ORGANIZATION OF AMERICAN STATES

INTER-AMERICAN JURIDICAL COMMITTEE

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Rio de Janeiro, Brazil

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

2016

General Secretariat
Organization of the American States
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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).

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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 the year 2016, in accordance with the terms of Article 91.f of the Charter of the Organization of American States and Article 13 of its Statutes, and with the instructions contained in General Assembly Resolutions dealing with the preparation of annual reports by the organs, agencies, and entities of the Organization, such as resolutions AG/RES. 2806 (XLIII-O/13), AG/RES. 2849 (XLIV-O/14) and AG/RES. 2873 (XLV-O/15), all of which were approved over the past years.

In 2016, the Inter-American Juridical Committee held two working meetings. The first meeting, its 88th regular session, took place April 4-8, at the OAS headquarters building in Washington D.C, United States; while the second meeting, its 89th regular session, was held from October 3-14, at its own headquarters building in Rio de Janeiro, Brazil.

The Inter-American Juridical Committee approved two reports in regards to mandates established under its own initiative: "Principles and guidelines on public defense in the Americas" (CJI/doc.509/16 rev.2); and "Electronic warehouse receipts for agricultural products" (CJI/doc.505/16 rev. 2). Additionally, the Committee adopted a resolution on the subject of "International Consumer Protection" CJI/RES. 227 (LXXXIX-O/16).

It must be noted that at its October meeting the Juridical Committee established two new rapporteurships in response to the following mandates of the General Assembly: "Conscious and effective regulation of business in the area of human rights"; and "Protection of cultural heritage". In addition, the Committee approved discussion on a topic submitted on its own initiative: "Mechanisms for online settlement of disputes arising from cross-border consumer transactions".

Lastly, the plenary of the Juridical Committee decided to continue to address the following topics: Immunity of States; Immunity of International Organizations; Law applicable to international contracts; Representative democracy; Application of the principle of conventionality control; and Considerations on the Work of the Inter-American Juridical Committee. The latter involves making a compilation of topics pertaining to Public and Private International Law of interest to the Organization.

This Annual Report contains mostly the work done and the studies associated with the aforementioned topics and is divided into three chapters. The first discusses the origin, legal bases, and structure of the Inter-American Juridical Committee and describes all sessions held during the present year. The second chapter describes the issues that the Inter-American Juridical Committee discussed at its regular sessions and contains the texts of the resolutions adopted and specific documents. Lastly, the third chapter concerns other activities developed by the Juridical Committee and its members during the year. As it is customary, annexed to the Annual Report there is a lists of the resolutions and documents adopted.

Dr. Fabián Novak Talavera, Chairman of the Inter-American Juridical Committee, approved the language of this 2016 Annual Report.

All this information may be accessed at the webpage of the Inter-American Juridical Committee at: http://www.oas.org/en/sla/iajc/default.asp in English and at

http://www.oas.org/es/sla/cji/default.asp, in Spanish.

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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. Eighty-eight regular session

The 88th regular session of the Inter-American Juridical Committee took place on April 4 to 8, 2016, in Washington D.C., United States in headquarters of the Organization of American States.

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":

Dr. Carlos Mata Prates
Dr. Hernán Salinas Burgos
Dr. David P. Stewart
Dr. José Antonio Moreno Rodríguez
Dr. Miguel Aníbal Pichardo
Dr. Gélin Imanès Collot
Dr. Ruth Stella Correa Palacio
Dr. Joel Hernández García
Dr. Ana Elizabeth Villalta Vizcarra

Dr. Fabián Novak Talavera (Chairman) and Dr. João Clemente Baena Soares were not in attendance due to a schedule conflict and health reasons, respectively.

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 and Jeannette Tramhel Senior Legal Officers; Christian Perrone, Legal Officer, Maria Lúcia Iecker Vieira and Maria C. de Souza Gomes, all of the Secretariat of the Inter-American Juridical Committee.

Among the highlights of the 88th Regular Session was that Committee Members held a new encounter with Organization of American States Secretary General Luis Almagro, who explained some topics of interest to the Organization and to the General Secretariat. Additionally, the plenary of the Juridical Committee participated in a meeting of the Committee on Juridical and Political Affairs of the Organization (CAJP), which enabled Dr. Mata Prates to explain the items on the Juridical Committee's agenda. The Juridical Committee also held a round table discussion on International Private Law with the attendance of top-tier experts from the United States and Canada.

The Inter-American Juridical Committee had before it the following agenda, adopted by means of Resolution CJI/RES. 217 (LXXXVII-O/15), "Agenda for the Eighty-Eight Regular Session of the Inter-American Juridical Committee":

CJI/RES. 217 (LXXXVII-O/15)

AGENDA FOR THE EIGHTY-EIGHTH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

(Washington, DC from 4- 8 April, 2016)

Themes for consideration:

1. Immunity of States
   Rapporteur: Dr. Carlos Alberto Mata Prates
2. Immunity of international organizations
   Rapporteur: Dr. Joel Hernández García
3. Electronic warehouse receipts for agricultural products
   Rapporteur: Dr. David P. Stewart
4. Law applicable to international contracts
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and Gélin Imanès Collot
5. Representative democracy
   Rapporteur: Dr. Hernán Salinas Burgos
6. Guide for the application of the principle of conventionality.
   Rapporteur: Dr. Ruth Stella Correa Palacio
7. Considerations on the work of the Inter-American Juridical Committee: compilation of topics of Public and Private International Law
   Rapporteur: Dr. Ruth Stella Correa Palacio

This resolution was approved unanimously at the meeting held on August 11, 2015, by the following members: Gélin Imanès Collot, José Luis Moreno Guerra, João Clemente Baena Soares, Hernán Salinas Burgos, Ana Elizabeth Villalta Vizcarra, Ruth Stella Correa Palacio, Carlos Alberto Mata Prates (Vice President) and David P. Stewart.

It must be noted that the decision of the "Date and venue of the 89th regular session of the Inter-American Juridical Committee" was made in August 2015, under resolution CJI/RES. 216 (LXXXVI-O/15).

CJI/RES. 216 (LXXXVII-O/15)

DATE AND VENUE OF THE EIGHTY-NINE REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that article 15 of its Statutes provides for two annual regular sessions;

BEARING IN MIND that article 14 of its Statutes states that the Inter-American Juridical Committee has its headquarters in the city of Rio de Janeiro, Brazil;

RESOLVES to hold its 89th regular session as of 3 October, 2016, in the city of Rio de Janeiro, Brazil.

This resolution was approved unanimously at the meeting held on August 6, 2015, by the following members: Gélin Imanès Collot, José Luis Moreno Guerra, João Clemente Baena Soares, Hernán Salinas Burgos, Ana Elizabeth Villalta Vizcarra, Joel Hernández García, Ruth Stella Correa Palacio, Carlos Alberto Mata Prates (Vice President) and David P. Stewart.

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B. Eighty-Ninth regular session

The 89th Regular Session of the Inter-American Juridical Committee took place on October 3 to 14, 2016, at its headquarters in the city of 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:

Dr. David P. Stewart
Dr. Hernán Salinas Burgos
Dr. Fabián Novak Talavera
Dr. Joel Hernández García
Dr. Ana Elizabeth Villalta Vizcarra
Dr. João Clemente Baena Soares
Dr. Carlos Mata Prates
Dr. Gélin Imanès Collot
Dr. José Antonio Moreno Rodríguez
Dr. Ruth Stella Correa Palacio

Dr. Miguel Aníbal Pichardo was not present due to work reasons. Additionally, Dr. David P. Stewart was present solely during the second week due to health related 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, Principal Legal Officer with that same Department; Christian Perrone, Legal Officer, and Maria Lúcia Iecker Vieira and Maria C. de Souza Gomes from the Secretariat of the Inter-American Juridical Committee.

At the start of the meeting, the Chair announced the names of the new Members elected by the General Assembly held in Santo Domingo, Dominican Republic, in June 2016: Dr. Duncan B. Hollis of the United States, Dr. Alix Richard of Haiti and Dr. Juan Cevallos Alcívar of Ecuador, whose terms begin to run in January 2017.

One of the activities conducted by the Committee was a meeting with representatives of legal counsels of Ministries of Foreign Relations of Brazil, Chile, United States, Mexico, Peru, Paraguay and Uruguay. The Committee also hosted an academic event in the area of International Private Law in coordination with the School of Law of the University of Rio de Janeiro, on the OAS's role in the codification and promotion of International law, international consumer protection, and international contracts.

At its 89th Regular Session, the Inter-American Juridical Committee had before it the following agenda, which was adopted by means of resolution CJI/RES. 221 (LXXXVIII-O/1) "Agenda for the Eighty-Ninth Regular Session of the Inter-American Juridical Committee":

CJI/RES. 221 (LXXXVIII-O/16)

AGENDA FOR THE EIGHTY-NINTH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

(Rio de Janeiro, Brazil, as of 3 October 2016)

Themes for consideration:

1. Immunity of States
   Rapporteur: Dr. Carlos Alberto Mata Prates
2. Immunity of international organizations
   Rapporteur: Dr. Joel Hernández García
3. Electronic warehouse receipts for agricultural products
   Rapporteur: Dr. David P. Stewart
4. Law applicable to international contracts
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra, Gélin Imanès Collot and José Antonio Moreno Rodríguez
5. Representative democracy
   Rapporteur: Dr. Hernán Salinas Burgos
6. Guide for the application of the principle of conventionality
   Rapporteur: Dr. Ruth Stella Correa Palacio
7. Considerations on the work of the Inter-American Juridical Committee: compilation of topics of Public and Private International Law
   Rapporteur: Dr. Ruth Stella Correa Palacio
8. International consumer protection
   Rapporteurs: Drs. David P. Stewart, José Antonio Moreno Rodríguez, Gelín Imanès Collot and Ana Elizabeth Villalta Vizcarra

This resolution was approved unanimously at the meeting held on April 8, 2016, by the following members: Carlos Alberto Mata Prates (Vice chairman), Hernán Salinas Burgos, David P. Stewart, José Antonio Moreno Rodríguez, Miguel Aníbal Pichardo Olivier, Gélin Imanès Collot, Ruth Stella Correa Palacio, Joel Antonio Hernández García and Ana Elizabeth Villalta Vizcarra.

During its 89th Regular Session, October, 2016, the plenary of the Inter-American Juridical Committee decided to hold its next regular session starting March 6, 2017, through resolution CJI/RES. 228 (LXXXIX-O/16), "Date and Venue of the Ninetieth Regular Session of the Inter-American Juridical Committee".

The Committee also approved its agenda for the upcoming session, consisting of ten topics, as listed in resolution CJI/RES. 229 (LXXXIX-O/16), "Agenda for the Ninetieth Regular Session of the Inter-American Juridical Committee" from March 6, 2016.

CJI/RES. 228 (LXXXIX-O/16)

DATE AND VENUE OF THE NINETIETH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that article 15 of its Statute provides for two annual regular sessions;

BEARING IN MIND that article 14 of its Statute states that the Inter-American Juridical Committee has its headquarters in the city of Rio de Janeiro, Brazil;

RESOLVES to hold its 90th regular session from March 6, 2017, in the city of Rio de Janeiro.

This resolution was approved unanimously at the meeting held on October 13, 2016, by the following members: David P. Stewart, Hernán Salinas Burgos, Fabián Novak Talavera, Ana Elizabeth Villalta Vizcarra, João Clemente Baena Soares, Carlos Mata Prates, Gélin Imanès Collot, and José Antonio Moreno Rodríguez.

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CJI/RES. 229 (LXXXIX-O/16)

AGENDA FOR THE NINETIETH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

(Rio de Janeiro, Brazil, as of 6 March, 2017)

Current topics:

1. Conscious and effective regulation of business in the area of human rights
   Rapporteur: Dr. Ana Elizabeth Villalta Vizcarra
2. Protection of cultural heritage
   Rapporteur: Dr. Joel Hernández García
3. Immunity of States
   Rapporteur: Dr. Carlos Alberto Mata Prates
4. Immunity of international organizations
   Rapporteur: Dr. Joel Hernández García
5. Law applicable to international contracts
   Rapporteurs: Drs. Ana Elizabeth Villalta Vizcarra and José Antonio Moreno Rodríguez
6. Representative democracy
   Rapporteur: Dr. Hernán Salinas Burgos
7. Guide for the application of the principle of conventionality
   Rapporteur: Dr. Ruth Stella Correa Palacio
8. Considerations on the work of the Inter-American Juridical Committee: compilation of topics of Public and Private International Law
   Rapporteur: Dr. Ruth Stella Correa Palacio
9. Mechanisms for online settlement of disputes arising from cross-border consumer transactions
   Rapporteur: Dr. José Antonio Moreno Rodríguez

10. Guide for the protection of statelessness persons
    Rapporteur: Dr. Carlos Alberto Mata Prates

This resolution was unanimously adopted at the session held on October 13, 2016 by the following members: Drs. David P. Stewart, Hernán Salinas Burgos, Fabián Novak Talavera, Ana Elizabeth Villalta Vizcarra, João Clemente Baena Soares, Carlos Mata Prates, Gélin Imanès Collot and José A. Moreno Rodríguez.

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At this same meeting, the plenary of the Juridical Committee approved a resolution on budgetary matters urging the States to allocate the amounts of funding it needs to be able to honor and comply with the mandates entrusted to it. The resolution was titled "Budget of the Organization of American States," document CJI/RES. 225 (LXXXIX-O/16):

CJI/RES. 225 (LXXXIX-O/16)

BUDGET OF THE
ORGANIZATION OF AMERICAN STATES

THE INTER-AMERICAN JURIDICAL COMMITTEE,

RECALLING that the Juridical Committee, as the main and consulting Organ of the OAS in juridical matters, has contributed since its inception to the progressive development and codification of international law and Inter-American legislation, both public and private, and highlighting the importance to continue fulfilling in an adequate manner the mandates of the General Assembly and those that by its own initiative are incorporated in the Committee´s agenda;

RECALLING ALSO, that for more than 43 years the Committee has successfully organized jointly with the OAS Department of International Law of the Secretariat of Legal Affairs, Technical Secretariat of the Committee, the Course of International Law, which has served as an instrument to disseminate International Law, both public and private, as well as Inter-American legislation among various generations of experts on the subject,

RESOLVES:

1. To express its profound concern regarding the proposed budget cuts of the Inter-American Juridical Committee included in the draft of the budget program for the year 2017, to be submitted to the consideration of the General Assembly in October 2016.

2. To request that the Member States and the political organs of the Organization take into account that for the Inter-American Juridical Committee to operate in minimum conditions, allowing it to fulfill the duties assigned by the OAS Charter and the mandates periodically assigned by the General Assembly, requiring a minimum amount of USD 310,700 in the non-staff item, thus allowing the Committee to hold its two annual regular sessions, in addition to affording the operational costs of the offices in Rio de Janeiro and organizing the annual Course on International Law.

3. To distribute this Resolution to the Member States of the Organization, as well as to the General Secretary and to the President of the OAS Permanent Council, and to inform the other Organs in charge of analyzing the budget program of the Organization.

This resolution was unanimously adopted at the session held on October 6, 2016 by the following members: Drs. Hernán Salinas Burgos, Fabián Novak Talavera, Joel Hernández García, Ana Elizabeth Villalta Vizcarra, João Clemente Baena Soares, Carlos Mata Prates, Gélin Imanès Collot, José A. Moreno Rodríguez and Ruth Correa Palacio.

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At the end of the working meeting, the Juridical Committee took time to pay homage to Drs. Fabián Novak Talavera, David P. Stewart and Gélin Imanès Collot, whose terms come to an end on December 31, 2016. These members were recognized for their invaluable commitment to the development and codification of International Law and the Inter-American System. It was highlighted the contribution bestowed by Dr. Novak to the Inter-American Human Rights System, representative democracy and corporate social responsibility in the field of human rights and the environment in the Americas. With respect to Dr. David P. Stewart, emphasis was placed on his most valuable involvement in the areas of electronic warehouse receipts, international contracts and consumer protection, as well as to helping to draft the OAS Principles on Privacy and Data Protection," and the "Model Law on the Simplified Corporation." As for Dr. Gélin Imanès Collot, his contributions were made in the field of statelessness and international contracts.

CJI/RES. 222 (LXXXIX-O/16)

TRIBUTE TO DOCTOR FABIÁN NOVAK TALAVERA

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that on December 31, 2016 Dr. Fabián Novak Talavera´s mandate comes to an end:

RECALLING that Dr. Novak Talavera has been a member of the Committee since January 2009, having served two consecutive mandates, as President of the Committee during the period 2014-2016;

AWARE of the invaluable contribution made by doctor Novak Talavera throughout his mandate to the work of the Committee, and that his reports represented an invaluable support to the development and codification of international legislation and the Inter-American System, especially those related to the Inter-American System of Human Rights, representative democracy, and the social responsibility of companies in the field of human rights and the environment in the Americas.

UNDERLINING Dr. Novak Talavera´s professionalism, and his various personal qualities, among which his legal and academic culture, as well as his pleasant manner and leadership, that distinguishes him among the members of the Committee,

RESOLVES:

1. To express its heartfelt thanks to Dr. Fabián Novak Talavera for his dedication and invaluable contribution to the work of the Inter-American Juridical Committee.

2. To wish him continued success in his future work, in the hope that the keeps in touch with the Inter-American Juridical Committee.

3. To send this resolution to the various organs of the Organization.

This resolution was unanimously adopted at the session held on October 13, 2016 by the following members: Drs. David P. Stewart, Hernán Salinas Burgos, Ana Elizabeth Villalta Vizcarra, João Clemente Baena Soares, Carlos Mata Prates, Gélin Imanès Collot and José A. Moreno Rodríguez.

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CJI/RES. 223 (LXXXIX-O/16)

TRIBUTE TO DOCTOR DAVID P. STEWART

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that on December 31, 2016 Dr. David P. Stewart´s mandate comes to an end;

RECALLING that Dr. Stewart has been a member of the Committee since January 2009, having serving as a member of the Committee for two consecutive mandates;

AWARE of the invaluable contribution made by Dr. Stewart throughout his mandates to the work of the Committee, and that his reports were an invaluable contribution to the development and codification of international law and the Inter-American System, especially his reports in the areas of electronic warehouse receipts, international contracts and protection of consumers, in addition to his contribution in the drafting of the "OAS principles about protection of privacy and personal data", and of the "Model act on the simplified stock corporation";

UNDERLINING the various attributes of Dr. Stewart, among them his exceptional juridical and academic culture and cordial leadership, together with the pleasant manner that distinguishes him among the member of the Committee,

RESOLVES:

1. To express its heartfelt thanks to Dr. David P. Stewart for his dedication and invaluable contribution to the work of the Inter-American Juridical Committee.

2. To wish him continued success in his future work, in the hope that he keeps in touch with the Inter-American Juridical Committee.

3. To send this resolution to the various organs of the Organization.

This resolution was unanimously adopted at the session held on October 13, 2016 by the following members: Drs. Hernán Salinas Burgos, Fabián Novak Talavera, Ana Elizabeth Villalta Vizcarra, João Clemente Baena Soares, Carlos Mata Prates, Gélin Imanès Collot and José A. Moreno Rodríguez.

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CJI/RES. 224 (LXXXIX-O/16)

HOMAGE TO DOCTOR GÉLIN IMANÈS COLLOT

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that on December 31, 2016 Dr. Gélin Collot´s mandate comes to an end;

RECALLING that Dr. Collot has been a member of the Inter-American Juridical committee since January 2013;

AWARE of the invaluable contribution made by Dr. Collot to the work of the Committee, and that his reports represented an invaluable support to the development and codification of international legislation and the Inter-American System, especially those related to stateless persons, and international contracts;

UNDERLINING the various attributes of Dr. Collot, among them his exceptional juridical and academic culture, together with the pleasant manners and leadership that distinguish him among the members of the Committee,

RESOLVES:

1. To express its thanks to Dr. Gélin Collot for his dedication and invaluable contribution to the work of the Inter-American Juridical Committee.

2. To wish him continued success in his future work, in the hope that the keeps in touch with the Inter-American Juridical Committee.

3. To send this resolution to the various organs of the Organization.

This resolution was unanimously adopted at the session held on October 13, 2016, by the following members: Drs. David P. Stewart, Hernán Salinas Burgos, Fabián Novak Talavera, Ana Elizabeth Villalta Vizcarra, João Clemente Baena Soares, Carlos Mata Prates and José A. Moreno Rodríguez.

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CHAPTER II

TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE AT THE REGULAR SESSIONS HELD IN 2016

THEMES UNDER CONSIDERATION

Over the course of 2016, the Inter-American Juridical Committee held two regular sessions, during which it approved two reports in response to mandates established by this body: "Principles and guidelines on public defense in the Americas" (CJI/doc.509/16 rev.2); and "Electronic warehouse receipts for agricultural products" (CJI/doc.505/16 rev. 2). Additionally, the Committee adopted a resolution regarding the theme "International Consumer Protection" (CJI/RES. 227 (LXXXIX-O/16)).

Furthermore, the Committee incorporated to its agenda two new mandates proposed by the General Assembly in June, 2016: "Conscious and effective regulation of business in the area of human rights"; and "Protection of cultural heritage". In addition, the Committee created a new Rapporteurship to respond to a mandate established within it its own initiative: "Mechanisms for online settlement of disputes arising from cross-border consumer transactions". Lastly, the plenary of the Juridical Committee decided to continue to address the following topics: Immunity of States; Immunity of International Organizations; Law applicable to international contracts; Representative democracy; Application of the principle of conventionality control; and Considerations on the Work of the Inter-American Juridical Committee. The latter involves making a compilation of topics of Public and Private International Law of interest to the Organization.

Following there is a presentation of the aforementioned topics, along with, where applicable, the documents on those topics prepared and approved by the Inter-American Juridical Committee.

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1. Immunity of States

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

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

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

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

The Chairman asked Dr. Stewart to present his *questionnaire*. Dr. Novak urged the Rapporteur to include national practices. Dr. Gélin Imanès Collot proposed that the Rapporteur include in his document references to the 2005 Convention on Immunities of States.

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

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

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

During the 84th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2014), the Rapporteur, Dr. Mata Prates, decided to bring forward a part of the report he was

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

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

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

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

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

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

As a preliminary finding, the Rapporteur noted that a narrow concept of immunity has been established with regard to States. Notwithstanding, he explained that he would still have a methodological question about how to continue with preparing the report, inasmuch as there weren't enough responses to put together an overview of the practices in the countries of the Americas; that is, only 11 countries responded.

Dr. Hernández García advised the Rapporteur to take into consideration in his study the failure of States in the Region to sign the United Nations Convention on Jurisdictional Immunities of States and their Property (2005), and commented on the proceedings before the Federal Senate of Mexico to move toward ratification of the aforementioned Convention. He also confirmed the tendency of courts to resort to international customary practice, inasmuch as domestic law provides no legal basis in this area of law. As for practice in Mexico, not many cases of immunity of States have been brought in the country's courts; while, in contrast, there has been a higher number of cases on immunity of International Organizations.

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

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

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

During a second meeting devoted to discussion of the topic, Dr. Mata Prates introduced a preliminary report titled "Immunity of States. Preliminary Outline," document CJI/doc.480/15, which

includes potential findings and expected outcomes. The report traces over time the development of immunity of States, and how it became relative, and that reflects a division between jurisdictional immunity and immunity from execution of judgment.

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

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

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

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

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

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

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

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

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

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

Dr. Correa confirmed the deep judicial roots of this topic and believed that efforts could involve narrowing the scope of the exceptions, in addition to providing input on the responsibility of States. She urged the Secretariat to promote a greater response to the *questionnaires* and the Rapporteur to prepare guidelines.

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

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

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

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

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

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

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

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

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

Dr. Hernández García pointed out that this was a perfect opportunity for studying the topic, in view of the interest shown by the legal counsels. However, the responses from States shall not provide the perfect solution in these cases. Without referring to the nature of the document, interesting issues refer to practical guidelines used as a reference. Three topics deserve the attention of the Committee:

1. The issue concerning notices/notification;

2. Immunity from execution;

3. In labor matters to find mechanisms that allow access to justice, because immunity from execution does not mean exception of payment.

He proposed a draft guide making an inverse exercise, and before delivering it to the political organs, it would be convenient to also send it to the seven counsels that met with the Committee, thus being able to approve the final report at the end of the process.

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

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

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

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

The Chairman informed that the discussion appears in the previous phase, as it is like having a product and not disclosing it.

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

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

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

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

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

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2. Immunity of International Organizations

Document

CJI/doc. 499/16	Immunities of International organizations: Second report (Presented by Dr. Joel Hernández García)

During the 81st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2012), Dr. David P. Stewart proposed to the plenary creating an instrument on immunity of States in transnational litigation. He reported that in 1986 a draft Convention on immunity of States introduced by the Juridical Committee did not go anywhere. Additionally, he noted that the United Nations Convention on Jurisdictional Immunities of States and Their Property has still not come into force. He also stressed that States do not have adequate laws on the topic. In his explanation, Dr. Stewart described the positive effects that an instrument on this subject area could have in the field of trade, in addition to serving as a guide for government officials.

The Committee has only followed up on the subject of immunity of States during the sessions explained hereafter, as of the current year.

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

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

He explained the development of the topic in the Committee and what he has done as Rapporteur since he was appointed in March of the current year. He was pleased at the decision to separate the field of immunities into two sub-topics to be addressed by the Committee: immunities of States and of international organizations. He noted that 12 responses to the questionnaire conducted in 2013 were received from the following States: Bolivia, Brazil, Colombia, Costa Rica, El Salvador, United States, Jamaica, Mexico, Panama, Paraguay, Dominican Republic and Uruguay. Based on the responses provided to the Committee, he was able to establish that only the United States and Jamaica have a national law. The majority of the countries address this issue through international instruments, mainly through headquarters agreements.

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

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

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

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

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

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

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

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

Dr. Hernández García noted that in many aspects he concurs with the comments of the other Members and he proposed to submit a report at the next Committee meeting.

During the 88th Regular Session of the Inter-American Juridical Committee (Washington, D.C., April, 2016), the Rapporteur for the Topic, Dr. Hernández García explained that this report was the result of an analysis of 15 international conventions, and took into consideration, *inter alia*, the constitution of international organizations, headquarter agreements and specific immunity-related treaties. In addition, he commented that the *rationale* underlying the report was to look for general principles to guide international organizations and countries in respect of the former's international immunities.

He said that the purpose of the study was to analyze the scope and limits of the immunities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The document submitted by Dr. Hernández García at the April 2016 is included below:

CJI/doc.499/16

IMMUNITIES OF INTERNATIONAL ORGANIZATIONS:
SECOND REPORT

(Presented by Dr. Joel Hernández García)

1. Background

At its 86th regular session the Inter-American Juridical Committee decided to separate the review of immunities of international organizations from the general topic of "Immunity of States and International Organizations", which it has been discussing since its 81st regular session. The Rapporteur presented his first report in response to the Committee's mandate at the 87th regular session (document CJI/doc.486/15 of July 30, 2015).

In his first report, the Rapporteur argued that the separate study of the issue was amply justified for three reasons. First, the sources of International Law on which Member States draw in granting immunities to international organizations are different from those used in the case of States. Second, the material context of immunities differs markedly from one case to the next. While we see a more homogenous practice with respect to immunities in the case of States, where international organizations are concerned, the treatment is on a case-by-case basis. Last, and perhaps most important, the very nature of these two subjects of International Law inevitably makes their appearance before domestic tribunals is different.

The Rapporteur proposed drafting an instrument containing "general principles of International Law in the Americas on jurisdictional immunities of international organizations."

The purpose is to set down in the proposed document the principles that are generated in international practice and customs in order to provide the administrative or judicial bodies of Member States with a point of reference to guide their decisions. The proposed instrument should also be useful for international organizations by helping them better to manage their legal relations with host States. The Rapporteur believes that both Member States and international organizations would benefit from the knowledge of those principles in the negotiation of future headquarters agreements.

2. Methodology

It should be recalled that the Rapporteur proposed in his first report examining the following sources of law in drafting the above instrument: constituent treaties of the organizations of the Inter-American System, headquarters agreements in force for Member States, and case-law decisions.

The purpose of this comparative review will be to identify, *inter alia*, the following aspects:

a. The material scope of the jurisdictional immunities of international organizations.
b. Exceptions or limits provided in treaties or domestic court decisions.
c. The scope of the exception to jurisdictional immunity with respect to "commercial activities" or violations of domestic or International Law, particularly in labor matters.
d. The scope of the principle of observance of domestic law by international organizations, including observance of the fundamental right of access to justice.
e. Third-party recourse to remedy violations of domestic or International Law.

3. Constituent treaties, agreements on privileges and immunities, and headquarters agreements

The first stage reviewed 15 international instruments, including constituent treaties, agreements on privileges and immunities, and headquarters agreements of the following regional and subregional organizations. A detailed breakdown of the contents of those treaties can be found in the Annex of this report.

Organization of American States

- Charter of the Organization of American States signed in Bogotá on April 30, 1948, as amended by the Protocol of Buenos Aires in 1967, the Protocol of Cartagena de Indias in 1985, the Protocol of Washington in 1992, and the Protocol of Managua in 1993.
- Agreement on Privileges and Immunities of the Organization of American States adopted at Washington, D.C., on May 15, 1949.
- Headquarters Agreement between the Organization of American States and the Government of the United States of America of May 14, 1992.

Inter-American Development Bank

- Agreement Establishing the Inter-American Development Bank (IDB), adopted at Washington, D.C., on April 8, 1959.

Pan American Health Organization

- Basic Agreement on Technical Advisory Cooperation between the Government of the United Mexican States and the Pan American Sanitary Bureau of May 30, 1984.
- Agreement between the Pan American Sanitary Bureau and the Government of Mexico regarding the establishment of a representative's office in Mexico City and the privileges and immunities required for its operation, of May 30, 1984.

Latin American Institute for Educational Communication

- Cooperation agreement entered into by the countries of Latin America and the Caribbean, henceforth the "Member States" to reorganize the Latin American Institute for Educational Communication (ILCE), adopted at Mexico City on May 31, 1978.
- Agreement between the Government of the United Mexican States and the Latin American Institute for Educational Communication (ILCE) concerning the headquarters of the Institute and the Permanent Missions to be accredited to said Institute adopted on July 10, 1981.

Latin Union

- Constituent Agreement of the Latin Union signed in Madrid on May 15, 1954.
- Headquarters Agreement between the Government of the Argentine Republic and the Latin Union signed at Paris, February 8, 1996.

Southern Cone Common Market (MERCOSUR)

- Treaty establishing a Common Market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay (Treaty of Asunción) of May 26, 1991.
- Additional Protocol to the Treaty of Asunción on the Institutional Structure of MERCOSUR (Protocol of Ouro Preto) of December 17, 1994.
- Headquarters Agreement between the Eastern Republic of Uruguay and the Southern Cone Common Market (MERCOSUR) for the operation of the Administrative Secretariat of MERCOSUR of December 16, 1996.
- Headquarters Agreement between the Republic of Paraguay and the Southern Cone Common Market (MERCOSUR) relating to the operation of the Permanent Review Tribunal of June 20, 2006.

Latin American Faculty of Social Sciences (FLACSO)

- Agreement on the Latin American Faculty of Social Sciences (FLACSO) of June 18, 1971, as well as the Agreement of April 30, 1975, and the Protocol of Amendment to the Agreement, of June 8, 1979.

The treaties in this area recognize the following as recipients of privileges and immunities: international organizations, missions and representatives of Member States, and officials of the organizations' secretariats. The privileges and immunities contained in those treaties cover the following applicable matters, depending on the subject concerned:

- Immunity from jurisdiction
- Immunity from execution
- Inviolability of premises and archives
- Facilities of communication
- Tax exemption
- Immigration facilities
- Monetary and exchange facilities
- Customs facilities
- Responsibility for contracts of employment governed by local law
- Waiver of immunity

4. Material scope of the immunities of international organizations contained in the treaties reviewed

Legal capacity

A common theme present in constituent treaties is that they grant the international organization legal capacity to exercise its functions and fulfill its purposes.

The content of that legal capacity varies from treaty to treaty. However, in general, they recognize the capacity (i) to contract, (ii) to acquire and dispose of real and personal property, and (iii) to institute legal proceedings.

Immunity from jurisdiction

The texts reviewed recognize immunity from jurisdiction to the international organization, the Member States and their representatives, and the staff of the organization's Secretariat. However, there are degrees of variation to that immunity, depending on the recipient.

By and large, the treaties grant international organizations, as well as their property and assets, immunity from all judicial proceedings. That absolute immunity granted to international organizations is developed to different degrees in each of the treaties examined. Notable, however, is the Agreement Establishing the Inter-American Development Bank, where the immunity extends to the territories of a Member State where the Bank has an office or where it has appointed

an agent for the purpose of accepting service or notice of process or has issued or guaranteed securities.

Immunity from jurisdiction also extends to the missions of the Member States of the international organization. Broadly speaking, representatives of Member States enjoy the same level of immunity from jurisdiction as is recognized under International Law to diplomatic agents.

In the case of general secretariat staff of international organizations, immunity varies with the administrative level of the official. For example, the Secretary General and Assistant Secretary General of the OAS enjoy privileges and immunities equivalent to those accorded to diplomats.

For the rest of the staff, immunity from jurisdiction is of a functional nature. In other words, officials enjoy immunity from all judicial proceedings in respect of acts performed in the course of their official duties.

Inviolability of premises and archives and facilities of communication

The treaties reviewed recognize the inviolability of the premises and archives of international organizations. For example, the Agreement on Privileges and Immunities of the OAS provides that "[t]he premises of the Organization and of its Organs shall be inviolable" (Article 3) and that "[t]he archives of the Organization and of its Organs, and all documents belonging to them or in their possession, shall be inviolable wherever located" (Article 4).

The inviolability of premises and archives generally extends to the missions of Member States.

The treaties reviewed grant both international organizations and Member States missions facilities of communication. Those facilities cover the use of codes, receipt of documents, and even exemption from mail fees of Member States. Those facilities extend to the missions of Member States.

Tax exemptions and customs facilities

Such matters are mainly governed by agreements on privileges and immunities as well as by headquarters agreements.

International organizations and their officials are exempt from all direct taxes. Similarly, international organizations are exempt from customs duties, prohibitions, and restrictions on articles that they import or export for official use.

In the case of the missions of Member States, the treaties reviewed grant tax exemptions and customs facilities similar to those recognized to diplomatic missions.

At a personal level, international organization officials are exempt from taxation on salaries and emoluments. They are also granted customs facilities for the import of their personal effects upon taking up their post in the host country.

5. Exceptions to or limits on the immunities of international organizations under the treaties reviewed

The instruments examined expressly stipulate exemptions or limits on the immunities or privileges accorded.

A feature of the treaties examined is the waiver of privileges and immunities. In the case of international organizations, the treaties establish that the privileges and immunities granted to officials and staff members may be waived in the interests of the organization. The Agreement on Privileges and Immunities of the OAS provides that "the Secretary General shall waive the privileges and immunities of any official or member of the staff in any case where … the exercise thereof would impede the course of justice" (Article 14).

In some cases a safeguard is included, by which immunities and privileges are not waived when doing so would prejudice the purposes for which they were granted. See, for example, Article 13 of the Agreement on Privileges and Immunities the OAS.

Another limitation envisaged in agreements is based on the nationality of the representative of the Member State or of the secretariat official. Some agreements limit the privileges and

immunities of their nationals when their functions are performed within their territory. For example, customs and immigration facilities and exemption from taxation are denied to nationals in the Agreement Establishing the Inter-American Development Bank (see Article 9).

Generally speaking, the tax exemption excludes the payment of charges for public utility services for international organizations, Member State missions and representatives, and Secretariat officials. The tax exemption only applies to direct taxes and excludes indirect levies, such as value-added tax (VAT).

One constant in the cases of waiver of immunity from jurisdiction concerns measures of execution. In the instruments reviewed, immunity from jurisdiction includes immunity from execution unless the waiver of immunity from jurisdiction excludes *ipso facto* immunity from execution. For instance, the second paragraph of Article 5 of the Headquarters Agreement between the Eastern Republic of Uruguay and MERCOSUR for the Operation of its Administrative Secretariat states that a separate pronouncement shall be required for a waiver of immunity from execution.

As regards responsibility for contracts employment of governed by local law, most of the treaties analyzed do not contain specific rules. Given that such matters are the ones that most often come before domestic courts, it would be useful to review other international instruments in order to identify international practice.

In the meantime, it is worth noting that the Agreement between the Government of the United Mexican States and the Pan American Sanitary Bureau provides that the Bureau's Representative's Office shall establish appropriate procedures for the settlement of controversies arising from contracts or other private law disputes in which the Bureau's Representative's Office is a party (Article IV.2.a).

That instrument also provides that the Bureau's Representative's Office shall establish appropriate procedures for the settlement of controversies involving an official of the Bureau's Representative's Office who enjoys immunity by reason of their official position, where the Representative has not waived said immunity (Article IV.2.b)

For its part, the Headquarters Agreement between the Government of the Republic of Argentina and the Latin Union provides that "the Organization shall pay the social security contributions established under Argentine national law and its staff rules for local employees" (Article VII).

In other words, we can tentatively identify two approaches. On one hand, the approach adopted by the Pan American Sanitary Bureau in Mexico where the Bureau accepts the obligation to establish dispute settlement mechanisms; and on the other, making disputes subject to local law, as Argentina provides for the office of the Latin Union on its territory.

By reviewing more instruments we will be able to determine if the practice of States coalesces around those two approaches.

* * *

3. Electronic warehouse receipts for agricultural products

Documents

CJI/doc.497/16	Electronic warehouse receipts for agricultural products (Presented by Dr. David P. Stewart)
CJI/doc.505/16 rev.2	Electronic warehouse receipts for agricultural products (Presented by Dr. David P. Stewart)

During the 81st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2012), Dr. David P. Stewart proposed developing a standard law on electronic customs warehouse receipts relating to the transportation of agricultural products. He explained that many countries use antiquated procedures at various stages in the chain of production.

Dr. Gómez Mont Urueta then asked Dr. Stewart to act as the Rapporteur on the subject. Dr. Stewart accepted. Dr. Jean-Michel Arrighi asked Dr. Stewart to look into the scope of the Inter-American Convention on Contracts for the International Carriage of Goods by Road.

At the 82nd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March, 2013), the rapporteur of the topic, Dr. David P. Stewart, presented document CJI/doc.427/13, dated January 31, 2013, entitled "Electronic warehouse receipts for agricultural products."

Besides explaining the objective of his proposal, Dr. Stewart offered a general analysis of the issue. He explained that, within the distribution chain, products sent to domestic and international markets are subject to warehousing, which can vary in cost and can lead to indebtedness. In this context, he expressed interest in having an instrument that gives States a form of secure, efficient transaction that is negotiable and has a value; and in modernizing the system to make it electronic.

Both UNCITRAL and UNIDROIT have embarked on global efforts in this arena, but the Committee's work may be relevant at the hemispheric level. He noted as well that the OAS has the advantage of being able to act more quickly than other forums as it already has an instrument on secured transactions. The rapporteur therefore proposed two approaches: a set of draft principles or a model law. In both cases the support of experts would be needed as this was not an area he is used to handling in his work. Dr. Fabián Novak Talavera and Dr. Gélin Imanès Collot both supported the idea of a model law to assist national efforts. The rapporteur noted that while a number of instruments were already dealing with secured transactions, this proposal would fill a gap in this area. Besides, States would find a model law more acceptable over a binding instrument.

The Chairman asked the Rapporteur to submit a proposal model law for the August meeting. He also requested the Secretariat to consult or survey the States on existing legislation in this area.

By note verbale OEA/2.2/33/13 of July 2, 2013, the Department of International Law sent the permanent missions to the OAS a request for information on existing legislation.

