairs of the Ministry of Foreign Affairs).

Throughout the process of researching, consulting on, and drafting this Guide, the rapporteur worked closely with the OAS Department of International Law (hereinafter DIL) headed by jurist Dante Negro, with important contributions from jurist Jeannette Tramhel, among others.

The rapporteur subsequently received input and suggestions from the team of collaborators composed of Drs. Daniel Trecca (Director of the Central Authority of Uruguay), Manuel Ferreira and María José Rodríguez (legal advisors of the Central Authority of Uruguay).

Part 1. Objectives of the Guide and their rationale

1. The objective of this Guide to Best Practices in International Jurisdictional Cooperation for the Americas is to provide legal practitioners (judges, lawyers, etc.) with a *soft law* instrument that will enable them to take full advantage of the tools that technology offers us today when applying existing conventions and autonomous norms in this area. This will make it possible to update, in practice and by means of *soft law*, the *hard law* instruments in force that for chronological reasons do not provide for the use of technology, but which generally do not prohibit it either.

2. This Guide does not impose solutions on the States and the various public and private legal operators. Rather, it proposes ways to achieve its objective: the best use of the technology available in each country, improving and optimizing the functions performed by the Conventions and autonomous norms in force in the States, without the need, at least initially, to modify or replace the aforementioned regulations. It also offers solutions or recommendations for cases in which there are no conventions between States. This is without prejudice to the future development of an adequate legal framework to allow the use of information and communication technologies (ICTs).[43]

3. In practice, the solutions suggested in the Guide regarding the use of information and communication technologies may be implemented to the extent that the economic and technological realities of each State render them feasible. This will make it possible to benefit from their use without waiting for time-consuming (convention-based and autonomous) coding processes.

4. The COVID-19 pandemic accelerated the application of technology in the practice of law, to a greater or lesser extent, in all countries, showing that certain acts of international jurisdictional cooperation can be expedited, shortening times, while maintaining all the necessary guarantees of authenticity and privacy.

5. This Guide draws on successful experiences, proposes new ones, and suggests expanding their use in order to improve and streamline international jurisdictional cooperation among the American States in the way their legal operators apply the regulations in force.

6. This Guide will be applied in a manner that complements the ASADIP Principles on Transnational Access to Justice (TRANSJUS). If their proposed solutions differ, the one most likely to enhance and expedite international jurisdictional cooperation shall prevail.

7. The Guide may also prove useful as a model for the development of new regulatory instruments or the modification of existing ones.

8. It is recommended that the Ibero-American Protocol on International Judicial Cooperation, approved at the Plenary Assembly of the XVII Ibero-American Judicial Summit, held in Chile from April 2 to 4, 2014, be incorporated into the legal systems of the States, through such constitutional mechanisms as each one may establish.

9. This Guide includes an analysis of some (both conventional and autonomous) regulatory solutions in force in the region, with a view to detecting to what extent these norms do not prohibit,

[43] See, in this regard, the excellent study by ALBORNOZ, María Mercedes and PAREDES, Sebastián, "No turning back: information and communication technologies in international cooperation between authorities," *Journal of Private International Law*, 2021, Vol. 17, No. 2, 224-254, https://doi.org/10.1080/17441048.2021.1950332 where they state, summarizing the objective of the study: "The analysis of international conventions, some soft law instruments and domestic PIL rules supports the argument that an adequate legal framework that accepts the use of ICTs in international cooperation is necessary. Indeed, there is no turning back from the use of technologies in this field, where modern and suitable regulation would strengthen legal certainty, of utmost importance for the parties involved in cross-border litigation." (p. 224)

and in some cases admit and even impose as mandatory, the use of technological means in international jurisdictional cooperation.[44]

Part 2. General rules for the interpretation and application of the conventional and autonomous norms in force

Rule 1. Interpretation and application of the norms

The interpretation and application of the conventional and autonomous norms in force in each State in the area of international jurisdictional cooperation shall be broad and flexible, incorporating as far as possible the technological tools available in the States involved and taking into account the transnational nature of the cooperation and its consequent requirements.

Rule 2. Speed and efficiency of cooperation

In the interpretation and application of the conventional and autonomous norms in force in each State, an attempt shall be made to ensure that international jurisdictional cooperation is prompt and efficient.

Rule 3. Subjective purpose and legal formalities

In the interpretation and application of the conventional and autonomous norms in force in each State in the area of cooperation, priority should be given to their substantive purpose rather than to legal formalisms, whose only raison d'être is to guarantee substantive rights, while always respecting the guarantees of due process.

Rule 4. Unknown tools and mechanisms

Judges and other legal operators of a State shall admit the use and efficiency of technological tools and mechanisms existing in another State, even if they are unknown or not accessible in their own State, provided that they facilitate international jurisdictional cooperation and do not impair the guarantees of due process.

Rule 5. Use of technological means

Technological means shall be used, as far as possible, for all proceedings, hearings and procedures, and the parties, judges, and other legal operators shall be allowed to take part in the processes or procedures using whatever digital means are available, without the need to require and comply with in-person or similar formalities that are not strictly necessary, based on the existing functional analogy between both means.

Rule 6. Tools and hardware

To the extent that due process guarantees are not impaired, there shall be no requirement to use handwritten signatures, personal presentations, or additional authentications, incorporations or presentations on physical media, or to present original physical documentation, as digitalized documentation is deemed to be sufficient.

Rule 7. Analog media and hardcopy (paper) documents

There will be a tendency to replace analog media and traditional paper-based notarial instruments with electronic media and documents.

[44] See, in this regard, ALBORNOZ, María Mercedes and PAREDES, Sebastián, "No turning back: information and communication technologies in international cooperation between authorities", *Journal of Private International Law*, 2021, Vol. 17, No. 2, 224–254, https://doi.org/10.1080/17441048.2021.1950332 p. 226-227.

Rule 8. Publicizing of official communication and information channels

official authorities involved in international jurisdictional cooperation shall endeavor to publish through their respective websites the official communication and information channels through which they will provide their services, as well as the technological mechanisms employed. Likewise, States shall endeavor to keep the information they provide to international organizations, such as the OAS, the Hague Conference on Private International Law, and the United Nations, among others, up to date.

Rule 9. Utilization of technology in general

As far as possible, and to the extent that each country's technology permits, the use of electronic files, electronic documents, simple computer encoding, electronic signatures, digital signatures, electronic communications and electronic domicile shall be authorized in all judicial and administrative proceedings before the Judiciary, with the same legal effectiveness and probative value as their conventional equivalents. At the same time, care shall be taken to maintain technical security conditions and due process guarantees.

Rule 10. Electronic mail

As far as possible, e-mail—preferably that of the agency, not the personal institutional accounts of officials—shall be used for the receipt and forwarding of letters rogatory, notifications, and electronic summons, alone or accompanied by documents and other communications. For such purposes, and as established by the regulations of each country, judges, lawyers, litigants, and other legal operators must establish the corresponding mail -or equivalent- to be used for processing judicial matters. However, for informal communications, other means of electronic communication may be used.

Comment on Rule 10: For example, such electronic means of communication may include *WhatsApp* or *Telegram*. Others that serve that function may appear in the future.

Rule 11. Electronic address/domicile

To the extent that it is technically and economically feasible, States shall promote the use of electronic domicile in all judicial (and administrative?) proceedings before the judiciary, and it shall be recognized as having the same effectiveness and probative value as its conventional (or traditional?) equivalent. States shall regulate it and provide for the technical mechanisms that guarantee its safety and gradual implementation.

Rule 12. Videoconferencing

In order to overcome the difficulties and delays caused by physical distances, the use of videoconferencing is recommended for evidentiary and other proceedings, in order to help make them more expeditious, efficient, and effective, while ensuring technical security and due process guarantees.

Comments to Rule 12

- **Agreements (Acordadas) of the Supreme Court of Justice (SCJ) of Uruguay**

This rule is inspired by, among other sources, the *Acordadas* of the Supreme Court of Justice (SCJ) of Uruguay,[45] Nos. 7784, 7902, and 7815, which gave the Ibero-American Convention on the Use of Videoconferencing the status of an *Acordada*.

In **Acordada No. 7784**,[46] of 2013, we highlight the following:

In paragraph I *in fine* it states: "Proceedings by videoconference reaffirm the principles of non-delegability, immediacy and access to Justice, by circumventing the difficulties posed by physical distances."

[45] **Agreements (*Acordadas*):** Decisions of the **Supreme Court of Justice** in plenary session or of some of its Chambers, especially in oversight matters (*Superintendencia*). They are true "Administrative Regulations". Resolutions of the Chief Justice: These are orders of the Chief Justice of the **Supreme Court**.

[46] https://www.poderjudicial.gub.uy/documentos/70-2013/3007-171-2013-reglamento-de-dilgenciamiento-por-videoconferencia.html

"(II) it is an unquestionable truth that technological progress placed at the service of Justice enables the use of new tools to contribute to agile, efficient, and effective proceedings."

(III) a modern Judiciary must assume that international collaboration between courts of different States is increasingly common and supported by a series of circumstances. These include large-scale migration of people, the increasing interconnectedness of economies and the development of the media. It is therefore necessary to address the creation and implementation of solutions that take advantage of technological development and the resources available to the Uruguayan Judiciary, so as not to undermine the degree of development of the Republic in this area and avoid being at a disadvantage with other nations."

V in fine:

"Rules 34, 35, 42, and 95 of the so-called One Hundred Brasilia Rules on Access to Justice for Persons in Conditions of Vulnerability (*Acordada* 7647) encourage the possibility of using information technology tools to favor those who live in remote places,[47] through the use of technologies that alleviate the disadvantages they face. By way of example, the displacement of witnesses from small towns and villages involves an extraordinary expense that is often too much for the most disadvantaged to bear;"

Of course, Article 3 of the *Acordada* provides: "The IT services of the Judiciary will progressively install the necessary technical infrastructure in the various regions of the Republic, including a secure connection. Provision shall be made for its use both between courts of the Republic and for international connections."

In **Acordada No. 7902**,[48] of 2017, we highlight the following:

"(III) that in order to provide better service to the parties before the courts, it is necessary to take full advantage of technological development and the resources available to the Judiciary;"

In **Acordada No. 7815**,[49] of 2014, we highlight the following:

Acordada 7815 grants *Acordada* status to the Ibero-American Protocol on International Judicial Cooperation, approved at the Plenary Assembly of the XVII Ibero-American Judicial Summit, held in Chile from April 2 to 4, 2014, and establishes that it, where appropriate, it shall be followed as a guideline for action.

In its Recital II) it states that the Ibero-American Protocol "...constitutes a valuable tool to promote inter-agency collaboration at the national and international levels and to facilitate compliance with requests for cooperation made by the judiciaries of the Ibero-American States;"

- **Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters**

As for the Hague Convention of March 18, 1970, on the Taking of Evidence Abroad in Civil or Commercial Matters, there is nothing to prevent to the proceedings provided for in its Articles 7, 8, and 9 being carried out by technological means. Furthermore, Article 9, paragraph 2, is open-minded with respect to the procedures to be followed in the execution of letters rogatory:

"However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance (sic) by reason of its internal practice and procedure or by reason of practical difficulties."

---

[47] https://www.acnur.org/fileadmin/Documentos/BDL/2009/7037.pdf

[48] https://www.poderjudicial.gub.uy/documentos/66-2017/2169-072-2017-acordada-n-7902-preceptividad-del-interrogatorio-de-peritos-por-videoconferencias.html

[49] https://www.poderjudicial.gub.uy/documentos/69-2014/2864-122-2014-acordada-7815-protocolo-iberoamericano-de-cooperacion-judicial.html

- **Inter-American Convention on Support Obligations**

The "giving notice to the debtor" provided for in Article 13 of the Inter-American Convention on Support Obligations (CIDIP-IV, Montevideo, 1989) can be by videoconference, since the rule does not specify anything in this regard and does not require it to be in person; the "holding of a hearing" (Article 13) could also, for the same reasons, be by electronic means.

- **ASADIP Principles on Transnational Access to Justice (TRANSJUS)**

Art. 4.6 of the Principles establishes:

"With a view to ensuring security and maximum efficiency of inter-jurisdictional procedural measures, judges and other judicial officials may establish direct and impromptu means of judicial communication, using any appropriate mechanism to achieve certainty and security.

Accordingly, judges and other judicial officials may hold common hearings **via videoconference or other available means** or coordinate their decisions so as to avoid conflicts and ensure the effectiveness of such decisions.

The parties shall have access to the communications between the courts or, where this is not appropriate, they shall be informed of such communications."

- **Ibero-American Convention on the Use of Videoconferencing in International Cooperation between Justice Systems and its Additional Protocol Related to Costs, Linguistic Regime, and Submission of Requests. (Mar del Plata, 2010)**

The preamble of this Agreement recognizes "the importance of increasing the use of new technologies as a tool to contribute to expeditious, efficient, and effective administration of justice." Article 1 states that the purpose of the agreement is "to promote the use of videoconferencing between competent authorities of the Parties as a specific means to strengthen and accelerate mutual cooperation in civil, commercial and criminal law, and other matters by express agreement between the parties."

Rule 13. Electronic files and documents issued by judicial and administrative authorities

Electronic files and documents issued by the judicial and administrative authorities of the States, including those containing electronic certifications and signatures, shall have the same legal validity and probative effectiveness as files and documents in physical format.

Rule 14. Direct judicial communications

Without prejudice to the transmission of letters rogatory through the formal channels established in conventional and autonomous norms in force in each State regarding international jurisdictional cooperation, judges may establish direct and spontaneous judicial communications, using any suitable mechanism that guarantees certainty, security, and due process, in order to make the requested cooperation effective (TRANSJUS Article 4.6-7, Article 2612 **CCCN of Argentina, and Agreement (Acordada) No. 7885 of the Supreme Court of Justice of Uruguay),[50] Emerging Guidance regarding the development of the International Hague Network of Judges and General Principles for Judicial Communications, including**

[50] https://www.poderjudicial.gub.uy/documentos/67-2016/2586-164-2016-acordada-n-7885-designar-juzgados-de-frontera-limitrofes-con-la-republica-argentina.html.
In its Recital I), Agreement 7885, of 2016, refers to the Framework Collaboration Agreement between the Supreme Court of Justice of the Eastern Republic of Uruguay and the Federal Board of Courts and Superior Courts of Justice of the Argentine Provinces and the Autonomous City of Buenos Aires, which is geared to improving direct judicial communications in matters of international cooperation. In Recital II), it states: "That, in the aforementioned agreement, it was established that the courts to be identified may use the judicial channel as a means of transmission of letters rogatory, when they involve an international request for first degree cooperation (*cooperación de primer grado*), consisting of mere formalities, the submission of evidence, and precautionary measures. For that purpose, letters rogatory may be sent, digitally signed, by means of the aforementioned e-mails;"

commonly accepted safeguards for Direct Judicial Communications in specific cases, within the context of the International Hague Network of Judges).

Rule 15. Joint hearings and coordinated decisions

Judges and other justice operators may hold joint hearings through videoconferences or any other available means, and even coordinate their decisions to avoid contradictions between them and ensure their effectiveness. The parties may have access to communications between the courts and when this is not appropriate, they must be informed of the same.

Rule 16. Digital, mechanical analog, digitized, or scanned signature

When judges and other operators do not have digital signatures, they may validly sign the acts, orders, and decisions they adopt by means of mechanical, digitized, or scanned autographic signatures, as available. States and their authorities shall endeavor to adopt the necessary domestic measures to ensure the security of documents signed by these means.

Rule 17. Management systems and computer support

The States shall endeavor to have adequate management systems and computer support to meet the minimum requirements for validating notifications, communications, summons, and so on, such as, inter alia, the authenticity of the documents, the certainty that the document or the letter rogatory comes from the authority from which it claims to come, as well as to allow it to be used as a valid means of evidence in judicial proceedings.

Rule 18. Electronic forms

Among other tools to expedite procedures in the area of international jurisdictional cooperation, efforts will be made to use model electronic forms.

Rule 19. When the rule does not distinguish, the interpreter may not do so

It is a general principle of law that when a rule does not distinguish, the interpreter may not do so. As we will see when analyzing some conventional and national texts in the following chapters, conventional and legal norms do not generally prohibit the use of technological means, but simply do not mention them, for chronological reasons. The most modern standards generally expressly allow such use. Therefore, as will be explained in more detail, when the rule refers to "document", without specifying, it may be interpreted as referring to a paper or digital document; when it refers to "transmit", without specifying the medium, it may be interpreted as meaning that such transmission may be physical or electronic, and so on.

Rule 20. Evolutionary or progressive interpretation of the law.

It is recommended that instruments—both *hard law* (conventions, laws, regulations) and *soft law*—governing aspects of international jurisdictional cooperation without reference to modern technological and information technology tools be interpreted in an evolutionary or progressive manner, including their use in the application and operation of the aforementioned normative instruments.

Comments to Rule 20

As discussed in the report preceding these rules, many conventions and laws on international jurisdictional cooperation, mainly for chronological reasons, do not refer to the various technological and computer tools currently available. However, neither do they prohibit the use of such new tools; moreover, for the most part, their broad language allows the technology to be included without contradicting the regulatory text. The incorporation of technology often modifies the support of the exhortation, for example, but not its content and security guarantees. On the contrary, in some cases it increases those guarantees, and always greatly streamlines procedures.

It should be added that the available technological and information technology tools are already being used in many countries, as shown in the preceding report.

The purpose of the suggestion embodied in this Rule 20 is "to remedy, precisely by means of interpretation, the aging of regulatory texts."[51]

It should be added that the so-called "evolutionary" or "dynamic" interpretation is that which "attributes to a text a current meaning," (...) "which ascribes to a normative text a new meaning, different from the usual or consolidated one. Evolutionary interpretation is the product of the adaptation of old, or relatively old, laws (or Constitutions) to new situations not envisaged by lawmakers in the past (or by the constitutional drafters)." (...) "the interpretation of normative texts must change when the circumstances in which they are to be applied change." [52]

In Colombia, Castro Herrera et al. state that "evolutionary interpretation—making specific use of the institutions of legal sociology—manages to construct a paradigm of legal interpretation suitable for the context of twenty-first century law."[53]

The aforementioned author adds: "This positive law, which emanates naturally from the social component through legally established procedures, is applied to a society that is innately dynamic and changing, and which, for elementary reasons, cannot remain static or immobile. This point, which has always been contentious, is accentuated and becomes more serious when society, institutions, customs, values, and ways of life undergo especially rapid and profound change." [54]

And concludes:

> "... evolutive interpretation acts as a figure that determines the commitment of judges to interpret legal norms in a reasonable manner, that is to say, adhering to the concept of justice; and to obtain the full achievement of the application of justice in a given place and time, the judge must interpret positivized postulates based on the needs and social circumstances of the context and time in which they are applied. As Manuel Segura Ortega rightly states: "Judges have the duty to put an end to the indeterminacy of the law and, therefore, neither the obscurity, insufficiency, or silence of normative texts can be used as grounds for not rendering a decision. Accordingly, it is the legal system itself that—positively—orders judges to complete the work of the legislator where necessary." (Segura Ortega, 2008, p. 222).[55]
>
> "... anyone who undertakes the exercise of interpreting must bear in mind and weigh each factor independently of positive law; those factors helped to strengthen the harmonization of interpretation and bring about an effective solution in each specific case. This is how sociology and the data collected from social reality become judgments that determine and give force to applicable law."[56]

Coincidentally, the renowned Uruguayan scholar, Prof. Dr. Héctor Gros Espiell, said:

---

[51] https://leyderecho.org/interpretacion-evolutiva/#:~:text=La%20interpretaci%C3%B3n%20evolutiva%20es%20producto,o%20por%20los%20padres%20constituyentes

[52] https://leyderecho.org/interpretacion-evolutiva/#:~:text=La%20interpretaci%C3%B3n%20evolutiva%20es%20producto,o%20por%20los%20padres%20constituyentes

[53] Castro Herrera, L.E., Maiguel Donado, C.A., Barrios Márquez, E.J., & Jaraba Salcedo, A. (2021), Construcción de sentido e interpretación evolutiva aplicada a la praxis legal y constitucional. Revista Academia & Derecho, 12 (23), p. 2.

[54] Castro Herrera, L.E., Maiguel Donado, C.A., Barrios Márquez, E.J., & Jaraba Salcedo, A. (2021), Construcción de sentido e interpretación evolutiva aplicada a la praxis legal y constitucional. Revista Academia & Derecho, 12 (23), p. 16.

[55] Castro Herrera, L.E., Maiguel Donado, C.A., Barrios Márquez, E.J., & Jaraba Salcedo, A. (2021), Construcción de sentido e interpretación evolutiva aplicada a la praxis legal y constitucional. Revista Academia & Derecho, 12 (23), p. 16-17.

[56] Castro Herrera, L.E., Maiguel Donado, C.A., Barrios Márquez, E.J., & Jaraba Salcedo, A. (2021), Construcción de sentido e interpretación evolutiva aplicada a la praxis legal y constitucional. Revista Academia & Derecho, 12 (23), p. 17-18.

"Law is a social phenomenon. It is an element of social reality. It is not only normative, but also a part of the reality to which it applies, which cannot be grasped if the law that governs it is not known. But this positive law, born from society through legally established procedures, is applied to a society that is dynamic and changing, never static nor immobile. This point, which has always been problematic, is accentuated and becomes more critical when society, institutions, customs, values, and ways of life undergo especially rapid and profound change. Our age—the age in which we live—is one of the best examples in history of this phenomenon."[57]

"...the law in force today cannot and must not be interpreted, necessarily and always, according to what was thought when the rule was adopted. Respect for social change, respect for what change means and will mean in an open, tolerant, and democratic society, requires that the law be interpreted and applied in a way that gives the words, terms, and concepts that the law employs the significance and meaning consistent with the times in which the interpretation is made."

"It is absurd to consider that a norm conceived and developed in the 19th century, for example, should be interpreted, necessarily and absolutely, according to then-reigning ideas, while disregarding the ideas, realities, criteria, values, and meanings, that such words, terms, and concepts have today." [58]

"... I think we all understand that when we speak of evolutionary and dynamic interpretation, we mean interpretation that necessarily takes into account the changes and evolution that the law has undergone, and considers those changes and that evolution when interpreting norms in terms of how they apply today." [59]

"It is that attitude that underpins what, in my opinion, constitutes the necessary evolutionary, dynamic, and progressive interpretation of all law, both public and private. An interpretation that considers the modern meaning of concepts, which predominates over what they used to mean and does not bar the way to future interpretations that may, in turn, come about taking into account realities that supersede those currently in existence." [60]

By way of conclusion, it should be noted that evolutionary interpretation does not mean changing the text, but rather adapting it to new realities as a result of technological progress.

Moreover, evolutionary interpretation is precisely what allows legal norms to retain their applicability and propriety, despite the time elapsed between their drafting and entry into force and their current application.[61]

Rule 21. Exhortation

States whose domestic laws prevent compliance with any of the rules set forth in this Guide are urged to proceed to a progressive development of their domestic legislation.

[57] "El cambio social y político, las definiciones jurídicas y la interpretación dinámica y evolutiva del Derecho", Héctor Gros Espiell, at:
http://www.chasque.net/frontpage/relacion/0408/derecho.htm

[58] "El cambio social y político, las definiciones jurídicas y la interpretación dinámica y evolutiva del Derecho", Héctor Gros Espiell, in:
http://www.chasque.net/frontpage/relacion/0408/derecho.htm

[59] "Social and Political Change, Legal Definitions and the Dynamic and Evolutionary Interpretation of Law," Héctor Gros Espiell, in:
http://www.chasque.net/frontpage/relacion/0408/derecho.htm

[60] "Social and Political Change, Legal Definitions and the Dynamic and Evolutionary Interpretation of Law," Héctor Gros Espiell, in:
http://www.chasque.net/frontpage/relacion/0408/derecho.htm

[61] Cecilia FRESNEDO DE AGUIRRE, 147. "Public Policy: Common Principles in the American States," *Recueil des cours*, Vol. 379 (2016), Leiden/Boston, Brill Nijhoff, 2016, p. 73-396, p. 209.

Part 3. Rules for international jurisdictional cooperation

Rule 22. Most favorable practices

State authorities shall always accord priority to the most favorable practices for ensuring prompt and effective international jurisdictional cooperation.

Comments to Rule 22

- **Inter-American Convention on Letters Rogatory**

This rule is inspired by Article 15 of the Inter-American Convention on Letters Rogatory,[62] which states: "This Convention shall not limit any provisions regarding letters rogatory in bilateral or multilateral agreements that may have been signed or may be signed in the future by the States Parties or preclude the continuation of ***more favorable practices in this regard that may be followed by these States.***" (Emphasis added.)

- **Inter-American Convention on the Taking of Evidence Abroad**

Art. 14 of the Inter-American Convention on the Taking of Evidence Abroad (CIDIP-I, Panama, 1975) refers, as does Art. 15 of the Convention on Letters Rogatory, to more favorable practices, so we refer to the comments made therein.

- **Inter-American Convention on Execution of Preventive Measures**

Art. 18 of the Inter-American Convention on Execution of Preventive Measures (CIDIP-II, Montevideo, 1979) establishes:

"*This Convention shall not limit any provisions regarding preventive measures in bilateral or multilateral agreements that may have been signed or may be signed in the future by the States Parties, or preclude the continuation of* ***more favorable practices*** *in this regard that may be followed by these States.*" (Emphasis added)

- **Inter-American Convention on the International Return of Children**

Article 35 of the Inter-American Convention on the International Return of Children (CIDIP-IV, Montevideo, 1989) uses the expression "more favorable practices," which is also used in other conventions:

"This Convention shall limit neither the provisions of existing or future bilateral or multilateral conventions on this subject entered into by the States Parties, nor the **more favorable practices** that those States may observe in this area."

- **Inter-American Convention on Support Obligations**

Like other Inter-American Conventions, such as the Restitution Convention, the Inter-American Convention on Support Obligations (CIDIP-IV, Montevideo, 1989) recognizes and prioritizes "more favorable practices": *"This Convention shall limit neither the provisions of existing or future bilateral or multilateral conventions on this subject entered into by the States Parties, nor the* ***more favorable practices*** *that those States may observe in this area.*"

- **MERCOSUR Protocol on Precautionary Measures**

Article 26 of the MERCOSUR Protocol on Precautionary Measures, as well as other rules already mentioned, establishes: "*This Protocol* ***shall not restrict the application of provisions more favorable to cooperation*** contained in other Conventions on Precautionary Measures in force on a bilateral or multilateral basis between the States Parties."

- **ASADIP Principles on Transnational Access to Justice (TRANSJUS)**

The materialization of these practices can be found, for example, in the ASADIP Principles on Transnational Access to Justice (TRANSJUS), which can be applied "where the parties have agreed that procedural aspects of their legal relationship shall be governed by them, unless expressly

[62] https://www.oas.org/juridico/spanish/tratados/b-36.html

prohibited by the law of the forum," and also [These Principles may be applied] as long as such application is technically feasible and does not result in an outcome manifestly incompatible with the fundamental principles of the applicable law (art. 1.3).

Although there are very few reports on the application of the TRANSJUS Principles, some countries report that although they do not apply them, they recognize that they are not incompatible with current regulations (e.g.: Costa Rica). There therefore seems to be no problem with applying them or this Guide.

The TRANSJUS Principles include the principle of *in dubio pro cooperationis* (Article 1.2 b), as follows: "International legal cooperation is essential to the balanced consideration of the parties' rights. In case of doubt generated by persistent normative conflict, solutions promoting international legal cooperation shall be favored."

- **Doctrine**

Worth noting here are, as Tellechea points out, is that

"*The position arrived at by the doctrines of Argentina and Uruguay on the occasion of the XXV Argentine Congress of International Law, Section of Private International Law, in La Plata, September 26 and 27, 2013, which addressed the issue based on the valuable summary of the issue by Professor María Blanca Noodt Taquela, referred to the "Application of the rule most favorable to international judicial cooperation", concluding unanimously: In the event of a plurality of -- in principle -- applicable sources, and without prejudice to any relevant rules on the compatibility of treaty law, the rule most favorable to international judicial cooperation shall apply" and "1.3. In particular, cooperation may be provided by having recourse to rules from different sources in accordance with the methods of private international law and general principles accepted in the field." These are concepts embraced by the ASADIP Principles, which in Chapter 1, "General Provisions and Principles", Article 1.2, espouse the aphorism in dubio pro cooperationis, adding that "legal operators must be oriented toward favoring international legal cooperation.*"[63]

Rule 23. Ways and means of transmitting letters rogatory

States shall tend to accept and use electronic means of transmitting letters rogatory, regardless of the channel used (by the parties concerned, by the judicial, diplomatic or consular channels or by the central authority), in order to expedite cooperation and make it more effective. It is recommended that the States use and develop the Central Authority channel and, as far as possible, progressively remove the legal and practical obstacles that prevent or limit direct communication between judges in neighboring countries.

Comments to Rule 23

- **Inter-American Convention on Letters Rogatory**

Art. 4 of the Inter-American Convention on the Law Applicable to International Contracts establishes that:" Letters rogatory may be transmitted to the authority to which they are addressed by the interested parties, through judicial channels, diplomatic or consular agents, or the Central Authority of the State of origin or of the State of destination, as the case may be. (…)".

- **Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor, and Administrative Matters of Las Leñas and its Buenos Aires amendment**

Article 5 of the Protocol on jurisdictional cooperation and assistance in civil, commercial, labor, and administrative matters (MERCOSUR, Las Leñas, 1992) establishes:

"*Each State Party shall send to the jurisdictional authorities of the other State, through the channel envisaged in Article 2, letters rogatory regarding civil, commercial, labor, or administrative matters, when their purpose is: a) to undertake procedural*

[63] TELLECHEA BERGMAN, Eduardo, "Hacia Una necesaria profundización de la cooperación jurisdiccional internacional y el reconocimiento de los fallos extranjeros En el ámbito interamericano", Revista de Derecho de la Universidad de Montevideo- No. 32 - Year 2017, p. 103-124, p. 116. 103-124, p. 109.

formalities, such as summonses, subpoenas, service of process, notifications, and so on;
b) the receipt or taking of evidence."

The Buenos Aires amendment of 2002 adds to the channel provided for in Art. 2,[64] which is the central authority, the diplomatic or consular channel and the private channel. However, like the rules already analyzed, neither the Protocol nor its amendment refer to the means used, so that transmissions can be made by electronic means without contravening the rule.

The aforementioned rules establish the channels of transmission of the letters rogatory but are silent about the **means** to be used for such transmission, so there is nothing to stop letters rogatory being transmitted by digital means, regardless of whether the channel used is private, judicial, consular, or diplomatic, or the central authority. In other words, the rule does not prohibit—and therefore it is permitted—that letters rogatory be transmitted by any of the channels established in Art. 4 of the Convention in digital form.

- **Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters**

Art. 2 of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters also does not provide for the means by which letters rogatory are to be received and remitted, so the same comment applies.

Article 27 of the aforementioned Convention envisages the possibility of using other channels for remitting letters rogatory:

"*The provisions of the present Convention shall not prevent a Contracting State from*:

(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention."

- **Guide to Good Practice on Use of Video-Link under Hague Evidence Convention**

The HCCH published in November 2019, after years of research, the Good Practice Guidance on the Use of Video-Link under the Convention on Evidence. We refer readers to it and recommend its application.

- **Inter-American Convention on the Taking of Evidence Abroad**

Article 3, paragraph 2 of the Inter-American Convention on the Taking of Evidence Abroad (CIDIP-I, Panama, 1975) establishes:

"Should the authority of the State of destination find that it lacks jurisdiction to execute the letter rogatory but consider that another authority of the same State has jurisdiction, ***it shall ex officio forward to it, through the appropriate channels, the documents and antecedents of the case***." (emphasis added).

The reference to "appropriate channels" for transmission leaves the door open to the use of computerized media.

- **Inter-American Convention on the International Return of Children**

The Inter-American Convention on the International Return of Children (CIDIP-IV, Montevideo, 1989) establishes in its Article 7, paragraph 3:

"*The Central Authorities of the States Parties shall cooperate with one another and exchange information on the operation of the Convention in order to secure the prompt return of children and to achieve the other purposes of this Convention.*"

It is evident that IT tools are extremely useful to make the cooperation and exchange of information provided for in the aforementioned regulation faster and more efficient.

[64] https://legislativo.parlamento.gub.uy/temporales/D2019081185-005013625.pdf#page=8

Article 8 establishes:

"A party seeking a child's return may file an application or petition with the competent authorities in accordance with Article 6: a. By a letter rogatory; b. By filing a request with a central authority; or c. Directly, or through diplomatic or consular channels."

As usual, the rule does not refer to the means used to transmit the letter or request, so it can be in paper or digital format. The same applies to the contents of said instruments and accompanying documents.

Article 22 establishes:

"*Letters rogatory and requests for the return or the locating of children may be transmitted, as appropriate, to the requested authority by the parties themselves, or through judicial, diplomatic, or consular channels, or through the Central Authority of the requesting or the requested State.*"

The channels contemplated by the rule governing the transmission of letters rogatory and requests do not establish that the medium must be a paper document, so that digital documents may be used.

- **Hague Convention of October 25, 1980, on Civil Aspects of International Child Abduction**

Article 2 of the Hague Convention of October 25, 1980, on Civil Aspects of International Child Abduction adopts a broader approach to the measures that States may take to comply with the objectives of the Convention:

"*Contracting States shall take **all appropriate measures** to secure within their territories the implementation of the objects of the Convention. For this purpose, they shall use the most expeditious procedures available."*

Article 7 provides that:

"*The Central Authorities **shall collaborate*** with each other and promote collaboration between the competent authorities in their respective States in order to secure the immediate return of the children and to achieve the other objectives of this Convention. *They shall, in particular, either directly or through an intermediary, take **all appropriate measures to enable**:*

(a) to discover the whereabouts of a child who has been wrongfully removed or retained; (b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures; (c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues; (d) to exchange, where desirable, information relating to the social background of the child; (e) to provide information of a general character as to the law of their State in connection with the application of the Convention; (f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organizing or securing the effective exercise of rights of access; (g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers; (h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child; (i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application."

Given the nature of the actions to be taken by the Central Authorities to achieve the objectives of the Convention, it is evident that technological tools are extremely useful for ensuring that they act with the required speed. This is observed in practice in many countries.

Likewise, in order to comply with the mandate of Art. 9, computerized channels for transmitting requests "directly and without delay" are much more effective than the traditional ones. Article 9 mandates the following:

"*If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another Contracting State,* ***it shall directly and without delay transmit the application*** *to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be."*

Article 28 establishes:

"*A Central Authority may require that the application be accompanied by a written authorization empowering it to act on behalf of the applicant, or to appoint a representative empowered to act on the applicant's behalf.*"

The "written authorization" may be in the form of a paper or digital document, as the rule does not distinguish between the two.

The HCCH has generated a number of tools in support of the Convention and its practical implementation, such as the Guide to Good Practice, the International Hague Network of Judges, the International Child Abduction Database (INCADAT), and the Electronic Case Management System for the 1980 International Child Abduction Convention (iChild), among others.[65] Their use is recommended.

Those countries where in practice it is a requirement, in active and passive international judicial assistance (letters rogatory, obtaining evidence, etc.), to issue physical documents, sometimes even with the copies indicated in some international instruments, for their transmission by the appropriate means,[66] may in fact replace the physical transmission of paper documents with electronic transmission of originally digital or digitized documents.

Practice shows that central authorities, as agencies specialized in private international law and international jurisdictional cooperation, are a more efficient way of transmitting letters rogatory than diplomatic or consular channels, which "usually take several months."[67]

Therefore, this Guide recommends that States use and develop the Central Authority channel. For the purposes of greater efficiency, Tellechea agrees with what we have been arguing:

"*...the transmission of letters rogatory, when carried out through the mail, generally registered mail, in practice takes several days to send the letter rogatory from the requesting central authority to the requested central authority. The speedy execution of justice makes it necessary to analyze the possibility of using electronic means both for the transmission of letters rogatory and for other communications between the central authorities regarding their execution, a possibility that was not foreseeable when these bodies were created in the nineteen sixties and seventies by the Hague and Inter-American Conventions, but that today constitutes a reality thanks to current technologies allowing for instantaneous and secure communication and capable of accrediting the authenticity of the request.*"[68]

The private channel also has advantages, and its operation can be improved by the ratification, by those States that have not yet done so, of the Hague Convention of October 5, 1961, Abolishing the Requirement of Legalisation for Foreign Public Documents. Thus, as Tellechea points out:

---

[65] See https://www.hcch.net/es/instruments/conventions/specialised-sections/child-abduction/ihnj

[66] Take, for example, Costa Rica, which requires it for the transmission of letters rogatory and the like through the General Secretariat of the Supreme Court of Justice and the Ministry of Foreign Affairs and Worship to the different diplomatic and consular representations in charge of forwarding the request to the central authority or the competent authority of the other country, or vice versa.

[67] TELLECHEA BERGMAN, Eduardo, "Hacia Una necesaria profundización de la cooperación jurisdiccional internacional y el reconocimiento de los fallos extranjeros En el ámbito interamericano", Revista de Derecho de la Universidad de Montevideo- No. 32 - Year 2017, p. 103-124, p. 116. 103-124, p. 109-110.

[68] TELLECHEA BERGMAN, Eduardo, "Hacia Una necesaria profundización de la cooperación jurisdiccional internacional y el reconocimiento de los fallos extranjeros En el ámbito interamericano", Revista de Derecho de la Universidad de Montevideo- No. 32 - Year 2017, p. 103-124, p. 116. 103-124, p. 110.

"*Using this channel, the interested party withdraws the letter rogatory from the issuing office and remits it to a correspondent in the requested State who, in accordance with the regulations of the latter, will be responsible for forwarding it to the competent court for processing: a procedure that ensures rapid and confidential transmission of requests for judicial assistance*. *In practice, this method is impaired by the fact that, by its very nature, it requires proof of the authenticity of the foreign letter rogatory. Between States not party to the Hague Convention of October 5, 1961, Abolishing the Requirement of Legalization for Foreign Public Documents, this accreditation requires legalization, with all the delays that this entails.24 Therefore, for this channel to be more efficient, it would be worth encouraging the countries of the Americas that have not yet done so, to adopt the Convention and ensuring that a future revision of the inter-American regulatory framework contemplates that, among States Parties to conventions such as the Hague Convention that provide for more expeditious procedures for accreditation of the authenticity of foreign documents, those procedures will be followed.*"[69]

Regarding direct communication between judges in neighboring countries, Tellechea states:

"*Various conventions provide for this option, which does not require legalization*. *They include the Inter-American Conventions on Letters Rogatory, Article 7; the Inter-American Convention on International Traffic in Minors, Article 15; and the Ouro Preto Protocol on Precautionary Measures, Article 19, fourth paragraph. This type of jurisdictional communication is tailored to the circumstances found in border areas, where the sociological environment favors the emergence of international private relations of all kinds and litigation arising from them, and consequently makes it necessary to attend to a significant volume of international cooperation between judges in close proximity to each other.*

This type of judicial communication has begun to be successfully applied along the Argentine-Uruguayan border on the Uruguay River, including in precautionary matters. This is not the case, unfortunately, on the border with Brazil, a country that, based on case-law interpretation of its Constitutional requirement that letters rogatory must be subject to centralized control, exequatur, before the Superior Court of Justice25, rejects the possibility of direct transmission of letters rogatory between judges in border areas, even though the issue, strictly speaking, refers to the transmission -- not control or oversight -- of the letters rogatory. This position triggers serious delays that often frustrate jurisdictional assistance and the realization of justice itself, since, e.g., a letter rogatory issued by a Uruguayan judge in the border city of Rivera to his counterpart in the neighboring city of Livramento, has to be sent to Montevideo so that the central authority in Uruguay can send it to the central authority in Brasilia, which in turn has to send it to the Superior Court of Justice, which, after checking it, sends it to the Court in Livramento for processing, which then returns it via the same route. When properly managed, this so far underutilized channel should facilitate effective jurisdictional assistance at the borders. This proposal is consistent with the "Recommendations to the States of the Americas on Border or Neighboring District Integration", adopted by the Inter-American Juridical Committee on March 3, 2014, at its 84th regular session, CJI/RES.206 (LXXXIV-O/14). In this regard, it should be noted that by Agreement (Acordada) no. 7885 of December 21, 2016, the Supreme Court of Justice of Uruguay resolved to designate the Courts bordering the Argentine Republic in the Departments of Artigas, Salto Paysandú, Río Negro, Soriano and Colonia, as "Border Courts" for the purposes of processing requests for international judicial cooperation, with this Agreement coming into force for communications sent as of April 1, 2017."[70]

---

[69] TELLECHEA BERGMAN, Eduardo, "Hacia Una necesaria profundización de la cooperación jurisdiccional internacional y el reconocimiento de los fallos extranjeros En el ámbito interamericano", Revista de Derecho de la Universidad de Montevideo- No. 32 - Year 2017, p. 103-124, p. 116. 103-124, p. 112.

[70] TELLECHEA BERGMAN, Eduardo, "Hacia Una necesaria profundización de la cooperación jurisdiccional internacional y el reconocimiento de los fallos extranjeros En el ámbito

Regarding precautionary matters, Tellechea affirms:

"Given the nature and needs of border areas, it would be worth including direct communication in this area between judges in neighboring countries, an option not contemplated in the channels listed by Article 13 of the Convention and which Article 19 (4) of the Ouro Preto Protocol expressly included. *At the inter-American level, direct jurisdictional communication between tribunal in border areas without the need for authentication is accepted in relation to merely procedural and evidentiary assistance by the Convention on Letters Rogatory and, in a broad manner, by the 1994 Mexico Convention on International Traffic in Minors, Article 15.*"[71]

It is recommended that authentication be eliminated as a general requirement.

Tellechea's arguments in this regard are as follows:

> *14.a, deals with the requirement in a generic manner, without expressly excluding from it the transmission of letters rogatory through diplomatic, consular, and central authority channels, which -- based on their official nature, doctrine, and positive law -- coincide in not requiring legalization. This is the position taken by the final part of Article 11 of the 1940 Treaty on International Procedural Law of Montevideo regarding the transmission of letters rogatory through diplomatic or consular agents and, more broadly, by the 1975 Inter-American Convention on Letters Rogatory (Articles 6 and 734), which includes transmission via a central authority and direct communication between judges in neighboring countries. 6 and 734. The conventional provision in its current wording results in practice in some countries requiring legalization to authenticate requests for precautionary assistance, regardless of the channel used, when that requirement would only be appropriate in cases of transmission through private channels and, even then, provided that there is no conventional regulation between the requesting and the requested State that, like the Hague Convention of October 5, 1961 Abolishing the Requirement of Legalization for Foreign Public Documents, establishes a more expeditious procedure for this purpose.*"[72]

- **Hague Convention of November 23, 2007, on the International Collection of Alimony for Children and other Family Members and Protocol on the Law Applicable to Alimony Obligations**

Art. 1 of the 2007 Convention establishes its objective as follows:

"The object of the present Convention is to ***ensure the effective*** *international recovery of child support and other forms of family maintenance, in particular by:*

(a) establishing a ***comprehensive system of co-operation*** *between the authorities of the Contracting States;*

(b) ***making available applications*** *for the establishment of maintenance decisions;*

(c) providing for the recognition and enforcement of maintenance decisions; and

(d) requiring ***effective measures for the prompt enforcement*** *of maintenance decisions.*"

It seems unquestionable that the use of technological means helps achieve the proposed objective. In addition, the use of computer tools is not prohibited by law, so there is no regulatory impediment to their use.

---

interamericano", Revista de Derecho de la Universidad de Montevideo- No. 32 - Year 2017, p. 103-124, p. 116. 103-124, p. 112-113.

[71] TELLECHEA BERGMAN, Eduardo, "Hacia Una necesaria profundización de la cooperación jurisdiccional internacional y el reconocimiento de los fallos extranjeros En el ámbito interamericano", Revista de Derecho de la Universidad de Montevideo- No. 32 - Year 2017, p. 103-124, p. 116.

[72] TELLECHEA BERGMAN, Eduardo, "Hacia Una necesaria profundización de la cooperación jurisdiccional internacional y el reconocimiento de los fallos extranjeros En el ámbito interamericano", Revista de Derecho de la Universidad de Montevideo- No. 32 - Year 2017, p. 103-124, p. 116.

Chapter II of the 2007 Convention refers to Administrative Cooperation. Art. 5 establishes the general functions of the Central Authorities in the following terms:

"*Central Authorities shall:*

a) co-operate with each other and promote co-operation amongst the competent authorities in their States to achieve the purposes of the Convention;

b) seek, as far as possible, solutions to difficulties which arise in the application of the Convention."

Art. 6, for its part, determines the specific functions of the Central Authorities:

"1. Central Authorities shall provide assistance in relation to applications under Chapter III. In particular, they shall:

a) transmit and receive such applications;

b) initiate or facilitate the institution of proceedings with respect of such applications.

2. In relation to such applications they shall take all appropriate measures:

(a) where the circumstances require, to provide or facilitate the provision of legal assistance;

(b) to help locate the debtor or the creditor;

(c) to help obtain relevant information concerning the income and, if necessary, other financial circumstances of the debtor or creditor, including the location of assets;

(d) to encourage amicable solutions with a view to obtaining voluntary payment of maintenance, where suitable by use of mediation, conciliation or similar processes;

(e) to facilitate the ongoing enforcement of maintenance decisions, including any arrears;

(f) to facilitate the collection and expeditious transfer of maintenance payments;

(g) to facilitate the obtaining of documentary or other evidence;

(h) to provide assistance in establishing parentage where necessary for the recovery of maintenance;

(i) to initiate or facilitate the institution of proceedings to obtain any necessary provisional measures that are territorial in nature and the purpose of which is to secure the outcome of a pending maintenance application;

(j) to facilitate service of documents.

(…)."

It is evident that technology in general and information technology are useful to ensure more efficient and prompt performance of all the functions - general and specific - imposed by the Convention on Central Authorities.

Article 12 refers to the "Transmission, receipt and processing of applications and cases through Central Authorities", and paragraph 7) thereof states: "*Central Authorities shall employ t**he most rapid and efficient means of communication** at their disposal.*" The previous comment applies here, too.

Next, Art. 13 refers to "means of communication and provides:

"*Any application submitted through the Central Authorities of the Contracting States in accordance with this Chapter, or any documentation or information attached to or provided by a Central Authority, **may not be challenged by the respondent on the sole ground of the medium or means of communication used*** between the respective Central Authorities."

This rule is of particular importance. It should be taken as an example that, if the requested State does not yet use certain media or means of computerized communication that the requesting State does use, it must admit them, because the medium and the means do not alter the substance of the document.

Chapter V on recognition and enforcement of decisions includes Art. 29, which states:

"The physical presence of the child or the applicant shall not be required in any proceedings in the State addressed under this Chapter."

This is one more example of cases in which it is not necessary to require attendance in person.

Another rule of the Convention that deserves to be highlighted in this Guide is Art. 52, which enshrines the so-called "Most Effective Rule", as follows:

"1. *This Convention shall not prevent the application of an agreement, arrangement or international instrument in force between the requesting State and the requested State, or a reciprocity arrangement in force in the requested State that provides for:*

(a) broader bases for recognition of maintenance decisions, without prejudice to Article 22 f) of the Convention;

(b) simplified, more expeditious procedures on an application for recognition or recognition and enforcement of maintenance decisions;

(c) more beneficial legal assistance than that provided for under Articles 14 to 17; or

(d) procedures permitting an applicant from a requesting State to make a request directly to the Central Authority of the requested State.

2. This Convention shall not prevent the application of a law in force in the requested State that provides for more effective rules as referred to in paragraph 1 a) to *c). However, as regards simplified, more expeditious procedures referred to in paragraph 1 (b), they must be compatible with the protection offered to the parties under Articles 23 and 24, in particular as regards the rights of the parties to be duly notified of the proceedings and be given adequate opportunity to be heard and as regards the effects of any challenge or appeal*."

With respect to the forms contemplated in this Agreement, it is worth reiterating that nothing prevents them from being completed in digital format and transmitted by computer.

It may be concluded, as Albornoz and Paredes do, that this Agreement has a strong relationship with technology and encourages its use. Its entire cooperation scheme was structured with the objective of making the best use of ICTs and the new opportunities that future ICT advances may create. The link between the Child Support Convention and technology is clearly illustrated by *iSupport*, an electronic case management and secure communications system for cross-border child support collection, developed by the HCCH. This innovative platform, which uses e-CODEX electronic communications technology, enables States to achieve considerable savings and provide their citizens with effective access to justice.[73]

- **Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards**

The Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards (CIDIP-II, Montevideo, 1979) also does not specifically provide for the use of technological means for its application in practice. However, there is nothing to prevent meeting its requirements using the technological tools available today.

- **Inter-American Convention on Support Obligations**

Art. 11 of the Inter-American Convention on Maintenance Obligations (CIDIP-IV, Montevideo, 1989) establishes the conditions that a judgment must meet to be extraterritorially effective. These include "*That the judgment and the documents annexed to it are covered by the external formalities necessary for them to be considered authentic in the State from which they originate*" (paragraph d), without specifying whether the judgment and the documents annexed to it have to be on paper or can be digital, so there is nothing to prevent the latter.

---

[73] ALBORNOZ, María Mercedes and PAREDES, Sebastián, "No turning back: information and communication technologies in international cooperation between authorities", *Journal of Private International Law*, 2021, Vol. 17, No. 2, 224-254, https://doi.org/10.1080/17441048.2021.1950332 p. 232, where they cite the corresponding HCCH site: https://www.hcch.net/en/instruments/conventions/isupport1/

The same is true with respect to the requirement of subparagraph e) regarding notice and summons: "*That the defendant has been served or summoned in due legal form in a manner substantially equivalent to that accepted by the law of the State where the judgment is to take effect*" and of the requirement of Art. 12: "*A request for enforcement of an order shall include the following; A certified copy of the order; Certified copies of the documents needed to prove compliance with Article 11.e and 11.f; A certified copy of a document showing that the support order is final or is being appealed.*" However, there is nothing to prevent meeting its requirements using the technological tools available today.

- **The Hague Convention of May 29, 1993, on Protection of Children and Cooperation in Respect of Intercountry Adoption**

As in other conventions, the Hague Convention of May 29, 1993, on Protection of Children and Cooperation in Respect of Intercountry Adoption requires, in order to achieve its objectives, effective and rapid communications between Central Authorities, as well as with other competent authorities of the States Parties. Such communication is crucial for the proper implementation of this Convention. Although the Convention does not expressly refer to ICTs, their use is fully compatible with the Convention regime and should be promoted in practice, as recognized by the 2005 and 2015 Special Commissions.[74]

- **Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law -UNCITRAL**

Chapter IV of the Model Law refers to cooperation with foreign courts and representatives.[75] Article 25.2 expressly empowers courts to communicate directly with foreign courts or representatives or to request information or assistance -- also directly-- from them. In the same vein, Art. 26 refers to direct communications.

Most notable is Article 27, which establishes that the cooperation referred to in Articles 25 and 26 may be implemented by **any appropriate means**. This flexible approach undoubtedly encourages the use of ICTs, such as telephone, e-mail, video-link or others in international cooperation, at least in cross-border insolvency matters.[76]

- **ASADIP Principles on Transnational Access to Justice (TRANSJUS)**

Art. 5.1, 2nd paragraph of the Principles establishes:

In any case, and in particular when it is not possible to achieve the initial summons, subpoena, or notification of the defendant in person, the claimant may request that service of process or other notices to the defendant be effected **by any available technological means**, pursuant to Article 4.7 of these Principles."

In fact, the possibility for the claimant to request the use of technological means is not limited to situations where notification cannot be made in person, as the Transjus Principles strongly encourage the use of technological tools to foster cooperation in international litigation.[77]

---

[74] ALBORNOZ, María Mercedes and PAREDES, Sebastián, "No turning back: information and communication technologies in international cooperation between authorities", *Journal of Private International Law*, 2021, Vol. 17, No. 2, 224–254, https://doi.org/10.1080/17441048.2021.1950332, p. 231-232.

[75] https://undocs.org/pdf?symbol=en/A/RES/52/158

[76] ALBORNOZ, María Mercedes and PAREDES, Sebastián, "No turning back: information and communication technologies in international cooperation between authorities", *Journal of Private International Law*, 2021, Vol. 17, No. 2, 224–254, https://doi.org/10.1080/17441048.2021.1950332, p. 233.

[77] ALBORNOZ, María Mercedes and PAREDES, Sebastián, "No turning back: information and communication technologies in international cooperation between authorities", *Journal of Private International Law*, 2021, Vol. 17, No. 2, 224–254, https://doi.org/10.1080/17441048.2021.1950332, p. 235.

- **Conference of Ministers of Justice of Ibero-American Countries (COMJIB)**

On October 30, 2004, in Cartagena de Indias (Colombia), the Member States of the COMJIB[78] created the IberRed (Ibero-American Network for International Legal Cooperation),[79] which "is a cooperation tool, in civil and criminal matters, made available to the legal operators of 22 Ibero-American countries and the Supreme Court of Puerto Rico (including Spain, Portugal and Andorra), which benefits more than 500 million citizens."[80]

IberRed has a web page with a public and a private access that constitutes a secure communication system, called Iber@, for points of contact and central authorities. The security of the Iber@ system and the ease with which it can be used and accessed allow for a "collaborative 2.0 environment" through which members can interact to optimize knowledge management with respect to matters addressed in the Iber network. In addition, Iber@ does not require software, which means it can be used from any PC thanks to its authentication system, and allows secure, real-time communication, no matter where the point of contact is located."[81]

- **Treaty of Medellin on the Electronic Transmission of Requests for International Legal Cooperation between Central Authorities (2019)**

It is crucial that the States take into account the solutions envisaged in the Treaty of Medellin, Article 1 of which establishes that its purpose is to regulate "...the use of the Iber@ electronic platform as a formal and preferential means of transmission of requests for international legal cooperation between Central Authorities, within the framework of the treaties in force between the parties and which contemplate direct communication between said institutions."

For the purposes of the Treaty, "requests for international legal cooperation" means "requests between Central Authorities whose transmission is carried out under a treaty in force in criminal, civil, commercial, labor, administrative or any other field of law, as well as subsequent actions arising therefrom or which are covered by the same treaty." As can be seen, the material scope of application of the treaty is broad.

Likewise, "transmission" of requests for international legal cooperation, for the purposes of the Treaty, means "...the sending between Central Authorities, by means of Iber, of any type of request for international legal cooperation, its response, follow-up or any communication related thereto and its execution, such as clarifications, extensions, and suspensions, among others. In this sense, it is understood to include the spontaneous transmission of information in accordance with the treaties in force between the Parties." This standard also allows for a broad interpretation that in practice is very useful.

Rule 24. Medium used for the letter rogatory

It is recommended that State authorities remit the letter rogatory in digital format.

Comments to Rule 24

Neither Art. 4 of the Letters Rogatory Convention nor any other refers to the medium to be used for a letter rogatory, so that it need not necessarily be on paper, and may be digital. It should be noted that it is not the content of the letter rogatory that is being modified, but rather the medium in which the information is stored, which goes from being material to being electronic.

- **Inter-American Convention on Execution of Preventive Measures**

Like most such texts, the Inter-American Convention on the Execution of Preventive Measures of 1979 uses expressions such as plead, inform, return, interpose, transmit, accompany, and process in reference to letters rogatory and other documents and their handling (in particular,

[78] https://comjib.org/
[79] https://comjib.org/iberred-presenta-su-nueva-plataforma-de-cooperacion-juridica/
[80] https://comjib.org/iberred/
[81] https://comjib.org/iberred/

arts. 5, 10, 11, 13, 15 and 16), but nowhere does it mention that such letters rogatory and documents and their processing must be done by traditional means, in person, on paper.

- **Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters**

Article 1 of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters provides that States shall request the taking of evidence or other measures "by letter rogatory", without specifying whether it should be on paper or in a digital file, so that the latter would not be prohibited; it is simply not mentioned for chronological reasons.

- **Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards**

As for the Inter-American Convention on the Extraterritorial validity of Foreign Judgments and Arbitral Awards (CIDIP-II, Montevideo, 1979), it should be noted that the conditions that the judgment or award must meet, according to Art. 2, in order to be recognized as extraterritorially effective can be met, at least most of them, in digital format. Thus, for example, "*the formal requirements necessary for them to be deemed authentic in the State of origin*" (subparagraph a) need not necessarily be recorded on paper, as evidenced by the electronic note in the margin (*apostilla*). Much less translations (subparagraph b), which can perfectly well be done and transmitted in digital form. As for the legalization requirement (subparagraph c), it is sufficient to refer to what was said in Part 3 on merely procedural cooperation.

Art. 3 lists the documents of proof required to request execution of judgments, awards and decisions:

"(a) A certified copy of the judgment, award or decision;

"(b) A certified copy of the documents proving that the provisions of items (e) and (f) of the foregoing article have been complied with; and

"(c) A certified copy of the document stating that the judgment, award or decision is final or has the force of *res judicata.*

There is nothing requiring that the "certified copies" be on paper; therefore, they can be digital.

- **Supplemental Agreement to the Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labor, and Administrative Matters.**

Art. 19 of the Protocol on jurisdictional cooperation and assistance in civil, commercial, labor, and administrative matters (MERCOSUR, Las Leñas, 1992) establishes: "Request for recognition and enforcement of judgments and arbitral awards by judicial authorities **shall be transmitted by way of rogatory letter through the Central Authority**."

As can be seen, the rule does not require that the letter rogatory has to be in paper form and that its transmission be by physical transfer of that paper, by hand, so that the letter rogatory can perfectly well be drawn up and transmitted by computerized means.

Regarding the conditions for its extraterritorial validity, required by Article 20, the same comments apply as those made regarding Article 2 of the Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards.

- **Hague Convention of November 23, 2007, on the International Recovery of Child Support and Other Forms of Family Maintenance**

Among the definitions in Art. 3 of the Hague Convention of November 23, 2007, on the International Recovery of Child Support and Other Forms of Family Maintenance, we find that paragraph *d) states that* "***agreement in writing***" "*means an agreement* ***recorded in any medium****, the information contained in which is accessible so as to be usable for subsequent reference."* It is very clear that the definition of "written agreement" includes agreements recorded in digital format.

- **Treaty of Medellin on the Electronic Transmission of Requests for International Legal Cooperation between Central Authorities (2019)**

Pursuant to Article 3.1 of the Treaty of Medellin, the Parties agree to use the secure electronic platform "Iber@" "for the transmission of requests for international legal cooperation between Central Authorities, within the framework of the relevant treaties in force between the Parties and with the legal effects provided for in such treaties." And subparagraph 3 adds: "The documentation transmitted between Central Authorities by means of Iber@ shall be considered original and/or authentic for the purposes provided for in the treaties in force between the parties. Iber@ validates the electronic transmission; however, the competent authorities shall be responsible for analysis of the content. Transmission of applications and their documentation via Iber@ shall not require subsequent physical submissions."

Rule 25. Requirements for compliance with the letter rogatory

It is recommended that State authorities allow compliance with the requirements to be met by a digital letter rogatory.

Comments to Rule 25

- **Inter-American Convention on Letters Rogatory**

Article 5 of the Convention stipulates: "Letters rogatory shall be executed in the States Parties provided that they meet the following requirements:

a. The letter rogatory is legalized, except as provided for in Articles 6 and 7 of this Convention. The letter rogatory shall be presumed to be duly legalized in the State of origin when legalized by the competent consular or diplomatic agent;

b. The letter rogatory and the appended documentation are duly translated into the official language of the State of destination."

The rule establishes two requirements: legalization and translation.

- **HCCH Apostille Convention [Convention of 5 October 1961 Abolishing the Requirement of Legalization for Foreign Public Documents]**

With respect to legalization, it should be noted that when the States involved are party to the Convention *of October 5, 1961, abolishing the requirement of legalization for foreign public documents (HCCH Apostille Convention of 1961)*,[82] the documents will be authenticated through this mechanism and not through legalization.

The Convention has more than 120 States Parties, and many countries have now implemented one or more components of the e-APP (e-Apostille Program) or are in the process of doing so. That program "...was launched in 2006 to promote and facilitate the implementation of technology within the framework of the Convention of October 5, 1961, Abolishing the Requirement of Legalization of Foreign Public Documents (Apostille Convention). It is designed to ensure the continued effective operation of the Convention through the issuance of electronic Apostilles (e-Apostilles) and the use of electronic Apostille records that recipients can access online to verify the origin of an Apostille they have received (e-Records)."[83]

This shows that documents, whether in paper or digital format, can be authenticated by electronic means, such as the electronic apostille. When the Apostille Convention is not applicable, the manner in which digital documents may be digitally legalized may also be regulated.

Regarding the translation requirement, the rule does not preclude the translation being done digitally, including the mechanisms for its signature and authentication.

[82] https://assets.hcch.net/docs/52558144-9886-451b-8a54-8ec253fba7ff.pdf
[83] https://assets.hcch.net/docs/f71e22ca-3bc4-4aca-a57f-426b011b3e33.pdf

Rule 26. Documents accompanying the letter rogatory

It is recommended that State authorities allow digital documents accompanying a letter rogatory. Where digitization is not possible, the most efficient and fastest practices possible shall be used.

Comments to Rule 26

- **Inter-American Convention on Letters Rogatory**

Article 8 of the Convention stipulates: "Letters rogatory shall be accompanied by the following documents to be delivered to the person on whom process, summons or subpoena is being served:

a. An authenticated copy of the complaint with its supporting documents, and of other exhibits or rulings that serve as the basis for the measure requested;

b. Written information identifying the judicial or other adjudicatory authority issuing the letter, indicating the time-limits allowed the person affected to act upon the request, and warning of the consequences of failure to do so;

c. Where appropriate, information on the existence and address of the court-appointed defense counsel or of competent legal-aid societies in the State of origin."

The expression "documents to be delivered to the person on whom process, summons or subpoena is being served" does not mention that the document has to be on paper, so it can be in digital format. It also does not require that the delivery be physical or in person, so it can be done electronically, where that possibility exists.

Regarding the documents referred to in paragraph a. above: "Authenticated copy of the complaint with its supporting documents, and of other exhibits or rulings that serve as the basis for the measure requested", if they were originally digital, there will be no problem delivering them by electronic means. Otherwise, if the original document is on paper, there are technical means to digitize it, such as scanning.

If the digitization of documents originally issued on paper is difficult for reasons of time and/or cost, because they are very bulky, or for any other reason, there are alternative ways to overcome the problem. Thus, for **example**, in Uruguay, "If the notification is accompanied by existing documentation in paper format, after being notified electronically, the addressee has 3 working days to withdraw the documents in question. If the interested party does not withdraw the documents on time, the notification will be deemed to have been made upon expiration of those three days." (Report by Dr. Daniel Trecca)

Rule 27. Preparation of letters rogatory

States Parties to the 1979 Additional Protocol to the 1975 Convention on Letters Rogatory and/or the 1984 Additional Protocol to the 1975 Convention on the Taking of Evidence shall prepare letters rogatory by completing in digital form the forms provided by said Protocols and their Annexes. The copy to be kept by the requested State and other documents may be digital. States not party to the aforementioned Protocols shall endeavor to develop and provide their authorities with forms that can be digitally completed and processed.

Comments to Rule 27

- **1979 Additional Protocol to the Letter Rogatory Convention**

Article 3 of the 1979 Additional Protocol to the Convention on Letters Rogatory provides that:

"*Letters rogatory shall be prepared on forms that are printed in the four official languages of the Organization of American States or in the languages of the State of origin and of the State of destination and conform to Form A contained in the Annex to this Protocol.*"

Based on an evolving or progressive interpretation, as mentioned in **Rule 20**, nothing precludes the preparation of forms created in digital format, in the required languages.

"Letters rogatory shall be accompanied by:

a. Copy of the complaint or pleading that initiated the action in which the letter rogatory was issued, as well as a translation thereof into the language of the State of destination;"

- **1984 Additional Protocol to the 1975 Convention on the Taking of Evidence Abroad**

The 1984 Additional Protocol to the 1975 Convention on the Taking of Evidence provides, as does the 1979 Additional Protocol to the Convention on Letters Rogatory, annexed forms on which letters rogatory requesting the taking of evidence are to be drawn up (Article 2) and instructions on their transmission and processing all (Article 3). We refer here to the comments made above with respect to the forms and rules on the subject in the 1979 Protocol.

There is nothing in the text of the rule to prevent the digital letter rogatory from being accompanied by the documents indicated in the rule, in digitized format, if the original was on paper. In order to avoid burdening the judicial or other authority with the task of digitizing the documents referred to, the party concerned may be asked to submit a digital version of the complaint or pleading in question. In fact, the original complaint or pleading is prepared on a computer, and then printed out to be filed with the appropriate court or authority.

"*b. Untranslated copy of the documents attached to the complaint or pleading*."

Same comment as for paragraph a). The parties may be requested to submit this documentation in digital form.

"*c. Untranslated copy of any rulings ordering issuance of the letter rogatory*."

Same comment as for paragraph a). Note that the original of the aforementioned rulings is typed into a computer, so the digital document already exists, and can also be digitally signed and authenticated.

"*d. Form conforming to Form B annexed to this Protocol and containing essential information for the person to be served or the authority to receive the documents; and*"

Nothing precludes Annex B from being completed on the computer, in its digital version, and then transmitted electronically.

"e. Certificate conforming to Form C annexed to this Protocol on which the Central Authority of the State of destination shall attest to execution or non-execution of the letter rogatory."

Nothing precludes Annex B from being completed on the computer, in its digital version, and then transmitted electronically.

"The copies shall be regarded as authenticated for the purposes of Article 8(a) of the Convention if they bear the seal of the judicial or administrative authority that issued the letter rogatory."

The incorporation of the seal of the judicial body in the aforementioned documents is an IT issue to be solved by the respective technicians, which is undoubtedly technically feasible.

"*A copy of the letter rogatory together with Form B and the copies referred to in items a, b, and c of this Article shall be delivered to the person notified or to the authority to which the request is addressed. One of the copies of the letter rogatory and the documents attached to it shall remain in the possession of the State of destination; the untranslated original, the certificate of execution and the documents attached to them shall be returned to the Central Authority of the State of origin through appropriate channels*."

Delivery to the notified person and transmission to the authority to which the request is addressed may be made in digital form. The copy to be kept by the requested State may be digital, as well as the other documents mentioned in this paragraph of Art. 3 of the Protocol.

"*If a State Party has more than one official language, it shall, at the time of signature, ratification or accession to this Protocol, declare which language or languages shall be considered official for the purposes of the Convention and of this Protocol. If a State Party comprises territorial units that have different official languages, it shall, at the time of signature, ratification or accession to this Protocol, declare which language or languages in each territorial unit shall be considered official for the purposes of the Convention and of this Protocol. The General Secretariat of the*

Organization of American States shall distribute to the States Parties to this Protocol the information contained in such declarations."

- **The Hague Agreement on the Notification or Transfer Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters**

Pursuant to Art. 3 of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965), requests for service must be made on model forms annexed to the convention.

- **Supplemental Agreement to the Protocol on Precautionary Measures**

The Supplemental Agreement to the Protocol on Precautionary Measures (Montevideo, 1997) approves 7 forms,[84] with two columns, one in Spanish and the other in Portuguese, to avoid translation, which is costly and time-consuming, to which data is simply entered in the spaces left blank.

Forms 1 to 3 refer to letters rogatory requesting precautionary measures; Form 4, to letters rogatory communicating requesting the stay or revocation of provisional measures (*contracautela*); Form 5, to letters rogatory communicating compliance with the requested measure; Form 6, to letters rogatory communicating the filing of the lawsuit in the main proceeding; and Form 7, to letters rogatory communicating the lifting of the precautionary measure.

The Agreement makes no reference to the fact that the forms must be printed or that the information required must be incorporated on paper; it is clear that their use in digital format is perfectly feasible, does not contradict any standard, and greatly expedites their preparation and transmission, so that States are urged to make use of the resources offered by technology.

In sum: the above rules do not mention digital tools but do not prohibit them either, so there is nothing to prevent their use to comply with the way letters rogatory are prepared or the use of the attached forms in digital format.

Rule 28. Transmission and processing of the letter rogatory

It is suggested that State authorities transmit and execute letters rogatory digitally.

Comments to Rule 28

- **Additional Protocol to the Convention on Letters Rogatory**

Article 4 of the 1979 Protocol to the Convention on Letters Rogatory of 1975 stipulates:

"*Upon receipt of a letter rogatory from the Central Authority in another State Party, the Central Authority in the State of destination shall transmit the letter rogatory to the appropriate judicial or administrative authority for processing in accordance with the applicable local law*."

"Upon execution of the letter rogatory, the judicial or administrative authority or authorities that processed it shall attest to the execution thereof in the manner prescribed in their local law and shall transmit it with the relevant documents to the Central Authority. The Central Authority of the State Party of destination shall certify execution of the letter rogatory to the Central Authority of the State Party of origin on a form conforming to Form C of the Annex, which shall not require legalization. In addition, the Central Authority of the State of destination shall return the letter rogatory and attached documents to the Central Authority of the State of origin for delivery to the judicial or administrative authority that issued it."

If the applicable domestic law does not expressly prohibit it but simply does not mention it, and of course if it expressly authorizes it, such transmissions, records, remissions, certifications and dispatches may be made in digital form.

[84] http://www.sice.oas.org/Trade/MRCSRS/Decisions/DEC997.asp and https://www.casi.com.ar/sites/default/files/e19971215%20AC%20PROTOCOLO%20MEDIDAS%20CAUTELARES.pdf

If in any country there is a regulation that expressly prohibits these operations in digital form, which we have not been able to ascertain, it would be best to amend in line with the recommendations of this Guide and contemporary requirements.

It is especially recommended that direct communications between the central authorities and the courts of the State to which they belong "in all matters relating to the receipt, transmission and processing of requests for international assistance", (...) "eliminating the intermediation of other agencies, which will significantly shorten the time required for processing assistance." In order to avoid possible interferences by the administration in the performance of a cooperative act, it is interesting to note the Uruguayan judicial system's Supreme Court of Justice Resolution 7134/92, which, for the purpose of scheduling the shifts of the offices involved in processing letters rogatory received from abroad, takes into consideration the date they were issued, thus avoiding any manipulation in this regard. To that end, the Supreme Court annually approves a Schedule of Shifts for processing foreign letters rogatory. Similarly, to avoid interference in the processing of letters rogatory, the Private International Law Section of the Argentine Association of International Law recommended at the XXV Argentine Congress of International Law, Conclusion 2.3: "To ensure to the greatest extent possible the technical independence of the central authority."[85]

- **The Hague Agreement on the Notification or Transfer Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters**

Article 5 of the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters (1965) provides:

"The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency, either:

a) by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

b) by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed. (…)"

If the legislation of the requested State admits the use of electronic means and channels, there will be no impediment; in principle, there will be no impediment if such legislation does not prohibit it. If the requesting party so requests, there should also be no objection to the use of technological tools, unless the legislation of the requested State expressly prohibits it.

For their part, Articles 10, 11, and 19 show openness to other forms of document referral, thereby authorizing the use of technological tools:

Article 10:

"Provided the State of destination does not object, the present Convention shall not interfere with:

a) the freedom to send judicial documents, by postal channels, directly to persons abroad,

b) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination,

c) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination."

Article 11:

"*The present Convention shall not prevent two or more Contracting States from agreeing to permit, for the purpose of service of judicial documents, channels of transmission other than those*

[85] TELLECHEA BERGMAN, Eduardo, "Hacia Una necesaria profundización de la cooperación jurisdiccional internacional y el reconocimiento de los fallos extranjeros En el ámbito interamericano", Revista de Derecho de la Universidad de Montevideo- No. 32 - Year 2017, p. 103-124, p. 111.

provided for in the preceding Articles and, in particular, direct communication between their respective authorities."

Although, obviously for chronological reasons, the aforementioned regulations do not mention digital technological tools, there is nothing to prevent them from being used in compliance with this agreement, given the broad wording used: "...channels of transmission other than those provided for in the preceding Articles*..."*

As a reaffirmation of the above, it should be recalled that the Hague Conference (HCCH) has expressly stated that e-mail is functionally equivalent to postal means of communication.[86]

Art. 19:

"To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for in the preceding Articles, of documents coming from abroad, for service within its territory, the present Convention shall not affect such provisions."

In conclusion, it can be affirmed, with Albornoz and Paredes, that there is no legal obstacle in this Convention to Central Authorities or diplomatic or consular personnel using electronic means to transmit requests for cooperation and the subsequent certificates informing whether the documents were served or not. Therefore, it can be concluded that the Convention implicitly accepts the use of ICTs, which is undoubtedly very beneficial for the implementation of cooperation and is consistent with the spirit of the Convention.[87]

- **Inter-American Convention on Execution of Preventive Measures**

Article 17 of the Inter-American Convention on Execution of Preventive Measures (CIDIP-II, Montevideo, 1979) establishes:

"States Parties belonging to economic integration systems or having common borders ***may agree directly among themselves upon special methods and procedures more expeditious than those provided for in this Convention***." *These agreements may be extended to include other States in the manner in which the parties may agree*." (Emphasis added)

- **MERCOSUR Protocol on Precautionary Measures**

The MERCOSUR Protocol on Precautionary Measures (Ouro Preto, 1994) contains provisions along the same lines as those mentioned above.

Article 2 establishes: "Precautionary measures *may be* ***requested***..."

Art. 4 mentions the actions of ***decreeing*** precautionary measures and ***adopting*** orders.

Art. 11 refers to "***providing for*** precautionary measures."

Article 14 establishes: "*The judge or court of the requesting State* ***shall communicate*** *to the judge or court of the requested State: a) when* ***transmitting*** *the rogatory letter, the time limit - counted from the enforcement of the protective measure - within which the application (demanda) in the main proceeding must be* ***filed*** *or* ***brought****; b) as soon as possible, the date of* ***filing*** or the non-filing of the application in the main proceeding."

---

[86] ALBORNOZ, María Mercedes and PAREDES, Sebastián, "No turning back: information and communication technologies in international cooperation between authorities", *Journal of Private International Law*, 2021, Vol. 17, No. 2, 224–254, https://doi.org/10.1080/17441048.2021.1950332 , p. 228, which contains the following footnote reference: "E.g., the 1999 Geneva Round Table and the 2003 and 2009 Meetings of the Special Commission on the Practical Operation of the Service Convention. See HCCH, Practical Handbook on the Operation of the Service Convention (HCCH, 4th ed., 2016) 169."

[87] ALBORNOZ, María Mercedes and PAREDES, Sebastián, "No turning back: information and communication technologies in international cooperation between authorities", *Journal of Private International Law*, 2021, Vol. 17, No. 2, 224–254, https://doi.org/10.1080/17441048.2021.1950332, p. 228.

Article 15 establishes: *"The judge or court of the requested State **shall** immediately **inform** the judge or court of th*e requesting State of the date on which the requested precautionary measure was complied with or the reasons why it was not complied with."

Article 19 refers to the channels of transmission of letters rogatory: "*diplomatic or consular channels, through the respective Central Authority or by the interested parties*."

As in other Conventions already analyzed, this one does not establish whether the requests, decrees, adoption of orders, communications, transmissions, and so on must be on paper or may be made in digital format.

Rule 29. Technical capacity-building of the Central Authorities

It is recommended that the States train and keep their central authorities officials up to date with latest developments.

Comments to Rule 29

As stated by Professor Tellechea, "The complexity of the activity entrusted to central authorities makes it necessary to train their officials in the different levels and forms of international judicial assistance. To that end, it will be advisable to provide in future documents for periodic meetings between central authorities in the Americas for this purpose, as well as to try to standardize their actions through the preparation of good practice guides."[88]

Rule 30. Evaluate the possible territorial decentralization of Central Authorities

The possible territorial decentralization of central authorities is recommended for very large States.

Comment to Rule 30

"The purpose of this initiative is to make the operation of the central authorities more agile and more closely linked to the environment in which they operate and to the needs of the parties and operators in judicial proceedings. This concurs with Conclusion 2.2, issued by the Private International Law Section of the Argentine Association of International Law at the aforementioned XXV Congress."[89]

Rule 31. Special formalities and procedures in the enforcement of evidentiary cooperation measures

The requesting State may request, and the requested State shall endeavor to comply with, special formalities and procedures, such as the use of information technology, when complying with the requested evidentiary cooperation measure.

Comments to Rule 31

- **Inter-American Convention on the Taking of Evidence Abroad**

Article 6 of the Convention provides:

[88] TELLECHEA BERGMAN, Eduardo, "Hacia Una necesaria profundización de la cooperación jurisdiccional internacional y el reconocimiento de los fallos extranjeros En el ámbito interamericano", Revista de Derecho de la Universidad de Montevideo- No. 32 - Year 2017, p. 103-124, p. 111.

[89] TELLECHEA BERGMAN, Eduardo, "Hacia Una necesaria profundización de la cooperación jurisdiccional internacional y el reconocimiento de los fallos extranjeros En el ámbito interamericano", Revista de Derecho de la Universidad de Montevideo- No. 32 - Year 2017, p. 103-124, p. 111-112.

"*At the request of the authority issuing the letter rogatory, the authority of the State of destination may accept the observance of additional formalities or special procedures in performing the act requested, unless the observance of those procedures or of those formalities is contrary to the laws of the State of destination or impossible* [of performance]."

This rule enables the requesting State to request the use of information technology, and the State is entitled - and this Guide encourages it to do so - to comply with such a request.

The two exceptions that the rule provides for in respect of such compliance are: first, that the requests "*are incompatible with the law of the requested State*", which, as discussed above, is infrequent; and second, that the request is "*impossible for* the requested State *to comply with.*" In the latter case, this Guide encourages and recommends that States incorporate the necessary technology.

(See Comments to Rule No. 12)

Rule 32. Scope of the public order (ordre public, sometimes translated as public policy) exception

It is especially recommended that in matters of international jurisdictional cooperation, the authorities of the States clearly recognize that the use of technological tools does not contravene fundamental principles of international public order, even if their use is not provided for in their domestic laws. These tools are merely instrumental, and do not affect substantive aspects, as long as the security of the means used is guaranteed and the guarantees of due process are respected.

Comments to Rule 32

International public order is an exception to the application of foreign law that otherwise be applied by a judge pursuant to judicial conflict of law rules. The exception to the application of foreign law operates only in cases contravening **international** public order, constituted by those **fundamental principles that make up the essence and legal individuality of a State**. These principles may, or may not, be set forth in positive rules.[90]

It is not enough that applicable foreign law formally contravenes the rules establishing the public order principles; it must contravene the fundamental principles themselves. As Boggiano puts it, the incompatibility of foreign law must be with the spirit of the judge's law.[91]

The **internal** public order is made up of all those rules in the State's legal system that cannot be modified by the will of the parties. International public order is much more restricted than domestic public order.[92]

In general, contracting States include a public order reservation clause in treaties, which makes it unquestionably lawful to resort to the international public order exception when applying a treaty, although within the conceptual limits governing that exception. When the issue was discussed at CIDIP-I, in Panama, in 1975, it was agreed to include the formula of Article 17 of the Convention on Letters Rogatory, which is transcribed below, albeit recognizing "the necessary exceptional nature of its application."[93]

- **ASADIP Principles on Transnational Access to Justice (TRANSJUS)**

With respect to the "**security of the means used**", it should be noted that the ASADIP-TRANSJUS Principles establish, in Article 4.7:

---

[90] FRESNEDO DE AGUIRRE, Cecilia, *Curso de Derecho Internacional Privado*, Volume I, 2nd ed., Montevideo, FCU, 2004, p. 268ff.

[91] BOGGIANO, Antonio, *Derecho Internacional Privado*, T. 1, 2nd Ed., Buenos Aires, Depalma, 1983, p. 291.

[92] FRESNEDO DE AGUIRRE, Cecilia, *Curso de Derecho Internacional Privado*, Volume I, 2nd ed., Montevideo, FCU, 204, p. 272.

[93] PARRA ARANGUREN, Gonzalo, *"La Convención Interamericana sobre Normas Generales de DIPr. (Montevideo, 1979)"*, p. 178, No. 23.

"As long as the security of the communications can be guaranteed, judges and other judicial officials shall promote and foster the use of new information and communication technologies, such as telephone communications, videoconferencing, electronic messaging and any other means of communication appropriate for effecting the requested cooperation."

- **Inter-American Convention on General Rules of International Private Law**

On the occasion of CIDIP-II (Montevideo, 1979), it was decided to basically accept the text approved in Panama, although, at the behest of GOLDSCHMIDT, a clause was introduced to the effect that for the international public order exception to operate, the application of foreign domestic law would have to manifestly contravene the "principles" of public order of the law of the forum (lex fori). The text of Article 5 of the General Rules Convention states:

"The law declared applicable by a convention on private international law may be refused application in the territory of a State Party that considers it manifestly contrary to the principles of its public policy (ordre public).

The formula approved in Montevideo takes up the idea already admitted in Panama that the violation must be manifest, a specification that is intended to exclude the possible operation of the exception in cases of doubt; but it perfects it in the sense of specifying that it apply to the principles of the law itself, "without allowing its intervention when only the norms that develop those principles are affected."[94] The inclusion in Article 5 of the expression "manifestly" underlines the completely exceptional nature of international *ordre public*.[95]

VALLADÃO had stressed the importance of including the word "manifestly,"[96] in order to restrict the natural tendency to extend the hypotheses regarding the operation of the exception.

Let us look at some examples of rules on the public order exception, contained in conventions formulated, in general, in similar terms.

For instance:

- **Inter-American Convention on Letters Rogatory**

Article 17 of the Inter-American Convention on Letters Rogatory (CIDIP-I, Panama, 1975):

- **Inter-American Convention on the Taking of Evidence Abroad**

Article 16 of the Inter-American Convention on the Taking of Evidence Abroad (CIDIP-I, Panama, 1975):

- **Inter-American Convention on Support Obligations**

Article 22 of the Inter-American Convention on Support obligations (CIDIP-IV, Montevideo, 1989): "T*he enforcement of foreign judgments or application of foreign law prescribed by this Convention may be refused when the requested State Party considers such enforcement or application* ***manifestly contrary to its fundamental principles of public policy*** *(order public)."*

- **MERCOSUR Protocol on Precautionary Measures**

Article 17 of the MERCOSUR Protocol on Precautionary Measures (Ouro Preto, 1994) and its Supplemental Agreement (Montevideo, 1997) establishes: "*The jurisdictional authority of the requested State may refuse to comply with a letter rogatory concerning precautionary measures, when these are* ***manifestly contrary to its*** **ordre public [*orden público*].**"

---

[94] PARRA ARANGUREN, Gonzalo, "La Convención Interamericana sobre Normas Generales de DIPr. (Montevideo, 1979)", *Inter-American Juridical* Yearbook, Washington, OAS Secretariat for Legal Affairs, 1979, p. 157-186, p. 177, No. 22. 157-186, p. 177, No. 22.

[95] GOLDSCHMIDT, Werner, "Normas Generales de la CIDIP-II. Hacia una teoría general del derecho internacional privado interamericano", p. 152, No. 5.

[96] PARRA ARANGUREN, Gonzalo, "La Convención Interamericana sobre Normas Generales de DIPr. (Montevideo, 1979)", *Inter-American Juridical* Yearbook, Washington, OAS Secretariat for Legal Affairs, 1979, p. 157-186, p. 177, No. 22.

Without prejudice to the inclusion or not of an express rule on the international public order [*orden público internacional*] exception in the thematic conventions, that exception is part and parcel of the general theory of private international law, which always operates. It is also enshrined in Article 5 of the Inter-American Convention on General Rules of Private International Law (CIDIP-II, Montevideo, 1979), already referred to.

- **Declaration of Uruguay with respect to the scope that the Republic grants to ordre public**

Regarding the restricted scope to be given to the international public order exception, it is useful to note here the Declaration made by the Uruguayan delegation upon signing the General Rules Convention, which essentially stated that:

Nevertheless, Uruguay wishes to state expressly and clearly that, in accordance with the position it maintained in Panama, its interpretation of the aforementioned exception refers to ***international public order as an individual juridical institution, not necessarily identifiable with the internal public order of each state****. Therefore, in the opinion of Uruguay, the approved formula conveys an exceptional authorization to the various States Parties to declare in a nondiscretionary and well-founded manner that the precepts of foreign law are inapplicable whenever these concretely and in a serious and open manner offend the standards and* ***principles essential to the international public order on which each individual state bases its legal individuality***."[97]

This statement clearly establishes the distinction between internal and international public order, concepts that should not be confused, and the exceptional nature of the international public order exception.

CONCLUSIONS

The research findings set down herein show that there are instruments - both *hard law* and *soft law* - that allow, or at least do not prohibit, the use of ICTs in their practical application. What is needed, then, is knowledge of these instruments and their effective application by State authorities.

* * *

5. Contracts between merchants with a contractual weak party

Documents

CJI/RES. 286 (IV-E/23)	Party autonomy in international comercial contracts with a weak bargaining party: inherent challenges and possible solutions. Report and recommendations on good practices
CJI/683/23 rev.3	Party autonomy in international comercial contracts with a weak bargaining party: inherent challenges and possible solutions. Report and recommendations on good practices

*** * ***

During the 98th Regular Session of the Inter-American Juridical Committee (Virtual session, April, 2021), Dr. Cecilia Fresnedo, recently elected as a member of the Committee, introduced as a new theme to the Committee's agenda the issue of "Contracts between merchants with a contractually weak party", document CJI/doc. 636/21. Dr. Fresnedo spoke about the weaknesses of contracts, in which one of the parties "unilaterally establishes the conditions in the contract, including the choice of law and/or the venue - or arbitration court – (agreements which are known as *take-it-or-leave-it contracts*). It occurs when merchants lack bargaining power and autonomy to choose, a situation that leads to abuses. Accordingly, she expressed her interest in preparing a document in line with the CJI Guide on the Law Applicable to International Commercial Contracts in the Americas and the regulations in effect in the field of international commercial contracts.

[97] https://www.oas.org/juridico/spanish/firmas/b-45.html

Dr. José Moreno Rodríguez thanked Dr. Fresnedo for her proposal while warning about extreme situations that may arise when no resolute will has been expressed. Among other challenges, he pointed to the complex treatment of divergent positions between countries that export services and goods and recipient countries in various areas, including consumer issues, labor rights, insurance, and transportation. In this regard, he suggested developing soft-law instruments as an alternative that could help address the challenges posed by these kinds of project. As regards coordination, he said it would be necessary to embark on an exploratory phase with the universal coding institutions and determine the required type of instrument, that could help guide the parties. The CJI Guide on international commercial contracts provides a large number of tools to those who are not properly protected, as in the case of contracts lacking full consent. In addition, the Guide encourages the use of the universal solutions that are proposed in the most important contractual instruments, such as the UNIDROIT Principles and the 1980 Vienna Convention.

Dr. Espeche-Gil said he agreed to this issue being included on the Committee's Agenda, and pointed to obligations as well as abuses committed with credit cards.

The Chairman congratulated Dr. Fresnedo on her proposal, and in view of the interest shown in it, he confirmed its inclusion on the working agenda. He also urged Dr. Fresnedo to participate as its rapporteur.

Dr. Fresnedo welcomed the comments on her proposals and invited other members to collaborate closely with her rapporteurship.

During the 99th Regular Session of the Inter-American Juridical Committee (Virtual session, August, 2021), the topic's rapporteur, Dr. Cecilia Fresnedo de Aguirre, presented the first progress report entitled Contracts between merchants and contractually weak parties, document CJI/doc. 642/21. She noted that although the doctrine and codification forums have studied negotiated international commercial contracts, they ignore commercial contracts in which one of the parties lacks negotiating power. The contractual weakness (or contractually weak party) does not depend on the status of merchant or the experience that said entity may have, since in such contexts the general conditions have been unilaterally established and are not negotiable. This being so, it is not possible to alter the negotiation of clauses referring to choice of law and forum. The research carried out allowed the rapporteur to verify the absence of a specific instrument that addresses this type of international commercial contract in which one of the parties is contractually weak.

The rapporteur urged that this task be carried out in accordance with other codification forums, such as The Hague Conference on Private International Law, UNIDROIT, and UNCITRAL.

She explained that her report benefited from the responses of experts from six different countries: Argentina, Bolivia, Canada, Colombia, Cuba, and Venezuela, who are members of the American Association of Private International Law (ASADIP). Such responses allowed her to carry out an analysis of the legislation, jurisprudence and doctrine of specialists from those countries. All of it was possible thanks to a cooperation agreement between the CJI and ASADIP.

In light of the comments received, the rapporteur highlighted the following elements:

- In the inter-American sphere, there are various instruments that regulate the autonomy of the will regarding the choice of the forum with different variants, but they do not refer to commercial contracts entered into with a weak party.
- There is agreement in that answers are lacking as regards the problem posed by the autonomy of the conflicting will with respect to asymmetric contracts between merchants; if answers do exist, they are insufficient or inadequate.
- Some States exclude or limit the autonomy of the will in various matters: consumer contracts (Argentina, Bolivia, Canada, Mexico, and Uruguay); labor contracts (Bolivia, Canada, Cuba, Mexico, and Uruguay); insurance contracts (Argentina, Bolivia, Cuba, Uruguay, and Venezuela); and commercial-agency contracts (Colombia).

- Among contracts with a specific regime, a diversity of situations can be observed: Canada, as regards consumers and workers; Cuba, as regards insurance; Uruguay, as regards all those excluded from the autonomy of the will (art. 50, Law 19,920); and Venezuela, as regards labor matters.
- International contracts are generally designed in situations in which the parties have equivalent bargaining power rather than for asymmetric, adhesion, or similar contracts where one party imposes "conditions and the other adheres or not, without any possibility of negotiating or discussing the unilaterally pre-established clauses." Of the States consulted, only two explained that they had something in this regard: Bolivia (contracts by means of forms as to transportation and insurance) and Colombia (a private international-law bill).
- It is both necessary and convenient to develop "clear solutions regarding the autonomy of the conflictual will in adhesion contracts, with general conditions or asymmetric contracts," considering the scant analysis at the legislative, jurisprudential, and doctrinal level.

Specifically, the rapporteur proposed to work on the preparation of an Addendum to the CJI Guide on the Law Applicable to International Commercial Contracts in the Americas. To this end, she suggested the following work methodology:

- Offer Committee members the opportunity to present their views.
- Wait for the answers to the specialists who have not yet responded (the deadline would be set for the end of the year).
- Investigate the norms, jurisprudence, and doctrine of those countries about which no information has been received.
- Analyze the conventional instruments in force in the region, the autonomous norms and the soft-law instruments to identify which solutions could be developed in relation to asymmetric contracts between merchants, and which could be created to correct gaps. All this would provide content to the programmed Addendum.

Dr. José Moreno Rodríguez congratulated the rapporteur on her first report. Regarding the type of document to be prepared, he proposed moving forward with a study that presents proposals for good practices instead of an addendum or guide — something that may be of use to the merchants of the region. The challenge imposed by the exceptions is of utmost importance, since these contracts have very different regulations in the States; in this regard he mentioned franchise contracts in California and law of agency contracts in Paraguay. He therefore suggested trying to avoid imposing unique solutions concerning the regulation of exceptions in our countries by preparing a report or a list of good practices. He explained that UNIDROIT and the Hague Conference contain balanced regulations on the protection of weak parties, as well as the window offered by the Committee's Guide in this regard. Regarding the selection of forums, he stated that in this area there are already binding instruments and referred to the Buenos Aires Protocol which in a general way refers to abusive clauses. In addition, he mentioned an arbitration decision inviting States to act in particular situations in which there are abusive clauses. Dr. Moreno Rodríguez expressed his position in favor of a study that brings together the largest number of jurisdictions in our countries in matters of international trade, while also taking into account the efforts of other international bodies.

The rapporteur on the subject, Dr. Fresnedo, expressed that she had no objection to Dr. Moreno Rodríguez's suggestions to prepare a report that could conclude with a recommendation of good practices, without excluding either contracts or clauses for the election of forums, but that also define criteria that establish what is reasonable and those cases in which there is absence of consent.

Dr. Eric P. Rudge appreciated the report and the explanations provided by the rapporteur. He pointed out the importance that must be given to the contractual freedom of the parties. In his particular case, the system of his country comes from the Netherlands and he as a judge, at the moment he has to make a decision, must verify that the parties have entered freely into an agreement, given the

circumstances. He appreciated the interest in elaborating a work aimed at protecting the weak party. He also congratulated the rapporteur for the use of questionnaires sent to specialists, and finally urged her to work on a document that includes good and bad practices.

Dr. José Moreno Rodríguez expressed his interest in continuing the proposal and invited the rapporteur to survey the situation in a maximum number of countries and to dialogue with international organizations, in order to allow the Committee's work the greatest possible visibility and present our region with best practices.

The rapporteur asked the plenary if it would not be better to limit her project to international contracts between merchants. She also clarified that it is not her intention to limit contractual freedom or autonomy of will. What is wanted is to work on those contracts where there is no negotiation or where the consent of the parties has not been obtained: cases that do not allow certainty or predictability. In other words, a document that urges the judges to ensure that the agreements are not abusive.

Dr. Eric P. Rudge thanked the rapporteur for her explanations, adding that this is a casuistic question that will depend on the circumstances of each case, that is, where the parties that allege absence of consent in a contract must present the respective evidence.

Dr. Dante Negro explained that it is up to the Committee to decide the way forward and explained that the idea of the Addendum was to frame the work of the rapporteur within the general principles established in the Guide to international contracts, all this with the object of respecting a certain harmonization in the matter. In light of differences of opinion, he proposed holding an informal meeting over the next few days with those who have addressed this session in order to determine the way forward.

During the 100th Regular Session of the Inter-American Juridical Committee (Lima, May, 2022), the rapporteur for the topic, the rapporteur for this topic, Dr. Cecilia Fresnedo, presented a progress report on the matter, document CJI/doc.660/22, which includes new responses from Canada, Mexico and Panama and includes a draft guide subject to format definition. The guide prioritizes choice of court clauses and the law applicable to contracts and in its first part establishes its objectives and justification. Considering the intension is to supplement existing mechanisms the guide attempts to offer clear rules on the choice of law clauses and asymmetrical commercial contracts with pre-established general conditions. It is assumed that the "admission of the autonomy of the conflictual will in the contracts of adhesion in the same terms as in the parity or free discussion contracts is unfair".

From a normative point of view, eight rules are proposed that are intended to provide the Committee with a basis on which to work:

1.- Existence of consent;

2.- Documentation on the express agreement of choice of law or of the judge;

3.- Verification of the existence of tacit consent;

4.- Validity of consent;

5.- Interpretation of forum selection clauses included in adhesion contracts or the equivalent;

6.- Acceptance of the selection of forum clause included in adhesion contracts or the equivalent by the acceding Party;

7.- Interpreting selection of law clauses included in adhesion contracts or the equivalent;

8.- Immediately applicable or necessary policing rules (mandatory rules);

9.- International public policy.

Dr. José Moreno Rodríguez thanked the rapporteur and expressed his agreement with this study focused on a topic with situations of injustice against weak parties. At the same time, he expressed some doubts about the nature of the document, mainly in relation to the fact that it cannot be a guide

in matters of international contracts, because the report already gathers together consensus generated through the years, dating back to 1984, reflecting solutions to the Inter-American Convention on the Law Applicable to International Contracts (Convention of Mexico). This proposal generalizes issues applicable to certain contracts, but not to most contractual ties. He felt that the national jurisdiction domain should not be entered through a rule that falls within the sphere of the imperative, and that is respected by every international organization, as this is something that might cause reluctance among States. This is a work that could be very relevant and valuable, but it should take the form of a report, rather than a guide. A report that is useful for the relevant actors, that detects abusive practices that are inserted in the imperative of each country (such as transport contracts in Uruguay, and distribution contracts in Paraguay, for example). The type of product to be presented should continue to be evaluated. Encouragement should also be expressed for maintaining dialogs with international organizations specializing in this field, which would allow measurement the type of consensus that this could have, in order to open up the region to the world. In addition, this should be undertaken in coordination with what is underway at the global level.

Specifically, Dr. Moreno Rodríguez proposed to evaluate the nature of what should be prepared, which could take the form of a report or a guide to good practices. No normative regulation is required, as instruments are already in place for addressing imperative issues on which judges and arbitrators may act. The suggestion is to work on a set of good practices and factual situations where problems were encountered, in order to deal with abusive situations.

Dr. George Bandeira congratulated the rapporteur on her report, which demonstrates her knowledge of technical issues. Regarding access to justice and the reference to human rights, he asked her whether the application of the *Drittwirkung* doctrine on the opposability of fundamental rights to individuals should be investigated. He also noted that it should be open to different possibilities, in view of the nature of what it wants to present to States, taking into account the rigor and quality of the material to hand.

The Chair found that this is a controversial topic, including the situation of helplessness of the individual facing companies that offer services. Hence the importance of the consumer's or user's perspective. Regarding the existence of the validity of consent, the practical aspect of consent (sufficient and binding) should be included in the contractual link

The rapporteur for this topic, Dr. Cecilia Fresnedo, offered her thanks for these comments and their usefulness.

In relation to what was proposed by Dr. José Moreno, the rapporteur is willing to modify the nature of the report. With regard to the substantive remarks, she explained that any idea of not creating an annex to the Committee's report on international commercial contracts would be discarded, and she would therefore work on drafting a report containing a guide to good practice. At the same time, she noted the existence of topics that are essentially international in nature, such as the transportation field, where users are completely unprotected. In this sense, the Guide to International Commercial Contracts does not include the protection of weak parties and this is aggravated by monopolistic offers. Moreover, in contracts between merchants there are also situations of abuse, in which general conditions are opposed to which no consent has been given. She also expressed her belief that there is no consensus, reflected in the lack of ratifications of the Inter-American Convention on the Law Applicable to International Contracts (Mexico Convention). Finally, she expressed surprise at the lack of doctrinal developments regarding abuses, as the interests of seller countries, organized in powerful global lobbies, is opposed to the interests of the buyers (who consume the services). While there are rules, someone must inform operators of abuses, as this would be contained in autonomous conventional rules. There should be urging for the amendment of injustices. In relation to the suggestion from Dr. Galindo, the rapporteur explained that all topics related to access to justice are fundamental.

Dr. José Moreno Rodríguez invited the members to support their respective Foreign Ministries in responding to the questionnaire, and asked the Secretariat about the response from Paraguay, which to his knowledge has sent the answer. In relation to his explanation on the consensus created by the Mexico Convention, he agreed that there are no ratifications, but clarified that his reasoning is based on the influence of this regional instrument on both global regulations and in our countries. Similarly, in his understanding the OAS Guide helped bringing States into line with the Mexican Convention, as is the case of Canada, Mexico, Panama, Paraguay, with projects underway in Brazil, Chile, Colombia and Uruguay.

The rapporteur said she could not understand the lack of ratifications of the Mexican Convention and thanked Dr. José Moreno, who will be able to provide more expert contacts to respond to her report.

During the 101st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August, 2022), the topic was not considered.

During the 102nd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March, 2023), the rapporteur for the topic, Dr. Cecilia Fresnedo, highlighted the new features in this revised version, document CJI/doc. 683/23. It had been decided to change the original title, "Contracts between merchants with a contractually weak party," for something more indicative: "Party autonomy in international commercial contracts with a weak bargaining party: Inherent challenges and possible solutions."

She explained that she had broadened the geographical scope of the report, with the inclusion of universal, regional, and subregional conventional instruments in force in the region and of the situation in Argentina, Bolivia, Brazil, Canada (both common law and civil law provinces), Chile, Colombia, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Panama, Paraguay, Peru, the United States (including Puerto Rico), Uruguay, and Venezuela, corresponding to 19 of 35 OAS member states. She had also researched and incorporated doctrine and jurisprudence from both within the region and beyond. Comments had been received from the American Bar Association International Law Section.

The aim of the report is to explore in depth a topic that has generally been neglected by the instruments of both hard law and soft law, leading to the absence—or, at best, the inadequacy—of regulations addressing this issue.

- The aim is to complement the general mechanisms already in place to prevent abuses by contractually stronger parties over their weaker counterparts and the few special rules that exist on the subject, in the understanding that these afford insufficient protection.
- The report offers recommendations and suggestions regarding choice-of-law and choice-of-judge clauses in adhesion contracts or any other type of asymmetric contract. The rapporteur noted that few specific rules existed in a context where international commercial contracts were asymmetrical.
- The starting assumption is that the rules of private international law—conventional and autonomous alike—that regulate international contracts are designed for "free discussion" contracts, and not for adhesion contracts.
- In her understanding, in international commercial adhesion contracts, the adhering merchant is in a comparable situation to that of an adhering consumer: he or she cannot negotiate the unilateral conditions set by the other party.

The rapporteur then reviewed the recommendations.

Dr. Rudge thanked the rapporteur for her report and suggested including a table of contents. His country was currently reviewing its Civil Code and this issue was of great importance to its lawmakers.

He recommended reviewing the European Community law on consumer protection, which could also give an idea of the shortcomings existing in the protection of weaker parties.

Dr. Rojas-Báez appreciated the thoroughness of the document, with its numerous citations. He explained that he had participated in a litigation in his country in which the parties sought different objectives. In relation to the proposal, he suggested that the notion of "substantial injustice" in Recommendation 7 be approached through objective parameters.

Dr. Galindo congratulated Dr. Fresnedo for her impressive work which, he said, would have a practical impact in the region. He suggested to amend some of the recommendations to ensure a uniform approach. In Recommendation 1 to use the expression "should." Recommendation 9 (11) should not make an express reference to particular instruments in order to give it greater resonance, since not all countries are parties to the Mexico Convention. Consumer protection should adopt the language or framework of the system of human rights law to provide weaker parties with greater protection.

The rapporteur expressed her support for all the suggestions, but she clarified that since these are legal entities, care must be taken when framing them within the scope of human rights. The wording of the verb tense in Recommendation 9 was to keep it in line with the International Contract Guide, but if the majority wanted to move it to the substantive part she would not object.

Dr. José Luis Moreno Guerra asked about a situation in which a state were a weak party vis-à-vis an international conglomerate, citing, in that regard, a case involving Ecuador and Texaco.

The rapporteur agreed on the importance of taking account of the role of states as negotiators, and small states in particular, and she noted that the motivation of the discussions was economic in nature, driven by particular interests.

Dr. Luis García-Corrochano noted the wide range of elements that would apply in this matter. In Recommendation 1, he proposed including the elements of validity of consent. Since an asymmetrical relationship was involved, the burden of proof must fall on the stronger party. Recommendation 3, on criteria for interpretation, should promote better national standars on adhesion contracts (with a better definition). In Recommendation 7, the rejection of the choice clause would have an inhibiting effect and the matter would therefore be referred to another jurisdiction. This could result in an injustice equivalent to prejudgment. Finally, the incompatibility of choice of forum or choice of law clauses in the event of silence seemed to imply that it was supplementary.

The rapporteur agreed with the proposal to adjust the terminology and with the need to make a distinction between the free discussion contracts, parity contracts, and standard clause contracts that are central to her study. As for recommendation 11 (9), it could be subject to criticism from autonomists. The rapporteur regretted that institutions of the international theory of rights were left in the hands of judges who could act with nationalistic biases in analyzing contracts. And that was without taking into account the economic interests of contracts in the hands of the private individual who has the ultimate power. The problem with the defect of consent does not arise in this type of contract, because one of the parties is imposing the contract; it is therefore a matter of weak negotiating parties.

The Chair thanked the rapporteur for her document. He spoke of a well-known case in Paraguay involving an adhesion contract in which claims were made regarding access to justice and violation of mandatory rules in his country (the Bunder case), which was used as a basis for the advisory opinion of the MERCOSUR permanent court. It had also been invoked by courts in Belgium with respect to situations of abuse.

In his view, there are two ways to protect weak parties:

- For the legislature to declare certain contracts abusive. This is the case with distribution contracts.

- For there to be a general consensus that is clearly established that a presumption of abuse clearly exists, such as labor and consumer contracts, and that they should be subject to protection. On other issues there is no consensus, and what has been done is to leave escape valves for "standard clause contracts," such as those governing insurance, distribution, and transportation. In all cases, there are always protections provided by public policy, as explained in the CJI's Guide to International Contracts.

In his opinion, not all types of international contracts could be considered equivalent to consumer contracts, and that could be dangerous, since the aim was to find something that works. Isolation was not the goal, but to help trade to flow better; for that reason he asked for additional clarification in the substantive part to indicate that it the Committee's intent was not to move away from the views of other international institutions.

In the Chair's opinion, the final recommendations were in line with what other international organizations were doing. He supported Dr. George Galindo's proposed language for recommendation 11 (9). Recommendation 6 should be kept only for "cases of doubt," not always. In Recommendation 5, on choice of forum, he asked the rapporteur to explain where this came from. Finally, he asked the rapporteur to submit it to a consultation period before its approval to allow it to be fine-tuned.

Dr. Alejandro Alday explained that a treaty on business and human rights was being negotiated at the UN, in which there was a tendency to raise companies' standard of conduct with respect to the effects they can have on the negotiation of contractual conditions and human rights. Accordingly, he promised to provide the rapporteur with material on the topic.

The rapporteur thanked the members for their suggestions and agreed to make the changes proposed. She reiterated that the treatment given to the autonomy of choice was expressly regulated in certain areas, but that they were not regulated in the majority of cases. For that reason, her report seek to address the general problem. In closing, she agreed to submit the document for consultation as soon as possible, by early July, to allow the final adoption of the document at the Committee's August session.

At the end of the discussion the Chair asked that the adjustments be made to establish the course of action to follow. From a substantive point of view, he proposed making a general reference to the Committee's Guide on International Contracts, or including a mention of it in the recommendations.

Two days later, Dr. Cecilia Fresnedo explained the modifications made to her report on Contracts between traders with a contractually weak party, document CJI/doc.683/23 rev.1, and presented the main amendments:

- A table of contents was added to the report;
- References to human rights standards were included;
- A reference to the Inter-American convention on international contracts was integrated into the commentaries;
- The concordance of topics with the Guide on International Contracts was clarified;
- Some expressions were softened.
- Recommendation 1 was retained; while in recommendation 6 the word "expressly" was deleted.

In concluding her presentation, she suggested referring to applicable law instead of applicable norm.

The Chairman thanked the rapporteur for her presentation. He noted that the Hague Conference has incorporated Spanish as one of its three official languages. He supported the last explanation on the use of applicable law in Spanish, which is otherwise in harmony with other instruments. He considered it appropriate to refer this version for review by experts and States.

The rapporteur agreed with the idea of submitting the document for review. Regarding the way of operating, the text would be sent to a list of persons prior to the meeting of the American Association of Private International Law (ASADIP) in Rio de Janeiro.

Dr. Ramiro Orias emphasized the value and timeliness of the report and its recommendations. He suggested incorporating some reference to electronic commerce, particularly when viewing adhesion contracts.

The rapporteur explained that this work refers to commercial contracts and not to consumer contracts, but that the issue of electronic commercial contracts would merit another work.

During the 103rd Regular Session of the Inter-American Juridical Committee (August, 2023), this topic was not considered within the Committee, however, the rapporteur for the topic, Dr. Cecilia Fresnedo de Aguirre, made a presentation to the members of ASADIP at the XVI ASADIP CONFERENCE, organized in August 2023, an event attended by all the members of the Committee.

During the Special Meeting of the Inter-American Juridical Committee (Virtual Session of December 12, 2023), the rapporteur of the topic, Dr. Cecilia Fresnedo de Aguirre presented the amended elements of the report entitled "Party autonomy in international commercial contracts with a weak bargaining party: inherent challenges and possible solutions. Report and recommendations for good practices," document CJI/doc.683/23 rev.2.

She explained that the last set of amendments addressed comments received at the ASADIP session in August in Rio de Janeiro, its final version having been sent to the Committee's Technical Secretariat in October, the Department of International Law.

Among new elements, she mentioned:

- A paragraph on the August event in Rio de Janeiro was incorporated into the proposals put forward on that occasion, as no additional comments were received.
- The initial part of the report includes references to indicators of "contractual weakness" and contractual modalities (distribution, agency, insurance, etc.). Besides, she proposed tools that judges and legal practitioners can use to "prevent rights abuses."
- Detailed developments related to the jurisprudential practice in the United States and the actions of the courts in that country, at the time of analyzing the appropriate forum, detailing the approach to the subject of the report.
- In the section devoted to the questionnaire responses, suggestions were made to the states: in the case of Uruguay, the usefulness of the Committee's work for national legislators, judges, and practitioners was noted. With respect to the United States, the proposal was to use the *Restatement on conflicts of laws* as a source for other countries of the region.
- The section on "unbalanced contracts" identifies the laws on abuse of dominant position, explaining that they were not included in the report under review.
- The first recommendation sets out the validity of choice of court and/or choice of law clauses vis-à-vis third parties. The fifth recommendation restricts the scope of objections to choice-of-court clauses in binding contracts. Lastly, a new recommendation is included for legislators when drafting regulations on international contracts.

The Chair thanked the rapporteur for her presentation on a subject that has stirred great interest.

Dr. George Bandeira Galindo also thanked the rapporteur for her work and for the openness with which she reported on the changes that had been made. He made two observations on style: suggesting that the language of the first and ninth recommendations begin with the words "it is recommended." The sixth recommendation was about putting the verb in the conditional tense: "the clauses should."

Dr. Eric P. Rudge, in thanking the rapporteur for her report, asked for clarification on the "classical solutions" mentioned on page 6, specifically whether they had been included as part of the recommendations. He also asked for a list of abbreviations or acronyms to be placed at the beginning of the text and concluded by suggesting that the recommendations at the end of the text be formatted differently, if possible.

Dr. Ramiro Orias requested the rapporteur to update the reference to Bolivian laws, on page 11, to include the latest language pertaining to law 708 (dated June 25, 2015), which contains more contemporary provisions in line with the issues under reference.

Dr. José Luis Moreno Guerra expressed satisfaction with the quality of the rapporteur's work. Referring to points of grammar on the option to choose or discretion to choose the forum and the law, he urged the rapporteur to refrain from using symbols between words, such as "and/or." He suggested a modification to the structure around recommendation 1 to avoid verbs followed by verbs, referring only to expression of will. Citing the same sentence, he argued for the reference to be to "the parties" instead of "both" as there may be more than two parties. He also asked whether the term "access to actual justice" related to access or justice. On recommendation 4, he suggested that the reference to eradication of poverty be amended with a more realistic target, such as reducing the causes that create poverty.

The rapporteur welcomed the comments, confirming that most of the suggested changes could be made subject to some of them being revised. She said using "and/or" was a formula to include all possible options, not just one or the other or one and the other. As regards actual justice, she explained it as an expression used to refer to issues that go beyond access to justice (it would not only be a question of having a judge, but also requires due process and a sentence that is executed, etc.).

At the end of the discussion, the Chair declared the report adopted and requested the Secretariat to read aloud the draft resolution so as to place on record that it was adopted unanimously.

The following are the resolution and report adopted by the Committee at its Special Session held virtually in December 2023:

CJI/RES. 286 (IV-E/23)

PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL CONTRACTS WITH A WEAK BARGAINING PARTY: INHERENT CHALLENGES AND POSSIBLE SOLUTIONS. REPORT AND RECOMMENDATIONS ON GOOD PRACTICES

THE INTER-AMERICAN JURIDICAL COMMITTEE,

AWARE of the necessity and advisability of providing recommendations on possible good practices in international contracts between merchants with a contractually weaker party.

TAKING INTO ACCOUNT the document "Party autonomy in international commercial contracts with a weak bargaining party: inherent challenges and possible solutions. Report and recommendations of good practices," presented by Dr. Cecilia Fresnedo de Aguirre, as rapporteur on the subject,

RESOLVES:

1. To adopt the report entitle "Party autonomy in international commercial contracts with a weak bargaining party: inherent challenges and possible solutions. Report and recommendations of good practices,", document CJI/doc.683/23 rev.2.

2. To thank Dr. Cecilia Fresnedo for her work as rapporteur on the subject and for the presentation of the cited report on the issue.