At the 83rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2013), the rapporteur for the topic, Dr. David P. Stewart, presented a first draft of the document titled “Proposed Principles for Electronic Warehouse Receipts” (registered as document CJI/doc.437/13) and asked the Committee members to convey their proposals and suggestions by December 2013, with a view to submitting final draft in March 2014.

The Rapporteur considered that the focus of model law should be on agricultural products, and that it should be consistent with the Model Law on Secured Transactions, including both electronic and paper receipts. He also noted that he would take into account the work done by UNIDROIT and UNCITRAL as well as the latest developments at the international level. Finally, he said that the document should emphasize the need for government supervision of the whole process.

During the 84th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March, 2014) the Rapporteur on the issue, Dr. Stewart presented document CJI/doc.452/14. He mentioned that the same as with the Juridical Committee's report on Simplified Joint Stock Companies, the work focused on small enterprises: in that case, small farmers who normally lack access to financial markets and need a certification that will enable them to finance harvesting based on their output. In that context, electronic transactions – the use of modern technology – could facilitate access to capital for those farmers. He also mentioned that that was not a unique proposition.

He pointed out that a first version of the Model Law had already been prepared jointly with the Department of International Law. Furthermore, he noted the importance of bringing in other experts on the subject: both governmental and nongovernmental.

The Chairman welcomed the Rapporteur's Proposal and Dr. Fabián Novak mentioned that the model law format was ideal.

During the 85th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August, 2014), the Rapporteur was unwell and unable to attend. Given Dr. Stewart's absence, Chairman Novak suggested that the Committee continue its discussion of the subject at its 86th Regular Session in March 2015. The other Members agreed.

During the 86th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March 2015), Dr. Stewart stressed the positive effects that developments in electronic warehouse receipts for agricultural products could have on the economies of the countries, particularly on small-scale agricultural goods-producing companies. Implementation of an efficient warehousing and receipt system would make it possible to better manage financial transaction systems. Additionally, he recognized the need to create an electronic format secured transactions mechanism. At the end of his presentation, the Rapporteur requested an extension to complete the report in order to be able to continue consulting with technical experts in the region.

Dr. Dante Negro mentioned the existence of associations such as the American Association of International Private Law (ASADIP), which brings subject matter experts together and offers assistance, the Hague Conference on International Private Law. Dr. Negro also brought attention to the network of experts on the subject of secured transactions available to the Department of International Law.

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2015), Dr. Stewart recalled that, in the last report, he had proposed to follow up on the topic and have a subject matter expert on the Committee. In this regard, he expressed appreciation for the presence of Dr. Juan Carlos Sciullo, who explained Argentina's experience in the field.

Dr. Sciullo explained his own personal experience at the Ministry of Agriculture of Argentina and the legislative legacy dating back to 1914. In several countries of Latin America, as well as his country, he has been able to establish that a system is place, consisting of two documents: the property certificate and the warrants, which serve as the negotiable bonds of certificate of deposit. This dual system would seem to be an obstacle to an electronic warehouse receipt system. In his view, the Committee must address both of these negotiable instruments, in view of the fact that they function autonomously. Credit recovery is a complex procedure and, often, the time periods imposed by the courts pose difficulties. Dr. Sciullo also spoke about the scope of a draft law in his country, which is aimed at, among other things, updating the Argentine system, by creating an exemption for the credits, but not including deposit maintenance fees, or operation of the bankruptcy law. In practice, he believed it is acceptable to expand the scope of warrants to include live goods. He mentioned the experience of the Chilean law that enables issuance of warrants for a type of shellfish (abalone).

The adoption of electronic mechanisms poses challenges, inasmuch as it requires acceptance of electronic notifications. In his opinion, each country must choose the registration and notification mechanism that is best suited to it.

Dr. Stewart noted that his report shows that the main issue is to take into account the situation of the producer and his or her needs. He asked the expert for his suggestions as to the direction the study should take; what can this Committee do to develop this study in the future and promote these instruments.

Dr. Sciullo mentioned that the study should focus on granting of authorizations to issue these instruments. There must be verification of the kinds of borrowers, which banks should target, wither large or small-scale producers. In the case of the latter, there could be softer criteria in place to grant authorizations.

Dr. Salinas explained the importance of addressing a topic that is of such great economic impact to the region. For his part, Dr. Stewart requested more time to research and carry on with this work.

During the 88th Regular Session of the Inter-American Juridical Committee (Washington D.C., April, 2016), the Rapporteur for the topic, Dr. Stewart, noted that the issue is very important and that the Committee can make a relevant impact on the subject. Nevertheless, there is a need to seek the opinion of more experts in order to reach a consensus on the matter.

Dr. Salinas requested clarification on the type of contribution that could be expected for the next session.

Dr. Stewart mentioned that the objective was to draft a model law, but that the initial study of the matter had not foreseen the burden that would be imposed by the necessary modifications to the domestic systems. Accordingly, he suggests seeking a greater number of perspectives from experts from different systems, including representatives from the World Bank, from the academic sphere, and from the OAS itself, among others.

Dr. Moreno asked whether this work is being coordinated with the work of the International Institute for the Unification of Private Law (UNIDROIT) on the matter of agricultural contracts.

Dr. Stewart stated that they are two different activities, but that there had been contact with UNIDROIT.

During the 89th Regular Session of the Inter-American Juridical Committee (Washington D.C., October, 2016), the Rapporteur of the theme, Dr. Stewart, presented the last version of his report (CJI/doc.505/16) that describes a series of principles on the topic. He reported that the initial intention was to prepare a model law; however, in view of the circumstances and complexities of the topic, a set of principles was suggested instead. Dr. Stewart expressed his gratitude to the Department of International Law and especially to Dr. Jeannette Tramhel for her decisive contribution to the work of the rapporteur.

The Chairman proposed approving the theme and sending it to the Permanent Council.

Dr. Baena Soares expressed his satisfaction for this kind of documents that have an impact, are useful and of interest for the Member States, and congratulated Dr. Stewart for his work, a positive contribution of the Committee to the member countries.

Dr. Moreno stated that he had followed this project with great interest in view of its usefulness for the Region, as relevant legislative amendments are being made in the countries in the area, and the work of Dr. Stewart may be used as a guide.

Drs. Salinas, Villalta, Mata Prats and Collot supported the decision to approve and send the report to the Permanent Council.

The Chairman informed that the document was approved and that the decision to deliver it to the Permanent Council had been accepted.

The text of the document presented by Dr. Stewart and the Report of the Inter-American Juridical Committee are as follows:

CJI/doc.497/16

ELECTRONIC WAREHOUSE RECEIPTS FOR AGRICULTURAL PRODUCTS

(Presented by Dr. David P. Stewart)

The subject of a proposed model law on electronic warehouse receipts relating to the transportation of agricultural products was first raised in the Inter-American Juridical Committee at its 81st Session in Rio de Janeiro in August 2012. For the Committee's 82nd regular session in March 2013, the rapporteur for this topic, Dr. David P. Stewart, presented a preliminary discussion in the document entitled "Electronic warehouse receipts for agricultural products" (CJI/doc.427/13). At its 83rd regular session in August 2013, the Committee considered a first draft of a document titled "Proposed Principles for Establishing an Electronic Warehouse Receipts System" (CJI/doc.437/13). For the Committee's 84th regular session in March 2014, the Rapporteur presented a report together with preliminary draft Principles for Electronic Warehouse Receipts for Agricultural Products (CJI/doc.452/14). For the 86th regular session in March, 2015 and the 87th regular session in August, 2015, the rapporteur presented reports on the work related to this topic that has been undertaken by other organizations (CJI/doc.475/15 and CJI/doc.483/15).

During the last of these aforementioned meetings in August 2015, a presentation was made by Dr. Carlos Di Sciullo, an expert in this topic from the Ministry of Agriculture in Argentina. He explained the use of the dual document system, which has been described in the above-noted documents, and how this system operates in practice in several countries of Latin America as well as his own. Dr. Sciullo also spoke about the scope of a draft law in his country, which is aimed at, among other things, updating the Argentine system. Noting the complexity of the issues involved and the challenges to be faced in the adoption of electronic mechanisms, such as acceptance of electronic notifications, he recommended that the study focus on the granting of authorizations to issue these instruments.

Background: The background to this topic was set out in some detail in the earlier documents noted above. In brief, throughout Latin America, warehouse receipts are under-utilized as a financial instrument in gaining access to credit. A warehouse receipt is a document of title that represents the (agricultural) goods that a producer deposits in a warehouse. In theory, the holder of the receipt (in most cases the depositor, *i.e.*, the producer or farmer) should be able to obtain credit secured against that warehouse receipt. However, at this point in time warehouse receipts are not widely used in Latin America as a source of financing.

Research undertaken to date (primarily by Dr. Tramhel of the Department of International Law) has confirmed the highly technical and complex nature of this subject. As explained in the previous report, further consultations and meetings with experts in the field will be required to advance the draft principles that have been presented to this Committee and to ensure consistency with other OAS projects in other related topics (such as secured transactions) and by other organizations on related topics (such as the work by UNCITRAL on electronic transferable records). As the necessary resources to allow such meetings are not available at this time, it was recommended that consideration be given to the establishment by the secretariat of a closed website to enable exchanges with experts in the form of a "virtual" online discussion group. This website should be launched very shortly. Meanwhile, work to identify and invite appropriate experts in the topic in the Americas remains ongoing. The National Law Center for Inter-American Free Trade has been undertaking extensive research on this topic for some time and is in the process of completing its commentary on the preliminary draft principles mentioned above, which would be included among the documents to be posted to the website for online discussion.

Recommendations

The potential value of a draft set of principles or model law on electronic warehouse receipts for our hemisphere remains clear. Accordingly, taking into account the work that has been

undertaken to date, as well as the need for additional research and consultations, the Rapporteur recommends that:

- the topic of electronic warehouse receipts for agricultural products remain on the agenda;
- the secretariat complete its work to post the draft principles to a closed website and begin "virtual" online consultation and other consultations with experts as may be possible; and
- further consideration of the proposed draft be deferred until substantive consultations with appropriate experts have taken place.

*** * ***

CJI/doc.505/16 rev.2

INTER-AMERICAN JURIDICAL REPORT.

ELECTRONIC WAREHOUSE RECEIPTS FOR AGRICULTURAL PRODUCTS

The topic of electronic warehouse receipts for agricultural products was included on the agenda of the Inter-American Juridical Committee at its 81st Regular Session in Rio de Janeiro in August 2012. For the Committee's 82nd regular session in March 2013, the rapporteur for this topic, Dr. David P. Stewart, presented a preliminary discussion in the document entitled "Electronic warehouse receipts for agricultural products" (CJI/doc.427/13). At its 83rd regular session in August 2013, the Committee considered a first draft of a document titled "Proposed Principles for Electronic Warehouse Receipts" (CJI/doc.437/13). For the Committee's 84th regular session in March 2014, the rapporteur presented a report together with preliminary draft Principles "Electronic Warehouse Receipts" (CJI/doc.452/14). For the 86th regular session in March 2015, the 87th regular session in August, 2015, and the 88th regular session in April, 2016, the rapporteur presented reports on the work related to this topic that has been undertaken by other organizations (CJI/doc.475/15, CJI/doc.483/15 and CJI/doc.497/16, respectively).

Background: Throughout the Americas, producers in the agricultural sector, especially those at the small and medium-sized end of the scale, too often lack ready access to credit. In many countries in the region, these producers often have no choice but to sell their produce immediately upon harvest. As a result, they lose the potential benefits that would come from greater flexibility in marketing. Warehouse receipt systems "enable producers to delay the sale of their products until after harvest when prices are generally more favourable."[1] Such systems also enable producers to access credit by borrowing against the products in storage. An effective and efficient warehouse receipts system can therefore contribute directly to economic growth and development where it is needed the most.

But an effective warehouse receipt system requires *both* a reliable network of physical infrastructure (modern warehouses) and a legal regime for warehouse receipts that inspires confidence among lenders.

As explained in some detail in the earlier documents noted above, warehouse receipts are not widely used today in Latin America as a source of financing. One reason appears to be the lack of a modern and harmonized approach to the relevant law. This situation inspired the rapporteur to investigate the topic, particularly with a view towards the development of draft legislation that might encourage a shift towards *electronic* warehouse receipts which are also *negotiable* (i.e.,

[1] Food and Agriculture Organization of the United Nations, European Bank for Reconstruction and Development, 2014. *Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends*. p. viii.

available for use as security for credit), given the benefits that would be associated with such arrangements.

Accordingly, research was undertaken by the Department of International Law under the direction of the rapporteur that confirmed the highly technical and complex nature of this subject. As explained in previous reports, consultations were initiated with various organizations that are also engaged in related work, including the United Nations Commission on International Trade Law (UNCITRAL) Working Group IV on Electronic Commerce concerning its ongoing work towards a draft Model Law on Electronic Transferable Records; Food and Agriculture Organization of the United Nations and the European Bank for Reconstruction and Development (2014), *Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends*; World Bank Group (2016), *A Guide to Warehouse Receipt Financing Reform: Legislative Reform;* International Institute for the Unification of Private Law (UNIDROIT), FAO and International Fund for Agricultural Development (IFAD) (2015), *Legal Guide on Contract Farming* (as to its possible relevance) and the National Law Centre for Inter-American Free Trade (NATLAW), which has been working towards a draft model law for warehouse receipts that would cover both paper-based and electronic format.

These consultations suggest not only that there is growing awareness of the importance of the subject worldwide but also that there does not yet appear to be a sufficient understanding of the issues or consensus on an agreed approach that would support development of model substantive legislation that is "medium neutral"(*i.e.,* applicable to both paper-based and electronic format). Accordingly, the following set of draft principles is offered in the hope they may serve: (1) as an initial step to underscore for OAS Member States the importance of warehouse legislation reform, and (2) as a means of promoting developments in this area without precluding future work on model legislation for electronic warehouse receipts, if and when appropriate circumstances should materialize.

While these principles may have application to a wider range of goods, the focus of this effort has been on warehouse receipts for *agricultural* products, in order to promote access to credit among those producers, both large and small, in that financially underserved sector.

Recommendation:

Adoption of the attached draft principles.

* * *

Principles for Electronic Warehouse Receipts for Agricultural Products

PREAMBLE:

Warehouse receipt financing is a form of asset-based lending that offers agricultural producers access to credit. A modernized system of warehouse receipts, whether paper-based or electronic, that reduces uncertainty and increases lender confidence, can significantly improve access to credit and thereby contribute towards the development of the agricultural sector; this requires a reliable legal framework.

The Organization of American States (OAS) adopted the Model Inter-American Law on Secured Transactions (2002) and accompanying Model Registry Regulations (2009), which have served as a basis for the modernization of secured transactions regimes in several OAS Member States and which envisage the use of electronic documents and signatures.

The United Nations Commission on International Trade Law (UNCITRAL) adopted Model Laws on Electronic Commerce (1996) and Electronic Signatures (2001) and an Electronic Communications Convention (2005) to serve as a basis for legislative reforms and to encourage the transition towards electronic commerce. UNCITRAL is continuing its work in this area with the preparation of a draft Model Law on Electronic Transferable Records.

Other international organizations have also recognized the need for legislative reforms to encourage the use of warehouse receipts as a vehicle for increasing agricultural lending, for example, Food and Agriculture Organization of the United Nations and European Bank for

Reconstruction and Development, Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends (2014) and World Bank Group, A Guide to Warehouse Receipt Financing Reform: Legislative Reform (2016).

In order to bring attention to the importance of this work for the agricultural sector of the Americas, particularly small producers without access to traditional forms of credit, and in furtherance of these legislative advancements, the following principles have been formulated.

COMMENTARY:

Warehouse receipt financing is a form of asset-based lending that allows businesses to obtain loans by using warehouse receipts as collateral. A receipt is typically issued by the warehouse operator to the depositor (producer) upon delivery of produce. Because the receipt provides proof of ownership of a specific quantity and quality of products stored in a specific location, on the basis of these receipts, the depositor (producer) can raise money from lenders willing to accept the receipts as collateral.

A strong warehouse receipt system is critical for the modernization of the agricultural sector and will particularly benefit small scale producers who would otherwise lack or have only little conventional access to credit. Improving performance of the agricultural sector is essential in many countries as a way to alleviate poverty and stimulate economic growth.

A modern electronically-based system of warehouse receipts can have significant advantages over traditional paper-based systems; depending on design and implementation, this can reduce uncertainty and increase efficiency and thereby encourage lender confidence. However, to be effective it also requires a reliable legal structure regulating the system of warehouse receipts and guaranteeing the enforceability of the receipts in case of default of the depositor. Besides mandating the transferability of warehouse receipts, the system must also prescribe the form and manner of registration of warehouses and issue of warehouse receipts, including the legal recognition of electronic records and transfers.

In principle, different legislative options are available to legally enable the use of electronic warehouse receipts. One possibility is to maintain the existing legislative regime applicable to paper-based warehouse receipts and to adopt legislation based on the functional equivalence principle such as the forthcoming UNCITRAL Model Law on Electronic Transferable Records. Another option would be to adopt legislation dealing specifically with warehouse receipts existing only in electronic form (and therefore separate and different from paper-based warehouse receipts). A third possibility could be to prepare medium-neutral legislation on warehouse receipts that repeals pre-existing legislation dealing with paper-based warehouse receipts.

1. PURPOSES

The purposes of these principles are as follows:

(a) To promote a strong and reliable system of warehouse receipt financing and thereby encourage secured lending for and modernization of the agricultural sector;

(b) To improve access to credit, particularly for small scale agricultural producers without access to conventional forms of collateral, as a way to stimulate economic growth and alleviate poverty;

(c) To facilitate and encourage a transition from paper-based to electronic warehouse receipts;

(d) In support of efforts to further harmonization and codification at regional and international levels in the field of secured lending, to outline basic principles for electronic warehouse receipts that are consistent with the OAS Model Inter-American Law on Secured Transactions and other related international instruments and that can serve as the basis for further development or future model law.

COMMENTARY:

Some countries in the Hemisphere have not yet enacted the necessary legal provisions to recognize electronically transferable records. These principles are intended to accommodate both

paper-based and electronically-based warehouse receipts and to serve as a bridge to facilitate this transition.

The principles pave the way for future development of legal instruments in this subject matter, such as a model law, when the sufficient degree of ripeness has been achieved to enable harmonization on specific issues that currently remain at variance in different legal systems (see discussion below on single vs. dual paper-based documents).

2. SCOPE

The principles apply to electronic warehouse receipts that are used for agricultural products in general, without differentiation by industry.

COMMENTARY:

The principles are broadly applicable to electronic warehouse receipts used for different kinds of agricultural products, without differentiation by industry. However, this does not foreclose the possibility of developing "commodity-specific" receipts if the need so arises in the future (e.g., electronic warehouse receipts for cotton). The term "agricultural products" is left undefined to enable interpretation as needed.

3. CONSISTENCY WITH RELATED AREAS OF LAW

(a) The principles are intended to operate in conjunction with a modern secured transactions regime, one that is consistent with international standards as embodied in the OAS Model Inter-American Law on Secured Transactions and other international instruments in the field of secured transactions, such as the recently adopted UNCITRAL Model Law on Secured Transactions (2016) and UNCITRAL Legislative Guide on Secured Transactions (2007) among others.

(b) The principles are intended to support and supplement, and to be consistent with, the overarching domestic legal framework that governs secured lending and related areas of insolvency and/or bankruptcy.

(c) The principles are intended to be consistent with domestic laws governing electronic commerce and signatures.

COMMENTARY:

The principles are intended to be consistent with and to further harmonization efforts at the regional and international levels in the field of secured lending and electronic commerce.

A warehouse receipt may be encumbered (*i.e.*, "charged") by a security interest and thus used as collateral to obtain financing. Therefore, the law that governs these receipts must be consistent with the overarching legal framework that governs security interests. If the legal regime does not permit or recognize the creation of such interests, then it will be difficult if not impossible to adopt a modernized system of electronic warehouse receipt financing.

Similarly, because a warehouse receipt may be subject to a security interest, it is important that the rights and priorities associated with that interest are clear, especially *vis-à-vis* third parties who may have competing claims in the receipt itself or against the goods represented by the receipt. This is especially true in the event of the insolvency and/or bankruptcy of either the depositor or the warehouse operator. Accordingly, the principles must also be consistent with the legal regime that governs insolvency and/or bankruptcy and that establishes the rights and priorities of creditor claims.

4. DEFINITIONS

For the purposes of the principles, the following definitions apply:

*"**Authority**" means the entity that has been authorized to license a warehouse, to conduct regular inspections and to renew or revoke the license. It may be a government body or a private entity.*

*"**Depositee**" (or "bailee") means a person (warehouse operator) to whom goods are delivered for deposit and who issues the warehouse receipt.*

*"**Depositor**" (or "bailor") means a person who delivers goods to a depositee for deposit, and to whom the warehouse receipt is initially issued.*

*"**Deposit**" (or "bailment") means the transfer of possession of moveable goods (without transfer of title, ownership or property rights) from the depositor to the depositee for custody and control, storage and safekeeping.*

*"**Electronic warehouse receipt" or ("EWR")** means a warehouse receipt that is issued [or released] in and exists in electronic form.*

*"**Electronic warehouse receipt provider**" (or "**EWR provider**") means an entity that issues or releases electronic warehouse receipts, which may be the warehouse operator itself or a third party service provider operating on behalf of the warehouse.*

*"**Licensed warehouse**" means a warehouse that has been licensed by the authority as defined above.*

*"**Warehouse operator**" means a person who operates a "licensed warehouse" for the storage of goods.*

*"**Warehouse receipt**" means the paper-based documentation that is issued to the person in control (depositor or bailor) upon the delivery of goods.*

COMMENTARY:

Insofar as possible, terms used in the principles are intended to be consistent with the same or similar terms as defined in related instruments. The term "warehouse receipt" is defined broadly to encompass both the "single document" and "dual document" systems as used in common law and civil law jurisdictions as described below [see Commentary under Point 5 – Legal Characteristics]. An electronic warehouse receipt (EWR) is considered to be an "electronic transferable record" as that term is defined in the UNCITRAL Draft Model Law on Electronic Transferable Records[2] although that definition is yet to be finalized.[3]

5. LEGAL CHARACTERISTICS

Recalling that a warehouse receipt -

- *usually is a contractual agreement for the storage of a specific quantity of goods with specific characteristics in a specific warehouse for a specified period;*
- *is an agreement for deposit (or bailment) between the initial depositor of the goods and the warehouse operator;*
- *should include the elements of a contract (parties, price, performance) and describe the respective rights and obligations of each party while respecting the principle of freedom of contract;*
- *should state on its face whether it is negotiable or non-negotiable; and,*
- *should state clearly whether or not it is subject to the claims of any prior creditors with a security interest in the goods represented by the warehouse receipt;*

…an electronic warehouse receipt (EWR) shares these same legal characteristics.

An electronic warehouse receipt (EWR) and a paper-based warehouse receipt are functionally equivalent and should be equally admissible in a court of law and provide full evidence of the rights and obligations that it embodies.

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[2] *Draft Model Law on Electronic Transferable Records, Note by the Secretariat*. A/CN.9/WG.IV/WP.137. 23 February 2016, para.29.

[3] *Ibid*., para. 19. See discussion below regarding "release".

COMMENTARY:

Background:

Upon delivery of agricultural products (such as grain) to a warehouse, the warehouse operator issues a warehouse receipt. The traditional - and still predominant - practice in most countries of the Hemisphere is to issue the receipt in paper form. That receipt, defined herein as the "paper-based documentation" - and it is assumed for the moment that it is a *negotiable* receipt – not only serves as proof of receipt of the goods, it also has the following two functions: 1) proof of ownership and 2) negotiable paper capable of being given as collateral.

Most common law countries operate under the "single document" system, wherein the "paper-based documentation" that is issued by the warehouse operator consists of only one document, referred to as the "warehouse receipt." That single document can encompass both functions; 1) it is a statement of ownership rights in the stored commodities, recognized in law as or *de facto* equivalent to a document of title. Whether or not the warehouse receipt is 2) negotiable, is typically indicated directly on the document.

Most civil law countries operate under the "dual document" system, wherein these two functions - ownership and negotiability - have been separated into two different documents (or two parts, attached as one document). One of these is referred to as the "certificate of deposit" (*certificado de depósito)* (alternatively, "certificate of property" *[certificado de propiedad]* or "title of ownership" *[titulo de propiedad]*); the other is referred to as the pledge bond (*bono de prenda*). If the certificate of deposit is issued on its own without the pledge bond, the certificate grants full rights (in civil law these are referred to as "dominion rights") over the goods and the holder thereof may, by presenting only the certificate, obtain release of the goods from the warehouse. When 1) the certificate of deposit is issued together with 2) the pledge bond, the certificate of deposit in itself establishes title, but only an imperfect right to the release of the stored goods. In that case, both documents must be presented together to obtain the goods. The pledge bond can be separated from the certificate of deposit and both documents can be negotiated separately. The pledge bond can be used as collateral for credit from financial institutions; the pledge bond is held by the lender until the sale of the goods whereupon the proceeds of sale are used to repay the loan.

Under this system, where two documents may be issued and where both documents may be negotiated independently, there is potential for fraud and misuse. It has been suggested that this may be one of the reasons why, in civil law countries using the dual document system, warehouse receipts are underutilized as a major source of financing.

By contrast, under an electronic warehouse receipt (EWR) system, upon delivery of the products to a warehouse, the warehouse operator as issuer submits a request to the EWR provider (if the operator and EWR provider are not one and the same entity) for the release of the EWR to the credit of the depositor's EWR account. When the depositor obtains a loan from the lender using the EWR as collateral, that transaction would be appropriately recorded in the relevant registry that is maintained, presumably, by the EWR provider. An integrated and properly supervised system of electronic warehouse receipts can promise more security against fraud and mismanagement than the current paper-based system. Moreover, distinctions between the single or dual document systems (should) become irrelevant.

Shared Legal Characteristics:

The legal characteristics comprising Principle 5 and listed above are fundamental to any warehouse receipt, whether paper-based or electronic. The electronic warehouse receipt should not be denied legal effect, validity or enforceability on the sole ground that it is in electronic form.

As a comprehensive study undertaken by the FAO has pointed out, it is important first to define the national policy objectives behind a legislative initiative to introduce a system of

electronic warehouse receipts.[4] Particularly noteworthy, after an explanation of the "single" and "double" receipt systems, is the finding that "(i)t is crucial that the receipt format be consistent with the general legal framework to ensure smooth implementation within the commercial order and rapid uptake by warehouses and lenders."[5] Thereafter follows the observation that "an important challenge to ensure the integrity of electronic receipts is creating a unique electronic equivalent."[6]

Transferability:

To promote warehouse receipt financing and encourage commercial lending in the agricultural sector, warehouse receipts should be transferable with the effect that the transferee acquires rights equivalent to those transferred by negotiation of a paper warehouse receipt.

Treatment of Prior Claims:

These principles set out targeted standards that may not necessarily be current practice under every legal system. Ideally, it should be readily evident to the person in control of a warehouse receipt whether or not the goods it represents are subject to prior claims. One approach might be the position that issuance of a warehouse receipt cuts off any prior claims. The alternative is to consider that prior claims survive issuance. The latter would be more consistent with secured transactions rules under which a perfected security interest in the crop is not extinguished upon deposit of that crop into a warehouse.[7] In any case, clear rules as to the treatment of prior claims are essential.

To satisfy itself that the deposited goods are not subject to any prior claims, the warehouse operator may require the depositor to complete a statement of ownership and encumbrances. Thereafter, the warehouse receipt and the goods it represents should be eligible to be encumbered only by those claims that may arise subsequent to issuance, such as the warehouse operator's lien, or rights under certain legislation.

6. RIGHTS AND OBLIGATIONS OF THE PARTIES

Recalling that -

a) the warehouse operator -

- *is required to issue an appropriate warehouse receipt, and, where necessary, arrange for the release of an EWR and shall keep appropriate records of the relevant transactions;*
- *is required to exercise a general duty of care;*
- *is required to release the goods upon the satisfaction of the conditions stated in the warehouse receipt or the EWR that has been issued; and,*
- *has the right to be paid for its costs (storage, cleaning, etc.) as outlined in the terms of the warehouse receipt and is entitled to a possessory lien against the goods in order to secure payment for these costs.*

b) the depositor -

- *is responsible for its obligations in the underlying contract of deposit (or bailment);*

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[4] Food and Agriculture Organization of the United Nations and European Bank for Reconstruction and Development, 2014, *Designing Warehouse Receipt Legislation: Regulatory Options and Recent Trends.* See also, World Bank Group, 2016, *A Guide to Warehouse Receipt Financing Reform: Legislative Reform.*

[5] *Ibid.*, p. 35.

[6] *Ibid.*, p. 40.

[7] For example, United States Uniform Commercial Code (UCC), Article 7-503.See also UNCITRAL Model Law on Secured Transactions, Article 49.

- *has the right to receive the goods or their fungible equivalent in exchange for the warehouse receipt; and,*
- *is entitled to a "pro-rata" interest in commingled, undifferentiated stored commodities as may be applicable.*

c) [Where applicable] the person in control of a warehouse receipt [or holder-in-due-course], is entitled to the same rights as the depositor.

…accordingly, the EWR Provider -

- *shall comply with the obligations and rights set out in its operating agreement.*

COMMENTARY:

The warehouse operator and the depositor are subject to their respective rights and duties of their contract, *i.e*., the warehouse receipt. The EWR provider is not a party to that contract, but rather, is governed by the terms of its operating agreement. It is expected to release EWRs appropriately when requested and to keep appropriate records of the transactions during the "lifecycle" of the EWR. The warehouse operator may also serve simultaneously as EWR provider or the two functions may be performed by different entities.

7. ISSUANCE [AND/OR RELEASE]

Recalling that a warehouse receipt should be issued only by a licensed warehouse operator, an Electronic Warehouse Receipt (EWR) should be issued [released] only by a licensed EWR provider.

COMMENTARY:

In traditional paper-based systems, the "issuance" of the warehouse receipt is usually in the hands of the warehouse operator, who is also the depositee (or bailee) and dutiful caretaker of the stored goods. The terms "issuance" and "issuer" as used in many paper-based systems have potential connotations under substantive law. Under electronic registry systems, the term "release" had been suggested in order to differentiate the function of the physical or technical step of putting the electronic transferable record (in this case the electronic warehouse receipt) into circulation.[8] The modalities for release depend on the type of system (token or registry). In a registry system, the "issuer" (*i.e.*, warehouse operator) submits a request for the release of the electronic warehouse receipt to the registry operator (EWR provider).[9] However, it has been suggested that in this context the use of the term "release" may be confusing because it has traditionally denoted the physical action of the release of goods from the warehouse and that therefore, another term may be preferable. It has also been suggested that "issue" is indeed the correct term to use. Rather than focus on the terms or a single step such as issuance or release, what counts is the ability to manage the whole life-cycle from issuance to archival storage. Whether the system is paper-based or electronic, confidence among lenders in the integrity of the system in its entirety is essential, including the critical components of credible issuance and/or release.

Also integral to establishing such confidence is the need to circumscribe the relationship between paper based and electronic receipts for the same underlying goods. Conditions under which an EWR may be released to replace an already issued paper-based receipt must be clearly specified.

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[8] UNCITRAL, Legal issues relating to the use of electronic transferable records: Note by the Secretariat. A/CN.9/WG.IV/WP.118. August 17, 2012, paras. 8 and 9. Footnote 36 states that: "The term "release" of an electronic transferable record is used to refer to the technical step of putting that electronic record into circulation, while the terms "issuance" and "issuer" are used in their well-established meaning under applicable substantive law..." However, this discussion has since been abandoned and Working Group IV has decided to consider the whole life-cycle rather than specific steps.

[9] *Ibid*., para. 29.

8. REQUIREMENTS FOR WAREHOUSE OPERATORS AND EWR PROVIDERS

Recalling that

- *warehouse operators should be accredited and licensed by an appropriate, independent governmental authority or private entity;*
- *warehouse operators are generally required to carry insurance or other forms of coverage to indemnify the depositor and/or any third parties in the event of loss or destruction of the goods stored.*

…an EWR provider should be accredited and licensed by an appropriate, independent governmental authority or private entity and should be appropriately insured.

COMMENTARY:

Lenders must be assured that the stored goods exist in order to serve as collateral and will continue to be preserved during the entire period until release. The two means to achieve such confidence are accreditation (of warehouse operators and EWR providers) and indemnification.

Accreditation

Warehouses should be accredited and licensed by an appropriate, independent governmental authority or duly authorized private entity. The accreditation and license should be for a stated period of time, renewable under certain conditions. The appropriate governmental authority or private entity should have continuing responsibilities of supervision, inspection and regulation, with rights of access to monitor the warehouse operation.

Indemnification

Lenders need certainty that should the goods in custody be destroyed or damaged, the lender will nevertheless be made whole. Lender confidence can be strengthened through the use of mechanisms such as insurance, indemnity funds and performance bonds. A key factor is legislative requirements that warehouse operators maintain insurance coverage.

Comparable oversight and regulation is required for the EWR provider. Whether or not the EWR provider is distinct from the warehouse operator, the EWR provider may be subject to a range of obligations that go beyond those of the warehouse operator. These may include requirements concerning record duration, data confidentiality, centralized database or registry maintenance, and restrictions on changes, corrections and re-issuances. Provisions should be considered to require licensing for the operation of the electronic registry and for monitoring and oversight. Insurance coverage can be important for damage due to errors and omissions, fraud and dishonesty (although coverage for intentional acts varies with each jurisdiction).

9. PRIORITIES

These principles respect the rights and priorities of lenders and creditors as established by the existing domestic legal framework governing secured transactions, bankruptcy and insolvency.

COMMENTARY:

As noted above, the principles are intended to operate in conjunction with a modern secured transactions regime. If the legal regime does not permit or recognize the creation of security interests in warehouse receipts, then it will be difficult if not impossible to adopt a modernized system of electronic warehouse receipt financing.

The purpose of Principle 9 is to confirm that the principles are not intended to change existing rights of creditors but rather, to work in tandem with the existing legal framework.

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4. Law applicable to international contracts

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

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

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

Meanwhile, Dr. Arrighi, who has also took part in the ASADIP meetings, noted that some members of the ASADIP held senior positions with their governments and never suggested ratification of the Conventions was a priority. He added that doing protocols or amendments to conventions already signed and ratified would depend on the willingness of States Party. A review of the Convention of Mexico should therefore be proposed by Mexico or Venezuela - the only ones to have ratified it. Finally, he noted the important role played by the Inter-American Juridical Committee in creating a network of experts who supported initiatives in this area.

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

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

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

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

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

She explained that some countries indicated that the translations of the Conventions were not particularly felicitous, and that that was an obstacle to its ratification. However, she mentioned that

there were ways of correcting those deficiencies, so she suggested that the Committee bring countries' attention to the mistakes.

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

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

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

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

The Chairman pointed out that silence with respect to ratifying was in itself a form of political response. Dr. Salinas said that some instruments adopted in The Hague suffered the same fate as some of the Inter-American conventions, in the sense of being ratified by only a handful of States. Dr. Elizabeth Villalta pointed out that her report mentions the possibility of incorporating solutions (developed in the Convention) into domestic law, as Venezuela had done and Paraguay was in the process of doing.

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

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

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

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

Dr. Negro noted that this meeting provides a good opportunity to revise the *questionnaire*. He said, perhaps we could go back to the original purpose of the study, which was to understand why the

Mexico Convention was not ratified by more States. As for the experts, he mentioned that we could call on the American Association of Private International Law (ASADIP) to collaborate, inasmuch as it is the ideal forum to deal with topics of Private International Law and it has offered its good offices to support the work of the Juridical Committee.

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

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

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

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

The Chairman noticed that the Members were in agreement in shortening the *questionnaire* and, particularly, in learning the reasons for States not ratifying the Mexico Convention. Therefore, he requested the rapporteurs to shorten the *questionnaire* and that Dr. Stewart would take part in drafting a revised version. He also requested Drs. Villalta and Stewart to provide a list of topics of Private International Law, on which the Committee could focus.

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

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

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

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

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

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

The Vice-Chairman noted that the consensus of the Juridical Committee would be to keep the topic on the agenda and he requested the Secretariat to send out a reminder to the States, reflecting the importance the Juridical Committee attaches to Private International Law.

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

During the 88th Regular Session of the Inter-American Juridical Committee (Washington D.C., April, 2016), one of the Co-Rapporteur for the Topic, Dr. Villalta reminded members that at the 86th session a *questionnaire* was approved and sent out to member states and experts on the subject; replies were received from the following ten states: Bolivia, Brazil, Jamaica, Paraguay, Argentina, Uruguay, Mexico, Panama, Canada, and the United States. Additionally, a total of fifteen experts responded to the questions: Professors Mercedes Albornoz, Nuria González, Nadia de Araujo, Sara Feldstein de Cárdenas, Cecilia Fresnedo, Sara Sotelo, Carmen Tiburcio, Didier Opertti Badán, José Martín Fuentes, Alejandro Garro, Peter Winship, Diego Fernández Arroyo, Aníbal Mauricio, Dale Furnish, and Carlos Berraz. She thanked all of them for their responses.

Most States were in favor of the principle of freedom of choice. Additionally, a majority supported the choice of the place with which the contract had the closest ties, in the event that the parties themselves had not determined the applicable law or that their choice was ineffective.

In response to the question on the need for an amendment to the Inter-American Convention, most states indicated that the political context should be taken into account.

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

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

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

In concluding her presentation, the Rapporteur expressed support for the initiatives and suggestions of experts in favor of disseminating and promoting the development of Private International Law in the region.

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

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

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

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

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

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

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

Dr. Negro indicated that the Committee Secretariat was available to support the work of preparing a guide. He said that this is an ideal example of a case where the success of a Convention is not reflected in the number of ratifications. Conventions can be influential in other ways, such as by ensuring that their principles are inserted into domestic legal systems. He further noted that many of the obstacles to possible ratification did not seem to have to do with the content of the Convention, and that it may ultimately be possible to use its principles, together with the principles derived from The Hague Conference on the subject.

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

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

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

During the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, October, 2016), Dr. Villalta recalled the background of discussions on the issue of international contracts and informed about the guide on international contracts drafted with Dr. Moreno. This guide

is based on the main principles of the Mexico Convention on the Law Applicable to International Contracts, on The Hague Principles on the Election of the Law Applicable to International Contracts and the most important international instruments in this field. She also reported that the responses to the *questionnaire* sent to the States were also used for the drafting of the Guide. In addition to the surveys carried out with professors and jurists of the Hemisphere that were please to support the initiative of the Committee. Dr. Moreno, on the other hand, stated that he could notice the merits of the Mexico Convention, despite its low number of ratifications. The lack of ratification of the Convention was due, in his opinion, to three causes:

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

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

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

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

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

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

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

Dr. Mata Prates also congratulated the rapporteurs. He noted a norm inflation in the Americas, particularly in Latin America. Therefore, he considered of great value a "soft law" proposal by the Committee to be used by jurists to help interpreting and applying existing norms. In his view, drafting a guide seems to be a good methodology.

The Chairman recalled that among the documents distributed there is one on the progress of the rapporteurs, including a selection of the norms useful for the proposed guide. Rapporteurs would also

need members to analyze the possible solutions presented. As no member had objected the solutions offered, he asked the rapporteurs about the elements needed to transform the project into a guide.

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

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

Dr. Salinas required time to discuss the topic with specialists on Private International Law in his country before sending his comments.