3. To urge OAS member states to give due consideration to this report and its recommendations and to the Department of International Law to disseminate it as widely as possible.

This resolution was unanimously approved at the special session held on 12 December 2023 by the following members: Drs. Luis García-Corrochano Moyano, George Rodrigo Bandeira Galindo, Ramiro Gastón Orias Arredondo, Eric P. Rudge, Cecilia Fresnedo de Aguirre, Alejandro Alday González, José Antonio Moreno Rodríguez, Martha del Carmen Luna Véliz, José Luis Moreno Guerra and Julio José Rojas-Báez.

* * *

CJI/doc. 683/23 rev.3

INTER-AMERICAN JURIDICAL REPORT.

PARTY AUTONOMY IN INTERNATIONAL COMMERCIAL CONTRACTS WITH A WEAK BARGAINING PARTY: INHERENT CHALLENGES AND POSSIBLE SOLUTIONS. REPORT AND RECOMMENDATIONS ON GOOD PRACTICES

I. BACKGROUND

At its ninety-eighth regular session (April 5 to 9, 2021), the Inter-American Juridical Committee (CJI) approved the inclusion on its agenda of the topic "Contracts between merchants with a contractually weak party" (OEA/Ser. Q, CJI/doc. 636/21 of April 6, 2021). As proposed by the CJI, the aim is to prepare a report on problems posed by contracts between merchants with a contractually weaker party and recommendations for possible best practices.

As a first step in addressing the issue, in my capacity as rapporteur I prepared a questionnaire that, within the cooperation framework established between the CJI and the American Association of Private International Law (ASADIP), was sent to various specialists in the region and to which six responses were initially received.

At the September 16, 2021, meeting between the OAS, The Hague Conference on Private International Law, and the Legal Advisors of the Foreign Ministries, it was suggested that the OAS member states be invited to answer questionnaires on the two new agenda items of the Inter-American Juridical Committee, including the one referring to "Contracts between merchants with a contractually weaker party." Responses have been received from the foreign ministries of **Argentina, Canada** (answer sent by Isabel Mainville, Deputy Director of Inter-American Relations | Directrice adjointe – Relations Interaméricaines, Global Affairs Canada | Affaires mondiales Canada, Government of Canada | Gouvernement du Canada), **Paraguay** (Permanent Mission of Paraguay to the OAS), **Mexico** (answer sent by the Permanent Mission of Mexico to the OAS), and **Panama** (answer sent by Otto A. Escartín Romero, Director in Charge of Legal Affairs and Treaties of the Ministry of Foreign Affairs, prepared by Juan Carlos Arauz Ramos, President of the National Bar Association of Panama).

On July 15, 2022, comments on the Second Progress Report on this topic were received from the **International Law Section of the American Bar Association**, which, together with all the material received, are incorporated and taken into account in this report.

A Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS was held on September 26 and 27, 2022. On that occasion, the Rapporteur presented the Second Progress Report on this topic. The comments subsequently gathered from the legal advisors are included in this report.

On November 30, 2022, responses to the questionnaire were received from the National Court of Justice of Ecuador.

On December 5, 2022, additional comments were received from Alexis Damián Elías Am, Alternate Representative of the Argentine Republic to the OAS.

Contributions have also been received from specialists such as Professor Alejandro Garro.

On August 10, 2023, the topic was presented at the XVI Conference of ASADIP, held in Rio de Janeiro, and comments and suggestions were received from Dr. Carolina Iud of Argentina and Dr. Marcos Dotta of Uruguay, which were taken into account in this document. Other participants in the Conference who wished to send comments and suggestions on the document were given until September 30, 2023 to do so.

With respect to states of the OAS—and other regions—that did not respond to the questionnaire, and also some that did, the rapporteur carried out research and reflected in this report the normative and/or jurisprudential solutions, as well as doctrinal references related to the subject matter of the questionnaire, citing the relevant sources. In particular, she mentions some provided by Brazil, Canada, Chile, Colombia, Cuba, the Dominican Republic, Ecuador, Peru, the United States, and Venezuela.

In sum, for the purpose of preparing this report and its recommendations as to possible good practices in the area of international contracts between merchants with a contractually weaker party, the universal, regional and subregional treaty instruments in force in the Hemisphere have been taken into account, as have the autonomous private international law of the following countries: Argentina, Bolivia, Brazil, Canada (common law and civil law provinces), Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador,[1] Guatemala, Mexico, Panama, Paraguay, Peru, Puerto Rico, United States, Uruguay, and Venezuela; that is, 20 of the 35 OAS member states.

Finally, for the preparation of this Report, the Rapporteur had the unconditional support of the OAS Department of International Law, especially through Drs. Dante Negro and Jeannette Tramhel, whom she thanks.

II. PRESENTATION OF THE TOPIC

1) Distinction between international commercial free discussion contracts and international commercial contracts with standard clauses. Indicators of contractual weakness

For many years, in preparing instruments of hard law and soft law alike, both the forums that set doctrine and codify laws have dealt with party autonomy in international commercial contracts, focusing on free discussion contracts, in which both parties negotiate the terms of the contract, including the provisions on the choice of law applicable to the contract, as well as the choice of forum or the inclusion of an arbitration clause.

Rules on party autonomy normally exclude contracts with consumers, with employees, and, sometimes, with the insured persons; attention is rarely paid, however, to contracts where the parties, while both merchants, are in a grossly unequal position because one of them completely lacks bargaining power. This is generally the case with contracts with standard clauses in all their variants, adhesion contracts, printed unilateral general conditions, form contracts, asymmetrical contracts (which are the opposite of free discussion contracts, i.e., contracts in which the parties do not have equal or equivalent bargaining power),[2] B2b contracts, and other denominations. Henceforth, we will use the term "contracts with standard clauses"—which is the terminology used in instruments such as the UNIDROIT Principles of International Commercial Contracts and the Hague Principles on International Contracts—in the broad, comprehensive sense developed below.

The contracts with standard terms dealt with by this report are essentially adhesion contracts—both domestic and international—that are unilaterally drafted by the party offering the service or product, without the possibility for the adhering party, even if that party is a merchant, to negotiate the terms of the contract, which are usually set down in printed general conditions or in

[1] In spite of the research carried out, it has not been possible to detect any rules on disputes in relation to international contracts, although substantive law has been found in the Civil Code of the Republic of El Salvador, at https://www.fao.org/faolex/results/details/es/c/LEX-FAOC211293/. The Civil Code is the only normative reference that appears in Symeon C. SYMEONIDES, *Codifying Choice of Law Around the World. An International Comparative Analysis*, New York, Oxford University Press, 2014, p. 360.

[2] Definition taken from Article 25 of the Proposed General Law on Private International Law, on which the Instituto Antioqueño de Derecho Internacional Privado works, as mentioned in the answer to the questionnaire of Dr. Claudia Madrid Martínez, which will be referred to below.

forms. This report includes all contractual modalities that fall under the above concept, without prejudice to specific references to any particular contractual modality made in other parts of the document. In other words, the report refers to all international commercial contracts, whatever the specific modality (distribution, agency, transportation, insurance, banking contracts, etc.), in which one of the parties lacks bargaining power, in particular, with respect to choice of law and/or choice of judge clauses.

It has been argued that this form of contracting is indispensable for international trade to function, since it would be impossible and very costly to negotiate each contract individually, especially when the supply is massive. The veracity of this statement is not in question, but it cannot legitimize the possible inclusion of abusive clauses in contracts of this sort. This report and its recommendations aim precisely to provide judges and other legal operators with tools to allow them to avoid abuses of law derived from the superior bargaining power of one of the parties and materialized in the inclusion of abusive clauses regarding the choice of judge and/or law, etc., inserted in adhesion contracts, forms, and other variants.

This report focuses on **choice-of-law and/-judge (or arbitrator) provisions commonly included in the general terms and conditions of international adhesion contracts between merchants**. However, references are included to domestic contracts, contracts with consumers, employees, and insured, among others, as well as to other terms commonly included in adhesion contracts, such as limitation or exoneration of liability. This is because the imbalance of bargaining power in adhesion contracts exists not only in international commercial contracts, but also in domestic contracts, as well as in civil contracts.

The main attribute of these contracts, whatever their denomination, is that one of the parties has a much greater contractual power, since they can unilaterally establish the terms of the contract, including choice of law and/or choice of judge (or arbitrator). The other party, even if a merchant with experience and professional advice, has to choose between adhering to the conditions presented to him or declining to enter into the contract. In the doctrine of the United States, these are known as “take-it-or-leave-it contracts.” one party to the contract either takes it or leaves it.

The situation described in the previous paragraph is aggravated when the general conditions constitute a monopolistic offer in the commercial sector to which they belong, the result of dominant market control by some sectors.[3] In such cases, the merchant presented with the terms can only either take them or decline to contract, which means he cannot trade, because he has no alternative general terms and conditions to choose from nor any possibility of negotiating and discussing the unilaterally imposed terms. It would be beyond the scope of this report to delve into the problem of the anticompetitive nature of market dominance and monopolies. For the purposes of this report and its recommendations, suffice it to say that the monopolistic general conditions used in certain sectors of international trade are usually offered in the market through contracts with standard clauses or adhesion contracts. We will focus here on analyzing how to neutralize or minimize the harmful and unfair effects arising from the inherent imbalances in adhesion contracts.

All the circumstances described under this heading constitute indicators of contractual weakness of the party adhering to contracts with standard terms, even if it is a properly informed and advised merchant. These circumstances could be summarized, in this first approach to the topic and without prejudice to further developments, as the existence of pre-printed, non-negotiable, unilateral general conditions and that such conditions are monopolistic, with the adhering party bereft of options.

2) Arguments for and against the admission of party autonomy in conflict of laws in adhesion contracts

Party autonomy in conflict of laws is the power that a legislator—domestic or international—grants the parties to agree on the law applicable to their contract and/or the competent judge to settle

[3] On p. 7 of its comments on the second progress report of this Rapporteur, ABA-SIL says: “When the stronger bargaining party enjoys dominant market control, that can have monopolistic consequences. However, there is an argument that market dominance is the issue in that case, rather than the contract of adhesion. Focusing on the unequal bargaining party runs the risk of shifting focus from the anticompetitive nature of market dominance.”

any disputes that may arise in relation to their contract. This choice of law and/or judge agreement is an agreement between both parties to the contract, of two or more laws, and therefore precludes unilateral selection by either of the parties to which the other party did not consent. Where questions arise with standard-clause, adhesion, and analogous contracts is with the very existence of consent, in particular with respect to choice-of-law and/or -judge clauses included in their general terms, form, or similar means.

It has been argued that contractually weaker merchants may sometimes be willing to accept the terms of adhesion contracts because it entails lower costs and greater speed in contracting, due to the fact that they make international trade transactions much more efficient in terms of time and money. This may be true in some cases, especially in those in which the general conditions do not contain abusive terms or provisions that are clearly detrimental to the interests of the adhering party. In such cases, the choice of court and/or law provisions will not cause problems because if a dispute arises, the merchant who adhered will resort to the jurisdiction established in the general conditions and will not dispute the law established therein as applicable to the contract. Problems come about when, once the dispute has arisen, the adhering merchant is faced with a clause that requires it to litigate in a forum that is inaccessible or very prejudicial, either because the cost of litigating there exceeds the amount to be claimed or does not merit the expense, or for other reasons. Thus, for example, I do not believe that any merchant with an establishment in Uruguay who has imported goods from Argentina that arrive damaged or missing for a total amount of a few tens of thousands of dollars or less, would willingly accept a provision in the general conditions of the bill of lading stating that in the event of any claim, the competent courts are those of the United Kingdom.

With respect to the law, it has been said that in general the party drafting the contract chooses its own law, which is generally so, because it is the law best known to the lawyers of that party. But the fundamental reason for the choice of law is that it is the best suited to the interests of the one who chooses it. Here, too, the balance is tipped in favor of the drafter of the general terms and conditions.

It should be noted that the mere fact of unequal bargaining power or lack of bargaining does not invalidate a choice-of-law (or -judge) provision; for that to happen the provision must be to the detriment of the weaker party.[4] It is up to the legislator—in first place—and to the judge or arbitrator, when the contentious stage is reached, to avoid abuses in that regard.

The legislator, whether international, through treaty-based private international law provisions, or national, through autonomous or domestic of private international law provisions, as well as those who develop soft-law instruments, such as this report, should act before conflict arises. It is for the judge or arbitrator to act once the dispute has arisen.

Thus, once an action is brought before a court, the court must decide whether or not to assume jurisdiction, and then determine which law is applicable to the contract from which the dispute arose. For both questions, it must analyze whether the contractually weaker party really had "autonomy" or "freedom" to choose the competent judge and the law applicable to the contract, or whether in fact there was no effective choice by the two parties. Such decisions vary from country to country in accordance with the provisions of their respective legal systems. If the judge determines that the contract, and especially the choice-of-forum and -law provisions, were freely entered into, the provisions will be upheld. Otherwise, if the court determines that the contract and terms were not freely entered into or that the choice of law and judge was not valid, the court will rely on its own private international law norms to determine both its jurisdiction and the law applicable to the contract.

If a merchant who has sufficient contractual power to unilaterally establish the general conditions of a contract, including the determination of the applicable law and the competent jurisdiction, were to be placed on an equal footing with the merchant who has no choice but to adhere or not to contract, considering that the supposed "consent" of both parties is worth the same, then unequal parties would be treated equally. In other words, the same treatment cannot be given to the

[4] Eugene F. SCOLES & Peter HAY, *Conflict of Laws*, Hornbook Series, St. Paul, Minn., West Publishing Co., 1982, p. 640-641.

terms of a free discussion contract and to the standard clauses of an asymmetrical contract, such as an adhesion contract in all its variants.

3) The classic solution

The classic and traditional way to avoid this type of problem is for the legislator to establish one or more reasonable forums accessible to both parties, instead of allowing the contractually stronger merchant to unilaterally impose a jurisdiction on the adhering merchant that is highly inconvenient for the latter, a jurisdiction that is also exclusive, because the valid choice of forum excludes other possible concurrent jurisdictions.

As regards applicable law, the legislator has sometimes established prescriptive solutions through a connecting point such as the place of performance of the contract, or the place of its conclusion, for example; at others, by determining a regulatory framework that prevents abuses of the weaker party by the stronger. This solution has been criticized on the grounds that the parties themselves should know best which the most appropriate law is to govern their contract. This statement may be valid when both parties negotiate and analyze the possibilities regarding the law applicable to the contract. However, when the choice is unilateral, what happens is that the choosing party opts for the law most favorable to its interests, not for the contract in the abstract, much less for the adhering merchant.

4) The current situation

The current situation is that in general, both the conventional and autonomous rules of private international law on international contracts, as well as the provisions of soft law, give little or no attention to the specific issue of adhesion contracts, which account for an important percentage of international commercial contracting. Therein lies the importance of the proposed topic. **Most of the responses received acknowledge the need to address this situation or the desirability of doing so**.

International commercial contracts with a contractually weaker party frequently give rise to disputes in which the validity or otherwise of provisions included in the general terms and conditions is challenged.

All this justifies the analysis of the subject, starting with an examination of the current situation and concluding with recommendations on possible good practices by which to remedy some of the current problems, or at least improve the undesirable and sometimes frankly unfair situations that arise in this area. This new instrument developed within the framework of the CJI will complement what we have: instruments of hard law (conventions and domestic laws) and soft law (the CJI Guide on the Law Applicable to International Commercial Contracts in the Americas, the UNIDROIT Principles of International Commercial Contracts, the Hague Principles on International Contracts, among others). The Report on problems posed by international contracts between merchants with a contractually weaker party and recommendations for possible best practices will be a novel document, since it refers to a subject that is little or not at all developed by existing instruments, which we believe will be of practical use to operators of the law.

III. THE QUESTIONNAIRE

D. Legislation

1) Does your country have any private international law (PrIL) autonomous or conventional legislation on party autonomy in conflict of laws,[5] especially on the choice of law and/or forum (judge or arbitrator) in international commercial contracts?

The following is a non-exhaustive systematization of the conventional instruments and the national or autonomous laws in force in the region that deal with party autonomy in conflict of laws, especially on the choice of law and/or forum (judge or arbitrator) in international commercial contracts. It indicates the Contracting Parties to each of the treaty texts or the source where the corresponding list can be consulted.

[5] We understand by "autonomous" rules or legislation those rules of Private International Law that emanate from the parliament of a State, that is, that are from an internal or national source, and not international, such as treaties and conventions.

a. Conventional instruments on the autonomy of choice in conflicts that address the choice of forum:

- The Montevideo Treaty on International Civil Law of 1889 (Articles 56 et seq.), which is binding on Argentina, Bolivia, Colombia, Paraguay, Peru, and Uruguay ("1889 MTICL").

- Convention on Private International Law ("Bustamante Code"), Havana, February 20, 1928, which is binding on the Bahamas, Bolivia, Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela.[6]

- The Montevideo Treaty on International Civil Law of 1940 (Articles 56 et seq.), which is binding on Argentina, Paraguay, and Uruguay ("1940 MTICL").

- The Additional Protocol to the 1940 Treaties of Montevideo (Article 5), which is binding on Argentina, Paraguay, and Uruguay.

- Buenos Aires Protocol on International Jurisdiction in Contractual Matters, Buenos Aires, August 5, 1994, CMC/Dec. 1/94, which is binding on Argentina, Brazil, Paraguay, and Uruguay.

- The 2005 Hague Convention on Choice of Court Agreements, to which Mexico is the only state party in the Americas. Entered into force on October 1, 2015.[7]

To summarize:

- Within the OAS, there coexist various conventional instruments that regulate party autonomy in conflict of laws in matters of forum, all with different spatial scopes of application, without prejudice to some overlapping.[8]

- Some of these instruments prohibit the choice of forum, such as the 1889 TDCIM, which provides for mandatory solutions (Articles 56 et seq.).

- Others, such as the 1940 DTCIM and its Additional Protocol, prohibit it, albeit with some exceptions where it is allowed (Articles 56 and 5, respectively).

- Others admit it, although invariably within a regulatory framework that sets limitations and requirements for it to be possible. Examples include the Bustamante Code (Articles 318-339), the Buenos Aires Protocol, and the 2005 Hague Convention.

- Consequently, it would be too simplistic to state that within the OAS sphere party autonomy regarding choice of forum is admitted. It is admitted in some cases but not in others, and invariably subject to certain conditions and with some exclusions.

- None of the texts in question refers to commercial contracts in which one of the parties is in a weaker position.

b. Conventional instruments on party autonomy regarding choice of law:

- The Montevideo Treaty on International Civil Law of 1889 (Articles 33 et seq.), which is binding on Argentina, Bolivia, Colombia, Paraguay, Peru, and Uruguay. It does not admit party autonomy in conflict of laws, but it does establish mandatory solutions as to the law applicable to the contract. However, as it does not expressly prohibit it, as Article 5 of the Additional Protocol to the 1940 Treaties of Montevideo does, some Argentine authors have interpreted—wrongly, in my

[6] Argentina, Mexico, Paraguay, and Uruguay signed but did not ratify, so it does not apply to them. See updated information at: http://www.oas.org/en/sla/dil/inter_american_treaties_A-31_Bustamente_Code_signatories.asp (last accessed: June 13, 2021).

[7] https://assets.hcch.net/docs/8084dc52-44b5-4a0d-8326-0109d9902435.pdf (last accessed: June 13, 2021).

[8] Issues arising when two or more states are Contracting Parties to two or more treaties on the same subject are regulated by the 1969 Vienna Convention on the Law of Treaties, Article 30 in particular.

opinion and in general in all Uruguayan doctrine—that by not expressly prohibiting it, party autonomy is allowed.[9]

- The Convention on Private International Law ("Bustamante Code"), Havana, February 20, 1928 (Articles 184-186) — which is binding on the Bahamas, Bolivia, Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela — does not clearly admit party autonomy in conflict of laws, although the doctrine has interpreted that it is presumed.[10]

- The Montevideo Treaty on International Civil Law of 1940 (Articles 37 et seq.), which is binding on Argentina, Paraguay, and Uruguay. It does not admit party autonomy in conflict of laws, but it does establish mandatory solutions.

- The Additional Protocol to the 1940 Treaties of Montevideo (Article 5), which is binding on Argentina, Paraguay, and Uruguay, expressly prohibits party autonomy in conflict of laws.

- The Convention on the Law Applicable to Agency, The Hague, 1978, which deals with party autonomy in conflict of laws. The universal scope of the Convention (Article 4) also makes it applicable in relation to non-Contracting Parties. Only one OAS member state (Argentina) is a party to this Convention, and the only other parties are France, the Netherlands, and Portugal.

- The United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), which admits party autonomy (Article 6).

- The Inter-American Convention on the Law Applicable to International Contracts (CIDIP-V, Mexico City, 1994), which is only binding on Mexico and Venezuela, and which admits party autonomy in conflict of laws.

To summarize:

- Within the sphere of the OAS there coexist various conventional instruments that regulate party autonomy regarding choice of law, all with different geographical scopes of application, some overlaps notwithstanding.[11]

- Some of these instruments prohibit party autonomy regarding choice of law, such as the 1889 TDCIM, which provides for mandatory solutions (Articles 33 et seq.), or do not clearly admit it, such as the Bustamante Code.

- Others, such as the 1940 DTCIM and its Additional Protocol, prohibit it, albeit with some exceptions (Articles 37 et seq. and 5, respectively).

- Others admit it, although invariably within a regulatory framework that sets limitations and requirements for it to be possible, such as the Inter-American Convention on the Law Applicable to International Contracts.

- Some others do admit it, but only with respect to certain specific contracts, such as the Convention on the Law Applicable to Agency (The Hague, 1978), and the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).

- Consequently, it would be too simplistic to state that within the OAS sphere party autonomy regarding choice of law is admitted. It is admitted in some cases but not in others, and invariably subject to certain conditions and with some exclusions.

---

[9] On this subject, see Cecilia FRESNEDO DE AGUIRRE, *La Autonomía de la Voluntad en la Contratación Internacional*, Montevideo, FCU, 1991, especially p. 51-55, and "La autonomía de la voluntad en la contratación internacional," in *Curso de Derecho Internacional, XXXI*, 2004, Inter-American Juridical Committee, OAS General Secretariat, p. 323-390.

[10] Gilberto BOUTIN, *Derecho Internacional Privado*, 2nd edition, Panama, Edición Maître Boutin, 2006, p. 609, with a quote from Tatiana Maekelt. On p. 614, Boutin adds that Article 185 of the Bustamante Code "...indicates obliquely and implicitly the presence of autonomous will of the parties...."

[11] Issues arising when two or more states are Contracting Parties to two or more treaties on the same subject are regulated by the 1969 Vienna Convention on the Law of Treaties, Article 30 in particular.

- **None of the texts in question refers to commercial contracts in which one of the parties is in a weaker position**. Only the Bustamante Code refers, in Article 185, to adhesion contracts.

c. Conventional instruments on party autonomy regarding arbitration:

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958. To date, 168 countries are parties to this Convention, including most of the OAS member states.[12]

- Inter-American Convention on International Commercial Arbitration, Panama City, January 30, 1975, CIDIP-I. To date it has 19 Contracting Parties.[13]

- MERCOSUR Agreement on International Commercial Arbitration, Buenos Aires, July 23, 1998, CMC/Dec. 3/98, which is binding on Argentina, Brazil, Paraguay, and Uruguay.

- Agreement on International Commercial Arbitration between MERCOSUR and the Republic of Bolivia and the Republic of Chile, Buenos Aires, July 23, 1998, CMC/Dec. 4/98 (not in force).

- European Convention on International Commercial Arbitration of April 21, 1961, to which Cuba is a party, along with several European states.

To summarize:

Within the OAS, arbitration, based on party autonomy, is widely accepted within the regulatory framework established by the various international instruments that coexist in the region.

d. Autonomous regulations on party autonomy regarding choice of forum

- **Argentina** regulates this point in Articles 2605-2607 CCCN;[14]

- **Bolivia** has a small scattering of state regulations relating to PrIL matters, and those are of limited application. These norms have "shortcomings and limitations, both system- and content-wise," which "the insufficient number of conventions ratified by the Plurinational State are unable to fulfill."[15] Among the provisions of PrIL of state origin worth mentioning in relation to the subject matter at hand are those found in the Code of Civil Procedure (Law No. 1760, of February 28, 1997), the Law of the Judicial Branch (Law No. 25, of June 24, 2010), the Civil Code (Law No. 708 on Conciliation and Arbitration of June 25, 2015), the Commercial Code (Decree Law No. 14379, of

[12] https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (last accessed: July 7, 2021).

[13] https://www.oas.org/juridico/english/sigs/b-35.html (last accessed: July 7, 2021).

[14] CIVIL AND COMMERCIAL CODE, ARTICLE 2605. Agreement on choice of forum. In equity and international matters, the parties are entitled to extend jurisdiction to judges or arbitrators outside the Republic, unless Argentine judges have exclusive jurisdiction or extension is prohibited by law. CIVIL AND COMMERCIAL CODE, ARTICLE 2606. Exclusivity of the choice of forum. The judge chosen by the parties has exclusive jurisdiction, unless they expressly decide otherwise.
CIVIL AND COMMERCIAL CODE, ARTICLE 2607. Express or tacit extension. The extension of jurisdiction is valid if it arises from a written agreement by which the interested parties express their decision to submit to the jurisdiction of the judge or arbitrator to whom they have recourse. Any means of communication that makes it possible to establish proof by text is also admissible. Likewise, the extension is valid for the plaintiff, by the fact of filing the lawsuit and, with respect to the defendant, by answering it, failing to do so, or submitting preliminary objections without articulating a declinatory action.

[15] Carlos ESPLUGUES MOTA, "Una aproximación internacional privatista al nuevo Código de Procedimiento Civil de Bolivia de 2013." *Rev. Boliv. de derecho*, No. 18, July 2014, ISSN: 2070-8157, p. 16–63, http://www.scielo.org.bo/pdf/rbd/n18/n18a02.pdf, p. 22–23.

February 25, 1977) and the Arbitration and Conciliation Law of 1997 (Law No. 1770, of March 10, 1997), the latter included in the Code of Civil Procedure of 2013.[16]

- **Brazil** (Article 25 CPC, except in cases of exclusive jurisdiction of Brazilian courts, as established at Article 23 CPC. Article 63(1) CPC requires the agreement to be in writing and Article 63(3) allows the courts *ex officio* to set aside the provision on choice of forum when considered abusive);[17]

- **Canada** (Civil Code of Quebec, Articles 3148 (4), 3149-50 *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28, s. 10(e)(ii), among others);[18]

- **Colombia** has no rules on international procedural competence; Colombian judges must, therefore, resort to the system of internal territorial competence, which generates significant problems. Different interpretations based on doctrine and jurisprudence exist.

- **Cuba** (Civil Code and Law No. 7 on Administrative Civil and Labor Procedure, as updated, Articles 2 to 4);[19]

- Although **Ecuador** does not have clear specific rules regarding autonomy of will, based on certain legislative reforms and judicial decisions, it is understood that autonomy of will is admitted with respect to choice of forum and choice of law. Arbitration and Mediation Act, RO No. 145, September 4, 1997, Article 1505 of the CC, amended by the aforementioned Act, rejecting that the choice of a foreign jurisdiction was unlawful, decision of the Supreme Court establishing that as of the 1997 reform choice of forum was not unlawful (Decision of the Supreme Court, First Civil and Commercial Division, *Teresa García Franco v. Societá Italiana per Condotte D'Acqua Spa*, Judgment No. 217), among others.[20]

- The **United States of America** has accepted party autonomy in relation to forum selection since 1972, starting with the case of *The Bremen v. Zapata Off-Shore Co*.,[21] albeit within certain limitations, as will be discussed below. It should be noted that, as Silberman states, in the United States (judicial) jurisdiction has a statutory (state or federal) basis, as well as limitations of constitutional dimension. In most states of the Union, the basic principles governing conflict of laws are developed at the jurisprudential level and applied at the state and federal level. The two *Restatements on Conflict of Laws* (the first in 1934 and the second in 1971) have had a substantial influence on conflict of laws. Oregon and Louisiana have codified some areas of conflict of laws.[22]

---

[16] Carlos ESPLUGUES MOTA, "Una aproximación internacional privatista al nuevo Código de Procedimiento Civil de Bolivia de 2013." *Rev. Boliv. de derecho*, No. 18, July 2014, ISSN: 2070-8157, p. 16–63, http://www.scielo.org.bo/pdf/rbd/n18/n18a02.pdf, p. 23.

[17] Claudia LIMA MARQUES, Lucas LIXINSKI and Pablo Marcello BAQUERO, "Brazil," Encyclopedia of Private International Law, Cheltenham, UK - Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 1928–1939, p. 1932–1933.

[18] Joost BLOM, "Canada", Encyclopedia of Private International Law, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 1950-1959, p. 1953, states that actions based on contracts are usually sufficiently connected to the province if the contract is expressly governed by the law of the province (s. 10(e)(i) and (ii) of the *Court Jurisdiction and Proceedings Transfer Act*, which quite feasibly reflects what would be the presumptive common-law connecting factors *(Club Resorts Ltd v. Van Breda* (2012) SCC 17).

[19] https://cuba.vlex.com/vid/ley-no-7-procedimiento-631841493. On this point, see José Carlos FERNÁNDEZ ROZAS, "Cuba," *Encyclopedia of Private International Law*, Cheltenham, UK - Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 2002–2008.

[20] Hernán PÉREZ LOOSE, "Ecuador," *Encyclopedia of Private International Law*, Cheltenham, UK - Northampton, MA, USA, Edward Elgar Publishing, Volume 3, pp. 2043–2053, pp. 2045–2046.

[21] United States Supreme Court 407 U.S.1 (1972). See Cecilia FRESNEDO DE AGUIRRE, *La autonomía de la voluntad en la contratación internacional (*Tesis *cum laude*), Montevideo, FCU, 1991, p. 25–27. See text of the ruling in Andreas F. LOWENFELD, Conflict of Laws, Cases and Material Series, Matthew Bender & Co., Inc., New York, 1986, p. 289–298.

[22] Linda SILBERMAN, "USA", *Encyclopedia of Private International Law*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, pp. 2637–2647, p. 2637.

- **Guatemala** admits party autonomy in Article 34 of Decree 2-89, decreeing the Law of the Judiciary.[23]

- **Mexico** admits party autonomy regarding choice of forum (the Federal Code of Civil Procedure, the Code of Civil Procedure for the Federal District (today Mexico City), the Commercial Code, and many of the codes of civil procedure of the different states allow the express and tacit extension of territorial jurisdiction);

- **Paraguay** (Law 5393/2015 "on the law applicable to international contracts" of January 14, 2015);

- **Peru** (Book X of the Civil Code of 1984, Articles 2057–2067, and Arbitration Law - Legislative Decree 1071 of June 27, 2008);[24]

- **Dominican Republic** (Article 12 of Law No. 544-14 on Private International Law (LGDIPr) of the Dominican Republic, published on December 18, 2014);[25]

- **Venezuela** (Article 40 LDIPV);

- **Uruguay** (Article 60 LGDIPr).

To summarize: Most, or at least several, OAS countries allow choice-of-forum agreements, although always within a regulatory framework of which the scope varies from one State to another.

e. Autonomous regulations on party autonomy regarding choice of law

- **Argentina** (Articles 2651 CCCN);[26]

---

[23] https://www.oas.org/juridico/pdfs/mesicic4_gtm_org.pdf; reference in Symeon C. SYMEONIDES, *Codifying Choice of Law Around the World*. *An International Comparative Analysis*, New York, Oxford University Press, 2014, p. 362. Article 34, "On jurisdiction," provides: "Guatemalan courts are competent to summon foreign or Guatemalan persons who are outside the country, in the following cases: (...) (c) In the case of acts or legal transactions in which it has been stipulated that the parties submit to the jurisdiction of the courts of Guatemala."

[24] https://img.lpderecho.pe/wp-content/uploads/2020/03/C%C3%B3digo-civil-03.2020-LP.pdf - Aurelio LÓPEZ-TARRUELLA MARTÍNEZ, "Peru," *Encyclopedia of Private International Law*, Cheltenham, UK - Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 2410–2420, p. 2410.

[25] http://www.asadip.org/v2/wp-content/uploads/2017/02/Ley-544-14-sobre-Derecho-Internacional-Privado-de-la-Republica-Dominicana.pdf

[26] CIVIL AND COMMERCIAL CODE, ARTICLE 2651. Party autonomy. Rules. Contracts are governed by the law chosen by the parties as to their intrinsic validity, nature, effects, rights and obligations. The choice must be express or result in a clear and certain manner from the terms of the contract or the circumstances of the case. Said choice may relate to the whole contract or parts thereof.

The exercise of this right is subject to the following rules:

(a) at any time they may agree that the contract shall henceforth be governed by another law, either by a previous choice or by application of other provisions of this Code. However, such a modification does not affect the validity of the original contract or the rights of third parties;

(b) if the application of a national law is chosen, the domestic law of that country shall be construed as the chosen law, with the exclusion of its conflict-of-law rules, unless otherwise agreed;

(c) the parties may, by mutual agreement, establish the material content of their contracts and even create contractual provisions that displace coercive rules of the chosen law;

(d) generally accepted trade usages and practices, customs and principles of international trade law are applicable when the parties have incorporated them into the contract;

(e) the principles of public policy and the internationally mandatory rules of Argentine law apply to the legal relationship, regardless of the law governing the contract; the internationally mandatory rules of those States with preponderant economic ties to the case also apply to the contract in principle;

(f) contracts made in the Republic to violate internationally mandatory rules of a foreign nation that are necessarily applicable to the case have no effect whatsoever;

- **Bolivia** (through the interpretation of norms contained in the Constitution and in the Civil Code, in spite of Article 804 of the Commercial Code, which seems clearly against it);

- **Canada:** In Quebec, the rule is that the law chosen by the parties applies (Civil Code of Quebec, Articles 3111, 3117–19); in common-law provinces, the principle of party autonomy is applied, and the effectiveness of the parties' choice of law is recognized as long as it has been made in good faith, lawfully, and without contravening public policy *(Vita Food Products Inc v. Unus Shipping Co*, 1939, AC277, 290 PC);[27]

- **Colombia**, with limitations and by way of non-unanimous interpretation (Civil Code, Article 20, and Commercial Code, Articles 869 and 1328), although nothing is said about non-bilaterally negotiated contracts;

- **Ecuador**, as regards the law applicable to contracts, according to the Supreme Court, the amendment of Article 1505 of the Civil Code enabled not only the choice of forum, but also the choice of law. This freedom of the parties to choose the law applicable to international contracts is the result of a legislative reform (of Article 1505 CC) that eliminated what was considered an insurmountable obstacle, rather than the adoption of an express law allowing parties to choose the law (and jurisdiction) applicable to their international contract;[28]

- **United States** (§ 186-188 Restatement (Second) on Conflict of Laws) and Uniform Commercial Code (§ —105);

- **Guatemala** (Article 31 of Decree 2-89, decreeing the Law of the Judiciary);[29]

- **Mexico** (Federal Civil Code, in the Civil Code for the Federal District (Mexico City) and in many civil codes of the other states);

- **Paraguay** (Law 5393/2015 "on the law applicable to international contracts" of January 14, 2015);

- **Peru** (Book X of the Civil Code of 1984, Articles 2068-2101;[30]

- **Puerto Rico** (Civil Code, 2020, Article 54).[31]

(g) the choice of a particular national forum does not imply the choice of the domestic law applicable in that country.

[27] Joost BLOM, "Canada", Encyclopedia of Private International Law, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 1950–1959, p. 1955.

[28] Hernán PÉREZ LOOSE, "Ecuador," *Encyclopedia of Private International Law*, Cheltenham, UK - Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 2043–2053, p. 2050.

[29] https://www.oas.org/juridico/pdfs/mesicic4_gtm_org.pdf; reference in Symeon C. SYMEONIDES, *Codifying Choice of Law Around the World*. *An International Comparative Analysis*, New York, Oxford University Press, 2014, p. 362. Article 31 states: "Legal acts and transactions are governed by the law to which the parties have submitted, unless that submission is contrary to express prohibitory laws or public policy."

[30] https://img.lpderecho.pe/wp-content/uploads/2020/03/C%C3%B3digo-civil-03.2020-LP.pdf - Aurelio LÓPEZ-TARRUELLA MARTÍNEZ, "Peru," *Encyclopedia of Private International Law*, Cheltenham, UK - Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 2410–2420, p. 2410.

[31] "Article 54. - Party autonomy. (31 L.P.R.A. § 5421) The content of contracts and legal transactions is governed, in whole or in part, by law, in the forum, and according to the procedure agreed upon by the interested parties, unless otherwise provided by law. In the absence of an agreement, obligations are governed, in order of priority: (a) by the presumptions set forth in the following article; (b) by the law of the State of common domicile of the parties; (c) by the law of the State in which the agreement was made; and (d) by the law of the State with the closest connection to the agreement." See at https://bvirtualogp.pr.gov/ogp/Bvirtual/leyesreferencia/PDF/55-2020.pdf. See on the subject Tomás ORTÍZ DE LA TORRE, "El nuevo Derecho internacional privado de Puerto Rico: breve nota acerca del sistema conflictual del Título preliminar del Código Civil, 1 de junio de 2020," in *Anales de la Real Academia de Doctores de España*. Volume 5, Number 2 - 2020, p. 261-278.

- **Uruguay** (Article 45, LGDIPr, 2021);
- **Venezuela** (Law on Private International Law (LDIPV) of 1998, Article 29).

Other countries have more restrictive solutions. Thus, for example, in **Panama**, Article 6, paragraph 3 of the Civil Code establishes that: "But the effects of contracts granted in a foreign country to be performed in Panama, shall be governed by Panamanian laws" In other words, the referred rule enshrines the principle of *lex loci solutionis.*[32] However, Article 6 of the Commercial Code establishes: "Commercial acts shall be governed: (1) Regarding the essence and mediate or immediate effects of the obligations resulting therefrom, and unless otherwise agreed or clearly stated, by the laws of the Republic of Panama. (2) Regarding the means for fulfillment, by the laws of the Republic, unless otherwise stipulated or if the proposing party expressly offers within the national territory to another party that has a consumer status, in which case only the laws and regulations of the Republic will apply (…)." This norm enshrines the autonomy of will with respect to the issues established therein. The admission of autonomous will is also based on Article 1106 of the Civil Code, which establishes: "The contracting parties may establish any agreements, terms and conditions they deem advisable, provided they are not contrary to the law, morality or public policy."[33]

In the **United States**, most contract law is state, not national, law; therefore, it varies from state to state among the 50 states and territories that make up the Union. States have regulated these matters by means of state statutes, adopting the Uniform Commercial Code, which regulates, for example, the sale of goods. Other contractual modalities are regulated by judge-made common law. However, there are principles of contract law that generally apply in all U.S. jurisdictions.[34]

Brazil does not admit the party autonomy regarding law applicable to contracts but establishes a prescriptive legal solution in Article 9 of its *Lei de Introdução ās Normas do Direito Brasileiro* (Introductory Act to the Norms of Brazilian Law) of 1942. This act establishes that international contracts are governed by the law of the place of its execution *(locus contractus*) and this is the interpretation of the majority of doctrine, although a minority of scholars consider that the act should be interpreted as referring to the law of the place where the contract is to be performed. This is a rigid point of connection, which, as interpreted by case law, amounts to an impediment for the parties to make a valid choice of the law applicable to the contract.[35]

To summarize: Most, or at least several, OAS countries allow choice-of-law agreements, although always within a regulatory framework of which the scope varies from one State to another.

f. Autonomous regulations on party autonomy regarding arbitration

- **Argentina** (Law 27.449, which regulates the arbitration agreement at Articles 14 to 18);[36]

---

[32] Gilberto BOUTIN, *Derecho Internacional Privado*, 2nd edition, Panama, Edición Maître Boutin, 2006, p. 611 and 635.

[33] *Ibidem,* p. 613 and 633.

[34] COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE SECOND PROGRESS REPORT ON "CONTRACTS BETWEEN MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY" OF THE ORGANIZATION OF AMERICAN STATES, July 15, 2022.

[35] Claudia LIMA MARQUES, Lucas LIXINSKI and Pablo Marcello BAQUERO, "Brazil", *Encyclopedia of Private International Law*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, pp. 1928-1939, p. 1935. The authors add that the parties' choice of law may be valid when it is contained in an arbitration clause.

[36] Article 7. For the purposes of this law:

(…)

(d) Where a provision of this Law, other than Chapter 1 of Title VII, leaves the parties free to decide a matter, that power includes the power to authorize a third party, including an institution, to make such a decision;

(…)

- **Canada** (Civil Code of Quebec, Article 3121);
- **Colombia** (Article 2 of the repealed Law 315 of 1996, currently covered by Article 101 of Law 1563 of 2012);
- **Cuba** (Decree-Law No. 250/07, Special Official Gazette No. 037 of July 31, 2007, Council of State, governing International Commercial Arbitration in Cuba);
- **Ecuador** has a Mediation and Arbitration Law (published in Official Gazette No. 417 of December 14, 2006);
- **Mexico** (the Commercial Code also regulates commercial arbitration, with the UNCITRAL Model Law on Arbitration incorporated into domestic law);
- **Paraguay** (Law No. 1879/2002 "On Arbitration and Mediation" of April 24, 2002). Article 2 of the law refers to the object of arbitration, and Article 10 to the form of the arbitration agreement);
- **Uruguay** (Law 19.636); and
- **Venezuela** (International Commercial Arbitration Law, Article 5).

In short, many of the region's countries have a law on international commercial arbitration, which are generally based on the UNCITRAL Model Law.

2) Is there a regulatory framework for the exercise of that autonomy by the parties?

Conditions for the validity of the choice of law and/or forum (judicial or arbitral)?

Special conditions (for example: that the term must be in written form) and/or general conditions (for example, that the term does not contravene international public policy)? Others?

a. What emerges from the research and from the information received from the countries?

In general, the parties' exercise of party autonomy, with respect to both the forum and the law, is subject to a certain regulatory framework, and some of those found are more lax while others are more restrictive.

Thus, in **Argentina** the CCCN requires that choice-of-forum provisions be **in writing**, although it also admits tacit choice. Furthermore, "[a]ny means of communication that makes it possible to establish proof by text is also admissible. Likewise, the extension is valid for the plaintiff, by the fact of filing the lawsuit and, with respect to the defendant, by answering it, failing to do so, or submitting preliminary objections without articulating a declinatory action" (Article 2607 CCCN, second paragraph).[37]

(e) Where a provision of this Law refers to an agreement which the parties have entered into or may enter into or otherwise refers to an agreement between the parties, all provisions of the arbitration rules referred to therein shall be deemed to be included in that agreement;

[37] CIVIL AND COMMERCIAL CODE, ARTICLE 2605. Agreement on choice of forum. In equity and international matters, the parties are entitled to extend jurisdiction to judges or arbitrators outside the Republic, unless Argentine judges have exclusive jurisdiction or extension is prohibited by law.
CIVIL AND COMMERCIAL CODE, ARTICLE 2607. Express or tacit extension. The extension of jurisdiction is valid if it arises from a written agreement by which the interested parties express their decision to submit to the jurisdiction of the judge or arbitrator to whom they have recourse. Any means of communication that makes it possible to establish proof by text is also admissible. Likewise, the extension is valid for the plaintiff, by the fact of filing the lawsuit and, with respect to the defendant, by answering it, failing to do so, or submitting preliminary objections without articulating a declinatory action.
CIVIL AND COMMERCIAL CODE, ARTICLE 2651. Party autonomy. Rules. Contracts are governed by the law chosen by the parties as to their intrinsic validity, nature, effects, rights and obligations. The choice must be express or result in a clear and certain manner from the terms of the contract or the circumstances of the case. Said choice may relate to the whole contract or parts thereof.

In other countries the situation is less clear. This is the case, for example, in **Bolivia**, where the legal system lacks special or general provisions directly related to party autonomy.

With respect to Bolivia, Esplugues Mota notes: "Unfortunately, the Bolivian CPC seems to reveal a lack of awareness on the part of the country's lawmakers in this regard. Thus, the new Code reproduces the situation of a lack of solutions in this connection that was evident in the previous CPC. Like its predecessor, the new text limits itself to designing rules on domestic jurisdiction without providing a harmonized model for rules on international jurisdiction. It apparently assumes that Bolivian courts may hear all disputes brought before them concerning all types of matters and litigation, regardless of where they arose and the level of connection they have with Bolivia."[38] In short, the new Bolivian CPC does not contain any rules on international jurisdiction, only ones on domestic jurisdiction.

In **Canada**, according to Dr. Saumier, there are no specific rules that set conditions for the validity of choice-of-forum and choice-of-law provisions; it may therefore be inferred that the general rules on the validity of contract terms apply.

In **Chile**, there do not appear to be any specific internal or autonomous rules governing the exercise of party autonomy in conflict of laws. However, some more general rules are interpreted as validating the terms on choice of law and judge (Articles 16.2 and 1545 of the CC, Article 113 *in fine* of the Commercial Code, and others).[39] Picand points out that prior to 1999, the Supreme Court interpreted terms on choice of forum as being invalid under Article 1462 of the Civil Code.[40] However, since then the Court has changed its position, and it now recognizes the validity of choice-of-forum agreements.[41] In matters of applicable law, the general principle is that the parties are free to choose the law governing the contract.[42]

In **Colombia** there is no law on PrIL; instead, there are a number of disparate provisions contained in its codes and special laws. As Zapata Giraldo explains, in contractual matters, the plaintiff could choose between the forum of the place of performance of the contract and that of the defendant's domicile.[43] It should be noted that this solution is identical to that set out in Article 56 of the Montevideo Treaty on International Civil Law of 1889, to which Colombia is a party.

---

[38] Carlos ESPLUGUES MOTA, "Una aproximación internacional privatista al nuevo Código de Procedimiento Civil de Bolivia de 2013." *Rev. Boliv. de derecho,* No. 18, July 2014, ISSN: 2070-8157, p. 16-63, http://www.scielo.org.bo/pdf/rbd/n18/n18a02.pdf, p. 27 and 29.

[39] Eduardo PICAND ALBÓNICO, "Chile," *Encyclopedia of Private International Law,* Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, pp. 1959-1969, p. 1961.

[40] Article 1462: "Anything contravening Chilean public law is illicit in purpose. Thus, an undertaking to submit in Chile to a jurisdiction not recognized by Chilean law is null and void due to defect of purpose."

[41] *Ibidem,* p. 1959-1969, p. 1962. See case law cited therein.

[42] *Ibidem,* p. 1959-1969, p. 1963. The author cites Articles 1545 and 16(2) CC and Article 113 of the Commercial Code, among others. Article 1545: "Every legally concluded contract is a law for the contracting parties and cannot be invalidated except by their mutual consent or for legal cause." Article 16 CC: "Property located in Chile is subject to Chilean laws, even if its owners are foreigners and do not reside in Chile. This provision shall be without prejudice to the stipulations contained in contracts validly executed in a foreign country. However, the effects of contracts executed in a foreign country to be performed in Chile, shall be in accordance with Chilean laws." Article 113 C. Com.: "All acts concerning the performance of contracts entered into in a foreign country and performed in Chile are governed by Chilean law, in accordance with the provisions of the last paragraph of Article 16 of the Civil Code. Thus, the delivery and payment, the currency in which said payment is to be made, measures of all kinds, receipts and their form, liabilities triggered by non-performance or imperfect or tardy performance, and any other act relating to simple performance of the contract, shall be in accordance with the provisions of the laws of the Republic, unless the contracting parties have agreed otherwise."

[43] Adriana ZAPATA GIRALDO, "Colombia," *Encyclopedia of Private International Law,* Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 1981-1990, p. 1985.

Regarding the law applicable to commercial contracts, Article 869 of the Commercial Code provides that the execution of contracts entered into abroad but to be performed in Colombia is governed by Colombian law. It does not establish by which law other aspects of the contract are governed. As for doctrine, some interpret these provisions as peremptory, others suggest that a systematic analysis is possible, arguing that when opting for arbitration, the parties may choose the law applicable to the contract, and that the United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention), to which Colombia is a party, admits autonomy at Article 6.[44]

According to Dr. Madrid Martínez, there are no specific rules establishing the validity of choice-of-forum and choice-of-law provisions due to the precarious regulation of the issue. With regard to choice-of-court agreements, foreign judgments deciding on matters over which Colombian courts have exclusive jurisdiction are not recognized in Colombia (General Procedural Code of Colombia, Article 606).

In **Ecuador**, as reported in the response to the questionnaire, "in general, the parties' exercise of party autonomy is subject to a certain regulatory framework, which is sometimes more flexible, while at other times narrower. Article 318 of the Sánchez de Bustamante Code on Private International Law admits express or tacit choice but requires that at least one of the parties be a national of the contracting State to which the judge belongs or has his domicile therein, in the absence of local laws to the contrary. Several of its articles refer to the public policy framework."

The **United States of America** is not a party to any treaties on (judicial) jurisdiction, so common-law principles or state and federal rules apply. A unique feature of the U.S. jurisdictional system is that jurisdiction is subject to the constitutional limits of the "due process clause," the standard for which was established by the Supreme Court in *International Shoe Co. v. Washington*:[45] the defendant is required to have certain "minimum contacts" with the forum State, "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice."[46] To that end, the Supreme Court has required that the exercise of jurisdiction be "reasonable"*(Asahi Metal Industry Co v. Superior Court*, 480 U.S. 102, 112 (1987)),[47] and has instructed judges to evaluate the burden on the defendant, the interests of the forum State, the plaintiff's interest in obtaining "relief," the interest of the interstate judicial system in obtaining the most efficient dispute settlement, and the shared interest of several states in realizing fundamental substantive social policies.[48]

As mentioned above, the United States of America has accepted party autonomy in relation to forum selection since 1972, starting with the case of *The Bremen v. Zapata Off-Shore Co*.,[49] albeit within certain limitations. Judge Burger, in ruling in the case, held that the extension was valid unless the party opposing its enforcement could show that the extension was unfair, or invalid because of fraud or because one party had exploited its position of dominance over the other.[50] In the case, the extension clause had been freely agreed because, although the parties did not have the same

[44] *Ibidem*, p. 1981-1990, p. 1986-1987.
[45] 326 U.S. 310, 316 (1945).
[46] Linda SILBERMAN, "USA", *Encyclopedia of Private International Law*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 2637-2647, p. 2641; Cecilia FRESNEDO DE AGUIRRE, *La Autonomía de la Voluntad en la Contratación Internacional*, Montevideo, FCU, 1991, p. 22. See text of the ruling in Andreas F. LOWENFELD, *Conflict of Laws*, Cases and Material Series, Matthew Bender & Co., Inc., New York, 1986, p. 464-470.
[47] Cecilia FRESNEDO DE AGUIRRE, *La Autonomía de la Voluntad en la Contratación Internacional*, Montevideo, FCU, 1991, p. 23-24.
[48] Linda SILBERMAN, "USA", *Encyclopedia of Private International Law*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, pp. 2637-2647, p. 2641-2642
[49] United States Supreme Court 407 U.S.1 (1972). See full text of the ruling in Andreas F. LOWENFELD, *Conflict of Laws*, Cases and Material Series, Matthew Bender & Co., Inc., New York, 1986, p. 289–298. See Cecilia FRESNEDO DE AGUIRRE, *La autonomía de la voluntad en la contratación internacional (*Tesis *cum laude*), Montevideo, FCU, 1991, p. 25-27.
[50] Andreas F. LOWENFELD, *Conflict of Laws*, Cases and Material Series, Matthew Bender & Co., Inc., New York, 1986, p. 295.

economic power (Unterweser, a German company, was smaller than the U.S. company Zapata), the signing of the contract had been preceded by free and meaningful negotiations between the parties. Burger acknowledged, however, that party autonomy has limits and that courts should reject an extension clause that is unilaterally imposed by a powerful party on a weaker one. The Court accepted that the clause could be rendered null and void if the party seeking to avoid its effects could show that litigation in the contractual forum would be so difficult and inconvenient that it would effectively deprive it of its "day in court." The position expressed by the Court in *The Bremen v. Zapata Off-Shore Co.* was reiterated in 1974 in the case of *Scherk v. Alberto Culver Co.*[51]

Scoles & Hay state with respect to choice of forum provisions, the validity of which is regulated by the Supreme Court's decision in *The Bremen v. Zapata Off-Shore Co.*, that the term is valid as long as it is not a consumer contract, when it is the result of free negotiation between economically equal parties, when it is not affected by fraud or superior bargaining power, and when it is not shown that validating the clause would deprive a party of the opportunity to be heard and to bring its claim.[52]

The mere fact that a choice of law and/or choice of judge clause is inserted in an adhesion contract or other form of non-negotiated contract would not appear to be sufficient to consider them abusive and, therefore, void. However, the tendency in the United States would seem to be to require judges to conduct "scrutiny" to determine the clause's fairness. To make this determination, a court can consider whether the forum selection clause contains an inconvenient venue, which is one which has no real connection to the parties' contract, and/or is designed to discourage the party with no bargaining power from filing a lawsuit.[53]

Regarding the validity or otherwise of choice of forum (and choice of law) clauses in form contracts and similar contracts, there is case law in both directions, depending on the circumstances. Thus, for example, in *Future Industries of America v. Advanced UV Light* (2011),[54] the court upheld the validity of the choice of forum clause, as well as the choice of law clause, both of which favored the defendant.[55] However, courts are selective in whether or not to validate forum selection clauses. Thus, the same court that validated the clause in Future Industries invalidated it in *Global Seafood Inc. v. Bantry Bay* (2011),[56] due to the fact that the language used to draft it was too broad.[57]

It is also worth mentioning *Phillips v. Audio Active Ltd.* (2007),[58] which establishes a four-part "balance test": (1) whether the clause was reasonably communicated to the party resisting enforcement; (2) whether the clause is mandatory or permissive, i.e., to decide whether the parties are required to bring any dispute to the designated forum or simply permitted to do so; (3) whether the claims and parties involved in the suit are subject to the forum selection clause, in which sense, if the forum clause was communicated to the resisting party, has mandatory force and covers the claims and parties involved in the dispute, it is "presumptively"[59] enforceable; and (4) whether the resisting party has rebutted the presumption of enforceability by making a sufficiently strong showing that "enforcement would be unreasonable or unjust, or that the clause was invalid for such reasons as fraud or overreaching."[60]

---

[51] 417 U.S.506, 94 S. Ct. 2449 (1974). See text of the ruling in Andreas F. LOWENFELD, Conflict of Laws, Cases and Material Series, Matthew Bender & Co., Inc., New York, 1986, p. 312-320.

[52] Eugene F. SCOLES & Peter HAY, *Conflict of Laws*, Hornbook Series, St. Paul, Minn., West Publishing Co., 1982, p. 360.

[53] https://www.law.cornell.edu/wex/forum_selection_clause, referencing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), https://supreme.justia.com/cases/federal/us/499/585/

[54] https://casetext.com/case/future-industries-v-light-gmbh

[55] https://www.law.cornell.edu/wex/forum_selection_clause

[56] https://casetext.com/case/global-seafood-inc-v-bantry-bay-mussels-ltd

[57] https://www.law.cornell.edu/wex/forum_selection_clause

[58] https://casetext.com/case/phillips-v-audio-active

[59] Note that the expression "presumptively" does not imply certainty, but only presumption; i.e., that even if all of the above circumstances are met, the court may set aside the forum selection clause.

[60] https://www.law.cornell.edu/wex/forum_selection_clause

On the other hand, it should be clarified that this document focuses mainly on cases in which the defendant—basically claiming that they did not negotiate or consent to the clause—opposes the enforcement of the choice of forum clause by filing a plea of lack of jurisdiction, invoking the nullity or unenforceability of the clause or similar situations. Notwithstanding the foregoing, it should be noted that there are also cases in which the plaintiff submits its claim in a forum other than the one chosen in the clause, and the defendant intends to enforce that clause.[61]

As stated in the American Bar Association International Law Section's comments on the second progress report on the topic at hand, party autonomy is a generally recognized principle in the American legal tradition. This arises from U.C.C. § 1-302(a).[62] Adhesion contracts are not invalid *per se* and are usually honored. However, **the concept of** "**contractually weaker party" has been accepted in the United States in specific contexts, such as franchising[63] and auto dealerships.**[64] Party autonomy has limits, since certain obligations cannot be altered by means of an agreement between the parties. Thus provides U.C.C. § 1-302(b).[65] In addition, the exercise of free

[61] See with respect to this hypothesis *Atlantic Marine Construction Co. v. United States District Court for the Western District of Texas* (__ S.Ct. __, 2013 WL 6231157 (Dec. 3, 2013)), https://www.americanbar.org/groups/business_law/resources/business-law-today/2014-january/keeping-current-u-s-supreme-court/;
https://www.casebriefs.com/blog/law/civil-procedure/civil-procedure-keyed-to-friedenthal/atlantic-marine-construction-co-inc-v-u-s-district-court-for-the-western-district-of-texas/ **Note that in this case it was a contract freely negotiated by both parties, so it is outside the scope of analysis of this document**.

[62] U.C.C. § 1-302(a) ("Except as otherwise provided in subsection (b) or elsewhere in [the Uniform Commercial Code], the effect of provisions of [the Uniform Commercial Code] may be varied by agreement."). COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE SECOND PROGRESS REPORT ON "CONTRACTS BETWEEN MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY" OF THE ORGANIZATION OF AMERICAN STATES, July 15, 2022.

[63] On this subject, see, too Symeon C. SYMEONIDES, Codifying Choice of Law Around the World. An International Comparative Analysis, New York, Oxford University Press, 2014, p. 168.

[64] The following documents are cited in the COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE SECOND PROGRESS REPORT ON "CONTRACTS BETWEEN MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY" OF THE ORGANIZATION OF AMERICAN STATES (July 15, 2022): See, for example, Albert A. Foer, Abuse of Superior Bargaining Position (ASBP): What Can We Learn from Our Trading Partners? (Aug. 20, 2018), available at:
www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0054-d-0007-151038.pdf; Yee Wah Chin, What Role for Abuse of Superior Bargaining Position Laws?, N.Y.L.J. (July 6, 2016), available at https://ssrn.com/abstract=2806417. For a comparative law perspective, see, e.g., ICN TASK FORCE FOR ABUSE OF SUPERIOR BARGAINING POSITION, REPORT ON ABUSE OF SUPERIOR BARGAINING POSITION (2008) ("ICN ASBP Report"), available at https://centrocedec.files.wordpress.com/2015/07/abuse-of-superiorbargaining-position-2008.pdf; FABIANA DI PORTO & RUPPRECHT PODSZUN, ABUSIVE PRACTICES IN COMPETITION LAW (2018). See also, concerning the food-supply chain, Ioannis Lianos & Claudio Lombardi, Superior Bargaining Power and the Global Food Value Chain. The Wuthering Heights of Holistic Competition Law? (Jan. 1, 2016), available at https://ssrn.com/abstract=2773455; ANNA PISZCZ & ADAM JASSER, LEGISLATION COVERING BUSINESS-TO-BUSINESS UNFAIR TRADING PRACTICES IN THE FOOD SUPPLY CHAIN IN CENTRAL AND EASTERN EUROPEAN COUNTRIES (2019).

[65] U.C.C. § 1-302(b): ("The obligations of good faith, diligence, reasonableness, and care provided by [the
Uniform Commercial Code] may not be disclaimed by agreement."). COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE SECOND PROGRESS REPORT ON "CONTRACTS BETWEEN MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY" OF THE ORGANIZATION OF AMERICAN STATES, July 15, 2022.

will is sometimes limited by form requirements, including that it be in writing (U.C.C. § 2-201), or notoriety requirements (U.C.C. § 2-316(2), among others. However, such obligations and form requirements are quite limited, especially with respect to contracts between merchants, be they adhesion or negotiated contracts.

Choice of law rules and their limits, as well as conflict of law principles, vary from state to state. Most U.S. states, however, follow some version of the approach set forth in the Restatement (Second) of Conflict of Laws, more than any other. Under such an approach, courts generally enforce the parties' choice, especially when the chosen law merely establishes a predetermined term that the parties may have included in their written agreement. In that case, the chosen law operates as a mechanism to fill a gap.[66]

However, U.S. courts may refuse to enforce a choice of law provision when the chosen law goes beyond the role of filling a gap. Even then, the court would fail to enforce the term only in two limited circumstances: first, where there is no reasonable basis for the parties' choice; second, where the application of the chosen law would violate a fundamental public policy of another jurisdiction with a superior material interest in the dispute. Such circumstances are very limited.[67]

In other words, § 187 (2) of the Restatement (Second) of Conflict of Laws requires that the law chosen to govern the contract have a "substantive relationship" with the parties or the contract, or that there be some other reasonable basis for the parties' choice. Moreover, the parties' express choice of law will not be recognized as effective if the application of that law would be contrary to a fundamental policy of the State whose law would have been applicable on the basis of the Restatement (Second) of Conflict of Laws.[68]

---

[66] COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE SECOND PROGRESS REPORT ON "CONTRACTS BETWEEN MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY" OF THE ORGANIZATION OF AMERICAN STATES, July 15, 2022. See Restatement (Second) of Conflict of Laws § 187(1) (Am. L. Inst. 1981) ("The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.").

[67] COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE SECOND PROGRESS REPORT ON "CONTRACTS BETWEEN MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY" OF THE ORGANIZATION OF AMERICAN STATES, July 15, 2022. See Restatement (Second) of Conflict of Laws § 187(2) The Second Restatement provides in relevant part as follows: (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

[68] § 187. LAW OF THE STATE CHOSEN BY THE PARTIES. TEXT. (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue. (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of s 188, would be the state of the applicable law in the absence of an effective choice of law by the parties. (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law."

With respect to the **sale of goods**, Article 2 of the UCC also respects, in general, the right of the parties to choose the law that will govern their contract, provided that there is a reasonable relation to the chosen jurisdiction.[69] The reference to a "reasonable relation" and the apparent limitation it creates is sometimes called a "nexus requirement." Thus, if there is no nexus with the chosen jurisdiction, the choice will be invalid.[70] Some states such as New York and Florida have passed rules expressly rejecting the nexus requirement. Those states provide that the parties to a dispute for an amount not less than US$250,000 may choose the law of a state with which the contract has no reasonable relation.[71]

As for **choice of forum**, the approach is similar to that for the choice of law. In general, parties are free to choose the forum; some U.S. states limit such a choice to jurisdictions with which the parties or the transaction have some reasonable nexus or relation. In the context of international trade, some U.S. court decisions have suggested that the nexus requirement should not be given weight, but that the parties' choice should be respected, as, for example, in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972) mentioned above.[72]

The party autonomy in matters of choice of forum is not unlimited. In the American legal tradition, the doctrine of *forum non conveniens* may be the grounds for a court's refusal to enforce a choice of forum provision when the chosen forum is "seriously inconvenient." However, this is not very common in the field of contractual claims, unlike in tort cases.[73]

In sum, the report of the International Law Section of the American Bar Association (ILS-ABA) concludes by stating that contracting parties generally enjoy broad party autonomy—in both choice of law and choice of forum—in the U.S. legal tradition, although that autonomy is not

---

[69] COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE SECOND PROGRESS REPORT ON "CONTRACTS BETWEEN MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY" OF THE ORGANIZATION OF AMERICAN STATES, July 15, 2022. U.C.C. § 1-301(a) ("Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.").

[70] COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE SECOND PROGRESS REPORT ON "CONTRACTS BETWEEN MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY" OF THE ORGANIZATION OF AMERICAN STATES, July 15, 2022.

[71] COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE SECOND PROGRESS REPORT ON "CONTRACTS BETWEEN MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY" OF THE ORGANIZATION OF AMERICAN STATES, July 15, 2022. N.Y. Gen. Oblig. Law § 5-1401(1) (2018). Paragraph 1 of the New York statute provides in relevant part as follows: The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand [U.S.] dollars ... may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not such contract, agreement or undertaking bears a reasonable relation to this state. Id.; Fla. Stat. §§ 685.101.

[72] COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE SECOND PROGRESS REPORT ON "CONTRACTS BETWEEN MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY" OF THE ORGANIZATION OF AMERICAN STATES, July 15, 2022. See on the subject Cecilia FRESNEDO DE AGUIRRE, *La Autonomía de la Voluntad en la Contratación Internacional*, Montevideo, FCU, 1991, p. 25-26.

[73] COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE SECOND PROGRESS REPORT ON "CONTRACTS BETWEEN MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY" OF THE ORGANIZATION OF AMERICAN STATES, July 15, 2022. See Restatement (Second) of Conflict of Laws § 84 ("A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff.")

unlimited. This includes contracts between merchants, including adhesion contracts. Accordingly, U.S. courts will generally enforce the parties' agreements.[74]

In **Panama**, according to its Foreign Ministry, choice of law by the parties is permitted, although such an agreement must be in writing. However, this depends on the nature of the case, the domicile of the defendant, or the matter. "Jurisdiction cannot be arranged based on elements not outlined in the law."

In **Paraguay**, according to a report by its permanent mission to the OAS, Article 6 of Law 5393/2015 provides as follows: "Express or tacit choice. The choice of law, or any modification of the choice of law, must be made expressly or be clear from the provisions of the contract or the circumstances. An agreement between the parties to accord jurisdiction to a national court or arbitral tribunal to settle disputes relating to the contract is not in itself equivalent to a choice of applicable law." In turn, Article 7 states the following: "Formal validity of choice of law. The choice of law is not subject to any condition as to form, unless the parties expressly provide otherwise." Law 1879/2002 provides as follows in Article 10: "Form of the arbitration agreement. The arbitration agreement must be in writing. An agreement shall be deemed to be in writing when it is set forth in a document signed by the parties or in an exchange of letters or telegrams in which such agreement is recorded; or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract." Article 17 of Law 5393/2015 referring to policing and public policy laws is also mentioned.

In **Peru**, Article 2057 of the CC establishes the jurisdiction of the defendant's domicile as the general rule, without prejudice to a series of special rules for specific situations.[75] The express or tacit choice of forum by the parties is also allowed (Article 2058.3); Article 2059 establishes what is understood by tacit submission.[76] In the absence of conditions of validity established in the aforementioned rules, the doctrine has interpreted that there is considerable flexibility with respect to choice of forum agreements. There are only two scenarios in which the agreement would not be enforceable: in cases involving real estate located outside Peru (Article 2067.1 CC) and in cases involving issues related to personal status that do not have a sufficient connection with Peruvian territory (Article 2062.2 CC).[77]

Article 2060 of the Peruvian Civil Code establishes the conditions for the validity of the extension or choice of foreign court provision in matters of national jurisdiction: "The election of a foreign court or the extension of jurisdiction thereto in order to hear lawsuits arising from the exercise of actions of concerning property will be recognized, provided that they do not involve matters of exclusive Peruvian jurisdiction, nor constitute an abuse of law, nor are contrary to public policy in Peru."

---

[74] COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE SECOND PROGRESS REPORT ON "CONTRACTS BETWEEN MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY" OF THE ORGANIZATION OF AMERICAN STATES, July 15, 2022.

[75] https://img.lpderecho.pe/wp-content/uploads/2020/03/C%C3%B3digo-civil-03.2020-LP.pdf - Aurelio LÓPEZ-TARRUELLA MARTÍNEZ, "Peru," *Encyclopedia of Private International Law*, Cheltenham, UK - Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 2410-2420, p. 2411.

[76] "Article 2059.- A person tacitly submits to a jurisdiction when they appear in court without reservation. Procedural acts aimed at opposing such jurisdiction, or carried out under the threat or imposition of coercive measures on the person or on their rights or property, do not imply a submission or extension to a court."

[77] https://img.lpderecho.pe/wp-content/uploads/2020/03/C%C3%B3digo-civil-03.2020-LP.pdf - Aurelio LÓPEZ-TARRUELLA MARTÍNEZ, "Peru," *Encyclopedia of Private International Law*, Cheltenham, UK - Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 2410-2420, p. 2412.

In short, as López-Tarruella explains, in matters of contractual obligations, Peruvian courts have jurisdiction when the contract has been entered into in Peruvian territory *(forum celebrationis*), which is not a good solution, and when the contract must be performed in Peruvian territory (Article 2058.2). In general, the interpretation, based on Article 2095 CC on applicable law, is that it is the main obligation of the contract that must be performed in Peru. Peruvian courts will decline jurisdiction when the parties have chosen a foreign forum unless: (a) the case is within the exclusive jurisdiction of Peruvian courts; (b) the choice of forum is seen as an abuse of law, as could be the case of choice of forum provisions included in consumer contracts, in favor of the foreign domicile of the professional; and (c) when the choice of forum agreement contravenes public policy.[78]

Regarding applicable law, Article 2095 admits party autonomy, provided that it is express; tacit choice is not admitted. Pursuant to Article 2096, the limits to party autonomy are those established by the competent law in accordance with Article 2095; i.e., the law validly chosen by the parties or, failing that, the law of the place of performance of the contract. The courts must apply the mandatory rules of both the law chosen by the parties and Peruvian law.

In the **Dominican Republic**, Article 12 of Law No. 544-14 admits that the parties may expressly or tacitly choose Dominican courts, unless the case concerns matters of exclusive jurisdiction of Dominican courts (Articles 11 and 16). Regarding contractual obligations, Dominican courts have jurisdiction when such obligations are to be performed in the Dominican Republic (Article 16.1). Regarding choice-of-forum agreement, Article 18 states: "The choice-of-forum agreement is the one by which the parties decide to submit to the Dominican courts certain or all disputes that have arisen or may arise between them, with respect to a certain legal relation, whether contractual or non-contractual. Paragraph I. The choice agreement may take the form of a provision included in the contract or of a separate agreement. Paragraph II. The choice of forum agreement must be in writing. An agreement shall be deemed to be in writing when it is set forth in a document signed by the parties or in an exchange of letters, faxes, telegrams, e-mails, or other means of telecommunication that leave a record of the agreement and are accessible for subsequent consultation in electronic, optical or other support or is recorded in an exchange of statements of claim and defense in the process initiated in the Dominican Republic, in which the existence of the agreement is alleged by one party and not denied by the other." Article 21 enshrines the forum of necessity.

Regarding applicable law, Article 58 of Law No. 544-14 provides that the contract is governed by the law chosen by the parties. As to the requirements for the validity of the agreement, paragraph I of the above provision states: "The agreement of the parties on the choice of the applicable law must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the terms of the contract, considered as a whole."[79]

In **Uruguay**, the General Law on Private International Law, No. 19.920, establishes at Article 45, paragraph 4, that the choice-of-law agreement "must be expressly stated or unambiguously apparent from the contractual terms as a whole." Regarding the choice of forum, Article 60 provides that there must be a written agreement, and oversight must ensure "that the agreement was not obtained in a clearly abusive manner, having regard to the particular case."[80]

---

[78] https://img.lpderecho.pe/wp-content/uploads/2020/03/C%C3%B3digo-civil-03.2020-LP.pdf - Aurelio LÓPEZ-TARRUELLA MARTÍNEZ, "Peru," *Encyclopedia of Private International Law*, Cheltenham, UK - Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 2410-2420, p. 2414.

[79] On this subject, see José Carlos FERNÁNDEZ ROZAS, "Dominican Republic," *Encyclopedia of Private International Law*, Cheltenham, UK - Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 2036-2043.

[80] On the regulation of international contracts in the General Law on Private International Law (No. 19.920 of 2020) of Uruguay, see FRESNEDO DE AGUIRRE, Cecilia, *Derecho Internacional Privado. Parte Especial Civil y Comercial*, Volume III, 1st edition, Montevideo, FCU, 2022, pp. 256-325, in particular, in matters of applicable law and competent jurisdiction, p. 286, 294-305, 310-312.

The General Law on Private International Law thus reflects the recognition of party autonomy by Uruguayan doctrine on private international law; "it expresses, however, with full awareness of the need to set those limits to its exercise demanded by the protection of the international public policy of the forum State and of the fundamental political, economic and social interests of that same State, but also of the State of the *lex contractus* and of others with which there is a significant relation, interests protected by absolutely imperative rules (mandatory rules)."[81] In the opinion of this rapporteur, Professor Talice's assertion, which is fully acceptable, is of the utmost importance and should guide the actions of judges and others who enforce the law.[82]

b. Some doctrinal considerations

In order for the parties' choice of law and/or forum to be valid, there must first be an agreement between the two (or more) parties to the contract, which presupposes a bilateral agreement; a unilateral provision is not enough to speak of party autonomy.[83] Such has been the case for a long time. In his magnificent thesis on contracts, De Cores refers in this regard to the seventeenth century work of Petro de Oñate, who stated that "a contract must be a covenant; and we define covenant, according to the judgment of Labeon (...) to be an agreement of two or more persons on the same thing; from which it follows, evidently, that a contract cannot exist between less than two persons, and that **free consent requires at least two wills.**" He adds that "the free man must contract freely." Oñate, says de Cores, not only analyzes the absence of consent traditionally accepted in law, but "focuses on the question of the *degree of deliberation and freedom that is required for contractual consent to be understood as given.*[84]

For its part, the **Inter-American Juridical Committee's Guide on the Law Applicable to International Commercial Contracts in the Americas** is crystal clear when it states: "Party autonomy assumes that the parties have effectively exercised their desire to make that choice."[85] Both parties, not just one; it is unequivocal.[86]

In the same sense, Boggiano—traditionally a defender of party autonomy—recognizes: **"In a matter as important as the election by the parties of the applicable law due process of choice by *both* parties should be guaranteed."**[87]

---

[81] TALICE, Jorge, "La autonomía de la voluntad como principio de rango superior en el Derecho Internacional Privado Uruguayo," *Liber Amicorum en Homenaje al Profesor Dr. Didier Opertti Badán*, Montevideo, FCU (co-sponsored by the OAS), p. 527-562, p. 537.

[82] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in Comentarios a la nueva Ley General de Derecho Internacional Privado (Nº 19.920 del 17 de noviembre de 2020), Eduardo Vescovi (Coordinador), Montevideo, Ed. Idea, 2022, p. 219-266, p. 222.

[83] NYGH, Peter, *Autonomy in International Contracts*, Oxford, Clarendon Press, 1999, p. 46. Nygh states that there must be at least two restrictions for autonomy of will to operate: the first, that the contract be international, and the second, **that the choice be free and voluntary, because otherwise we cannot speak of an agreement**.

[84] DE CORES HELGUERA, Carlos, *Pasado, presente y futuro de la Teoría General del Contrato. Una mirada desde la tradición jesuítica*, Montevideo, Universidad Católica del Uruguay, 2015, p. 410 *et seq.* and p. 439, citing Oñate's work entitled *De contractibus*, ex typographia Francisci Caballi, Romae, 1646. Emphasis added.

[85] Inter-American Juridical Committee, *Guide on the Law Applicable to International Commercial Contracts in the Americas*, OEA/Ser.Q, ISBN 978-0-8270-6926-8, 2019, p. 137, No. 255.

[86] MILLS, Alex, *Party Autonomy in Private International Law*, Cambridge University Press, 2018, p. 19. In this sense, he writes: "Party Autonomy is concerned with the agreed wishes of the parties, as expressed in a contractual clause. It is not concerned with the presumed wishes or the expectations of the parties".

[87] BOGGIANO, Antonio, "International Standard Contracts, A Comparative Study," *Recueil des Cours*, 1981-I, p. 41 (emphasis in original), and BOGGIANO, Antonio, *Contratos internacionales*, Buenos Aires, Depalma, 1990.

In Uruguay, paragraph 4 of Article 45 of the General Law on Private International Law seeks to ensure with respect to the choice of law that a valid agreement has existed between both parties to the contract, that there was valid consent by both parties, which is clear from the grammatically literal tone of the provision, especially from the use of the plural in referring to the parties.[88]

c. Some conventional sources

Article 318 of the **Bustamante Code** admits express and tacit choice, but it requires that at least one of the parties be a national of or domiciled in the contracting State to which the judge belongs, in the absence of local laws to the contrary. Several of its articles refer to the public policy framework."

The **Inter-American Convention on the Law Applicable to International Contracts (Mexico City, 1994)** provides in Article 7 that the parties' agreement on choice of law "must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the terms of the contract, considered as a whole."

Article 3(c) of the **Convention on Choice of Court Agreements (The Hague, 2005)** provides that the agreement "must be concluded or documented: (i) in writing; or (ii) by any other means of communication which renders information accessible so as to be usable for subsequent reference." Note that subparagraph (a) defines "exclusive choice of court agreement" as "an agreement concluded by two or more parties," which in my view excludes terms drafted unilaterally by one of the parties and included in pre-printed general conditions. Subparagraph (d) reaffirms that interpretation, since it establishes the independence of the exclusive choice-of-court agreement forming part of a contract with respect to the other terms of the contract. Therefore, a party entering into a contract with general terms and conditions or the equivalent thereof should consent not only to the contract, but also to the choice-of-forum clause.

Article 4 of the **Buenos Aires Protocol on International Jurisdiction in Contractual Matters** requires that "the contracting parties have agreed to be bound in writing, provided that the agreement was not obtained in an abusive manner."

In sum: as mentioned above, this section (2) shows that, in general, the parties' exercise of party autonomy, with respect to both the forum and the law, is subject to a certain regulatory framework, and some of those found are more lax while others are more restrictive.

3) Are some categories of contracts and/or parties excluded from the scope of party autonomy? Do contracts excluded from the autonomy regime have special regulations?

In general, all systems—both autonomous and conventional—exclude some categories of international contracts from party autonomy regarding choice of forum and/or law, or establish limits in that regard.

a. Argentina

(i) <u>International consumer contracts</u>

Thus, in Argentina, party autonomy is excluded from international consumer contracts, both in terms of applicable law (Article 2651 of the CCCN) and jurisdiction (Article 2654 of the CCCN).[89] Such contracts have a specific regulatory regime in TITLE III of the CIVIL AND COMMERCIAL CODE (Articles 1092–1122).

---

[88] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in *Comentarios a la nueva Ley General de Derecho Internacional Privado (No. 19.920 del 17 de noviembre de 2020)*, Eduardo Vescovi (Coordinator), Montevideo, Ed. Idea, 2022, p. 219-266, p. 224.

[89] CIVIL AND COMMERCIAL CODE, ARTICLE 1094. Interpretation and normative priority. The rules governing consumer relations must be applied and interpreted in accordance with the principle of consumer protection and access to sustainable consumption.
In case of doubt about the interpretation of this Code or special laws, the interpretation most favorable to the consumer prevails.

(ii) International insurance contracts

In insurance matters, Article 57 of Law 17,418 expressly declares null and void any compromissory provisions included in policies.

Insurance contracts, even when the insured is a merchant, are excluded from party autonomy in Argentina, although there is no specific rule in that respect,[90] only the generic rule in Section 16 of the Insurance Law No. 17,418, which states: "The extension of jurisdiction within the country is admissible"; from this it could be inferred that it would not be valid outside the country. The report of the Ministry of Foreign Affairs added: "Insurance contracts, even when the insured is a merchant, are excluded from party autonomy in Argentina and by application of the Insurance Act, it is a consumer contract, regulating the relationship between insured and Insurer, since the insured becomes a "user or consumer of insurance."

(iii)International contracts for carriage of goods

The Report of the Argentine Representative to the OAS states: "Contracts for the carriage of goods by sea, air or land are excluded from party autonomy, although doctrinal interpretations have varied in that regard."[91]

In relation to **maritime transport** contracts,[92] the issue of jurisdiction clauses has been the subject of much debate, with the resulting fluctuations in case law. Prior to 1936 (the date of the case *Compte v. Ibarra*), the validity of such clauses was generally accepted,[93] although the issue was highly controversial. In *Frendelburg Schats y Cia. c/barca Scotland*," on November 5, 1870, the Court declared local jurisdiction in a claim by consignees against the vessel.[94] In the case*" Monté Pagano vs. Eriksen*, the Supreme Court accepted the validity of the jurisdiction clause, arguing that the only limit on party autonomy is the "prohibition to waive or invalidate on the basis of conventions laws in whose observance public policy and good customs have an interest," which those related to jurisdiction are not, even if they are of public interest.[95]

This problem was discussed at the Conference of the International Law Association in Buenos Aires in 1922, and the Argentine delegates' motion was approved, in the sense that terms

---

ARTICLE 1095. Interpretation of the consumer contract. The contract is interpreted in the most favorable sense for the consumer. Where there are doubts as to the scope of their obligation, the least burdensome one is adopted.

[90] According to the answer to the questionnaire by María Blanca Noodt Taquela and Report of the Argentine Ministry of Foreign Affairs.

[91] It should be noted, regarding the carrier's liability in passenger transport contracts, that Article 604 of Law 20.094 states: "The provisions of this law regulating the liability of the carrier with respect to the passenger and his baggage, apply to any contract of carriage of persons by water entered into in the Republic or whose performance begins or ends in an Argentine port, whether the vessel is national or foreign, or when the courts of the Republic are competent to hear the case." This is consistent with the passenger's status as a consumer in passenger transportation contracts, whether international or domestic.

[92] On this subject, see Cecilia FRESNEDO DE AGUIRRE, *La Autonomía de la Voluntad en la Contratación Internacional*, Montevideo, FCU, 1991, p. 56-64.

[93] José Domingo RAY, "La cláusula atributiva de jurisdicción," (Separata de Lecciones y Ensayos No.15), Bs.As., 1960, p. 4. E.g.: in the case *"G. Saenz v. Mala Real,*" the Federal Chamber of the Capital, on June 6, 1906, accepted the validity of the jurisdiction clause. However, the jurisprudence oscillated on this point (Cfr., Alberto C. CAPPAGLI, "A medio siglo de 'Compte c/Ibarra,'" in *Revista del Colegio de Abogados de Bs.As*., 1986, T. XLVI, No. 3, p. 88). Thus, the same tribunal ruled on June 8, 1916, declaring the competence of the Argentine courts in the case *"Regie Generale vs. Hamburgo Sudamerican*" (RAY, op.cit., p. 6). In the case *"Monte Pagano vs. Eriksen,*" the Supreme Court admitted the validity of the aforementioned clause, in a decision dated May 21, 1923. Recognizing the validity of jurisdiction clauses, Atilio MALVAGNI, *Contratos de Transporte por Agua*, Ed. De Palma, Bs. As., 1956, p. 651, cites several cases.

[94] CAPPAGLI, op.cit., p. 90.

[95] José Domingo RAY, "La cláusula atributiva de jurisdicción," (Separata de Lecciones y Ensayos No.15), Bs.As., 1960, op. cit., p. 7.

attributing jurisdiction should be considered invalid, a formula known as the "Buenos Aires Rule."[96] However, this gave rise to an interesting controversy between the Argentine and European delegates:[97]

The Argentine delegates Melo, Vico, Chedufau, and González Gowland supported the need to consider the jurisdiction clauses inserted in bills of lading as null and void, while admitting that the consignees of the cargo could always choose another jurisdiction (Chedufau's proposal, shared by Vico). What is inadmissible is the provision waiving the jurisdiction of the port of destination, even if it is express, and should be considered null and void, because such a clause in fact implies "an exoneration of the shippers' liability for the loss and damage of the goods."[98]

They were based, according to Melo, on the fact that **"the principle that contracts are the expression of the will of the parties is not what is real in this contract**. **The shipper always finds itself faced with a printed policy form, the same for all companies, and has no choice but to acquiesce to that form and accept it in order to be able to transport its goods**."[99]

Merlo adds: "In the face of such thefts," which, despite in reality being nothing more than that, escape the criminal sphere and are, moreover, covered by liability limitation clauses, which are based on the dangers of the sea, "the non-liability of the carriers is occurs in fact because the costs of the claim at the port of shipment, when it is raised there, turn out to be greater than the amount claimed. The shipper is thus resigned to loss time after time in such unfortunate experiences." "The only way to protect them effectively is to prevent the insertion of clauses that force them to take their claims to the port of shipment."[100]

The European delegates, including the German Professor Sieveking, the Norwegian delegate Friedericksen and the English delegate Temperley, were all against the Argentine proposal, arguing that it was a "dangerous" position,[101] which it undoubtedly was for their interests, since it was not a question in that instance of the supposed interests of international trade (abstract and indeterminate), but of the conflicting interests of the carriers, on the one hand, and of the cargo owners, on the other. It is up to the law to achieve a reasonable balance between the parties, based on criteria of justice and equity, since otherwise the terms favorable to the stronger party will weigh more heavily.

Dr. Melo states at a certain point in the discussion: "we (referring to the Argentine position) seek effective protection for the trade interests of the nations of the Americas that do not have ships to serve that trade. That is all we ask, and we base our position on what has been accepted in Europe as an expression of concordance between conflicting interests. Consignees of goods should not be bound by jurisdiction clauses that force them to seek justice in European ports."[102] This statement remains fully valid for those countries of the Americas, such as Uruguay, which do not have a merchant fleet.

This analysis of the 1922 Buenos Aires Conference of the International Law Association is useful here, because it shows what happens when aspects related to freedom of contracting are discussed from the point of view of those who have the possibility of influencing such contracting

---

[96] *Ibidem,* p. 9.
[97] *Ibidem,* p. 9-14.
[98] MELO, quoted in RAY, op.cit., p. 9, who adds: "I have had the opportunity to note the injustices to which the jurisdiction-attributing clause inserted in all bills of lading and policies of affreightment gives rise. This clause in fact implies an exoneration of the shippers' liability for the loss and damage of the goods."
[99] MERLO adds: "Goods arrive in the ports of the Americas and there are shortages, shortages which are almost always caused by a fact especially known to the shippers, namely theft and pilferage, which, according to statistics published in "The Times" in 1920, have increased in recent years by more than 70 percent to the alarm of underwriters, who on several occasions have met in international congresses to discuss the matter; and in the United States in 1921 the matter was brought before Congress, according to a study by Professor Huebuer."
[100] José Domingo RAY, "La cláusula atributiva de jurisdicción," (Separata de Lecciones y Ensayos No.15), Bs.As., 1960, p.11.
[101] *Ibidem,* p.10-13.
[102] *Ibidem,* p.13-14.

and those who do not. It makes clear the reasons (factual, not legal) why these positions in favor of and against party autonomy, respectively, are often adopted.

Since the *Compte v. Ibarra* in 1936, the trend has been against accepting the validity of choice of forum provisions and in favor of their nullity.[103]

It is essential to refer here to the reality denounced by the Supreme Court of Argentina in the eighth recital of the *Compte v. Ibarra* decision, that there is often "a poorly concealed contempt or distrust for the country's laws and judges." On that occasion the Court was referring to Argentina, but this is a frequent attitude towards developing countries. Thus, Juenger stated that litigating in the courts of developing countries involves risks against which one must protect oneself, including choice of law and choice of forum provisions—the former alone not being sufficient—in all contracts.[104]

The *Compte v. Ibarra* judgment, states Cappagli,[105] "together with solid legal arguments, clearly shows the position of our country in shipping and quite evidently approaches the issue from the point of view of economic policy." Malvagni considers that "the real basis of the Supreme Court's thesis is not legal, but political,"[106] and adds that "the political argument still stands, because although it is true that we currently have a significant merchant marine in terms of tonnage, we continue to be a country of shippers, given that foreign navies continue to serve more or less 85 percent of the country's foreign trade."[107] This reasoning not only remains fully valid in Argentina, because the grounds and reasons invoked there have not changed and, therefore, the jurisprudence continues along the same lines,[108] but is also equally valid for Uruguay and many other developing countries.

The Court also based its decision on the power of the National Congress to regulate maritime and land-based trade with foreign nations and between the country's provinces (Article 67 (12) of the Argentine Constitution), as well as on the fact that the laws governing that constitutional precept attribute exclusive and non-extendable jurisdiction to the domestic courts in matters of chartering and, in general, for any act or contract concerning shipping and maritime trade (Law 48, Article 2 (10) and Articles 2 and 12),[109] among other arguments.

The solution of the Supreme Court in the *Compte v. Ibarra* case was what Dr. Malvagni later reflected in his bill, which was the source of Argentina's Navigation Law (Law No. 20.094).

As to the law applicable to charter party and transport contracts, Article 603 of the above-mentioned Navigation Law,[110] in force since 1973, confirms the solution of the "law of the place

---

[103] *Ibidem*, p. 4 and CAPPAGLI, "A medio siglo de 'Compte c/Ibarra,'" in *Revista del Colegio de Abogados de Bs.As*., 1986, T. XLVI, No. 3, p. 88.

[104] Supreme Court Validation of Forum Selection Clauses, 19 Wayne L.Rev.49,50(1972), cited in Symposium - Conflicts of Law in Contracts between Developed and Developing Nations, in 11 *Georgia Journal of International and Comparative Law*, Fall '81, p. 698.

[105] CAPPAGLI, "A medio siglo de 'Compte c/Ibarra,'" in *Revista del Colegio de Abogados de Bs.As*., 1986, T. XLVI, No. 3, p. 89.

[106] Atilio MALVAGNI, *Contratos de Transporte por Agua*, Ed. De Palma, Bs. As., 1956, p. 653.

[107] *Ibidem*, 654.

[108] CAPPAGLI, "A medio siglo de 'Compte c/Ibarra,'" in *Revista del Colegio de Abogados de Bs.As*., 1986, T. XLVI, No. 3, p. 123) states that "the passage of half a century shows us that the principles laid down by our Supreme Court on November 16, 1936, when it ruled in the *Compte v. Ibarra* case, remain fully in force."

[109] CAPPAGLI, "A medio siglo de 'Compte c/Ibarra,'" in *Revista del Colegio de Abogados de Bs.As*., 1986, T. XLVI, No. 3, p. 93. In the same sense, Article 85 of the Uruguayan Constitution gives competence to the General Assembly to "establish the courts and arrange the administration of justice" and "to issue laws related to ... foreign and domestic commerce."

[110] Article 603 states: "The obligations inherent in a contract of full or partial charter for the transport of goods, or for the transport of general cargo or of separate packages in any vessel and, in general to any contract in which the carrier assumes the obligation to deliver the cargo at a destination, are governed by the law of the place where the obligations are to be performed."

where such contracts are to be performed." In this regard, Cappagli says:[111] "We have not found any judicial precedents on the subject, dictated on the basis of the current Navigation Law..., which makes us think that the question of the applicable law is no longer discussed, given the peacefulness of the solution" since *Compte v. Ibarra*.

Regarding the jurisdiction over contracts of carriage, the Malvagni Project established that it fell to the judges of the place where the contract is executed, i.e. where the goods are delivered. "The solution in favor of the courts of the country of the port of destination, as decided in *Compte v. Ibarra*, is today the generally accepted one,"[112] with the alternative that the plaintiff may opt for the courts of the country of the defendant's domicile, which is also the solution adopted by the aforementioned Navigation Law, Article 614.[113]

b. Bolivia

Bolivia, albeit not directly, excludes **consumer** contracts, which would be subject to Bolivian law (Law 453 of 2013), and **labor** contracts, which are subject to a system that provides strong worker protection (Article 4 of Supreme Decree 28699 of 2006, partially regulating the General Labor Law). In insurance matters, Article 1039 of the Commercial Code establishes limits on party autonomy: "Article 1039. (JURISDICTION AND COMPETENCE). The judge of the insured's domicile or of the place where the insured interests are located shall have jurisdiction and competence to hear legal actions arising from the insurance contract. Any convention to the contrary is null and void."[114]

As regards international **transportation** contracts, Dr. Canelas says that, although there is no specific exclusion in the Commercial Code, carriage contracts are subject to mandatory rules. The Commercial Code contains a section on carriage contracts (Articles 927 et seq.) that covers "commercial transportation by land, water, and air," and which, in accordance with Article 14.V of the Constitution, provides that "carriage may begin or end outside the Republic and carriers are subject to Bolivian laws and Bolivian courts for acts engaging their responsibility within the national territory."

c. Canada

In Canada, CCQ Article 3149 provides that **consumers** and **employees** who are residents of or domiciled in Quebec may bring their contractual claims in Quebec and shall not be bound by any choice-of-forum clause designating a foreign court or by any arbitration clause. With regard to choice-of-law clauses in consumer or employee contracts, there are provisions that allow for party autonomy, but they limit its effects if the chosen law is less protective than the law of the consumer's or employee's place of residence, in cases where the contract is linked to that residence (CCQ, Article 3117-18).

Similar rules exist for **insurance** contracts entered into by Quebec residents. Section 3119 of the CCQ provides that when the conditions set out in that section are met, the law of Quebec

---

[111] *Ibidem*, p. 113.

[112] *Ibidem*, p.114.

[113] Article 614 of the Navigation Law states: "The national courts have jurisdiction to hear lawsuits arising from contracts for the use of ships, when the respective obligations are to be fulfilled in the Republic, without prejudice to the option that the plaintiff has for the courts of the domicile of the defendant. In contracts of full or partial charter for the transport of goods, or for the transport of general cargo or separate packages in any vessel, or of persons and, in general, in any contract in which the carrier assumes the obligation to deliver the effects at destination, any provision that establishes any jurisdiction other than that of the Argentine courts is null and void."

[114] http://www.aidaargentina.com/wp-content/uploads/Bolivia-Codigo-Comercio.pdf (last accessed: January 12, 2023).

applies;[115] the *Insurance Act*, RSO 1990, c I.8, s. 123 provides that if the conditions set out in that section are met, the law of Ontario applies to the insurance contract.[116]

As to international contracts of **carriage**, the Marine Liability Act, SC 2001, c 6, s. 46. Section 46 establishes that when the Hamburg Rules are not applicable to a contract for the carriage of goods by water, the claimant may initiate judicial or arbitral proceedings in Canada if the conditions established in said section are met, unless the parties to the dispute have designated, by means of an agreement after the claim arises, the place where the claimant can institute judicial or arbitration proceedings (which would be what is called a *post litem* extension).[117]

d. Colombia

(i) International commercial agency contract

In Colombia, the only express exclusion to the party autonomy system deals with agency contracts: Article 1328 provides that commercial agency contracts to be performed in Colombia are subject to Colombian law and adds that "any stipulation to the contrary shall be deemed unwritten." This rule is considered internationally binding.

(ii) International labor contracts

In labor matters, although there is no exclusion as such, Article 2 of the Substantive Labor Code provides that "the present Code shall apply throughout the territory of the Republic with respect to all inhabitants, regardless of their nationality." This rule has been seen by the doctrine as a manifestation of the principle of absolute territoriality, but which does not, however, preclude the ability of parties to choose the law applicable to an employment contract in specific cases that have been highlighted by jurisprudence. Thus, according to Dr. Madrid Martínez, "choice of law can exist

---

[115] Section 3119 provides: "Notwithstanding any agreement to the contrary, a contract of insurance covering property or an interest situated in Québec, or that is subscribed in Québec by a person resident in Québec, is governed by the law of Québec if the policyholder applies for the insurance in Québec or the insurer signs or delivers the policy in Québec. Similarly, a contract of group insurance of persons is governed by the law of Québec where the participant has his residence in Québec at the time he becomes a participant. Any sum due under a contract of insurance governed by the law of Québec is payable in Québec.
See https://www.legisquebec.gouv.qc.ca/en/document/cs/CCQ-1991 (last accessed: January 12, 2023).

[116] "Contracts deemed made in Ontario. 123 Where the subject-matter of a contract of insurance is property in Ontario or an insurable interest of a person resident in Ontario, the contract of insurance, if signed, countersigned, issued or delivered in Ontario or committed to the post office or to any carrier, messenger or agent to be delivered or handed over to the insured or the insured's assign or agent in Ontario shall be deemed to evidence a contract made therein, and the contract shall be construed according to the law thereof, and all money payable under the contract shall be paid at the office of the chief officer or agent in Ontario of the insurer in lawful money of Canada. R.S.O. 1990, c. I.8, s. 123." See https://www.ontario.ca/laws/statute/90i08#BK115 (last accessed: January 12, 2023).

[117] "Claims not subject to Hamburg Rules. 46 (1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where (a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada; (b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or (c) the contract was made in Canada. Marginal note: Agreement to designate (2) Notwithstanding subsection (1), the parties to a contract referred to in that subsection may, after a claim arises under the contract, designate by agreement the place where the claimant may institute judicial or arbitral proceedings." See https://laws-lois.justice.gc.ca/eng/acts/m-0.7/page-3.html#docCont (Last accessed: January 12, 2023).

if 'the expression of the will of the contracting parties can be decisive in clarifying doubtful cases';[118] if Colombian law is not formally applicable but the parties decide that it is, when the contract has been partially performed in the territory;[119] when there is no contradiction or transgression of the rules, principles, and precepts of Colombian law in force;[120] when this is agreed on in good faith; and when the law chosen improves the conditions of workers, in accordance with the principle of favorability."

e. Cuba

In **Cuba, limitations** are placed on party autonomy through administrative authorizations and, in practice, the bodies in charge of approval demand the enforcement of Cuban law if it is the law applicable to the **insured or worker**, with the same applying as regards the competent forum.

Regarding **insurance**, DL 177 of 1997 establishes that for a contract to be approved, it must be authorized by the Superintendence of Insurance of Cuba. In addition to the above, there are exclusive venues with competence over foreign investments. Article 60 of the Law on Foreign Investment, No. 118 of 2014, stipulates, in principle, the competence of Cuban courts. Dr. Peña indicated that "Article 60 of Decree Law 263 of 2008, on insurance matters, provides that the competent authority to hear and settle any action arising from an insurance contract shall be that of the domicile of the insured, unless otherwise agreed."

Contracts for the **carriage of goods by sea** are also excluded from party autonomy with respect to competent forum.

f. Ecuador

In Ecuador, **employment** contracts, which are governed by Ecuadorian law, are excluded from party autonomy. Likewise, **consumer** contracts are governed by the Organic Law on Consumer Protection (Law No. 2000-21),[121] which contains material rules governing the various aspects of the contract and the obligations of the parties. Chapter VII deals with contractual protection, adhesion contracts, and prohibited provisions, among other issues.

The report received states: "In cases of international transportation there is only one contract, which is governed by the law that applies to it according to its nature. SPECIAL CONTRACTS IN MARITIME AND AIR TRADE. Chartering, if not governed by an adhesion contract, shall be governed by the law of the place of departure of the goods. The acts for the performance of the contract shall conform to the law of the place where they are performed.

In sum, contracts excluded from party autonomy have a specific regulatory regime: "depending on their nature, they are governed by the Labor Code, Civil Code, Commercial Code, according to jurisdiction and competence."

g. United States

In the United States, all or almost all states have **consumer protection laws, which can also be applied to merchants**.

Also excluded from the scope of party autonomy are **insurance contracts** (e.g., in Nevada), **franchise, distribution and agency contracts** (e.g., in Iowa), and **construction contracts** (e.g., in Louisiana).[122]

h. Panama

The report presented by the Panamanian Foreign Ministry, states that **adhesion contracts and the like, in which both parties are merchants, are excluded from the autonomous regime.**

---

[118] Corte Suprema de Justicia, Sala de Casación Penal, Case No. 10461, November 22, 1998.
[119] Corte Suprema de Justicia, Sala de Casación Penal, Case No. 15468, June 28, 2001.
[120] Corte Suprema de Justicia, Sala de Casación Penal, Case No. 10661, May 28, 1998.
[121] https://www.dpe.gob.ec/wp-content/dpetransparencia2012/literala/BaseLegalQueRigeLaInstitucion/LeyOrganicadelConsumidor.pdf
[122] Symeon C. SYMEONIDES, *Codifying Choice of Law Around the World. An International Comparative Analysis*, New York, Oxford University Press, 2014.

However, analysis of the Panamanian Code of Private International Law reveals some nuances, as shown below.

Law No. 61 of October 7, 2015, which replaces Law No. 7 of 2014 adopting the Code of Private International Law,[123] refers in Chapter V to "Forums of International Judicial Jurisdiction." Article 11 provides: "Panamanian courts have jurisdiction to hear actions arising from international legal relations when: (...) 4. They concern claims arising from international contracts as defined in Art. 68.5. It derives from an express or tacit extension, and the subject of the extension is of a dispositive nature." Article 68 states: "Contracts are deemed to be international when the parties are domiciled in different States and when: 1. The contract contains a benefit or obligation relating to services, goods, or capital that produce their effects in the territory of the Republic of Panama, or 2. The services, goods, or capital, or the legal cause thereof have been perfected in the territory of the Republic of Panama, or 3. The parties have included a provision conferring jurisdiction in favor of the Panamanian courts."

Article 69 admits party autonomy as the first criterion for determining the law applicable to international contracts.[124] Article 91 specifically governs international sales contracts in accordance with the general autonomy rule established in Art. 69. The same occurs in Article 92 with respect to international factoring contracts, Article 93 with respect to international loan contracts, Article 94 with respect to contracts for the assignment of receivables, and Article 95 with respect to international leasing contracts.

Article 72 adds: "Party autonomy shall be limited only by public policy and evasion of the law."

Regarding **insurance contracts**, Article 78 provides that they shall be governed by "the law of the registered office of the insurance company, unless otherwise agreed. Insureds who are nationals or domiciled in the Republic of Panama may file their claim before the Panamanian courts or before the courts of the insurance company's headquarters."

Article 82 provides: "**International agency and franchise contracts** are governed by party autonomy, but, in relation to indemnity for breach or non-performance of the contract, by the law of performance of the contract or that of greater protection to the concessionaire or franchisee at the option of the latter." And as to jurisdiction, Article 83 states: "Panamanian courts shall privately hear claims arising from agency and franchise contracts when such contracts are performed within the Republic of Panama."

The Code of Private International Law contains specific provisions on **"unequal contracts."** Article 84 defines them as follows: "Unequal contracts are understood to be contracts other than those between merchants in which the weaker party does not have the power to negotiate the key terms of such contracts. Key terms shall be understood to be those provisions that fix the price and establish the conditions of performance of the contract and dispute settlement. The imposition of one of these clauses shall be understood as proof of an unequal contract."

Article 84 seems to exclude contracts between merchants from the concept of "unequal contracts," even when there is a weaker party that does not have the power to negotiate the key provisions of such contracts, which expressly include the dispute resolution terms, i.e., the choice of law and judge.

However, Article 85 then states: "Employment contracts and consumer contracts are unequal contracts. Under no circumstances should this enumeration be interpreted as exhaustive." This last sentence enables the extension of the concept of unequal contracts to forms of contract other than the aforementioned employment contracts and consumer contracts. However, it is not clear whether that extension could cover contracts between merchants, given their exclusion in Article 84.

---

[123] (last accessed: January 12, 2023).

[124] The aforementioned rule states: "International contracts are subject to the law designated by the autonomous will of the parties. In the absence thereof, the judge shall apply the law of the place of performance of the obligation, and when this cannot be determined, the judge shall apply the law of the State having the closest connection with the international contract, and in default thereof, the law of the forum."

This does not mean that when one of the parties in an international commercial contract between two merchants lacks bargaining power, we are dealing with an "unequal" contract, according to the following definition of the term by the dictionary of the Real Academia Española: "That which is not equal; Diverse, variable (...)".[125]

Employment and **consumer** contracts are expressly regulated in Articles 86 to 90 of the Code of Private International Law.

Regarding **international trust contracts**, Article 96 provides: "The international trust contract shall be governed by the law chosen by the incorporator. The choice must be express or result from the provisions of the instrument creating the international trust or evidencing its existence, and be interpreted, where necessary, in the light of the circumstances of the case. When in the law chosen in application of the preceding paragraph the trust institution or the category of trust in question is not known, such choice shall have no effect and the law indicated in the following article shall apply."

The rule admits the choice of the applicable law made unilaterally by the incorporator of the trust, though within the regulatory framework established in Article 96 itself.

Article 98 excludes **international donation agreements** from the autonomy system and states that it "is governed by the law of the personal status of the donor."

i. Paraguay

In **Paraguay**, Law No. 5393/2015 governs only "the choice of law applicable in international contracts when each party acts in the exercise of its business or profession," and expressly excludes **consumer, labor, franchise, representation, agency and distribution contracts** (Article 1) from its scope. In addition, Article 3 states: "This Law does not apply to the determination of the law applicable to: (a) the capacity of natural persons; (b) arbitration agreements and choice of court agreements; (c) corporations or other associations and trusts; (e) insolvency proceedings; and (f) the question of whether a representative may bind, in relation to third parties, the person on behalf of whom they intend to act." For its part, Law 1879/2002 excludes from arbitration (and from the provisions on party autonomy) matters in which "the intervention of the Public Prosecutor's Office is required" (Article 2).

For their part, arbitration agreements have a specific regulatory regime in Law No. 1879/2002 on Arbitration and Mediation.

As for the other matters excluded from the scope of Law 5393/2015 (capacity of individuals, corporations, partnerships, associations and trusts, insolvency proceedings and issues referring to representatives), they are governed by specific regulations in the appropriate codes and laws.

j. Peru

In **Peru**, Luz Monge Talavera considers it "regrettable" that some contracts, such as consumer, insurance or labor contracts that she mentions by way of example and not in an exhaustive manner have not been exempted from the general autonomy regime, as they constitute contracts with a weaker party. The author adds that "within the perspective of Peruvian law, we are not dealing with an all-powerful or completely unlimited freedom. The choice will be valid as long as it is compatible with international public policy and moral conventions" (Article 2042 CC) (...) "The legislator thus seeks to erect lukewarm barriers to prevent abuse of law or evasion of the law." The choice of law by the parties must be express; tacit choice is not admitted.[126]

k. Mexico

In **Mexico**, contracts with **consumers** and contracts with **employees** are excluded. Dr. Albornoz stated that the "Federal Consumer Protection Law is declared 'a public-policy and social interest law, to be observed throughout the Republic' (Article 1). It establishes that in adhesion contracts, terms that 'oblige consumers to waive the protection of this law or subject them to the jurisdiction of foreign courts' shall not be deemed valid and shall be considered unwritten, for which

[125] dle.rae.es/desigual (last accessed: January 12, 2023).

[126] Luz MONGE TALAVERA, "Ley aplicable a los contratos internacionales en el derecho peruano", Actualidad Jurídica Iberoamericana Nº 14, February 2021, ISSN: 2386-4567, p. 944-969, 950-951.

reason they cannot be registered in the Public Registry of Adhesion Contracts (Article 90.VI).” With respect to labor contracts, the “Federal Labor Law is ‘of general observance throughout the Republic” (Article 1) and, in some cases, provides for its extraterritorial enforcement.[127] However, neither the Federal Consumer Protection Law nor the Federal Labor Law expressly refers to party autonomy in a conflictual sense.”

l. Uruguay

In **Uruguay**, **Article 50** of the General Law on Private International Law (Law No. 19.920 of 2020) excludes from the choice-of-law regime all contracts that constitute, modify, or transfer real rights; rental contracts on real estate located in Uruguay; contractual obligations that have as their object matters arising from the civil status of persons, inheritances, testaments, matrimonial regimes, and those arising from family relationships; obligations arising from securities and the sale, transfer, or marketing of goods in securities markets; contracts granted in consumer relations; individual employment contracts in a relationship of dependence (excluding remote work); and contracts for insurance and water transport. All of these are governed by the laws established by the legislature in the aforesaid Article 50. Similarly, Article 60.2 provides that an agreement of the parties determining international jurisdiction shall not be admissible in contracts relating to the matters referred to in Article 50.

Paragraph G states: “*Insurance contracts are governed by the Insurance Contracts Law No. 19,678 of October 26, 2018.*” This law has specific rules on applicable law and competent jurisdiction for insurance and reinsurance contracts.[128] Articles 117 to 119 of the above insurance law, referenced by the General Law on Private International Law, exclude party autonomy in conflict of laws and establish prescriptive legal solutions both in terms of applicable law and competent jurisdiction. It should be noted that the provisions referred to cover not only insurance contracts with consumers, but **also insurance contracts between merchants**, as is typically the case with international transportation, regardless of the mode. Consequently, insurance law prevents insurance companies from unilaterally establishing choice of law and forum clauses in the general conditions

[127] See Carlos Alberto Puig Hernández, “Las normas internacionales de la Ley Federal del Trabajo,” in Patricia Kurczyn Villalobos and Rafael Tena Suck (eds.), *Tema selectos de derecho laboral. Liber amicorum: homenaje a Hugo Ítalo Morales Saldaña*, Mexico City, Instituto de Investigaciones Jurídicas UNAM, 2014, p. 425-462.
https://www.rki.de/DE/Content/InfAZ/N/Neuartiges_Coronavirus/Transport/Archiv_Risikogebiete/Risikogebiete_aktuell_en.pdf?__blob=publicationFile.

[128] Law No. 19,678, Article 117 (Law applicable to insurance contracts), Article 117. Insurance contracts are governed by the law of the State of the place of performance of the service. The foregoing is understood as the place of domicile of the branch, agency, or office of the insurance company that has entered into the contract and issued the policy. This standard includes all transportation insurance, whether maritime, air, land or multimodal, as well as life insurance contracts, pensions, retirement insurance in all its varieties, civil liability insurance, surety bonds, export credit and the like.
Contracts of insurance for damage to real property or property accessory to real property are governed by the law of the State where the property covered by the insurance is located at the time of their conclusion. This standard includes fire, theft, explosion, lightning, storm, hail, glass, and similar insurance. Unless otherwise agreed, reinsurance contracts are governed by the law of the place where the ceded risk is located, this being understood as the place of domicile of the ceding insurer. In the event of several reinsurances on a scale, the place of risk location shall be deemed to be that of the domicile of the first reinsured insurer.
Article 118 (Competent jurisdiction over insurance contracts). The competent jurisdiction to hear disputes over insurance contracts shall be that of the State whose law is applicable to the contract in accordance with the provisions of Article 117 of this Law. The courts of the State of the domicile of the domicile of the branch, agency, or office of the insurance company that has entered into the contract and issued the policy shall also have jurisdiction, at the option of the plaintiff.
Article 119 (Peremptory character). The rules on legislative and judicial competence set out in this chapter are of a public policy nature and cannot be modified by the will of the parties, except as provided in the third paragraph of Article 117 of this law.

of their policies, thus protecting not only the consumer policyholder, but also the commercial policyholder from possible abuses. And the reason for this is very simple: no matter whether the insured is an individual consumer or a merchant (natural or legal person), in both cases the insured does not negotiate the general conditions of the insurance policy, but simply adheres or not; i.e., there is no express negotiation or agreement—or one that unequivocally flows from the contract clauses considered as a whole—between the parties regarding the choice of law and forum.[129]

The same happens in the case of transport documented in waybills, bills of lading or similar documents: it does not matter whether the person signing the adhesion contract is an individual consumer who has contracted the transport of goods purchased for his personal use, or whether he is a merchant who has contracted the transport of certain merchandise; in neither case does the individual or the merchant have the opportunity to negotiate or change or opt for other general conditions. That is why in such cases it is advisable to establish legal solutions that ensure a minimum of contractual balance and avoid abuse.[130]

Article 50 (H) states: "Contracts of carriage by water are governed by the Law on Commercial Maritime Law, No. 19,246 of August 15, 2014."[131] And it refers to the 1940 Treaty on the Law of International Commercial Navigation.[132] This in turn governs contracts of transport by water at Articles 25 to 27 and establishes that the applicable law and competent jurisdiction in such contracts is that of the State of the place of performance of the obligation, this being understood as "the port where the merchandise is unloaded or the persons are disembarked."[133] [134]

---

[129] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in Comentarios a la nueva Ley General de Derecho Internacional Privado (Nº 19.920 del 17 de noviembre de 2020), Eduardo Vescovi (Coordinador), Montevideo, Ed. Idea, 2022, p. 219-266, 243-244.

[130] *Ibidem*, p. 219-266, 243-244.

[131] Law Nº 19.246 "Art 7. Norms of Private International Law. 7.1. Where there is no binding treaty governing the applicable law and the competent jurisdiction in matters of maritime law, these shall be determined in accordance with the provisions of the Montevideo Treaty on the Law of International Commercial Navigation of 1940. 7.2. These provisions shall govern collision, assistance and salvage, particular or general average, contracts of adjustment, ship chartering, carriage of goods and persons, maritime insurance, ship mortgage, and all other matters of international maritime law. 7.3. (Post-litem extension) Whatever the competent jurisdiction according to the above rules, after the occurrence of the disputed event, the parties may agree to submit the dispute to another jurisdiction, either in court or arbitration."