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

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

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

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5. Representative Democracy

Documents

CJI/doc. 501/16	Representative democracy in the Americas: Second report (Presented by Dr. Hernán Salinas Burgos)
CJI/doc. 506/16	Representative democracy in the Americas: Third report (Presented by Dr. Hernán Salinas Burgos)

During the 85th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2014), Dr. Salinas suggested including "Representative Democracy in the Americas" as a new topic for the Committee's agenda, in keeping with talks held with the OAS Secretary General, Mr. José Miguel Insulza, at the start of said working meetings. The proposal involves a study to consider the progress achieved by the Organization on this subject matter. Dr. Salinas' initiative was supported by the plenary, and he was appointed the topic Rapporteur.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Dr. Arrighi indicated the Inter-American Juridical Committee's reports were of absolute importance given that they served as the basis for advising OAS organs when it came to defending democratic order in the countries of the region. At the same time, he stressed the importance of the base texts as well and noted that the solution to some of the difficulties might be found in existing norms, without having to seek out solutions in the Inter-American Democratic Charter alone. There were a series of norms about democracy adopted in 1985, in addition to a provision of the OAS Charter - Article 2(b) - which stipulated that one of the purposes of the OAS was to promote and consolidate representative democracy. These instruments could help to address some of the gaps in the existing body of rules to defend democratic order. Dr. Arrighi pointed out that this latter provision was the one that made implementation of the electoral observation missions possible. In this regard, if an instrument declared something to be a function of the Organization, this would include all organs thereof, equally including the General Secretariat. Accordingly, the Secretary General would be able to work on those topics.

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

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

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

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

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

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

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

For its part, the second topic refers to the role played by the definition of each State organ. Dr. Hernández García agreed with Dr. Arrighi about the fact that the Democratic Charter was addressed to governments as both active and passive subjects. Additionally, once a breakdown in democratic order occurred, representation before the Organization was barred. In this sense, it was worth wondering whether the Democratic Charter was directed at States as a whole, wherein the executive branch acted as representative to the Organization. Here was where the question posed by the Secretary General regarding a definition for the term "government" in the Democratic Charter took on renewed significance. He suggested that the provisions of the Charter needed to be explained further and that a determination had to be made as to whether this was a weakness of the Charter or if it was simply the best that could be managed as a political agreement.

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

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

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

As to the notions of State and of government, Dr. Arrighi recalled that when it came to imposing sanctions, the entity suspended is the government, as in the cases of the TIAR (Inter-American Treaty of Reciprocal Assistance) and Cuba. It was the same as what was understood with Resolution 1080. In the Democratic Charter the idea was to be more extreme, and as was evident in the case of Honduras, those who ended up suffering were students who had been awarded scholarships for the Rio Course

who could not attend the Course and the opposition which was unable to take its complaints to the OAS, etc. No dialogue was permitted with anyone.

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

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

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

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

The report confirms the existence of privileges of the Secretary General to act according to the Inter-American Democratic Charter, and, in this sense, suggests tools for action, provided there is the necessary political will. In this regard, the Rapporteur proposed two types of tools: one of them involving immediate action and the other referring to follow-up activities (also embodying a preventive role).

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

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

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

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

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

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

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

The Rapporteur, Dr. Salinas, thanked for the opinions and proceeded to answer the consultations and observations. His language is cautious as he is the Rapporteur and because, at the end of the session, he expects the plenary to decide. As regards the distinction between prevention and intervention, this is explained by the juridical duty of the States in favor of human rights and of representative democracy. The collective action of the Organization within the juridical framework in the Democratic Charter is not an intervention, and therefore the establishment of tools and mechanisms of prevention does not imply that there is intervention, because at the end, the political organs will act, in view of the information that can be remitted by these tools of the Organization. There is a fine line here, but the Organization has the powers to determine class action. The Secretary General should be well informed to submit a theme to the attention political organs. The inter-pairs action is a mechanism of technical information that is not aiming to issue political criticism. In this respect the Rapporteur inquired why a difference is being made between democracy and human rights, and if information is already accepted with reference to promotion of human rights, why is it opposed to start-up reports on about democracy?

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

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

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

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

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

The Chairman appreciated core differences that go beyond personal precisions. For this reason he suggested not forcing a decision from the Committee, but instead allowing a reflection considering the elements on the table, while recalling importance of submitting a product useful to the General Assembly, agreed by all. He asked the Rapporteur to present a report with the background information on this subject.

The reports presented by Dr. Salinas are as follow:

CJI/doc.501/16

REPRESENTATIVE DEMOCRACY IN THE AMERICAS: SECOND REPORT

(Presented by Dr. Hernán Salinas Burgos)

I. INTRODUCTION

At the 86th regular meeting of the Inter-American Juridical Committee (IAJC), held from August 23 to 27, 2014, I presented a preliminary First Report in my capacity as Rapporteur on the topic of representative democracy in the Americas.

The aim of the Rapporteurship was to study the work of the Inter-American Juridical Committee and other OAS bodies, the experiences to date in implementing the Inter-American Democratic Charter (IADC), and new developments and present-day challenges to democracy in the Americas, so as to prepare a report containing proposals for improving the juridical implementation of that instrument to strengthen representative democracy in the Hemisphere.

In that context, the Rapporteurship would focus exclusively on the analysis and formulation of proposals concerning the means of collective action established in Chapter IV of the IADC.

The preliminary First Report was thus to consider the work and deliberations of the IAJC and other OAS bodies, as well as contributions in the area of doctrine, and describe the main shortcomings, gaps, and possible contradictions in the IADC as it addresses means of collective action to protect and preserve democratic institutions. Also included, but not thoroughly discussed or assessed, are various proposals that have been made in this area.

Lastly, mindful of the apparent will of OAS Member States and of political circumstances both in the Hemisphere and within the Organization, the Rapporteurship has decided against issuing proposals to revise the content and amend the text of the IADC in terms of the collective action mechanism it envisions. Accordingly, we reaffirm that the purpose of this Rapporteurship is to study, and to seek ways or means of strengthening, the existing means of collective action set forth in Chapter IV of the Charter, so as to improve the implementation and effectiveness of collective measures, without thereby amending the text, in keeping with the principle of nonintervention. In the First Report, certain basic assumptions were put forth for consideration in pursuing that aim: (1) the lack of tension between the applicability of a collective means of protecting democracy as set forth in Chapter IV of the IADC and the principle of nonintervention; and (2) the IADC's comprehensive approach to representative democracy, in that its aim is to promote and safeguard both the creation of democracy and its exercise. This is consistent with what the Inter-American Juridical Committee stated in its resolution CJI/RES. 159 (LXXV-O/09): "*democracy does not consist only in electoral processes, but also in the legitimate exercise of power within the framework of the rule of law, which*

includes respect for the essential elements, components and attributes of democracy"- which the states have undertaken to uphold.

II. PURPOSE OF THIS SECOND REPORT

As stated in the First Report, Chapter IV of the IADC is founded on four principles: first, the state's general consent to the adoption of measures; second, conflict prevention; third, the gradual nature of measures; and fourth, the adoption of sanctions only as a last resort. In this context, Articles 17 and 18 of the IADC are of a preventive nature - designed to prevent the type of situation cited in its Articles 19 and 20, that is, an "*interruption of the democratic order"* that automatically becomes an *"insurmountable obstacle"* to the Member State's participation and triggers a possible "*collective assessment"* and action to correct it.

Pedro Nikken states:

> *The IDC describes four distinct scenarios or situations, for which it provides solutions that, in principle, also are differentiated. These situations are: (1) a risk to the democratic institutional political process or the legitimate exercise of power (article 17); (2) a situation that may affect the development of the democratic institutional political process or the legitimate exercise of power (article 18); (3) an alteration of the constitutional order that gravely affects the democratic order (article 20); and (4) an interruption of the democratic order in a member state, in the judgment of the General Assembly (article 21)*[1].

The IADC does not define what each of these scenarios consists of; so the circumstances of each must be appraised, in the IADC context, according to the magnitude of infringement upon *"the essential elements of representative democracy"* (Article 3) or the *"essential components of the exercise of democracy"* (Article 4). Therefore, assessment of the gravity of infringement will determine the judgment as to the magnitude of harm to democracy and as to which situation, among those set forth in Articles 17, 18, 20, and 21, has occurred. So each one must be analyzed specifically, so as to define the degree of harm to democracy, which can stem from a single act or from a government policy that seriously undermines or destroys its essence.

Nikken also says:

> *In practice, the options available through the IDC can be reduced to two. The first, which is preventive in nature, is to make use of the mechanisms provided by diplomacy and international cooperation to help overcome and revert an ongoing democratic crisis. Consent from the government concerned, in varying forms and degrees, is necessary for this. The second option, clearly punitive, is the sanction imposed upon a state in which the democratic order has broken down.*[2]

So there must be two aspects to evaluating the means of collective action set forth in Chapter IV of the IADC. One is preventive, and also includes mechanisms for follow-up on inter-American standards to promote and strengthen democratic institutions. The other pertains to the implementation of collective action in crisis situations.

The purpose of this report is to study the shortcomings indicated in the First Report and the proposals contained therein, analyzing and offering specific proposals concerning the preventive action foreseen in Chapter IV of the IADC.

Bearing in mind that one of the most pressing needs in terms of protecting democracy in the Americas is to strengthen the IADC's preventive mechanisms, so as to be able to anticipate and successfully impede interruption of the democratic order, or an alteration of constitutional order that

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[1] NIKKEN, Pedro. *Analysis of the Basic Conceptual Definitions for the Application of Mechanisms for the Collective Defense of Democracy Provided for in the Inter-American Democratic Charter*, in "Collective Defense of Democracy: Concepts and Procedures," Andean Commission of Jurists, (Series: Diffusion of the Inter-American Democratic Charter 5), Lima, Peru, 2006, p. 81.

[2] Ibid., p. 83.

would curtail the basic elements of democracy and the fundamental components of its exercise, it is essential to address the situations foreseen in Articles 17 and 18 of that democracy-protecting instrument in a timely and efficient manner.

As stated eloquently by the Permanent Representative of the Dominican Republic at a Permanent Council meeting held to receive the report of the Secretary General on the situation in Honduras:

> *The Inter-American Democratic Charter does not need firepower to set the field ablaze. What it needs is more water power, to cool down flare-ups, to contain tensions before they can cause breakdowns. Its efficacy as an instrument of multilateral diplomacy must be based fundamentally on preventive action.*[3]

III. STRENGTHENING THE CAPACITY OF THE SECRETARY GENERAL TO TAKE PREVENTIVE MEASURES

a. The Secretary General has broad capacity to take preventive action to safeguard representative democracy in the region under Article 110 of the OAS Charter.

As stated in the First Report, and citing a 2007 report by the Secretary General, this official plays an important role in providing technical and analytical support to Member States as they seek to maintain peace and stability in their democratic systems, in his political efforts to support those States, and as the ideal political conduit for informing and assisting the Permanent Council and/or General Assembly in generating initiatives for dealing with a potential crisis.

One of the most significant reforms to the OAS Charter was introduced by the "Protocol of Cartagena de Indias," signed on December 5, 1985, at the fourteenth special session of the OAS General Assembly. In the context of regional policy and the evolution of Inter-American affairs, It sought to reevaluate the political and juridical role of the OAS.

That was the context for the amendment to the OAS Charter, reflected in its Article 110, concerning the political functions of the Secretary General, giving him powers analogous to those given the United Nations Secretary-General by the UN Charter. Until the 1985 amendment, consensus had attributed to this high official a mainly administrative role. It was in discussing the Protocol of Cartagena that Member States began to re-conceive the Secretary General's role as a facilitator to the policymaking organs when vital or serious situations so warranted.

Article 110 of the OAS Charter provides:

> *The Secretary General, or his representative, may participate with voice but without vote in all meetings of the Organization.*
>
> ***The Secretary General may bring to the attention of the General Assembly or the Permanent Council any matter which in his opinion might threaten the peace and security of the Hemisphere or the development of the Member States.***
>
> *The authority to which the preceding paragraph refers shall be exercised in accordance with the present Charter.* (emphasis ours)
>
> As Hugo Caminos says: "*This change put an end to the tendency, until then predominant, to see the Secretary General of the inter-American regional organization as an administrative official incapable of any political initiative.*"[4]

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[3] Minutes of the special Permanent Council meeting held on July 20, 2009, CP/ACTA 1702/09, p. 13 [unofficial translation].

[4] CAMINOS, Hugo. *Democratic Legitimacy in the Inter-American System: A New Legal Framework for Cooperation between Regional Organizations and the United Nations*," in "International Law in a Transforming World. *Liber Amicorum* in tribute to Professor Eduardo Jiménez de Aréchaga," Ed. Fundación de Cultura Universitaria, 1984, p. 1039 [unofficial translation].

Moreover, as stated by Dr. Eduardo Vío Grossi, Judge of the Inter-American Court of Human Rights and former Member of the CJI, the IADC is not

> *what establishes the international legal obligation to exercise democracy; the OAS Charter itself does so, so then only it can interpret the IADC, that is, determine its meaning and scope. In other words, in this case, the autonomous source of the applicable international legal standard - -what creates the law, or the basis on which a dispute can be decided, which amounts to the same thing - is the treaty known as the OAS Charter.*"

The Inter-American Democratic Charter is only an auxiliary source, more specifically, of what are called

> *"Declaratory legal resolutions of international organizations." Therefore, its function is to interpret the provisions of autonomous sources, in this case the aforementioned basic convention, and therefore it is not binding upon the OAS Member States, although it is upon the OAS organs, including those of which the latter are Members.*[5]

Therefore, Dr. Vío says: "*One could argue that the Inter-American Democratic Charter defines the international legal nature of democracy, its elements as they are to be considered by the OAS, the obligations the states assume in their regard, and the mechanisms it therefore provides for promoting and strengthening democracy (...)*"[6], adding that "(*...) as an auxiliary source, and precisely because of that juridical status, it cannot exceed the dictates of the autonomous interpretive source - the OAS Charter ...*"[7], since any resolution of an international organization derives its normative authority from the founding treaty, i.e., the OAS Charter.

This nature of the IADC is recognized in the instrument itself: first, in its preambular paragraph 18, where it states that, for its preparation, the Permanent Council was charged with "*strengthening and expanding the [base document of the Inter-American Democratic Charter], in accordance with the OAS Charter"*; then, in its preambular paragraph 19, where it says that *"all the rights and obligations of Member States under the OAS Charter represent the foundation on which democratic principles in the Hemisphere are built*"; and finally in preambular paragraph 20, referring to the progressive development of international law and the advisability of clarifying the provisions of the OAS Charter and other instruments according to established practice.

Here we should point out that, although the IADC interprets the democracy provisions of the OAS Charter, it does not refer explicitly to the application of the general standards the Charter envisages as regards the purviews of the OAS organs, which, therefore, could also be applicable in the case of the promoting, defending, and strengthening democracy.

In effect, the IADC, in envisioning the collective action mechanism established in its Chapter IV, cannot (nor has it intended to) curtail the powers of the OAS as recognized in its Charter. These are the mechanism foreseen in Article 54 of the OAS Charter, which provides that the General Assembly, as "*supreme organ of the Organization,"* can *"consider any matter relating to friendly relations among the American States";* Article 61, which establishes that *"the Meeting of Consultation of Ministers of Foreign Affairs shall be held in order to consider problems of an urgent nature and of common interest to the American States";* Article 82, which states that "w*ithin the limits of the Charter and of inter-American treaties and agreements, the Permanent Council takes cognizance of any matter referred to it by the General Assembly or the Meeting of Consultation of Ministers of Foreign Affairs*"; and the aforementioned authority of the Secretary General to "*bring to the attention of the General Assembly or the Permanent Council any matter which in his opinion*

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[5] VIO GROSSI, Eduardo. The *Inter-American Democratic Charter with respect to the Case of Honduras, in* "Anuario de Derecho Público 2010," Universidad Diego Portales, p. 344 [unofficial translation].

[6] Ibid, p. 349.

[7] Ibid., p. 356.

might threaten the peace and security of the Hemisphere or the development of the Member States"(Article 110, paragraph 2).

So the powers the IADC confers on the OAS Secretary General in matters of prevention should be interpreted in the context of the powers the OAS Charter grants him, in Article 110 in particular.

Now, as stated earlier, the aforementioned article empowers the Secretary General to bring to the attention of the General Assembly, or of the Permanent Council, any matter which, in his opinion, might threaten the peace and security of the Hemisphere or the development of the Member States.

In addition, the preamble to the OAS Charter reads: *"Convinced that representative democracy is an indispensable condition for the stability, peace and development of the Region."* That is, the OAS Charter, in this preambular paragraph, conceives of representative democracy as an indispensable condition for the existence of other values or institutions, such as stability, peace, and development.

The preamble to a treaty forms part of the context in which obligations under the agreement are to be interpreted (Article 31 n. 2, Vienna Convention on the Law of Treaties).

A harmonious interpretation of the provision in Article 110, second paragraph, of the OAS Charter; of the aforecited preambular provision; of Article 2 (b), which provides that the aims of the Organization include *"to promote and consolidate representative democracy, with due respect for the principle of nonintervention"*; and of the IADC's preventive provisions leads us to conclude that the Secretary General is empowered to bring to the attention of the General Assembly or Permanent Council of the OAS any matter which, in his opinion, might threaten representative democracy in a Member State, in the light of analysis conducted under the provisions of IADC Article 3 (essential elements of representative democracy) and IADC Article 4 (fundamental components of the exercise of democracy).

This means that the Secretary General, under the OAS Charter, has broad powers of a preventive nature to safeguard representative democracy in the region, within the context of Charter Article 110, with no need to amend the IADC. In particular, when the political process of democratic institutions or the legitimate exercise of power is in jeopardy in a Member State, or a situation could impair the workings of that political and institutional process or the legitimate exercise of power, the only requirements are the existence of the appropriate circumstances, the political will of the highest OAS official, and, of course, the necessary political support from the Member States. The challenge seems to be one of adding, to this normative framework, tools to strengthen the actions of the Secretary General in this preventive vein.

Together with the powers of a preventive nature to safeguard representative democracy, which the Secretary General can exercise under Article 110 of the OAS Charter and Articles 17 and 18 of the IADC, we need to consider such powers as are not explicitly conferred by treaty but are understood as tacitly conferred because they are inherent to the fulfillment of those provisions.

We need to ponder those that would allow the Secretary General to inform himself duly of any situation - that is, to seek or receive information that would allow him to activate, in a duly justified and timely manner, a preventive mechanism to safeguard democracy, under the powers conferred in Article 110 of the Charter and, in particular, Article 18 of the IADC. So the Secretary General can fully seek and receive information in order to determine whether a situation exists that would risk or impair the political process of democratic institutions or the legitimate exercise of democratic power, enabling the Permanent Council or the General Assembly to take decisions. This includes the ability to use good offices and appropriate diplomatic measures. It means that such information may be gathered or derived not only from a State's executive administration but also from its various branches of government, from political parties, and from civil society. Thus the effective exercise of the powers vested in the Secretary General by Article 110 of the OAS Charter, along with the necessary political will of this high OAS official and of the policymaking bodies, can get around any "governmental locks" the IADC might elicit.

We should note in that respect what the Secretary General said in 2012 at a Permanent Council meeting to consider the situation of Paraguay, where they discussed sending a mission to that country on the Secretary General's initiative:

> *Now perhaps we can call it not a mission. We might say that the General Secretariat shall conduct all necessary diplomatic measures and good offices enabling it to inform this Council as to what the situation in Paraguay is. And then the Secretariat will figure out how to do it (...) According to the Charter, the General Secretariat (...) is a central organ of the Organization of American States. And I consider it my duty to comply with that decision. The day they tell me I have to wait for what other organizations will say in order to act, to do my job, I think the Organization will be in very bad shape*[8]*."* At the same meeting he added, " (*...) I think there is no doubt that the Secretariat can and should seek background information, wherever such information exists.*[9]
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> Moreover, the interim Representative of Uruguay said, at that same meeting:
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> (…) *I think the Secretary General's statement can settle this situation. Clearly he is empowered by his office, statutorily and under Article 20, Chapter IV, of the Inter-American Charter, to assist, to visit, to use good offices and on-site diplomatic measures - this is undeniable. Therefore, if the Secretary General wishes to visit and conduct that special mission and choose his collaborators, we have no problem with that.*[10]
>
> Lastly, the Permanent Representative of Mexico, also at that meeting, said:
>
> *Nevertheless, I want to call the attention of all my colleagues to the statement of fact by the Secretary General. The Secretary General has powers, powers that stem from the founding Charter of our Organization: Article 107 specifically gives the Secretary General, as a central institution, authority to fulfill such tasks as arise from agreements, from decisions of the General Assembly; and one that seems essential to me is Article 110, paragraph 2, establishing his duty to bring to the attention of this Permanent Council such matters as may be of interest to the Permanent Council.*[11]

b. Mecanisms to strengthen the capacity of the Secretary General to take preventive action

In the context described above, "early warning" mechanisms could help to give the Secretary General a more dynamic, proactive, and flexible role in the area of prevention, with a gradual approach, strengthening his capacity to assist Member States in dealing with emerging political and institutional crises, and also in the post-crisis process. Under the present institutional structure, especially within the purview and authority of the Secretary General, timely operational mechanisms could be established, with the necessary administrative and political support. The idea is to enhance the powers of the Secretary General to safeguard and strengthen democracy, on the basis of the powers conferred on him by the OAS Charter and in the context of the provisions of Charter Article 2, which establishes that one of the Organization's purposes is *"to promote and consolidate representative democracy."* The idea is to develop authority, under Charter Article 110, in relation with that aim - which, unlike the promotion and protection of Human Rights, has no institutions of its own. Therefore, the favored solutions proposed are those in which the functions of the Secretary General are not undermined and in which bodies are not created that would overlap his functions.

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[8] Minutes of the special Permanent Council meeting held on June 26, 2012, CP/ACTA 1857/12, p. 45.

[9] Ibid., p. 46.

[10] Ibid., p.48.

[11] Ibid., p. 50.

The First Report described a set of "early warning" mechanisms that have been proposed. Here we will delve more fully into those which, in the opinion of this Rapporteur, seem the most viable, in terms of resources involved and political circumstances in the region. We will distinguish among those that can be considered "early warning" mechanisms *per se* - those that seem appropriate for preventing the escalation of a threat to democracy into an actual crisis, involving preventive diplomacy; and, on the other hand, democracy-monitoring mechanisms designed to strengthen the framework of democratic institutions with a view to early and timely detection of potential situations that could pose a threat to democracy. We will also discuss whether these mechanisms would be well placed under the direction of the OAS General Secretariat or should have autonomy and functional independence within the General Secretariat or another OAS body.

Among "early warning" mechanisms *per se*, one option is to create - within the present Secretariat for Strengthening Democracy (SSD)[12], which is a branch of the General Secretariat - a department on the matter, similar to what we have today, for example, for cooperation and electoral observation; or else to create, under the General Secretariat, a special secretariat. This department or secretariat would be charged with seeking and receiving information on situations that pose a risk to the framework of democratic institutions or the legitimate exercise of democratic power, to which the various branches of government could appeal, as could political parties, civil society, etc. Here also we should contemplate the formulation of cooperation proposals and initiatives that are timely, effective, balanced, and gradual, as appropriate, to address situations that could impair the political process of democratic institutions or the legitimate exercise of power, in keeping with the provisions of Chapter IV of the IADC[13]. On the other hand, the Secretary General, in that same context, and should the severity of circumstances so warrant, could generate the designation of an *ad hoc* Rapporteur, by decision or resolution of the Permanent Council. As indicated in the First Report, with enough political consensus, a higher designation could be created as a dependency of the Secretary General, whether permanent or *ad hoc* - an envoy for democracy, but tasked with action of an eminently preventive nature, focusing on discreet dialogue and good offices to prevent institutional crises.

This poses a need to coordinate actions by the Secretary General with the Inter-American Commission on Human Rights, so as to establish timely, ongoing dialogue that functions as an early warning on situations where the Commission foresees a crisis that could threaten democracy and Human Rights.

In terms of follow-up on democratic processes in the Member States under this new department or secretariat, a "democracy indicators" mechanism, or a democracy barometer or observatory, could be implemented, with the task of preparing, in collaboration with independent

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[12] The resolution that created the Secretariat for Democratic Development [AG/RES 1063-XX-O/90)] provides:

"*THE GENERAL ASSEMBLY …*

CONSIDERING the recommendation …to maintain unwavering support for democratic processes in the hemisphere

WELCOMING the decision taken by Member States to support and strengthen genuinely democratic and participatory systems …

RESOLVES…1. To request the Secretary General to establish within the General Secretariat a Unit for Democratic Development.

2. To ask that such a Unit provide a program of support for democratic development that can respond promptly and effectively to Member States which, in the full exercise of their sovereignty, request advice or assistance to ***preserve or strengthen their political institutions and democratic procedures."*** (emphasis ours).

[13] See "Declaration of Florida" [AG/DEC. 41 XXXV-O/05), adopted by the OAS General Assembly in 2005.

experts, periodic, perhaps yearly, systematic, updated reports on the status of democracy in the region; or sectoral reports on essential elements of democracy or the fundamental components of its exercise, with recommendations to Member States. These would permit early, timely detection of threats to the process of democratic governance in the countries of the Americas and of trends, actions, and circumstances that imperil the essential elements of democracy and the fundamental components of the exercise of representative democracy. Therefore, such an instrument would permit identification, under a preventive approach, of weaknesses in democracy in the Region, would promote initiatives to assist countries in strengthening democratic regimes, and would establish dialogue with the countries involved, so as to improve the quality of democracy and detect possible risks to it. This could include a mechanism to facilitate the conflict resolution among institutions within a state, creating a forum for discussing experiences with constitutions and the law and for further study of the matter, in the context of preventing situations that could threaten the democratic order.

Accordingly, and bearing in mind the powers the OAS Charter confers on the Secretary General and the potential of such powers for effective preventive action in terms of safeguarding representative democracy, the creation, proposed by some, of an "ombudsman for democracy" or a "high commissioner for democracy" as an independent institution charged with guaranteeing application of the IADC, with considering communications, complaints, or charges, with activating mechanisms for dialogue, with conducting investigations to ascertain how the IADC is applicable, with mediating when possible, and with proposing solutions, basically through mechanisms of discreet or soft diplomacy[14], would not be advisable. Along with the risk of potential conflicts between the Secretary General and such an ombudsman, all these functions can be handled as already mentioned, directly by the Secretary General or through a mechanism that is functionally independent but contained within that institution, such as a special rapporteurship, to which I will now refer.

In effect, the other option is to create an independent mechanism that would function both as an "early warning" mechanism *per se* and as a way to monitor the course of democracy in the Member States. This would be a special rapporteurship on democracy, as a permanent office with functional independence and its own operational architecture, patterned on existing structure and practice in the Inter-American Human Rights System (Special Rapporteurship on Freedom of Expression of the Inter-American Commission on Human Rights) and within the framework of the General Secretariat or the Permanent Council. This rapporteurship, unlike an ombudsman or high commissioner for democracy - though it would have autonomy and the functional independence to communicate with civil society and with subnational authorities in Member States, who could sound a warning on situations that could fall under Articles 17 and 18 of the IADC - would not be *"totally outsourced."* Working under a Special Rapporteur, it would have a general mandate to conduct activities to protect and promote democracy, including the following functions: (a) to receive information on situations that pose a risk to the framework of democratic institutions or the legitimate exercise of democratic power and, on that basis, prepare reports for the Secretary General or the Permanent Council; (b) to conduct promotional and educational activities to strengthen representative democracy; (c) to advise the Secretary General or the Permanent Council on missions to OAS Member States to enhance the overall observation of the situation and/or to investigate a particular situation pertaining to the effective working of the framework of democratic institutions; (d) to conduct visits to OAS Member States; (e) to prepare reports on specific themes; (f) to promote adoption of the necessary legislative, judicial, administrative, or other measures to ensure effective exercise of the right to democracy and strengthen the framework of democratic institutions of Member States; (g) to render technical advisory services to OAS bodies; (h) to prepare an annual report on the status of the right to democracy and the effective exercise of representative democracy

[14] See statement by SANTISTEVAN, Jorge, in Seminario Internacional "La Carta Democrática Interamericana: Realidad y desafíos a 10 años de su adopción," Santiago, Chile, December 1 and 2, 2010, p. 22-29.

in the Americas, for submission to the OAS General Assembly each year; and (i) to gather all the information needed for such reports and activities.

An additional option to complement or replace any of the foregoing proposals is to implement the 2006 proposal by the Government of Peru that the General Secretariat create and implement a voluntary peer review mechanism by which Member States that so wished could undergo peer review of their fulfillment of the aims of the IADC, under the provisions of its Articles 3 and 4, on the essential elements of democracy and fundamental components of its exercise - together with specific indicators, using standard, previously agreed formats. As indicated in the First Report, this mechanism would facilitate the identification of shortcomings, gaps, deficits, and areas to be strengthened, focusing on horizontal and technical cooperation to address them. The democracy peer review mechanism would enlist government-proposed experts, accept inputs from civil society, and share its report with the Permanent Council, offering recommendations to governments. This exercise must not be seen as a grading of a government, or of a country's institutions. It should, rather, be seen as a forum of voluntary participation, for joint identification of facets of national institutions that should be strengthened, including legal aspects.

IV. CONCLUSIONS

As stated in the First Report and reaffirmed herein, after over a decade in effect and application, the Inter-American Democratic Charter has shortcomings, basically in terms of prevention, which make it difficult to properly and fully safeguard and protect representative democracy in the Americas.

From this analysis, we conclude that the OAS Charter, an international treaty under whose framework the IADC was concluded, grants the OAS Secretary General broad powers to take effective preventive action to safeguard representative democracy in the region. In effect, the OAS Secretary General is vested with express powers and with powers inherent to his function, which allow him to take extensive and flexible preventive initiatives - in particular, to gather information, use his good offices, and conduct preventive diplomacy. Because the OAS Charter is the treaty underlying the IADC, the powers conferred on the Secretary General by the IADC must be interpreted in keeping with those the Charter confers on him, as well as with the aforementioned inherent powers.

So the Organization has within its framework an organic institution in the person of the Secretary General, with the capacity to play an effective role in safeguarding democracy, especially from a preventive standpoint. Along with the existing normative context, there must be the necessary political will on the part of this highest OAS official to undertake this role, political support from the Member States, and tools and mechanisms to help him in his mission - and these must be strengthened.

So the need is to fortify the preventive action of the Secretary General - not to strengthen his powers by amending the instruments, but to give him effective mechanisms by which to deploy effectively his capacity to gather and receive information, use his good offices, and engage in preventive diplomacy. Along these lines, "early warning" mechanisms, as described and discussed in this report, can be used to detect and respond promptly to situations that threaten representative democracy and to monitor the course of democracy in the Americas, the criteria being the essential elements of representative democracy and the fundamental components of its exercise, as described in Articles 3 and 4, respectively, of the IADC.

The idea is to create such mechanisms, whether they would report directly to the Secretary General or would have functional independence within the General Secretariat context. They would assist in the fulfillment of the important role given the Secretary General by the IADC - and by the OAS Charter - in terms of safeguarding representative democracy, especially on the side of prevention. This Rapporteurship has discarded the notion of creating independent mechanisms, finding rather that what should be strengthened is the preventive capacity of the Secretary General, considering his powers under applicable provisions and his role in the Inter-American System - and that mechanisms ought not to be created that might weaken, conflict with, or be at odds with his mission.

Lastly, as stated earlier, this report has focused on strengthening preventive mechanisms to safeguard representative democracy. A subsequent report will address, *inter alia*, other shortcomings noted in the First Report, pertaining to the IADC's sanctions or punitive mechanisms in the case of crisis or the interruption of representative democracy in a Member State.

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CJI/doc.506/16

REPRESENTATIVE DEMOCRACY IN THE AMERICAS: THIRD REPORT

(Presented by Dr. Hernán Salinas Burgos)

I. INTRODUCTION

During the 88th regular session of the Inter-American Juridical Committee (IAJC) (Washington D.C., April 2016), the undersigned, as Rapporteur for this topic, presented a Second Report on Representative Democracy, document CJI/doc.501/16.

The aim of said report was to formulate specific proposals, bearing in mind the inter-American standards and the practice of the Organization of American States, addressing the shortcomings of the Inter-American Democratic Charter (IDC) as regards prevention, its description, and proposals for debate put forward in the Rapporteurship's First Report. This, in order to enhance preventive action provided for in Chapter IV of the IDC without having to amend its provisions and to help Member States make progress in reaching a common understanding of the terms of the above-mentioned Chapter and the conditions under which they apply. In this Report, which also includes the relevant aspects the IAJC has already noted on the subject, we will indicate the main points addressed in the Second Report, complementing its analysis, focusing on points that were not discussed and formulating several final conclusions.

II. THE OAS SECRETARY GENERAL AND STRENGTHENING HIS PREVENTIVE ROLE IN DEFENDING DEMOCRACY

a. Authority of the Secretary General

An initial analysis and discussion took place regarding the OAS Secretary General's role and the need to strengthen preventive action on his part, as provided for in Articles 17 and 18 of the IDC,

[1] in order to assist Member States in managing political/institutional crises and post-crisis processes in an efficient, dynamic, proactive, and flexible manner in keeping with the principle of gradualness; the foregoing, in the context of an appropriate balance between the promotion and defense of democratic principles — one of the fundamental mandates of the OAS — and that of non-intervention — one of its fundamental principles.[2]

A first point of said analysis was to specify that the OAS Charter is an international treaty in the framework of which the IDC was approved as a General Assembly resolution. Thus, the IDC, and specifically Chapter IV thereof, cannot be interpreted in a manner that contradicts the founding treaty of the OAS or as limiting the authority granted under the OAS Charter to the Secretary General or the Organization's main organs.[3] Indeed, the OAS does not have more or less powers than those that the Charter expressly or implicitly establishes; thus, respect for the principle of non-intervention cannot be understood as contrary to the principle of democratic legitimacy and Inter-American mechanisms that are set in motion to defend such a principle. This is without prejudice to the unquestionable legal value of the IDC not only as an instrument for interpreting the OAS Charter on the subject of defending representative democracy, but also because it provides flexibility or swift adaptation to new circumstances and provides for the ability to harmonize the legal and political diversity of the Hemisphere.[4]

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[1]. Eduardo Vio's Grossi First Report in 2003 as the IAJC's Rapporteur on the Application of the IDC, entitled "*Democracy in the Inter-American System: Follow-Up Report on the Application of the Inter-American Democratic Charter,"* (CJI/doc. 127/03), refers to two resolutions adopted by the Permanent Council in relation to the crisis in Venezuela, confirming the use of Article 17 and 18 in the following terms: "*…Consequently, that is why the measures that the OAS can and has adopted in the case through the two recent resolutions mentioned above are aimed less towards "normalizing democratic institutionality", as Article 20 states, than towards "safeguarding and strengthening democratic institutionality," which was not or is not being altered but is in fact in force."* (para. 13). Jean-Paul Hubert, Rapporteur of the IAJC, in his report entitled, "*Follow-up on the Application of the Inter-American Democratic Charter,"* (Document OEA/Ser. Q; CJI/doc. 317/09 corr. 1) presented at the 74th regular session on March 19, 2009, states that the provisions of both Articles 17 and 18 "*are preventive in nature, and seek to avoid the escalation of political problems into a more serious crisis*."

[2]. See Report of the Secretary General on compliance with operative paragraph 3 of the resolution AG/RES. 2480 (XXXIX-O/09) "*Promotion and Strengthening of Democracy: Follow-up to the Inter-American Democratic Charter*," presented to the Permanent Council at its meeting held on May 6, 2010, p. 6.

[3]. The IAJC, in its *Observations and Comments on the Draft Inter-American Charter* approved at its 59th regular session on August 16, 2001 (Document OEA/Ser. Q CJI/doc.76/01), expressly indicated that the OAS Charter prevails over any decision of one of its organs. Furthermore, the Chair of the Working Group Charged with Studying the Draft Inter-American Charter stated at the regular meeting of the Permanent Council held on September 6, 2001, that: "*Said (democratic) clause is adopted within the confines of the OAS Charter without exceeding them, through a process of interpretation thereof aimed at nurturing the values that were its foundation [in line] with the contemporary elements of real life that are different from the techniques used in classic coups d'états, present in the mind of delegates attending the Assembly in Bogotá, but similar in their reprehensible aim, which is the disruption of the rule of law and the annihilation, more or less subtly, more or less openly, of the essential elements of democracy."* Inter-American Democratic Charter. Documents and Interpretations. (CP OEA/Ser.G CP-1), 2003, p. 54.

[4]. As Beatriz Ramacciotti points out *"the normative provisions of the IDC constitute an authentic, extensive interpretation of the pertinent provisions of the OAS Charter. What is more, the IDC forms a "whole" with the OAS Charter, given that it was adopted not as an isolated act, but rather precisely "linked" to all the precedents of standards and practices adopted previously in the field of democracy (resolutions, declarations, related treaties such as the American Convention on Human Rights, among others). The provisions of the IDC are thus integrated in the provisions of the OAS Charter and other inter-American juridical instruments, in a harmonious set of principles,*

Thus, the authority Chapter IV of the IDC confers on the Secretary General must be interpreted in accordance with both the explicit as well as implicit powers that the OAS Charter grants him, in particular under Article 110(2), to "*bring to the attention of the General Assembly or the Permanent Council any matter which in his opinion might threaten the peace and security of the Hemisphere or the development of the Member States,"* in relation to the preambular provision thereof, which notes that "*representative democracy is an indispensable condition for the stability, peace and development of the region,"* as well as Article 2(b) of the same which notes that one of the purposes of the OAS is *"to promote and consolidate representative democracy, with due respect for the principle of nonintervention."*[5] This is under the assumption, as the Secretary General has indicated, that "*the primary role of the Secretary General of the OAS is to ensure compliance with inter-American standards, beginning with those set out in the Charter and General Assembly resolutions,"*[6] adding that, "*specifically, the Secretary General must be the guardian of the guiding principles of the system, which include respect for human rights, promotion and strengthening of democracy and cooperative relations among its members".*[7]

Additionally, two relevant preambular provisions of the IDC should be borne in mind, in the context of which Articles 17 and 18 of the IDC must also be interpreted. Namely, these are the first preambular paragraph, which stipulates:

> *CONSIDERING that the Charter of the Organization of American States recognizes that representative democracy is indispensable for the stability, peace, and development of the region, and that one of the purposes of the OAS is to promote and consolidate representative democracy, with due respect for the principle of non-intervention,"* and the last preambular paragraph that reads "*BEARING IN MIND the progressive development of international law and the advisability of clarifying the provisions set forth in the OAS Charter and related basic instruments on the preservation and defense of democratic institutions, according to established practice.*

A harmonious interpretation of the IDC standards and the aforementioned provisions of the OAS Charter and their context indicate to us that the Secretary General is empowered, without the need for any State's consent, to bring to the attention of the General Assembly or the OAS Permanent Council, any situation in which, in his view, representative democracy of a Member State is endangered in light of an analysis undertaken in keeping with the provisions set forth under Articles 3 (essential elements of representative democracy) and 4 (fundamental components of democracy) of the IDC.[8]

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*standards, and practices on the international promotion and protection of democracy that makes up the Inter-American Democratic System." "*Democracia y Derecho Internacional en las Américas" ["Democracy and International Law in the Americas"], Lerner Ed. S.R. L., Córdoba, Argentina, 2009, p. 263.

[5] During the discussion on the second report of this Rapporteur that took place at the IAJC session where it was presented, Jean-Michel Arrighi, Secretary of Legal Affairs of the OAS, in reference to Article 2(b) of the OAS Charter specified that "*the aforementioned provision of the OAS Charter was the one that enabled implementation of electoral observation missions. In that regard, if an instrument grants functions to the Organization, this would include its organs, and likewise encompass the General Secretariat. Accordingly, the Secretary General may work on these issues.*" See "Annotated Agenda of the Inter-American Juridical Committee." 89th Session. Rio de Janeiro, Brazil. October 3-14, 2016, (Document DDI/doc. 4/16), p. 23.