[132] See, with respect to Article 7 of Law No. 19,246: FRESNEDO DE AGUIRRE, Cecilia, "Normas de Derecho Internacional Privado en las Leyes Nº 18.803 y 19.246 de Derecho Marítimo," *Reforma del Derecho Marítimo Uruguayo*, Asociación Uruguaya de Derecho Marítimo, Fernando Aguirre Ramírez (coordinator), Montevideo, FCU, 2015, p. 127-168.

[133] Treaty on the Law of International Commercial Navigation of 1940: "Article 25. contracts of charter party, and of transport of merchandise or persons, concerned with effecting such transportation between ports of one and the same State, are governed by the laws of that State, regardless of nationality of the vessel involved. Cognizance of actions which may arise falls under the jurisdiction of the judges or tribunals of the said State." "Article 26. When the contracts above mentioned are to be executed in one of the States, they are governed by the law in force in that State, regardless of the place where they were concluded or the nationality of the vessel. The phrase 'place of execution' refers to the port where the merchandise is unloaded or the persons are disembarked." "Article 27. In the cases specified in Article 26, the judges or tribunals of the place of execution, or, at the option of complainant, those of the defendant's domicile, shall be competent to try the respective actions; and any stipulation providing otherwise shall be null."

[134] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in Comentarios a la nueva Ley General de Derecho Internacional Privado (Nº 19.920 del 17 de noviembre de 2020), Eduardo Vescovi (Coordinador), Montevideo, Ed. Idea, 2022, p. 219-266, 245-246.

Contracts for land transportation of goods cannot be considered as falling under Article 45 of the General Law on Private International Law either. It is clear, based on the reality of this type of transport contracts documented in waybills and similar documents, that it is not possible to admit party will in them because the clauses—including those of law and judge—contained in the pre-printed general conditions reflect the will of only one of the parties to the contract: the carrier, not that of the shipper or of the consignee of the goods.[135]

Uruguay's rules on party autonomy also exclude contracts for the carriage of goods by air, by virtue of Article 62.2 of Law 19.920, which provides that the law repeals all provisions that are contrary to the law, but not the special rules in force on legal relations, with respect to matters not covered by the law.[136] Contracts for the land transportation (road or rail) of goods are also excluded by virtue of the same Article 62.2 of Law 19.920 with respect to those countries bound by the 1889 Montevideo Treaty on International Civil Law (Argentina, Paraguay, and Uruguay, with Bolivia, Colombia, and Peru) or the 1940 Montevideo Treaty on International Commercial Land Law (Argentina, Paraguay, and Uruguay). This is also true with respect to countries not bound by the aforesaid treaties, based on various doctrinal interpretations with legal grounds.[137]

In addition, **Article 19 of the Mining Code** of Uruguay excludes party autonomy in conflict of laws in all contracts related to mining activity, through a detailed and categorical formula: "Mining activities, whatever the modality thereof, and all controversies, claims, and petitions involving the same, shall be subject without exception to the legislation and jurisdiction of the Eastern Republic of Uruguay. Any agreement to the contrary is null and void. This provision is of a public policy nature and shall be included on a mandatory basis in all contracts granting mining rights" (Article 19, final paragraph). This is a mandatory rule.

As to the contracts excluded from the autonomy regime, Article 50 of Law 19.920 provides that:

- contracts that constitute, modify, or transfer real rights and lease contracts on real estate located in Uruguay are governed by Uruguayan law;

- contractual obligations that have as their object matters arising from the civil status of persons, inheritances, testaments, matrimonial regimes, and those arising from family relationships are governed by the law which regulates the respective category;

- obligations derived from securities are governed by the law of the place where they are contracted; and the form of drafts, endorsements, guarantees, interventions, acceptances, or protests of credit instruments is governed by the law of the place where each of those acts is carried out. If the instrument does not indicate the place where an obligation was contracted, it shall be governed by the law of the place where it is to be paid, and, if such place is not indicated, by the law of the place where it was issued.

- Obligations arising from the sale, transfer, or marketing of goods in the securities markets are governed by the law of the state where they are issued, without prejudice to the law chosen by the parties when it is recognized by the aforesaid law or to the provisions of special laws (Article 50, subparagraphs A to D).

---

[135] *Ibidem*, p. 219-266, p. 248; FRESNEDO DE AGUIRRE, Cecilia y LORENZO IDIARTE, Gonzalo A., *Texto y Contexto de la Ley General de Derecho Internacional Privado*, Montevideo, FCU, April 2021, pp. 211-213, among other works.

[136] In Uruguay, the international air transportation of goods is governed by the Warsaw system and, in particular, by the Montreal Convention of 1999 (Law No. 19.169), which sets material rules for all aspects of air cargo and passenger transportation and has specific rules on the competent jurisdiction, which are also of a public policy nature.

[137] FRESNEDO DE AGUIRRE, Cecilia, *Actualización. Curso de Derecho Internacional Privado, de acuerdo a la Ley General de Derecho Internacional Privado No. 19.920, November 2020*, Montevideo, FCU, 2021, and FRESNEDO DE AGUIRRE, Cecilia and LORENZO IDIARTE, Gonzalo A., *Texto y Contexto de la Ley General de Derecho Internacional Privado No. 19.920*, Montevideo, FCU, 2021, p. 206-213.

- "E. Contracts entered into in consumer relations are governed: (1) By the law of the state where the goods are purchased or the services are used by the consumer. (2) If the goods are purchased or the services are used in more than one country, or if the applicable law cannot be determined for other reasons, the law of the consumer's domicile shall apply. (3) In the case of contracts entered into at a distance, as well as when the contract has been preceded by offers or specific advertising in the consumer's domicile, the law of that state shall apply, provided that the consumer has given his consent thereto."

- "F. Individual employment contracts in a relationship of dependence—with the exception of those covering remote work—are governed by the law of the place where the work is performed or by the law of the domicile of the worker or by the law of the domicile of the employer, at the choice of the worker. Once it is determined, however, it shall govern all aspects of the employment relationship."

- The regime applicable to insurance contracts and to contracts for carriage by water is established by reference: "G. Insurance contracts are governed by the Insurance Contracts Law, No. 19.678 of October 26, 2018. H. Contracts for carriage by water are governed by the Law on Commercial Maritime Law, No. 19.246 of August 15, 2014."

As regards jurisdiction, Article 59 of Law 19.920 provides for special solutions for certain forms of contract (among other matters), in addition to the general solutions regarding jurisdiction provided for in Article 57:

- "D. In matters of consumer relations, if the consumer is the plaintiff provided that the contract was concluded in the Republic, or if the provision of the service or delivery of the goods that are the object of the consumer relationship took place in the Republic."

- "E. In matters of employment contracts, when the claimant is the worker and is domiciled in the Republic."

ll. Venezuela

Non-derogability of jurisdiction by agreement is established for **insurance** contracts and contracts for **carriage by sea,** i.e., the parties may not agree on a jurisdiction other than that established by law. In addition, international private law rules on contracts do not expressly provide for exclusions.

Therefore, as Dr. Madrid Martínez states, "with respect to the Mexico City Convention — which is applicable in Venezuelan law — it has been said that **it would have been desirable to exclude asymmetric contracts from its scope of application**,[138] especially in light of the success of the special rules for certain contracts contained in the Rome Convention then in force, a model followed by the inter-American codifier."[139] (Emphasis added)

Party autonomy rules are evidently designed, as Dr. Madrid Martínez affirms, "to regulate equal or freely discussed contracts." For this reason, when party autonomy in conflict of laws is not limited and is applicable to contracts concluded "between parties with different bargaining power," dangerous consequences arise. She further states that the only existing protection would be that "established by way of internationally peremptory norms." She concludes that while

[138] This was the proposal made by Siqueiros. See SIQUEIROS, José Luis, Ley aplicable en materia de contratación internacional, in: *Proyecto de Convención Interamericana sobre Ley Aplicable en Materia de Contratación Internacional*, OEA/Ser.Q./CJI/RES.II-6/9, Washington, D.C., OAS, 1991, p. 10, 18, and 37.

[139] "The Mexico City Convention does not contain an express regulation on the protection of consumers and employees. This safeguard falls within the prevalence given by the inter-American instrument to the mandatory forum provisions, according to the prevailing interpretation. Some have criticized the omission; however, it should be considered correct that the European model was not followed at the time, since its solution is unsatisfactory and has merited, in particular, suggestions for a specific regulation of those matters, as should also occur, eventually, in the Americas." See Moreno Rodríguez, José Antonio, La CIDIP-VII y el tema de la protección al consumidor. Algunas reflexiones en borrador para el foro virtual de expertos, in:
http://www.oas.org/DIL/esp/CIDIPVIIproteccionconsumidorjosemorenorodriguez.pdf

this tool is not ideal, "it would help to temper the rigors of party autonomy in conflict of laws in contracts with weak parties," which is compelling. However, the idea of this report is to complement this insufficient protection.

According to Dr. Madrid Martínez, "**labor matters** are the only area in which it would be possible to speak of a specific regime. Thus, for employment contracts, the Organic Law on Labor and Workers provides,[140] in Article 3, that the provisions of that law shall be applied 'to work performed or agreed upon in the country, and they shall in no circumstance be waivable or relaxable by special agreement.' Doctrine has assessed this provision as a rule of extension, so that if the work is performed or agreed on in Venezuela, Venezuelan law will necessarily apply and, outside those cases, the employment contract is exposed to the general solutions, including the fundamental one: party autonomy."

In **consumer contracts**, Dr. Madrid Martínez states that protection "is given by way of the internationally mandatory rules that would be imposed on the law applicable to the contract. However, this solution is currently somewhat complicated due to the repeal of consumer protection rules in domestic law. Thus, in 2014, the Law for the Defense of People in Access to Goods and Services[141] was repealed by the Organic Law on Fair Prices,[142] which merely establishes a catalogue of consumer rights in Article 7. In such cases, it will be up to the judge to build consumer protection on the basis of Article 7, and to attend to the constitutional mandate ignored by the legislature to guarantee the right of all persons to access quality goods and services, as well as to adequate and non-deceptive information on the content and characteristics of the products and services they consume, to freedom of choice, and to fair and decent treatment (Constitution, Article 117)."

Dr. Madrid Martínez highlights Article 7.10 of the Organic Law of Fair Prices, which recognizes the right of **consumers** to "protection in **adhesion contracts** that are disadvantageous or injurious to their rights or interests," because in some cases, choice-of-law or choice-of-forum clauses in adhesion contracts can injure consumers' rights or interests. In consumer contracts, this rule is the only protection in the system to ensure that consumers genuinely want to submit to arbitration."

Dr. Madrid Martínez adds: "The possibility of considering the arbitration agreement as an abusive clause that violates the rights of a legally weak consumer is present in the Norms for the Protection of Financial Service Users,[143] in that Article 25.d thereof rules null and void a clause that 'imposes the compulsory use of arbitration.'"

In sum, it emerges from the examination in this section (3) that all legal systems exclude party autonomy in relation to certain specific international contracts. They do so through provisions included in their laws on private international law (e.g., Article 50(G) and (H) of the LGDIPr No. 19.920 of Uruguay; Articles 2651 and 2654 of the Argentine CCCN; Article 98 of the Panamanian Code of Private International Law), or by means of special laws (for example, Article 57 of the Argentine Insurance Law (Law 17.418)).

From the different legal systems analyzed, we can extract that the international contracts excluded—totally or partially—from the autonomy regime are, depending on each jurisdiction, the following: international consumer contracts, employment contracts, contracts for the carriage of goods (passenger transportation contracts are consumer contracts), insurance contracts, agency contracts, franchise contracts, distribution contracts, construction contracts, agency contracts, trust contracts, donation contracts, and contracts relating to mining activities. It is interesting to highlight the Panamanian regulation of "unequal contracts," although its scope is not clear.

As for **other adhesion or similar contracts in which both parties are merchants**, I have not yet found any generic rules that deal with them and that establish under which conditions a

[140] Special Official Gazette No. 6076, May 7, 2012.
[141] Special Official Gazette No. 39.358, February 1, 2010.
[142] This Law, originally published in the Official Gazette No. 40.340 of January 23, 2014, was later amended and published in the Official Gazette No. 6156 of November 19, 2014. In 2015 the law was amended again, published in Special Official Gazette No. 6202 on November 8, 2015, and published again, with material corrections, in Official Gazette No. 40,787 of November 12, 2015.
[143] Special Official Gazette No. 40.809, December 14, 2015.

choice-of-forum and/or choice-of-law clause is admissible, and under which conditions it is not. It would seem that the key is to determine when the free consent of both parties exists, i.e., when there is a true agreement of wills in relation to the choice-of-forum and/or choice-of-law clause, which, as we have seen, is independent of the rest of the contract. Note that in general all the systems — both conventional and autonomous — refer to the agreement of the parties, in the plural, which in itself excludes unilateral clauses not consented to by the party adhering to the contract.

Finally, it should be stated that while the vast majority of legal systems admit party autonomy in matters of international contracts, none do so in an unrestricted and unlimited manner. All legal systems establish a more or less extensive regulatory framework as well as exclusions for some contracts.

4) Are international commercial adhesion contracts, of any kind, in which both parties are merchants (contracts with general conditions, form contracts, contracts with standard clauses, contracts with pre-stated clauses) subject to any specific regulations? If so, what are they? Do you think that the existing regulations are adequate, or would you suggest any amendments or additions?

As to the question of whether international commercial adhesion contracts—in all and any of their variants—in which both parties are merchants (contracts with general conditions, form contracts, contracts with standard clauses, with prearranged clauses) are subject to any special regulations, the situations vary in the different conventional and autonomous regimes, as well as in the instruments of soft law.

Although many of the rules discussed in this section refer to national or domestic adhesion contracts, they also apply, by analogy, to international adhesion contracts, since the problems of one sort can be transposed to those of the other.

Let us now look at the responses of the different countries to the question posed in this section. In **Argentina**, there are no special regulations governing international adhesion contracts.

In **Bolivia**, by contrast, Dr. Canelas explained that Article 817 of the Commercial Code refers to "**contracts by means of forms**," which entail some basic rules: "Contracts concluded by means of a form are governed by the following rules: (1) In the event of uncertainty, they shall be interpreted in the sense least favorable to the person who prepared the form, (2) Any waiver of rights shall only be valid if it is expressly, clearly, and specifically stated, and (3) Typed clauses shall take precedence over printed ones, even if the latter have not been left without effect."

Similarly, said Dr. Canelas, "Articles 455 et seq. of the Civil Code — on offer and acceptance in contracts — together with Article 815 of the Commercial Code — on contracts by correspondence — may prove useful in elucidating issues raised by contracts of this type."

Dr. Canelas also noted that specific regulations for transport and insurance that could be of relevance do exist, starting with the General Transport Law of 2011, and the Insurance Law, No. 1883 of 1998.

Article 109 of the 2011 General Transport Law stipulates that the insurance required from infrastructure operators and managers to cover the damages provided for in this law must be contracted in accordance with the applicable national legislation on the matter.

In **Canada**, Dr. Geneviève Saumier says that there are no specific regulations for adhesion contracts.

In **Colombia**, Dr. Claudia Madrid Martínez said, there was no regulation in Colombian private international law with respect to adhesion contracts. She explained that "the Colombian system — not only with regard to international contracting, but in general — needs a renewal, since its main rules, of a unilateral and statutory nature, are the same that came from the Chilean Civil Code drafted by Andrés Bello and that, with some minor amendments, was adopted by Colombia in 1873." She added: "With that in mind, the Antioquia International Private Law Institute is working on a **Draft General Law on International Private Law**, in which conflictual and procedural solutions have been included that **distinguish between freely discussed contracts and asymmetric contracts**, the latter being "understood as those in which the parties do not have equal or equivalent bargaining power" (Article 25). In such cases a choice of court is permitted provided that the choice

is made after the dispute has arisen (Article 25.3). Choice of law is also permitted; but, in the case of workers, as long as the chosen law does not deprive them "of the protection afforded by the mandatory provisions contained in the law applicable if no choice is made" (Article 82), and, in the case of consumers, "as long as this does not adversely affect the consumer's rights under the law of his domicile" (Article 83).

In **Ecuador**, it is reported that: "In view of the fact that in adhesion contracts there is a party that is in a better position, which predisposes the clauses and conditions, it **has been considered appropriate to protect the adherent** to avoid any type of abuse by the party that is in a better position. In adhesion contracts the parties are not in equal conditions, since one of them is in a better position; for this reason, the law grants special protections to the party that is in a position of inferiority, i.e., the adherent, to try to equalize the conditions of the parties"

In the **United States**, one of the ways in which the laws address the enforceability of an adhesion contract is by analyzing whether it is unconscionable from either a procedural or substantive standpoint. In such cases the court determines whether or not the contract or a part thereof should be enforced.[144]

In **Paraguay** such contracts have not been subject to special regulation. However, as stated in the Report of the Permanent Mission of Paraguay to the OAS, "**adhesion contracts**, i.e., those whose clauses have been unilaterally established by the supplier of goods or services, without the consumer—for the purposes of its conclusion—being able to discuss, alter, or materially modify its content, are governed by certain provisions in Law No. 1334/98 on consumer and user protection." For its part, Article 8 of Law 5393/2015 states: "Agreement on the choice of law. 1. To determine whether the parties agreed on a choice of law, the law allegedly chosen by the parties applies. 2. If the parties used standard or adhesion clauses indicating different laws, and under both laws the same

[144] COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE SECOND PROGRESS REPORT ON "CONTRACTS BETWEEN MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY" OF THE ORGANIZATION OF AMERICAN STATES, July 15, 2022: Section 208 of the Restatement (Second) of Contracts provides: "If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result." Comment (a) to that section of the Restatement explains: The determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect. Relevant factors include weaknesses in the contracting process like those involved in more specific rules as to contractual capacity, fraud, and other invalidating causes; the policy also overlaps with rules which render particular bargains or terms unenforceable on grounds of public policy. Policing against unconscionable contracts or terms has sometimes been accomplished "by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract." Uniform Commercial Code § 2-302 Comment 1. Particularly in the case of standardized agreements, the rule of this Section permits the court to pass directly on the unconscionability of the contract or clause rather than to avoid unconscionable results by interpretation. Compare § 211. Comment (d) specifically addresses unconscionability and weakness in the bargaining process: A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms. Factors which may contribute to a finding of unconscionability in the bargaining process include the following: belief by the stronger party that there is no reasonable probability that the weaker party will fully perform the contract; knowledge of the stronger party that the weaker party will be unable to receive substantial benefits from the contract; knowledge of the stronger party that the weaker party is unable reasonably to protect his interests by reason of physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement, or similar factors. See Uniform Consumer Credit Code § 6.111.

standard clauses prevail, the law indicated in those standard clauses applies; if under these laws different standard clauses prevail, or if none of the standard clauses prevail, then there will be no choice of law. 3. The law of the State in which a party has its place of business determines whether that party consented to the choice of law if, in light of the circumstances, it is not reasonable to determine this question under the law referred to in this article."

With respect to **representation, agency, and distribution contracts**, Esteban Burt explains that Law 194/93 of June 17, 1993, "regulates representation, agency, and distribution contracts for goods or services between foreign manufacturers and firms and individuals or legal entities in Paraguay. He adds that: "Clearly, most representation contracts are simple adhesion models, prepared by the foreign firm, very often with arbitrary clauses, such as that the relation was invariably governed by the laws of the foreign country and that only the judges of that place were competent; that the contractual relationship could be cancelled at discretion with three or fewer months' notice given by the foreign firm; and that in the case of termination, the representative was not entitled to any compensation, among others, both imaginative and harmful. Faced with such abuses, the protection of the Paraguayan courts became imperative when there were disputes over the validity of contracts, despite the fact that they established foreign law and jurisdiction."[145]

In addition to the substantive rules on the invalidity of unfair terms, the prohibition of the termination of contracts at short notice, and other provisions, Law 194/93 establishes that the parties must submit to the territorial jurisdiction of the judges of Paraguay or to the arbitration courts constituted in Paraguay. Burt adds: "For agency contracts performed in the territory of Paraguay, it is reasonable for the foreign manufacturer or multinational company to appear before our courts in the event of a dispute (C.P.C. 3; C.O.J. 17/19). It would be disproportionate and onerous to expect, for example, that a representative in Paraguay for French perfumes or Russian automobiles should have to litigate in the courts of Paris or Moscow to uphold his rights in the event of a dispute. It is not the intention of Law 194/93 to arbitrarily deprive the foreign firm of the benefits of its own jurisdiction. It provides, however, that when the business is located in our country; when economic benefits are obtained by trade through Paraguay, the foreign firm must be willing to litigate or arbitrate its dispute here."[146]

In **Venezuela**, Dr. Claudia Madrid Martínez indicated that "there is no special regulation, so they are subject to the general provisions of private international law on contractual matters."

Regarding treaty-based rules, it is worth mentioning that the **Bustamante Code** contains a special provision regarding adhesion contracts, which provides: "Aside from the rules already established and those which may be hereafter laid down for special cases, in contracts of accession, the law of the one proposing or preparing them is presumed to be accepted, in the absence of an expressed or implied consent."

5) In response to the question in the questionnaire about whether the existing regulations in the respective countries were adequate or whether they required any adjustments or additions, the following replies were received:

a. Responses to the questionnaire

Dr. José Manuel Canelas, from Bolivia, said that his country's existing legislation was insufficient, starting with the lack of a basic treatment of the rules of private international law.

In **Uruguay**, there are no special rules of private international law concerning contracts of adhesion or asymmetric or similar contracts. While mechanisms to prevent abuses in asymmetric contracts can be inferred from the existing regulatory framework (international public policy, evasion of the law, mandatory rules), this will always be subject to divergent doctrinal and jurisprudential views. I therefore believe that it would be highly desirable to have clear rules on this issue. This CJI document could be taken into account by domestic lawmakers for the purpose of their elaboration. In the meantime, it will be useful for judges and other legal operators.

---

[145] Esteban BURT, "Ley de representación, agencias y distribución", LLP 1999, p. 381, PY/DOC/381/2007.

[146] Esteban BURT, "Ley de representación, agencias y distribución", LLP 1999, p. 381, PY/DOC/381/2007.

Regarding **Venezuela**, **Dr. Claudia Madrid Martínez** stated that "the Venezuelan system is in line with modern standards for regulating the law applicable to freely discussed contracts, but **in the case of asymmetric contracts there is no adequate response**. In those cases, the admission of absolute party autonomy could bring more problems than benefits. Firstly, when one of the parties is structurally stronger or at least has the power to propose the content of the contract—thinking of a contract between equals—it is very likely that when choosing the applicable law, he will consider only his own interests and leave aside those of the other party. The Venezuelan system is silent not only in establishing special rules for asymmetric contracts, but also in excluding them from the scope of the general rules. This makes special regulations for asymmetric contracts all the more necessary."

b. Rapporteur's considerations

In this rapporteur's opinion, agreeing with Dr. Madrid Martínez, in general the conventional and autonomous rules of private international law that regulate international contracts are designed for "freely discussed" contracts: contracts in which both parties have equivalent, though not identical, bargaining power and enjoy the possibility of negotiating the terms of the contract. They are not designed for asymmetric, adhesion, or equivalent contracts, in which one party establishes the conditions and the other either adheres or not, without the possibility of negotiating or discussing the unilaterally pre-established terms.

Evidently, there is no party autonomy per se between the parties (plural) in the case of adhesion contracts because there is no agreement by two or more parties as to the choice of forum and/or applicable law. In such cases, as Dr. Madrid Martínez rightly states, "the admission of absolute autonomy of choice could bring more problems than benefits," but above all, it is unfair, because it allows the contractually stronger party — the one who has the power to establish the conditions of the contract, including the applicable law and competent judge — to unilaterally choose the forum and the law most convenient to his interests. That is the case in contracts between merchants, and not only in contracts with consumers, employees, and insured persons. Covering these situations does not seem to be at the basis of party autonomy or in the opinion of its advocates. On the contrary, it denaturalizes the very concept of party autonomy in conflict of laws, which is the power that a legislator—domestic or international—grants the parties to an international contract to choose the law that will govern their contract and/or the competent judge (or arbitrator) to hear any dispute arising in relation to said contract. It is, in essence, an agreement between two parties, not a unilateral decision.

What is observed in practical reality is that the party that unilaterally issues the general conditions in adhesion contracts chooses the law and the judge best suited to its interests, which are usually unfavorable for the other party. For example, for the person offering the good or service, the law with lower limits of liability and shorter limitation periods for filing claims, for example, will be more advantageous, while for the merchant acquiring the good or service under an adhesion contract, the exact opposite will be true, that is, a law that does not set liability limits or establishes them in high amounts, and that provides lengthy limitation periods.

As regards jurisdiction, the party offering the service or good should choose a forum close to its domicile or place of business and, at the same time, as far as possible from the domicile or place of business of its counterparty, in order to discourage possible claims. It is worth noting that, although in international contracts that involve huge amounts this may be irrelevant, in a large number of international contracts claims for breach—total or partial—of contract are for amounts that do not warrant litigation in faraway forums, which, for the merchant who purchased the good or service, results in denial of justice, plain and simple, as it is impossible for them in practice to have their day in court.

The non-existence—or at best the insufficiency—of rules that address the problem described, which is found in the majority of countries and treaty-based systems covered by this report, requires that it be regulated. This is the raison d'être of this document.

6) Are choice-of-law and/or choice-of-forum (judge or arbitrator) clauses unilaterally included in pre-printed general conditions, forms, or similar documents in international commercial contracts in which both parties are merchants valid under your country's laws?

Responses varied as to the question of whether choice-of-law and/or choice-of-forum (judge or arbitrator) clauses included unilaterally in pre-printed general conditions, forms, or similar documents in international commercial contracts in which both parties are merchants were valid or not under the countries' laws.

In **Canada**, Dr. Geneviève Saumier said that the Civil Code of Quebec contains substantive provisions that protect the party entering into the contract from external, illegible, incomprehensible, or abusive clauses (Articles 1435-37). However, because the rules on jurisdiction and choice of law only protect consumers, employees, and insured persons, the courts have not extended similar protection to parties entering into adhesion contracts different from the three referred to above.

In **Cuba**, said Dr. Peña Lorenzo, such clauses are admissible as valid. She further stated that their treatment does not vary depending on whether or not the general conditions are signed by the adhering party. As to the criteria for determining whether or not the valid consent of both parties exists, she argued that there is no difference with other contracts: account is taken of "the acceptance or, as the case may be, approval of the contract by the competent authority."

However, she added, although in theory international commercial contracts negotiated and consented to by both parties are treated in the same way as international commercial adhesion contracts and similar contracts, in which there was neither negotiation nor consent of the adherent to the choice of law and/or choice of judge or arbitrator clauses, "then for contracts for which there is a system of approval, administrative oversight addresses those situations, by proceeding with their approval or denial."

In **Ecuador**, it is reported that "in adhesion contracts formalism prevails, due to the protection that the law grants to the adherent. The different protections that the law establishes amount to an imposition of forms that must be observed. In the case of Ecuador, the Organic Law on Consumer Protection also imposes certain forms to adhesion contracts, turning them into formal contracts and excluding consensualism."

In the **United States of America**, Comment (b) to § 187 of the *Restatement (Second) on Conflict of Laws* states that a choice-of-law provision, like any other contractual provision, will not be given effect if the consent of one of the parties to its inclusion in the contract was obtained by improper means, such as misrepresentation, duress, or undue influence, or by mistake.[147] It adds that a factor which the forum may consider is whether the choice-of-law provision is contained in an "adhesion" contract, namely one that is drafted unilaterally by the dominant party and then presented on a "take-it-or-leave-it" basis to the weaker party who has no real opportunity to bargain about its terms. Such contracts are usually prepared in printed form, and frequently at least some of their provisions are in extremely small print. Choice-of-law provisions contained in such contracts are usually respected. Nevertheless, the forum will scrutinize such contracts with care and will refuse to apply any choice-of-law provision they may contain if to do so would result in substantial injustice to the adherent.[148]

---

[147] The original response reads as follows: "A choice-of-law provision, like any other contractual provision, will not be given effect if the consent of one of the parties to its inclusion in the contract was obtained by improper means, such as misrepresentation, duress, or undue influence, or by mistake". (http://www.kentlaw.edu/perritt/conflicts/rest187.html)

[148] The original response was as follows: "A choice-of-law provision, like any other contractual provision, will not be given effect if the consent of one of the parties to its inclusion in the contract was obtained by improper means, such as by misrepresentation, duress, or undue influence, or by mistake. Whether such consent was in fact obtained by improper means or by mistake will be determined by the forum in accordance with its own legal principles. A factor which the forum may consider is whether the choice-of-law provision is contained in an "adhesion" contract, namely one that is drafted unilaterally by the dominant party and then presented on a "take-it-or-leave-it" basis to the weaker party who has no real opportunity to bargain about its terms. Such contracts are usually prepared in printed form, and frequently at least some of their provisions are in extremely small

With respect to adhesion contracts, Scoles & Hay note that some courts and commentators view unilaterally drafted contracts imposed on one party by an economically stronger party as adhesion contracts, while others do so only when the contract contains unfair or unconscionable terms. The *Restatement (Second) on Conflict of Law*s opts for the first concept but does not invalidate purely on that basis (the fact of being an adhesion contract) the choice-of-law provision; it only does so when its application would be to the detriment of the weaker party. In other words, the mere fact of unequal bargaining power or lack of bargaining does not invalidate a choice-of-law provision; the provision must be to the detriment of the weaker party.[149] This is a very reasonable solution, which could serve as a source of inspiration for other countries in the region.

In **Panama**, according to a report from the Foreign Ministry of that country, the clauses for the choice of law and/or forum (judge or arbitrator) included unilaterally in pre-printed general conditions, forms or similar documents, in international commercial contracts to which both parties are merchants, are valid according to the law of their country, although there is no special rule in this regard. They invoke Article 195 of its Commercial Code.[150]

In **Paraguay**, according to a report by the Permanent Mission to the OAS, the aforesaid clauses are valid and fall within the scope of party autonomy, "as no express impediments are envisaged in the legal framework, other than the exclusions provided, such as those already referred to, especially those contained in Article 8 of Law 5393/2015." The report concludes by stating: "There is no special rule on choice-of-law and/or choice-of-forum clauses unilaterally included in pre-printed general conditions, forms, or similar documents in international commercial contracts in which both parties are merchants. Law No. 1334/98 provides rules on adhesion contracts (Article 24 et seq.) and Law No. 5393/2015 provides for choice of law situations in cases involving standard or adhesion clauses (Article 8)."

In response to the question of whether international commercial contracts negotiated and consented to by both parties are treated in the same way as international commercial adhesion contracts and similar contracts, in which there was neither negotiation nor consent of the adherent to the choice of law and/or choice of judge or arbitrator clauses, the report states: "No, they are not accorded the same treatment in the regulatory framework. Law No. 1334/1998 distinguishes the 'adhesion contract' as 'a contract whose clauses have been unilaterally established by the supplier of goods or services, without the consumer, in order to enter into it, being able to discuss, alter, or materially modify its content (article 4.h), and it contains special rules in chapter V." This statement is consistent with the definition of "consumer and user" provided in article 4.a of Law No. 1334: "For the purposes of this law, the following definitions shall apply: (a) CONSUMER AND USER: any natural or legal person, whether national or foreign, who acquires, uses, or enjoys goods or services of any nature as the final recipient," which does not distinguish whether the natural or legal person is a merchant or not. In this sense, Manuel Dos Santos Miranda states that Law No. 1334/1998 "does not create new types of contracts, but rather a protective regulatory framework that applies to commercial relations—if the conditions are met—and is integrated with the rules of common law."[151] However, he goes on to say that the law excludes intermediate consumer,

---

print. Common examples are tickets of various kinds and insurance policies. Choice-of-law provisions contained in such contracts are usually respected. Nevertheless, the forum will scrutinize such contracts with care and will refuse to apply any choice-of-law provision they may contain if to do so would result in substantial injustice to the adherent."
(http://www.kentlaw.edu/perritt/conflicts/rest187.html)

[149] Eugene F. SCOLES & Peter HAY, *Conflict of Laws*, Hornbook Series, St. Paul, Minn., West Publishing Co., 1982, p. 640-641.

[150] The aforementioned article states: "Article 195. Commercial contracts are not subject to special forms in order to be valid. Whatever the form and language in which they are concluded, the parties shall be bound in the manner and on the terms in which it appears that they intended to be bound. Contracts which, in accordance with this Code or special laws, must be summarized in a public deed or require forms or solemnities necessary for their effectiveness are excepted from this provision."

[151] Manuel DOS SANTOS MIRANDA, "La Protección Legal de los Consumidores en Paraguay," available at:

"understood as that whose product returns or re-enters the production and distribution chains and thus becomes part of the cost (and therefore of the final price) of a new good or service."

In **Venezuela**, said Dr. Claudia Madrid Martínez, the only reference to adhesion contracts, "which applies to both commercial contracts and contracts with a weaker party, concerns the imposition of an additional requirement for submission to arbitration. Thus, Article 6 of the Commercial Arbitration Law provides that in adhesion contracts, 'the statement of willingness to submit the contract to arbitration must be made **expressly and independently**.' This is because the legislature sought to ensure the parties are truly willing to go to arbitration and that such 'willingness' does not result from an imposition by the drafter of the contract." She added that this rule has been applied to choice-of-court agreements.

Dr. Claudia Madrid Martínez also noted: "The Venezuelan system does not exclude any contract from the scope of party autonomy, whether to choose a forum, arbitration, or the applicable law. The system applies irrespective of the bargaining power of the parties and whether or not there has been negotiation between them prior to the conclusion of the contract."

In this rapporteur's opinion, it is curious that in general no system—neither autonomous nor conventional—places any importance on the fact that the general conditions constitute a monopolistic offer and that therefore the adherent does not have the possibility of choosing other general conditions more in line with his interests. This is a clear element, which explains why merchants sometimes end up entering into asymmetric contracts, even if they do not agree with the general terms and conditions included in them, because they have no other choice. The only "option" would be not to enter into the contract, not to trade, which is obviously not a realistic option.

The general rule, applicable to all contracts as regards party autonomy in conflict of laws, should be that the legislature wants to make sure of the parties' true will—not only to go to arbitration, but also as to the choice of court and law—and to ensure that such "will" does not result from an imposition by the contract's drafter.

In general, the specialists consulted admitted that the existing legislation on this point is insufficient and should be amended, which supports the inclusion of this topic in the CJI's agenda and the preparation of this report.

B. Jurisprudence

7) Does your country's case law validate or not choice-of-law and/or choice-of-forum (judge or arbitrator) clauses included unilaterally in pre-printed general conditions, forms, or similar documents? On what basis (statutory, doctrinal, other)? In particular, does it validate them or not in the following circumstances:

- Insurance contracts, when the insured is a merchant?
- Contracts for the carriage of goods by sea?
- Contracts for the carriage of goods by air?
- Contracts for the carriage of goods by road or rail?
- Other adhesion or similar contracts in which both parties are merchants?

With respect to **Argentina**, the country's representative to the OAS mentions Judgment No. 59310/07 of June 24, 2011, National Court of Appeals for Commercial Matters, Federal Capital, Autonomous City of Buenos Aires, Judges: Uzal - Míguez. In re: "*Repoc SA V. Liebherr Argentina SA y Otros s/ Ordinario,*" and transcribes the following: "The fact that the extension is included in an agreement with prearranged clauses does not prima facie disqualify its effectiveness. It is common for pre-drafted general contracting clauses or standard general conditions of adhesion contracts to include, as in the present case, provisions on the extension of jurisdiction, which are often a reflection of the power relationship between the parties, where the contrast between the stipulator and the adhering party expresses that between the "contracting party in a stronger economic position" and the "contracting party in a position of weakness." It has been pointed out

https://www.pj.gov.py/ebook/monografias/nacional/civil/Manuel-Dos-Santos-M-Proteccion-Legal-Consumidores-Py.pdf, pp. 9 and 12 (last accessed: November 22, 2022).

that these manifestations of disparate bargaining power are often clearly expressed through the so-called "asymmetrical clauses," in which, for example, the choice of forum may even be exclusive to one of the parties, but the other may choose between several agreed courts. In this context, it can be concluded that, in order to determine the enforceability of a choice-of-court clause, it will be necessary to analyze whether, in order to admit it, there could be any obstacle or denial of substantial or procedural rights; whether there is any fraud, circumvention, or abuse of ignorance by some of the parties; or whether there is any violation of public policy principles (See, Uzal, María Elsa, "Soluciones Jurisdiccionales en el Ambito Internacional" in Highton E. and Areán B. "Código Procesal Civil y Comercial de la Nación, Análisis doctrinal y jurisprudencial," Ed. Hammurabi, 1st Ed., 2004, pp. 197/198). In other words, special care must be taken to determine whether there is an unreasonable disparity of bargaining power that would invalidate the consent, thereby undermining the existence of an effective agreement by the parties. Although the extension of jurisdiction, by means of a pre-determined clause, is an exceptional power, which must always be interpreted narrowly, only in case of doubt, it is necessary to follow the rule of non-extendability, otherwise it would be a serious blow to the rules of commerce in general."

Regarding **Bolivia**, José Manuel Canelas said that although no jurisprudence had been identified in this regard, he also noted "that the systematization and disclosure of case law in Bolivia is very deficient."

Regarding **Canada**, Geneviève Saumier says that such contracts are considered valid under the rules of the Quebec Civil Code, which allow party autonomy in conflict of laws (Article 3111 for choice of law and Article 3148 for choice of forum).

In **Cuba**, Taydit Peña stated that if the contract was accepted or approved at the proper time, the case law validates it.

Regarding **Colombia**, Claudia Madrid Martínez stated that no decisions in respect of such contracts had been located.

In **Ecuador**, reportedly "the Organic Consumer Defense Law grants general protection to all clauses in adhesion contracts (...); contractual protection benefits all parties that adhere to a contract. This contractual protection is definitely more advanced than that which protects a restricted group of people. Moreover, in certain systems legal persons are not allowed to benefit from this protection; however, in Ecuador contractual protection is also afforded to legal persons."

In **Panama**, in general, case law validates the choice of law and judge clauses.

In **Paraguay**, according to the report of the Permanent Mission to the OAS, what little case law there is "has validated choice-of-law and/or -forum clauses agreed by the parties on the basis of the party autonomy and freedom recognized as a general principle in the Civil Code and Law No. 5393/2015." Among others, the report mentions as examples of that case law a judgment of the Civil and Commercial Chamber of the **Supreme Court of Justice** of September 15, 2014 (case "Los Trigales S.A. v. ASUR Aseguradora del Sur S.A. de Seguros Generales s/ Indemnización de Daños y Perjuicios" (Decision and Judgment No. 833)), which states that **insurance regulations "...must be interpreted in favor of the insured, since it is well known that insurance contracts are normally adhesion contracts in which the insured is at a disadvantage, in that they must adhere in full to such contracts." It should be noted that in this case the insured was a corporation, i.e., it concerned an insurance contract between two merchants** (emphasis added).

The judgment of the Civil and Commercial Chamber of the **Supreme Court of Justice**, of March 21, 2013, "Reconstitution of Expte. Hans Werner Bentz c. Cartones Yaguareté S.A. s/ Incumplimiento de contrato" (Decision and Judgment No. 82), establishes that "... the choice of applicable law made by the parties in the contract is valid as the normative content of the agreement in question to regulate the rights of the parties, as long as it does not affect mandatory provisions of national law."

Regarding **Venezuela**, Claudia Madrid Martínez reported that no decisions had been located in respect of insurance contracts where the insured is a merchant.

With respect to contracts for the carriage of goods by sea, she indicated that under Article 6 of the Commercial Arbitration Law, "the Political-Administrative Chamber of the Supreme Court of Justice **has rejected, on several occasions, arbitration agreements contained in commercial**

adhesion contracts. Thus, by **deeming bills of lading to be adhesion contracts**, the Chamber has enforced Article 6 of the Commercial Arbitration Law, ruling that in them, the arbitration agreement 'must be made expressly and independently' in such a way that indicates it is the result of the will of all the contracting parties and not of only one of them. The Chamber has therefore ruled that Venezuelan courts have jurisdiction, disregarding the arbitration clause contained in the contract."

"In this regard, the Chamber has stated: 'from a simple reading of the above clause, it is clear that it does not refer to submission to any judicial authority, but to the submission of disputes about the aforementioned Bill of Lading to arbitration, understood in its restricted meaning, i.e., as a form of dispute resolution between parties, different from judicial proceedings... For this Chamber, the clause invoked by the defendant's representative for derogating the jurisdiction of the Venezuelan courts to hear the matter at hand is not valid, since, as has been said, it does not contain any agreement of the parties to submit knowledge of the actions arising from the aforesaid Bill of Lading, in an exclusive and excluding manner, to the jurisdictional bodies of London, England... Furthermore, this Chamber notes that the lawsuit has been filed against the captain of the vessel that transported the wheat and not against the commercial company that issued the Charter Contract to which these proceedings refer; and, for that reason, the alleged lack of jurisdiction is dismissed. So ordered."[152]

Madrid Martínez continues:

"This reasoning has been admitted by the Chamber itself to reject choice-of-court agreements. In this regard, the same Chamber has stated '**even though the private-law legislation does not make special reference to the conventional derogation of jurisdiction in adhesion contracts, it is only permissible through an agreement of wills that may be expressed independently from the set of pre-written rules but that is evidently the product of the will of all the contracting parties and not only of one of them**. In the present case, since bill of lading B/L No. GEOFF411 is an adhesion contract, Clause 25—which excludes the jurisdiction of any courts other than those of Rotterdam, the Netherlands—does not have sufficient force to derogate Venezuela's jurisdiction, as explained in the preceding paragraphs; for this reason, the argument of lack of jurisdiction put forward by the lower court in the decision under examination must be discarded'" (emphasis added).[153]

Claudia Madrid Martínez reported her inability to locate any decisions in respect of contracts for the carriage of goods by air or by land (road or rail).

In **Mexico**, María Mercedes Albornoz said that the "the information located refers to contracts with a consumer, i.e., with a weak party." She proceeded to transcribe an opinion (isolated thesis) taken from the web page of the Supreme Court of Justice of Mexico,[154] in which the Court found that "the agreement to extend territorial jurisdiction is not valid when it is included in an adhesion contract regulated by the federal consumer protection law, since it negates the right of access to justice." The Court states that "in accordance with the postulates set forth in Articles 1 and 17 of the Constitution and the provisions of Article 1 of the aforementioned federal law — specifically, in its first and last paragraphs — it is concluded that the reasons that led the First Chamber of the Supreme Court of Justice of the Nation, in jurisprudence thesis 1a./J. 1/2019 (10a.), title and subtitle: 'COMPETENCE BY EXPRESS SUBMISSION. The rule established in Article 1093 of the Commercial Code is not applicable to clauses stipulated in banking adhesion contracts when there is a violation of the guarantee of access to the administration of justice," and in the contradiction of thesis 192/2018 from which it derives, to establish that the express submission agreement in which the parties extend jurisdiction by reason of territory, **in adhesion contracts entered into with financial institutions, when the access to justice of the user public is denied**, **are clearly applicable to contracts for the provision of services regulated by the Federal Consumer Protection Law.** This is the case because both — financial contracts and contracts

[152] Supreme Court of Justice, Judgment No. 01359, June 13, 2000.
[153] Supreme Court of Justice, Judgment No. 01252, May 30, 2000.
[154] Supreme Court of Justice of the Nation, Digital Record: 2022770, Venue: Collegiate Circuit Courts, Tenth Epoch, Subject(s): Civil, Thesis: I.11o.C.134 C (10a.), Source: Gaceta del Semanario Judicial de la Federación, Book 84, March 2021, Vol. IV, p. 2758, Type: Isolated.

regulated by the Federal Consumer Protection Law — aim to safeguard the rights of users and consumers and to ensure fairness, certainty, and legal security in relations between suppliers and consumers. Now, based on the above premises, the extension of territorial jurisdiction agreed in a contract for the provision of services is not valid, in the case at hand, if the place where the trial must be held is different from the place where the consumer has his normal residence. This is the case because being an adhesion contract, its terms are not negotiable, and although the consumer may choose not to enter into it if he does not want to be bound by the stipulated terms, this would imply that he could not enjoy the service he wishes to hire; in turn, this shows that if the consumer wants to enjoy the service in question, he is forced to sign the adhesion contract in the terms in which it is drafted and with the conditions imposed by the service provider; and this shows that the consumer cannot oppose what was previously stipulated in the contract and, therefore, it has not been established that the consumer expressed his willingness to agree on the place where the trial deriving from the service contract would take place. Moreover, as the First Chamber of the Supreme Court of Justice of the Nation itself stated in the aforementioned jurisprudence, the territorial jurisdiction agreement is limited to the hypotheses set forth in Article 1093 of the Commercial Code; however, when an adhesion contract agrees on a place of trial different from the place where the consumer has his habitual residence, it is presumed that a financial burden is imposed on the consumer, which may hinder or nullify his right of access to justice. This is because what is being safeguarded is that the consumer not only has the necessary opportunity to learn of the lawsuit filed against him, but also has the possibility of being able to move to the court hearing the case, and this is achieved precisely when the court in question is in the same locality where the defendant consumer resides. Hence, the extension of territorial jurisdiction agreement is not valid when it is included in an adhesion contract regulated by the Federal Consumer Protection Law, since it negates the right of access to justice."

8) Do you consider that the way in which your country's courts resolve problems posed by international commercial adhesion contracts, whatever their kind, is adequate?

The Alternate Representative of Argentina to the OAS, Alexis Damián Elías Am, responded: "No, at present, the way in which the country's courts resolve problems posed by different kinds of international commercial adhesion contracts is not adequate due to the absence of domestic legislation, and the problem that the impact of treaty-based rules of sometimes poses."

Taydit Peña Lorenzo, from Cuba, said that the jurisprudential solutions in her country were not entirely adequate, since international commercial adhesion contracts are given "the common or general treatment of contracts, without taking into account their risks. In the absence of normative provisions that inform the possible solutions to those contracts, there is no notable jurisprudence that protects the possible abuses of dominant position that such contracts may entail in the international order."

Claudia Madrid Martínez stated, with respect to **Venezuela**, that "with so few decisions, limited to questions linked to choice-of court and -arbitration agreements and silent on choice-of-law clauses in adhesion contracts or asymmetric contracts, it is difficult to make an assessment of the case law on the subject."

Geneviève Saumier, from Canada, said that the way in which her country's case law resolves the problems raised by the various variants of international commercial adhesion contracts is not adequate, but that it would be a challenge to devise a special rule for adhesion contracts given the diversity of situations to be covered.

The Report of **Ecuador** states that "... by express provision of Article 43 of the Organic Law on Consumer Protection, abusive clauses are considered null and void and have no effect whatsoever. Obviously, it is necessary that a competent authority declare the clauses as abusive, which will cause them to be considered as not written. On the other hand, it could be debated if after one or more provisions are declared unfair the contract would remain in force. In that regard, the doctrine has interpreted this situation by stating that if after certain provisions are declared as abusive, the adhesion contract continues to have some meaning, it will subsist; but if, by virtue of the type of provisions that are declared abusive, the contract turns meaningless or unenforceable, it will become void."

The report prepared by the Permanent Mission of **Paraguay** to the OAS states "that the way in which the country's courts resolve problems posed by international adhesion contracts of whatever kind is adequate because it is based on the general principles governing such matters and the regulations in force."

C. Doctrine

9) What are the doctrinal approaches in your country regarding the issue addressed in this questionnaire?

As regards **Argentina**, Alexis Damián Elías Am reports the following:

"As a consequence of the provisions contained in Articles 1 and 2 of the CPCCN, agreements extending jurisdiction to arbitrators or judges acting abroad require the consent of the parties and are subject to three conditions of admissibility: (a) the matter is exclusively property-related in nature; (b) the matter is international in nature; (c) absence of exclusive Argentine jurisdiction or of a legal prohibition of extension.

"The predominant doctrinal and jurisprudential trend when evaluating provisions **extending international jurisdiction in adhesion contracts to predefined general conditions states that that circumstance alone does not invalidate the contractual consent unless the existence of an unreasonable disparity of bargaining power or an injury to the right of due process is established by placing the adherent in a situation in which access to justice is severely impeded;** it proposes that the conformity of parties according to the rules of modern contracting be evaluated bearing in mind the person of the adherent and the excusability of the error, for which the rule contained in Article 929 of the CCC is considered useful. However, if a flexible approach is adopted, the truth is that such solutions look at the issue from the point of view of Argentine law and have taken such contracts into account though not to the extent that they were concluded by consumers. Even though such circumstances would appear to be almost self-evident as a consequence of the structural weakness of the consumer, it cannot be overlooked that the validity or invalidity of the provision is ultimately subject to judicial assessment, with the consequent jurisdictional uncertainty and the impact on transaction costs that this entails.

Thus, it is understood that the system is organized as follows:

A. Discretionary contracts, in which there is full private autonomy.

B. Contracts entered into by adhesion or prearranged general provisions – Articles 984 to 989. The thing being regulated is not a general type of contract, but a modality of consent. The definition of an adhesion contract is contained in Article 984. **It provides a full treatment to the adhesion contract and differentiates it from consumer contracts; however, a consumer contract is identified as such when it is performed through adhesion to prearranged provisions.**

C. Consumer contracts: When it is proven that there is a consumer contract, Title III applies, whether or not it is entered into by adhesion, since the latter is a condition that does not in itself typify the contract. Articles 1092 to 1095 refer to the consumer relationship; Articles 1096 to 1099, to abusive practices; Articles 1100 to 1103, to information and advertising directed at consumers; Articles 1104 to 1116, to special modalities, and Articles 1117 to 1122, to abusive provisions.

In the words of Dr. Ricardo Lorenzetti: 'One of the great paradigms that this Code incorporates is to consider that a person can act in equal conditions with another, and also that there are others who are weaker and need greater protection; equality of equals and inequality with protection rules for those who are in positions of inferiority. For this reason, the consumer contract is defined (Articles 1092-1093), broad regulations on abusive practices are included (Articles 1096 et seq.), as are regulations on special modalities (Articles 1104 et seq.), including electronic means (Articles 1106 et seq.), and on abusive provisions (Articles 1117 et seq.).

In recent times it has become commonplace to speak of a novel constitutionalization of private law. It is a notion that, in a nutshell, represents a greater intervention of the State in private legal relations. Ricardo Lorenzetti, one of the central protagonists of this academic avant-garde, points out some characteristic features of this concept.

The closeness between the public and the private that Lorenzetti highlights, cannot imply anything other than greater official intervention in private contracting which, in turn, results in greater restriction of party autonomy. The contrast between state interference and the retreat of individualism underscores the relevance of this topic for our work. The aforementioned author reinforces the idea and argues that: The public sphere has been contractualized, since Rawls's analysis has been imposed in political law and the contractualist basis has been imposed in collective decisions.

The new Civil and Commercial Code shows that the intervention of the State in private contracting is much more active than in the past and, furthermore, this interference looks set to strengthen in the future. As **Julio César Rivera and Daniel Crovi** rightly point out: In the area of economic relations connected with property, **a certain degree of State intervention in favor of persons with less bargaining power, which results in the limitation of the party autonomy and in certain limits imposed on the exercise of subjective rights**.

As **Carolina IUD** concludes, although Argentine domestic law does not contain express rules governing extension-of-jurisdiction agreements in international contracts concluded by consumers, we understand that there are some mechanisms that can be interpreted as providing a framework of protection."

Regarding **Bolivia**, José Manuel Canelas Schutt said that the doctrine was very limited. He added that "the Bolivian lawyer Fernando Salazar Paredes wrote, with the support of Professor Nahid Cuomo, a draft law on private international law in 2004,[155] which has not yet been enacted, in which they proposed "**special solutions for contracts on real estate, the conveyance of goods and persons, consumers, and workers, with a particular focus on the protection of the weaker party**" (emphasis added).[156]

As regards **Canada**, Geneviève Saumier stated that doctrine existed with respect to the specific issue of party autonomy and international adhesion contracts between merchants.

As for **Cuba**, Taydit Peña Lorenzo indicated that "doctrine has raised and defended the **importance of adopting criteria that favor the weaker party in a legal relationship, in terms of both international jurisdiction and the applicable law**. Likewise, mechanisms have been adopted to avoid the validity of abusive clauses that such contracts may contain" (emphasis added).

The specialist added: "Cuba has exorbitant forums of jurisdiction (the Cuban nationality of one of the parties, Procedural Law, Article 2.1), and in practice, it is very protective of state economic interests. But the foregoing does not mean that this is reflected in the rules that make up private international law, although in practice there is, as it happens, a regime of administrative authorizations (for contracts in the framework of foreign investment, insurance, on goods of sensitive economic interest, in some employment contracts, etc.). In any case, we are far from the system of harmonization of domestic legislation and jurisprudence with the advances in these contracts that we would like to achieve."

In **Colombia**, said Claudia Madrid Martínez, "most of the doctrinal studies on international contracting are centered around the Vienna Convention. The analyses from the point of view of conflicts are focused on Articles 20 of the Civil Code and 869 and 1328 of the Commercial Code. With a few exceptions,[157] **the studies tend to emphasize freely discussed contracts**. It is possible that the lack of clarity regarding the admissibility of party autonomy in contractual matters has caused this vital analysis to be overlooked" (emphasis added).

---

[155] Explanatory memorandum to the bill, para. 6.23.

[156] Draft published in: Fernando Salazar Paredes, *Derecho Internacional Privado Boliviano* (CERID 2004), final chapter.

[157] Aristizábal-Johnson, Cristina, Falta de protección del consumidor internacional como situación que desfavorece el desarrollo económico global, in: *EAFIT Journal of International Law*, 2014, Vol. 5, 01, pp. 101 et seq.; Madrid Martínez, *La contratación internacional en el Derecho internacional privado colombiano*…, op. cit., p. 273-276 and p. 401-403.

The report from **Ecuador** states that "a review of the bibliography of the Library of the National Court of Justice has not found any specific doctrine on the subject of private contractual freedom to choose a forum or procedure."

Regarding **Mexico**, María Mercedes Albornoz reported that "it has not been possible to locate doctrine that specifically addresses the issue of conflict autonomy or the issue of party autonomy regarding choice of forum in international contracts between merchants when one of them is a weaker party."

In **Panama**, Gilberto Boutin recognizes that the solution of Art. 185 of the Bustamante Code, which establishes that "[a]side from the rules already established and those which may be hereafter laid down for special cases, in contracts of accession, the law of the one proposing or preparing them is presumed to be accepted," "is totally incongruous, since adhesion contracts allow no negotiation."[158]

This specialist adds, "The autonomy of the will of the parties is neither absolute nor a panacea, nor is it an entelechy. It pertains to the framework of exchange of goods, services, and capital within the international economic community." Regarding the limits to freedom of contract, he refers to policing laws, public policy, and evasion of the law.[159]

In **Paraguay**, Roberto Ruíz Díaz Labrano states: "The second part of Article 8 of Law No. 5393/15, regarding the determination of the existence of choice of law by the parties, refers to a situation in which the parties have used standard or adhesion provisions that indicate or lead to the application of different rights. Standard provisions are those prepared in advance by one of the parties for general and repeated use and which are used without negotiation with the other party. Standard provisions are generally governed by special regulations in national laws, which is why the reference or inclusion of such provisions may have different effects, depending on how they are considered in relation to different national laws."[160]

In **Peru**, Luz Monge Talavera states that "national legislation designed to regulate cross-border trade in the last century contains imperfections, "inaccuracies and omissions" that are not aligned with the demands of international trade, now globalized." She adds that "various aspects remain unanswered or subject to ambiguous provisions, whose interpretation is not always the most appropriate." Examples she mentions include the failure to designate the law applicable to contractual consent and the defects that could affect it, and the absence of a provision specifying the scope of the law governing the contract.[161]

The author adds that the principle of free will, which has been in force in Peru since 1984, "has sometimes led to the nullity of the provision." [162]

---

[158] Gilberto BOUTIN, *Derecho Internacional Privado*, 2nd edition, Panama, Edición Maître Boutin, 2006, p. 625.

[159] *Ibidem*, p. 640.

[160] See the how the transcribed paragraph is further developed by Roberto Ruiz Díaz Labrano in "Ley aplicable a los contratos internacionales en base a los Principios de La Haya. Ley Nº 5393/2015 de fecha 15 de enero de 2015 de la República del Paraguay", en *Contratos internacionales (entre la libertad de las partes y el control de los poderes públicos)*, Biblioteca de Derecho de la Globalización, (Directors: Diego P. Fernández Arroyo and José Antonio Moreno Rodríguez), p. 277-306.

[161] Luz MONGE TALAVERA, "Ley aplicable a los contratos internacionales en el derecho peruano", Actualidad Jurídica Iberoamericana Nº 14, febrero 2021, ISSN: 2386-4567, p. 944-969, 960.

[162] *Ibidem*, p. 944-969, p. 962

In **Uruguay**,[163] Macarena Fariña states:[164] "In the LGDIP, party autonomy in conflict of laws rests on the freedom and autonomy of the parties in the negotiation. In fact, **the agreement is valid, as long as both parties provide a real and effective consent without imposition.**"

[163] As for the doctrinal opinions of the rapporteur in this report, they are reflected and quoted herein. The following books, in chronological order, can be seen developed in the following works: FRESNEDO DE AGUIRRE, Cecilia, *La Autonomía de la Voluntad en la Contratación Internacional*, Montevideo, FCU, 1991; *Curso de Derecho Internacional Privado*, Tomo II, *Parte Especial*, Volumen 2, Montevideo, FCU, 2009; *Actualización. Curso de Derecho Internacional Privado, de acuerdo a la Ley General de Derecho Internacional Privado Nº 19.920 de noviembre 2020*, Montevideo, FCU, 2021; *Derecho Internacional Privado. Parte Especial Civil y Comercial*, Volume III, 1st edition, Montevideo, FCU, 2022; and the following doctrinal articles by the author: "Las cláusulas abusivas y la cláusula de jurisdicción en los contratos internacionales de adhesión," in *Revista Judicatura* (Official Publication of the Association of Judiciary Magistrates of Uruguay), December 1992, No. 32, p. 273-298, "La autonomía de la voluntad en la contratación internacional," in *Curso de Derecho Internacional, XXXI*, 2004, Inter-American Juridical Committee, OAS General Secretariat, p. 323-390; "La autonomía de la voluntad, ¿un cheque en blanco?," in *El derecho internacional privado en los procesos de integración regional,* Diego P. Fernández Arroyo / Juan José Obando Peralta (Coordinators), Jornadas de la ASADIP 2011, San José, Costa Rica, November 24-26, ASADIP / Editorial Jurídica Continental, 2011, p. 67-92; "La autonomía de la voluntad, ¿un cheque en blanco? Los Principios de la Conferencia de La Haya," in *Suplemento Especial de La Ley Uruguay* T. 146, Dec. 2012, p. 183-195 (updated version of "La autonomía de la voluntad, ¿un cheque en blanco?," in *El derecho internacional privado en los procesos de integración regional,* Diego P. Fernández Arroyo / Juan José Obando Peralta (Coordinators), Jornadas de la ASADIP 2011, San José, Costa Rica, November 24-26, ASADIP / Editorial Jurídica Continental, 2011, p. 67-92); "Party autonomy, a blank check?," in *Uniform Law Review-Revue de Droit Uniforme* 2012-4, p. 655-679 (updated version of "La autonomía de la voluntad, ¿un cheque en blanco?," in *El derecho internacional privado en los procesos de integración regional,* Diego P. Fernández Arroyo / Juan José Obando Peralta (Coordinators), Jornadas de la ASADIP 2011, San José, Costa Rica, November 24-26, ASADIP / Editorial Jurídica Continental, 2011, p. 67-92); "Determinación de la jurisdicción y acceso a la justicia", *El acceso a la justicia en el derecho internacional privado. Jornadas de la ASADIP 2015*, Asunción, CEDEP-ASADIP-Ed. Mizrachi&Pujol S.A., 2015, p. 147-174; "El acceso a la justicia como derecho humano a ser garantido por el derecho internacional privado," *El Derecho entre dos siglos. Estudios conmemorativos de los 25 años de la Facultad de Derecho de la Universidad Católica del Uruguay*, T. I, Montevideo, Universidad Católica del Uruguay, 2015, p. 113-156; "Public Policy: Common Principles in the American States," *Recueil des cours*, Vol. 379 (2016), Leiden/Boston, Brill Nijhoff, 2016, pp. 73-396, especially chapter V; "El rol del Derecho internacional privado como garante del derecho humano fundamental de acceso a la justiciar efectiva", *Hacia un Derecho Judicial Internacional. Ponencias al XLII Seminario Nacional de Derecho Internacional Privado y Comparado*, Escuela Judicial del Estado de México-AMEDIP, 2019. p. 3-35; "Private International Law in Uruguay: Present and Future," National, International, Transnational: *Harmonischer Dreiklang im Recht. Festschrift Fur Herbert Kronke Zum 70 Geburtstag*, Herausgegegeben von Christoph Benicke, Stefan Huber, Verlag Ernst und Werner Gieseking Bielefeld, 2020, p. 87-107; "Ley aplicable y jurisdicción competente en el transporte marítimo de mercaderías: problemas y soluciones," *Estudios de Derecho Marítimo*, UCAB 2020-2022, Gustavo Adolfo Omaña Parés (Coordinator), Caracas, 2022, p. 167-180; "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in *Comentarios a la nueva Ley General de Derecho Internacional Privado (No. 19.920 del 17 de noviembre de 2020)*, Eduardo Vescovi (Coordinator), Montevideo, Ed. Idea, 2022, p. 219-266. See also the opinions of OPERTTI BADÁN, Didier and FRESNEDO DE AGUIRRE, Cecilia, in *Contratos Comerciales Internacionales. Últimos desarrollos teórico-positivos en el ámbito internacional*, Montevideo, FCU, 1997, in "The latest trends in Latin American Law: The Uruguayan 2009 General Law on Private International Law," *Yearbook of Private International Law*, Volume 11 (2009), © sellier, European law publishers & The Swiss Institute of Comparative Law Yearbook of Private International Law, Printed in Germany, p. 305-337 and in "El derecho comercial internacional en la nueva Ley General de Derecho Internacional Privado de Uruguay. Una

For his part, Gonzalo Lorenzo expressed before the Constitution and Legislation Committee of the Senate, in 2020, that "in this bill (referring to the General Law on Private International Law (No. 19,920)) there is no provision that can be said to generate, promote or even avoid any type of abuse by one party over the other."[165]

In **Venezuela**, said Claudia Madrid Martínez, "The studies **tend to focus on freely discussed contracts and the admission of the principle of party autonomy**. Little has been written in Venezuela regarding asymmetric contracts, but a few works on labor matters[166] and consumer protection in private international law are notable.[167] In addition, **it has been admitted that by**

primera aproximación," in *¿Cómo se codifica hoy el derecho comercial internacional*, 1st volume of the Colección Biblioteca de Derecho Global, FERNÁNDEZ ARROYO, Diego P. and MORENO RODRÍGUEZ, José A. (Directors), p. 385-411, and in *Foro de Derecho Mercantil*, Revista Internacional No. 26, January-March 2010, Bogotá, Colombia, p. 7-39.

[164] FARIÑA, Macarena, "El nuevo régimen en materia de relaciones de consumo internacionales: ¿una solución suficiente para los reclamos de los cyberconsumidores?," in *Comentarios a la nueva Ley General de Derecho Internacional Privado (No. 19.920 del 17 de noviembre de 2020)*, Eduardo Vescovi (Coordinator), Montevideo, Ed. Idea, 2022, p. 367-390, p. 382.

[165] Shorthand version of the June 30, 2020 session of the Constitution and Legislation Committee of the Senate, attended on behalf of the LGDIPr Drafting Committee by Drs. D. Opertti and J. Talice, and representing IUDIPr, Drs. C. Fresnedo and G. Lorenzo. FRESNEDO DE AGUIRRE, Cecilia, *Actualización. Curso de Derecho Internacional Privado, de acuerdo a la Ley General de Derecho Internacional Privado Nº 19.920 de noviembre 2020*, Montevideo, FCU, 2021, p. 76.

[166] Carrasquero Stolk, Andrés, Trabajadores con elevado poder de negociación, in: Anuario de la Maestría en Derecho internacional privado y comparado, UCV, 2021, No. 3, p. 373 et seq.; Dos Santos, Olga María, Jurisdicción y el Proyecto de Ley Orgánica Procesal del Trabajo, in: *Liber Amicorum. Homenaje a la Obra Científica y Académica de la Profesora Tatiana B. de Maekelt*, Caracas, Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela, 2001, Tomo II, p. 3 ss.; Felce R., Carlos, La legislación aplicable al contrato internacional de trabajo en el Derecho del trabajo venezolano, bajo la Ley de Derecho Internacional Privado, in: *Libro Homenaje a Gonzalo Parra-Aranguren*, Caracas, Tribunal Supremo de Justicia, 2002, Addendum, p. 3 et seq.; Guerra, Víctor Hugo, Un caso práctico de "trabajador internacional" resuelto a través del Derecho Internacional Privado, in: *Libro Homenaje a Fernando Parra Aranguren*, Caracas, Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela, 2001, Tomo II, p. 345 et seq.; Pró-Rísquez, Juan Carlos, El trabajador internacional, la jurisdicción no exclusiva de los tribunales laborales venezolanos y el recurso de interpretación de la Ley Orgánica del Trabajo: Comentarios a recientes sentencias del Tribunal Supremo de Justicia, in: *Libro Homenaje a José Andrés Fuenmayor*, Caracas, Tribunal Supremo de Justicia, 2002, Vol. II. p. 151 ss.; Pró-Rísquez, Juan Carlos, Comentarios a una sentencia: El lugar de contratación como factor determinante para la aplicación de la legislación venezolana, in: *Revista de la Facultad de Ciencias Jurídicas y Políticas, Universidad Central de Venezuela*, 2007, No. 127, p. 214 et seq.

[167] Madrid Martínez, Claudia, *Medios electrónicos de pago en el comercio internacional*, Caracas, Revista Venezolana de Legislación y Jurisprudencia, 2018; Madrid Martínez, Claudia, Redes sociales y protección de usuarios. Una mirada desde el Derecho internacional privado venezolano, in: I. Canfora and A. Genovese (eds.) *Risoluzione alternativa delle controversie tra accesso alla giustizia e regolazione del mercato*, Bari, Edizioni Scientifiche Italiane, 2020, pp. 239 et seq.; Madrid Martínez, Claudia, and Luciane Klein Vieira, Los desafíos de la actuación internacional de la empresa: el impacto de las "buenas prácticas comerciales" en la protección del consumidor, in: P. All, J. Oviedo and E. Véscovi (Dir.), *La actividad internacional de la empresa* (Bogotá, Ibañez, ASADIP, 2017, p. 163 et seq.; Madrid Martínez, Claudia, La protección internacional del consumidor, o de como el Derecho internacional privado puede influir en la conducta de los proveedores de bienes y servicios, in: A. do Amaral Junior and L. Klein Vieira (eds.), *El Derecho internacional privado y sus desafíos en la actualidad*, Bogotá, Edit. Ibañez, 2016, p. 155 et seq.; Madrid Martínez, Claudia, Prestación de servicios bancarios a consumidores y determinación de la jurisdicción. Una mirada desde el sistema venezolano de derecho internacional privado, in: *Revista de Direito do Consumidor*, 2015, No. 97, p. 17 et seq.; Madrid Martínez, Claudia, Determinación del régimen de los contratos de consumo: perspectiva interamericana y venezolana, in: F. Esteban

including legal persons in the concept of consumer, a broader protection can be achieved with respect to non-bilaterally negotiated contracts, in the Venezuelan case, enhancing the enforcement of internationally mandatory rules that limit the wide field recognized to party autonomy.[168] Nothing has been said about adhesion contracts, beyond those that are entered into by consumers."

The **ILS-ABA report (USA)** contains the considerations summarized below:[169] it states that merchants per se are more sophisticated than the average consumer and employee, and, as such, are in a better position to protect themselves. Even in cases where the merchant has no bargaining power, the adhering merchant has the knowledge and sophistication inherent to its status as a merchant that allows it to take measures outside the contract to protect itself. The report mentions insurance, quality control measures, among others, as examples (it does not refer to any measure protecting against the consequences of a detrimental choice-of-law and/or -judge provision inserted in the general conditions of a non-negotiated adhesion contract). In addition, the report argues that the merchant chooses to engage in a commercial activity for economic gain, which, according to the report, distinguishes it from individual employees and consumers. **In the opinion of this rapporteur**, even accepting that this is the case, it does not seem to be sufficient reason to subject such a merchant to unfair unilateral provisions (especially in the matter of choice of law and judge) established by the person drafting the general conditions.

The ILS-ABA report (USA) adds that, if greater supervision of contracts between merchants were to be implemented, there could be unintended consequences, such as the party with greater bargaining power deciding not to contract, or raising prices, increasing costs for the adhering party. The adhering party may prefer to run the risk of the adhesion contract rather than the increased cost of increased contract supervision. **In the opinion of this rapporteur**, the risks described above do not justify allowing one of the parties to establish the law and the judge that best suits it, to the detriment of the interests of the adhering party, regardless of whether the latter is a merchant.

The ILS-ABA Report (USA) recognizes that it is true that a merchant without bargaining power will be forced to accept the terms set by the party with greater bargaining power on a "take it or leave it" basis. When the party with greater bargaining power exercises market dominance, this has monopolistic traits. However, the report argues that in such cases the issue is market dominance, rather than the adhesion contract. Focusing on the unequal bargaining power of the parties risks shifting the focus from the anti-trust nature to market dominance.[170]

In short: as the report rightly states, "[s]triking the right balance between ensuring party autonomy while also ensuring fairness is a challenging task." [171] However, this rapporteur and the CJI do not shirk such a challenging task.

---

de la Rosa (ed.), *La protección del consumidor en dos espacios de integración: Europa y América. Una perspectiva de Derecho de internacional, europeo y comparado*, Valencia, Tirant lo Blanch, REDPREA, 2015 p. 147 et seq.; Madrid Martínez, Claudia, *Responsabilidad civil derivada de la prestación de servicios. Aspectos internos e internacionales*, Caracas, Academia de Ciencias Políticas y Sociales, 2009.

[168] Madrid Martínez, Claudia, Los contratos no bilateralmente negociados: más allá del consumidor, in: D. Fernández and J.A. Moreno (eds.), *Contratos internacionales*, Buenos Aires, ASADIP, Department of International Law of the OAS Secretariat for Legal Affairs, 2016, p. 437 ff.

[169] COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE SECOND PROGRESS REPORT ON "CONTRACTS BETWEEN MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY" OF THE ORGANIZATION OF AMERICAN STATES, July 15, 2022.

[170] COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE SECOND PROGRESS REPORT ON "CONTRACTS BETWEEN MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY" OF THE ORGANIZATION OF AMERICAN STATES, July 15, 2022, p. 7.

[171] COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE SECOND PROGRESS REPORT ON "CONTRACTS BETWEEN

IV. OTHER LEGISLATIVE, JURISPRUDENTIAL AND DOCTRINAL CONSIDERATIONS RELEVANT TO THIS REPORT

1. Private international law cannot ignore the imperative of protecting the weaker party

Although the protection of the weaker party in private international law is a relatively recent topic, it has been the subject of important studies, including at the Hague Academy of International Law.[172]

Mohamed Salah, in his 2005 Hague Academy course, warned of "the traditional indifference of the principle of party autonomy to considerations linked to the weakness of one of the parties to the contract"[173] and "the impossibility for private international law, despite its neutrality, to ignore the imperative of protecting the weaker party."[174] The recommendations put forward in this report are intended to mitigate that indifference as much as possible and to assume the obligation to protect the contractually weaker party.

Mohamed Salah states that **in most contractual situations there is great disparity of power between the contracting parties (he does not distinguish whether or not they are merchants), and that to adhere to the law of autonomy is, in fact, to agree to validate the will of only one of the parties: the stronger one**. He adds that when one of the parties is in a position to dictate the choice of the applicable law and of the competent jurisdiction to the other party, and that choice is motivated by a desire to remove the contract from the provisions of protective law, the reference to party autonomy becomes a pure fiction. **"To ignore that reality is to agree to the consecration of the law of the strongest."** He adds that this also means taking to the extreme the idea that the function of private international law is exclusively a distributive function, indifferent to the content of the rules of substantive law.[175] The author then refers to the fact that private international law has a new function of regulating contractual relations that relativizes the famous distinction between the justice of private international law and the justice of substantive law.[176] He further adds that the evolution of positive private international law has shown, for example, through the rules of conflict with multiple points of connection, a great sensitivity to the imperatives of material justice.[177]

Mohamed Salah affirms that the determination of the scope of party autonomy and the various procedures for the protection of the weaker party must strike a balance in which the terms are clearly specified. He recognizes, however, that there is still a reluctance in private international law to consider the issue of weakness in relations between professionals.[178]

Mohamed Salah goes on to list various situations of weakness: those inherent to the person of one of the contracting parties for reasons of age or disability or those arising from the economic and social position of one of the contracting parties, from a state of ignorance, and from the position of need in which one party finds itself vis-à-vis the other. He then refers to adhesion contracts, the mass consumption society, and wage earners, among others.[179]

The author then goes on to analyze weaknesses in relations between professionals. He says that it is traditionally stated that the professional is expected to defend his interests, and therefore

---

MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY" OF THE ORGANIZATION OF AMERICAN STATES, July 15, 2022, p. 2.

[172] MOHAMED SALAH, MAHMOUD, "Loi d'autonomie et méthodes de protection de la partie faible en droit international privé », *Recueil des cours*, T. 315, 2005, p. 141-264, 151.

[173] *Ibidem*,, p. 141-264, 153.

[174] *Ibidem*,, p. 141-264, 164.

[175] *Ibidem*, p. 141-264, 164-165. The author quotes F. LECLERC, La protection de la partie faible dans les contrats internationaux. Étude de conflit des lois, Bruylant, Brussels, 1995, p. 127, when he states: « puisque l'autonomie de la volonté se fonde sur l'intérêt des parties, et plus spécialement celui de voir compétence donnée à la loi la plus avantageuse, n'est-il pas à craindre que la règle de conflit ne serve que les intérêts de celui qui dirige l'opération contractuelle, et que soient par conséquent négligés ceux de l'autre partie ? »

[176] *Ibidem*, p. 141-264, 165.

[177] *Ibidem*, p. 141-264, 177, citing Pocar.

[178] *Ibidem*, p. 141-264, 166.

[179] *Ibidem*, p. 141-264, 168-169.

cannot be considered a weaker party. However, he states that **whenever the application of the law of autonomy results in the expression of a unilateral will, private international law must provide specific protection**. Private international law, he adds, cannot only take into account the satisfaction of the needs of international trade, but must be able to echo other values worthy of protection.[180]

It is interesting to note that Mohamed Salah is in favor of retaining party autonomy, albeit with changes, within the system of protection of the weaker party. The key point is that intervention cannot result in the displacement of the rules that guarantee that party the protection that its position requires.[181] In the opinion of this rapporteur, the author is correct: it is not a matter of prohibiting party autonomy. But when one of the parties is faced with the impossibility of negotiating the choice-of-law and/or -judge provision chosen by the other party, it must be protected by private international law to the extent that the situation requires.

The author then analyzes in depth the protection of employees and consumers, among others, by private international law in European law. With respect to the **distribution contract**, he states that, from the perspective of better protecting the weaker party, it should be established as a principle that the parties' choice of a law applicable to the contract may not deprive the distributor of the protection afforded it by the mandatory provisions of the law of the State where it has its place of business.[182]

2. The need to regulate party autonomy

Giesela RÜHL,[183] states that the recognition and widespread acceptance enjoyed by party autonomy in European private international law is matched by an appreciation that the principle requires regulation, especially when it works to the detriment of one of the parties to the choice-of-law or choice-of-court agreement. The European legislator, therefore, has adopted a number of provisions specifically designed to protect so-called "weaker" parties from the dangers of party autonomy.[184] She mentions the consumer as a paradigmatic example of a weaker party, but adds that passengers, insurance policyholders, employees, franchisees and distributors are also considered as such in European private international law (Article 4 (1) (e) and (f), Articles 5, 7 and 8 of the Rome I Regulation). She adds that the levels of protection vary, and that, except with respect to consumers, there are no additional requirements relating to the way of contract formation that need to be met in order to trigger the rules on the protection of the weaker party.[185]

The author does not specifically refer to the abuses that may arise from choice-of-law and choice-of-court provisions inserted in international commercial contracts between merchants in which one of the parties lacks bargaining power.

With respect to choice of court, RÜHL points out that Articles 15 and 23 of the Brussels I Regulation limit the freedom to choose the competent jurisdiction to protect policyholders and employees.

Rühl states that the fact that consumers, passengers, employees, insurance policyholders and maintenance creditors are in need of protection seems undisputed by European doctrine. However, it is largely unclear why protection is afforded to these persons and not to others who in other

---

[180] *Ibidem*, p. 141-264, 173, 175-176.
[181] *Ibidem*, p. 141-264, 178.
[182] *Ibidem*, p. 141-264, 211.
[183] RÜHL, Giesela, "The Protection of Weaker Parties in the Private international law of the European Union: A Portrait of Inconsistency and Conceptual Truancy" (2014) 10 J Priv Int L, p. 335-358. Electronic copy available at: https://ssrn.com/abstract=2632115 (the digital version does not include page numbers).
[184] "The recognition and wide-spread acceptance enjoyed by party autonomy in European private international law is matched by an appreciation that the principle requires regulation, notably when it works to the detriment of one of the parties to the choice-of-law or choice-of-court agreement. The European legislator, therefore, has adopted a number of provisions specifically designed to protect so-called "weaker" parties from the dangers of party autonomy."
[185] "There are no additional requirements relating to the way of contract formation that need to be met in order to trigger the protection of the pertaining rules and regulations."

contexts are viewed as weaker parties, such as tenants, franchisees or commercial agents.[186] The author even wonders about the motives for protecting parties generally recognized as weaker. She identifies three reasons: asymmetric information or misinformation regarding the content and quality of the applicable law and the competent court. The contractually stronger party may use the information at its disposal to the detriment of the interests of the weaker party.

In the opinion of this rapporteur, in the contracts we are dealing with, which are international commercial contracts between two merchants, where both are supposed to be equally informed, but one of whom lacks bargaining power, especially with respect to provisions on choice of law and choice of court, the knowledge that the party whose only options are to adhere to the contract or not may have does not change its situation as the contractually weaker party.

As a second reason for protecting certain persons, Rühl highlights economic or social dependence, such as that of employees, which this can leave them feeling compelled to accept choice-of-law and choice-of-court terms in a cross-border employment contract which in fact are not to their benefit.[187]

A third reason the author mentions is the mental or intellectual disadvantage of one of the parties, although she refers, for these purposes, to tort liability and maintenance creditors, which are outside the scope of this study.

3. Ways to protect weaker parties

Giesela Rühl identifies at least three approaches to protecting the weaker party,[188] although, she says, unfortunately it is unclear why and when each of these approaches applies.[189]

The author points out that one way to protect weaker parties applied by European legislators is to exclude party autonomy, both with respect to choice of law and to choice of court. She notes the case of tort liability (Articles 6(4), 8(3) and 14(1) of the Rome II Regulation, among others).

Secondly, the author points out that one way to protect weaker parties is to substantially limit party autonomy, both with respect to choice of law and to choice of court. In terms of choice of law, this measure applies to passengers and some insurance policyholders. Article 5(2) of the Rome I Regulation provides that the parties to a contract of carriage of passengers may choose as the applicable law only that of the country where the passenger or the carrier has their habitual residence, where the carrier has their place of central administration, or where the place of departure or destination is situated.[190] As regards insurance policyholders, the limitations as to party autonomy and the restrictions on choice of applicable law are set out in Article 7(3) of the Rome I Regulation. Similar restrictions apply to the choice of court.

As to the third way of protecting the weaker party, RÜHL points to the analysis of the form of exercising party autonomy contained in Articles 6(2) (referring to consumers) and 8(1), (referring to individual employment contracts) of the Rome I Regulation. Basically, these rules limit the effect

---

[186] "That consumers, passengers, employees, insurance policy holders and maintenance creditors are in need of protection seems to be largely undisputed in European scholarship. However, it is largely unclear why protection is afforded to these persons – and not others who in other contexts are viewed as weaker parties, notably tenants, franchisees or commercial agents."

[187] "This can leave an employee feeling compelled to accept choice-of-law and choice-of-court terms in a cross-border employment contract which in fact are not to his benefit."

[188] RÜHL, Giesela, "The Protection of Weaker Parties in the Private international law of the European Union: A Portrait of Inconsistency and Conceptual Truancy" (2014) 10 J Priv Int L, p. 335-358. Electronic copy available at: https://ssrn.com/abstract=2632115 (the digital version does not include page numbers).

[189] "There are at least three different approaches that find application both in choice of law and in international civil procedure. Unfortunately, it remains unclear why and when each of these approaches applies."

[190] "According to Article 5(2) second sentence of the Rome I Regulation the parties to a carriage contract may choose as the applicable law only the law of the country where the passenger or the carrier has his habitual residence, where the carrier has his place of central administration or where the place of departure or arrival is situated."

of a choice of law by stipulating that a choice of law cannot deprive a consumer or employee of the protection of mandatory law which would be applicable in the absence of a choice of law.[191] The author also mentions other variants and nuances regarding this issue.

RÜHL concludes by pointing out that the way in which party autonomy is regulated in European private international law barely meets the requirements of transparency and consistency. She adds that in the future, European policymakers and academics should move away from individual regulations and address the underlying problems from a more holistic and principled perspective.[192]

As ways to protect weaker parties, Mohamed Salah refers to **policing rules** (of a mandatory nature) and public policy.[193] The question then arises as to how to combine the policing rule with the contract law. It states that in commercial contracts that necessitate protection of a weaker party, the policing rule is the only mechanism that can respond to this need. However, this would not always mean that the policing rule makes up completely for contract law. Coordination between the two areas of regulation seems justified in commercial contracts involving persons with unequal economic power, where the need for protection is highly variable depending on the aspects of the contractual relationship. Sometimes, only one of these aspects requires the intervention of mandatory law.[194]

As regards **foreign policing rules**, their enforcement is recognized in several private international law texts. Mohamed Salah mentions the following:[195]

- The Hague Convention of 14 March 1978 on the Law Applicable to Agency,[196] Article 16 of which provides for the possibility of giving effect to the mandatory rules "of any State with which the situation has a significant connection, if and in so far as, under the law of that State, those rules must be applied whatever the law specified by its choice of law rules."

- The 1980 Rome Convention on the Law Applicable to Contractual Obligations (consolidated version),[197] Article 7.1 of which provides: "When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application."

- The Inter-American Convention on the Law Applicable to International Contracts,[198] Article 11.2 of which provides: "It shall be up to the forum to decide when it applies the mandatory provisions of the law of another State with which the contract has close ties."

It should be added, regarding national or autonomous rules of private international law, that Article 6.2 of the **General Law on Private International Law (No. 19.920 of 2020) of Uruguay**[199]

---

[191] "It serves to protect consumers and employees and limits the effect of a choice of law by stipulating that a choice of law cannot deprive a consumer or employee of the protection of mandatory law which would be applicable in the absence of a choice of law."

[192] "For the future this finding requires us – European scholars and European lawmakers – to leave the confines of individual regulations and individual legal fields and to look at the underlying problems from a more principled, holistic perspective."

[193] MOHAMED SALAH, MAHMOUD, "Loi d'autonomie et méthodes de protection de la partie faible en droit international privé », *Recueil des cours*, T. 315, 2005, p. 141–264, 216 et seq.

[194] *Ibidem*, p. 141–264, 227–228.

[195] *Ibidem*, p. 141–264, 228–230.

[196] https://assets.hcch.net/docs/68b15c35-5a56-4f67-9eca-c4aa8a792aa0.pdf

[197] https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41998A0126(02):es:HTML

[198] https://www.oas.org/juridico/english/treaties/b-56.html

[199] https://www.impo.com.uy/bases/leyes/19920-2020#:~:text=(Separaci%C3%B3n%20conyugal%20y%20divorcio).,demandado%2C%20a%20opci%C3%B3n%20del%20actor.

establishes: "The court may, when it considers it pertinent, apply the mandatory provisions of the law of another State with which the case has a significant connection."

Other national laws on private international law provide for the enforcement of mandatory rules of third States in certain circumstances. Thus, for example, it is worth mentioning:

- Article 19 of the **Swiss Federal Act on Private International Law**
- Article 3079 of the **Civil Code of Quebec**

The doctrine adopts different positions.[200]

In Chapter IV of his course at The Hague Academy, Mohamed Salah states that since,[201] in general, the rules of private international law lead to the application of the law of autonomy, the problem is to know whether there are mechanisms that allow ex-post control over the use that the parties have made of that autonomy. He answers that the two possible mechanisms are the classic ones: **evasion of the law and the international public policy reservation**.

Horatia Muir Watt argues that state sovereignty and freedom of contract combine to produce a view of the relationship between law and market in the transnational economic sphere,[202] according to which the empowerment of private actors is subject to limits imposed by the general interest. She then refers to public policy and mandatory rules as a framework limiting that freedom.

In the opinion of this rapporteur, the extent to which these classic mechanisms are sufficient to protect contractually weaker merchants will depend on their interpretation and application by the courts. The recommendations on possible best practices contained in this document are therefore of undeniable practical importance.

4. Laws on abuse of superior bargaining position

These laws, **Yee Wah Chin** points out, prohibit a party to a trade agreement, which has superior bargaining power to the other party, from engaging in activities considered unfair trade practices. Several European and Asian countries have such laws (France, Germany, Japan, South Korea, etc.). The United States, by contrast, does not have a federal law that governs unfair trade practices in general. The closest it has are the *Lanham Act* (§ 43, 15 USC § 1125) and the Federal Trade Commission Act (§5, 15 USC §45). These laws basically refer to injury arising from misleading advertising, such as injury to commercial reputation, among others. However, some U.S. states do have unfair competition laws.[203] These are, in general, antitrust laws, which do not specifically have to do with the issues addressed in this report, which are, in particular, those arising from the unilateral inclusion of choice-of-law and/or choice-of-court provisions in commercial adhesion contracts in which both parties are merchants.

Notwithstanding the foregoing, in addition to the general laws referred to above, many States have specific laws that reflect over superior bargaining positions, such as those relating to **automobile dealerships**, and **franchise** relationships, the two areas where protection regulations are most commonly found in U.S. states.[204] Yee Wah Chin cites California's Franchise Investment

---

[200] MOHAMED SALAH, MAHMOUD, "Loi d'autonomie et méthodes de protection de la partie faible en droit international privé », *Recueil des cours*, T. 315, 2005, p. 141–264, 231 et seq.

[201] *Ibidem*, p. 141–264, 250 et seq.

[202] Horatia MUIR WATT, "Party autonomy," *Encyclopedia of Private International Law*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 2, p. 1336–1341, 1336. "…state sovereignty and freedom of contract combined to produce a view of the relationship between law and market in the transnational economic sphere according to which the empowerment of private actors was subject to limits imposed in the name of the general interest. Whether framed in terms of public policy or overriding mandatory rules, …"

[203] YEE WAH CHIN, « What Role for Abuse of Superior Bargaining Position Laws?," *New York Law Journal*, Volume 256-Nº 3, Wednesday, July 6, 2016, Electronic copy available at: http://ssrn.com/abstract=2806417

[204] Yee Wah Chin, "What Role for Abuse of Superior Bargaining Position Laws?," *New York Law Journal*, Volume 256-Nº 3, Wednesday, July 6, 2016, Electronic copy available at: http://ssrn.com/abstract=2806417

Law and New York's Franchise Act and Franchised Motor Vehicle Dealer Act as good examples. All this shows, as Yee Wah Chin states, that although they do not have a general law on abuse of dominance, concern about the issue exists in the U.S. and is focused on specific industries where abuse of dominance is common.[205]

It should be noted that there are other industries where abuse of dominant position also exists, but lobbies and the enormous economic interests at stake generally prevent the adoption of protections for the contractually weaker party. An example is the case of transportation, where the carrier unilaterally issues the provisions that make up the general conditions printed on the back of bills of lading, including those of limitation—or plain and simple exoneration—of liability, choice of law and court, etc., which are not negotiable, either by the shipper, or, much less, by the consignee or recipient of the goods. In Uruguay this situation has historically been remedied by the prohibition of party autonomy in relation to adhesion contracts and the use of choice of law rules–conventional[206] and autonomous[207]—that use the point of connection, place of performance, positively defined, which avoids different interpretations and uncertainties. This solution, which is still in use, has worked without problems, as evidenced by abundant case law.[208]

5. Unbalanced contracts

As we have noted, consumer contracts are not the only contracts in which there is an imbalance between the parties. This seems to be recognized by Paula Serra Freire, when she states that "in the case of unbalanced contracts, as in the case of consumer contracts, the provisions are normally not freely negotiated by the parties but imposed by one party on the other. In such cases, the provisions on jurisdiction almost always lead to a choice that suits the dominant party."[209]

The above quote prompts the following observation: it is clear that when the choice-of-court—or choice-of-law—provisions are not freely negotiated but unilaterally imposed, the choice will benefit the one that issues them and probably be detrimental to the one that merely adheres to the contract. It is up to the law to guarantee a reasonable balance—given that absolute equality between the parties obviously does not exist—between the rights and obligations of the contracting parties.

Akinwumi Ogunranti, for his part, recognizes that while party autonomy is part of the exercise of freedom of contract with respect to choice of law, there are circumstances in which one party is prevented from exercising that freedom because the other party has "overwhelming" bargaining power. He adds that an example of this situation are adhesion contracts, among which he mentions especially **loan, consumer, franchise, employment and transportation contracts**. These contracts, he claims, eliminate the free will of the adhering party or restrict it significantly. Hence the need to strike a balance between freedom to contract and fairness between the parties in

---

[205] Yee Wah Chin, "What Role for Abuse of Superior Bargaining Position Laws?," *New York Law Journal*, Volume 256-Nº 3, Wednesday, July 6, 2016, Electronic copy available at: http://ssrn.com/abstract=2806417

[206] Treaty on International Commercial Law, Montevideo, 1889 (Articles 14 and 15), Treaty on the Law of International Commercial Navigation, Montevideo, 1940 (Articles 25–27), Treaty on International Commercial Law, Montevideo, 1940 (Articles 14–18).

[207] Articles 2399, 2401 and 2403 of the Civil Code, now repealed and replaced by Law 19.920 (Articles 48 and 57), and Law on Maritime Commercial Law, No. 19,246 of 2014 (Article 7).

[208] This jurisprudence can be consulted in the 34 issues of *Revista de Transporte y Seguros*, an annual publication of Fundación de Cultura Universitaria (https://fcu.edu.uy/), among other publications.

[209] SERRA FREIRE, Paula, "L'autonomie de la volonté et les contrats de consommation: une étude sur la clause attributive de jurisdiction," in *Contratos Internacionales*, Diego P. Fernández Arroyo y José Antonio Moreno Rodríguez (Directores), Biblioteca de Derecho de la Globalización, ASADIP – OAS, Buenos Aire, 2016, pp. 483–508, 483–484. Free translation of the original French: « …dans le cas de contrats déséquilibrés, comme dans le cas des contrats de consommation, normalement les clauses ne sont pas négociées librement par les parties et sont imposées par une partie à l'autre. Dans ces cas, les clauses attributives de juridiction conduisent le plus souvent à un choix qui convient à la partie plus forte ».

such contracts.[210] Ogunranti quotes Ehrenzweig in support of the above, when he describes true autonomy as the freedom to contract, not to adhere.[211]

In Uruguay, Díaz Sierra asks "whether it is possible to review contracts when a clear imbalance has occurred due to the abuse of a dominant position by one of the contracting parties with respect to its weaker co-contractor."[212] Further on, the author states: "The dominant position is a position of power, which may result from greater economic power, from a monopolistic or oligopolistic position, or from any other circumstance. [...] There is domination when one party is in a situation of supremacy in relation to the other, whether economically or legally. "She adds that "it is common to observe a franchisor in a position of dominance. The dominant position, in itself, is immaterial, neither good nor bad. But **the abuse of that dominant position, which is reflected in the unfair imbalance of the relative position of the parties, is intolerable**."[213] She goes on to refer to mass contracting and prearranged contracts.[214]

Díaz Sierra states that "one key to classing provisions as abusive is the denaturalization of the obligations of the prearranger."[215] Although the author refers in her article to the substantive regulation of contracts in general, to substantive party autonomy, as opposed to the regulation by private international law of international contracts and party autonomy in conflict of laws, it is worth considering some of the ideas referred to in this report, among others, since the author sometimes refers to private international law instruments. In addition, some of the concepts discussed, such as good faith, abuse of rights, public policy, etc., can also apply to international contracts.

After a thorough analysis of Uruguayan, and some foreign, doctrine and jurisprudence, Díaz Sierra concludes by stating that "the *favor debilis* principle can be internalized." She adds that party autonomy (she seems to refer to the material aspect, not to conflict of laws) "has been restricted in modern law by the theories of abuse of rights, injury and unforeseeability, especially in prearranged contracts and in what has come to be called consumer law, where restrictions become stronger as soon as the interpretation in favor of the non-prearranger, the prohibition of certain terms considered abusive, the provision of a time for consideration to the protected party, or the authority of the contract at its sole discretion, are provided for."[216]

For his part, Blengio states: "It is surely not by chance, then, that in the majority of cases involving a significantly unbalanced contractual relationship, a conflict of interests is found between two parties with markedly unequal bargaining power. And that the former is the effect of the abuse of the latter." [217]

Applying this concept to the choice-of-law provisions of a contract, it is evident that while one party will be satisfied with the law that establishes the lowest limits of liability, the other, with the law that establishes the highest; one party will be satisfied with the law that establishes the shortest limitation periods, the other with the longest, for example. Therefore, when it comes to the choice of law, the interests of the parties are usually at odds, and it will be the party with greater bargaining power—or absolute, in adhesion contracts where there is no negotiation whatsoever—

---

[210] Akinwumi OGUNRANTI, "The Scope of Party Autonomy in International Commercial Contracts: A New Dawn?" (LLM Thesis, Dalhousie University, Schulich School of Law, 2017) [Unpublished], https://digitalcommons.schulichlaw.dal.ca/llm_theses/95/, p. 73–74.

[211] Akinwumi OGUNRANTI, "The Scope of Party Autonomy in International Commercial Contracts: A New Dawn?" (LLM Thesis, Dalhousie University, Schulich School of Law, 2017) [Unpublished], https://digitalcommons.schulichlaw.dal.ca/llm_theses/95/, p. 73–74.

[212] María del Carmen DÍAZ SIERRA, "Desde la autonomía de la voluntad a la institucionalización de la figura del sujeto débil. ¿La caída de la doxa?", http://revistaderecho.um.edu.uy 2012/12, p. 111.

[213] *Ibidem*, p. 130.

[214] *Ibidem*, p. 131 et seq.

[215] *Ibidem*, p. 133.

[216] *Ibidem*, p. 146.

[217] Juan BLENGIO, "Las cláusulas abusivas desde la perspectiva de la aplicación coordinada de los principios de libertad e igualdad a la contratación", *Estudios de Derecho Civil en Homenaje al Profesor Jorge Gamarra*, Montevideo, FCU, 2001, p. 55-82, p. 62.

that will establish the law that is best suited to its interests. It is not the abstract and often invoked—though not defined—interest of international trade, but the interest of the strongest that prevails in contracts such as the ones that concern us.

6. Principle of freedom and principle of equality

The Uruguayan civil lawyer Juan Blengio has studied in depth the scope of these two principles and how they interrelate in contractual matters, their recognition in constitutional law, and their application to private relations, which is why they are applicable to the subject that concerns us in this report. Therefore, I would like to refer here to the key thinking of the aforementioned professor.

Blengio states that "contracts are governed not only by the constitutional principle of freedom (which in this case takes the guise of private autonomy or business autonomy), but also by another principle of equal rank: equality." He arrives at this conclusion by two means, which he considers complementary: on one hand, the direct application of Articles 8 and 332 of the (Uruguayan) Constitution and, on the other, the so-called indirect application of constitutional norms.[218]

As Blengio states, with solid reasoning, "the party autonomy is nothing but a specific manifestation of the right to freedom," ... but "such freedom is certainly not full because it is limited for a number of factors," including "the incidence of so-called general provisions, such as those of good faith, abuse of rights, and public policy." In particular, he adds, "the party autonomy is limited by the impact of another of the pillars that govern contracting: the principle of equality. This has been expressly and unconditionally enshrined in the Constitution (Article 8) and is wholly applicable to the sphere of private relations, in particular those governed by contract law."[219]

The author adds that "the principle of equality applies to relations between private individuals: (a) it is a necessary consequence of the assimilation of the contract into law (Article 1291 of the CC); and (b) because its direct application is imposed by Article 332 of the Constitution [...]. Therefore, the direct applicability of the constitutional principle to the field of private relations ... firmly supports the argument that the contract must be a means for the realization of commutative justice and an instrument for the exercise of distributive justice."[220]

It has been said, as an argument "to deny the application of the principle of equality to the field of private contracts," that "admitting the application of the principle of equality would imply disregarding party autonomy." Blengio rightly responds that this argument lacks weight, since "it is based on a plea of principle: it assumes the absolute prevalence of one principle (that of freedom of initiative) over another (that of equality), when in fact both have the same rank." And he adds: "The existence of two guiding principles of contracting—party autonomy (freedom) and equality—determines the need to coordinate them, since their application may point in different and even contrasting directions."[221]

The aforementioned principles, their interrelation, and their harmonious application apply to contracts in general, including international contracts, since they are included in general rules of a higher rank than the rules of private international law, such as constitutional rules.

---

[218] *Ibidem*, p. 55-82, 57-58. See also, by the author, "Principio de igualdad y autonomía privada. Una cuestión que se discute. Primera Parte," in *Anuario de Derecho Civil Uruguayo*, Vol. XXXII, Montevideo, FCU, 2002, p. 571-588.

[219] Juan BLENGIO, "Las cláusulas abusivas desde la perspectiva de la aplicación coordinada de los principios de libertad e igualdad a la contratación", *Estudios de Derecho Civil en Homenaje al Profesor Jorge Gamarra*, Montevideo, FCU, 2001, p. 55-82, p. 58.

[220] *Ibidem*, p. 55-82, 59.

[221] *Ibidem*, p. 55–82, 59–60, citing the renowned constitutionalist Cassinelli Muñoz, adds in footnote No. 12: "In any case, if differences were to be found in terms of rank, they would favor the principle of equality, since, as Cassinelli has pointed out (Cursillo, Cuadernos No. 13, 2nd series, 1990, p. 190), since the constitutional provision that enshrines it (Article 8) does not envisage the possibility that it may be limited even for reasons of general interest, unlike the case with the right to freedom (Article 7)." (Emphasis added.)

When the parties act freely through proper negotiation with both giving their consent, party autonomy is acceptable and accepted. The problem arises when the choice is unilateral and the other party has no possibility to negotiate that choice, to oppose it, or to choose another formula. In such cases, on party is obviously "contractually weaker," regardless of their status as a consumer or a merchant, a worker or o professional, or of the greater or lesser amount of information or economic power it has.[222]

As de Cores rightly notes, "the existence of a 'weaker party' raises the question of the equality of the parties in the contractual relationship, which brings up the issue of direct applicability of the constitutional principle of equality." He adds that "the Constitution affects contractual relations by limiting party autonomy in contracts."[223] This seems indisputable, since the constitutional rule has a higher rank than the autonomous rule of private international law.[224]

The choice of law must be compatible with the principle of equality of the parties before the law, which, in the opinion of this rapporteur, is a fundamental principle of Uruguayan and other countries' international public policy, as enshrined in constitutions and human rights instruments.[225] In the field of international commercial contracting, observance of this principle does not allow the validation of possible cases of taking advantage of a contractually dominant position by one party over the other. Such situations may arise in international commercial practice as a result—unintended by the legislator—of how the applicable law operates in certain cases where one party is contractually stronger than the other. This greater strength or power derives from the party's possibility, in the context of international trade, of unilaterally setting contract conditions through adhesion contracts in their different variants. To accept in such cases that one party can impose on the other party the law governing the contract—and even the jurisdiction—from a position of contractual, economic, or other form of dominance (such as a monopoly), creating a normative imbalance, would violate the principle of equality.[226]

Precisely, one of the fundamental objections to the 1994 Mexico Convention was "the failure to exclude or at least expressly limit the scope of application of the Convention to adhesion contracts when they show a flagrant breach of the guiding principle of contracting: the free consent of the parties; or, absent that, a restorative substitute."[227]

Furthermore, de Cores explains, analyzing the "coordination between freedom and equality," that "the law of contracts and private law in general are based on the dignity and freedom of development of persons; but he notes that, in order for such freedom to be material and effective, it is necessary to positively develop fundamental rights and freedoms." And he adds in reference to the social function of the contract, that it "is not currently presented as excluding private autonomy, but as a corrective role: the contract has to fulfill a decent function, avoiding the preponderance of

---

[222] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in Comentarios a la nueva Ley General de Derecho Internacional Privado (Nº 19.920 del 17 de noviembre de 2020), Eduardo Vescovi (Coordinador), Montevideo, Ed. Idea, 2022, p. 219-266, 224.

[223] DE CORES HELGUERA, Carlos, *Pasado, presente y futuro de la Teoría General del Contrato. Una mirada desde la tradición jesuítica*, Montevideo, Universidad Católica del Uruguay, 2015, p. 563 and 567, citing abundant important national and foreign doctrine.

[224] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in Comentarios a la nueva Ley General de Derecho Internacional Privado (Nº 19.920 del 17 de noviembre de 2020), Eduardo Vescovi (Coordinador), Montevideo, Ed. Idea, 2022, p. 219-266, 224.

[225] For example, Art. 24 of the American Convention on Human Rights.

[226] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in Comentarios a la nueva Ley General de Derecho Internacional Privado (Nº 19.920 del 17 de noviembre de 2020), Eduardo Vescovi (Coordinador), Montevideo, Ed. Idea, 2022, p. 219-266, p. 224-225.

[227] OPERTTI BADÁN, Didier and FRESNEDO DE AGUIRRE, Cecilia, *Contratos Comerciales Internacionales. Últimos desarrollos teórico-positivos en el ámbito internacional*, Montevideo, FCU, 1997, p. 56.

excessive individualism, which is contrary to the interests of others." He goes on to affirm that, "true to the nature of the law of principles, it is not exclusion that is postulated, but the coexistence of freedom with justice and equality." The individual and social principles of contracts must coexist, and "it is incumbent on the court to apply them in a coordinated manner." [228]

7. Large and small or medium-sized merchants. "B2B and B2b contracts"

Linked to the issue of party autonomy and equality of parties, the distinction developed by the doctrine regarding the insufficiency of B2B (business to business) and B2C (business to consumer) contracts in terms of contemplating the situation of small and medium-sized companies is very interesting. General contract law, explains de Cores, distinguishes a new category: contracts between companies of the same size (B2B) and contracts between a large company and a small or medium-sized company (B2b). In Italian doctrine they have also been referred to as "asymmetric contracts."[229]

If a merchant who has sufficient contractual power to unilaterally establish the general conditions of a contract, including the determination of the applicable law and the competent jurisdiction, were to be placed on an equal footing with the merchant who has no choice but to adhere or not to contract, considering that the supposed "consent" of both parties is worth the same, then unequal parties would be treated equally.[230] This situation is exacerbated when a party to a contract operates in a sector of international trade organized into sectoral, trade, interest, or similar groups, which have the de facto possibility of regulating the sector through the development of forms, general conditions, and other methods used in a monopolistic manner by all merchants in the sector. It should be noted in this regard that the prohibited criteria of distinction established—in a non-exhaustive manner—in Article 1.1 of the American Convention on Human Rights refer not only to the usually invoked categories of race, color, sex, language, and religion, but also to "economic position." In the cases outlined in that paragraph, "economic position" is clearly significant in determining the difference between two parties, even if both are merchants.[231] The classic example, again, is international transport in all its modes.[232]

This rapporteur obviously does not ignore the fact that in general one party is contractually stronger than the other, that it is very difficult for both to have the same bargaining power, but I do not consider that **this reality should enable the lawmaker—or the courts—to consolidate situations of imbalance and abuse**. On the contrary, it is first the lawmaker, and second the courts,

---

[228] DE CORES HELGUERA, Carlos, *Pasado, presente y futuro de la Teoría General del Contrato. Una mirada desde la tradición jesuítica*, Montevideo, Universidad Católica del Uruguay, 2015, p. 492–493.

[229] *Ibidem*, p. 633–642.

[230] UPRIMNY YEPES, Rodrigo and SÁNCHEZ DUQUE, Luz María, "Article 24. Igualdad ante la Ley", *Convención Americana sobre Derechos Humanos. Comentario*, Christian Steiner / Patricia Uribe (Editores), Konrad Adenauer Stiftung, 2014, pp. 579-605, state (on p. 581): "...giving concrete content to the mandate to treat those who are equal equally and those who are not differently is an extremely difficult task, insofar as it is necessary to determine, within the infinite number of similarities and differences that exist between situations or persons, which should be accorded greater weight relevance in order to determine when one can say what or what should be treated equally."

[231] *Ibidem*, p. 579-605, the autors mention on p. 601 as one of the characteristics of the prohibited criteria in Article 1.1 of the Convention, "that they *are associated with historical practices of discrimination and subordination*." This is exactly what happens in the case of transportation. Usages and practices embodied in general conditions and claimed as being those of the trade are in fact unilateral practices not accepted by the adhering party that constitute historical abuses of discrimination and subordination of the contractually weaker merchant by the contractually stronger one.

[232] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in Comentarios a la nueva Ley General de Derecho Internacional Privado (Nº 19.920 del 17 de noviembre de 2020), Eduardo Vescovi (Coordinador), Montevideo, Ed. Idea, 2022, p. 219-266, p. 228.

whose function it is to safeguard a fair and adequate balance between the rights of both.[233] In this same sense, de Cores unequivocally states: "**Contemporary notions have progressed in the sense of realizing that the classical ideal of contractual freedom depends entirely on a model of contract formation in which transactions are negotiated by adequately informed parties with similar bargaining power, and that they reach mutually beneficial arrangements that will maximize profits for both parties; but that such a scheme is illusory**. **Thus, contractual freedom and the binding force of the contract enter into dialogue with the generic aspirations of contractual justice."**[234]

If it is left to only one of the parties to the contract to choose the law and the court, that party will obviously choose the law and the court that best suit it (the law with the shortest statute of limitations for action, with the lowest liability limits, the court most inaccessible to the other party, etc.). Merchants are not idealistic characters in search of the common good; they are people who seek to profit as much as possible from their activity, and it is fine and reasonable that this should be so, but not at the expense of the rights of others.[235]

Fernández de la Gándara and Calvo Caravaca strike a similar tone: "The risk that the interests of the stronger party in international commercial contracting are concealed and protected through international trade customs or unilaterally drafted standard contracts and general conditions is not a hypothesis that should be discarded." [236]

Some may say that is how unfair and inequitable the world is and there is nothing to be done about it. I would answer that in Uruguay we have been doing something about it for over a hundred years, with prescriptive solutions that, through the "place of performance" connection point contained in autonomous choice of law rules (Appendix) and treaty-based norms (Montevideo Treaties of 1889 and 1940, which remain in full force and effect), ensured at least formal justice and a reasonable balance between the always conflicting interests of the parties to the contract. Of course, this did not admit the validity of unilateral provisions established by the party setting the general conditions of the contract, including provisions on "choice" of applicable law and jurisdiction (in addition to other general conditions of the contract, such as the limits on liability or its plain and simple exoneration), while the co-contracting merchant could only choose between contracting or not contracting, which in general is not a valid option, especially when there are no alternative general conditions in the market.

In sum, this is clearly not a case of a technical/legal issue or the "ethereal" and undefined interests of international trade, but rather a matter of opposing strong economic interests among different participants in international trade. And party autonomy favors the strongest, that is undeniable.

8. Unfair terms and unequal bargaining power

The Blengio study referred to in the previous paragraph also addresses the issue of the "notion of an abusive or vexatious provision" and "arbitrary imbalance and unequal bargaining power." Summarizing, the author states that "the contractual freedom of each person should not interfere with the right of those who come into contact with them to enjoy equal freedom of negotiation, so that **the phenomenon of unequal bargaining power resulting in the prevalence of one party and**

---

[233] *Ibidem*, p. 219–266, p. 228–229.

[234] DE CORES HELGUERA, Carlos, *Pasado, presente y futuro de la Teoría General del Contrato. Una mirada desde la tradición jesuítica*, Montevideo, Universidad Católica del Uruguay, 2015, p. 528.

[235] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in Comentarios a la nueva Ley General de Derecho Internacional Privado (Nº 19.920 del 17 de noviembre de 2020), Eduardo Vescovi (Coordinador), Montevideo, Ed. Idea, 2022, p. 219-266, p. 229.

[236] FERNÁNDEZ DE LA GÁNDARA, Luis y CALVO CARAVACA, Alfonso-Luis, *Derecho Mercantil Internacional*, 2ª ed., Madrid, Ed. Tecnos, 1995, p. 51.

the correlative subordination of the other, with the consequent loss of freedom, as Stathopoulos teaches, **cannot be a matter of indifference to the law.**"[237]

Blengio describes as "abusive, vexatious, or leonine, any provision in an unequal contract that violates the principle of equality and which gives rise to a relationship arbitrarily skewed in favor of the party with greater bargaining power."[238] And what can be more skewed, I wonder, than a contractual relationship in which one party sets all the terms of the contract, including of course the choice of law applicable to the contract (and also the jurisdiction), while the other party can only decide whether or not to contract, even though not contracting is not a viable option.

According to Blengio, "the so-called adhesion contract does not exhaust the array of different contracts in which an abusive provision may come into play. Nor is the consumer a protagonist whose presence is indispensable for the existence of such a provision," since "an unjustifiably unbalanced contractual relationship can, for example, be found in contracts between professionals. And the type of contract is not exactly insignificance, as the examination of the issue in France shows." And he concludes: "The unfair provision would stand out for two reasons: (a) a subjective one: the existence of contractual parties with disparate bargaining power; and (b) an objective one: a contractual relationship unjustifiably skewed in favor of the dominant party."[239]

9. Good faith in contracting and public policy

Blengio affirms, agreeing with Gamarra, that good faith "is a rule of conduct filled with ethical content, which imposes the duty to adjust one's conduct to conform to a legal standard (just as a good father might in relation to guilt), which implies acting with fairly, correctly, and honestly." The author then adds, consistent with Schlechtriem, that "general principles, such as good faith, are nourished by values and standards of conduct found at three levels: (a) that of the Constitution, which is the highest and most important; (b) that of laws, naturally including the Civil Code; and (c) that of collective convictions. Among examples relating to the first level he cites the case of 'equality of bargaining power between the parties, which must be considered a constitutional prerequisite of freedom of contract.'"[240]

Blengio concludes by stating that, in his opinion, "especially in light of the impact of the principle of equality, the exercise of a dominant position that results in an unbalanced situation in a contractual relationship, in favor of the more powerful party, would surely qualify as behavior contrary to objective good faith. It is not a question of considering a subjective state of error, but the infringement of a standard of conduct, which requires one to act with fairly and correctly for the entire life of the contract. Therefore, since there is a disparity of bargaining power, an arbitrarily unbalanced relationship in favor of the professional or supplier, especially in the case of an adhesion contract, entails conduct by the latter that would not meet the standard of fair and just behavior towards the counterparty (and would, therefore, be in violation of the rule requiring contracting parties to act in good faith)." And he goes on to say that good faith "would stand as a limit to private autonomy whose violation would have repercussions on the (in)efficacy of the business."[241]

Lastly, Blengio adopts, following Gamarra, a notion of public policy (without specifying whether it refers to the domestic or international sphere) that essentially coincides with the legal, doctrinal, and jurisprudential concept of international public policy: "Public policy," says the Uruguayan jurist, "can be defined as the set of fundamental principles and general interests on which

---

[237] Juan BLENGIO, "Las cláusulas abusivas desde la perspectiva de la aplicación coordinada de los principios de libertad e igualdad a la contratación", *Estudios de Derecho Civil en Homenaje al Profesor Jorge Gamarra*, Montevideo, FCU, 2001, p. 55-82, 61, citing STATHOPOULOS, "Equality in the Law of Contracts," in *Law in Motion, World Law Conference, Innternational Encyclopedia of Laws*, Ed. Kluwer Law International, Brussels, 1997, p. 292.