[6] Letter of May 30, 2016 from the Secretary General to the Chair of the Permanent Council, requesting the convening of said Council for purposes of activating the procedure provided for in Article 20 of the IDC with respect to Venezuela, (Document OSG/243-16), p. 108.

[7] Id.

[8] Eduardo Vio's study presented to the IAJC at its 59th regular session on August 9, 2001, (Document OEA/Ser. Q; CJI/doc. 71/01) called "Observations and Comments of the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter," points out with reference to

That said, this preventive action on the part of the Secretary General is limited by the need for the affected State's consent in the case of an on-site mission and by an objective assessment of the essential elements and fundamental components of democracy, stipulated in Articles 3 and 4, respectively, of the IDC, thus ensuring respect for the principle of non-intervention.[9]

In turn, in keeping with the OAS Charter, the General Assembly as the "*supreme organ of the Organization*" may "*consider any matter relating to friendly relations among the American States"* (Article 54) and the Permanent Council "*Within the limits of the Charter and of Inter-American treaties and agreements, ... takes cognizance of any matter referred to it by the General Assembly or the Meeting of Consultation of Ministers of Foreign Affairs."*[10] (Article 82)

The foregoing led us to conclude in the previous report that within the stipulated normative framework, the Secretary General has sufficient preventive powers to safeguard representative democracy in the Region without the need to amend the IDC. The challenge, therefore, would seem to be how to add to this normative framework the tools needed to strengthen the Secretary General's preventive action, in keeping with the implicit powers understood to be conferred on him. Indeed, these implicit powers are considered inherent to the fulfillment of the aims and objectives that are pursued with the express preventive powers provided to him. This also entails having political will to exercise these powers in the interest of safeguarding democracy in the region.[11]

b. Tools aimed at strengthening the preventive role of the Secretary General

Among these tools, we have considered all those needed to enable the Secretary General to seek and receive information in order to activate a preventive mechanism to safeguard democracy in an informed and timely manner, in keeping with the authority conferred on him under Article 110 of

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what ended up being Article 17 of the IDC: 8"*Even though what is set forth in this provision may be applied without it being expressly stated, inasmuch as it stems from hemispheric practice as well as the general spirit of the OAS Charter, such provision should not be understood to mean that the State in question is the only one that could bring the hemispheric organization's attention to the risk mentioned therein or that this risk may only be studied by the organization upon request*," (para. 29). Furthermore, in reference to what ended up being Article 18 of the IDC, he states: "*The observation formulated regarding the previous article is valid, and therefore, this provision should not allow for arguments to be made that the Secretary General may solely take measures not involving visits to the territory of the respective State with the permission of that state,"* (para. 30).

[9]. Furthermore, without prejudice to the explicit and implicit authority granted to the Secretary General to defend democracy, the analysis of a given situation, as well as decisions made regarding application of Chapter IV of the IDC is a matter reserved jointly for the Permanent Council and the General Assembly.

[10]. The conclusions of the report by the IAJC Rapporteur, Jean-Paul Hubert, entitled "*Legal Aspects of the Interdependence between Democracy and Economic and Social Development*", presented at the 68th Regular Session of the IAJC on March 20, 2006, (Document OEA/Ser. Q; CJI/doc. 190/05 rev. 3) point out that: "*The Inter-American Democratic Charter is inseparable from the OAS Charter and it has thus generally been agreed (a) that the former was conceived as a tool to update and interpret the fundamental Charter of the OAS, and (b) the Inter-American Democratic Charter constitutes beyond any doubt the reaffirmation and interpretation, on the one hand, and the normative development, on the other, of principles already included in the OAS Charter in relation to the effective exercise of representative democracy."*

[11]. The Secretary General, in his letter dated May 30, 2016, to the Chairman of the Permanent Council requesting the convening of said organ for purposes of activating the procedure under Article 20 of the IDC with respect to Venezuela, states: "*In defending democracy we must avoid double standards, and use the mechanisms available to us, including the Inter-American Democratic Charter, in all cases where situations are identified in which the essential elements of representative democracy and the fundamental components of the exercise of democracy are deteriorating." Op. cit.*, p. 5.

the OAS Charter and Article 18 of the IDC, including dispatching of missions or special envoys, diplomatic measures, and good offices.[12]

Nevertheless, this preventive action on the part of the Secretary General is limited by the necessary consent of the affected State in the case of an on-site mission, as well as an objective consideration of the essential elements and fundamental components of democracy, provided for under Articles 3 and 4, respectively, of the IDC, ensuring respect for the principle of non-intervention.[13]

Among the tools of a preventive nature, the Rapporteurship has favored strengthening the role of the Secretary General, proposing tools that do not undermine the Secretary General's powers or create bodies that would encroach on such a role.

In this regard, the establishment of "early warning" mechanisms stands out — differentiating between those useful for preventing a situation in which democracy is at risk from becoming a crisis in and of itself, linked to the exercise of preventive diplomacy, and on the other hand, mechanisms for following-up on democracy and its evolution, which aim to strengthen and consolidate democratic institutional frameworks in order to quickly and opportunely detect potential situations that might put countries in the Region at risk.[14]

It is suggested that these mechanisms be placed under the remit of the current Secretariat for Strengthening Democracy,[15] which is part of the General Secretariat. There would be a department on the subject, similar to the one that currently exists, for example, for electoral cooperation and observation. This unit or special secretariat, which also reports to the Secretary General, would be charged with and have the necessary resources to gather and receive information on situations in which democratic institutionality or the legitimate exercise of democratic power is at-risk. Different branches of the State, political parties, and civil society, etc. could avail themselves of this unit or special secretariat.[16] In this framework, the discussion proposed by the Secretary General in his 2007

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[12] See statements of the Secretary General, the Interim Representative of Uruguay, and the Permanent Representative of Mexico at the Special Session of the Permanent Council on June 26, 2012, where the impeachment trial that removed President Lugo from Office in Paraguay was discussed. See the Report of Rapporteur Hernán Salinas B., "*Representative Democracy in the Americas. Second Report,*" document (CJI/doc. 501/16), p. 6.

[13] Furthermore, notwithstanding the explicit and implicit authority provided to the Secretary General to defend democracy, the analysis of a given situation as well as decisions taken with regard to applying Chapter IV of the IDC is a matter reserved jointly for the Permanent Council and the General Assembly.

[14] Paragraph 17 of the ICD preamble recalls that: "*(...) in the Declaration of Managua for the Promotion of Democracy and Development, the Member States expressed their conviction that the Organization's mission is not limited to the defense of democracy wherever its fundamental values and principles have collapsed, but also calls for ongoing and creative work to consolidate democracy as well as a continuing effort to prevent and anticipate the very causes of the problems that affect the democratic system of government (...)".* In "What Has Become the Emerging Right to Democratic Governance?*"* published in the *European Journal of International Law*, v. 22, n.2, p. 523, Susan Marks points out: "*Democracy means more than elections, it is said: what is needed as well is the strengthening of democratic institutions, values and norms*".

[15] The mission of the Secretariat for Strengthening Democracy (SSD) is to help to strengthen political processes in the Member States, in particular to support democracy as the best option for ensuring peace, security and development. The SSD is the heir to the Unit for the Promotion of Democracy (UPD) created in 1991 (AG/RES. 1124 (XXI-O/91). Since the UPD's founding, it played an important role in promoting democracy and strengthening institutions and democratic practices in the countries of the continent.

[16] A mechanism like the one described diminishes the relevance of the criticism leveled by, among others, Lisa McIntosch Sundstroom in her article "*Carrots and Sticks for Democracy in the OAS: Comparison with the East European Experience,"* published in *Canadian Foreign Policy*, v. 10, n.3

report seems relevant. Specifically, he proposed interpreting the term "government" as all branches of the State and not just the executive branch in order to overcome the limitations on activating collective-action mechanisms to defend democracy.[17] Furthermore, if the seriousness of the situations so warrants an *ad hoc* rapporteur could be appointed by agreement or per a resolution of the Permanent Council or General Assembly.

Additionally, within that same arena, mechanisms aimed at assisting States in bolstering and consolidating democracy could be developed to follow-up on the evolution of democracy. At the same time, such mechanisms would also have an obvious preventive role to help counteract potential threats to democratic order.

In this respect, the Rapporteurship favors the mechanism whereby the General Secretariat drafts and presents periodical reports to the Permanent Council through the appropriate secretariat[18]

(Spring 2003). On pp. 45-60, she states that in the IDC there is no "*clear role for non-governmental actors of the Member States, in keeping with Article 22. Again, the process is totally in the hands of the current governments in power in the OAS Member States, instead of including representation of opposition and citizen groups' points of view.*"

17. As Ayala points out, *"the reference to a request from a "government" has to do with the constitutional reality regarding internal law, according to which the representation of the international action by the states is assigned to the government through its Executive Branch, specifically its Head of State and/or Government and its Minister of Foreign Affairs."* See Ayala, Carlos, "International Mechanisms for the Collective Protection of the Inter-American Democratic Charter," in *Collective Defense of Democracy: Concepts and Procedures, Series: Diffusion of the Inter-American Democratic Charter 5*, Andean Commission of Jurists, Lima 2006, p. 99. Furthermore, the OAS Secretariat for Legal Affairs, in a document from May 5, 2016, entitled "*Considerations for the Invocation of the Inter-American Democratic Charter (IDC),"* notes: "*Articles 17 and 18 of the IDC refer to the "request of the government" and the "consent of the government." The Permanent Council and ultimately the General Assembly are the organs where governments are represented, and who decide what actions to take. In the current state of the law it seems difficult to accept that government officials other than those designated and accredited by the executive branch can represent that state in those organs. It is true that, in accordance with international law, all powers form the government (for example the Montevideo Convention of 1933) and that their actions generate international responsibility for the state; but it is no less true that domestic legal orders and national constitutions, give the executive branch, and not to other powers, the international representation of the state, which has been taken up and incorporated into international standards concerning diplomatic and consular relations or the adoption of treaties.".* http://www.oas.org/en/media_center/press_release.asp?sCodigo=S-009/16 . Along the same lines, Beatriz Ramacciotti affirms "*in contrast to some assessments, including that of the OAS Secretary General himself in a report to the Permanent Council, we interpret the expression "government" used in the Democratic Charter to refer exclusively to the executive branch. This position is based not only on inter-American practice, but also on the fact that international relations and foreign policy of the State basically is conducted through the executive branch. This power can be seen in the Constitutions of the OAS Member States, in particular, in those with a presidential system. In keeping with these domestic standards, the political organs that adopt decisions at the OAS – i.e., the General Assembly, the Meetings of Consultation of Ministers of Foreign Affairs, and the Permanent Council are comprised of representatives from each Member State appointed by the executive branch*," in *op. cit.*, p. 269-270.

18. The Permanent Representative of the Dominican Republic in a document dated August 17, 2001, which contains comments on and amendments to the Draft IDC, proposes establishing *"an early alert system that can detect the presence of factors conspiring against democratic stability in a specific country, as well as a mechanism of the Organization that would be charged with monitoring said situation in order to appropriately alert the Organization. This monitoring mechanism could be done through reports on the situation of democracy in the countries of the hemisphere, prepared by the Unit for the Promotion of Democracy. These reports could be presented annually or whenever a*

or a special secretariat on the situation of democracies in different countries of the Region or sectors regarding some essential elements of democracy or fundamental components of its exercise. An instrument such as the one described could identify, under a preventive criterion, the shortfalls of democracy in the Region, promote models to aid the countries in strengthening democratic regimes, as well as establish a dialogue with the relevant countries in order to enhance the quality of democracy and detect potential situations that put it at risk.

In this context, as was already indicated in this Rapporteurship's Second Report,[19] the Secretary General needs to cooperate and coordinate action with the Inter-American Commission on Human Rights, and specifically, its Office of the Special Rapporteur for Freedom of Expression. This would enable establishment of an opportune and ongoing dialogue, which, considering the link between representative democracy and respect for human rights — in particular, freedom of expression — would operate as an early warning regarding situations in which the Commission foresees a crisis that threatens both.

An alternative mechanism that could also be considered is the establishment in this same arena of a voluntary peer review assessment mechanism,[20] whereby Member States who so desire could undergo assessment by their peers on compliance with the precepts of the IDC pursuant to the provisions of Article 3 and 4. This mechanism, designed based on homogeneous indicators and formats agreed upon ahead of time, would also facilitate the identification of shortfalls, gaps, and flaws as areas to be strengthened, while giving priority to horizontal cooperation. Initially, this mechanism could operate solely for those Member States that expressly and voluntarily accept it.

Other mechanisms proposed include a special rapporteur on democracy, an ombudsman or high commissioner for democracy, or an organ or body of independent experts similar to the Inter-American Commission on Human Rights. Such mechanisms, which would be permanent, functionally independent, and have their own operational structure, are not considered appropriate as they could in some way undermine the powers of the Secretary General or constitute bodies that encroach on his authority as regards prevention. Furthermore, its creation might entail the need to reform the OAS Charter or the IDC.

III. MODELS OR GUIDELINES TO DETERMINE WHAT CONSTITUTES "SITUATIONS THAT MAY AFFECT THE DEVELOPMENT OF THE DEMOCRATIC INSTITUTIONAL POLITICAL PROCESS OR THE LEGITIMATE EXERCISE OF POWER" AND "INTERRUPTION OF THE DEMOCRATIC ORDER OR UNCONSTITUTIONAL ALTERATION OF THE CONSTITUTIONAL REGIME QUE SERIOUSLY IMPAIRS DEMOCRATIC ORDER IN A MEMBER STATE"

a. Basis for a proposal on the subject

As pointed out in the First Report, one of the criticisms regarding the limitations of Chapter IV of the IDC refers to the "vagueness" of the terms used and the "imprecision" of criteria to define when and to what extent democratic institutionality has been altered. The foregoing is an inevitable consequence of the desired leeway that was conferred on collective-action mechanisms to safeguard democracy in the Hemisphere.[21] As Nikken points out, the IDC represents a not always successful

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situation arises that could lead to the interruption of democratic order in any of the countries." (p. 3).

19. See "Representative Democracy in the Americas: Second Report," presented at the 88th regular session of the IAJC, April 4-8, 2016, (Document CJI/doc.501/16). p. 7.

20. As noted in the first preliminary report of this Rapporteur, this mechanism was proposed by Peru in 2006. See (Document CJI/doc. 501/16), p. 9.

21. The Rapporteur Jean-Paul Hubert, in his Report presented to the IAJC "*Follow-Up On the Application of the Inter-American Democratic Charter*" cited above, states: *"There are important negative consequences to what Legler calls the lack of "a clear set of benchmarks to serve as a threshold for determining precisely at what point the OAS should intervene according to the main action clauses in Articles 17-21".* As he himself explains, there is *"an important magnitude issue at play; (...) it is unclear what antidemocratic measures are serious enough violations of the*

attempt to clarify more precisely different scenarios where democratic constitutional order is altered.[22] Indeed, [neither] the IDC nor any other Inter-American instrument defines what constitutes "*situations […] that may affect the development of its democratic political institutional process or the legitimate exercise of power*" and "*interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a Member State*." Thus, an issue to be debated is the need to define with greater accuracy what constitutes these situations, based on the premise, as emphasized by the IAJC, that there is a vital link between the effective exercise of representative democracy and the rule of law. This is concretely expressed in the observance of all essential elements of representative democracy and the fundamental components of the exercise of the same. Democracy, therefore, does not consist only in electoral processes, but also in the legitimate exercise of power within the framework of the rule of law, which includes respect for the essential elements, components, and attributes of democracy mentioned above.[23]

It is suggested that having more precise guidelines and definitions on this subject, would determine more precisely the situations in which its activation is most likely and that the Organization would therefore be expected to act in order to protect democracy. In addition, this would facilitate the ability of the Secretary General and the Member States to invoke the IDC and convene the Permanent Council to collectively analyze situations that at first glance would seem to be cases that correspond to the situations mentioned previously. Finally, it is stated that without guidelines, the invocation of these situations is wholly subject to political discretion which could lead to charges of lack of objectivity and double standards.[24] Nevertheless, as Nikken has stated "*conversely, this shortcoming offers the advantage of endowing these mechanisms with certain flexibility and allows attention to concentrate on the mechanisms more than on the objective seriousness of the situation, in order to determine which is the most appropriate for attending to each given case. This is a context that favors the operation of one of the fundamental components of the IDC, namely its gradual nature*" which as we see below stems from OAS practice.[25] Indeed, the mechanisms for defending democracy set forth under Chapter IV of the IDC are designed such that in their application the principles of gradualness and proportionality are respected. The idea is that the responses that the mechanisms provide are assessed in keeping with the degree of seriousness of

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Democratic Charter to warrant OAS action; were the OAS to respond to every minor infraction of the Democratic Charter, it would need to intervene constantly in its Member States' internal affairs to defend democracy; yet by choosing not to respond to minor transgressions and to focus only on major threats, the OAS runs the risk of allowing the incremental erosion of democracy, or its 'death by-a-thousand-cuts'." The Rapporteur notes that Legler gives the example of Peru during the 1990s under Fujimori, where, he says, *"by the time the OAS took action to defend democracy, the country had long since slipped into authoritarianism."* See Legler, Thomas (ed.); Lean, Sharon L. (ed.); Boniface, Dexter B. (ed.), "The International and Transnational Dimensions of Democracy in the Americas*,"* in *Promoting Democracy in the Americas, John Hopkins University Press*, 2007, p. 120.

[22]. Nikken, Pedro. "Analysis of the Basic Conceptual Definitions for the Application of Mechanisms for the Collective Defense of Democracy Provided for in the Inter-American Democratic Charter," in *Collective Defense of Democracy: Concepts and Procedures, Series: Diffusion of the Inter-American Democratic Charter 5*, Andean Commission of Jurists, Lima 2006, p. 57.

[23]. Resolution CJI/RES. 159 (LXXV-O/09).

[24]. In this regard Nikken notes: *"Except for the cases of a total and utter collapse of democratic institutions and of a government's spontaneous request for cooperation it is difficult to delimit each scenario in a precise manner. This difficulty is fertile ground for the political interests of the OAS members charged with reaching a judgment to prevail in the analysis of the political crisis existing in another state, a crisis which would require triggering the collective-action mechanisms set forth in the IDC,"* op. cit., p. 84.

[25]. Id.

each problem and more serious responses are forthcoming solely where there is a collective sense that the situation has deteriorated in ways that radically affect democracy.[26]

It is in this context that the Secretary General pointed out in his Report presented to the Permanent Council, in keeping with resolutions AG/RES. 2114(XXXV-O/05) and AG/RES. 2251 (XXXVI-O/O6) - CP/doc. 4184/07, April 4, 2007: "*If the principal good to safeguard is democracy, how can we do it if we do not clearly define when and how it is endangered?"* It is along these lines that a proposal has emerged to reach a formal political consensus through a General Assembly resolution regarding the situations that can be identified "*that may affect the development of [its] democratic political institutional process or the legitimate exercise of power" and "interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a Member State."*

b. Purpose and elements to consider in a proposal on the issue

For purposes of formulating a proposal on the issue, this analysis will focus fundamentally on the situations provided for under Articles 18, 20, and 21 of the IDC where organs of the OAS determine that the situation described in each of these provisions exist, as opposed to the case envisaged under Article 17, where initial application exclusively depends on the willingness of the affected State. In the latter case, the State must, in order to activate the mechanism stipulated therein, assess whether a situation puts at *"risk its democratic political institutional process or its legitimate exercise of power"* and thereafter the competent organ of the OAS will act. In that case, as Ayala indicates

> *the risk or danger at hand must refer to the democratic institutional political process or the legitimate exercise of power by a State. That is, the situation of risk must specifically concern one of the democratic institutions in the State, such as Congress or Parliament, the Supreme Court, the Electoral Council, the Public Ministry or the Executive Branch itself, and be such that it might specifically affect the democratic institutional process of the State, or the legitimate exercise of power by any of these. It could also be a circumstance where a specific institutional process is concerned and which in turn is linked to one of the essential elements of democracy, for instance the holding of periodic elections that are free, fair and based on universal secret suffrage as an expression of the sovereignty of the people.*[27]

In the opinion of this Rapporteur the first question we must pose is whether an exercise like the one some are suggesting is really necessary, bearing in mind the dynamic and evolution of democratic and institutional processes, as well as the risk this exercise may entail of hindering the IDC's adaptation to new situations, which are unforeseeable today.[28] Given the foregoing, rather

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[26.] In this respect, in a report of the Rapporteur Eduardo Vio Grossi (1994 - CJI/SO/II/doc. 37/94 rev.1, corr.2) the Inter-American Juridical Committee already noted in 1994 with regard to the role of the OAS in defending democracy: *"It should not be forgotten that the basic objective towards which the Organization should work is speedy restoration of the damaged democratic system, rather than the mere exclusion of the offender. It should also be important to consider that the sanction of suspension cannot be taken as an end in itself, without the actions of the Organization essentially striving to terminate the state of interrupted democracy. This involves spurring the restoration of democracy rather than merely excluding or suspending the offender."*

[27.] Ayala, *op. cit.*, p. 100.

[28.] In the Report entitled "*Follow-Up On the Application of the Inter-American Democratic Charter*," Rapporteur Hubert notes: *"As pointed out by Cameron, and realistically echoed by the Secretary General in his report, making the meaning of unconstitutional alterations of the constitutional regime more explicit "does not imply (…) that the determinations of such an alteration are ever cut-and-dried, nor that such determinations are a matter of technical or expert judgment. One must not forget that Article 19 of the Democratic Charter talks about alterations that "seriously impair the democratic order,"* and Hubert goes on to adds that: *"The determination as to whether a violation*

than establishing definitions, it would seem more advisable to articulate criteria or guidelines that stem from both OAS practice and doctrine, which, in addition to helping a process of providing greater legal certainty to the concepts outlined above, have the flexibility required to be adapted and applied to new situations while respecting the principle of gradualness in the application and interpretation of the IDC.[29] Furthermore, an approach like the one proposed would be keeping with an instrument like the IDC, which as Legler points out, "*its operative clauses facilitate a gradual and flexible diplomatic response on the part of the OAS in many scenarios that include preventive diplomacy, punitive measures, effective electoral monitoring, and strengthening democracy in the long term.*"[30]

The establishment of these criteria or guidelines must be fashioned in light of the essential elements of democracy set forth under Article 3 of the IDC and the fundamental components of its exercise provided for in Article 4 thereof and in other Inter-American instruments,[31] with consideration as to the seriousness of its infringement both quantitatively as well as qualitatively.[32]

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impairs the democratic order," rightfully adds Cameron, "requires political judgment, and cannot be resolved a priori."

[29] The OAS Secretary General, José Miguel Insulza, in his above-referenced 2007 report referred to the importance of the gradual nature of courses of action as a fundamental element of OAS action, whereby it is possible to design courses of action by the Secretariat and the Permanent Council that enable crises to be prevented and mechanisms or processes to be introduced that allow for the seriousness of the situation to be politically assessed and analyzed and to develop in a progressive manner steps in keeping with the level of the crisis in order to reestablish the integrity of the institutional framework and democratic stability. The Chair of the Working Group charged with studying the draft IDC noted: "*in the political sphere, we want to look at the democratic clause more as a gradual commitment for prevention and dissuasion than as a simple enforcement instrument*," *op. cit.*, p. 54.

[30] Legler, Thomas, "¿Mucho que celebrar? El décimo aniversario de la Carta Democrática Interamericana" ["A lot to Celebrate? The Tenth Anniversary of the Inter-American Democratic Charter"], Presentation prepared for the VI Summit of Former Presidents: "Democratic Institutionality and Social Inclusion," September 11, 2011, Lima, Peru, p. 3.

[31] In this respect, it is noteworthy that Resolution I of the V Meeting of Consultation of the Ministers of Foreign Affairs of 1959, stated in its last preambular paragraph and in its operative section: "*It is advisable to state, with no attempt to be complete, some of the principles and attributes of the democratic system in this hemisphere, so as to permit national and international public opinion to gauge the degree of identification of political regimes and governments with that system, thus contributing to the eradication of forms of dictatorship, despotism, or tyranny, without weakening respect for the right of peoples freely to choose their own form of government, Declares: 1. The principle of the rule of law should be assured by the separation of powers, and by the control of the legality of governmental acts by competent organs of the state. 2. The governments of the American republics should be the result of free elections. 3. Perpetuation in power, or the exercise of power without a fixed term and with the manifest intent of perpetuation, is incompatible with the effective exercise of democracy. 4. The governments of the American states should maintain a system of freedom for the individual and of social justice based on respect for fundamental human rights. 5. The human rights incorporated into the legislation of the American states should be protected by effective judicial procedures. 6. The systematic use of political prescription is contrary to American democratic order. 7. Freedom of the press, radio, and television, and, in general, freedom of information and expression, are essential conditions for the existence of a democratic regime. 8. The American states, in order to strengthen democratic institutions, should cooperate among themselves within the limits of their resources and the framework of their laws so as to strengthen and develop their economic structure, and achieve just and humane living conditions for their peoples."*

[32] Nikken notes: *"It is the appraisal of the seriousness of the infringement that determines the judgment of the severity of the detriment to democracy and the identification of which situation exists, out among those foreseen in articles 18, 20 and 21 [of the IDC]" op. cit.*, p. 83, and adds *"that both articles provide guidelines to identify when a subversion of the democratic order has*

Although the IDC does not define what conceptually differentiates the "essential elements" from the "fundamental components," Nikken specifies that "*the differences must be approached from the angle of the seriousness of the offences being perpetrated against the 'essential elements' or the 'essential components' of democracy. This implies that taken in isolation, a violation of the former would signify a more serious infringement."*[33] Thus, according to Nikken, each situation provided for in Chapter IV *"must be the object of individual analysis for the purpose of measuring the harm inflicted to democracy, which may result from a single act or from a governmental policy that seriously impairs it or destroys its essence."*[34]

Based on the language of Article 3 it follows that individual acts of human rights violations are excluded from those events that would trigger any action under the IDC.[35] Thus, the IDC would enter into play when the elements listed as "essential" in Article 3 have been so severely compromised that they challenge the essence itself of *"gross and reliably attested violations of human rights*,"[36] which cannot be remediated through normal action by the regional human rights' system's organs, and affect those rights that are "key,"[37] principally, those which are non-derogable.

Against this backdrop, it is useful to consider the list of key conditions that constitute violations of Article 3 (essential elements of democracy), as presented by former US President Jimmy Carter in his speech before the OAS in Washington D.C.[38] Carter listed the following: *Violation of the integrity of central institutions, including constitutional checks and balances providing for the separation of power;*[39] *holding of elections that do not meet minimal international standards;*[40] *failure to hold periodic elections or to respect electoral outcomes; systematic violation*

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taken place and what its degree of seriousness is, for the purpose of applying the collective-action mechanism appropriate to each situation," p. 40.

[33].Id.

[34].*Ibid*., p. 82.

[35]. Nikken states that, *"Isolated violations of human rights, including if they are not remedied through recourse to internal jurisdiction, are not an issue to which the IDC can be applied. Here it is the Inter-American Human Rights Commission and the Inter-American Court of Human Rights that must act, within their respective spheres of competence," op. cit.*, p. 42.

[36]. See Resolution 1503(XLVII) of the UN Economic and Social Council (ECOSOC) of May 27, 1970.

[37]. Nikken notes the seriousness of said situation also depends on the rights that are subject to systematic violation, specifically, those who suspension is never authorized by the American Convention on Human Rights (Article 27) even under states of emergency, or those rights whose observance warrant "particular attention" under the American Declaration of the Rights and Duties of Men. Thus, even numerous violations would be insufficient to implement the provisions for applying the IDC unless it can be established that due to their extent, connection, unity of purpose, or the importance of the juridical goods encroached upon, they correspond to a policy that is incompatible with the respect for human rights in a democratic society, *op. cit.*, p. 42 -43

[38]. See former US President Jimmy Carter's speech "Promise and Peril of Democracy," at the inaugural Lecture Series of the Americas on January 25, 2005, on the OAS website, Media Center, Speeches. Washington, D.C. See also, Robert Dahl, *On Democracy* (Yale University Press, 1998). See also, Ramacciotti, *op. cit*., p. 273-274.

[39]. Nikken notes that the separation and independence of the branches of the government are "*one of the most salient aspects for the legitimacy of public power within democratic standards.*" He added that "*in a democratic concept of the state, a judicial system subjected to the executive or legislative branch undermines the essence of the legitimate exercise of power*," *op. cit*., p. 47-48.

[40]. Robert A. Pastor claims that the most serious threats to democracy (vertical accountability) are those that "*are aimed at the fairness of the electoral process. They may include physical intimidation of candidates, political party leaders, or voters; manipulation of the voter list or the count; prevention of a party from delivering its message to voters; or indefinite postponement of elections. These violations can sever the bonds of accountability between leaders and voters*." See Robert A.

of basic freedoms, including freedom of expression, freedom of association, or respect for minority rights; unconstitutional termination of the tenure in office of any legally elected official by any other elected or non-elected actor; arbitrary or illegal, removal or interference in the appointment or deliberations of members of the judiciary or electoral bodies;[41] *interference by non-elected officials, such as military officers, in the jurisdiction of elected officials* [this entails an absolute respect for the principle of legality, according to which the sphere of competence of the various bodies holding public power must be delimited by the constitution and the laws]; *systematic use of public office to silence, harass, or disrupt the normal and legal activities of members of the political opposition, the press, or civil society;*[42] and *an unjustified declaration of a state of emergency*.

c. Criteria or guidelines in light of OAS doctrine and practice

Article 18 of the Charter provides for some of its preventive mechanisms; it refers to "*situations that arise in a Member State that may affect the development of its democratic political institutional process or the legitimate exercise of power*." It is not applicable, in theory, once the procedure set forth in Article 17 is activated, unless: a) the affected government, despite having requested assistance from the OAS because its "*democratic political institutional process […] is at risk*," does not meet the conditions that the Secretary General or Permanent Council deem necessary for providing the required assistance; or b) the democratic crisis has intensified to such a point that the Secretary General or Permanent Council believe that the provisions available under Article 17 are insufficient to satisfactorily resolve the crisis.

Furthermore, Article 18 would also not be applicable in situations that surpass the mere risk of *"[affecting] the development of its democratic institutional political process or the legitimate exercise of power*," but rather constitute an "*alteration of the constitutional regime that seriously impairs the democratic order*" or an "*interruption of the democratic order*." In the event of one of that latter situations, Articles 20 and 21 of the IDC would be applicable, in accordance with the democratic clause contained in Article 19.

In addressing the political situation in Venezuela in 2002, the Permanent Council adopted three resolutions, of which two CP/RES. 821 (1329/02) and CP/RES. 833 (1348/02)) were in keeping with Article 18 of the Charter, although neither of the two expressly indicate this. These two resolutions were adopted when the constitutional president had already reassumed the power that had been illegitimately usurped for 48 hours; the intent of the resolutions was the full reestablishment of democratic order. As noted, although these resolutions do not mention Article 18, both use language similar to that found in this article. Article 18 refers to "decisions for the preservation of the democratic system and its strengthening," while the resolutions refer to "*the consolidation of the democratic process*" (second preambular paragraph and first operative paragraph of the first resolution and sixth preambular paragraph of the second) and "*preserve, the free exercise of the essential elements of democracy*" (fifth operative paragraph of the second resolution). Permanent Council Resolution CP/RES. 833 (1348/02) characterizes the presentation or request of the Permanent Representative of Venezuela to the OAS regarding the situation in Venezuela as presenting "*incidents that could destabilize the democratic constitutional order in*

Pastor, "A Community of Democracies in the Americas-Instilling Substance into a Wondrous Phrase," in *Canadian Foreign Policy Journal*, v. 10, n. 3 (Spring 2003), p. 15-29.

41. Nikken explains: "*In these cases, the critical criterion is that the designation of the heads of these institutions take place in strict compliance with constitutional and legal procedures, and that said procedures not restrict the independence that these bodies must enjoy in a democratic society, in accordance with generally accepted international standards*," *op. cit*., p. 44.

42. Nikken states: "*Freedom of expression should also be considered to be included among human rights as "essential elements" of representative democracy. Its inclusion under "essential components", however, underlines first of all that the violation of human rights that affects the essence of democracy is related to general situations of transgression against fundamental rights as a systematic practice or government policy. Secondly, it stresses that freedom of expression not only is an individual right, but also fulfills a democratic social purpose*," *Ibid*., p. 51.

Venezuela." This wording is very similar to that of Article 18 of the IDC.[43] As such, in accordance with these resolutions, the measures the OAS can and has adopted for that Venezuelan situation based on these two resolutions have focused on "*the preservation of the democratic regime and its strengthening*," which, therefore, would not have been or is not being altered, but rather would still be in force. The aforementioned interpretation is also based on the content of these resolutions, in that they note the "*full exercise of democracy in Venezuela*" (first operative paragraph of Resolution CP/RES. 823 (1348/02)) and support for the democratic and constitutional regime of the Bolivarian Republic of Venezuela, whose government is headed by Hugo Chávez Frías (i.e. once they assume that democracy exists in Venezuela or that there has not been or no longer is an alteration of the constitutional regime that seriously impairs the democratic order and, thus, would merit the adoption of one of the provisions called for in Article 20, which could lead to implementation of the measure in Article 21 to suspend the Member State). Furthermore, in support of the theory that the two resolutions in questions are based on the stipulations of Article 18, one could invoke the circumstances referred to in said resolutions: General Secretariat staff visits to Venezuela, Venezuela's invitation to the OAS to facilitate dialogue and democratic agreements in Venezuela (third preambular paragraph of CP/RES. 821(1329/02)), the offer to provide any support required by the Government of Venezuelan (first operative paragraph), and the Secretary General's report on the situation in Venezuela (second preambular paragraph of CP/RES. 833 (1348/02)). All of the aforementioned could be considered as falling under Article 18, particularly as visits are one of the measures that may be adopted by the OAS Permanent Council, with the prior consent of the government concerned to proceed.[44] A situation similar to that of Venezuela occurred in Ecuador in 2009, with the acts of police insubordination against the constitutional order.[45] The related Permanent Council Resolution CP/RES. 977 (1772/10) corr.1, adopted September 30, 2010, uses similar language, like "*with respect to the strengthening and preservation of the democratic institutional system*" (second preambular paragraph and first operative paragraph); "*to take appropriate measures to strengthen and preserve the democratic institutional system*" (fourth operative paragraph), and "*to preserve the institutional democratic order and the rule of law*" (second operative paragraph).

Article 20 may be invoked if there is an alteration of the constitutional regime that seriously impairs the democratic order, i.e. the essential elements and fundamental components mentioned in Articles 3 and 4.[46] Here, the implication is that there is a critical threshold of seriousness that must be breached, but which does not reach the level of an "interruption of the democratic order."[47]

Nikken states that:

> *In general, this is a scenario in which a government policy exists that openly or indirectly aims to violate or undermine the Constitution, with grave harm being*

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[43]. See Eduardo Vio's report to the IAJC, entitled "*Follow-up on the Application of the Inter-American Democratic Charter*," presented at the 62nd regular session on March 20, 2003, paragraph 9 (Document OEA/Ser. Q; CJI/doc.127/03). Paragraphs 10, 11, and 12.

[44]. *Ibid*., paragraphs 13,14, and 15.

[45]. Secretary General's oral report on his visit to Ecuador, in keeping with Permanent Council Resolution CP/RES. 977 (1772/10) corr. 1. See Record of the Special Meeting of the Permanent Council Held on October 6, 2010.

[46]. The IAJC has affirmed that "*alteration to the constitutional order that seriously affects democratic order (Art. 19 and 20 of the IDC) are situations which must be seen in the light of validity of the essential elements of representative democracy and the fundamental components of the exercise of same,"* (CJI/RES. 159 (LXXV-O7/09).

[47]. Secretary General Cesar Gaviria, in his remarks at the September 16, 2002 protocolary session of the Permanent Council, stated: "*The text of the Democratic Charter is significant progress on Resolution 1080. It bears noting the introduction of the idea "alteration of the constitutional order," that's to say an act prior to an "interruption" or "rupture" could be grounds for our action or reaction,"* in *Carta Democrática Interamericana. Documentos e Interpretaciones*, Document (CP OEA/Ser.G CP-1, 2003), p. X-XI.