[238] Juan BLENGIO, "Las cláusulas abusivas desde la perspectiva de la aplicación coordinada de los principios de libertad e igualdad a la contratación", *Estudios de Derecho Civil en Homenaje al Profesor Jorge Gamarra*, Montevideo, FCU, 2001, p. 55-82, 63.

[239] *Ibidem*, p. 55-82, 62-64.

[240] *Ibidem*, p. 55-82, p. 73.

[241] *Ibidem*, p. 55-82, p. 75-76.

the legal system of the State is based."[242] Regarding the concept of international public policy in private international law, see the Declaration of Uruguay regarding Article 5 of the Inter-American Convention on General Rules of Private International Law (CIDIP-II, Montevideo, 1979),[243] Article 5 of the General Law on Private International Law, No. 19.920 of 2020 (Uruguay),[244] among others, and abundant doctrine.[245]

---

[242] *Ibidem*, p. 55–82, 77, citing Jorge GAMARRA, TDCU vol. XIV, Montevideo, 1972, esp. p. 93, 190–192.

[243] https://www.oas.org/juridico/english/sigs/b-45.html

[244] "(International public policy) - The courts or other competent authorities, by means of a well-founded decision, shall declare inapplicable the precepts of foreign law when they seriously, concretely, and manifestly contradict fundamental international public policy principles on which the Republic bases its juridical individuality. Among others, this situation occurs when the application of foreign law is irreconcilable with fundamental rights enshrined in the Constitution of the Republic and in international conventions to which the Republic is a party." In: https://www.impo.com.uy/bases/leyes/19920-2020#:~:text=(Separaci%C3%B3n%20conyugal%20y%20divorcio).,demandado%2C%20a%20opci%C3%B3n%20del%20actor.

[245] Among many other works, see: ALFONSÍN, Quintín, *Teoría del Derecho Privado Internacional*, Montevideo, Ed. Idea, 1982; BATTELLO CALERÓN, Silvio Javier, *El orden público en el derecho internacional privado del Mercosur*, Córdoba, Advocatus, 2012; BĚLOHLÁVEK, Alexander J., "Public Policy and Public Interest in International Law and EU Law," Czech Yearbook of International Law, New York, Juris Publishing Inc., 2012, p. 117-148; BLOM, Joost, "Public Policy in Private International Law and its Evolution in Time," Netherlands International Law Review, Vol. 50, Issue 03, Dec. 2003; BUCHER, Andreas, "L'ordre public et le but social des lois en droit international privé, *Recueil des cours*, Vol 239 (1993); DE ROSAS, P.E., "Orden público internacional. Tendencias contemporáneas. Orden Público en el ordenamiento del Mercosur," Boletín de la Facultad de Derecho, No. 22, 2003; DREYZIN DE KLOR, Adriana, "El orden público subregional," Revista de Derecho Privado y Comunitario, Bs As, 1996, vol. 12, p. 507-538; FRESNEDO DE AGUIRRE, Cecilia, "El Orden Público como excepción al normal funcionamiento del sistema de conflicto," in Anuario Área Socio Jurídica, Facultad de Derecho, Universidad de la República, 3, Orden Público, Seminario organizado por el Instituto de Historia del Derecho y Derecho Romano, FCU, 2007, p. 181-195; FRESNEDO DE AGUIRRE, Cecilia, "Orden Público Internacional y Derechos Humanos en el Derecho Internacional Privado de Familia," *Anuario Uruguayo Crítico de Derecho de Familia y Sucesiones*, T. II, 2014, p. 113-125, and in El Derecho Internacional Privado y sus Desafíos en la Actualidad, Alberto do Amaral Júniot / Luciane Klein Vieira (Academic Coordinators), Bogotá, Grupo Editorial Ibáñez, 2016, p. 537-560; FRESNEDO DE AGUIRRE, Cecilia, "El orden público internacional, la flexibilización y los derechos humanos en el legado de CIDIP," ReASADIP (2016), electronic publication, and in *Estudios de Derecho. Generación 1970. Una celebración Académica*, Montevideo, FCU, 2018, p. 73-89; FRESNEDO DE AGUIRRE, Cecilia, "Public Policy: Common Principles in the American States," *Recueil des cours*, Vol. 379 (2016), Leiden/Boston, Brill Nijhoff, 2016, p. 73-396; FRESNEDO DE AGUIRRE, Cecilia, "Public Policy in Private International Law: Guardian or Barrier?," in Diversity and Integration in Private International Law, Edited by Verónica Ruiz Abou-Nigm and María Blanca Noodt Taquela, Edinburgh University Press, 2019, p. 341-361; FRESNEDO DE AGUIRRE, Cecilia, "Principios y fuentes del Derecho Internacional Privado. El jus cogens y los principios fundamentales," Revista Uruguaya de Derecho Internacional Privado No. 11 (2020), p. 277-295; FRESNEDO DE AGUIRRE, Cecilia, *Actualización. Curso de Derecho Internacional Privado, de acuerdo a la Ley General de Derecho Internacional Privado Nº 19.920 de noviembre 2020*, Montevideo, FCU, 2021; FRESNEDO DE AGUIRRE, Cecilia y LORENZO IDIARTE, Gonzalo A., *Texto y Contexto. Ley General de Derecho Internacional Privado Nº 19.920*, Montevideo, FCU, 2021; FRESNEDO DE AGUIRRE, Cecilia, *Derecho Internacional Privado. Parte General*, Volume I, Montevideo, FCU, 2022; IUD, Carolina, "Los matices del orden público internacional en las relaciones de familia," Revista de Derecho de Familia y de las Personas, Year V, (No.) 8, September 2013, La Ley, September 2013, pp. 43-51; NASCIMENTOS REIS, R., "Orden Público del Mercosur. Un introito," Prismas: Direito Politico, Público e Mundial, Brasilia, vol. 4, No. 2, pp.

And Blengio concludes by stating: "This way of conceiving public policy must lead to the conclusion that, in terms of economic and legal relations, a contract (or any of its terms) that goes against those values, principles, and interests is considered contrary to public order. In this context, it should be emphasized once again, given its particular importance for the specific issue of abusive provisions, the principle of equality, with its essence of attributive and retributive justice, will play a significant role, making it particularly suitable for configuring a special sector of public policy, one that offers protection, the perspective from which it will be necessary to approach the delimiting function of private autonomy that the legal system assigns to this general provision."[246]

10. The role of lawmakers and the courts: formal and substantive justice

The legislator traditionally establishes, on the one hand, general rules regarding choice of law and choice of court, and on the other, categories of persons, groups, and types of contracts that need protection and are excluded from the general rules. Usually the law—and doctrine—refers to consumers, workers, and insured and aims to ensure formal justice through special provisions.[247] The sectors excluded from the general autonomous regime vary from one legislation to another; some exclusions are expressly stated, while others are outside the general regime because they do not fall within the broad scope of the general rules.[248]

In any case, it will then be up to the courts to ensure substantive justice in each case, guaranteeing with respect to international contracts—which obviously including commercial ones—a reasonable balance that can be expected by any person, bargaining in good faith, and drafting and performance of the contract, among other principles. To do so, it should rely on all the tools afforded by private international law and the law in general—whether hard or soft—and, of course, human rights instruments. This is particularly important in the case of adhesion and related contracts. In this regard, Basedow, as *rapporteur* of the Institute of International Law, states that it is the domestic courts with jurisdiction to decide international cases involving adhesion contracts that include choice of law and/or judge clauses which must ensure that abuse of a dominant position does not occur by declaring such provisions null and void.[249]

115-130, July-Dec. 2007; OPERTTI BADÁN, Didier, "El orden público internacional," Curso del Comité Jurídico Interamericano, 1980: OPERTTI BADÁN, Didier, "Primera lectura (3.12.2020) de la Ley General de Derecho Internacional Privado de la República Oriental del Uruguay a cargo del Profesor Emérito de Derecho Internacional Privado Dr. Didier Opertti Badán en el Aula "Tatiana Maekelt," Caracas, 3 de diciembre de 2020," Comentarios a la nueva Ley General de Derecho Internacional Privado (No. 19.920 del 17 de noviembre de 2020), Eduardo Vescovi (Coordinator), Montevideo, Ed. Idea, 2022, p. 13-35; SANTOS BELANDRO, Ruben, Convención Interamericana sobre Normas Generales de Derecho Internacional Privado y su influencia sobre el Derecho regional, Montevideo, Facultad de Derecho de la Universidad de la República-FCU, 2015; SANTOS BELANDRO, Ruben, Ley general de Derecho internacional privado de la República Oriental del Uruguay 19.920, de 17 de noviembre de 2020. El texto y su contexto americano. Curso general, Montevideo, Asociación de Escribanos del Uruguay, 2021; THOMA, Ioanna, "Public policy (ordre public), Basedow/Rühl/Ferrari/De Miguel (eds.), *Encyclopedia of Private International Law*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, 2017, Volume II, p. 1453-1460, among many other general (and specific) works dealing with the subject.

[246] Juan BLENGIO, "Las cláusulas abusivas desde la perspectiva de la aplicación coordinada de los principios de libertad e igualdad a la contratación", *Estudios de Derecho Civil en Homenaje al Profesor Jorge Gamarra*, Montevideo, FCU, 2001, p. 55-82, p. 78.

[247] NYGH, Peter, *Autonomy in International Contracts*, Oxford, Clarendon Press, 1999, p. 143-155.

[248] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in *Comentarios a la nueva Ley General de Derecho Internacional Privado (No. 19.920 del 17 de noviembre de 2020)*, Eduardo Vescovi (Coordinator), Montevideo, Ed. Idea, 2022, p. 219-266, p. 226.

[249] Yearbook of Institute of International Law - Session of Hyderabad 2017, vol. 78 EAN 978-2-233-00883-1 © éditions A. Pedone, Fourth question: Human Rights and Private International Law, Rapporteur: Jürgen BASEDOW, 4th commission, https://www.idi-iil.org/app/uploads/2018/12/8.-s%C3%A9ances-pl%C3%A9ni%C3%A8res-Basedow.pdf Article 2.1 of the draft resolution

In other words, to validate and enforce a choice-of-law (or choice-of-court) provision unilaterally imposed by one party on the other—particularly when the other party did not even consent to such a provision—would violate Uruguayan international public policy.[250]

In this regard, it should be noted, in the case of Nygh, that in the United States there has been a strong academic movement to exclude adhesion contracts from the general principle of party autonomy, though not always accompanied by case law.[251] He then cites two authors: Ehrenzweig, who says: "The principle of party autonomy has no place in the conflicts law of standardized contracts";[252] and Weintraub, who goes even further and proposes a compensatory nullity rule designed to protect against adhesion contracts.[253]

The *Restatement (Second) on Conflict of Laws*, in its section 187, commentary (b), establishes a solution that, as Nygh notes, is more cautious:[254] it states that it is the courts that must "scrutinize" adhesion contracts carefully and reject the application of any choice-of-law clause, if applying it would result in substantial injustice to the adhering party.[255] This seems to be a balanced solution, which would not imply the outright rejection of the provision, but leave it to the judge to assess it.

11. Contracts with standard clauses, adhesion contracts, and their variants

As has just been explained, the case of adhesion contracts is of fundamental concern, as is that of contracts with preset general conditions and other related modalities in which one of the parties has the power to dictate the text of these contracts or general conditions, including choice-of-law and -judge provisions, without any possibility for the other party to negotiate or modify their content, and worse, often not even to opt for another form, other general conditions, etc. This is because what is on offer in each sector of international trade is the same regardless of the operator with whom it is intended to contract. This is typical, for example, in transport documented in bills of lading, waybills, etc., as was noted in the Working Group that drafted Uruguay's General Law on International Private Law. These are contracts between merchants, who, even if they have access to legal advisors, do not have a choice (take-it-or-leave-it contracts).

In these cases, the precise situation that de Cores describes in the following terms occurs: "the self-determination of one of the parties is seriously curtailed." Those who adhere to an adhesion contract, form, or an agreement with unilateral general conditions, especially in monopolistic conditions, have their self-determination seriously curtailed because they have no choice but to adhere or not contract. **In such cases, de Cores states, "the legal system must intervene by compensating for the vulnerability in the contractual situation**."[256] Nygh also recognizes that, accompanying the growing recognition of the principle of party autonomy, there is international recognition of the need for protection for economically weaker parties.[257]

---

provides: "States shall ensure respect for human rights by their organs, including courts of general jurisdiction in international relations between private individuals. These rights serve to control and correct, where necessary, the results produced by the operation of rules of private international law."

[250] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in Comentarios a la nueva Ley General de Derecho Internacional Privado (No. 19.920 del 17 de noviembre de 2020), Eduardo Vescovi (Coordinador), Montevideo, Ed. Idea, 2022, p. 219-266, 226.

[251] NYGH, Peter, *Autonomy in International Contracts*, Oxford, Clarendon Press, 1999, p. 152-153.

[252] EHRENZWEIG, Albert A., *A Treatise on Conflict of Laws*, St. Paul, Minn., West Publishing Co., 1962, p. 457

[253] WEINTRAUB, *Commentary on the Conflict of Laws*, 3rd ed., 1986, p. 397-398.

[254] NYGH, Peter, *Autonomy in International Contracts*, Oxford, Clarendon Press, 1999, p. 152-153.

[255] On this subject, see OPERTTI BADÁN, Didier and FRESNEDO DE AGUIRRE, Cecilia, *International Commercial Contracts. Últimos desarrollos teórico-positivos en el ámbito internacional*, Montevideo, FCU, 1997, pp. 49-50 and FRESNEDO DE AGUIRRE, Cecilia, *La autonomía de la voluntad en la contratación internacional*, Montevideo, FCU, 1991, p. 29-31.

[256] DE CORES HELGUERA, Carlos, *Pasado, presente y futuro de la Teoría General del Contrato. Una mirada desde la tradición jesuítica*, Montevideo, Universidad Católica del Uruguay, 2015, p. 493.

[257] NYGH, Peter, *Autonomy in International Contracts*, Oxford, Clarendon Press, 1999, p. 139.

These situations occur not only with respect to consumers, workers and policyholders, but also to merchants. As de Cores, agreeing with Blengio, states, "it is not consumer status or any other role per se that makes a protective regulation necessary, but rather the position of weakness of the subject vis-à-vis the one that has a situation of greater power." **He concludes by accepting the possibility of applying the protections in consumer relations, by analogy, "to all cases in which there are parties with unequal bargaining power**."[258]

Santos Belandro also recognizes that the problem with unrestricted freedom "is that it can undermine equity and punish the weaker party to the contract."[259] He adds, quoting de Vasconcelos, that "most have concluded that it is necessary to establish limits to autonomy, especially in a global society, defined by very different economic realities. The absence of such limits would inevitably lead to the exploitation of small and medium-sized actors in the global market (...) Certainly, restrictions to the principle of free will are necessary and universally accepted. The great challenge is to find the right balance between the amount of state intervention and the space for the exercise of that freedom (...)."[260]

From a European perspective, Muir Watt states that there has been a progressive mainstreaming of consumer protection, which has evolved from being an exception to being the rule where the supply of goods and services is concerned. Therefore, the renowned jurist adds that "party autonomy is severely restricted in an increasing number of circumstances, although within the safe limits of the European consumer market. However, a more radical reformulation of the issues in play may well be necessary. In the rapidly changing context of the global economy, the real difficulties are not simply market practices shaped by stronger parties through free choice of law and forum, but the implications of the growth of hitherto unaccountable private authority. The role of party autonomy in this evolution needs to be recognized before appropriate models of social justice can be devised in the uncharted legal environment beyond the State."[261] **The French professor thus recognizes that the time may have come to reformulate certain questions arising from the practices imposed by the stronger party through its free choice of law and judge**.

In the same sense, Mills argues that party autonomy in relation to applicable law, as well as to jurisdiction, is often restricted when the subject matter or object of the contract or the characteristics of the parties suggest an inequality that may leave the weaker party vulnerable to the imposition of a choice that is disadvantageous to it. He adds that **such a choice will neither be a true agreement, nor will it necessarily choose the most appropriate law for the legal relationship between the parties**. Therefore, the various justifications of party autonomy would

---

[258] DE CORES HELGUERA, Carlos, *Pasado, presente y futuro de la Teoría General del Contrato*. *Una mirada desde la tradición jesuítica*, Montevideo, Universidad Católica del Uruguay, 2015, p. 510-511, and quote from BLENGIO, Juan, "Ámbito subjetivo de aplicación de la ley de relaciones de consumo desde la perspectiva de la noción de consumidor y la viabilidad de su extensión analógica," in *ADCU*, T. XXX, Montevideo, FCU, 2000, p. 457. He also cites the contrary opinion of MOLLA, Roque y GROISMANN, Carlos, "Crisis del sistema jurídico. Algunas consideraciones acerca de la inviabilidad de la aplicación analógica de la Ley de Relaciones de Consumo Nº 17.250," in *ADCU*, T. XXXV, Montevideo, FCU, 2005, p. 719 et seq.

[259] SANTOS BELANDRO, Ruben, *Ley General de Derecho Internacional privado de la República Oriental del Uruguay 19.920 de 17 de noviembre de 2020*. *El texto y su contexto americano. Curso general*, Montevideo, Asociación de Escribanos del Uruguay, 2021, p. 594.

[260] DE VASCONCELOS PENANTE Jr, Francisco José, *La autonomía de la voluntad en el Reglamento Roma I y en la Convención Interamericana sobre Derecho Aplicable, de 17 de marzo de 1994 (CIDIP-V); La situación en Brasil*, Valencia, Spain, 2013, p. 57 and 59, cited by SANTOS BELANDRO, Ruben, *Ley General de Derecho Internacional privado de la República Oriental del Uruguay 19.920 of November 17, 2020*. *El texto y su contexto americano. Curso general*, Montevideo, Asociación de Escribanos del Uruguay, 2021, p. 594.

[261] MUIR WATT, Horatia, "Party Autonomy," *Encyclopedia of Private International Law*, Volume 2, Entries I-Z, Edited by Jürgen Basedow, Giesela Rühl, Franco Ferrari, Pedro de Miguel Asensio, Cheltenham, UK - Northampton, MA, USA, Edward Elgar Publishing, p. 1336-1341, 1341. Translation of the author's translation.

not be sufficient support giving effect to such provisions. He even states that he finds it curious that such cases of inequality were not excluded from the 1994 Mexico Convention.[262]

For its part, the Inter-American Juridical Committee, in its Guide on the Law Applicable to International Commercial Contracts in the Americas, refers to Commentary 5.4 to the Hague Principles: "The fact that the Principles are designed solely for commercial contracts obviates the need to subject the choice of law to any formal requirements or other similar restrictions for the protection of presumptively weaker parties, such as consumers or employees." He goes on to state: "However, **a weaker party can be anyone who lacks bargaining power**, **which can also include merchants and small businesses**. This is especially true in the case of **adhesion contracts** that include predetermined choice of law clauses; the situation is compounded in cases of a monopolistic offer where there is no freedom to consent to a choice of law clause included at the behest of one party.[263]

In short, when freedom comes into conflict with equality, in the new concept of contract that de Cores speaks of, "equity and justice occupy the center of gravity, replacing the mere interplay of volitional and individualistic forces that in a consumer society had demonstrably led to the predominance of the will of the strongest over that of the most vulnerable."[264] The position so clearly expressed by de Cores cannot give way for the sake of the much mentioned and cited—but never defined—interest of international trade. The promotion and facilitation of international trade cannot be at the expense of the aforementioned fundamental principles.[265]

12. Terms freely agreed to by both parties and unilateral stipulations

It is generally argued in doctrine that freedom of contract is an essential part of the market economy and that parties should be free to regulate the terms and conditions of their contracts. However, it is also recognized that the State must regulate that freedom, "first, to provide a framework within which the parties can operate, and second, to protect certain interests, either of the State itself or of the parties that need to be protected from abuse of economic power."[266] Nygh refers to the usual example of consumers and employees, as all authors do, but they are certainly not the only category of contracting parties that require the State to preserve a certain balance in legal framework. To do otherwise would be to leave the market and international contracts to the law of the strongest.[267]

---

[262] MILLS, Alex, *Party Autonomy in Private International Law*, Cambridge University Press, 2018, p. 456-457.

[263] Inter-American Juridical Committee, *Guide on the Law Applicable to International Commercial Contracts in the Americas*, OEA/Ser.Q, ISBN 978-0-8270-6926-8, 2019, p. 135, No. 280.

[264] DE CORES HELGUERA, Carlos, *Pasado, presente y futuro de la Teoría General del Contrato. Una mirada desde la tradición jesuítica*, Montevideo, Universidad Católica del Uruguay, 2015, p. 527-528, citing Cláudia LIMA MARQUES. And de Cores continues, citing Roger Brownsword and Jacques Mestre: "General considerations take their place, such as that when the parties are not free and equal in fact, contract law functions as a license to exploit the vulnerability of the other party. Thus, the inequality of bargaining power justifies judicial intervention, whose goal is to protect the contractual relationship through a reasonable balance of the interests involved. In such circumstances it is not possible to act as if the contract had been freely concluded and drafted in an egalitarian way: the judge may erase the manifest abuse and sanction the main imbalances by refusing to enforce it."

[265] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in Comentarios a la nueva Ley General de Derecho Internacional Privado (Nº 19.920 del 17 de noviembre de 2020), Eduardo Vescovi (Coordinador), Montevideo, Ed. Idea, 2022, p. 219-266, p. 232-233.

[266] See, e.g., NYGH, Peter, *Autonomy in International Contracts*, Oxford, Clarendon Press, 1999, p. 2.

[267] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in

Basedow states that "freedom of contract can only develop its efficiency-enhancing effect if economic actors can choose among several options. [...] The constitutional importance of competition for economic life allows us to better appreciate the ambivalent character of freedom of contract." He adds that "State law must ensure that unbalanced contract terms drafted by suppliers cannot be enforced. It follows, therefore, that provisions of State law designed to compensate for market failures should be mandatory.[268]

In an interesting paper by Argerich and Capalbo on international commercial contracts written "from the perspective of legal practice," the authors emphasize that the determination of the applicable law is a crucial aspect when legal operators are drafting an international contract. They add that choice of law can be a significant aspect of negotiation between lawyers.[269] This occurs in contracts where there is a negotiation scenario, where the parties and their lawyers discuss the terms of the contract, including on choice of law and forum or arbitration. In such cases, party autonomy is almost universally admitted, and it is right that it should be so.[270]

But the problem is that in general—and the General Law on Private International Law is no exception—no distinction is made between one or the other cases in regulation on the subject. This rapporteur at one time suggested that adhesion contracts, form contracts, contracts with general conditions, and the like should be excluded from the scope of party autonomy and has been told that that is impossible because international trade is largely handled through contracts of that type. It is for this very reason, due to the fact that, by and large, merchants do not sit down to negotiate contracts, but use forms, general conditions, and the equivalent, which one party has drafted and the other party can only take or leave—but in reality cannot leave either because it has no other option available to it in the market—that objections arise over party autonomy in international contracts, particularly commercial adhesion contracts.[271]

Merchants may be professionals who seek advice from their lawyers, but when there is no possibility of negotiating or opting for a solution other than the unilaterally pre-established one, party autonomy is unacceptable. Moreover, one cannot speak in such cases of "party autonomy," but rather of "autonomy of the party" that has sufficient power, strength, or authority in the area of international trade in which they operate to unilaterally impose conditions on the other party, who can only adhere to contract or not, because they have no other option.[272] In its Guide on the Law Applicable to International Commercial Contracts in the Americas, the Inter-American Juridical Committee has recognized that "standard contracts may present problems within a general framework of contract law. As they usually are prepared by or for business entities operating in the world's largest commercial centers, they may be of limited use in other applications. Moreover, in most cases the content is unilaterally formulated, of unilateral benefit and the drafting is inevitably influenced by legal concepts of the respective countries of origin."[273]

Comentarios a la nueva Ley General de Derecho Internacional Privado (Nº 19.920 del 17 de noviembre de 2020), Eduardo Vescovi (Coordinador), Montevideo, Ed. Idea, 2022, p. 219-266, 233.

[268] BASEDOW, Jürgen, "El derecho privado estatal y la economía – El derecho comercial como una amalgama de legislación pública y privada", *¿Cómo se codifica hoy el derecho comercial internacional?*, 1er volumen de la Colección Biblioteca de Derecho Global, FERNÁNDEZ ARROYO, Diego P. and MORENO RODRÍGUEZ, José A. (Directors), p. 5-27, p.22-23.

[269] ARGERICH, Guillermo and CAPALBO, María Laura, "Demystifying Private International Law for International Commercial Contracts", *Diversity and Integration in Private International Law*, Edited by Verónica Ruiz Abou-Nigm and María Blanca Noodt Taquela, Edinburgh University Press, www.edinburghuniversitypress.com, ISBN: 9781474447850, p. 325-340, 325, p. 337.

[270] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in *Comentarios a la nueva Ley General de Derecho Internacional Privado (No. 19.920 del 17 de noviembre de 2020)*, Eduardo Vescovi (Coordinator), Montevideo, Ed. Idea, 2022, p. 219-266, 234.

[271] *Ibidem*, p. 219-266, p. 234-235.

[272] *Ibidem*, p. 219-266, p. 235.

[273] Inter-American Juridical Committee, *Guide on the Law Applicable to International Commercial Contracts in the Americas*, OEA/Ser.Q, ISBN 978-0-8270-6926-8, 2019, p. 69-70, No. 88.

It is obvious that a choice-of-law or -judge provision obtained by force, or by fraud, deceit, or equivalent means will be null and void. What is more discussed in doctrine is the effect of greater bargaining power. All doctrine recognizes the need to protect consumers, workers, and policyholders from the greater bargaining power of their counterparty. In *The Bremen v. Zapata Off-Shore Co.*, discussed above, Justice Burger went further, and held that the choice of law (and of the judge) **must express the actual intent of the parties, not be inserted into a contract by one of the parties for its own benefit.**[274] Although outside the United States there appear to be no specific rules on this point, Nygh concludes by stating that there is undoubtedly a general policy of protecting the economically weaker party.[275]

As to consent itself, Nygh states that the question should not be limited to whether or not the parties consented in accordance with law, but should be factual: whether a choice of forum and/or choice of law was made and whether it is reasonable, in the circumstances, to assume that the other party accepted that choice.[276] It could not be construed that a party consented to a choice-of-law or -forum provision that is detrimental to it; that would be unreasonable.[277]

13. The right balance

According to the arguments that have been developed herein, with solid support from the doctrine of different countries, it would be reasonable to affirm that only when there is a fair and reasonable balance between freedom and equality, will the choice of applicable law—and of the court or arbitrator—be valid. Admitting party autonomy in conflict of laws, as Uruguay's General Law on Private International Law does at Article 45, does not imply validating the choice of the strongest, which would alter the balance and fairness of the contract.[278]

The balance and equity of the contract must be guaranteed by the lawmaker in the law, thereby guaranteeing formal justice; but if this does not allow the judge to reach a fair solution in a specific case, general theory provides them with the tools to achieve it. The role of the judge is not to apply the law like an automaton; if that were the case, we would use computers, not sentient human, beings to pass judgment. When the connection established is the will of the parties, it is also the legislator first, and then the judge, who must guarantee at least a "minimum equilibrium" in the contract.[279] It should be borne in mind that "in contracts between non-equals, the virtuality of the contract will depend on maintaining the balance in the exchange relationship,"[280] and this task is in the hands first of the legislator and then of the adjudicator in the case (judge or arbitrator).

---

[274] 407 US 1 (1972). NYGH, Peter, *Autonomy in International Contracts*, Oxford, Clarendon Press, 1999, p. 69; FRESNEDO DE AGUIRRE, Cecilia, *La autonomía de la voluntad en la contratación internacional*, Montevideo, FCU, 1991, p. 25-27.

[275] NYGH, Peter, *Autonomy in International Contracts*, Oxford, Clarendon Press, 1999, p. 70-71.

[276] *Ibidem*, p. 93

[277] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in *Comentarios a la nueva Ley General de Derecho Internacional Privado (No. 19.920 del 17 de noviembre de 2020*), Eduardo Vescovi (Coordinator), Montevideo, Ed. Idea, 2022, p. 219-266, p. 236.

[278] *Ibidem*, p. 219-266, p.236.

[279] DE CORES HELGUERA, Carlos, *Pasado, presente y futuro de la Teoría General del Contrato*. *Una mirada desde la tradición jesuítica*, Montevideo, Universidad Católica del Uruguay, 2015, p. 494, says, quoting contemporary French doctrine, that the so-called minimum equilibrium consists of "...the minimum of agreement and solidarity necessary in current relations. To that extent, selfish aspirations are curbed in favor of the mutual trust of the contracting parties in the observance of a contractual balance, the basis of which lies in a duty of fairness that imposes on the parties a minimum of solidarity, which consisting both of not taking unilateral advantage of the contract and of not sacrificing the interests of the co-contracting party."

[280] DE CORES HELGUERA, Carlos, *Pasado, presente y futuro de la Teoría General del Contrato*. *Una mirada desde la tradición jesuítica*, Montevideo, Universidad Católica del Uruguay, 2015, p. 532, quoting Atilio ALTERINI ("La autonomía de la voluntad," *Estudios de Derecho Civil*, La Ley, Buenos Aires, 1999, p. 179). De Cores also quotes, in the same sense, Henri BATIFFOL («La 'crise

In that sense, referring to adhesion contracts, Gamarra argues that, as of the enactment of the consumer relations law, all provisions (except for those on the economic equivalence of benefits) are subject to the control of the judge, who will determine whether they violate the principle of contractual balance or equality, which now becomes substantial, and not merely formal.[281] Therefore, the choice-of-law and/or choice-of-judge clauses included in adhesion contracts are also subject to the aforementioned control.[282]

Likewise, with respect to the balance of rights and obligations, Basedow makes comparable statements when, referring to "private rulemaking," he says that this is a reality, "although there is no doubt that the State can interfere in private rules at any time through appropriate laws or judicial decisions. Given the risk of bias inherent in private rules, such state intervention may be necessary to restore the balance of rights and obligations."[283]

14. The UNIDROIT Principles of International Commercial Contracts and their relevance to the subject matter of this report.

The UNIDROIT Principles refer specifically to **contracts with standard clauses** at Articles 2.1.19 to 2.1.22.

Article 2.1.19 (2) defines what is meant by standard terms: "Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party." Comment 2 clarifies: "What is decisive is not their formal presentation" (separate document, form, etc.) but "that they are drafted in advance for general and repeated use and that they are actually used in a given case by one of the parties without negotiation with the other party."

Article 2.1.19 (1) provides: "Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to Articles 2.1.20 - 2.1.22." In this respect, comment 3 specifies that, therefore, "**standard terms proposed by one party bind the other party only on acceptance.**" It adds that "standard terms contained in the contract document itself will normally be binding upon the mere **signature** of the contract document as a whole, at least **as long as they are reproduced above that signature and not, for instance, on the reverse side of the document**." This example is not only real, but also common: the general conditions of bills of lading, waybills, and other similar documents are invariably printed on the reverse side and are generally unsigned. On other occasions, as this rapporteur has personally seen, the signature is placed at the top of the general conditions printed on the reverse side. It is clear that those clauses were not consented to.[284]

---

du contrat' et sa portée», *Archives de Philosophie du Droit (APD)*, t. XIII, Centre National de la Recherche Scientifique, Paris, Sirey, 1968, p. 26 and 30.

[281] GAMARRA, Jorge, *Tratado de Derecho Civil uruguayo*, t. IX, Montevideo, FCU, 2003, p. 203, in DE CORES HELGUERA, Carlos, *Pasado, presente y futuro de la Teoría General del Contrato. Una mirada desde la tradición jesuítica*, Montevideo, Universidad Católica del Uruguay, 2015, p. 542.

[282] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in Comentarios a la nueva Ley General de Derecho Internacional Privado (Nº 19.920 del 17 de noviembre de 2020), Eduardo Vescovi (Coordinador), Montevideo, Ed. Idea, 2022, p. 219-266, p. 237.

[283] BASEDOW, Jürgen, "El derecho privado estatal y la economía – El derecho comercial como una amalgama de legislación pública y privada", *¿Cómo se codifica hoy el derecho comercial internacional?*, 1er volumen de la Colección Biblioteca de Derecho Global, FERNÁNDEZ ARROYO, Diego P. and MORENO RODRÍGUEZ, José A. (Directors), p. 5-27, 24.

[284] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in Comentarios a la nueva Ley General de Derecho Internacional Privado (Nº 19.920 del 17 de noviembre de 2020), Eduardo Vescovi (Coordinador), Montevideo, Ed. Idea, 2022, p. 219-266, p. 254-255.

Article 2.1.20 refers to surprising terms, and states that in principle standard terms are only binding on the adherent if they have "**expressly accepted**" them; otherwise, they are ineffective. Comment 1 establishes an important exception to the possible effectiveness of such clauses: "notwithstanding its acceptance of the standard terms as a whole, the adhering party is not bound by those terms which by virtue of their content, language or presentation are of such a character that **it could not reasonably have expected them**." Comment 2 states: "In determining whether or not a term is unusual, regard must be had on the one hand to the terms which are commonly to be found in standard terms generally used in the trade sector concerned, and on the other to the individual negotiations between the parties." In other words, both criteria must be taken into account.

Article 1.7 **(Good faith and fair dealing)** imposes on the parties the duty to act in accordance with good faith and fair dealing. International commercial contracts, obviously including choice-of-law—and choice-of-judge—provisions should be interpreted in the light of those criteria, invalidating those terms that denote bad faith or lack of fair dealing. These principles acquire particular relevance in cases where the choice of law (or of the judge or arbitrator) was imposed by one of the parties. Nygh notes that this circumstance may well be cause for disregarding such a choice.[285] Cordero Moss shows, based on two cases, that "there is no uniform concept of good faith and fair dealing that can be valid for all types of contracts at an international level." She mentions as one of the causes of this that "contractual practice is, in general, adopting model contracts prepared on the basis of English law, or, at least, of common law systems, ... whose very structure rejects the interference of good faith,"[286] which is surprising to someone with a civil law background.

Article 1.9 **(Usages and practices)** establishes that the parties are bound by any usage to which they have agreed, i.e., consented, which **excludes those that are merely unilateral**, **or even that have been challenged in court or arbitration**. Nor is it enough that the uses are widely known; they must also be regularly observed and not be unreasonable.

Article 3.2.7 **(Gross disparity)** allows a party to avoid the contract or any of its terms if at the time of the conclusion of the contract, the contract or any of its terms gave the other party an excessive advantage (para. (1)), and provides that the factors to be taken into account for these purposes are: "(a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill, and (b) the nature and purpose of the contract."[287] It deserves special attention that one of the criteria for determining whether there was an unjustifiable advantage in favor of one party is the "**unequal bargaining position**" (Comment 2).

Article 4.6 **(*Contra proferentem rule*)** is particularly relevant to adhesion and analogous contracts because such contracts are drawn up by only one of the parties.

15. <u>The Hague Principles on Choice of Law in International Commercial Contracts and their relevance to the subject matter of this Report</u>

Article 3 of the Hague Principles on Choice of Law in International Commercial Contracts provides: "The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a *neutral and balanced set of rules*, unless the law of the forum provides otherwise."[288]

This article allows the parties to choose non-State law, provided that such non-State law rules have garnered "general recognition beyond a national level. In other words, the 'rules of law' cannot refer to a set of rules contained in the contract itself, or to one party's standard terms and conditions, or to a set of local industry-specific terms." (Comment 3.4) And further on, comment 3.9, adds that

---

[285] NYGH, Peter, *Autonomy in International Contracts*, Oxford, Clarendon Press, 1999, p. 68.

[286] CORDERO MOSS, Giuditta, "El derecho contractual general y su (limitada) aptitud para ser armonizado," *¿Cómo se codifica hoy el derecho comercial internacional?*, 1er volumen de la Colección Biblioteca de Derecho Global, FERNÁNDEZ ARROYO, Diego P. y MORENO RODRÍGUEZ, José A. (Directors), p. 29-50, 44-45.

[287] *UNIDROIT Principles of International Commercial Contracts*, Asuncion, CEDEP - Intercontinental Editora, UNIDROIT, 2016, and https://www.unidroit.org/contracts

[288] https://assets.hcch.net/docs/21356f80-f371-4769-af20-a5e70646554b.pdf Emphasis added.

"Article 3 requires that 'rules of law' be generally accepted as possessing three attributes: there must be a *set of rules*, the set must be *neutral* and it must be *balanced*."[289] (Emphasis in original)

With respect to the *neutrality* requirement, comment 3.11 states that it is satisfied provided that "the source of the 'rules of law' is generally recognised as a neutral, impartial body, that is, one that represents diverse legal, political and economic perspectives." As to the requirement that the set of rules of law be *balanced*, comment 3.12 states that it "is justified by: (i) the assumption underlying party autonomy in commercial contracts according to which parties have relatively equal bargaining power; and (ii) the fact that the presumption that State laws are balanced is not necessarily transferrable to 'rules of law'. This requirement would likely preclude the choice of a set of rules that benefit one side of transactions in a particular regional or global industry."[290]

The Inter-American Juridical Committee, in its Guide on the Law Applicable to International Commercial Contracts in the Americas, states that the Hague Principles' requirement that a set of rules be *neutral and balanced* "attempts to address the concern that unequal negotiating power could lead to the imposition of unfair or unequal rules." The Guide adds that **"unilaterally drafted contractual clauses or conditions clearly do not qualify as non-State law that can be chosen as applicable law."**[291]

V. CONCLUSIONS

1. The subject under analysis has been explored little at all levels: legislative, jurisprudential, and doctrinal. The experts consulted agreed that there were no answers to the problem of party autonomy in conflict of laws in asymmetrical contracts between merchants, or that if there were any, they were insufficient or inadequate. Most of the responses received acknowledge the need to address this situation or the desirability of doing so, while still recognizing the importance of the UNIDROIT Principles of International Commercial Contracts and the Hague Principles on Choice of Law in International Commercial Contracts.

2. In general, the conventional and autonomous rules of private international law that regulate international contracts are designed for "freely discussed" contracts: contracts in which both parties have equivalent, although not identical, bargaining power. They are not designed for standard-clause, asymmetric, adhesion, or analogous contracts, in which one party establishes the conditions and the other either adheres or not, without the possibility of negotiating or discussing the unilaterally pre-established terms.

3. In the opinion of this rapporteur, this confirms the hypothesis from which we started when proposing the topic at the ninety-eighth session of the CJI and demonstrates the necessity and advisability of providing recommendations on possible good practices in international contracts between merchants with a contractually weaker party.

---

[289] FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920," in Comentarios a la nueva Ley General de Derecho Internacional Privado (Nº 19.920 del 17 de noviembre de 2020), Eduardo Vescovi (Coordinador), Montevideo, Ed. Idea, 2022, p. 219-266, p. 257.

[290] https://assets.hcch.net/docs/21356f80-f371-4769-af20-a5e70646554b.pdf p. 42-43 Emphasis added.

[291] Inter-American Juridical Committee, *Guide on the Law Applicable to International Commercial Contracts in the Americas*, OAS, 2019, p. 104, Nos. 192 and 194.

RECOMMENDATIONS AND POSSIBLE BEST PRACTICES IN INTERNATIONAL CONTRACTS BETWEEN MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY

Part 1. Objectives and rationale of these recommendations and possible best practices

1. The purpose of this Report and recommendations for possible best practices in contracts between merchants with a contractually weaker party is to explore in depth a subject generally neglected by both hard-law and soft-law instruments.

2. The report seeks to complement existing general mechanisms to prevent a contractually strong party from abusing a weak party (policing rules, mandatory rules, international public policy reservation and evasion of law) and the few special rules on the subject, since they provide insufficient protections.

3. The report provides justice system personnel—judges, arbitrators, lawyers, etc.—with recommendations and suggestions concerning choice-of-law and choice-of-court provisions in adhesion contracts or any other type of asymmetric contract. These recommendations and suggestions may be used to interpret the few existing specific rules, particularly in the absence of rules relating to asymmetric international commercial contracts.

4. The report and the recommendations and suggestions with which it concludes address the realization that under private international law, both conventional and autonomous rules governing international contracts are generally designed for "free discussion" contracts, not for adhesion contracts.

5. Under international commercial adhesion contracts, the adhering merchant's situation is identical or at least very similar or equivalent to the acceding consumer's, given that under neither of the two circumstances is the acceding party able to negotiate the unilateral terms established by the other. Not all legal systems allow consumer protection rules to be extended to merchants, however.

6. The non-existence—or at best the insufficiency—of rules that address this problem, which is found in the majority of countries and conventional systems, makes this Report and its recommendations and suggestions necessary, so that it may operate as a useful soft-law instrument offered by the Inter-American Juridical Committee to legal operators.

Part 2. Recommendations, suggestions and possible best practices in commercial contracts with a contractually weaker party

Note that the recommendations offered below are in line with the *Guide on the Law Applicable to International Commercial Contracts in the Americas* (OAS, 2019).

Recommendation 1: Existence and validity of the consent of both parties to the contract

It is recommended that the choice-of-law and/or judge clauses have been effectively and validly agreed byall parties to the contract. It is recommended that the judge or arbitrator ascertain in each specific case and according to the particular circumstances whether or not the elements of valid consent were present with respect to both parties to the choice-of-law and/or -judge provision.

Comments:

For the purpose of determining whether or not an adhering party did validly consent to the general terms and, specifically, to the choice of law and judge clauses contained therein, special consideration will be given to whether or not it was obtained in an abusive manner, taking into account the specific case, in accordance with the *lex fori* (Source: Article 4 of the Buenos Aires Protocol on International Jurisdiction in Contractual Matters, Buenos Aires, August 5, 1994. CMC/Dec. 1/94.

Consideration will also be given to whether such terms are monopolistic, meaning the adhering party is denied the possibility of choosing other terms.

Where a choice of law or choice of judge clause is clearly unfavorable to the adhering party, it will be an indicator that said party has not given its consent.

The agreement may be express or implied,[292] provided that it is evident from the parties' behavior and from the clauses of the contract, considered as a whole (Art. 7 of the Inter-American Convention on Law Applicable to International Contracts, Mexico City, 1994).

This rule is consistent with Art. 3.a of the 2005 Hague Convention on Choice of Court Agreements, which defines the "exclusive choice of court agreement" as "an agreement concluded by two or more parties," which excludes clauses drawn up unilaterally by one of the parties and included under general pre-printed terms. Subparagraph (d) reaffirms that interpretation, since it establishes the independence of the exclusive choice-of-court agreement forming part of a contract with respect to the other terms of the contract. An acceding party to a contract with general terms or other types of asymmetric contracts should therefore consent not only to the contract, but to the choice of forum (and/or law) clause as well.

In cases in which it is intended to enforce judge and/or law selection clauses against third parties, the same criterion shall apply: the third party must consent to the clause in question, otherwise, such clauses shall not be enforceable against them.

If the judge (or arbitrator) concludes that the law and/or judge selection clause is invalid, they shall determine the applicable law and/or the internationally competent jurisdiction in accordance with the applicable rules of private international law, in the absence of a valid choice. Such rules of private international law will be conventional or, failing that, the national or autonomous rules of private international law of the forum State. There will be no "breach" of the choice of forum and/or choice of law agreement, simply because that agreement is not valid.

Recommendation 2: Documentation of express agreement to the choice of law or judge and burden of proof of consent

It is recommended that express agreement to the choice of law or judge be documented in writing or by any other means of communication that may be available for subsequent reference. The burden of proof that there was free consent by both parties rests with the party that drafted the adhesion contract.

Comments:

This recommendation is derived from, among other sources, Art. 3.c of the Hague Choice of Court Agreements Convention 2005 and Art. 4 of the Protocol of Buenos Aires on International Jurisdiction in Contractual Matters, Buenos Aires, August 5, 1994. CMC/Dec. 1/94.

This recommendation is consistent with the legislation of several countries, including Argentina (Article 2607 CCCN), Brazil (art. 63(3) of the CPC), Uruguay (art. 60 of the General Law of Private International Law No. 19.920), and the Dominican Republic (Article 18.II of Law No. 544-14).

The fact that the choice-of-law and/or -judge provision is in writing is not sufficient to presume valid consent by both parties. We find in comparative law that an unsigned document does not imply consent, which, rather, is expressed by the signature or some other verifiable means denoting the will of the party. As jurisprudence has stated, "printed matter alone is binding on no one."[293] In any case, it is worth reiterating that these recommendations are not binding.

---

[292] Note that some autonomous systems of private international law admit tacit choice-of-law and/or -judge provisions, such as, for example, Article 45.4 of Uruguay's General Law on Private International Law (Law No. 19.920) and Articles 12 and 58 of Law No. 544-14 of the Dominican Republic, while others, such as Article 2095 of the Peruvian Civil Code, do not admit it.

[293] Judge Almirati held: "As long as the national legislation is not modified, the obligations between the parties, regardless of their origin, emanate from the expression of their will expressed by signing the document in question or the duly identified annexed document. Printed matter alone is binding on no one," in Judgment No. 147, 24/5/988, Uruguay, published in *Revista de Transporte y Seguros* Nº 2, 1989, Case No. 19, p. 47.

In addition, the proposed recommendation draws from a universal soft law instrument, namely the above-analyzed UNIDROIT Principles of International Commercial Contracts, in particular Comment 3 to Articles 2.1.20 to 22, and in Art. 2.1.20.

Recommendation 3: General interpretation of forum and/or law selection provisions included in adhesion contracts or the equivalent

When interpreting choice of forum and/or choice of law provisions in adhesion contracts or the equivalent, it is recommended bearing in mind that autonomist systems have been designed to regulate parity or free discussion contracts, and recourse should be had, when deemed necessary, to private international law mechanisms (public international policy reservation, evasion of the law reservation, mandatory rules, etc.) to mitigate possible injustices or imbalances that could arise from the application of the full autonomist system to adhesion contracts or the equivalent.

Comments:

It is up to the judge or arbitrator to dispense justice—not only formal, but also material and sustantive—and to maintain a minimum guaranteeing balance in the contract.

The mere fact of unequal bargaining power or lack of bargaining does not invalidate a choice-of-law provision; that requires that provision be to the detriment of the weaker party,[294] which may be a good criterion for the authority enforcing the law when interpreting and assessing choice-of-law and/or -judge provisions.

Recommendation 4: Specific interpretation of choice-of-forum and/or -law provisions in adhesion contracts or the equivalent

It is recommended that choice of forum provisions in adhesion contracts impeding or obstructing access to justice for the adhering party not be considered enforceable on the latter.[295]

Comments:

Access to effective justice is a fundamental principle that is universally recognized. It is expressly enshrined in various conventions and other human rights instruments, among them the American Convention on Human Rights (Art. 8), the International Covenant on Civil and Political Rights (Art. 14), the European Convention on Human Rights (Art. 6), ASADIP Principles on Transnational Access to Justice (Transjus) and in domestic constitutions as well.

Furthermore, the General Assembly of the Organization of American States has acknowledged "that expanding access to justice is fundamental for the full exercise of human rights and democratic governance; likewise, it is essential for successful citizen security strategies and for the elimination of poverty and inequality."[296]

Consequently, a choice-of-forum provision cannot be validated if it is unilaterally included under general terms or other types of adhesion contracts impeding access to justice for the party adhering to the contract in the event of a dispute.

While the inability to access justice may stem from a variety of factors, it is often the result of economic considerations such as, for instance, when the amount involved in a claim does not warrant litigation abroad because it would cost more to pursue than the amount being sought.

This recommendation is consistent with the ruling of the U.S. Supreme Court in *The Bremen v. Zapata Off-Shore Co.* case, analyzed in this report.

---

[294] Eugene F. SCOLES & Peter HAY, *Conflict of Laws*, Hornbook Series, St. Paul, Minn., West Publishing Co., 1982, p. 640-641.

[295] Suggestion of Dr. Carolina Iud, Legal Counsel of the Argentine Ministry of Foreign Affairs, at a meeting in September 2022.

[296] AG/RES. 2703 (XLII-O/12) STRENGTHENING THE ACTIVITIES OF THE INTER-AMERICAN PROGRAM OF JUDICIAL FACILITATORS (adopted at the second plenary session, held on June 4, 2012). Available at http://www.oas.org/es/sla/ddi/docs/AG-RES_2703_XLII-O-12.pdf

Recommendation 5: Acceptance of choice-of-forum provisions in adhesion contracts or the equivalent by the adhering party

It is recommended that choice-of-forum provisions included in adhesion contracts be considered valid and enforceable when the adhering party expressly accepts them. In this case, the person who drafted the general conditions of the contract may not oppose such acceptance and the application of the respective clause.

Comments:

Such acceptance may be express or evidenced by the claim being filed with the forum selected in the clause. In the latter case, the initial absence of consent is rectified at a later juncture following the signing of the contract. This recommendation takes its inspiration from the various conventional and autonomous provisions that allow choice of law or choice of judge at any stage in the contract's life: for example, Art. 8 of the Inter-American Convention on the Law Applicable to International Contracts, in the Americas, Art. 45 of Uruguay's General Law on Private International Law (Law No. 19.920), and so on.

Recommendation 6: Specific interpretation of choice-of-law provisions in adhesion contracts or the equivalent

It is recommended that effectiveness of choice-of-law provisions not be recognized in standard-clause or adhesion contracts favoring the party that unilaterally established the general terms in which the provision was included to the detriment of the adhering party, unless the acceding the party expressly accepted the application of said law. If doubts arise, the clauses in question should be interpreted according to the *contra proferentem* principle.

Comments:

This Recommendation draws from Article 4.6 (*Contra proferentem rule*) of the UNIDROIT Principles, which is particularly relevant to adhesion and analogous contracts that are drawn up by only one of the parties.

If the choice-of-law clause is found to be invalid, the judge shall proceed as appropriate in such cases in accordance with the rules governing conflict.

Recommendation 7: Substantive justice in a specific case

It is recommended that the judge (or arbitrator) refuse to apply any choice-of-law (or -judge) provision in the general conditions of an international commercial adhesion contract if doing so would result in an unbalanced or patently adverse situation for the adhering party.

Comments:

This recommendation is based on commentary (b) to section 187 of the *Restatement (Second) on Conflict of Laws*, Article 9 of the Inter-American Convention on General Standards of Private International Law (CIDIP-II, Montevideo, 1979), and Article 11 of the General Law on Private International Law (Law No. 19.920) of Uruguay.

Recommendation 8: Policing, mandatory, or necessary laws

It is recommended that in no case should choice-of-forum or choice-of-law provisions in an international commercial adhesion contract or an asymmetrical contract constitute an impediment to the application of mandatory forum provisions. It is suggested that account also be taken of the mandatory provisions of other forums with which the contract has a significant relation in the opinion of the adjudicator.[297]

Comments:

This rule draws on Recommendation 17.1 of the Guide on the Law Applicable to International Trade Contracts in the Americas, developed by the Inter-American Juridical Committee of the OAS.

[297] Suggestion of Dr. Carolina Iud, Legal Counsel of the Argentine Ministry of Foreign Affairs, at a meeting in September 2022.

The **ILS-ABA report (USA)** states that it should be limited to the forum where the contract is intended to be enforced.[298] The reformulated text in this third report takes that suggestion into account.

Note that, unlike in the United States, the enforcement of **foreign policing rules** is recognized in several private international law texts. Mohamed Salah mentions the following:[299] Article 16 of the Hague Convention on the Law Applicable to Agency of March 14, 1978; Article 7.1 of the Rome Convention on the Law Applicable to Contractual Obligations, 1980 (consolidated version); Article 11.2 of the Inter-American Convention on the Law Applicable to International Contracts.[300] As for provisions of national or autonomous private international law, Article 6.2 of Uruguay's General Law on Private International Law (Law No. 19.920), Article 19 of the Swiss federal law on private international law, and Article 3079 of the Civil Code of Quebec, among others, admit the application of the policing rules of third States, to a greater or lesser extent.[301]

Recommendation 9: International public policy

It is recoomended that the choice-of-forum or -law terms included in international commercial adhesion contracts or asymmetrical contracts whose application is manifestly incompatible with the international public policy of the forum shall under no circumstances be recognized as valid.

Comments:

This rule draws on Recommendation 17.1 of the Guide on the Law Applicable to International Trade Contracts in the Americas, developed by the Inter-American Juridical Committee of the OAS. It is also in line with Article 18 of the Mexico Convention on the Law Applicable to International Contracts and Article 11 of the Hague Principles.

Recommendation 10: To lawmakers

It is recommended that national lawmakers take this report and the foregoing recommendations into consideration when drafting norms of private international law governing international contracts.

* * *

BIBLIOGRAPHY

(consulted by the rapporteur for this report)

ARGERICH, Guillermo y CAPALBO, María Laura, "Demystifying Private International Law for International Commercial Contracts", *Diversity and Integration in Private International Law*, Edited by Verónica Ruiz Abou-Nigm and María Blanca Noodt Taquela, Edinburgh University Press, www.edinburghuniversitypress.com, ISBN: 9781474447850, p. 325-340.

BASEDOW, Jürgen, "El derecho privado estatal y la economía – El derecho comercial como una amalgama de legislación pública y privada", *¿Cómo se codifica hoy el derecho comercial internacional?*, 1er volumen de la Colección Biblioteca de Derecho Global, FERNÁNDEZ ARROYO, Diego P. y MORENO RODRÍGUEZ, José A. (Directores), p. 5-27.

[298] COMMENTS OF THE AMERICAN BAR ASSOCIATION INTERNATIONAL LAW SECTION ON THE SECOND PROGRESS REPORT ON "CONTRACTS BETWEEN MERCHANTS WITH A CONTRACTUALLY WEAKER PARTY" OF THE ORGANIZATION OF AMERICAN STATES, July 15, 2022.

[299] MOHAMED SALAH, MAHMOUD, "Loi d'autonomie et méthodes de protection de la partie faible en droit international privé », *Recueil des cours*, T. 315, 2005, p. 141–264, p. 228–230.

[300] For more details, see Chapter IV.3 of this report.

[301] For more details, see Chapter IV.3 of this report.

BLENGIO, Juan, "Las cláusulas abusivas desde la perspectiva de la aplicación coordinada de los principios de libertad e igualdad a la contratación", *Estudios de Derecho Civil en Homenaje al Profesor Jorge Gamarra*, Montevideo, FCU, 2001, p. 55-82.

BLENGIO, Juan, "Principio de igualdad y autonomía privada. Una cuestión que se discute. Primera Parte", en *Anuario de Derecho Civil Uruguayo*, Tomo XXXII, Montevideo, FCU, 2002, p. 571-588.

BLOM, Joost, "Canada", *Encyclopedia of Private International Law*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 1950-1959.

BOGGIANO, Antonio, "International Standard Contracts, A Comparative Study", *Recueil des Cours*, 1981-I, p. 9-113.

BOGGIANO, Antonio, *Contratos internacionales*, Buenos Aires, Depalma, 1990.

BOUTIN, Gilberto, *Derecho Internacional Privado*, 2ª edición, Panamá, Ed. Maître Boutin, 2006.

BURT, Esteban, "Ley de representación, agencias y distribución", LLP 1999, p. 381, PY/DOC/381/2007.

CAPPAGLI, Alberto C., "A medio siglo de 'Compte c/Ibarra'", en *Revista del Colegio de Abogados de Bs.As.*, año 1986, T.XLVI, No. 3.

CORDERO MOSS, Giuditta, "El derecho contractual general y su (limitada) aptitud para ser armonizado", *¿Cómo se codifica hoy el derecho comercial internacional?*, 1er volumen de la Colección Biblioteca de Derecho Global, FERNÁNDEZ ARROYO, Diego P. y MORENO RODRÍGUEZ, José A. (Directores), p. 29-50.

DE CORES HELGUERA, Carlos, *Pasado, presente y futuro de la Teoría General del Contrato. Una mirada desde la tradición jesuítica*, Montevideo, Universidad Católica del Uruguay, 2015.

DÍAZ SIERRA, María del Carmen, "Desde la autonomía de la voluntad a la institucionalización de la figura del sujeto débil. ¿La caída de la doxa?", http://revistaderecho.um.edu.uy 2012/12.

DOS SANTOS MIRANDA, Manuel, "La Protección Legal de los Consumidores en Paraguay", disponible en https://www.pj.gov.py/ebook/monografias/nacional/civil/Manuel-Dos-Santos-M-Proteccion-Legal-Consumidores-Py.pdf

EHRENZWEIG, Albert A., *A Treatise on Conflict of Laws*, St. Paul, Minn., West Publishing Co., 1962.

ESPLUGUES MOTA, Carlos, "Una aproximación internacional privatista al nuevo Código de Procedimiento Civil de Bolivia de 2013", *Rev. Boliv. De derecho* nº 18, julio 2014, ISSN: 2070-8157, pp.16-63, http://www.scielo.org.bo/pdf/rbd/n18/n18a02.pdf

FARIÑA, Macarena, "Primeras aproximaciones a la Ley General de Derecho Internacional Privado", *Tribuna del Abogado*, Nº 217 enero/marzo 2021, Publicación del Colegio de Abogados del Uruguay, p. 14-23.

FARIÑA, Macarena, "El nuevo régimen en materia de relaciones de consumo internacionales: ¿una solución suficiente para los reclamos de los cyberconsumidores?", en Comentarios a la nueva Ley General de Derecho Internacional Privado (Nº 19.920 del 17 de noviembre de 2020), Eduardo Vescovi (Coordinador), Montevideo, Ed. Idea, 2022, p. 367-390.

FERNÁNDEZ ROZAS, José Carlos, "Cuba", *Encyclopedia of Private International Law*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 2002-2008.

FERNÁNDEZ ROZAS, José Carlos, "Dominican Republic", *Encyclopedia of Private International Law*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 2036-2043.

FERNÁNDEZ DE LA GÁNDARA, Luis and CALVO CARAVACA, Alfonso-Luis, *Derecho Mercantil Internacional*, 2ª ed., Madrid, Ed. Tecnos, 1995.

FRESNEDO DE AGUIRRE, Cecilia, *La autonomía de la voluntad en la contratación internacional*, Montevideo, FCU, 1991 (Tesis para acceder al título de Profesor Adscripto de la Facultad de Derecho de la UdelaR aprobada con sobresaliente. Premio único mejor obra en la categoría Ciencias Sociales y Jurídicas, otorgado por el Ministerio de Educación y Cultura por resolución del 13 de octubre de 1992).

FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional", *Curso de Derecho Internacional*, XXXI, 2004, Comité Jurídico Interamericano, Secretaría General, OEA.

FRESNEDO DE AGUIRRE, Cecilia, Curso de Derecho Internacional Privado, Tomo II, Vol, 2, Montevideo, FCU, 2009.

FRESNEDO DE AGUIRRE, Cecilia, "Normas de Derecho Internacional Privado en las Leyes Nº 18.803 y 19.246 de Derecho Marítimo", *Reforma del Derecho Marítimo Uruguayo*, Asociación Uruguaya de Derecho Marítimo, Fernando Aguirre Ramírez (coordinador), Montevideo, FCU, 2015, p. 127-168.

FRESNEDO DE AGUIRRE, Cecilia, *Actualización Curso de Derecho Internacional Privado*, Montevideo, FCU, 2021, p. 70-103.

FRESNEDO DE AGUIRRE, Cecilia y LORENZO IDIARTE, Gonzalo A., *Texto y Contexto de la Ley General de Derecho Internacional Privado*, Montevideo, FCU, abril 2021.

FRESNEDO DE AGUIRRE, Cecilia, "La autonomía de la voluntad en la contratación internacional y los principios fundamentales en juego: las novedades de la Ley 19.920", en *Comentarios a la nueva Ley General de Derecho Internacional Privado (Nº 19.920 del 17 de noviembre de 2020)*, Eduardo Vescovi (Coordinador), Montevideo, Ed. Idea, 2022, p. 219-266.

FRESNEDO DE AGUIRRE, Cecilia, *Derecho Internacional Privado*, Tomo III, Montevideo, FCU, 2022.

LIMA MARQUES, Claudia, LIXINSKI, Lucas y BAQUERO, Pablo Marcello, "Brazil", *Encyclopedia of Private International Law*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, pp. 1928-1939.

LÓPEZ-TARRUELLA MARTÍNEZ, Aurelio, "Perú", *Encyclopedia of Private International Law*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 2410-2420.

LOWENFELD, Andreas F., *Conflict of Laws*, Cases and Material Series, Matthew Bender & Co., Inc., New York, 1986.

MADRID MARTÍNEZ, Claudia, "Venezuela", *Encyclopedia of Private International Law*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 2647-2658.

MALVAGNI, Atilio, *Contratos de Transporte por Agua*, Ed. De Palma, Bs.As., 1956.

MILLS, Alex, *Party Autonomy in Private International Law*, Cambridge University Press, 2018.

MOHAMED MAHMOUD, M.S., "Loi d'autonomie et méthodes de protection de la partie faible en droit international privé », *Recueil des cours*, T. 315, 2005.

MONGE TALAVERA, Luz, "Ley aplicable a los contratos internacionales en el derecho peruano", *Actualidad Jurídica Iberoamericana* Nº 14, febrero 2021, ISSN: 2386-4567, p. 944-969.

MORENO RODRÍGUEZ, José Antonio, *Derecho aplicable y arbitraje internacional*, Asunción, CEDEP—Intercontinental Editora, 2013.

MORENO RODRÍGUEZ, José Antonio, La CIDIP VII y el tema de la protección al consumidor. Algunas reflexiones en borrador para el foro virtual de expertos, en: http://www.oas.org/DIL/esp/CIDIPVIIproteccionconsumidorjosemorenorodriguez.pdf

MUIR WATT, Horatia, "Party autonomy", *Encyclopedia of Private International Law*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 2, p. 1336-1341.

MUIR WATT, Horatia, "El equilibrio económico en los acuerdos de elección de foro", *¿Cómo se codifica hoy el derecho comercial internacional?*, 1er volumen de la Colección Biblioteca de Derecho Global, FERNÁNDEZ ARROYO, Diego P. y MORENO RODRÍGUEZ, José A. (Directores), p. 129-150.

NYGH, Peter, *Autonomy in International Contracts*, Oxford, Clarendon Press, 1999.

OGUNRANTI, Akinwumi, "The Scope of Party Autonomy in International Commercial Contracts: A New Dawn?", (LLM Thesis, Dalhousie University, Schulich School of Law, 2017) [Unpublished], https://digitalcommons.schulichlaw.dal.ca/llm_theses/95/

OPERTTI BADÁN, Didier y FRESNEDO DE AGUIRRE, Cecilia, *Contratos Comerciales Internacionales. Últimos desarrollos teórico-positivos en el ámbito internacional*, Montevideo, FCU, 1997.

PÉREZ LOOSE, Hernán, "Ecuador", *Encyclopedia of Private International Law*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, pp. 2043-2053.

PICAND ALBÓNICO, Eduardo, "Chile", *Encyclopedia of Private International Law*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 1959-1969.

RAY, José Domingo, "La cláusula atributiva de jurisdicción", (Separata de Lecciones y Ensayos No.15), Bs.As., 1960.

RÜHL, Giesela, "The Protection of Weaker Parties in the Private international law of the European Union: A Portrait of Inconsistency and Conceptual Truancy" (2014) 10 J Priv Int L, p. 335-358.

SANTOS BELANDRO, Ruben, *Ley General de Derecho Internacional privado de la República Oriental del Uruguay 19.920 de 17 de noviembre de 2020. El texto y su contexto americano. Curso general*, Montevideo, Asociación de Escribanos del Uruguay, 2021.

SCOLES, Eugene F. & HAY, Peter, *Conflict of Laws*, Hornbook Series, St. Paul, Minn., West Publishing Co., 1982.

SERRA FREIRE, Paula, "L'autonomie de la volonté et les contrats de consommation: une étude sur la clause attributive de juridiction", en *Contratos Internacionales*, Diego P. Fernández Arroyo y José Antonio Moreno Rodríguez (Directores), Biblioteca de Derecho de la Globalización, ASADIP – OEA, Buenos Aire, 2016, p. 483-508.

SILBERMAN, Linda, "USA", *Encyclopedia of Private International Law*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p. 2637-2647.

SIQUEIROS, José Luis, Ley aplicable en materia de contratación internacional, en: *Proyecto de Convención Interamericana sobre Ley Aplicable en Materia de Contratación Internacional*, OEA/Ser.Q./CJI/RES.II-6/9, Washington, OEA, 1991

SYMEONIDES, Symeon C., *Codifying Choice of Law Around the World. An International Comparative Analysis*, New York, Oxford University Press, 2014.

TALICE, Jorge, "La autonomía de la voluntad como principio de rango superior en el Derecho Internacional Privado Uruguayo", *Liber Amicorum en Homenaje al Profesor Dr. Didier Opertti Badán*, Montevideo, FCU (copatrocinado por la OEA), p. 527-562.

UPRIMNY YEPES, Rodrigo y SÁNCHEZ DUQUE, Luz María, "Artículo 24. Igualdad ante la Ley", *Convención Americana sobre Derechos Humanos. Comentario*, Christian Steiner / Patricia Uribe (Editores), Konrad Adenauer Stiftung, 2014, p. 579-605.

WEINTRAUB, *Commentary on the Conflict of Laws*, 3rd. ed., 1986.

YEE WAH CHIN, « What Role for Abuse of Superior Bargaining Position Laws?", *New York Law Journal*, Volume 256-Nº 3, Wednesday, July 6, 2016, Electronic copy available at: http://ssrn.com/abstract=2806417

ZAPATA GIRALDO, Adriana, "Colombia", *Encyclopedia of Private International Law*, Cheltenham, UK – Northampton, MA, USA, Edward Elgar Publishing, Volume 3, p.1981-1990.

CHAPTER III

ACTIVITIES CARRIED OUT BY THE INTER-AMERICAN JURIDICAL COMMITTEE DURING 2023

A. Participation of the Chair of the Inter-American Juridical Committee before the General Assembly and the Committee on Political and Juridical Affairs

Documents

CJI/doc. 705/23	Report of the Chairman of the Inter-American Juridical Committee, before the Committee on Legal and Political Affairs – CAJP. Virtual session, April 20, 2023) (Presented by Dr. José Moreno Rodriguez)
CP/CAJP-3733/23	Summary of the presentation of the annual report of the Inter-American Juridical Committee by its Chair, Dr. José Antonio Moreno Rodríguez, to the Committee on Juridical and Political Affairs (April 20, 2023) (Document prepared by the Department of International Law)
CJI/doc. 704/23	Report by the Chair of the Inter-American Juridical Committee to the 53 Regular Session of the OAS General Assembly (Washington, D.C., June 23, 2023) (Presented by Dr. José Moreno Rodriguez)

* * *

On Thursday, April 20, 2023, the Chairman of the Inter-American Juridical Committee, Dr. José Moreno Rodríguez, presented to the Committee on Juridical and Political Affairs the annual report of the CJI corresponding to the activities carried out during the year 2022. On that occasion, the Chairman reported on the three documents submitted to the General Assembly for its due knowledge and consideration: the "Declaration on International Law" (CJI/DEC. 02 (C-O/22)); the report on "International Law Applicable to Cyberspace" (document CJI/doc. 671/21 rev.1), and the "Declaration on the inviolability of diplomatic headquarters as a principle of international relations and its relation to the concept of diplomatic asylum" (document CJI/DEC. 03 (CI-O/22) corr.1).

On Friday, June 23, 2023, the Chairman of the Committee, Dr. José Moreno Rodriguez, presented the "Annual Report- 2022" to the General Assembly at its regular session held in Washington, D.C. (document CJI/doc. 704/23). On that occasion, he reiterated the outcome of the three reports adopted during the period under review. He also reported on the topics worked on during the year 2023 that will be the subject of the next annual report. Regarding the Course on International Law, he explained that the Committee had resumed such activity after a two-year hiatus due to the conditions imposed by the Covid-19 pandemic. He took the opportunity to invite States to confirm their participation to the Ninth Joint Meeting with the Legal Advisers of the Ministries of Foreign Affairs of the OAS Member States to be held on August 9, 2023.

All mentioned presentations before the correspondent instance are included below. It is also enclosed the summary of the session that took place within the CAJP:

CJI/doc. 705/23

REPORT OF THE CHAIR OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS (CAJP) OF THE ORGANIZATION OF AMERICAN STATES
(April 20, 2023)

(Presented by Dr. José Antonio Moreno Rodríguez)

Your Excellency, Ambassador Hugh Adsett, Chair of the Committee on Juridical and Political Affairs, Permanent Representative of Canada to the OAS.

In my capacity as chair of the Inter-American Juridical Committee (CJI), it is an honor for me to submit this report on the activities in 2022 of this consultative body of the Organization of American States (OAS) on juridical matters, having been elected to that position at the regular meeting of August, while my colleague George Rodrigo Bandeira Galindo of Brazil was elected as vice chair. The two of us took office on January 1, 2023, and will serve for a term of two years.

It is also worth mentioning that in January 2022, two new members joined the CJI: Dr. Luis Moreno Guerra of Ecuador and Dr. Martha Luna Véliz of Panama; our former chair, Dr. Luis Garcia-Corrochano Moyano of Peru, was reelected to the CJI by the General Assembly.

I. Recent developments

In 2022, the Inter-American Juridical Committee held two face-to-face meetings: the first, in Lima, Peru, from May 2 and 6, 2022 (the first in-person meeting since the pandemic); the second, at its headquarters in Rio de Janeiro, Brazil from August 1 to 10.

During the period covered by this report, the CJI adopted the following documents which have been forwarded to the OAS General Assembly for consideration:

- The *Declaration on International Law* adopted at its 100th regular session emphasizes the need to adhere to the core principles of the OAS Charter and obligations arising from treaties and other sources of international law. The OAS is identified as the "principal, irreplaceable and most appropriate forum" where the member states of the region "negotiate and adopt common legal norms ... in the sphere of public international law and private international law." The contribution of the CJI to the "consolidation of the inter-American body of law" is also recognized.
- The report "*International Law Applicable to Cyberspace"* presents the current state of multilateral and doctrinal processes. The document analyzes key areas of international law where divergences exist, including, *inter alia*, the question of attribution of responsibility in cyberoperations, breach of international obligations, and responses available to States that are victims of malicious cyberoperations. It also includes official positions submitted since 2019 within the United Nations framework by a number of the region's States: Bolivia, Brazil, Canada, Chile, Cuba, Ecuador, Guatemala, Guyana, Peru, and the United States. The CJI hopes that this study will serve as a reference source for OAS member states.
- The *Declaration on the Inviolability of Diplomatic Premises As a Principle of International Relations and Its Relation to the Concept of Diplomatic Asylum* states that the rule on the inviolability of diplomatic premises allows no exceptions of any kind and that any abuse of this rule must be resolved "by resorting exclusively to the measures provided for in diplomatic law." The document contains an explanatory note clarifying the sources of the rule of inviolability of diplomatic premises and its relation to the concept of diplomatic asylum. The declaration responds to a mandate from the General Assembly. Prior to being taken up by the CJI, this topic was the subject of a reflection meeting of the Committee on Juridical and Political Affairs of the Permanent Council

held on April 30, 2021, that was attended by experts and State representatives who submitted observations.

II. The Committee's Agenda

Two new mandates of the General Assembly convened in November 2021 were added to the CJI agenda: (i) the principles of international law on which the inter-American system is founded, as the normative framework that governs the work of the OAS and relations between member states, and (ii) strengthening the accountability regime in the use of information and communication technologies. At the end of the regular session in August 2022, the agenda of the CJI comprised 12 items.

III. The session in Lima, Peru

I wish to reiterate my gratitude to the Government of Peru for the invitation to hold our one hundredth regular session in Lima, held in person in May 2022. On that occasion, the CJI met with government officials and professors of international law. Meetings in the field are a very important practice for the members of the Inter-American Juridical Committee, as they allow us to be in direct contact with national authorities dealing with international law, such as legal advisors and judges, as well as members of civil society and academia.

IV. Follow-up on reports of the Inter-American Juridical Committee

I wish to place on record the steps taken by the Department of International Law, in its capacity as Technical Secretariat of the CJI, to publicize and disseminate the reports prepared by the CJI, activity that has taken various forms in recent years:

- Training courses and seminars with diplomatic academies in Chile, Colombia, Costa Rica, Ecuador, El Salvador, Mexico and Uruguay;
- Webinars organized on specific topics, including one on neuro-rights and another on fireworks regulation in the first half of 2022;
- Updated information on the CJI website, including developments on topics completed between 1998 and March 2023.
- Multilingual publications on concluded topics, such as: International law and State cyberoperations; Access to public information (Model Law 2.0); Privacy and personal data protection; and Binding and non-binding agreements.

V. Course on International Law

This activity resumed in August 2022 after a two-year hiatus brought about by the COVID-19 pandemic. The Course on International Law ran for two weeks—from August 1 to 12—and was attended by 39 participants from various OAS member states. The next course, the forty-eighth, is scheduled for July 31 to August 4, 2023. The call for applications can be found on the CJI website at the link below:

OAS :: SLA Department of International Law :: Course on International Law (oas.org))

VI. Meeting with legal advisors and representatives of legal departments of member states

I would like to take this opportunity to announce that the IX Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States is scheduled for August this year. Unlike the most recent Joint Meeting, which was held virtually in 2021 and brought together some 20 participants, the next meeting will take place face-to-face at our headquarters in Rio de Janeiro on August 9, 2023. Therefore, we invite you to encourage your legal advisors or those who perform that function at your ministries of foreign affairs to attend. The Department of International Law sent the respective invitations through the distinguished permanent missions to the OAS on April 4, 2023.

VII. Budget of the Inter-American Juridical Committee

We are grateful for the funding that was granted to the Inter-American Juridical Committee in 2022, and we respectfully request that the amounts agreed upon in recent years continue to be maintained, allowing us to carry out our work as normal. I must remind you, however, of the need to restore the position of Secretary of the Inter-American Juridical Committee at our headquarters

in Rio de Janeiro. This situation also affects the work of the staff of our Technical Secretariat—the Department of International Law—who are obliged to attend to the increasing needs of CJI rapporteurs, in addition to the multiple duties that they already perform at the Organization's headquarters.

Lastly, I reiterate our willingness and interest in continuing to support member states in promoting the development and codification of international law, in accordance with the OAS Charter, in the hope that these contributions will be of the greatest utility.

I thank you and am at your disposal to address any questions or comments you may have.

* * *

CP/CAJP-3733/23

SUMMARY OF THE PRESENTATION OF THE ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE BY ITS CHAIR, DR. JOSÉ ANTONIO MORENO RODRÍGUEZ, TO THE COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS

(April 20, 2023)

(Document prepared by the Department of International Law)

I. Introduction

On Thursday, April 20, 2023, the Committee on Juridical and Political Affairs received the Chair of the Inter-American Juridical Committee (CJI), Dr. José Antonio Moreno Rodríguez, who presented the annual report on activities carried out in 2022 by that consultative body of the Organization of American States (OAS).

The oral presentation was a summary of the annual report, which was published as document CP/doc.5858/23 and can be consulted in Spanish on the CJI website at OEA:: Comité Jurídico Interamericano (CJI) :: Informes Anuales (oas.org); the English version can be viewed at: OAS :: Inter-American Juridical Committee (CJI) :: Annual Reports.

Ambassador Hugh Adsett, Permanent Representative of the Canada to the OAS, chaired the meeting, with representatives of the following 24 permanent missions to the OAS attending: Antigua and Barbuda, Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Haiti, Jamaica, Mexico, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Saint Lucia, Trinidad and Tobago, United States, and Uruguay.

II. Presentation by Dr. José Antonio Moreno Rodríguez, Chair of the CJI - CP/CAJP/INF. 1027/23

Dr. José Antonio Moreno Rodríguez, in his capacity as Chair of the Inter-American Juridical Committee, gave a virtual presentation of the annual report on the Committee's activities from January to December 2022.

His report mentioned the reports prepared in the course of 2022 that were forwarded to the OAS General Assembly for its information and consideration and provided a brief summary in each case:

- The Declaration on International Law emphasizes the need to adhere to the core principles of the OAS Charter and obligations arising from treaties and other sources of international law. It identifies the OAS as the "principal, irreplaceable and most appropriate forum" where the member states of the region "negotiate and adopt common legal norms ... in the sphere of public international law and private international law."
- The report "International Law Applicable to Cyberspace" presents the current state of multilateral and doctrinal processes. The report provides an analysis of the main issues of international law on which divergences exist, covering, among others, the question of

attribution of responsibility in cyber operations; the breach of an international obligation; and, the responses available to the State victim of a malicious cyber operation.

- The Declaration on the Inviolability of Diplomatic Premises as a Principle of International Relations and Its Relation to the Concept of Diplomatic Asylum states that the rule on the inviolability of diplomatic premises allows no exceptions of any kind and that any abuse of this rule must be resolved "by resorting exclusively to the measures provided for in diplomatic law." The document contains an explanatory note clarifying the sources of the rule of inviolability of diplomatic premises and its relation to the concept of diplomatic asylum.

In his presentation, the Chair mentioned that during the period under consideration, the CJI incorporated two mandates from the General Assembly, as a result of which its agenda comprised twelve items:

- "The principles of international law on which the inter-American system is founded, as the normative framework that governs the work of the OAS and relations between member states" and
- "Strengthening the accountability regime in the use of information and communication technologies."

Dr. Moreno reiterated his gratitude to the Government of Peru for the invitation to hold the one hundredth regular session in Lima, which took place in-person in May 2022.

In his oral report, the Chair devoted some space to recording the efforts of the Department of International Law in promoting the work of the CJI, and identified, inter alia:

- Training courses and seminars with diplomatic academies in Chile, Colombia, Costa Rica, Ecuador, El Salvador, Mexico and Uruguay;
- Webinars on neuro-rights and fireworks regulation;
- Updated information on the Committee's website, including developments on topics completed by the Committee between 1998 and March 2023;
- Multilingual publications on completed topics (International law and State cyberoperations; Model law 2.0 on access to public information; Privacy and personal data protection; and Binding and non-binding agreements).

Regarding the Course on International Law, Dr. Moreno Rodriguez mentioned that after a two-year hiatus due to the COVID-19 pandemic, the Course resumed in a face-to-face format; it took place in Rio de Janeiro from August 1 to 12, 2022, and was attended by 39 participants from different OAS member states. He also said that the next edition of the Course on International Law, the forty-eighth, is scheduled for July 31 to August 4, 2023 and that information could be found on the CJI website: OAS :: SLA Department of International Law :: Course on International Law (oas.org).

On the occasion of the IX Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States, Dr. Moreno Rodriguez invited the delegations to encourage their respective legal advisors or whoever performs these functions in their foreign ministries to attend. The event was scheduled to be held in person on August 9 at the Committee's headquarters in Rio de Janeiro, Brazil.

In other matters, the Chair of the CJI expressed his appreciation to the States for the budget agreed in 2022 and urged them to maintain those amounts to allow work to continue as normal. He also requested that the position of Committee Secretary of the CJI at its headquarters in Rio de Janeiro be restored.

Lastly, on behalf of the CJI, he reaffirmed the appetite of all its members to continue working to promote the development and codification of international law.

III. Consideration of the annual report of the Inter-American Juridical Committee in light of the presentation by Dr. José Antonio Moreno Rodríguez

The Chair of the CAJP, Ambassador Hugh Adssett, thanked Dr. Moreno Rodríguez for his presentation, and the Department of International Law, as Technical Secretariat of the Committee, for its attendance. All the delegations that took the floor at the meeting reiterated their appreciation for the Inter-American Juridical Committee and the Department of International Law.

The delegation of Mexico to the OAS welcomed Dr. Moreno Rodríguez, noting his commitment to the Committee, having recently been elected Chair, and his professional standing. It stressed the important role that should be accorded to the Committee, which was regarded as the custodian and promoter of the progressive development and codification of international law. It noted the presence among the members of the CJI of Mexican jurist Alejandro Alday, a prominent career diplomat and international lawyer. He also recalled Dr. Mariana Salazar Albornoz, another Mexican jurist, who completed her term of office in December 2022 and focused on new issues in international law, such as personal data protection (an effort that enabled the adoption by the General Assembly of the Updated Principles on Privacy and Personal Data Protection) and the applicability of international law to cyberspace. The Mission also mentioned that Mexico's interest in the work of the Committee has to do not only with the quality of the jurists it proposes, but also with the importance of the topics it has requested the CJI to examine through General Assembly mandates. In this regard, it referred to four issues, alluding to the diligent and serious work of their respective rapporteurs: "The principles of international law on which the inter-American system is founded, as the normative framework that governs the work of the OAS and relations between member states" (Rapporteur: Dr. George Rodrigo Bandeira Galindo); "Strengthening the accountability regime in the use of information and communication technologies" (Rapporteur: Dr. Martha del Carmen Luna Véliz); "Exceptionality in the use of force in the inter-American context" (Rapporteur: Dr. Luis García-Corrochano Moyano); and, "Corporate responsibility of manufacturers and sellers of weapons in the area of human rights" (Rapporteur: Dr. Alejandro Alday González).

Lastly, it underscored the valuable support of the Department of International Law, despite the limited resources available. It urged States to support the CJI financially through a more significant budget allocation, bearing in mind the impact of its work on the entire inter-American system, States, and the lives of citizens. It encouraged the CJI to continue performing its delicate task as an advisory body on legal matters and invited States to take part in strengthening the Committee by, for example, providing it with a person for its secretariat in Rio de Janeiro.

The delegation of Paraguay to the OAS expressed its gratitude to the CJI and commended it on its hard work, underscoring leadership and experience of its chair and the tireless efforts of the Department of International Law in its capacity as technical secretariat of the CJI. It highlighted the historical importance of the CJI in the legal integration of the Americas, as evidenced by the instruments implemented in the area of private international law, the model laws applicable in the region's countries, and studies on asylum and jurisdictional immunity, for example. In addition, the delegation noted the Committee's ability to adapt and adjust in response to new realities throughout its existence, citing in that regard the reports on the law applicable to cyberspace and the work on new technologies. The delegation concluded by appealing for support for the Department of International Law and calling for States to value and strengthen the CJI, whose work is inspired by the unrestricted rule of justice and law, as urged by the Colombian jurist José Joaquín Caicedo Castilla.

The delegation of El Salvador congratulated the Chair of the CJI on his election and expressed appreciation for the role that the CJI plays in promoting the progressive development and codification of international law. Among recent developments in the context of the Committee he highlighted the Declaration on International Law adopted at its hundredth regular session and its Report on International Law Applicable to Cyberspace, a document that will serve as a reference for initiatives under way in the United Nations. The proposed Guide on the Law Applicable to Foreign Investments that is due to emerge from the Committee is expected to serve multiple purposes. In other items on the CJI agenda, the delegation invited the Committee to accord importance to its discussions on normative development in the region, particularly with regard to the principles of international law on which the inter-American system is based as a normative framework that

governs the work of the OAS and the relations among the member states, as well as strengthening the accountability regime in the use of information and communication technologies. The delegation expressed appreciation for the convocation of the IX Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the OAS member states, for which its country had already designated a representative, as well as the Forty-eighth Course on International Law, highlighting its importance for training those who work in the field of law and international relations. It concluded by renewing his delegation's support for the CJI and called on it to continue to serve as a space that facilitates exchanges of information and training in international law.

The Chilean delegation noted the diversity and richness of the topics addressed by the CJI and expressed its appreciation and recognition for the reports it presented. It referred to international standards on neuro-rights, a subject to which it attached particular importance, as reflected in the adoption of a constitutional provision that imposed, inter alia, respect for "brain activity and information derived from it." It appreciated the efforts of the committee of experts that assisted the rapporteur on the topic within the Committee, in particular the NeuroTechnology Center of Columbia University, the Pro Bono Network of the Americas and the Kamanau Foundation of Chile. It also welcomed the Recommendations for the Approval of Domestic Legislation on the Regulation of Fireworks and Pyrotechnic Articles in the Americas, whose value for the life and health of people was clear. In that regard, the delegation acknowledged the efforts of the rapporteur for this topic, former CJI member Dr. Milenko Bertrand-Galindo, and the support for his work from the Corporación del Niño Quemado (Coaniquem). The delegation ended its presentation with a reflection on the impact that the Committee's work has on everyday life, despite the high technical level of some of its developments. In that regard, he cited comments by two Meta company executives, who said that the Updated Principles on Privacy and Protection of Personal Data served as real references for that company in the regulation of such data.

The Colombian delegation to the OAS noted that the persistent and fruitful work of the CJI were precisely why the role of the OAS as the premier forum for States to develop legal standards was "irreplaceable." In light of the contributions of the CJI to international development, he noted an interaction between current issues and others in the inter-American legal tradition. With regard to the topics completed, the delegation underscored the report on the right to compulsory education, which referred to particular areas of concern and delved into free, quality primary education consolidated as a fundamental right. The delegation hoped that the study on private customary international law in the context of the Americas would offer conceptual clarity. The delegation also expressed appreciation for the training provided to Colombia's diplomatic academy in the second half of 2022 and urged States to continue to support the Committee's efforts through pragmatic measures in four areas:

1. Administrative and budgetary reinforcement for the CJI to ensure its fulfillment of the multiple mandates assigned to it.
2. Internal dissemination of work approved by the CJI.
3. Continued timely response to questionnaires or comments requested by the CJI to facilitate report preparation.
4. Continued strengthening of exchanges with the legal offices of ministries of foreign affairs.

At the end of the presentation, the delegation announced the presentation of a candidate for the election to take place at the General Assembly in June this year: Dr. Alejandra Valencia Carter, a jurist of recognized experience, would bring a renewed vision of international law.

The delegation of the Dominican Republic congratulated the Chair of the CJI on his recent appointment and expressed appreciation for the work of the CJI. The delegation noted that one of the Committee members was a Dominican jurist, Dr. Julio José Rojas-Báez, who served as rapporteur for the topic "Legal implications of sea level rise in the inter-American regional context," a mandate included at the most recent regular session. Among the Committee's completed work, the delegation highlighted the "Declaration on International Law" of May 2022, the report on "International Law Applicable to Cyberspace," and the "Declaration on the Inviolability of Diplomatic Premises as a Principle of International Relations and its Relationship to the Concept of Diplomatic Asylum." The delegation urged States to disseminate the work of the CJI and to continue

to respond to questionnaires and requests in a timely manner, as this has a direct impact on the preparation of reports. It considered significant the inclusion of the two new mandates in the CJI agenda in 2022: the principles of international law on which the inter-American system is founded, as the normative framework that governs the work of the OAS and relations between member states; and strengthening the accountability regime in the use of information and communication technologies. Lastly, he acknowledged the contributions of the CJI in promoting the progressive development and codification of international law.

At the end of the session, the Chair of the CJI, Dr. Moreno Rodríguez, expressed his gratitude for the generous words and encouragement for the work of the Committee. He stressed the importance of the preparation of studies, reporting, and rapporteurships, as well as the dissemination work carried out by the CJI, citing as an example his efforts in Chile from where he had delivered his virtual presentation, had allowed him and the Director of the Department of International Law, Dr. Dante Negro, to present the recent endeavors by the Committee in academia, such as the proposed "Guide to the Law Applicable to Foreign Investments" and the recent work completed in the area of private international law.

* * *

CJI/doc.704/23

REPORT BY THE CHAIR OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE OAS GENERAL ASSEMBLY

(June 23, 2023)

(Presented by Dr. José Antonio Moreno Rodríguez)

Your Excellency, President of the 53rd General Assembly, Foreign Minister Roberto Álvarez Gil;
Distinguished representatives of the OAS Member States;
Secretary General Luis Almagro;
Assistant Secretary General Nestor Mendez;

We are truly grateful for this opportunity to deliver the Inter-American Juridical Committee's activities report for the January-December 2022 period, during which the sessions were held in person – the first one was in Lima, Peru, from May 2 to 6, 2022, while the second session was held from August 1 to 10, 2022, at our headquarters in Rio de Janeiro, Brazil. The details of the proceedings can be found on the Committee's website, with the corresponding report recorded as document CP/doc.5760/22.

This is the first time that I am privileged to address this Assembly, having begun my duties as Chair of the Committee in January this year.

I. Recent Developments

During the reporting period, the Committee adopted the following documents, which have been referred to the OAS General Assembly for its due information and consideration:

- The Declaration on International Law, adopted to mark the 100th regular session, emphasizes the need to abide by the essential principles set forth in the OAS Charter and the obligations arising from treaties and other sources of international law. The OAS is identified as the "principal, irreplaceable, and most appropriate forum" where the member states of the region "elaborate, negotiate, and adopt common legal norms in the field of public international law and private international law." The Committee's contribution to the "consolidation of the inter-American body of laws is also recognized."
- The report on International Law Applicable to Cyberspace outlines the current state of multilateral and doctrinal processes, giving as well an analysis of the main issues of international law on which differences of opinion exist, including topics of attribution of

liability in cyber-operations; breach of an international obligation, and the responses available to a state that has been a victim of a malicious cyber operation. It also includes official positions taken since 2019 at the UN by states of the region: Bolivia, Brazil, Canada, Chile Cuba, Ecuador, Guatemala, Guyana, Peru, and United States. It is the hope of the CJI that this study will serve OAS member states as a source of reference.

- The Declaration on the inviolability of diplomatic premises as a principle of international relations and its relationship to the notion of diplomatic asylum states that the rule on the inviolability of diplomatic mission premises allows no exceptions of any kind and that any abuse of this rule must be resolved "exclusively by resorting to the measures provided for in diplomatic law." The declaration contains an explanatory note clarifying the sources of the rule on the inviolability of diplomatic headquarters and its relationship to the concept of diplomatic asylum. This declaration stems from a General Assembly mandate and, we should remember, prior to being dealt with by the Committee, this issue was the subject of a discussion session within the Permanent Council's Committee on Juridical and Political Affairs, held on April 30, 2021 and attended by experts and representatives of the states, who offered their observations.

Let me take this opportunity to place on record three documents the Committee adopted recently, at its March 2023 session. They have been referred to the Permanent Council for subsequent transmittal to the General Assembly for consideration:

- The Declaration of Inter-American Principles on Neurosciences, Neurotechnologies, and Human Rights puts forward a set of proposals that seek to link advances in neuroscience and neurotechnologies to human rights protection measures, such as dignity, identity, the right to privacy and intimacy, physical and mental health, as well as the prohibition of torture and cruel, inhuman, and degrading treatment, among others.
- The Declaration of Inter-American principles on the legal regime for the creation, operation, financing and dissolution of civil nonprofit entities, a report intended to facilitate such entities' life cycle based on domestic and international standards and best practices, including the relevant legislation in the OAS member states. This CJI document systematizes, updates, and consolidates the standards developed in the region by means of an exhaustive study that is reflected in the comments on each principle.
- Lastly, the report on compulsory primary education urges OAS member states to ensure the full enjoyment of primary education and to reaffirm this "fundamental human right" as free, compulsory, and universal. The CJI resolution adopting this report also recommends finding alternative means of rendering technical and financial assistance to states experiencing problems implementing it.

II. Dissemination of international law

This Committee evidently has been very productive in a variety of areas of international law, in keeping with its mandate to promote the progressive development and codification of international law. It is therefore quite fitting for us to applaud the serious and responsible work of the respective rapporteurs and the collective commitment of my colleagues, who are striving to come up with and deliver useful results to redound to the benefit of all states.

I must also thank the Department of International Law of the Secretariat for Legal Affairs, our technical secretariat, for helping the Committee with its work, as well as for its important work in disseminating our collection. The courses and seminars offered at diplomatic academies in Chile, Colombia, Costa Rica, Ecuador, El Salvador, Mexico, and Uruguay during the period covered by this report provide one example of that kind of promotion.

In preparing our reports, the cooperation we receive from governments proved vital, especially in terms of responding to questionnaires requiring comments on the current status of a given subject matter. In that connection, we are truly grateful to those who have been able to follow up on our inquiries in the areas of "regional custom," "contracts with weak parties," and "participation of victims and civil society organizations in criminal proceedings against acts of corruption" – issues currently on the Committee's agenda – and on completed topics such as the "right to education" and "neurotechnologies."

1. Course on International Law

This activity returned in August 2022 after a two-year hiatus due to the conditions stemming from the COVID-19 pandemic. The Course on International Law ran for two weeks, from August 1 to 12, with 39 participants from various OAS Member States. This year's course is scheduled to run from July 31 to August 4 with a total of 45 people, who were selected after meeting the registration deadline.

2. Meeting with legal counsels and representatives of the legal offices of the member states

I would respectfully call your attention to the invitation to the Ninth Joint Meeting with the Legal Counsels to the Ministries of Foreign Affairs of the OAS Member States, scheduled for August 9 this year as an in-person meeting, to be held at our headquarters in Rio de Janeiro. States that have not yet sent in their confirmation are kindly invited to encourage their respective legal counsels – or those performing such functions in their Ministries of Foreign Affairs – to attend the meeting. This is a unique forum because it allows for direct dialogue - 4 - between Committee members and Ministry of Foreign Affairs officials with the inter-American system, as well as public and private international law, under their purview. For additional information, please contact the Department of International Law in its capacity as Technical Secretariat to the Committee.

3. CJI website

It is also worth noting that the website features the work the Committee has completed, and this can be browsed by subject and by chronological order; and also includes digital access to all the annual courses on international law held since 1974.

III. Budget of the Inter-American Juridical Committee

As a final note, let me end this presentation by acknowledging the funding provided to the Inter-American Juridical Committee for the reporting period, and respectfully request that the budget be extended for the coming year so that we can continue to discharge our functions.

Once again, Distinguished President, many thanks. I am now available to take any questions or comments.

* * *

B. IX Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the Member States

In the course of the regular session in August, the CJI held its Ninth joint meeting with legal advisers of the ministries of foreign affairs or its equivalent. The event took place in-person on August 9, 2023, at the headquarters of the Committee in Rio de Janeiro, Brazil. It brought together advisers and representatives from the following fourteen countries: Argentina, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Mexico, Paraguay, Peru, United States and Uruguay.

Two main topics within the agenda of the Committee were submitted for the consideration of the legal advisers, the study of "particular customary international law in the context of the Americas" as well as the proposed questionnaire of the rapporteur on "the legal implications of sea level rise in the Inter-American regional context." Moreover, a mandate proposed by the General Assembly regarding the "practice and experience in proceedings before the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights from the perspective of international law" was brought to the attention of the participants. A space was set aside to reflect on a request from the General Assembly to the Committee to continue considering the analysis of topics of private international law on its work agenda "in order to reactivate activities related to the development of this area" as well as the relevance about "updating some of the legal instruments in this area and/or propose new convention or protocol texts that may be submitted for consideration by the General Assembly." As it has been the case in the past, some advisers submitted suggestions on matters that could be incorporated into the CJI's agenda. At the end of the meeting, the U.S. candidate for the International Court of Justice, Professor Sarah Cleveland, made a brief presentation on the values that motivate her candidacy. The Committee expects to hold the Tenth Joint Meeting in the second half of 2025 (link to the agenda of the Ninth Joint Meeting).

C. Course of International Law

The Forty-eighth Course on International Law, organized by the CJI and its Technical Secretariat, the Department of International Law of the Secretariat for Legal Affairs of the OAS, was successfully held on July 31-August 11, bringing together 44 students and more than 10 professors from different countries from the region and abroad, including among them jurists and experts from the International Criminal Court, the Inter-American Commission on Human Rights, the Inter-American Juridical Committee, the General Secretariat of the OAS and professors from prestigious universities (link to the Course program - only available in Spanish). The event was held at the *Escola da Magistratura do Estado do Rio de Janeiro* (EMERJ), an educational institution oriented to the training and improvement of magistrates and the dissemination of legal knowledge.

* * *

D. Relations and cooperation with other entities

i.- Meetings with professors that took place at the Course of International Law.

- August 3, 2023: Visit of Judge Socorro Flores Liera, Judge to the International Criminal Court (ICC), lecturer at the Course of International Law on issues relatint to the "structure and composition of the ICC" as well as the participation of the victims to the processes of the ICC." Judge Flores Liera expressed her pleasure with this visit and the dialogue that was taking place between the two institutions, the ICC and the CJI. She underscored the importance of publicizing the work of the Court in the Hemisphere. She reflected about the various protections within both the ICC Office of the Prosecutor and the UN Security Council that prevent the politicization of decisions. She also referred to the impact of the Fund created to assist victims and supplement reparations, since most defendants have declared themselves penniless. Facing such defenses, the Court invites to oversee and monitor defendants' financial situations that allows it to examine their actual existence finances, something that incidentally depends on the cooperation of the States.
- August 4, 2023: Visit of Professor João Henrique Ribeiro Roriz, lecturer at the Course of International Law on the issue of "third world and human rights: Bandung, racism and decolonization." Professor Ribeiro Roriz explained that his reflection takes place around the Third World's effort to advance for the defense of its rights. In this context, his works focuses on the UN conventions, instruments that were key to the debate around decolonization and the human rights movement. The literature on the progress made by England and France is very extensive. Likewise, the contribution of the normative and doctrinal instrument from the Third World has contributed greatly, however it is not widely known. In this regard, he cited the influence of the newly independent countries in the drafting of the 1966 UN Covenants.
- August 7, 2023: visit of Professor Roberto Ruiz Díaz Labrano, lecturer at the Course of International on the issue "Dimension of International Private Law." Professor Díaz Labrano explained the reason that had led him to dedicate his life to private international law. He then spoke about the aims pursued in his class, which will have a particular focus on the autonomy of will.
- August 7, 2023: visit of Professor Mathias Forteau, lecturer at the Course of International on the issue of "litigating International Law before Domestic Courts." Professor Forteau explained he had been invited to give three classes, in which he will present some general thoughts the diversity of legal systems. It is a subject that allows for comparisons of how domestic decisions admit the application of international law and, specifically, how cases are applied at the national level according to their languages and traditions, among other variables. In another matters, he referred to his experience as a member of the International Law Commission where he has been able to verify that said institution has changed a great deal in the last ten years. It is now a more diverse institution, with a greater emphasis on relations with regional forums. He then referred to the

interest of the work carried out by the CJI on binding and non-binding agreements. He spoke of his experience in the field of non-binding agreements, having participated as an attorney before the International Court of Justice in the cases of *Bolivia v. Chile* and *Somalia v. Kenya*, which have addressed such issues

ii.- Participation of the Vice Chair at the seventy-fourth session of the International Law Commission of the United Nations, document CJI/doc.700/23.

On July 4, 2023, the Vice Chair of the Inter-American Juridical Committee, Dr. George Bandeira Galindo, newly elected member of the International Law Commission of the United Nation made a presentation at that forum on the latest development of the Inter-American Juridical Committee.

Dr. Galindo reported on his experience with the International Law Commission, where he had noted interest on the part of its members to collaborate more closely with the Committee. He said it would be useful for the CJI to open a time slot for reflecting on initiatives of mutual interest. He explained that he had been chosen as one of the intermediaries for the International Law Seminar, an event that brings together students from all over the world. On that occasion he had participated in the selection of "Universalism and Regionalism" as the central theme, and one of the topics discussed was ways to stimulate cooperation between the ILC and regional organizations. In addition, he invited ILC members to maintain constant participation within the CJI, by means of formal invitations, in order to keep the issue on its agenda. He explained that there were two common issues: one of them—the topic of rising sea levels—was being examined at the same time by both institutions, while the question of non-binding agreements was something that could be enriched by the work that the Committee had already completed.

At the end of his presentation, the plenary agreed to set aside at the next regular session a window for reflection on how foster cooperation and the need for a more systematized dialogue between the two institutions.

The document presented by the rapporteur for the topic, Dr. George Rodrigo Bandeira Galindo at the UN International Law Commission is reproduced below:

CJI/doc.700/23

PRESENTATION BY THE CHAIR OF THE INTER-AMERICAN JURIDICAL COMMITTEE, TO THE UNITED NATIONS INTERNATIONAL LAW COMMISSION

(July 4, 2023)

(Presented by Dr. George Rodrigo Bandeira Galindo)

Members of the International Law Commission of the United Nations,

On behalf of the Inter-American Juridical Committee and its chair, Dr. José Antonio Moreno Rodríguez, I would like to thank you for this opportunity to present a report on the activities of the Inter-American Juridical Committee, a report that has become a tradition in the framework of the International Law Commission and the purpose of which is to explore new avenues of cooperation between the two entities.

As you know, the Inter-American Juridical Committee is one of the principal organs of the Organization. It is the advisory body to the OAS on juridical matters and its purpose is to promote the progressive development and codification of international law and to examine the possibility of harmonizing the legislation of the countries of the region. Unlike other OAS bodies, such as the General Assembly or the specialized conferences, it is a technical body—not a political or diplomatic one—composed of 11 members elected by the General Assembly on the proposal of the member states. These individuals, once elected, no longer represent their countries but all the member states of the Organization and enjoy the broadest technical autonomy. The Inter-American Juridical Committee has its headquarters in the city of Rio de Janeiro and holds two meetings a year; its technical secretariat is

the Department of International Law of the OAS General Secretariat. Like the other organs of the Organization, it submits an annual report on its activities to the General Assembly of the Organization.

To fulfill the purposes described above, the Inter-American Juridical Committee undertakes the studies and work entrusted to it by the General Assembly and other bodies, including the Permanent Council. However, it receives most of his mandates from the General Assembly. In addition to those mandates, one of the most important and distinctive characteristics of the Inter-American Juridical Committee is its capacity to undertake, on its own initiative, studies and work it deems appropriate; it also deals with issues related to private international law. This capacity for initiative that the Inter-American Juridical Committee enjoys gives it broad freedom of action and decision-making and is reflected in the large range of issues on its agenda as a result. However, in recent years, the General Assembly has been entrusting the Inter-American Juridical Committee with a broader range of issues, underscoring its importance.

The richness and variety of the topics on which the Inter-American Juridical Committee has been working is reflected in the agenda approved for its one hundred third regular session scheduled for August 2023. The issues contained in that agenda that derive from mandates issued by the OAS General Assembly include: exceptionality in the use of force in the inter-American context; the principles of international law on which the inter-American system is founded, as the normative framework that governs the work of the OAS and relations between member states; the accountability regime in the use of information and communication technologies; legal implications of sea level rise in the inter-American regional context; and responsibility of arms production and trading companies in the area of human rights. The items included in its agenda on its own initiative are: private customary international law in the context of the Americas; the law applicable to foreign investments; contracts between merchants with a contractually weaker party; new technologies and their relevance to international legal cooperation; the participation of victims in criminal proceedings against acts of corruption; and the new law of outer space. As we can see, the variety and nature of the topics is wide, and the studies are at different stages of progress. Some have been incorporated very recently, while others are approaching the final stages of readiness.

In 2022, the Inter-American Juridical Committee held two face-to-face sessions. The first was in Lima, Peru, from May 2 to 6; the second took place at our headquarters in Rio de Janeiro from August 1 to 10. Details of the proceedings can be consulted on the web page of the Inter-American Juridical Committee, which is fully updated.

In 2022, the Inter-American Juridical Committee adopted the following documents, which have been forwarded to the OAS General Assembly for consideration and which I would like to bring to the attention of this Commission:

1. The *Declaration on International Law*, adopted on the occasion of the landmark one hundredth regular session of the Inter-American Juridical Committee. The Declaration emphasizes the need to adhere to the core principles of the OAS Charter and obligations arising from treaties and other sources of international law. The OAS is identified as the “principal, irreplaceable and most appropriate forum” where the member states of the region “negotiate and adopt common legal norms ... in the sphere of public international law and private international law.” The contribution of the CJI to the "consolidation of the inter-American body of law" is also recognized.

2. The report “*International Law Applicable to Cyberspace*.” This report presents the current state of multilateral and doctrinal processes in this area. The report provides an analysis of the main issues of international law on which divergences exist, covering, among others, the question of attribution of responsibility in cyber operations; the breach of an international obligation; and, the responses available to the State victim of a malicious cyber operation. It also includes official positions submitted since 2019 within the United Nations framework by a number of the region's States: Bolivia, Brazil, Canada, Chile, Cuba, Ecuador, Guatemala, Guyana, Peru, and the United States. The Inter-American Juridical Committee prepared this report so that it might serve as a reference tool for OAS member states and also—why not—for countries in other regions.

3. *The Declaration on the inviolability of diplomatic premises as a principle of international relations and its relationship to the concept of diplomatic asylum*. This Declaration affirms that the rule on the inviolability of diplomatic premises allows no exceptions of any kind and that any violation of

this rule must be resolved "by resorting exclusively to the measures provided for in diplomatic law." The document contains an explanatory note clarifying the sources of the rule of inviolability of diplomatic premises and its relation to the concept of diplomatic asylum. Prior to being taken up by the CJI, this topic was the subject of a meeting of reflection of the Committee on Juridical and Political Affairs of the Permanent Council of the OAS held on April 30, 2021, that was attended by experts and State representatives who submitted observations that were duly considered by the CJI in drafting the Declaration.

In addition, so far in 2023, the Inter-American Juridical Committee has completed three studies that were also submitted to the General Assembly, which held its annual regular session in late June this year:

1. *Declaration of Inter-American Principles on Neuroscience, Neurotechnologies, and Human Rights*. The Declaration formulates a set of proposals to link advances in neuroscience and neurotechnologies to protection measures in the area of human rights, including the rights to dignity, identity, the privacy, and health (both physical and mental), as well as the prohibition of torture and cruel, inhuman, and degrading treatment, among others.

2. *Declaration of Inter-American Principles on the Legal Framework for the Creation, Operation, Financing, and Dissolution of Non-profit Civil Entities*. This declaration is intended to facilitate the operation of such entities throughout their life cycle, based on international and national standards and best practices, including appropriate law in OAS member states. The work of the Inter-American Juridical Committee systematizes, updates, and consolidates the standards developed in the region based on an exhaustive study that is reflected in the comments on each principle.

3. Finally, the Inter-American Juridical Committee also approved the *report on compulsory primary education*, which urges OAS member states to ensure full enjoyment of primary education and strengthen the free, compulsory, and universal nature of this "fundamental human right." The resolution of the Inter-American Juridical Committee adopting the report also recommends seeking alternatives to provide technical and financial assistance to those States encountering problems with its implementation.

As mentioned, all this information can be found on the Inter-American Juridical Committee's web page. For the sake of time, I will not address them more specifically here, but I am at the disposal of the members of the Commission should they wish to discuss them in more detail.

The cooperation that we receive from governments, particularly in responding to questionnaires that require statements on the current status of an issue, is key in the preparation of our reports. However, this continues to be a challenge, as it is for the International Law Commission, since States do not always manage to submit contributions on all the topics on which we request such feedback.

Nevertheless, as can be seen, the Inter-American Juridical Committee has been fruitful in its output in diverse areas of international law, in keeping with its mandate to promote the progressive development and codification of international law. In that regard, the various rapporteurs are to be commended on their meaningful and responsible work, as is the collective commitment of my colleagues, who are concerned with seeking and obtaining useful results for the benefit of all States.

This work has been widely disseminated. Special mention should also be made of the work of our Technical Secretariat, the Department of International Law of the OAS, which in recent months has been organizing a series of courses with diplomatic academies in the region, in which the work of the Inter-American Juridical Committee is the main topic. Such courses have been held in Chile, Colombia, Costa Rica, Ecuador, El Salvador, Mexico, and Uruguay; in two weeks another will be held in Paraguay, followed by another in Panama.

Another activity that serves to disseminate the work of the Inter-American Juridical Committee widely is the Course on International Law, a traditional activity held in Rio de Janeiro that is about to celebrate its fiftieth anniversary. This activity resumed in August 2022 after a two-year hiatus due to the COVID-19 pandemic. The Course on International Law ran for two weeks—from August 1 to 12—and was attended by 39 participants from various OAS member states. This year, the Course is scheduled to take place from July 31 to August 4, 2023, and, as always, will coincide with our session.

The Ninth Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States is also scheduled to be held during the coming session in August this year. This is a special forum because it allows direct dialogue between members of the Inter-American Juridical Committee and those directly responsible for legal matters in each of the region's countries, in both the public and private spheres.

I would like to end this presentation by thanking the members of the International Law Commission and inviting them to strengthen the ties between the Inter-American Juridical Committee and the International Law Commission. It would be a great pleasure for the Inter-American Juridical Committee to receive annually in person a representative of the International Law Commission at our headquarters, so that they can directly present and explain developments in the work of this important body, as the Inter-American Juridical Committee is doing today. I remain at your disposal to answer any questions or comments.

iii. XVI Conference of the American Association of Private International Law (ASADIP)

On August 10, 2023, all members of the Committee participated at the XVI Conference of the American Association of Private International Law that took place at the Catholic University of Rio de Janeiro.

Both reporteurs on issues regarding private international law were invited to make presentations on the advancement of their work. Dr. José Moreno Rodríguez talked about the "Applicable law to foreign investments," whereas Dr. Cecilia Fresnedo explaining her report on both "Contracts between merchands with a contractual weak party" and "New technologies and their relevance for international jurisdictional cooperation." The Technical Secretariat of the Committee was represented by Drs. Dante Negro and Jaime Moreno-Valle who also addresses the Conference. The link to the program of the meeting organized by ASADIP - only available in Spanish.

* * *

THE ORGANIZATION OF AMERICAN STATES

The Organization of American States (OAS) is the world's oldest regional organization, dating back to the First International Conference of American States, held in Washington, D.C., from October 1889 to April 1890. At that meeting the establishment of the International Union of American Republics was approved. The Charter of the OAS was signed in Bogotá in 1948 and entered into force in December 1951. The Charter was subsequently amended by the Protocol of Buenos Aires, signed in 1967, which entered into force in February 1970; by the Protocol of Cartagena de Indias, signed in 1985, which entered into force in November 1988; by the Protocol of Managua, signed in 1993, which entered into force on January 29, 1996; and by the Protocol of Washington, signed in 1992, which entered into force on September 25, 1997. The OAS currently has 35 member states. In addition, the Organization has granted permanent observer status to 72 states, as well as to the European Union.

The essential purposes of the OAS are: to strengthen peace and security in the Hemisphere; to promote and consolidate representative democracy, with due respect for the principle of nonintervention; to prevent possible causes of difficulties and to ensure peaceful settlement of disputes that may arise among the member states; to provide for common action on the part of those states in the event of aggression; to seek the solution of political, juridical, and economic problems that may arise among them; to promote, by cooperative action, their economic, social, and cultural development; and to achieve an effective limitation of conventional weapons that will make it possible to devote the largest amount of resources to the economic and social development of the member states.

The Organization of American States accomplishes its purposes by means of: the General Assembly; the Meeting of Consultation of Ministers of Foreign Affairs; the Councils (the Permanent Council and the Inter-American Council for Integral Development); the Inter-American Juridical Committee; the Inter-American Commission on Human Rights; the General Secretariat; the specialized conferences; the specialized organizations; and other entities established by the General Assembly.

The General Assembly holds a regular session once a year. Under special circumstances it meets in special session. The Meeting of Consultation is convened to consider urgent matters of common interest and to serve as Organ of Consultation under the Inter-American Treaty of Reciprocal Assistance (Rio Treaty), the main instrument for joint action in the event of aggression. The Permanent Council takes cognizance of such matters as are entrusted to it by the General Assembly or the Meeting of Consultation and implements the decisions of both organs when their implementation has not been assigned to any other body; it monitors the maintenance of friendly relations among the member states and the observance of the standards governing General Secretariat operations; and it also acts provisionally as Organ of Consultation under the Rio Treaty. The General Secretariat is the central and permanent organ of the OAS. The headquarters of both the Permanent Council and the General Secretariat are in Washington, D.C.

MEMBER STATES: **Antigua and Barbuda, Argentina, The Bahamas** (Commonwealth of)**, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica** (Commonwealth of)**, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, United States, Uruguay, and Venezuela**

.

ISBN 978-0-8270-7788-1