> *inflicted upon the essential elements of democracy or the fundamental components of its exercise. Such a situation may emerge from a single act of extraordinary seriousness, such as the breaching of the independence of the judicial branch by its subjugation to another of the branches of government, the annihilation of freedom of expression in its entirety, or the abolition of the submission of the military to civilian authority (without having reached the point at which the military has taken control of the state). The scenario described in Article 20 could also be the result of actions that affect several of the attributes reviewed in Articles 3 and 4, such as the systematic violation of human rights (including, for instance, social rights or freedom of expression), or the destruction of political pluralism by means of a perverse electoral system.*[48]

[48.] Nikken, *op. cit*., p. 67. For Ayala, an *"alteration of the constitutional order capable of seriously affecting the democratic order may refer to any of the democratic institutions, meaning all of the various public authorities, the political parties, human rights and specifically the essential elements and fundamental components of democracy contained in the IDC (Arts. 3 and 4): 1. Respect for human rights and fundamental liberties; 2. access to power and its exercise subject to the rule of law; 3. the holding of periodic elections that are free, fair, and based on universal and secret suffrage as an expression of the sovereignty of the people; 4. the pluralist system of parties and political organizations; 5. the separation and independence of the branches of government; 6. the transparency of governmental activities; 7. the integrity and responsibility of governments in public administration; 8. respect for social rights; 9. freedom of expression and of the press; 10. the constitutional subordination of all State institutions to the legally constituted civil authority; and 11. respect for the rule of law on the part of all agencies and sectors of society*."[48] See Ayala, *op. cit*., p. 107-108. In a similar vein, El-Hage uses the expression "*sustained or systematic erosion of the essential elements of democracy or "creeping coup*." *The main characteristic of this set of facts is that, unlike coup d'états and coup d'état-like situations, in these instances the interruption of democratic order does not occur abruptly or suddenly, but in a gradual, sustained, and systematic manner*." See, El-Hage, Javier, "Under What Circumstances May the OAS Apply the Democracy Clause against a Member State?*"* This paper was published as part of the legal report "The Facts and the Law behind the Democratic Crisis in Honduras, 2009," prepared under the auspices of the Human Rights Foundation and its HRF Center for Research on Democracy, p. 108. El-Hage notes the following examples of actions that, when gradual, sustained, and systematic, should cause the application of the democracy clause in this context: *1. Use of public office to silence, harass, or disrupt the association, and activities of members of the political opposition, labor unions, minority groups, or [dissenting] civil society members. 2. Use of public office to silence, harass, or disrupt the legal association and activities of members of the press. 3. Use of public office to implement general human rights restricting policies. 4. Use of public office to implement a single-party regime. 5. Violation of the integrity of central institutions, including constitutional checks and balances providing for the separation and independence of powers. 6. Arbitrary or illegal appointment or removal of members of the judiciary or electoral bodies; in other words, "the gradual stacking of the judiciary and other crucial watchdog bodies with cronies who subsequently rubber-stamp their benefactors' unconstitutional actions." 7. Arbitrary or illegal interference in the deliberations of members of the judiciary or electoral bodies. 8. Arbitrary or illegal termination of a democratically-elected official by any other elected or non-elected official from quasi-autonomous agencies, prior to completion of an established term. 9. Abuse of constitutional powers by elected officials in order to make constitutional amendments through unconstitutional means, or to temporarily or substantively extend said powers. 10. Failure to hold periodic elections, to respect electoral outcomes; or the holding of elections that fail to meet minimal internationally established democratic standards. 11. Unjustified declarations of a state of emergency. 12. Interference by non-elected officials, such as military officers, in the jurisdiction of elected officials. 13. Civil-military crisis in which there is a legitimate threat of a military coup. This crisis may be caused by the manipulation of the military by civilian authorities,*" p. 108-110. Since the erosion of democracy occurs in a gradual, non-abrupt manner, El-Hage states that the application of the democracy clause

McConnell and McCoy believe that when the conditions that President Carter considered to be in violation of the abovementioned essential elements of democracy laid out in Article 3 of the IDC occur, this would constitute "*an unconstitutional alteration in the constitutional regime that seriously impairs the democratic order in a Member State*," and the OAS "*should take the initiative under Article 20 to address the situation without undue delay*."[49]

OAS practice for addressing the situation contained in Article 20 of the Charter is similar to that previously explained. When the Peruvian Congress and judiciary were dissolved on the orders of President Alberto Fujimori in April 1992, the *Ad Hoc* Meeting of Ministers of Foreign Affairs, in application of Resolution 1080 (XXI-O/91), stated at its April 13, 1992 meeting, through Resolution MRE/RES 1/92, that "*the events that occurred in Peru seriously affect the constitutional order and alter the representative democracy of a Member State of the Organization*." The Secretary General, in the presentation of his report to the Permanent Council on July 23, 2016, invoked Article 20 regarding Venezuela, arguing the constant efforts of the executive and judiciary to ignore and even invalidate the normal operations of the National Assembly. In addition to the judiciary's lack of independence, he pointed to the executive branch's repeated use of unconstitutional intervention in the legislature, in collusion with the Constitutional Chamber of the Supreme Court of Justice; the Supreme Court's adoption of a model to block every law enacted by the National Assembly, which has seriously undermined legislative powers; the inclusion of a series of decisions to prevent three members of the assembly from holding their seats and, thus, reducing the opposition's super-majority to a simple majority; the approval of two executive decrees declaring a state of emergency and a state of economic emergency, thereby further concentrating power and placing arbitrary limits on legislative authority regarding government contracts, senior officials, and the budget; the Supreme Court's approval of an official ruling to restrict the National Assembly's powers; the fact that more than 60% of lower-court judges can be removed from office without due process if a Supreme Court commission so chooses; and the provisional or temporary status of judges and prosecutors, which further debilitates judicial independence and prevents impartiality. The Secretary General also alleges, among other grounds for invoking Article 20: the Venezuelan government's deliberate attempts to block the recall referendum, allowable under the Venezuelan constitution and promoted by the opposition, by deliberately working to actively delay the process; political prisoners; and arbitrary detentions.[50] The Secretary General referred to an alteration of democratic constitutional order in Venezuela, rooted in a steady, sustained, and systematic erosion of democracy that has led to: "*1. The use of public power to disrupt the free association and activities of opposition groups and the media. 2. The violation of checks and balances on the separation and independence of state powers. 3. The arbitrary appointment of members of the judiciary, in order to validate their benefactor's unconstitutional actions. 4. The unjustified use of states of emergency. 5. The arbitrary, unconstitutional, or illegal interference in the deliberations of the judiciary and electoral authority. 6. The arbitrary, unconstitutional, or illegal termination of the tenure of democratically-elected officials. 7. The ongoing harassment and arbitrary decisions that affect state powers or members of the political system*."[51] Regarding freedom of expression and the press, the Secretary General added to his substantiation that "*flagrant violations [to this right] have been reported, from criminal and administrative proceedings against journalists and media outlets, to indirect censorship measures, harassment and stigmatizing rhetoric, repression and criminalization*

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can also be initiated as a "preventive" action when the alteration that impairs the democratic order is not yet a *fait accompli* but already a "threat," thus calling for the application of Article 18 of the Charter. He goes on to say that, "*This threat should be considered to be in place when any of the set of facts numbered above has happened in an isolated or even in a gradual manner, but not yet in a sustained and systematic way*," p. 110.

[49]. Shelley A. McConnell and Jennifer McCoy. "Analytical Review and Recommendations," *Collective Defense of Democracy: Concepts and Procedures, Series: Diffusion of the Democratic Charter 5*, Andean Commission of Jurists, Lima 2006, p. 26.

[50]. http://www.oas.org/en/media_center/press_release.asp?sCodigo=S-011/16.

[51].See request submitted by the Secretary General to the Chairman of the Permanent Council on May 30, 2016, *op. cit.*, p. 63.

of social protests, and violations of the right to access public information."[52] He also noted "*undue restrictions on social protest, the excessive use of force against protestors, and the criminalization of opposition members and dissidents…*"[53] In a Permanent Council meeting held to discuss the draft IDC, the Permanent Representative of Peru proposed clarifying the term "alteration of democratic system." He mentioned as examples using: "*the unconstitutional dissolution of the congress or parliament, the non-recognition of free and fair elections, the holding of elections with certain elements of fraud or with unequal conditions that alter the outcome, the elimination of the separation of powers or the existence of massive human rights violations or the suppression or restriction of individual liberties, particularly the exercise of political rights*."[54]

Article 21 addresses the most serious situation, that of the "interruption of the democratic order," which refers to circumstances that go beyond those included in Resolution 1080.[55] This marks an important difference between the IDC and the Washington Protocol, which comes into play when a "*democratically constituted government has been overthrown by force*." Although, this may consist in an abrupt act,[56] it could include other situations that severely undermine the "essential elements" described in Article 3, such as a self-coups (*autogolpes*),[57]or a *coup d'état* instigated from

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[52] *Ibid*., p. 102-103.

[53] *Ibid*., p. 110.

[54] Record of the regular meeting of the Permanent Council Held on July 11, 2001, Document (CP/ACTA 1285/01), p. 21.

[55]. The OAS General Assembly adopted Resolution 1080 in 1991. In the event of an interruption of democracy, this resolution provides for the immediate convocation of a meeting of the hemisphere's Ministers of Foreign Affairs to make decisions on specific collective actions to defend democracy. It was a key instrument to control the various democratic crises occurring in the Americas. It has been invoked four times: Haiti (1991), Peru (1992), Guatemala (1993), and Paraguay (1996).

[56] El-Hage likens a situation in which a democratically-elected government is overthrown by force to the classic *coup d'état*, which would have at least four of the following concurring elements: "*first, that the victim of the coup is the president or other civil authority with full control of executive power in that country; second, that the perpetrator of the coup has used violence or coercion to remove the victim from his post; third, that the action or actions that constitute the coup are abrupt or sudden and rapid; and fourth, that this action occurs in clear violation of the constitutional procedure to remove the president*," *op. cit*. p. 104.

[57] As noted by Rapporteur Hubert in his already cited report to the IAJC "Follow-up to the application of the Charter," "*1. that the concept of "unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a Member State" is so general so as to go beyond the idea of the traditional coup d'état; and 2) that by so expanding beyond the notion of coup d'état the Democratic Charter acknowledges that any of the powers of government can in fact be the victim of such alteration. It follows that it must be recognized and emphasized that the Inter-American Democratic Charter allows, if considered in its broadest implications, for intervention in the case of "unconstitutional interruption of the democratic order or an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a Member State", no matter if suffered by the executive, judicial or legislative (electoral) power.*" In this same report, Hubert indicates that Robert A. Pastor, in reference to the threats to democracy, mentions threats against horizontal accountability, which are those that occur when one when one branch of government oversteps its constitutional prerogative to control another branch. The most obvious example is when military forces replay the president or the president closes the Congress or changes the highest court in a significant and arbitrary fashion. Hubert also cites Maxwell A. Cameron, who distinguished between vertical accountability, "*in which citizens hold rulers accountable through elections*" and vertical responsibility "*linked to the separation of powers.*" He notes that, "*In Latin America, vertical accountability is well institutionalized, while horizontal accountability is not (…). When mechanisms of horizontal accountability are deficient, one branch of government may encroach upon the jurisdiction and competence of another. In presidential self-coups, or* autogolpes*, presidents may suspend the constitution, fire the Supreme Court, close Congress, and rule by decree until a*

within a government of legitimate origin, the abolition of elections as the mechanism for access to leading the state, the installation of a single-party system, or the instatement of *apartheid*.[58] Nikken maintains that an interruption could also be the result of events that, taken together, constitute a very serious and radical infringement upon the essence of democracy. This

> *might be the case should there emerge a government policy that seriously infringes upon human rights, such as the systematic practice of forced disappearances of persons, extra-judicial executions or other serious crimes against human rights, or, in general, when said policy discloses the existence of situations that appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms. This critical point may also result from a process that, in practice, yields the destruction of the independence of the branches of government, or the progressive ruin of an electoral system that ensures the holding of periodic, free and fair elections based on universal and secret suffrage*.[59]

Nikken adds that the interruption need not be total,

> *i.e. that it involves the abolition pure and simple of democracy. It is enough that it be essential, that is, that the political regime has been distorted to such an extent that it has lost the quality of being democratic. This implies the notion of a critical point at which the threshold of radical distortion of democracy has been crossed, something which can only be appraised by taking into account the circumstances of each specific case*.[60]

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plebiscite or a new election is held to ratify a new regime with wider executive powers." Regarding less serious situations, which fall under Article 21 and even Article 20 of the Charter, Cameron defines less extreme cases as when "*presidents may stack courts, abdicate their authority over the military in cases of human rights violations, abuse executive decree authority, refuse to accept legislative oversight, limit freedom of the press, or use public resources to undermine the development of political parties and local governments*." El-Hage believes that this interruption of the democratic order also includes the "*so-called* auto-coups *and* impeachment coups." He states that, "*the term auto-coup would refer to the abrupt action aimed at the forcible removal of a democratically-elected legislature, and would include the cases of closure or dismissal of parliament by the executive branch, as well as the abrupt dismissal of members of the supreme court or the constitutional court*." The "*term impeachment coup would refer to any sudden action by a legislature to remove a democratically-elected president, with disregard for the constitutional procedures for the removal of the president, and presidential succession*," *op. cit.* p. 107-108. In echo of the aforementioned, McCoy states that "*constitutionally sound impeachment procedures should not be included as a threat of democracy*." See, Jennifer McCoy, "Challenges for the Collective Defense of Democracy on the Tenth Anniversary of the Inter-American Democratic Charter," *Latin American Policy*, vol. 3, n.1, p. 35. In a speech by the Foreign Affairs Minister of the Bolivarian Republic of Venezuela, Luis Alfonso Dávila García, at the thirty-first regular session of the OAS General Assembly in San Jose on June 3, 2001, laid out Venezuela's proposals on the draft Inter-American Democratic Charter, proposing as (new) Article 12: "*A member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the General Assembly, the Meeting of Consultation, the Councils of the Organization, and the specialized conferences, as well as the commissions, working groups, and any other bodies established. It shall be understood that a situation equivalent to the overthrow by force of a democratically constituted government has occurred when there is an unconstitutional alteration or interruption that eliminates, dissolves, changes, or replaces any of the duly constituted powers of the state through procedures contrary to the national Constitution of the member state*."

58. Nikken, *op. cit*., p. 72.
59. *Ibid*., p. 72-73.
60. *Ibid*., p. 73.

Nikken also asserts that the limited infringements of Article 4 do not constitute an interruption of the democratic institutional political process, as they are not essential elements; it is a crisis instead under Article 18 or Article 20 of the IDC. The democratic elements listed in Article 3 must be undermined for there to be an interruption. This does not exclude "*that violations of Article 4 that might be added to other infractions of Article 3 may be decisive in determining that a critical point has been reached in the interruption of the democratic order*."[61] Lastly, Nikken states,

> *It does not seem appropriate to establish as criteria for differentiating between scenarios for implementation of Articles 20 and 21 the distinction between violations of Articles 3 and 4 of the IDC, according to which they would considered to be an 'interruption' when the 'essential elements' of democracy are breached, whereas if these affect only the 'essential components' of the exercise of democracy its exercise, there would be a mere unconstitutional 'alteration' of the democratic order. In practice, although it is difficult to conceive of an 'interruption of the democratic order' without there having been a violation of the 'essential elements' of democracy, not every breach of said elements necessarily reaches the degree of seriousness of a radical assault that actually destroys the democratic order*.[62]

As noted by the OAS Secretariat of Legal Affairs:

> *We cannot confuse the 'unconstitutional interruption of the democratic order' with the 'unconstitutional alteration;' these are two different situations as established by Article 19 that states that both are an 'insurmountable obstacle to its government's participation in sessions of the General Assembly (…).' In the first scenario, there is no government; in the second one, there is one, hence the procedure referred to in Article 20, which details the possible actions before the national authorities*.[63]

However, as per OAS practice, in pursuit of flexible and gradual solutions, and with a view to facilitating diplomatic processes and preventing sanctions, the OAS has described situations that clearly fall within the framework of the criteria indicated to apply Article 21; furthermore, it has invoked, as a first step, Article 20.[64]

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[61]. Id.

[62]. *Ibid*., p. 68.

[63]. *Considerations for the Invocation of the Inter-American Democratic Charter (IDC)*, *op. cit.*, *supra* note 16.

[64]. Permanent Council Resolution CP/RES. 953 (1700/09) "Current Situation in Honduras," adopted at the meeting held June 28, 2009, speaks of the "*breakdown of the constitutional order*" (second preambular paragraph); "*coup d'état*" (first operative paragraph); "*unconstitutional interruption*" (third operative paragraph); "*unconstitutional alteration of the democratic order*" (first preambular paragraph); "*strengthening and preservation of the democratic institutional system*" (fourth preambular paragraph); "*unconstitutional alteration of the democratic order*" (first operative paragraph); and finally "*[invoking] Article 20 of the IDC to instruct the Secretary General to […] carry out the necessary consultations with Member States of the Organization*." Also in relation to the same crisis in Honduras, General Assembly Resolution AG/RES. 1 (XXXVII-E/09), adopted at the thirty-seventh regular session on July 1, 2009, characterized the crisis in Honduras as a "*coup d'état*" (first preambular paragraph), "*coup d'état staged against the constitutionally established government*" (first operative paragraph), "*unconstitutional interruption*" (third operative paragraph), "*unconstitutional alteration*" (first preambular paragraph), "*unconstitutional alteration of the democratic order*" (first operative paragraph), and invokes application of Article 20 of the IDC, calling for "*diplomatic initiatives aimed at restoring democracy and the rule of law and the and the reinstatement of President J. M. Zelaya Rosales*" and "*should these prove unsuccessful within 72 hours, the Special General Assembly shall forthwith invoke Article 21 of the Inter-American Democratic Charter to suspend Honduras' membership*." A similar situation had already occurred when a coup d'état overthrew the constitutional president of Venezuela for 48 hours. The day after the coup, on April 13, 2002, the Permanent Council met and adopted Resolution CP/RES. 811

IV. CONCLUSIONS

The first point of analysis for this report was to determine whether the OAS Secretary General had sufficient authority, both explicit and implicit, to efficiently conduct the preventive action called for in Articles 17 and 18 of the IDC to defend representative democracy.

To this end, given that the IDC is an OAS General Assembly resolution approved in the framework the OAS Charter, an international treaty, the powers granted by Chapter IV of the IDC to the Secretary General on the matter should be interpreted in context and in accordance with the OAS Charter's provisions, specifically, Article 110, subparagraph 2 and 2 b).

Therefore, the Secretary General may, without the consent of any state, bring to the attention of the General Assembly or the Permanent Council any matter which, in his opinion, might threaten the representative democracy of a Member State. This would occur following a weighted and objective analysis carried out pursuant to the provisions of Article 3 (essential elements of representative democracy) and Article 4 (essential components of democracy) of the IDC and in keeping with the principle of non-intervention, specifically the consent of the state to conduct an on-site visit.

This analysis also leads to the conclusion that the Secretary General's powers on matters of prevention must also go hand in hand with political will. They should be strengthened using institutional tools and mechanisms that allow for a more efficient employment of his authority to defend representative democracy in the region.

To this end, an "early warning" mechanism should be created in the framework of the Secretariat for Strengthening Democracy or a special secretariat, both of which report to the Secretary General. This would aim to provide a broader and more diversified method for gathering and receiving information, in order to activate an informed and timely crisis prevention mechanism for democracy in the countries of the region, to include – as part of his authority – conducting special missions or representatives, diplomatic efforts, and good offices.

This same framework could also include the development of follow-up mechanisms for resources allocated to States for strengthening and consolidating their democracies, which would undoubtedly have a preventive effect. Implementing a mechanism for periodic reports on the status of democracies in the Region or thematic reports on some essential elements and components of representative democracy and its exercise is recommended. The purpose would be to enhance the quality of democracies and detect potential risks thereto. Alternatively, measures could be taken to establish a voluntary peer review mechanism, whereby Member States would submit to peer evaluation on compliance with the IDC precepts contained in Articles 3 and 4. This could be voluntary at the outset for states expressly accepting participation in the mechanism.

The second point of analysis was addressing criticism of the vagueness and imprecision of the terms used in Chapter IV of the IDC, specifically regarding what would constitute situations "*that may affect the development of its democratic political institutional process or the legitimate exercise of power*," "*alteration of the constitutional regime that seriously impairs the democratic order in a Member State*," and "*interruption of the democratic order*." This analysis also addressed the need for greater precision to lend improved predictability and less discretion in OAS actions to defend democracy. However, it also considered the advantage of having vaguer terms, in that they could provide more leeway for Chapter IV's mechanisms. This approach would shift the focus more to the mechanism than the objective level of seriousness of the situation, in order to determine which

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(1315/02), "Situation in Venezuela," which condemned the alteration of constitutional order (first operative paragraph) and convoked, in accordance with Article 20, third paragraph, of the Inter-American Democratic Charter, a special session of the General Assembly (sixth operative paragraph). Not only does it expressly invoke this provision, but it also uses the same terms to describe the situation: "*Considering that an alteration of the constitutional regime has occurred in Venezuela, which seriously impairs the democratic order*…" and, thus, calls for the measures set forth in Article 20.

is most appropriate for addressing it and gradually and proportionally preserve or reestablish democracy. According to OAS practice, and with a view to finding flexible and gradual solutions, enabling democratic practices, and preventing sanctions, the OAS has defined situations that would clearly meet the criteria established for activating Articles 20 and 21. Lastly, this point of analysis studied the need for considering the dynamics and evolution of democratic and institutional processes and, thus, the need for concepts to handle new and unpredictable situations.

Based on the foregoing, it would be preferable to have a list of criteria or guidelines instead of more elaborate and rigid definitions. This list would be adaptable to new situations and allow for the OAS to provide a gradual and flexible response to democratic crises in the region's countries. These models or guidelines should be developed according to the essential elements of democracy laid out in Article 3 and the essential components of Article 4 of the IDC and other inter-American instruments, taking into consideration both the quantitative and qualitative seriousness of the infringement, which could be caused by a single action or a government policy that gravely undermines or destroys the essence of democracy. This could be based on the list presented by former US President Jimmy Carter.

Furthermore, these guidelines should stem from the premise that violations only of the essential components of the exercise of democracy (Art. 4) can only be defined within the situations – depending on their severity – described in Article 18 or 20 of Chapter IV of the IDC. This does not preclude the violations in Articles 3 and 4 from being decisive in determining that a critical point of interruption of the democratic order has been reached. Nor does this call for establishing as criteria for differentiating between scenarios for implementation of Articles 20 and 21 the distinction between violations of Articles 3 and 4 of the IDC. Therefore, violations cannot always be deemed an "interruption of the democratic order." In fact, not all infringements of the essential elements of democracy are necessarily serious enough to constitute a radical, destructive assault on the democratic order.

The following criteria or guidelines could be included in the framework list:

1. Article 19 of the IDC refers to "*situations [that] arise in a Member State that may affect the development of its democratic political institutional process or the legitimate exercise of power*," i.e. a situation in which, based on Articles 3 and 4 of the IDC, even if there is a serious violation of these provisions, democratic order is only at risk of being altered and, therefore, the measures to defend democracy should focus solely on preserving, consolidating, and strengthening it. Against this backdrop, and in keeping with OAS practice and doctrine, there could be incidents or acts of insubordination to the legally constituted authority that could destabilize the democratic order or a series of acts that could constitute a process of democratic erosion, but which have only happened in an isolated or even in a gradual manner, but not yet in a sustained and systematic way. Thus, they cannot be considered an alteration of the democratic order.

2. Article 20 refers to situations in which there is an "*unconstitutional alteration of the constitutional regime that seriously impairs the democratic order*," *i.e.* the essential elements and components contained in Articles 3 and 4 of the IDC, which implies that there is a critical threshold of seriousness, but which does not reach the level of an "interruption of the democratic order." This would occur, according to the OAS practice and doctrine analyzed and the examples seen, when there is a government policy that aims to violate or undermine the Constitution, with grave harm being inflicted upon the essential elements of democracy or the fundamental components of its exercise, or a sustained, systematic, gradual erosion of these elements. Such a situation may emerge from a single act of extraordinary seriousness (ex. the breaching of the independence of the judicial branch, the suppression of freedom of expression, or the abolition of the submission of the military to civilian authority, without having reached the point at which the military has taken control of the state). It may also be the result of actions that affect several of the attributes reviewed in Articles 3 and 4 (ex. the systematic violation of human rights (including the freedom of expression), the systematic erosion of the principle of separation of powers through the gradual encroachment on legislative powers and the gradual takeover of the judiciary, or the destruction of political pluralism by means of a perverse electoral system). It could also refer to any of the democratic institutions, i.e. all government agencies, political powers, and human rights.

3. Article 21 addresses the most serious situation contained in Chapter IV of the IDC: the *"interruption of the democratic order of a Member State,"* which includes the classic *coup d'état*, but also extends to other situations that deeply damage the essential elements of democracy described in Article 3 of the IDC. These could include "self-coups," the so-called impeachment coups stemming from an abrupt action carried out by a legislative power to remove the democratically-elected president with disregard for the constitutional procedures permitted for this purpose, and other situations of interruption of the democratic order (ex. the installation of a single-party system or the adoption of an *apartheid* regime). This interruption of the democratic order could also occur when events, taken together, pass a critical point and create a situation in which the essence of democracy is radically damaged, such as a government policy that seriously infringes upon human rights (ex. the systematic practice of forced disappearances of persons, extra-judicial executions, and other serious crimes against human rights, or, in general, when said policy discloses the existence of a persistent pattern of gross and reliably attested violations of fundamental freedoms). This critical point may also result from a process that, in practice, yields the destruction of the independence of the branches of government, or the progressive ruin of an electoral system that ensures the holding of periodic, free and fair elections based on universal and secret suffrage. The rupture need not be total, just that it be essential, that is, that the political regime has been distorted to such an extent that it has lost the quality of being democratic. This implies the notion of a critical point at which the threshold of radical distortion of democracy has been crossed, something which can only be appraised by taking into account the circumstances of each specific case.

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6. International Consumer Protection

	Documents
CJI/doc. 498/16	Private International Law: Consumer Protection (Presented by Dr. David P. Stewart)
CJI/doc. 504/16	Private International Law: Consumer Protection (Presented by Dr. David P. Stewart)
CJI/doc. 508/16	Consumer Protection in Caribbean Community Law Thoughts about the Revised Treaty of Chaguaramas (RTC) (Presented by Dr. Gélin Imanès Collot))
CJI/ RES. 227/16	International Protection of Consumers

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

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

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

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

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

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

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

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

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

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

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

Reports submitted by both Dr. David P. Stewart and Dr. Gélin Imanès Collot, as well as the resolution on the matter appear below:

CJI/doc.498/16

PRIVATE INTERNATIONAL LAW: CONSUMER PROTECTION

(Presented by Dr. David P. Stewart)

During the 87th Regular Session of the Inter-American Juridical Committee (IAJC), held in Rio de Janeiro, Brazil in August 2015, consideration was given to various topics in the field of Private International Law which might usefully engage the attention of the IAJC. The topics were discussed in the context of considering the "path forward" for the OAS, the CIDIP Process and the role of the Inter-American Juridical Committee in the International Arena, including in the field of consumer protection. The IACJ will return to that subject at its 88th Regular Session, scheduled to begin in Washington on April 4. 2016.

In that connection, the Members of the Committee may find it useful to take account of Resolution 70/186 adopted by the United Nations General Assembly on December 22, 2015 on the subject of consumer protection. Copies of the English and Spanish versions of the resolution are attached. The resolutions can also be retrieved from the UN General Assembly website at the following locations:

http://www.un.org/es/comun/docs/?symbol=A/RES/70/186
http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/186.

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CJI/doc.504/16

PRIVATE INTERNATIONAL LAW: CONSUMER PROTECTION

(Presented by Dr. David P. Stewart)

During the 88th Regular Session of the Inter-American Juridical Committee (IAJC), held in Washington, D.C. in April 2016, the Committee discussed the advisability of including in its agenda the subject of international consumer protection. Consideration was given to the adoption on December 22, 2015 by the UN General Assembly of Resolution 70/186 setting forth UN Guidelines on Consumer Protection. The Committee determined to include the topic on its agenda with a view to drafting a set of guiding principles for consideration and possible adoption within our hemisphere. In light of the complexity of the topic, four rapporteurs were appointed: Drs. José A. Moreno Rodríguez, Ana Elizabeth Villalta Vizcarra, David P. Stewart and Gélin Imanès Collot. The Committee will return to that subject at its 89th Regular Session.

In that connection, the attention of the Members of the Committee is respectfully drawn to the following recent developments.

The International Law Association's Committee on International Protection of Consumers (chaired by Profs. Cláudia Lima Marques and Dan Wei) has published a compilation of papers and reports on the subject (including inter alia on the new UN Guidelines as well as legislation – actual or proposed in Brazil, China, Portugal, Australia, and MERCOSUR). The volume is entitled "The Future of International Protection of Consumers," Porto Alegre, 2016).

A Conference celebrating the 25th year of the International Association of Consumer Law will be held July 16 to 19, 2017, in Porto Alegre (UFRGS), Brazil. The Conference will provide a forum for leading international scholars, practitioners, representatives of the consumer organization, public authorities and business representatives to discuss the fundamentals, challenges and future of consumer protection worldwide. Additional information is available at the conference website at: http://www.ufrgs.br/direitodoconsumidor/iacl2017/:

The World Bank's Good Practices for Financial Consumer Protection (2012) are available at http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Good_Practices_for_Financial_CP.pdf.

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CJI/doc.508/16

CONSUMER PROTECTION IN CARIBBEAN COMMUNITY LAW

THOUGHTS ABOUT THE REVISED TREATY OF CHAGUARAMAS (RTC)

(Presented by Dr. Gélin Imanès Collot)

INTRODUCTION

Consumer rights is one of the highly specialized areas of law that is difficult to classify among the major specializations of our positive law. In addition, when you separate law into two major areas, consumer rights straddles both public law and private law. It is closely tied to commercial law because of its purpose and to human rights and basic human rights because of its justification.

Viewed from the perspective of liability because of product liability, consumer protection is part of the chapter on liabilities holding producers responsible in terms of the damages their product might cause or that their product risks causing to the buyer, either directly in the relationship between the producer and the buyer/consumer (contractual liability), or indirectly in the relationship between the producer, distribution networks, and the consumer (tortious liability).

On the basis of these two angles, the contractual and the tortious angles, the obligation that pertains to producers to compensate for damages caused by their product, whether because of or without any wrongdoing by them (liability in torts and liability in remedy in common law, especially in U.S. Law), develops an entire section of corporate law or commercial law on the basis of a very wide-ranging consumer vision of this subspecialty of the area of private law in the Romano-Germanic (continental) legal system.

Furthermore, the increasingly diverse and subtle risks to which consumers are exposed to, as a result of the globalization of business, oftentimes go beyond consumers' capacity to understand what is at stake, especially when they must tackle them as individuals. It is therefore necessary to ensure that organized sectors of every State intervene, along with civil society (consumer protection organizations), to defend their rights or government institutions for the protection of these rights by using preventive measures.

Ultimately, protection on the basis of protection provided by government institutions lends itself to two different approaches: one based on the right to compete, for the purpose of ensuring quality, leading to emulation by both entrepreneurs and producers, and one based on guaranteeing the rights of consumers as belonging to basic human rights, in short, second-generation human rights.

Whether on the basis of one approach or the other, one sector or the other, consumer rights constitute a safeguard to the competitiveness that is indispensable for a liberal economy in the current context of globalization and regionalization of markets and economies. In these markets, competitiveness is no longer confined to domestic stakeholders competing amongst themselves, but amongst businesses that belong to a production and marketing chain that uses all the facilities of ICTs.

It is in this tripartite hub (right to compete and to be competitive, human rights, and liability law) that can be found the rights of consumers, whose protection is generally ensured either in the domestic law of the most developed states or in convention-based law on the basis of international, regional or subregional legal instruments or both, with domestic law channeling the guarantees provided by international conventions.

Our examination of consumer protection is confined, in terms of regional convention-based law, to the revised Treaty of Chaguaramas (RTC) establishing CARICOM (1), while recalling the guarantees provided internationally by The Hague Convention of October 2, 1973 on the Law Applicable to Products Liability. It involves, of course, evaluating the acceptance of this legal instrument and how this protection has evolved in the domestic law of states parties (2).

1. Consumer protection in convention-based law

In convention-based law, consumer protection is targeted by two major legal instruments, an international one with a general scope, and the other a subregional convention confined to the 15 Member States of CARICOM, which are among the 35 Member States of the OAS. The former is The Hague Convention of October 2, 1973 (1.1), and the latter is the revised Treaty of Chaguaramas of 1973 (1.2).

1.1 The Hague Convention on the Law Applicable to Products Liability

The Hague Convention of October 2, 1973 on the Law Applicable to Products Liability[1] whose entry into force on June 3, 1975 has a general, international scope to protect consumers who are victims of damages caused by a product.

Apparently, as indicated by the title of said convention, it is confined to natural and industrial products, whether raw materials or manufactured goods, in other words, movable and immovable goods as defined by Article 2 of the Convention. It cannot be applied to services.

In addition, the Lugano Convention of October 30, 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters refers to the courts having jurisdiction to hear proceedings filed by consumers in conformity with Articles 15 to 17.[2]

The relevance of international legal instruments stems from the diversity of texts that are applicable to consumer protection at the national level and that run the risk of triggering international legal clashes because of their complexity.

Since the end of the second half of the past century, the international dynamics preceding the official installation of globalization in the nineties have been giving a new dimension to international economic ties, with markedly legal implications.

In this new driving force behind globalization, there is The Hague Convention with its broad international scope and the Treaty of Chaguaramas whose scope for implementation is confined to the borders of the Caribbean subregion, both of them dating back to the year 1973.

1.2 The Treaty of Chaguaramas and consumer protection in CARICOM

The Treaty of Chaguaramas of 1973 created, over the ruins of the Caribbean Free Trade Area (CARIFTA), the Caribbean Community including the CARICOM Single Market and Economy (CSME). This Treaty is aimed at establishing a community of dynamic trade and cooperation,

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1. Sandrine Clavel and Estelle Gallant. *Les grands textes de droit international privé*, p. 593-596, 1. ed. : Dalloz, 2014, (1516 p.).
2. Clavel Sandrine and Estelle Gallant, op. cit., p. 778.

ensuring the free circulation of persons, goods, services, and capital, with clear goals set forth in Article 6 of the convention.

It recalls two major principles that had already been highlighted by the GATT in 1946 and picked up by the WTO: the principle of non-discrimination (Article 7) and the principle of the most favored nation (Article 8). It tends to overcome all barriers, whatever they might be, capable of obstructing subregional economic ties. But it moves forward by stages, by establishing first a single market, then a single economy, and ultimately, a common bank, to date still theoretical.

The Treaty of Chaguaramas of 1973 has been revised and signed by the heads of government of 14 States parties at the twenty-second session of the conference held in Nassau, in The Bahamas, on July 5, 2001. In 2002, Haiti switched its status as an observer to that of a being a full member of CARICOM as a result of its adherence to the aforementioned Treaty.[3]

The version of said 1973 Treaty was revised in 2001, and it was this revised version that Haiti adopted and which was ratified by its parliament on November 26, 2003 and published in the Official Gazette, *Le Moniteur*, special issue No. 11 of December 28, 2007. This Treaty provides for the protection of consumers, which must be viewed in the light of comparative law.

1.2.1 Convention provisions for consumer protection

Divided into 10 chapters and 240 articles, the RTC gives special importance to consumer protection. It focuses an entire chapter on this subject, that is, Chapter 8, which is comprised of Articles 167 to 186, in other words, 20 articles divided into two parts dealing with the right to competitiveness and the right of consumers to protection. The last three articles, 184 to 186, comprising Part Two, have specific provisions for the protection of consumers in this Caribbean community.

Using a numbered listing, the provisions of Articles 184 to 186 highlight the major guiding principles underpinning the right to consumer protection, warning producers against the dangers and risks of aggressive competitiveness inside CARICOM.

1.2.2 The guiding principles stemming from the convention's provisions

Article 184 is inspired by the principle that CARICOM Member States must promote the interests of the Community's consumers on the basis of appropriate measures. It defines a consumer as *"any person to whom goods and services are supplied or intended to be supplied in the course of business carried on by a supplier or potential supplier, and who does not receive the goods or services in the course of a business carried on by him* (Article 184, subparagraph 2)." The consumer is therefore defined as being the end-user of goods or services and not the intermediary who buys them for resale.

On the basis of the terms of said article, the appropriate measures for which Member States are responsible must, above all, do the following:

- provide for the protection and supply of goods and the provision of services to ensure the protection of life, health and safety of consumers;
- ensure that goods supplied and services provided in the CSME satisfy regulations, standards, codes and licensing requirements established or approved by competent bodies in the Community;
- provide, where the regulations, standards, codes and licensing requirements referred to in paragraph (b) do not exist, for their establishment and implementation;
- encourage high levels of ethical conduct for those engaged in the production and distributions of goods and services to consumers;
- encourage fair and effective competition in order to provide consumers with greater choice among goods and services at lowest cost;

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[3] Haiti's long-awaited membership into CARICOM was one of the recommendations made in the report of the Committee chaired by Sir Shridath Ramphal.

- promote the provision of adequate information to consumers to enable the making of informed choices;
- ensure the availability of adequate information and education programmes for consumers and suppliers;
- protect consumers by prohibiting discrimination against producers and suppliers of goods produced in the Community and against service providers who are nationals of other Member States of the Community;
- encourage the development of independent consumer organisations;
- provide adequate and effective redress for consumers.

From this long listing, we must insist on stressing four basic principles:[4] the principle of providing adequate information and promoting the education of consumers so that they can make informed choices, the principle of ethics of producers, the principle of caution, and the principle of the need to establish independent consumer organizations. These principles require producers to think about untrue advertisement and clauses in small print regarding the waiver of product liability. It also requires that consumers (of tobacco and alcohol, for example) be warned of the deleterious impacts of their products on health, especially on the health of children.

2. Acceptance of the RTC and consumer protection in the domestic law of States parties

The revised Treaty of Chaguaramas of 1973 that established CARICOM brings together, in this subregional economic community, 15 Member States:[5] Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, Saint Lucia, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago.

The only things that these countries have in common is that each belong to an island formerly colonized by European settlers, albeit from different countries, as well as island traditions and the will to step up trade flows amongst themselves to promote the subregional economy and the value of human beings. Because of the influence of colonization, they display a wide diversity of cultures, languages, and legal traditions. Some adopted the common law tradition, whereas others have Romano-Germanic (Continental) law, and yet others use a hybrid system (Saint Lucia, for example).

In the same vein, there are differences in terms of adhering to international, regional, and subregional legal instruments. Depending on the legal system, they have had different approaches to accepting convention-based instruments such as the RTC. Some of these States have a monist system, in other words, they can directly apply these instruments in their domestic law by referring to them in all law reports and in bodies having jurisdiction (courts and tribunals). In contrast, other states tend to have a dualistic approach where outside regulations are clearly differentiated from domestic law.

In any case, Article 185 provides that:

> The Member States shall enact harmonised legislation to provide, *inter alia*, for the prohibition of inclusion of unconscionable terms in contracts for the sale and supply of goods or services to consumers, for the prohibition of unfair trading practices, particularly such practices relating to misleading or deceptive or fraudulent conduct, for the prohibition of production and supply of harmful and defective goods, etc.

Regardless of domestic legislation and in its absence, this Article 185 of the RTC is the target for common application, even partially, in the Caribbean area, as a result of the implementation of a

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4. Seven principles are being mentioned here: principle of sufficient information, principle of informed consent, principle of the protection of the confidentiality of personal information, principle of equity in transactions, principle of caution, the principle of safety in transactions, and the principle of collective promotion.
5. The two most recent members are Haiti and Suriname.

common surveillance and quality control structure known as the **Caribbean Rapid Alert System** (CARREX). As indicated by its name, CARREX is an alert system against circulation in the Caribbean area.

2.1 Mainstreaming the RTC in Caribbean domestic law on the basis of the monist system

Acceptance of the RTC entails fewer difficulties in those Caribbean countries where the legal system has opted for monism.[6] The RTC, like every other international, regional, and subregional legal instrument, is directly applicable in legal relationships and in courts. Sometimes, despite this direct application, the lawmaker nevertheless proceeds to draw up a law for the application of the instrument, as a kind of duplicate or redundant law.

It is regrettable that we have no precise information about the CARICOM member countries of the subregion that have adopted this kind of system, as it was not possible to call for completion of the *questionnaire* drafted for this purpose on time. In any case we can provide an example and illustrate acceptance of the RTC in a monist system by describing the Haitian model.

2.1.1 The Haitian system, monist model for incorporating the RTC

Haiti has close to 10 million inhabitants, or consumers, if you prefer. Potentially, it alone accounts for close to half of all CARICOM consumers, estimated at 20 million.[7] As a result, its demographic importance weighs heavily on the scale of the CARICOM Member States.

Because of the monism of the Haitian legal system (Article 276-2 of the Constitution of March 29, 1987 amended on May 11, 2011), the RTC is directly applied to consumer protection in Haiti without the need to refer to any domestic law. In fact, at present there is no domestic law on the matter.

Nevertheless, a draft law on consumer protection has been submitted to parliament for a vote. It must therefore, if not reinforce, at least announce a new outlook *de lege ferenda* aimed at accepting the RTC and giving impetus to its enforcement, by calling the attention of various stakeholders of the country's society about this guarantee (producers and consumers).

Alongside this, the Ministry of Trade and Industry (MCI) and other institutions involved are participating in setting in motion, ahead of this future legislation, surveillance measures consisting of installing a warning system against dangerous products (plastic forks that release toxic gases when exposed to heat).

To this end, a Standardization and Quality Control Department has been established as the administrative entity in charge of this task.[8] Alongside this standardization office, there are other structures involved such as the metrology laboratory, the laboratory of the School of Agronomy, and the Tamarinier Laboratory (for products such as semolina, fish, mangoes, etc.), human and plant health monitoring mechanisms, which are relatively effective.

Down the production chain, CARREX contributes to strengthening protection measures, in order to enforce harmonized legislation or when there is none. It provides the framework for a Caribbean inter-State monitoring instrument, with positive impacts on the nationwide application of the convention's provisions.

2.1.2 Acceptance in other CARICOM states with a monist system

Certain States, especially the 13 Members of CSME, except for The Bahamas and Montserrat, despite their diversity, tend to mainstream the Treaty into their domestic laws. To this end, acceptance can be direct in countries with a monist legal system and indirect in countries with a dualist legal system.

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6. Monism is preferred in France, Luxembourg, the Netherlands, Switzerland, etc.
7. Dieudonné Joachim. *Accompagner les associations de consommateurs*, Économie, Intégration régionale Le Nouvelliste, n. 1167, July 1, 2016.
8. Regarding this subject, please consult Mrs. Jean-Baptiste in charge of this department and Mrs. Paultre for the draft law submitted to parliament.

2.2 Acceptance of the RTC in Caribbean domestic law in a dualist system

In a dualist system, acceptance of international, regional, or subregional legal instruments, such as the RTC, establishes two different legal orders: one is an international or convention-based order and the other is a domestic order that evolves in a context of parliamentary sovereignty.[9]

In addition to being prioritized separately, these two legal orders have the specific characteristic of requiring the national territory to take over the direct enforcement of international legal instruments. Likewise, in order to mainstream the convention, the lawmakers must formally draft a new law for its enforcement.

In this case, as in the other, the law enforcing the convention runs the risk of clashing, in its specific details, with the international instrument. It is therefore important that the system establishing a priority of standards that would rank the international legal instrument so that it can supersede domestic law.

Once again, we regret that we did not have the list of CARICOM member countries that have adopted dualism in their legal system, because the questionnaire that was submitted and administered had not been completed.

2.3 Expected results of the survey (see questionnaire attached herewith)

CONCLUSION

Whether it is inspired by international, regional, or subregional legal instruments such as The Hague Convention or the Treaty of Chaguaramas, consumer protection arises from a complex, although to a certain extent effective, legal system. It makes it possible to ease or moderate the formerly aggressive conduct of producers of certain products such as alcohol and tobacco that have been recognized as harmful to health. It requires striking a certain balance when broadcasting commercials and publishing ads. Brewers and tobacco manufactures are now required to warn consumers about these products by adding to their ads and commercials that consumption of these products is harmful to health.

In Haiti, since the Pharval SA scandal in 2002, there is increasing concern about the protection of consumer rights. It involved children suffering from kidney failure after ingesting dyethylene glycol found in the pharmaceutical products Afebryl and Valodon, administered to these children on the basis of a doctor's prescription. Some of the children died because of this, whereas others were bedridden for many years before they eventually died. At the behest of the parents of the child victims, lawsuits were filed against the laboratory Pharval SA for their liability with respect to the products, but the outcome that was expected did not take place for many reasons.

It is hoped that protection measures for the development of a consumer protection law will be strengthened. It is recommended, for example, that networks of consumer organizations be established everywhere in the world, especially at the heart of CARCOM, in addition to the CARREX, in order to combat untrue advertising, to report abusive small-print clauses in contracts, insurance contracts in particular, and to build up solidarity with all those consumers who have been victims in order to provide them with the means to call for and secure reparations. Wouldn't that be a way of ensuring justice?

REFERENCES

CARICOM Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy, CARICOM Secretariat, Trinidad and Tobago, 2002, reprinted 2004. (288 p.)

The Caribbean Court of Justice, appellate jurisdiction rules, 2005. (85 p.)

CLAVEL SANDRINE and GALLANT ESTELLE. *Les grands textes de droit international privé*, 1. ed. : Dalloz, 2014. (1516 p.)

[9] Dualism prevails in Germany, Canada, and in the United Kingdom, whereas the United States has more of a hybrid system. Google, September 22, 2016.

JOACHIM DIEUDONNÉ. *Accompagner les associations de consommateurs*, Économie, Intégration régionale Le Nouvelliste, n. 1167, July 1, 2016.

NICOLAS ALRICH (Dr). *L'intégration d'Haïti à la CARICOM, au CSME peut être bénéfique*, Économie, Le Nouvelliste, n. 1016, June 2016.

ANNEXES

1. Treaty of Chaguaramas

2. Questionnaire

1. Has your country ratified the revised Treaty of Chaguaramas of 1973? If yes, specify the nature and date of the ratification instrument.
2. How and in what system has your country accepted this Treaty in domestic law?

a) In a monist system where said Treaty is directly applicable in all bodies, courts, and national tribunals? Yes: …….. No: …….

Other answers: ……..……

b) In a dualist system where said Treaty can only be applied via domestic laws that reproduce its provisions. Yes: …….. No: …….

Other answers: ……..……

3. In the context of dualism, are there laws or legal provisions for consumer protection in your country? Yes: …….. No: …….
Other answers: ……..……
4. If yes, what is the law's scope of application? General: …… Confined to certain subjects that need to be specified: …….
5. Is there case law (jurisprudence) or model cases that merit attention in a comparative law review?
6. Please scan the law and send us a copy, if possible.
7. Specify the model cases and, eventually, case law (jurisprudence) and doctrine that support enforcement of the law.

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CJI/RES. 227 (LXXXIX-O/16)

INTERNATIONAL PROTECTION OF CONSUMERS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

ACKNOWLEDGING that the need for greater international protection of consumers in the context of cross-border transactions is a topic of increasing global importance and is being addressed at the international level in a number of different forums, including the United Nations, and it is also a subject of growing concern within the American Hemisphere;

RECALLING that for some years, the Organization of American States has been discussing various ways to address this issue at the regional level and that in 2015, the Inter-American Juridical Committee decided to include the subject on its agenda, and asked four of its members to serve as Co-Rapporteurs (Ana Elizabeth Villalta Vizcarra, José A. Moreno Rodríguez, Gélin Imanès Collot and David P. Stewart);

CONSIDERING the growing attention given to the issues of consumer protection by national legislatures within our Hemisphere, and taking into account the work already undertaken in other international bodies, including but not limited to the United Nations (General Assembly 70/186 (2015)), the Organization for Economic Cooperation and Development (OECD), the International

Law Association (Report at the Sofia Conference in 2012 and Resolution 1/2016 adopted 11 August 2016), and the Caribbean Community (revised Treaty of Chaguaramas of 2001),

RESOLVES:

1. To recognize the challenges that individual consumers face in their cross-border dealings and, that as a consequence, they often need special protection, including access to effective, efficient and affordable methods of dispute settlement.

2. To acknowledge at the same time the importance of preserving the ability of sellers and providers to compete in the market place, in order to ensure that consumers are provided with a broad range of products and services appropriate to their needs and desires while also ensuring their health, safety and need for special protection.

3. To urge countries to consider the recommendations of international organizations for the adoption of appropriate principles and mechanisms in the areas of applicable law, dispute settlement procedures and best business practices for the providers of goods or services destined for consumers in cross-border transactions.

4. To emphasize the need for States to establish mechanisms of international cooperation and coordination in the area of consumer protection.

5. To focus its efforts on issues relating to mechanisms for online settlement of disputes arising from cross-border consumer transactions.

This resolution was unanimously adopted at the session held on October 13, 2016 by the following members: Drs. David P. Stewart, Hernán Salinas Burgos, Fabián Novak Talavera, Ana Elizabeth Villalta Vizcarra, João Clemente Baena Soares, Carlos Mata Prates, Gélin Imanès Collot and José A. Moreno Rodríguez.

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7. Guide for the application of the principle of conventionality

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

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

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

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

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

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

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

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

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

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

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

At the 88th Regular Session of the Inter-American Juridical Committee held in Washington, D.C., in April 2016, Dr. Correa, the Rapporteur for the item "Guide for the

application of the principle of conventionality" presented document CJI/doc. 500/16 and reviewed the background on the subject.

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

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

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

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

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

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

Dr. Salinas urged the Rapporteur to address two issues in her report: (1) the effectiveness of human rights laws and their implementation in the domestic system of law; and (2) the interpretation of constitutional provisions in the light of convention norms, and whether or not the interpretation of the Inter-American Court of Human Rights should be enforced, taking precedence over constitutional norms. He said that the guide should clarify

the issue of conventionality control, not so much from the point of view of compliance with the provisions of treaties, but rather with regard to the interpretation of domestic laws in the light of conventions and the interpretations of the Inter-American Court of Human Rights.

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

Dr. Stewart observed that the concept is not very well known in the common law tradition. In that regard he asked the Rapporteur if the principle applies only to those countries that have accepted the jurisdiction of the Court and if the principle should be understood as imposing additional obligations; that is, in the sense of making binding the opinions of interpretative international bodies, such as the Committee against Torture. In his opinion, states could take the comments of such international bodies into consideration, but not regard them as binding, despite the fact that some members of such committees regard them as compulsory and binding. As he understood the presentation, the doctrine of conventionality control was apparently even stronger and entailed a treaty-based obligation to give enforce the interpretations of the Inter-American Court of Human Rights.

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

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

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

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

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

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

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

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

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

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

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

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

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

Dr. Correa emphasized that the Court had decided that the rationale for its decisions should be used to interpret treaty provisions in justifying decisions at the domestic level. She

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

Dr. Salinas reiterated that a conceptual definition should be the starting point of the study. Naturally that involved implementing the Court's interpretation; the enforceability of international treaties is a separate matter, however. It is important to know the concept because if we restrict it to the Court's interpretation, then states parties, particularly those subject to the jurisdiction of the Court, will be taken into account, but we would not get a complete overview.

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

1. Link to the jurisdiction of the Court;

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

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

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

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

* * *

8. Principles and Guidelines about Public Defense in the Americas

	Documents
CJI/doc. 509/16 rev. 2	Report of the Inter-American Juridical Committee. "Principles and Guidelines about Public Defense in the Americas"
CJI/RES. 226 (LXXXIX-O/16)	Principles and Guidelines about Public Defense in the Americas (Annex: CJI/doc. 509/16 rev. 2)

During the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, October, 2016), the Chairman presented his report on the topic about public defendants (CJI/doc. 509/16 rev. 2) as decided at the beginning of the session and explained about the work carried out by the Inter-American Association of Public Defendants (AIDEF in its Spanish Acronym), which congregates associations of Public Defendants throughout Member States of the Organization. He mentioned that during 2015 the Association signed a bilateral agreement with the OAS through which the association achieved the status as observer within the Inter-American system. In addition, he pointed out that the AIDEF is mentioned in several OAS resolutions regarding public defense in the Americas, and that this encompasses a joint work with the Department of International Law (please see resolutions AG.RES. 2614/12; 2801/13; 2821/14; and 2887/16).

In this regard, the AIDEF forwarded a proposal detailing principles and guidelines for public defense in the Americas, describing it as a fundamental human right enshrined in several international and inter-American conventions.

It must be noted that during this session, representatives of said organization gave a presentation to the Juridical Committee, explaining the basis for draft principles and guidelines for public defense in the hemisphere.

During the analysis of the document, Dr. Salinas questioned the emphasis of the proposal of principles on the rights of public defenders and the lack thereof on their duties, ethical duties and probity. As an example, he provided a Chilean case where a public defender went beyond his functions.

The Chairman, on the other hand, noted that the principles in the document are useful for the adequate protection of the rights of defense; and probably it was not the purpose of the document to address the duties of defenders. He also noted that all States have codes of ethics for public officials. However, he raised as one of the major concerns of public defenders, the lack of uniformity in public defense systems in the hemisphere, to the extent that not all systems are at the same level of development and do not have the same protection capacity. The way he understands it, the intent of the proposal is to try to improve standards in the different countries. He then invited Dr. Salinas to submit a proposal on this topic for examination of the plenary of the Committee.

Dr. Mata Prates invited members to take into consideration both the core aspects and the procedural aspects of the document.

Dr. Salinas presented an alternative proposal to include in the resolution the need to respect ethical principles.

The Chairman recalled that these principles have already been approved by the Defender Agencies in the Hemisphere, and that therefore these principles are well known to States. However, he said that a new item might be included in the agenda of the following day, allowing a final discussion and approval of the principles in question.

Dr. Mata Prates indicated that his only doubts referred to item 13 of the introduction, yet item 6 of the principles proposes a certain balance since it requires "taking into account the internal systems of the countries". Out of this principle arises the decision of the State to implement public defense mechanisms that effectively choose.

The Chairman replied that the purpose of the “item” is to emphasize that it is a State’s service and that it should enjoy autonomy. More important that stating that it is a State duty, is pointing out its autonomy of action.

Dr. Stewart explained that the English version might create a possible confusion in regard to the right of defense, as it does not specify whether this right is in operation in civil or criminal proceedings. He asked whether States would have an obligation to present a defense also in the civil area. He explained that in the United States system, the obligation is for the criminal context, but not for the civil cases. In many states of the Federation, there are some similar institutions, although such defense is not a guarantee, nor an obligation they have to assume.

The Chairman clarified that the orientation of the principles is that of defense in the criminal circuit. However, public defense should not be limited to criminal matters, based on national legislation (principle 8).

Dr. Toro indicated that perhaps there is a question of translation. In Spanish, the terms are "should not be limited to the criminal forum". In English, it appears as the "criminal investigation", and therefore the Spanish version should be respected.

Dr. Salinas stated that he understood public defense should not be limited only to the criminal sphere, and that it should be extended to civil aspects, but that this is not clear in the text.

The Chairman specified that principle 8 establishes that the defense service refers to national legislation.

Dr. Salinas stated that it is an obligation in the criminal sphere and that it will be hopefully granted to other areas.

Dr. Mata Prates commented on the system in Uruguay that in principle has an ex-officio defender for matters of criminal law. However, the State also provides a lawyer in other matters, including civil matters, if the person claims that his/her level of income is low.

Dr. Stewart said that the US system is different and that it is a matter left to the decision of the States of the Federation. However, the Government must only provide a defender in criminal cases.

The Chairman noted that as there were no more objections the proposal was ready for approval and the plenary decided to send it to the Permanent Counsel.

The Resolution and the Report of the Inter-American Commission are as follows:

CJI/doc.509/16 rev.2

REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE.

PRINCIPLES AND GUIDELINES ON PUBLIC DEFENSE IN THE AMERICAS

INTRODUCTION

1. The right to defense is a right recognized under all human rights instruments – universal and regional alike. This is a central component of due process, under which the state has an obligation to treat the individual at all times as a real subject of the process.

2. Legal assistance is a guarantee for the exercise of this right and must be provided by the State.

3. At the international level, Article 14(3) (d) of the International Covenant on Civil and Political Rights states that everyone shall be entitled to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

4. At the international level, there are instruments in place specifically addressing the right of access to justice. Thus, the *Basic Principles on the Role of Lawyers*[1] was adopted in 1990. It provides that all persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offense assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

5. The *United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems,* which the General Assembly adopted in 2012,[2] are of particular interest. These Principles recognize legal aid as "an essential element of a fair, humane, and efficient criminal justice system that is based on the rule of law."

6. The scope of the United Nations Principles is limited to criminal justice. Thus, under Principle 3, States must ensure that anyone detained or arrested for, or suspected or accused of, a criminal offense liable to imprisonment or the death penalty is entitled to legal aid at all stages of the criminal justice process. It also specifically refers to children[3] and other especially vulnerable individuals.

7. Principle 12 of said instrument refers to the independence and protection of legal aid providers, with a provision that States should ensure that legal aid providers are able to carry out their work effectively, freely, and independently, without intimidation, hindrance, harassment or improper interference.

8. Likewise, the United Nations adopted a series of instruments specifically dealing with persons deprived of liberty, in terms of their right to be assisted by a lawyer – among them the *Standard Minimum Rules for the Treatment of Prisoners*[4] and the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.*[5]

9. At the regional level, Article 8(2) (d) of the American Convention on Human Rights recognizes defendants' right to defend themselves personally or to be assisted by counsel of their choice and to communicate freely and privately with their counsel, while sub paragraph (e) of this article establishes the inalienable right to be assisted by a state-provided lawyer, paid or unpaid depending on domestic laws, if defendants do not defend themselves personally or engage their own lawyer within the time period established by law, regardless of the likely applicable sanction or the complexity of the criminal matter to be settled; factors taken into account under other systems.

10. This provision is different from the one in the aforementioned Article 14 (3) (d) of the International Covenant on Civil and Political Rights, for which "*the interests of justice so require*" is the basis for the guarantee of providing an individual with a cost-free official defender if he lacks adequate means to pay for it.

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1. Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from August 27 to September 7, 1990, UN Doc.A/CONF.144/28/Rev.1 p. 118 (1990).
2. UNGA RES. 67/187.
3. Principle 11.
4. Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Geneva in 1955, and approved by the Economic and Social Council in its resolutions 663 C (XXIV), of July 31, 1957; and 2076 (LXII), of May 13, 1977.
5. Adopted by the General Assembly in resolution 43/173, of December 9, 1988.

11. This means that the legal aid standard established under the Inter-American system is higher than what exists at the international level. Consequently, it would be advisable for the region to develop its own principles and guidelines taking into consideration its particular characteristics.

12. Beyond the fact that the requirement for the independence of the public defender service is not expressly provided for in Article 8(2)(e) of the American Convention, in order to ensure competent legal aid and, more broadly, unrestricted access to justice, the due process guarantees enshrined in Article 8(2) of the Convention must be interpreted in light of the ongoing evolution of the *corpus juris* of International Human Rights Law,[6] taking into account the effectiveness of and need for protection of vulnerable groups.[7]

13. An independent official public defense service offered by the state is a fundamental requirement to properly guarantee the right to a competent defense, enshrined in Article 8(2)(e) of the American Convention. In this regard, the lack of an independent public defense will hinder access to justice for the most vulnerable segments of society.[8]

14. These concepts have been developed in five resolutions adopted by the OAS General Assembly: *"Guarantees for Access to Justice. The Role of Official Public Defenders,"* resolution AG/RES. 2656 (XLI-O/11); "*Official Public Defenders as a Guarantee of Access to Justice for Persons in Situations of Vulnerability,"* resolution AG/RES. 2714 (XLII-O/12)*;* "*Toward Autonomy for Official Public Defenders/Criminal and Civil Legal Aid Providers as a Guarantee of Access to Justice,"* resolution AG/RES. 2801 (XLIII-O/13)*; "Toward Autonomy for and Strengthening of Official Public Defenders as a Guarantee of Access to Justice,"* resolution AG/RES. 2821 (XLIV-O/14)*;* and *"Promotion and Protection of Human Rights"* –subsection ix: *"Toward Autonomous Official Public Defenders as a Safeguard for Integrity and Personal Liberty,", resolution* AG/RES. 2887 (XLVI-O/16).

15. Furthermore, the *100 Brasilia Rules*, adopted by the XIV Ibero-American Judicial Summit in March 2008, is worth noting. One of its underlying premises is that the judicial system should be structured as an instrument for effective defense of the rights of persons who are in situations of vulnerability and thus should help reduce social inequalities by encouraging social cohesiveness.

16. Notwithstanding the modality used by States to deliver legal aid, no provision under the Principles and Guidelines shall be interpreted as granting anything less than what is recognized under domestic law or in international treaties applicable to the administration of justice. This document is intended to contribute to the progressive development of standards in this field, especially taking into consideration the very nature of the Region's own public defense institutions.

PRINCIPLES

Principle 1

Access to justice, as a fundamental right, is also the means of restoring the exercise of rights that have been denied or violated.

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6. *Cf.* I/A Court HR, *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, cit., par. 120.

7. *Cf.* I/A Court HR, *Case of Vélez Loor vs. Panama, cit.* par.99; *Case of Ibsen Cárdenas and Ibsen Peña vs. Bolivia. Merits, Reparations, and Costs.* Judgment of September 1, 2010 Series C No 217, par. 90; *Case of Xákmok Kásek Indigenous Community vs. Paraguay. Merits, Reparations, and Costs.* Judgment of August 24, 2010, Series C No. 214, par. 250; and *Case of Sawhoyamaxa Indigenous Community vs. Paraguay. Merits, Reparations, and Costs.* Judgment of March 29, 2006. Series C No. 146, par. 189.

8. *Cf.* I/A Court HR, case of *Ruano Torres vs. El Salvador.* Judgment of October 5, 2015, Series C No. 303, pars. 156-157, 159, and 163.

Principle 2

Access to justice is not limited to ensuring admission to a court but applies to the entire process.

Principle 3

The work of official public defenders constitutes a core aspect for strengthening access to justice and consolidating democracy.

Principle 4

Cost-free state-provided legal counsel services are fundamental to promoting and protecting the right of access to justice for all persons, particularly those who find themselves in a situation of vulnerability.

Principle 5

States have an obligation to remove obstacles that may impair or limit access to a public defender, in such a way as to ensure full and free access to justice.

Principle 6

The diversity of domestic systems of laws notwithstanding, it is important that public defender institutions be independent and functionally, financially, and budgetarily autonomous.

Principle 7

As part of their efforts to guarantee an efficient public service, States have a duty to ensure absolute respect for public defenders in the performance of their functions and their mandate to protect the interests of those whom they defend, without any interference or undue control from other branches of government that might undermine their functional autonomy.

Principle 8

The public defender services should not be limited to the criminal jurisdiction but, consistent with the legal framework of each State, should encompass legal assistance in all jurisdictions.

Principle 9

Without prejudice to the diversity of the legal systems of each country, it is important for Public Defender Offices to develop, within the framework of their independence, instruments to systematize and register cases of alleged torture and other inhuman, cruel, and degrading treatment that could function as tools for prevention strategies and policies, the main objective being to prevent violations of human rights of persons deprived of liberty, recognizing that public defenders are crucial actors in the prevention, reporting, and support of victims of torture and other inhuman, cruel, and degrading treatment.

Principle 10

Taking into account the legal systems of each country, States should promote the participation of public defenders in the Inter-American Human Rights System, so the right to a technical defense is exercised and guaranteed from the very first step in proceedings instituted against a person at the national level until, as applicable, the adoption of a judgment by the Inter-American Court of Human Rights.

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CJI/RES. 226 (LXXXIX-O/16)

PRINCIPLES AND GUIDELINES ON PUBLIC DEFENSE IN THE AMERICAS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

TAKING INTO ACCOUNT:

That the right to defense is a right recognized by all the universal and regional instruments on human rights;

That legal assistance is a guarantee for the exercise of this right and must be provided by the State;

That the General Assembly of the OAS has adopted five resolutions on the matter addressing the concepts mentioned before.

TAKING NOTE of the report of Dr. Fabián Novak Talavera "Principles and Guidelines on Public Defense in the Americas" (CJI/doc.509/16 rev.1) presented during the 89th regular session of the Inter-American Juridical Committee;

ALSO RECOGNIZING the importance of the visit of and exchange of views with the representatives of the Inter-American Association of Public Defenders (AIDEF) during the present regular session,

RESOLVES:

1. To approve the ten principles contained in the document "Principles and Guidelines on Public Defense in the Americas" (CJI/doc.509/16 rev.2), attached to the present resolution.

2. To transmit the present resolution and the attached document to the Permanent Council of the OAS, with the recommendation to submit the present resolution and the attached document to the OAS General Assembly approval of said principles.

The present resolution was approved unanimously in the session held on October 13, 2016, by the following members: Doctors David P. Stewart, Hernán Salinas Burgos, Fabián Novak Talavera, Ana Elizabeth Villalta Vizcarra, João Clemente Baena Soares, Carlos Mata Prates, Gélin Imanès Collot and José A. Moreno Rodríguez.

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9. Protection of Cultural Heritage Assets

	Document
CJI/doc. 507/16	Protection of Cultural Heritage Assets (Presented by Dr. Ana Elizabeth Villalta Vizcarra)

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

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

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

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

He explained that the common object of conventions on this theme is the definition of property. He proposed drafting a practical guide allowing states to approach the subject from two perspectives: preventive and recovery. He observed that nothing comes from nowhere, as there are some guidelines in the United Nations as well as in the UNESCO (the United Nations Organizations for Education, Science and Culture).

The Chairman congratulated Dr. Hernández for his clarity in the subject covered.

Dr. Salinas joined the Chairman in congratulating the Rapporteur and invited the members to provide their contributions, as time is short for producing the report. He suggested starting a workgroup to help back up the work of the rapporteur.

Dr. Villalta recalled the report on the Protection of cultural assets in situations of armed conflict (CJI/doc.451/14). She said that a report was presented showing ratifications to international treaties related to the subject (CJI/doc. 507/16).

Dr. Mata Prates also congratulated the rapporteur and proposed adopting a methodology including the distribution of the documents by e-means to facilitate interactions and analysis of the theme by other members.

Dr. Hernández García said that he expects to distribute the report before the next regular session.

The document presented by Dr. Villalta appears here under:

CJI/doc.507/16

PROTECTION OF CULTURAL HERITAGE ASSETS

(Presented by Dr. Ana Elizabeth Villalta Vizcarra)

I. MANDATE

Pursuant to resolution AG/RES. 2886 (XLVI-O/16), entitled International Law, approved by the General Assembly of the Organization of American States (OAS) on June 14, 2016, at its Forty-sixth Regular Session held in the Dominican Republic, our countries affirm their commitment under operative section iii thereof, **Protection of Cultural Heritage Assets,** to protect the cultural heritage of the Americas for future generations, recognizing that the entirety of cultural heritage, as defined in section 23 of the Mexico City Declaration on Cultural Policies, of August 1982, includes:

> *…the works of its artists, architects, musicians, writers, and scientists and also the work of anonymous artists, expressions of the people's spirituality, and the body of values which give meaning to life. It includes both tangible and intangible works through which the creativity of that people finds expression: language, rites, beliefs, historic places and monuments, literature, works of art, archives, and libraries.*

The Resolution takes note of the Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations of 1976 and the report approved by the Inter-American Juridical Committee on the "Model Legislation on Protection of Cultural Property in the event of Armed Conflict" (CJI/doc.403/12 rev. 5) of March 15, 2013. Furthermore, it expresses concern for the loss of cultural heritage due to the destruction, looting, and illicit trade of cultural assets, which necessitates a shared response and the creation of effective international cooperation mechanisms to combat it.

In this regards, it resolves:

> *1. To encourage the Member States of the Organization of American States that have not yet done so to consider acceding to the conventions of the United Nations Education, Science and Cultural Organization (UNESCO), as pertains to the protection of cultural assets, as well as the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954 and its additional protocols and the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects of 1995; and,*
>
> *2. To instruct the Inter-American Juridical Committee to study existing legal instruments, in both the inter-American and international systems, pertaining to the protection of cultural heritage assets in order to inform the Permanent Council, prior to the forty-seventh regular session, about the current status of existing regulations in this area to bolster the Inter-American legal framework in this area.*

In relation to the mandate prescribed, and having been the Rapporteur for the topic "Model Legislation on Protection of Cultural Property in the Event of Armed Conflict," a report has been prepared on the Status of Ratifications of Member States of the Organization of American States (OAS) of the instruments related to this subject both in the Inter-American as well as the International Systems. This report is to be presented at the 89th Regular Session to be held in Río de Janeiro, Brazil October 3-14, 2016.

II. REPORT

Thus, the Inter-American System took into account the Roerich Pact of 1935 and the Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations of 1976 known as the "Convention of San Salvador". In the international system, the following conventions approved in the framework of the UNESCO (United Nations Educational, Scientific, and Cultural Organization) have been analyzed: *the Hague Convention* of *1954* for the Protection of Cultural Property in the Event of Armed Conflict; the Protocol to *the Hague Convention* of *1954* for the Protection of Cultural Property in the Event of Armed Conflict, the Hague, May 14,

1954; the Second Protocol to *the Hague Convention* of *1954* for the Protection of Cultural Property in the Event of Armed Conflict, the Hague, March 26, 1999; the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, November 14, 1970; the Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972; Convention on the Protection of the Underwater Cultural Heritage of 2001; the *Convention* for the Safeguarding of the *Intangible Cultural Heritage of* 2003; Convention on the Protection and Promotion of the Diversity of Cultural Expressions of 2005. In the framework of UNIDROIT (International Institute for the Unification of Private Law), the *UNIDROIT Convention on Stolen or Illegally Exported* Cultural Objects of 1995, and in the framework of international criminal law, the Rome Statute of the International Criminal Court of 1998.

a) Inter-American System

The **ROERICH PACT** is a treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments. This instrument was borne out of the ideas that Nicolai Roerich had regarding the protection of cultural moments, given that as a result of the First World War many cultural works were destroyed and the instruments that existed at that time were insufficient for their protection. This Pact was signed in Washington, DC on April 15, 1935 by the 21 Member States of the Pan-American Union, which were: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States of America, Uruguay, and Venezuela.

THE CONVENTION ON THE PROTECTION OF THE ARCHEOLOGICAL, HISTORICAL, AND ARTISTIC HERITAGE OF THE AMERICAN NATIONS, KNOWN AS THE CONVENTION OF SAN SALVADOR, was signed in Santiago de Chile, on June 16, 1976, and was negotiated due to the looting and plundering of the native cultural heritage suffered by the countries of the Hemisphere, which has damaged and reduced the archeological, historical, and artistic wealth. The legacy of this cultural heritage must be transmitted to coming generations through the protection and preservation of such heritage through standards for protection and surveillance based on the principle of Inter-American cooperation. Although this agreement is of the greatest importance for the Continent, currently there are only 12 States Party: Argentina, Bolivia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, and Peru. This limited number of ratifications (all Latin American countries) of this Convention means greater awareness is needed about the importance of caring for and conserving the continent's cultural heritage, encouraging Member States of the Organization to consider becoming parties thereto.

b) The International System

In the framework of **UNESCO** we have ***THE HAGUE CONVENTION* OF *1954* FOR THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT.** The need to negotiate this Convention stemmed from the massive destruction of cultural heritage during the Second World War, and was the first international treaty with universal scope focused exclusively on protecting heritage in the event of armed conflict. The Convention was signed in The Hague, Holland, on May 14, 1954. Currently, 22 States of the Inter-American System are party to this Convention, which are: Argentina, Barbados, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, United States of America, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Uruguay, and Venezuela (the lion's share of ratifying countries are Latin American). This Convention has two Additional Protocols—the First from 1954 has been ratified by19 States from our Hemisphere, namely: Argentina, Barbados, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, and Uruguay (as can be seen, the majority are States from Latin America); the Second Protocol, from 1999, has been ratified by 18 States from the Americas: Argentina, Barbados, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic and Uruguay (as in the case above, most of the States are Latin American).

The **CONVENTION ON THE MEANS OF PROHIBITING AND PREVENTING THE ILLICIT IMPORT, EXPORT AND TRANSFER OF OWNERSHIP OF CULTURAL PROPERTY,** signed in Paris on November 14, 1970, has the aim of protecting existing cultural

property within States' territory against the dangers of theft, clandestine excavation, and illicit export. For the effective protection of this heritage close collaboration between States is required both at a national and international level. 25 States from the Inter-American System are party to this Convention, namely: Argentina, Bahamas, Barbados, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, United States of America, Grenada, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Uruguay, and Venezuela. (The important thing about this Convention is that in addition to the majority of Latin American countries, we also have *common law* countries.)

The **CONVENTION CONCERNING THE PROTECTION OF THE WORLD CULTURAL AND NATURAL HERITAGE**, signed in Paris on November 21, 1972, seeks to prevent the deterioration or disappearance of cultural and natural heritage assets in view of the magnitude and gravity of the new dangers threatening them. It is therefore incumbent on the international community as a whole to participate in the protection of the cultural and natural heritage of outstanding universal value by granting collective assistance. To this end it is essential to adopt new provisions in the form of a convention. 35 OAS Member States are parties to this Convention, namely: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Ecuador, El Salvador, United States of America, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Saint Kitts and Nevis, Santa Lucia, Suriname, Saint Vincent and the Grenadines, Trinidad and Tobago, Uruguay, and the Bolivarian Republic of Venezuela.

The **CONVENTION ON THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE** was signed in Paris on November 3, 2001. The purpose of the Convention is to protect and preserve underwater cultural heritage as an integral part of the cultural heritage of humanity and as a particularly important element in the history of peoples. Given the threats it faces due to unauthorized activities, stronger measures are required to prevent such activities, through the codification and progressive development of rules to protect and preserve this heritage. Currently, 18 States from the Americas are States Party to this Convention—Antigua and Barbuda, Argentina, Barbados, Cuba, Dominica, Ecuador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Panama, Paraguay, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and Trinidad and Tobago (A particularity of this Convention is that it has States Party that are both common law as well as Latin American countries.)

The ***CONVENTION* FOR THE SAFEGUARDING OF THE *INTANGIBLE CULTURAL HERITAGE,*** *which was signed in Paris on October 17, 2003, seeks to highlight the importance of intangible cultural heritage — a mainspring of cultural diversity and a guarantee of sustainable development. Indeed, there is common concern about safeguarding humanity's intangible cultural heritage, and consequently, a binding multilateral instrument is needed that aims to safeguard this heritage, in a spirit of cooperation and mutual assistance. 31 countries from the Inter-American System are States Party to this Convention, namely:* Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, Uruguay, and Venezuela, (There are four common law countries what have not ratified this Convention — United States, Canada, Guyana, and Suriname).

The **CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS** was signed in Paris on October 20, 2005. The Convention seeks to affirm that cultural diversity is a defining characteristic of humanity, constituting a common heritage of humanity, which should be cherished and preserved for the benefit of all. Consequently, it is necessary to incorporate culture as a strategic element in national and international development policies, as well as in international development cooperation, taking into account that culture takes diverse forms across time and space and that this diversity is embodied in the uniqueness and plurality of the identities and cultural expressions of the peoples and societies making up humanity. Given the foregoing, an international treaty must provide for its preservation and protection. 33 OAS Member States are party to this Convention—Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Ecuador, El

Salvador, Grenada, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, Uruguay, and the Bolivarian Republic of Venezuela. (Only two common law countries, the United States and Suriname, are not parties thereto).

*The **UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED*** **CULTURAL OBJECTS**, signed in Rome on June 24, 1995, has the aim of protecting cultural heritage and exchanges to promote understanding among peoples, as well as disseminating culture for the well-being of humanity and the progress of civilization. To this end, it is necessary to contribute effectively to the fight against illicit trade in cultural objects by establishing common, minimal legal rules for the restitution and return of cultural objects between Contracting States, with the objective of improving the preservation and protection of cultural heritage for the benefit of humanity. Only 11 countries from the Inter-American System are Parties to this important Convention, namely: Argentina, Bolivia, Brazil, Colombia, Ecuador, El Salvador, Guatemala, Honduras, Panama, Paraguay, and Peru (only Latin American countries).

The **ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT** was signed in Rome on July 17, 1998. This instrument recognizes that grave crimes threaten the peace, security and well-being of the world, and affirms that the most serious crimes of concern to the international community as a whole must not go unpunished. To this end, their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, thus contributing to the prevention of new crimes. It has therefore been necessary to establish an International Criminal Court that is a permanent institution and has jurisdiction over the most serious crimes of international concern. 29 OAS Member States are party to this Convention—Antigua and Barbuda, Argentina, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Honduras, Mexico, Panama, Paraguay, Peru, Dominican Republic, Saint Kitts and Nevis, Saint Lucia, Suriname, Saint Vincent and the Grenadines, Trinidad and Tobago, Uruguay, and the Bolivarian Republic of Venezuela (only the Bahamas, Cuba, United States, Haiti, Jamaica, and Nicaragua are not States Party). This Convention was taken into account because in keeping with the Rome Statute the destruction of property that is not a military objective is a war crime, and therefore under the jurisdiction of the International Criminal Court.

III. REFLECTIONS

As can be seen from the conventions signed in the inter-American system, the Roerich Pact of 1935 was signed by all the States that at the time were part of the American [*sic*] Union (predecessor of the OAS) while the Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations of 1976 known as the "Convention of San Salvador" has only been ratified by 12 OAS Member States. Thus, the remaining countries in the continent must assess the need to ratify them, given their importance for protecting cultural heritage assets for humanity.

In the international system the UNESCO conventions that have the least number of ratifications are *the Hague Convention* of *1954* for the Protection of Cultural Property in the Event of Armed Conflict and its two Additional Protocols of 1954 and 1999, to which most States Party from the Americas are from the Latin American region. The other UNESCO conventions have a greater number of States Party both from civil law (Latin American) as well as common law countries.

The international convention that indeed has few States Party is the *UNIDROIT Convention on Stolen or Illegally Exported* Cultural Objects, to which currently only 11 countries, all from Latin America, are States Party.

As for the Rome Statute that created the International Criminal Court, this Convention was taken into account because the crimes under the jurisdiction of the Court are: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. Specifically, destruction of property not justified by military necessity is a war crime under the jurisdiction of this Court. 29 of the States Party to this Convention are from the Americas.

This initial analysis of all these Conventions, whose purpose is the protection of cultural heritage assets, demonstrates that greater dissemination of such Conventions is needed, above all in

common law countries. This is necessary in order to highlight their relevance in promoting and protecting these assets, which are of the highest significance for humanity as a whole and which, furthermore, entail a commitment to future generations.

A table of all these conventions has been prepared with their corresponding States Party so that there can be greater understanding of the current status of the instruments in force as regards the Member States of the Organization of American States (OAS). Dr. Lucas Lixinski, Senior Lecturer at the University of Australia, collaborated on the preparation of this table.

IV. TABLA DE ESTADOS PARTE EN EL CONTINENTE AMERICANO DE TRATADOS RELATIVOS A LA PROTECCIÓN DE BIENES CULTURALES PATRIMONIALES EN EL SISTEMA INTERAMERICANO Y EN EL SISTEMA INTERNACIONAL

Estado de Ratificación y de depósitos de Instrumentos de Ratificación de Tratados sobre Protección del Patrimonio Cultural por los Países Miembros de la OEA, tanto en el marco universal como regional.

	Interamericanas		**UNESCO**								**UNIDROIT**	**CPI**
País	Roerich	Convención de San Salvador 1976	Convención Haya de 1954	Protocolo 1 Haya de 1954 deposito	Protocolo 2 Haya de 1999	Objetos 1970	Patrimonio Mundial	Patrimonio Subacuático	Patrimonio Inmaterial	Diversidad Cultural 2005	1995	
Antigua y Barbuda							01/11/1983	25/04/2013	25/04/2013	25/04/2013		18/06/2001
Argentina	15/04/1935	27/05/2002	22/03/1989	10/05/2007	07/01/2002	11/01/1973	23/08/1978	19/07/2010	09/08/2006	07/05/2008	03/08/2001	08/02/2001
Bahamas						09/10/1997	15/05/2014		15/05/2014	29/12/2014		
Barbados			09/04/2002	02/10/2008	02/10/2008	10/04/2002	09/04/2002	02/10/2008	02/10/2008	02/10/2008		10/12/2002
Belize							06/11/1990		04/12/2007	24/03/2015		05/04/2000
Bolivia	15/04/1935	17/01/2003	17/11/2004			04/10/1976	04/10/1976		28/02/2006	04/08/2006	13/04/1999	27/06/2002
Brasil	15/04/1935		12/09/1958	12/09/1958	23/09/2005	16/02/1973	01/09/1977		01/03/2006	16/01/2007	23/03/1999	07/05/2002
Canadá			11/12/1998	29/11/2005	29/11/2005	28/03/1978	23/07/1976			28/11/2005		07/07/2000
Chile	15/04/1935		11/09/2008	11/09/2008	11/09/2008	18/04/2014	20/02/1980		10/12/2008	13/03/2007		29/06/2009
Colombia	15/04/1935		18/06/1998	18/06/1998	24/11/2010	24/05/1988	24/05/1983		19/03/2008	19/03/2013	14/06/2012	05/08/2002
Costa Rica	15/04/1935	14/05/1980	03/06/1998	03/06/1998	09/12/2003	06/03/1996	23/08/1977		23/02/2007	15/03/2011		07/06/2001
Cuba	15/04/1935		26/11/1957	26/11/1957		30/01/1980	24/03/1981	26/05/2008	29/05/2007	29/05/2007		
Dominica							04/04/1995		05/09/2005	07/08/2015		12/02/2001
Ecuador	15/04/1935	31/08/1978	02/10/1956	08/02/1961	02/08/2004	24/03/1971	16/06/1975	01/12/2006	13/02/2008	08/11/2006	26/11/1997	05/02/2002
El Salvador	15/04/1935	27/06/1980	19/07/2001	27/03/2002	27/03/2002	20/02/1978	08/10/1991		13/09/2012	02/07/2013	16/07/1999	03/03/2016
Estados Unidos de América	15/04/1935		13/03/2009			02/09/1983	07/12/1973					
Grenada						10/09/1992	13/08/1998	15/01/2009	15/01/2009	15/01/2009		19/05/2011
Guatemala	15/04/1935	24/10/1979	02/10/1985	19/05/1994	04/02/2005	14/01/1985	16/01/1979	03/11/2015	25/10/2006	25/10/2006	03/09/2003	02/04/2012
Guyana							20/06/1977	28/04/2014		14/12/2009		24/09/2004
Haití	15/04/1935	28/10/1983				08/02/2010	18/01/1980	09/11/2009	17/09/2009	08/02/2010		
Honduras	15/04/1935	15/04/1983	25/10/2002	25/10/2002	26/01/2003	19/03/1979	08/06/1979	23/07/2010	24/07/2006	31/08/2010	08/05/1998	01/07/2002
Jamaica							14/06/1983	09/08/2011	27/09/2010	04/05/2007		
México	15/04/1935		07/05/1956	07/05/1956	07/10/2003	04/10/1972	23/02/1984	05/07/2006	14/12/2005	05/07/2006		28/10/2005
Nicaragua	15/04/1935	06/02/1980	25/11/1959	25/11/1959	01/06/2001	19/04/1977	17/12/1979		14/02/2006	05/03/2009		
Panamá	15/04/1935	10/05/1978	17/07/1962	08/03/2001	08/03/2001	13/08/1973	03/03/1978	20/05/2003	20/08/2004	22/01/2007	26/06/2009	21/03/20002
Paraguay	15/04/1935	20/06/1906	09/11/2004	09/11/2004	09/11/2004	09/11/2004	27/04/1988	07/09/2006	14/09/2006	30/10/2007	27/05/1997	14/05/20001
Perú	15/04/1935	28/11/1979	21/07/1989	21/07/1989	24/05/2005	24/10/1979	24/02/1982		23/09/2005	16/10/2006	05/03/1998	10/11/20001
República Dominicana	15/04/1935		05/01/1960	21/03/2002	03/03/2009	07/03/1973	12/02/1985		02/10/2006	24/09/2009		12/05/20005
Saint Kitts y							10/07/1986	03/12/2009	15/04/2016	26/04/2016		22/08/2006

Nevis										
Santa Lucía						14/10/1991	01/02/2007	01/02/2007	01/02/2007	18/08/2010
Suriname						23/10/1997				15/07/2008
San Vicente y las Granadinas						03/02/2003	08/11/2010	25/09/2009	25/09/2009	03//12/2002
Trinidad y Tobago						16/02/2005	27/07/2010	22/07/2010	26/07/2010	06/04/1999
Uruguay	15/04/1935	24/09/1999	24/09/1999	03/01/2007	09/08/1977	09/03/1989		18/01/2007	18/01/2007	28/06/20002
Venezuela (República Bolivariana de)	15/04/1935	09/05/2005			21/03/2005	30/10/1990		12/04/2007	28/05/2013	07/06/2000

10. Conscious and effective regulation of business in the area of human rights

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

> Compilation of good practices, and initiatives, legislation, jurisprudence and challenges to be used in identifying alternatives for approaching the subject, to be considered by the Permanent Council within one year; in addition, request the Organs of the Inter-American System of Human Rights to provide their input and expertise to the process (document AG/RES. 2887 (XLVI-O/16)).

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

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OTHER TOPICS

1. Considerations Reflection on the work of the Inter-American Juridical Committee: compilation of topics of Public and Private International Law

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

During the 87th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2015), the space for reflection that began at the previous session carried on. On that occasion, Dr. Correa Palacio introduced document CJI/doc.484/15, "Considerations on the Work of the Inter-American Juridical Committee: compilation of topics of interest," which covers three focuses of work: 1) procedural work; 2) substantive work; and 3) topics suggested by other Committee Members. The first group includes considerations of a procedural nature of the Inter-American Human Rights Protection System, which emerge from dialogue held with the President of the Inter-American Court of Human Rights. She also encouraged inclusion of concerns expressed by Secretary General Luis Almagro regarding the issue of access to justice and equity.

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

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

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

Finally, she referred to some of the issues discussed on the meeting with experts on Private International Law (Washington D.C., April 4, 2016), such as the continuation of the Committee's work on Simplified Joint Stock Companies, the compilation of commercial practices, and drafting guidelines on Private International Law.

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

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

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

He expressed concerns of addressing sensitive Human Rights without incorporating issues relating to Public and Private International Law.

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

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

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

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

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

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

Dr. Arrighi stated that in his view the Inter-American Specialized Conference on Private International Law process, as practiced thus far, had run its course. He noted, too, that the CIDIPs had emerged as a substitute for the quest for a general codification when the latter had proved unable to resolve the problems that arose some 30 or 40 years ago (e.g., the Bustamante Code). The CIDIPs were designed to establish specific codifications. That had been an eminently Latin American project. The final moment for CIDIP had come with the discussion of consumer rights issues which had

mixed public law and private law with mandatory rules, with States governed by civil law and common law. Given that scenario, the CIDIP was not permitted to handle the topic.

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

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

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

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

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

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

Dr. Correa proposed focusing on a provisional agenda of substantive issues.

It is worth mentioning that the activities and meetings hold in Washington, D.C. during the 88th Regular Session allowed the Committee to receive suggestions for topics for a possible multi-year agenda. Valuable inputs were obtained from the realization of the roundtable with experts on Private International Law, the meeting with the Secretary General, and the participation of members in a meeting before the Committee on Political and Juridical Affairs.

During 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, October 2016), Dr. Ruth Correa mentioned the previous discussions of the Committee members about proposals of new themes, which were received during the last two years, with the aim of preparing a pluriannual agenda.

She highlighted that the list presented in her first report, document CJI/doc. 484/15 rev.1, is a compilation of the topic already mentioned and that Members should use it only as a reference.

She informed that the following themes are still included in the proposal of pluriannual agenda, and that they had been suggested by the members of the Committee:

Soon afterwards, she listed the topics that emerged from the meeting of International Private Law held on the occasion of the 88th Regular Session in April 2016, in Washington, D.C.:

1. Commercial usage and customs;
2. Electronic commerce;
3. Compilation of commercial customs/usage;
4. Rights of consumers;
5. E-commerce;

6. E-payments;
7. Online Resolution of Disputes, the CNUDMI/UNCITRAL principles;
8. Law conflicts in cross-bordering topics;
9. Revision on the perspective of the Americas on the Hague Conference proposed Draft text on recognition foreign decisions;
10. Revision of the themes approved in the CIDIPs;
11. Take up again the discussion of the theme on simplified stock societies/companies.

Dr. Correa explained that all the topics suggested at the meeting with the representatives of the juridical counsellors of the Ministries of foreign Affairs held on 5 October, 2016, are already included in the above list. However, are repeated below for practical purposes:

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

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

Dr. Salinas proposed the following criteria order for the following topics:

1 mandates of the General Assembly;

2 equilibrium between International Public Law and International Private Law;

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

4 assessing the juridical nature of international instruments.

The topic mentioned by Dr. Galindo should be included in the list of themes to be addressed by the Committee, under the coordination of Dr. Correa. Dr. Galindo is the legal counsel for Brazil in the field of inter-institutional agreements.

The Chairman proposed members to reorganize the suggestions provided by Dr. Ruth Correa in areas such as: human rights, democracy, and international private law, among others. In addition to grouping the topics by areas, priorities should be also established.

Dr. Hernández Garcia proposed developing the topics within a time-framing program, in order to submit a better finished result to the General Assembly. Dr. Salinas added the following criteria to those detailed above:

1 Precision is a must when themes are formulated. For example, in the area of the rights of indigenous peoples, that offers varied facets in view of its widespread nature. This is why the definition of areas/parts to be studied is needed, in addition to their different aspects;

2 themes should be practically useful;

3 Taking into consideration the expertise of each member in order to provide contributions and also to strengthen the result of the work carried out, taking into account the theme´s sophistication;

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

5 studies must be useful for the OAS, and provide added value to the work of the organization.

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

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

In a following meeting, the Chairman referred to the list of topics for the multi-annual agenda of the Juridical Committee with the priorities according to consensus that had been drafted on previous sessions. He further recalled that the suggestions made during the meeting with the representatives of the legal counsels of the Ministries of Foreign Relations of the member countries have been included. In this context, he presented the following three-part list:

Mandates of the General Assembly:

- Protection of cultural heritage, and
- Companies, the environment and human rights.

Private International Law topics:

- International Consumer Protection;
- Alternative means for the resolution of disputes (online resolution of disputes and others); and,
- Commercial usage and customary law.

Public International Law topics:

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

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

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

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

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

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

The President recalled that, according to the agreement of the members, the issue of International Contracts must be approved in March, and that there will be room for another topic on Private International Law.

Dr. Villalta stated that the working agenda now has two items of Private International Law on it, and that these items address complex matters and, therefore she suggested leaving pending for a later date the analysis of new initiatives.

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

The Chairman said he was in agreement with Dr. Moreno´s proposal. As regards the search for balance between Private and Public International Law, he urged to take into account the specializations of each one of the members of the Juridical Committee.

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

The President explained that this issue had been brought up by the representatives of the legal advisors of the Ministries of Foreign Affairs and mentioned as one of their most pressing problems. He explained that various organs of governments are signing agreements with entities from other States that often create or infringe international obligations.

Dr. Moreno explained that this is also an issue of Private International Law.

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

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

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

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

Dr. Collot mentioned that there are two very important issues in the proposed Agenda: cyber-security and immunities of international organizations. He explained that some people benefit from immunities, and that in this respect is important to understand the possible liability mechanisms. He

exemplified by a real case, where a member of an international organization killed a person while driving a car with the logo of the organization. He sought protection under the immunity of the organization. The case was judged and a penalty imposed on the organization, having also its accounts under embargo. However, it never went beyond, and finally the Haitian government intervened and compensated the victim; hence the importance of concentrating on procedures.

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

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

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

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

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

1. Topics of Private International Law:

- Resolution of disputes on consumer issues; and,

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

2. Topics of Public International Law:

- Protection of marine environment and State responsibility;

- Cyber security; and,

- Legal standing of interinstitutional agreements of an international character.

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

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

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

As there were no other objections, a list of new issues was approved in two areas:

1. Topics of Private International Law:

- Resolution of Disputes on consumer issues; and,
- Principles, usage, customs and practices in international procurement.

2. Topics of Public International Law:

- Protection of the marine environment and State responsibility;
- Cyber-security; and,
- Legal standing and effects of interinstitutional agreements of an international character.

2. Privacy and data protection

Document	
CJI/doc. 503/16	Privacy and data protection (Presented by Dr. David P. Stewart)

At the forty-third regular session of the OAS General Assembly (La Antigua, Guatemala, June 2013), the Inter-American Juridical Committee was instructed by Resolution AG/RES. 2811 (XLIII-O/13) *"to prepare proposals for the Committee on Juridical and Political Affairs on the different ways in which the protection of personal data can be regulated, including a model law on personal data protection, taking into account international standards in that area."*.

At the 83rd Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2013) the Committee designated Dr. David P. Stewart as Rapporteur for the topic.

At the 86th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, March, 2015), the Inter-American Juridical Committee adopted the report on Privacy and Personal Data Protection, approved as document CJI/doc. 474/15 rev. 2.

At the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, October 2016), Dr. Stewart, who had acted as Rapporteur for the topic, presented a brief report on the recent developments on the matter (document CJI/doc.503/16) in the hope that it may represent a follow-up to the report preciously adopted by the Committee. The document mentions actions taken by the European Parliament, Council and Commission and reminds of the new edition of the Data Protection Law on the Word Manual (published by DLA Piper) (2016).

Besides expressing his satisfaction for the resolution of the OAS General Assembly on the report of the Committee, Dr. Stewart also said he would like to see it adopted by the OAS Member States.

He urged the Committee to follow-up on this theme taking into account all the recent developments, which will impact the Committee´s work regarding the approved principles, considering that his mandate finishes in December 2016.

The Chairman proposed seeing the appropriateness of having a Rapporteurship or maintaining a subject under observation, allowing the Committee to mark presence and formulate pertinent answers.

The document presented by Dr. Stewart appears hereunder:

CJI/doc.503/16

PRIVACY AND DATA PROTECTION

(Presented by Dr. David P. Stewart)

At the 86th Regular Session of the Inter-American Juridical Committee (IAJC), held in Rio de Janeiro in March 2015, the Committee adopted its report of Privacy and Data Protection (CJI/doc. 474/15 rev. 2), which included a proposed statement of principles for privacy and personal data protection in the Americas with annotations. That report was forwarded to the OAS General Assembly for its consideration. With regard to that report, the following information is provided for the benefit of the Members of the Committee.

On December 15, 2015, the European Parliament, the Council and the Commission reached agreement on new data protection rules intended to establish a modern and harmonized data protection framework across the European Union. On April 8, 2016 the Council of the European

Union adopted the revised Regulation and Directive on privacy and data protection as part of the implementation of it so-called Digital Single Market Strategy. The instrument known as the General Data Protection Regulation (GDPR) and related Directive were adopted by the European Parliament on April 14, 2016. The Regulation entered into force on May 24, 2016.

On July 12, 2016 the Commission adopted its decision on the EU-U.S. "Privacy Shield," the new framework protecting the fundamental rights of individuals in the EU whose personal data is transferred to the United States. That arrangement replaces the previous EU-US "Safe Harbour" arrangement, which the EU Court of Justice had declared invalid on October 6, 2015. The new arrangement includes strong data protection obligations on companies receiving personal data from the EU, safeguards on U.S. government access to data, effective protection and redress for individuals, and annual joint review to monitor the implementation. The Commission's "adequacy" decision may be found at http://ec.europa.eu/justice/data-protection/files/privacy-shield-adequacy-decision_en.pdf. "Privacy Shield" became operational on August 1, 2016.

A new edition of the Data Protection Laws of the World Handbook (published by the law firm DLA Piper) (2016) has been published and is now available at https://www.dlapiperdataprotection.com/#handbook/about-section.

3. Guide for the protection of stateless persons

Document	
CJI/doc.488/15 rev.2	Guide for the protection of Stateless Persons. (Presented by Dr. Carlos Mata Prates)

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

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

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

At the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, October 2016), Dr. Mata Prates, who acted as rapporteur of the theme in the past, provided some remarks to the comments submitted to the report of the Committee on the protection of stateless persons by the United Nations High Commissioner for Refugees (UNHCR).

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

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

UNHCR manual as well as to guiding criteria for the States, such as the decisions and rulings of the inter-American system for the promotion and protection of human rights.

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

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

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

- 1954 Statute of Stateless Persons;
- 1961 Convention for the reduction of statelessness; and,
- American Convention of Human Rights (Article 25).

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

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

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

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

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

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

Dr. Mata Prates thanked Dr. Stewart for his suggestion not to mention the UNHCR, in which case it may be suppressed.

As regards the comments of the Chairman, as we approach the date for the UNHCR meeting with the aim of updating its model law, there would be no inconvenience in waiting for the results of said meeting in order to include the status of the question after introducing the amendments.

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

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

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

The Chairman proposed the following in terms of actions regarding the topics mentioned by Committee members:

- It was agreed to pay attention to the result of the UNHCR meeting and introduce and update them when necessary;
- Include the resolution adopted by the General Assembly in Santo Domingo;
- In matters involving decisions, introduce a determination in relation to the cases addressed by the Court, both decisions as well as consultative opinions, making a distinction between penalties and responsibility of the State vis-à-vis the criteria issued by the Court, in order to alleviate the rapporteur´ concerns; and,
- Clarify the issue raised by Dr. Stewart regarding the setting up of a new organ.

The document presented by Dr. Mata Prates appears hereunder:

CJI/doc.488/15 rev.2

GUIDE ON THE PROTECTION OF STATELESS PERSONS

(Presented by Dr. Carlos Mata Prates)

I. INTRODUCTION

1. The General Assembly of the Organization of American States (OAS) asked the Inter-American Juridical Committee (IJC), in the resolution "AG/RES. 2826 (XLIV-O/14), to prepare a "Guide on the Protection of Stateless Persons".

2. The Inter-American Juridical Committee assigned Dr. Carlos Mata Prates as rapporteur of the theme, during its 85th regular session.

3. Accordingly, this rapporteurship meets the requirements of the request made by the General Assembly of the OAS.

II. PURPOSE OF THIS REPORT

4. In accordance with the provisions set forth in the Resolution of the General Assembly of the OAS, what is requested or required is a *Guide on the Protection of Stateless Persons*, in other words, suggestions as to the establishing of some procedures, or even the approving of norms that enhance the efficacy and efficiency – assuming that the paramount principle is to protect such people who are in circumstances that pose a high degree of risk - when concrete measures are taken concerning questions on statelessness presented for the appreciation of the American States.

5. The above remarks do not excuse us from exploring the theoretical study of this problem - statelessness – on which a normative consensus already exists in today's international law, besides an extensive bibliography in the Americas and elsewhere.

6. Likewise, it is fitting that since the early 50's, when statelessness was recognized as a world problem, the Office of the United Nations High Commissioner for Refugees (UNHCR), was designated by the General Assembly of the United Nations as an organ entrusted with the avoidance and reduction of statelessness.

7. According to the precisions developed, the following report on the topic is hereby presented.

III. THEORETICAL FRAMEWORK

8. It must be considered that this report assumes the development carried out in respect to norms, with special reference to those contained in the **Universal Declaration of Human Rights (1948)**, the **Convention relating to the Status of the Stateless Persons (1954)** and the **Convention on the Reduction of Statelessness (1961)**.

9. As regards the American juridical instruments, special emphasis was placed on the contents of the **American Declaration of the Rights on Duties of Man (1948)** and the **American Convention on Human Rights (1969)**, where article 20 deals with the question.

10. It is also appropriate to consult the **Model Law for the Protection of Stateless Persons of the United Nations High Commissioner for Refugees (2012)**.

11. Finally, mention must be made of the study presented by the Member of the Inter-American Juridical Committee, Dr. José Luis Moreno Guerra, entitled **Measures Recommended for the States of the Americas to Prevent Statelessness (CJI/doc.482/15)** and the **Support Document on Statelessness (2015)** prepared by the Department of International Law of the OAS.

IV. METHODOLOGY

12. The comments above propose that this study is essentially practical in nature for the purpose of dealing with resolving a problem such as protecting stateless persons in an efficacious and efficient manner.

13. The methodology used was designed to gain familiarity with the panorama of the American States on the issue of the norms and practices they employ on the question related to protecting stateless persons. A *questionnaire* was drawn up and sent to the States in order to survey the situation based on the answers received and consequently carry out an analysis.

V. STATELESS PERSONS

14. A preliminary aspect to be considered refers to the concept of nationality. On this matter, the idea that is usually accepted is that *nationality* is a natural bond between an individual and a State, and that the rights and duties of both subjects are derived from this.

15. This juridical bond is in general regulated by the Constitutional Law of each State, whereas International Law converges with different norms in order to avoid or resolve conflicts such as positive or negative nationality.

16. Contemporary International Law recognizes the legitimacy of nationality being attributed by the States, applying the criteria of *jus soli* – acknowledging this bond for individuals born in the territory of the State; *jus sanguine* – acknowledging this bond for individuals who are the offspring of nationals regardless of the place of birth; and *jus labor* –acknowledging nationality based on the place where the individual works.

17. It should be borne in mind that despite the various criteria considered by contemporary International Law as legitimate, a negative conflict of nationality appears, in other words, when those persons that do not have any nationality and consequently are in a position of extreme vulnerability that calls for international law to intervene in order to prevent such situations or, if such situations become concrete, to find solutions to protect such persons.

18. With regard to the Convention relating to the Status of Stateless Persons (1954), article 1 states that: *"**DEFINITION OF THE TERM "STATELESS"** 1. For the purpose of this Convention, the term "stateless person" means a person who is not considered as a national by one State under the operation of its law."* This is the definition accepted by doctrine and jurisprudence.

19. The causes of people finding themselves in a situation of statelessness are multiple, for instance *de jure* stateless – those who do not obtain nationality automatically or by individual decision according to the legislation of a State – and *de facto* stateless – individuals who cannot

establish their nationality. In turn, among these individuals are those who had a nationality and lost it by a judicial sentence or administrative act in systems that allow this, or else renounce their nationality, and those cases where an individual has been unable to gain any nationality. For the effects of this report, as well as for doctrine and jurisprudence, both situations are considered capable of being assimilated to allow due protection.

20. In this respect and as a guiding criterion on the matter, as regards American international law, it must be remembered what article 20 of the American Convention on Human Rights (1969) prescribes, *"**Right to Nationality.** 1. Every person has the right to a nationality. 2. Every person has the right to the nationality of the State in whose territory he was born, if he does not have the right to any other nationality. 3. No one shall be arbitrarily deprived of his nationality or of the right to change it"*.

21. It bears repeating that the American Convention on Human Rights (1969) is a juridical instrument of a conventional nature and – given its high degree of acceptance as well as the passing of time – it must be considered that by now it has acquired the characteristics of common law.

VI. ANALYSIS OF THE ANSWERS TO THE QUESTIONNAIRE SENT OUT

22. A questionnaire was sent out to the American States with four questions on the topic under discussion: 1) *Is your country a signatory or has it ratified the Convention on the Reduction of Statelessness dated August 30, 1961?*; 2) *Indicate the practice in your State in statelessness cases*; 3) *Identify the national authority in charge of cases of statelessness*; 4) *Send the domestic legislation in your country on the topic, as well as any other documentation considered relevant*.

23. The following States provided responses to the above questionnaire: Argentina; Colombia; Costa Rica; Ecuador; El Salvador; Honduras; Paraguay; Peru, United States of America and Uruguay.

24. We must also report that the countries that have already ratified the Convention on the reduction of Statelessness (1961): Colombia; Uruguay (2); Argentina; Peru; Costa Rica; Paraguay (2); Ecuador; and Honduras (2). The United States of America and El Salvador are not parties to this Convention (however, El Salvador has ratified the Statute for Stateless Persons).

25. From the analysis of the responses forwarded it is clear that different situations appear regarding the organic aspect when dealing with statelessness cases (the Ministry of Foreign Affairs of Colombia, Costa Rica and Peru; in Argentine and Uruguay, the Commission of Refugees; in the United States of America and Honduras the organ in charge is the Migrations Secretariat, whilst in Ecuador and Paraguay there no specific authority to deal with those situations).

26. All the States that answered the questionnaire report that there is supplementary domestic legislation to the 1961 Convention and that all of them follow different procedures for resolving cases of stateless persons.

27. The responses received allow us to say that at the normative level the trend is to adhere to instruments aimed at avoiding or resolving the problems caused by statelessness. However, if we consider the responses received and the number of States Party to the OAS, this fact refrains us from drawing comprehensive conclusions about the reality of the Continent in this specific issue.

VII. PROPOSED GUIDE ON THE PROTECTION OF STATELESS PERSONS

28. In response to the request of the General Assembly, we suggest that OAS Member States adopt the following *Guide on the Protection of Stateless Persons*:

<u>At the normative level:</u>

<u>Ratifying or adhering to:</u>

- the Convention relating to the Statute of Stateless Persons (1954); and

- the Convention on the Reduction of Statelessness (1961).

<u>Approving the following:</u>

- Model Law on the Protection of Stateless Persons of the United Nations High Commissioner for Refugees (2012);
- Regulation for enforcing the provisions of the Conventions when required by the respective juridical system.

At the level of strategic framework:

- a world plan to put an end to the stateless (2014-2024)
- Declaration of Brasilia (2010)
- Manual on the Protection of Stateless Persons (UNHCR Manual)
- Decisions of the Inter-American Court of Human Rights
- Consulting Opinions of the Inter-American Court of Human Rights

At the organic and procedural levels:

- Establishing an accessible procedure for the protection of stateless persons, applying the principle of informality in favor of the stateless person and providing a reasonable time-frame.
- Taking into consideration the vulnerable situation of stateless persons, which calls for addressing the situation by applying the principle of protecting human beings.
- Acknowledging the status of the stateless person must include granting documentation to allow access to basic services (healthcare, and so on).
- Such acknowledgement will enable the stateless person to enjoy access to employment in the State where he/she resides.
- A specialized agency should be set up for the attention of situations of the stateless for the purposes of offering a service concerning the protection of the human rights involved.

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CHAPTER III

OTHER ACTIVITIES

ACTIVITIES CARRIED OUT BY THE INTER-AMERICAN JURIDICAL COMMITTEE DURING 2016

A. Presentations of Members of Committee in other *fora*

Document	
CJI/doc.511/16	Report on the presentation by the Inter-American Juridical Committee of the OAS at the United Nation's International Law Commission: Reactions and Participation by the Members of the International Law Commission (ILC) (Presented by Dr. Gélin Imanès Collot)

During the 88th Regular Session of the Inter-American Juridical Committee (Washington D.C., United States, April, 2016), Dr. Salinas reported on his participation in a meeting of the African Union Commission on International Law, which took place in Addis Ababa, Ethiopia, in October 2015. He explained that at the time of his participation the central theme was "challenges of the African Union to ratification of international treaties." He mentioned that the most important topic of this meeting to the Juridical Committee was linked to its historical role and practices of other international organizations for ratification and implementation of international treaties.

In turn, Dr. Stewart brought up his participation at a joint meeting with the Inter-American Commission on Human Rights and the Office of the Special Rapporteur for Freedom of Expression, held at OAS headquarters in Washington, where the topic of privacy and personal data protection was addressed. He mentioned that many of those in attendance questioned the way of viewing privacy and the level of personal data protection suggested by the Committee. Consequently, it was necessary to explain that the aim of the guide was to establish a common minimum standard.

Additionally, an oral report was presented about his participation at the experts' workshop on the topic of "Big Data in the Global South". He noted that the event was hosted by Technology and Society Institute of Rio (ITS Rio) and took place in Rio de Janeiro in October 2015. He explained that the discussion dealt with specific aspects of the Guide to Privacy and Personal Data Protection; however, most of the discussion was about specific issues pertaining to the risks to privacy as a result of data mining of "big data."

Then, at the 89th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, October 2016), Dr. Novak (Chairman of the Committee) reported on his participation at the regular session of the General Assembly in Santo Domingo, Dominican Republic. It was clear to him that this meeting is a fine opportunity to explain to the Member States about recent developments in the activities of the Committee and to remind them of the interest of the Committee in learning their opinion on follow-up to the agenda items completed and approved by the Juridical Committee. It is also an opportunity to respond to doubts and questions arising during the formal meeting as well as in informal settings such as hallway conversation.

Next, Dr. Collot shared details of his visit to the UN International Law Commission in representation of the Juridical Committee. He underscored the interest of the Members of this Commission in learning about the work of the Inter-American Juridical Committee. He addressed the items on the Committee's agenda specifically highlighting the following ones: representative democracy; immunity of States and of international organizations; and consumer protection.

Lastly, Dr. Villalta mentioned her presentation at the International Round Table on "the Status of Access to Justice in Latin America from an International Perspective," which took place on January 29, 2016 in Panama.

The report submitted by Dr. Collot to the UN International Law Commission (CJI/doc.511/16) appears hereunder:

CJI/doc.511/16

REPORT ON THE PRESENTATION BY THE INTER-AMERICAN JURIDICAL COMMITTEE OF THE OAS AT THE UNITED NATION'S INTERNATIONAL LAW COMMISSION: REACTIONS AND PARTICIPATION BY THE MEMBERS OF THE INTERNATIONAL LAW COMMISSION (ILC)

(Presented by Dr. Gélin Imanès Collot)

The UN's International Law Commission (ILC) held one of their working sessions in late May, specifically during the period 23-27 May 2016. We were designated delegates by the Inter-American Juridical Committee to present a report – on May 26 – to exchange views with our peers at the United Nations on the questions raised in the document.

As scheduled, at 10 am on Thursday 26 May, we were received by the Chairman of the International Law Commission, who welcomed as in a calm and friendly environment. We were introduced to our peers in the session. Some 30 jurists were present and filled the room.

Our presentation consisted in the reading of a report on the activities of the Inter-American Juridical Committee. The document raised great interest and was followed by appropriate and diverse interventions over an hour or more, during which the audience participated with questions and debates and comments, requests for clarification or suggestions. Discussions addressed main the four topics that follow:

- The Democratic Charter and representative democracy, their shortfalls and their derivatives;
- Immunity of States and of international organizations;
- International, regional and interstate (among two or three States) costumes and usages in International Law;
- Consumer protection.

All these topics are the main subjects of interest of the report. The audience paid considerable attention and expressed their views. We deem it important to provide details – in a succinct manner – of the fruitful discussions with the UN jurists on the four topics presented, all of which was highly interesting.

1. The Democratic Charter and representative democracy

Representative democracy is one of the main achievements of the Region, as this offers open space and possibilities for field comparisons *vis-à-vis* other regions in the world. The principle is included in the OAS Democratic Charter and is an expression of the Declaration by Member States.

Right from the beginning, our peers at the United Nations wondered about the juridical nature of the Democratic Charter. They asked whether the Charter is a true regional juridical instrument, under the format of a treaty, being regularly approved and ratified by Member States, or if, on the contrary, it is a *gentlemen´s agreement* enforced by the States as a customary.

In fact, it is quite different, as it is a Declaration adopted by Member States and as such, it is not subject to ratification, as the latter is a derivation of parliamentary sovereignty. However, according to International Law, Parliament sovereignty does not decide about the declarations of principles of heads of States and government that do not affect public order.

In a second level, we have the question about the effectiveness of the Charter, in terms of the results derived from its interpretation and enforcement to guarantee the respect of democracy in the Region. The Charter is not merely a means and a goal in itself. It is an instrument for action

and measure allowing or paving the way for a process and for the evaluation of its results.

A democratic process begins with the arrangement of the election in more or less reliable terms, focusing on the renewal of representation of public mandates. The yields of this democratic exercise are measured in terms of the rule of law applicable to all the citizens or groups of individuals, able to demand accountability and enforcement of correction institutional measures in case of power abuse.

In other words, elections are not organized periodically just to ensure the respect for the Charter and to strengthen democracy. This formula is unsustainable elsewhere in the world, nor in the OAS. Examples of abuses are sufficiently clear, and sometimes even traumatic, and they illustrate the need for rule of law in the region.

2. Immunity of the States and International Organizations

Immunity of States and the international organizations is one of the sensitive subjects that provoked this debate. The return to this topic was not meant to "put our foot in the door". On the other hand, it usually deals with the notion of vested or established right where the State and international organizations benefit from the immunity of jurisdiction and enforcement of court decisions in cases of unnoticed transgressions of the law.

It is better to consider the effects of said immunity in terms of responsibility and repair for the victims of offenses. Certainly, when applied to the State and international organizations, immunity does not mean irresponsibility or impunity. These legal entities are subjects of International Law, in spite of their power to produce legislation.

From a moral viewpoint, States and the international organizations cannot claim the right to irresponsibility and impunity giving a bad example. They must find and offer, in any case, the best formula so that they can enjoy immunity, avoiding at the same time paying with impunity and irresponsibility. As such, the UN has given a good example by recognizing its responsibility, in the spreading of cholera in Haiti.

3. International, regional e interstate customs

The existence of international customs increased the value and the possibility of questioning of the legal nature of the OAS Democratic Charter. It is worth pointing out that this questioning is a categorization of customs: as well international and interstate customs, and we can add regional and sub-regional customs.

There is no doubt that customs are part of the source of International Law, and of Private and Public International Law. This was especially the case in old times, that is to say, in a first stage of evolution of this branch of law, given the lack of the international norms. In fact, some of the conventions have their roots in international consuetudinary law. The distinction between international customs, regional customs, sub regional customs and interstate customs is a proof of the need to limit their field of enforcement and circumscribe the cases originated in the region or sub region, or among States that enforce them (interstate customs).

There are many agreements, conventions and international treaties that States apply even if they lack ratification. At the international level, we can take as an example the Kyoto Convention, the Convention on the Status of Stateless Persons, the regional plan, the Bustamante Code, etc. Enforcement pending ratification grants them the status of consuetudinary norms.

In any case, two questions come up in the area: they are never mentioned, let alone discussed. They question the formation of customs and the criteria for their identification in International Law, in order to avoid the uncomfortable assimilation to International Law on the derivations of the lack of legality or its denial.

4. Consumer protection

The protection of consumers is a tricky subject that has increasingly become a source of important concern due to the growing development of international economic relations. It is a calling to both consumers and to the public powers as it is their duty to guarantee the fundamental rights of the human person to whom these rights belong.

The need to protect consumer rights finds its expression in various texts, both domestic and international: the agreements, conventions and treaties that often fail to produce the desired results in many countries of the world, particularly in many LDCs (less-developed countries).

With the aim of supporting the revitalization of the law of protection of consumers, the Inter-American Juridical Committee is involved in reflections about the topic. The subject will be presented and discussed during the next regular session, in the light of its international, regional and sub-regional dimensions.

As a conclusion, it is important to question a suggestion raised by one of the interested parties at the UN. There was a suggestion for Member States to ratify the Democratic Charter. However, this is just an illusion, because the Charter is a declaration. Perhaps our Rapporteur wishes to prepare some guidelines on the topic.

The presentation concluded in the same friendly spirit and in the hope of deeper cooperation to identify areas of common interest, such as the protection of consumers. We had the chance of reinforcing the interests of both renowned international and regional organizations, and the need to maintain cooperation between them.

We finally mentioned the OAS website and renewed the invitation of the Department of International Law, of the secretariat and of the Chairman of the Committee to attend the current session.

I am grateful for your attention and I thank the Organization for the appointment for this important mission.

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B. Course on International Law

The XLIII Course on International Law was held in Rio de Janeiro, Brazil, from October 3 – 21, 2016. The purpose of this course is to ponder, debate, and update various issues pertaining to Public and Private International Law. Panelists included distinguished Professors from the Hemisphere and from Europe, legal advisors in the Ministries of Foreign Affairs of a number of Member States, and staff members of International Organizations and the OAS. Of particular note was the presence of Justice Dr. Antonio Augusto Cançado Trindade from the International Court of Justice, Judge Dr. Antonio Herman Benjamin from the Superior Tribunal of Justice (STJ) of Brazil and Ambassador Luis Alfonso de Alba Góngora, Permanent Representative of Mexico for the OAS. The course was attended by 15 scholarship holders from a number of countries in the Hemisphere, financed by the OAS and 20 participants, both Brazilian and foreign, who paid to participate in the course.

The Course Program was as follows:

XLIII Course on International Law

Río de Janeiro, Brazil
October 3-21, 2016
JW Marriott Hotel Rio de Janeiro

PROGRAM
Organized by the Inter-American Juridical Committee and the Department of International Law of the Secretariat for Legal Affairs of the Organization of American States

1st WEEK	
Monday October 3	
9:45 am – 10:10 am	Registry

10:15 am – 11:45 am	Inauguration Ceremony: • Welcoming Remarks **Jean-Michel Arrighi**, Secretary for Legal Affairs, OAS **Dante Negro**, Director, Department of International Law, OAS • Keynote Speech *110 Años de Labores del Comité Jurídico Interamericano* **Fabián Novak**, Chairman, Inter-American Juridical Committee, OAS
11:45 am – 11:55 am	Official Photo
11:55 am – 12:45 pm	Reception
Tuesday October 4	
9:00 am – 10:50 am	*La Doctrina del Control de Convencionalidad* **Professor: Ruth Correa**
10:50 am – 11:10 am	Break
11:10 am – 1:00 pm	*Contratos Internacionales: desafíos en materia de derecho aplicable* **Professor: María Mercedes Albornoz**
1:00 pm – 2:30 pm	Break
2:30 pm – 4:30 pm	*El Estatuto de Roma: principios, impactos y desafíos para los países de la OEA* **Profesor: Felipe Michelini**
Wednesday October 5	
9:00 am – 10:50 am	*Contratos Internacionales: desafíos en materia de derecho aplicable (conclusión)* **Professor: María Mercedes Albornoz**
10:50 am – 11:10 am	Break
11:10 am – 1:00 pm	*Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement and Access to Medications* **Professor: William F. Flanagan**
1:00 pm – 2:30 pm	Break
2:30 pm – 4:30 pm	*El Estatuto de Roma: principios, impactos y desafíos para los países de la OEA (conclusión)* **Professor: Felipe Michelini**
Thursday October 6	
9:00 am – 10:50 am	*Gestación por Sustitución Transfronteriza* **Professor: María Mercedes Albornoz**
10:50 am – 11:10 am	Break
11:10 am – 1:00 pm	*Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement and Access to Medications (continued)* **Professor: William F. Flanagan**
1:00 pm – 2:30 pm	Break
2:30 pm – 4:30 pm	*Arbitraje Comercial Internacional* **Professor: Verónica Sandler**
Friday October 7	
9:00 am – 10:50 am	*Protección Internacional del Medio Ambiente* **Professor: Herman Benjamin**
10:50 am – 11:10 am	Break
11:10 am – 1:00 pm	*Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement and Access to Medications (conclusion)* **Professor: William F. Flanagan**
1:00 pm – 2:30 pm	Break

	Arbitraje Comercial Internacional y Arbitraje de Inversiones
2:30 pm – 4:30 pm	**Professor: Verónica Sandler**
2nd WEEK	
Monday October 10	
9:00 am – 10:50 am	*El Consejo de Derechos Humanos de las Naciones Unidas* **Professor: Luis Alfonso De Alba Góngora**
10:50 am – 11:10 am	Break
11:10 am – 1:00 pm	*Protección Internacional de Refugiados en las Américas: Nuevas tendencias* **Professor: Juan Carlos Murillo**
1:00 pm – 2:30 pm	Break
2:30 pm – 4:30 pm	*El Contencioso de Armas Nucleares ante la Corte Internacional de Justicia* **Professor: Antonio Cançado Trindade**
Tuesday October 11	
9:00 am – 10:50 am	*El Consejo de Derechos Humanos de Naciones Unidas (conclusión)* **Professor: Luis Alfonso De Alba Góngora**
10:50 am – 11:10 am	Break
11:10 am – 1:00 pm	*La erradicación de la Apatridia en América a la Luz de los Estándares Interamericanos Relativos al Derecho a la Nacionalidad* **Professor: Juan Ignacio Mondelli**
1:00 pm – 2:30 pm	Break
2:30 pm – 4:30 pm	*El Contencioso de Armas Nucleares ante la Corte Internacional de Justicia (conclusión)* **Professor: Antonio Cançado Trindade**
Wednesday October 12	
9:00 am – 10:50 am	*La Democracia en el Sistema Interamericano: a 15 años de la Carta Democrática Interamericana* **Professor: Jean Michel Arrighi**
10:50 am – 11:10 am	Break
11:10 am – 1:00 pm	*La Democracia en el Sistema Interamericano: a 15 años de la Carta Democrática Interamericana (conclusión)* **Professor: Jean Michel Arrighi**
1:00 pm – 2:30 pm	Break
2:30 pm – 4:30 pm	*El Aporte de América al Derecho del Mar* **Professor: Elizabeth Villalta**
Thursday October 13	
9:00 am – 10:50 am	*El Uso de la Fuerza en el Derecho Internacional* **Professor: Pablo César Revilla Montoya**
10:50 am – 11:10 am	Break
11:10 am – 1:00 pm	*El Derecho Internacional Humanitario y los Desafíos de los Conflictos Armados Contemporáneos* **Professor: Gabriel Pablo Valladares**
1:00 pm – 2:30 pm	Break
2:30 pm – 4:30 pm	*El Derecho Internacional Humanitario y los Desafíos de los Conflictos Armados Contemporáneos (conclusión)* **Professor: Gabriel Pablo Valladares**
Friday October 14	
9:00 am – 10:50 am	*Las Operaciones de Mantenimiento de la Paz* **Professor: Pablo César Revilla Montoya**
10:50 am – 11:10 am	Break

3rd WEEK	
Monday October 17	
9:00 am – 10:50 am	*Teoría del Estado y la Unidad del Derecho Internacional* **Professor: Raphael Vasconcelos**
10:50 am – 11:10 am	Break
11:10 am – 1:00 pm	*Conflictos Territoriales y Solución de Controversias en América Latina: los últimos treinta años* **Professor: Antonio Remiro Brotons**
1:00 pm – 2:30 pm	Break
2:30 pm – 4:30 pm	*Movilidad Migratoria en Latinoamérica y Derechos Humanos: evolución de la normativa migratoria en la región* **Professor: Catalina Magallanes**
Tuesday October 18	
9:00 am – 10:50 am	*Protección internacional de en las regiones de Europa y Latinoamérica; el SECA (Sistema Europeo Común de Asilo) y el Plan de Acción Brasil* **Professor: Catalina Magallanes**
10:50 am – 11:10 am	Break
11:10 am – 1:00 pm	*Conflictos Territoriales y Solución de Controversias en América Latina: los últimos treinta años (continuación)* **Professor: Antonio Remiro Brotons**
1:00 pm – 2:30 pm	Break
2:30 pm – 4:30 pm	*Teoría del Estado y la Unidad del Derecho Internacional (conclusión)* **Professor: Raphael Vasconcelos**
Wednesday October 19	
9:00 am – 10:50 am	*"Evolución Intertemporal de los Tratados: una reflexión sobre la teoría de las fuentes de Derecho Internacional"* **Professor: Christian Perrone**
Break	Break
11:10 am – 1:00 pm	*Conflictos Territoriales y Solución de Controversias en América Latina: los últimos treinta años (conclusión)* **Professor: Antonio Remiro Brotons**
1:00 pm – 2:30 pm	Break
2:30 pm – 4:30 pm	*Derecho Internacional e Inversiones : Contratos y temas relevantes en energía* **Professor: Marilda Rosado**
Thursday October 20	
9:00 am – 10:50 am	*Reflexiones sobre el Derecho Internacional en las Américas* **Professor: João Clemente Baena Soares**
10:50 am – 11:10 am	Break
11:10 am – 1:00 pm	*Derecho Internacional e Inversiones : Contratos y temas relevantes en energía (conclusión)* **Professor: Marilda Rosado**
1:00 pm – 2:30 pm	Break

Friday October 21	
10:00 am – 10:45 am	Closing Ceremony: • Presentation and final words: **Christian Perrone** On behalf of the Department of International Law, Secretariat of the Inter-American Juridical Committee, OAS • Final Remarks: **João Clemente Baena Soares** Member, Inter-American Juridical Committee, OAS
10:45 am	Certificates

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C. Relations and Cooperation with other Inter-American bodies and with Regional and Global Organizations

1. Meetings sponsored by the Inter-American Juridical Committee

During the 88th Regular Session, held in Washington D.C. United States:

1) April 5, 2016: Visit from the Secretary-General form the OAS, Dr. Luis Almagro.

The discussion with the Secretary General focused on topics of interest in the field of international law: interpretation of Article 20 and the concept of Government in the OAS Inter-American Democratic Charter; regulation of political parties; protecting children from harassment and sexual violence in the hemisphere and internationally, due to the lack of standards in this area, including violations of rights occurring on-line; issues linked to cyber-security to provide for punishment of electronic fraud, particularly those of a transnational nature. Members expressed their gratitude for his presence and exchanged ideas with Mr. Almagro about the items on the agenda of the Juridical Committee. They explained the progress attained concerning the plan to draft a multiyear agenda for the Committee, as well as thanked him for his efforts and underscored the importance of keeping the budget at current levels.

2) April 5, 2016: Visit from the Members of the Campaign for a Convention on Sexual and Reproductive Rights (Clara Elena Cardona Tamayo, Marcelo Ferreyra, Mónica Coronado Sotelo, Regional Coordinators).

Representatives of the Campaign explained to the plenary recent developments on the subject of reproductive rights and proposed convention wording for the protection of these rights. Members of the Committee exchanged ideas and noted that many of the prescribed rights are already present in human rights protection instruments.

3) April 5, 2016: Meeting at the Washington College of Law, American University.

At the presentation of the book "The Role of the OAS in the 21st Century", written by Dr. Jean-Michel Arrighi, Secretary of Legal Affairs of the OAS, held at the Washington College of Law, the Vice-President of the Committee, Dr. Carlos Mata Prate, gave a presentation on the Committee's recent developments on behalf of the Committee. Additionally, Dr. Arrighi and Dr. Claudio Grossman, Dean of the Washington College of Law, took the floor in the presence of the plenary of the Committee, diplomats and students.

4) April 6, 2016: Meeting at the Georgetown Law Center, Law School, Georgetown University.

Thanks to good offices of Dr. David P. Stewart the plenary of the Committee hold a meeting with students and professors of Georgetown University School of Law, where a pleasant discussion and exchange of experiences took place on topics of interest in the context of international law and the Inter-American system.

5) April 7, 2016: Presentation of the Annual Report of the Inter-American Juridical Committee to the Committee on Juridical and Political Affairs (CAJP) of the OAS Permanent Council.

At the CAJP, the Vice President summarized the mandates taken on by the Committee and reports approved by it over the past year. Taking advantage of the presence of a majority of the Members of the Committee, some of the rapporteurs took the floor to explain their work: Drs. Villalta and Stewart conducted a review of the work on protection of cultural assets in situations of armed conflict, simplified stock corporations, and privacy and personal data protection, all of which are tied to mandates for which the Committee has proposed model legislation, though the General Assembly has yet to make any statement about this thus far. In turn, Dr. Correa presented a list of preliminary topics that will serve as the basis for a proposed agenda, and urged the delegations to propose ideas to enrich the list. At this time, several representatives of member states submitted specific proposals of themes or initiatives of interest, which could help to enrich the working agenda of the Committee, as well as thanked the Juridical Committee for its efforts.

6) April 4, 2016: Round Table on Private International Law".

In the afternoon of Monday April 4, 2016, a "Round Table on Private International Law" was held, with the attendance of the following accomplished professors and practitioners in the field, among others: Cristián Giménez Corte, Boris Kozolchyk, Timithy Lemay, Kathryn Sabo, S.I. (Stacie) Strong, Peter D. Trooboff, and John Kim. Additionally, there were two former members of the Inter-American Juridical Committee: Drs. Antonio Fidel Pérez and Carlos M. Vázquez.
The meeting focused on the future of Private International Law and specific issues in this field of law. The invited guests voiced their vision of how the Juridical Committee could react to the new challenges of Private International Law, particularly, the need for more flexible laws and greater implementation of existing laws. As for specific issues, they proposed several different topics for the Juridical Committee, including consumer protection and use and custom in Private International Law.

The proceedings of the meeting appear hereunder:

MINUTES OF THE ROUNDTABLE ON PRIVATE INTERNATIONAL LAW

(Corresponding to the meeting on Monday afternoon, April 4, 2016)

Subject matter

I) The Future of Private International Law

II) Specific issues in Private International Law

* * *

The special meeting of the Inter-American Juridical Committee's 88th Regular Session -- a roundtable discussion on Private International Law -- began at 2:09 p.m., at the OAS Headquarters in Washington, D.C., United States of America.

Attending the meeting were Doctors Carlos Mata Prates (Vice Chair), David P. Stewart, Miguel Aníbal Pichardo, Ana Elizabeth Villalta Vizcarra, Gélin Imanès Collot, Hernán Salinas Burgos, Ruth Stella Correa Palacio, Joel Hernández García, and José Antonio Moreno Rodríguez.

Also in attendance were Doctors Jean-Michel Arrighi, OAS Secretary for Legal Affairs; Dante Negro, Director of the Department of International Law; Luis Toro Utillano and Jeannette Tramhel, Senior Legal Officers of that Department; and Christian Perrone, Legal Officer of the Inter-American Juridical Committee Secretariat.

The meeting was also attended by the following experts in Private International Law: Cristián Giménez Corte, Boris Kozolchyk, Timothy Lemay, Antonio F. Pérez, Kathryn Sabo, S.I. (Stacie) Strong, Peter D. Trooboff, Carlos M. Vázquez, and John J. Kim.

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Round Table on Private International Law

The Vice Chair welcomed the experts on Private International Law taking part in the roundtable.

Dr. Stewart joined the Vice Chair in extending a warm welcome to the experts. He recalled key developments in the history of the Juridical Committee's involvement with the subject of Private International Law and its efforts, through numerous mechanisms, to promote the harmonization of this branch of law. The Inter-American Specialized Conferences on Private International Law (CIDIPs) bear witness to that. He also mentioned recent actions undertaken by the Juridical Committee, such as the model law on Simplified Joint Stock Companies, Electronic Warehouse Receipts, and actions relating to the Inter-American Convention on Law Applicable to International Contracts (Mexico Convention). Finally, he referred to the first such meetings in Rio de Janeiro with members of the American Association of Private International Law (ASADIP), during the last session, in August 2015 and explained that this meeting would be in further continuation.

Dr. Villalta thanked the experts who had come to take part in this roundtable and referred to the importance that the Committee attached to the inputs of the experts gathered there that day on matters relating to the law applicable to international contracts and consumer rights.

The Vice Chair explained that the event had been organized for the purpose of first updating the Committee's members regarding recent development in Private International Law and then proceeding to address specific issues in that field.

I) The Future of Private International Law

Dr. Vásquez, who was once a member of the Juridical Committee, shared his vision of the role of the Juridical Committee in the field of Private International Law. He noted that although he had wanted to become involved, the preparations for CIDIP-VI had been well under way when he joined the Committee. He stressed that the topics examined by the Committee varied in accordance with the interests of its members and so too, their intention to address issues of Private or Public International Law. He also noted that the Committee had had to take a difficult decision about whether to continue its work on Private International Law in the classic sense (conflict of laws) or to address substantive issues of private law in their international dimension. He referred to the specific capacities of the members of the Committee as a limitation because they were experts in international law and not necessarily in specific areas of private law.

Dr. Kozolchyk mentioned that he had been following developments in commercial law in the Americas and in Europe. He also mentioned the speed with which society was changing and its impact on commercial law. He explained that it was corporate groups that nowadays were setting

international standards, with States lagging behind as they strove to establish valid legal rules. He suggested that consideration be given to the codification of commercial uses and customs, as the National Law Center in the United States was doing.

Dr. Pérez, who had also been a member of the Committee, said that harmonization, economic development and social justice in the Americas should be the ultimate goal for the Committee to work towards. He said that Committee members typically prefer to work on subjects that are in their own areas of interest but that instead, the work of the Committee should be "demand driven." He referred to the importance of the distinction between Private International Law and International Private Law. In addition, he noted that the guarantees that used to exist were dwindling because the system is much more dynamic. By way of example, he cited the case of credit cards which were disappearing and being replaced by cell phone payments. He commented that the study of e-commerce, transactions with consumers and the aforementioned cell phone payments posed major challenges, and a contribution by the Committee in these areas could be very useful. He said that, in the area of consumer protection, if the Committee managed to "untie the Gordian knot," its work could have a major impact in the Americas. Along those lines, he noted that many areas of law require specialized knowledge and for that the Committee should elicit the support of experts.

The Vice Chair pointed out that the Committee was approaching civil society, especially experts and academics in the field of Private International Law.

Dr. Valladares gave an example of a situation where his clients had problems understanding the conventions and protocols of the Inter-American System and he had had to explain it to them. He referred to the websites of The Hague Conference and the OAS and suggested comparing the information available regarding the Inter-American Convention on Letters Rogatory and the related instrument of The Hague Conference. The latter had links on its website to explain how these legal instruments work, whereas the OAS website was short on information as to how others can access the system or do so in a more user-friendly way. He encouraged dissemination of information about the conventions that have already been adopted and noted that the success of CIDIPs II and III were due to a lot of preparatory work in advance.

Dr. Lemay referred to the matter of consumer rights, on which the United Nations Commission on International Trade Law (UNCITRAL) has already done some work, particularly on the matter of Online Dispute Resolution. He said that discussion of that matter had culminated in draft principles and practices on consumer rights, set forth in the document entitled "Technical Notes on Online Dispute Resolution." He pointed out that it had been impossible to find common ground for drafting a binding instrument on means for settling disputes. He suggested to the Committee that it take those studies as a starting point should it decide to do work in the area of consumer rights.

Dr. Strong listed her concerns regarding the current environment and the various interests involved. She pointed to the tension between different regulatory regimes, particularly when States take so long to regulate socially important matters. She suggested that the Committee might develop general principles of conflict of laws for cross-border matters, principles that would give precedence to one set (of choice of law rules) over another; she noted that academics in Europe have been deliberating over this topic and by addressing it, the OAS would be cutting edge.

In addition, Dr. Strong thanked the OAS for its support with respect to International Commercial Arbitration, noting that several persons have expressed their appreciation for this work, which provides a useful service by training judges and government officials: and thereby

contributes towards achieving consistency in the interpretation of the arbitration conventions - a prerequisite for the harmonization of international arbitration.

To supplement these in-person conferences, she suggested the OAS consider drafting guidelines on Private International Law issues following the model established by the Federal Judicial Center in the United States for judges in that country (specifically the International Litigation Series, also used by people outside the US). A system of that nature could facilitate access to information for judges and justice system personnel.

Dr. Giménez Corte thanked the Committee for inviting him and commented on the timeliness of the meeting, as it marked a revival of interest in the subject in the Americas, as evidenced by the state of new laws (PIL Codes) promulgated in recent years in such countries as Argentina, the Dominican Republic, Paraguay, and Venezuela. He proposed that the Committee consider two points, in particular: 1) focusing its attention on specific issues relating to societal demands; and 2) disseminating information about existing international instruments and their implementation. He noted that there are already many good instruments but little awareness about them or how they can be used. Likewise, he urged the Committee to coordinate and pool its efforts with those of organizations working in the field of Private International Law so as to avoid unnecessary duplication.

Dr. Sabo also thanked the Committee for inviting her and that Canada is pleased to see ongoing and continued interest in PIL within the Committee. Canada had not participated in the CIDIPs as much as she would have liked. She said the Committee could serve as a useful forum for preparatory work in the run up to the CIDIPs and then turn the work over to CIDIP for finalization. Along those same lines, she noted that the preparation mechanism made a big difference in terms of States' interest in the CIDIPs and that speed is detrimental to the success of projects in this area. It was therefore essential to let all States play an active part. Also important, albeit at a slightly lower level of priority, was the promotion and dissemination of existing instruments.

She agreed with the earlier proposal that the Committee consider drafting guidebooks or benchbooks but noted that it was paramount for all interested parties to participate when it comes to formulating binding instruments and models, if these are to be successful mechanisms.

Dr. Stewart summarized the comments and observations put forward and focused in particular on the work the experts were asking the Committee to do: 1) To pursue and develop topics relating to people's needs in the Hemisphere, that take regional demands into account; 2) To adopt, first and foremost, a pragmatic stance: it was not necessary for the Committee's concerns to be determined by the distinction between Private International Law and International Private Law; 3) To try and avoid duplicating efforts, by coordinating with other international bodies. To that end, various coordination mechanisms were suggested; 4) To consider not just the codification of international law but also the consolidation and harmonization of rules; 5) to use and make use of less formal instruments than those prepared by the CIDIPs - which historically focused on Conventions. On this last topic, Dr. Stewart wondered whether it was appropriate to add more conventions to those already adopted in the Inter-American System. He noted that international efforts were currently directed to establishing non-binding instruments, such as model laws and guidelines based on principles. He invited the experts to express their views on the paths the Committee should take.

Dr. Salinas congratulated Dr. Stewart on his initiative of inviting experts in Private International Law. He explained that he had noted a narrowing of the divide between Private International Law and Public International Law, with that division appearing to become less

relevant. He asked whether the current challenge had to with implementing existing international norms and tailoring them to hemispheric circumstances, which would then not involve establishing new norms.

Dr. Sabo responded to Dr. Stewart's thought-provoking query regarding the type of instrument that should be developed in Private International Law and said that the answer depended very largely on the substance of the matter to be regulated. She pointed out that one advantage enjoyed by the OAS is the absence of the need to satisfy a single block of States such as the EU (European Union) within the UN system. She further noted that the Committee could have an important role to play in adapting international instruments to the needs of the States in the region, including with regard to their implementation.

Dr. Trooboff said that the Hague Conference had successfully brought in experts to discuss existing conventions and that that had been highly useful, not just because of the educational spin-off mentioned earlier of providing easier access to information about how those conventions work, but also because they made it easier to identify the themes of future instruments.

Second, he mentioned the Hague Convention's "judgments project" initiative and noted that the Latin American States as represented are not aware of the background of the rich contribution of the Committee. In that regard, he proposed greater engagement between the Juridical Committee and the Hague Conference; without creating a separate instrument, this would highlight initiatives under way in the Americas and take into consideration the views of States and experts in that region. The Committee could serve as a caucus for the Americas for work being undertaken by the Hague Conference which would 1) enrich the work at the Hague Conference and 2) ensure that the work produced would be attractive to Latin American States.

Dr. Hernández García welcomed the idea and said that the Committee's agenda for the following day envisaged working on matters relating to Private International Law. He agreed that the Juridical Committee's agenda was basically "supply driven" and explained that this was because it comprised individuals specializing in very different fields, which was not the case of the bodies devoted exclusively to Private International Law that had been mentioned that afternoon (such as UNCITRAL). Nevertheless, he underscored that today's exercise was precisely aimed at making the Committee's agenda more "demand driven."

Dr. Pérez explained that in theory Dr. Sabo's proposal was correct. However, in practice, given that so many prior instruments have not been accepted, it would be unlikely to find political support to enable the Juridical Committee to develop additional products of a binding nature. In that context, he cited two developments that had repercussions for the future of Private International Law: 1) the emergence and mushrooming of private and civil society interest groups, all of them interested in the preparation of new international instruments. This was an area traditionally regarded as being in the domain of countries' ministries of foreign affairs; and 2) the emergence of other international organizations in the region that made the drafting process more difficult (e.g., Asia-Pacific Economic Cooperation Forum –APEC- and its work on simplified stock companies). He suggested that the Committee should examine the work of those organizations in order to assess hemispheric needs.

Dr. Moreno addressed the importance of the subject of cooperation among international organizations. He mentioned the example of the Hague Principles on Choice of Law in International Contracts, a process that benefited from the work of Latin American jurists, particularly those that had worked on the Mexico Convention.

He then read out a message from the Secretary of the International Institute for the Unification of Private Law (UNIDROIT), which referred to the historical influence of jurists from Latin American countries in that Institute and in the development of "soft law" instruments, and urged the Committee to seek common ground to exploit synergies.

Dr. Kozolchyk spoke about the relationship between (classical) Private International Law and International Private Law (harmonized private law) and, in that regard, about the importance of bearing in mind the variety of instruments available for handling the diversity of existing issues, depending on the kind of solutions sought; be they settlements of conflict or harmonization

solutions. By way of example, he mentioned the adoption of model laws on operations secured with bonds or shares, which resolves a classical conflict by means of a clear and safe solution based on the law applicable to the bond or share that was being sold or bought (there was market demand for it).

Referring to economic development, he said that uniform and harmonized law was the best vehicle for achieving it. Thus, concrete solutions - such as model secured transaction laws - are a better way to promote development than an abstract solution to a conflict. They create solutions that can be used by micro and small enterprises.

As for the Mexico Convention, he recalled the discussions regarding the custom-based sources of the law applicable to contracts and how that had been one of the Convention's main achievements.

Dr. Sabo commented that she agreed with those who had noted how difficult it was to reach consensus on conventions when they were being drafted and then, *a posteriori*, during implementation, but that that was no reason to preclude them outright when it came to reviewing the options available.

She also noted that many of the CIDIPs had been ratified by only a few States, not to mention those that have not entered into force. She suggested that the Committee verify and separate off instruments that in effect had been superseded by new norms, those that deserved a special implementation effort, and those that should be revisited with a view to making a new contribution to the topic concerned.

As regards cooperation, she noted that this dialogue had referred to relations with other international organizations. However, she suggested to look also at national efforts relating to legislative reforms, such as the work of National Law Reform Commissions that exist in Canada and the United States. They could be very fruitful with regard to important matters to be addressed by the Committee.

Dr. Giménez Cortes referred to the tension between "hard law" and "soft law" and said that although there was much talk of failure to enforce the former it was also necessary to take into consideration that "soft law" instruments are rarely implemented, even though the drafting of such instruments can be completed relatively quickly.. He also referred to the importance of legitimacy, especially when "soft law" instruments were drafted without democratic legitimacy.

Dr. Vázquez pointed out that many of the same matters had already been discussed in the past: 1) regional contributions; 2) suggestion by Dr. Trooboff; 3) tensions mentioned between hard law and soft law. He referred in particular to initiatives dating back to the start of this century, when an OAS *questionnaire* was used in a bid to determine the role of the OAS *vis-à-vis* other international endeavors. From his point of view, the work of the OAS and the Committee should be "demand driven" and the Committee's efforts should be devoted to coordinating with the Member States on how to meet their demands, while taking domestic experts' views into account. He explained that at one time the Committee played a central organizing role for the CIDIP but by CIDIP-VI it no longer did. In this regard, the distinction between PIL and IPL does make a difference because the Committee does not have expertise in these IPL areas of harmonization. He suggested that perhaps the Committee could perform a convening role to supervise experts in the field. As an example he mentioned the American Law Institute, which undertakes the work itself on matters of PIL but if the matter is IPL, they consult with experts.

Dr. Strong pointed out that the academic community did not know how to contact the Juridical Committee and that as many would be willing to provide support, that community is a prime source of assistance with conducting research. She cited her efforts in her role as Co-Chair of the PIL Interest Group of the American Society of International Law as an example: arrangements were made to enable participation by academics at meetings of the UNCITRAL Working Groups and of the US Department of State Advisory Council on Private International Law. She suggested that something similar could be arranged for the Committee and that publicity about the Committee could generate interest in the issues it was working on.

Dr. Villalta said that one of the reasons for the scant ratification of conventions approved by the CIDIPs was unfamiliarity with Private International Law instruments. She said she agreed with the experts regarding the need to resume study of many of the conventions adopted in the Inter-American System.

Dr. Moreno underscored major precedents with respect to cooperation among international agencies, such as that between the American Association of Private International Law (ASADIP) and the Hague Conference; between working groups of the United Nations Commission on International Trade Law (UNCITRAL) and UNIDROIT; and other instances.

Dr. Lemay returned to the subjects of cooperation and the implementation of Conventions, and commented that the United Nations Convention on Contracts for the International Sale of Goods was compatible with the Mexico Convention, in that - *inter alia* - both promote party autonomy. He noted that 20 countries were Parties to the former and that UNCITRAL constantly received requests for training courses related to that Convention. He explained that it would be a pleasure to conduct joint workshops within the framework of cooperation between UNCITRAL and the Juridical Committee.

Dr. Stewart summarized the experts' latest suggestions regarding the Committee's work as a set of actions to be undertaken, as follows: produce guidelines to facilitate better understanding of comparable Inter-American Convention to the Hague Convention on Notification and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters; prepare guidelines for the judiciary on the Convention on the International Sale of Goods, consider matters relating to commercial customs and practices; prepare legislative guidelines and "bench books"; coordinate on matters of mutual interest with the Hague Conferences; re-examine existing Inter-American PIL instruments; consult with national or regional organizations proposing legislative reforms; examine work of APEC; bring together a group of experts in Private International Law.

He also pointed out that although the Committee sought to base its work on demand, demand is not always voiced and that requests by the Committee to OAS Member States for suggestions frequently go unanswered. As an illustration of what he meant, he mentioned visits to the doctor. When one visits one's doctor, one does not necessarily know what illness one has, much less what medicines to take. For that reason, he insisted on the importance of meetings such as this one, which help diagnose diseases and possible treatments.

II) Specific issues in Private International Law

Dr. Kim thanked the Committee for inviting him and underscored the US Department of States' qualms about expanding the number of conventions in the region and noted that the area is well-saturated already. Moreover, he pointed out that this work requires considerable resources. He noted that the lack of acceptance by States of existing instruments is not a problem unique to the OAS but is one also faced by other organizations. He added that his office has focused on the work to achieve implementation of the treaties already negotiated. Regarding the discussion about a demand-driven agenda, he agreed with that approach but also concurred with Dr. Stewart that it often turned out to be difficult to articulate social demands, much less channel them. He noted that these same issues have been considered within the context of UNCITRAL and other bodies.

Dr. Pérez acknowledged the challenge of articulating demand but that it should not preclude us from identifying the persons and national agencies responsible for specific issues and coordinating directly with them. For example, one could send out *questionnaires* and direct implementation in such a way as to be of use to said agencies.

As a specific issue, he suggested once again tackling the consumer protection challenge. He noted that policy in that field had changed and there was room for developing it further. He also mentioned topics involving transactions, online buying and selling, and the need for appropriate and effective redress.

Dr. Trooboff cited an article in that day's New York Times which mentioned that 4.8 million businesses had been registered in China the previous year. He offered this by way of illustration that it was vital to address issues that can stimulate market potential. For that reason, he welcomed the Committee's work on Simplified Joint Stock Companies.

Dr. Lemay mentioned that UNCITRAL Working Group 1 was working on the subject and had mentioned the Juridical Committee's efforts.

Dr. Kozolchyk recalled the development of the subject of simplified joint stock companies: it had begun in Colombia, it was then taken up by the OAS, and then later addressed at UNCITRAL.

Dr. Negro explained that the Juridical Committee had approved a Model Law for Simplified Joint Stock Companies, but that last year, because of the specific situation the OAS was going through; the political organs of the Organization had not had time to analyze it. Nevertheless, efforts were under way so that the General Assembly would adopt a resolution to support that model law.

Dr. Salinas noted the need to continue these meetings between experts in PIL and the Juridical Committee.

Dr. Stewart acknowledged that the meeting had been useful and productive and thanked the experts for attending. He urged them to send in their reflections, ideas and visions on the matters discussed.

The Vice President seconded Dr. Stewart's words about staying in contact with the experts and the Committee's interest in holding other similar meetings, on specific issues, in the not too distant future.

The round table was adjourned at 4:44 p.m.

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2. Meetings sponsored by the Inter-American Juridical Committee

During the 89th Regular Session, held in Rio de Janeiro, Brazil:

1) October 4, 2016: Visit from Dr. Felipe Michelini.

   Dr. Michelini, a member of the Trust Fund for Victims of the International Criminal Court, explained the concepts taught in his class at the International Law Course, discussing the complexities of the international criminal system and the mission of the Rome Statute, from the perspective of a group of bodies working to reduce, prevent and punish international crime.

2) October 5, 2016: Visit from Professor William Flanagan.

   Professor Flanagan is the Dean of the Law School of Queens University in Canada and an expert specialized in mercantile law. The exchange with the Juridical Committee focused mostly on the current situation of international trade and uncertainty arising from events such as the United Kingdom's exit from the European Union ("*Brexit*") and the proposals of United States President Elect Donald Trump, who intends to renegotiate the North American Free Trade Agreement (NAFTA), in addition to the future of new agreements on the horizon, such as the Transpacific Strategic Economic Partnership, known commonly as the Transpacific Trade Partnership (TPP).

3) October 5, 2016: Visit from the Members of the Inter-American Association of Public Defender's Offices (AIDEF in its Spanish Acronym).

   AIDEF was represented by Drs. Andrés Mahnke (Chile), General Coordinator of AIDEF; Juan de Dios (Argentina), Secretary General of AIDEF; and, Marta Zanchis (Brazil), Deputy General Coordinator of AIDEF. Dr. Mahanke introduced the work that the Association and its members do within their countries and in the sphere of the OAS, highlighting cooperation with the Department of International Law of the Secretariat of Legal Affairs, which has facilitated five meetings with the Committee on Juridical and Political Affairs, in addition to coordinating efforts to approve the respective OAS General Assembly resolutions.

Since the main reason for their visit was the proposed general principles submitted to the Committee, the representatives explained the proposal, which provides for government appointed and free legal assistance for any individuals living in a special situation of vulnerability, on the grounds that access to justice is a fundamental right. The document also urges States to provide access to the protection system established within the Inter-American human rights protection arena, particularly those States that are parties to the American Convention. Lastly, he mentioned as one of the challenges, the lack of uniform human rights standards in domestic legislation. In this regard, he requested the Juridical Committee to take this challenge on and adopt the principles introduced by the AIDEF. There was an exchange of ideas with the Committee members and the Secretariat in order to settle questions prior to the examination that the Plenary Committee would conduct on the proposal at a later date.

4) October 6, 2016: Visit from Professors Cláudia Lima Marques and Juan José Cerdeira.

   Professors Cláudia Lima Marques and Juan José Cerdeira presented new developments in international consumer law. They specifically explained approval of resolution 1/2016 of the Working Group of the International Law Association (ILA) on Consumer Law. They mentioned, as well, recent developments in this area of the law, which gave rise to regional protection models and the advisability of creating a hemispheric model for the Americas. The Members of the Committee recalled the experience of the CIDIP-VII with the proposal of a convention on the law applicable to consumer contracts and commended suggestions for a more flexible, soft law instrument.

5) October 10, 2016: Visit from Drs. Juan Carlos Murillo and Juan Ignacio Mondelli from the United Nations High Commissioner for Refugees (UNHCR) Regional Legal Unit for the Americas.

   Dr. Juan Carlos Murillo, Director of the aforementioned Unit, reported to the members of the Committee about recent developments regarding refugees in the hemisphere, and specifically cited the Declaration of San Jose and the Declaration of New York. He explained that the Declaration of San Jose is important because it is the first time all actors are included in the same discussion –departure, transit and destination countries, alike. Additionally, he reported that its importance rests on shared responsibility and mutual support. Dr. Juan Ignacio Mondelli, Regional Protection Officer, gave a presentation on aspects linked to statelessness in light of comments submitted on the document the "Juridical Committee Guide to Protection of Stateless Persons". This exchange helped to recognize the importance of this engagement between the two bodies and the capacity of the UNHCR to provide feedback to the Committee.

6) October 11, 2016: Visit from Professor Antonio Augusto Cançado Trindade (Justice from the International Court of Justice).

   Judge Cançado Trindade addressed the latest developments of the jurisprudence of the International Court of Justice, particularly, the three cases about nuclear disarmament, which had specifically been decided by the International Court of Justice (Marshall Islands *v.* United Kingdom, Marshall Islands v. India and Marshall Islands *v.* Pakistan). He voiced his criticism and the challenges facing this type of cases, about which the Court is deeply divided. In his view, the Court lost out on the chance to establish clear rules on nuclear disarmament. He noted that he submitted a dissenting opinion, wherein he examined the merits of the matter. There were other exchanges about the current situation of international law and nuclear weapons and also the legal precedents of the Court.

7) October 11, 2016: Visit from Ambassador Luis Alfonso de Alba.

   Ambassador Luis Alfonso de Alba is the current Permanent Representative of Mexico to the OAS. In his talk with the Members of the Committee, he mentioned overarching issues, in particular, efforts made under his Chairmanship at the UN to amend the Human Rights Commission and enable the creation of the Council, the way these amendments were made in practice and the consequences for the universal system of human rights protection. On other matters, the Ambassador discussed Mexico's participation at debate on the budget of the Organization and pledged to make every effort possible to facilitate full functioning of the Juridical Committee, within the current budget constraints of the Organization. The Members expressed their gratitude for his support, along with explaining the specific needs of the Committee and the importance of keeping the 2017 budget at the level of the current year.

8) October 13, 2016: Visit from Dr. Pablo Revilla.

   Professor Pablo Revilla explained how issues such as use of force and peacekeeping operations are addressed in his class at the Course of International Law. There was an exchange with the Members who mentioned the importance and major challenges in this area at the current time. Dr. Revilla voiced his confidence in the UN system.

9) October 5, 2016: Meeting with the Juridical Advisors from the Ministries of Foreign Affairs.

   In the afternoon of Wednesday October 5, 2016, the plenary of the Committee held a meeting with representatives of the legal counsels of Ministries of Foreign Relations. On this occasion, Drs. George Galindo (Brazil), Claudio Troncoso (Chile), Violanda Botet (US), Alonso Martínez Ruiz (Mexico), Rubén Darío Ortíz Méndez (Paraguay) and Juan José Ruda (Peru) took part.

   There was a rich exchange on topics of interest in the field of public and private international law, such as immunity, cyber-security, international trade, institutional agreements and consumer law. General proposals were also put forth aimed at assessing the practical benefits of the work of the Committee, and coordination with other regional bodies, such as the universal system offices, in order to avoid duplication of efforts.

   The proceedings of the meeting appear hereunder:

INTER-AMERICAN JURIDICAL COMMITTEE
89TH REGULAR SESSION
(Rio de Janeiro, 3-14 October, 2016)

SUMMARIZED MINUTE

(Corresponding to the meeting held on Wednesday 5 October, 2016)

Meeting with the Legal Advisors of the Ministries of Foreign Affairs

The meeting of the Inter-American Inter-American Juridical Committee with the Legal Advisors of the Ministries of Foreign Affairs and their representatives commenced at 2:13 pm at Committee headquarters in the Itamaraty Palace, Rio de Janeiro, Brazil.

The meeting was attended by Drs. Fabián Novak Talavera (Chairman), Carlos Mata Prates (Vice-Chairman), Ana Elizabeth Villalta Vizcarra, Gélin Imanès Collot, Hernán Salinas Burgos, Ruth Stella Correa Palacio, João Clemente Baena Soares, Joel Hernández García and José Antonio

Moreno Rodríguez. Neither Dr. Miguel Aníbal Pichardo and Dr. David P. Stewart were present in this session.

The Legal Advisors who attended the meeting were Drs. George Galindo (Brazil), Claudio Troncoso (Chile), Violanda Botet (USA), Alonso Martínez Ruiz (Mexico), Rubén Darío Ortíz Méndez (Paraguay) and Juan José Ruda (Peru).

Also present were Drs. Jean-Michel Arrighi, Secretary for Legal Affairs, Dante Negro, Director of the Department of International Law, Luis Toro Utillano, Senior Legal Officer of said Department, and Christian Perrone, Legal Officer of the Secretariat of the Inter-American Inter-American Juridical Committee.

The Chairman thanked and welcomed the Legal Advisors and representatives from Ministries of Foreign Affairs of OAS Member States and invited them to introduce themselves individually. It should be noted that the Vice-Chairman of the Committee, Dr. Carlos Mata Prates, was present in his capacity as member of the Committee and Legal Advisor for Uruguay.

The Chairman explained the proposed procedure of the meeting. Each Rapporteur would begin with a brief explanation of the topics included in the agenda of the Inter-American Juridical Committee; thereafter, time would be allotted for the General Secretariat to report on its role in the field of international law. Finally, the Legal Advisors would be invited to submit their proposals for analysis and discussion.

I. Presentations of the topics on the agenda of the Inter- American Inter-American Juridical Committee

a. Immunity of International Organizations

The Rapporteur of the topic on "Immunities of international organizations," Dr. Hernández García, explained that originally the Inter-American Juridical Committee had decided to study the topic on immunities both of States and of international organizations conjunctively, but that since 2015 the topic was split into two different rapporteurships.

As regards the topic under his rapporteurship, Dr. Hernández explained that the purpose of the study is to develop a guide for the application of immunities by those who will apply the law: judges or members of the Ministries of Foreign Affairs from Member States. He advised that two documents were presented: the first comprised an analysis of the responses from twelve Member States to a questionnaire sent by the Inter-American Juridical Committee, while the second one contained an analysis of fifteen documents - headquarters agreements and constituent instruments of international organizations. The next part would be an analysis of decisions and sentences issued in Member States to assess the application of these immunities by the judiciary in practice.

b. International Contracts

The topic has three Rapporteurs: Drs. Moreno, Stewart and Villalta. Dr. Villalta explained that originally, when she proposed this topic, the purpose was to explain the lack of ratifications of the 1994 Inter-American Convention on the Law Applicable to International Contracts, notwithstanding positive comments received by the doctrine. By way of illustration as to the influence of the regional instrument, she cited the fact that the Hague Principles have incorporated elements and concepts from the inter-American Convention. From a methodological viewpoint, a questionnaire was forwarded to States and experts to which responses were received from 16 States and 18 experts.

c. Right of Consumers

This topic has four Rapporteurs: Drs. Collot, Moreno, Stewart and Villalta.

Dr. Villalta explained that the intention of the Committee is to propose the drafting of a guide that would serve States as a starting point to protect the weakest party in commercial relationships – the consumer.

d. Guide for the application of the principle of conventionality

The Rapporteur of the topic, Dr. Correa, explained that the Committee was seeking the opinion of States in order to draft a guide that would serve to unify the application of the principle

of conventionality regarding the effects of decisions taken by international organs. Questionnaires were sent to Member States in order to assist the work of the Committee and a total often responses have been received so far.

e. Considerations on the work of the Inter-American Juridical Committee

The Rapporteur, Dr. Correa, said that the intention of the Committee is to develop a pluriannual plan of work comprised of topics that are of the greatest interest to member States in the area of international law.

f. Immunity of States

The Rapporteur of the topic, Dr. Mata Prates, confirmed the explanation provided by Dr. Hernández that the topic of the immunities of States and of international organizations had been concentrated under the same rapporteurship. The topics having been divided, Dr. Mata Prates has assumed responsibility for immunity of States.

He commented on the low number of ratifications of the 2005 UN Convention on Immunities of States, which includes several concepts imbued in the doctrine and the practice of States.

The intention of the Committee is to clarify the scope of state immunities taking into consideration the application of jurisprudence and that for that reason another questionnaire has been sent to States.

g. Statelessness

Dr. Mata Prates, in his capacity as Rapporteur, explained that the Committee has worked on the topic of the protection of stateless persons pursuant to a mandate from the General Assembly. The Committee prepared a report that takes into account the best practices on the subject matter, including the principles proposed in the manuals of specialized entities, such as UNHCR (United Nations High Commissioner for Refugees).

h. Representative Democracy

Dr. Salinas, in his capacity as Rapporteur of the topic on Representative Democracy in the Americas, stated that the Committee has presented several reports on the subject matter over the years and that the latest mandate corresponds to a request from the Secretary General about certain conceptual *lacunae* in the Democratic Charter.

Having presented three reports, the third of which was to be discussed by the plenary the following week, he said that the focal point of these reports is the discussion about the powers of the Secretary General to act in cases of alteration or interruption of the democratic order, the preliminary conclusion being that the Secretary General has powers to act in those situations.

i. Electronic warehouse receipts for agricultural products

In view of the absence of Dr. Stewart during the first week of this session of the Committee, Dr. Dante Negro reported on the work of the Committee on this topic. He said that it was a highly technical topic that aims to facilitate the use by farmers of their stored, harvested products. At the end of the harvest, farmers have the option to deposit surplus stocks in warehouses and wait for the best sale opportunities. This deposit generates a negotiable document that can be exchanged, following the example of secured transactions, for which the OAS has a model law. In this regard, the Report of the Committee intends to further this system in order to apply it to warehouse receipts for agricultural products. Another challenge is enabling such transactions to be completed through electronic means in order to gain efficiency and speed in negotiable transactions. The intention of the Rapporteur is to present a study to facilitate the drafting by the Committee of a set of guiding of principles.

j. New Topics

The Chairman explained that the General Assembly at its recent meeting in the Dominican Republic has issued two new mandates for the Inter-American Juridical Committee: one relates to the protection of cultural heritage assets and the other to Business in the Area of Human Rights. He reported that although Rapporteurs had not yet been appointed and would be concluded in the

next few days, the Committee in the past had presented a report on the social responsibility of companies, human rights and the environment.

II. The role of the General Secretariat

On behalf of the General Secretariat, Dr. Jean-Michel Arrighi, Secretary for Legal Affairs, reported that the Secretariat acts as a bridge between requests from States and the search for the best mechanisms to provide proper support for those requests. He explained that the Secretariat is organized into three different departments: the Department of International Law that also acts as Technical Secretariat of the Committee, the Department of Legal Cooperation that acts as Secretariat of the Mechanism for Follow-Up on the Implementation of the Inter-American Convention against Corruption and the Department of Legal Services, in charge of normative instruments that govern the General Secretariat.

As regards legal instruments, one of the duties of the Secretariat is to assist States in the day-to-day application of treaties and model legislation. He said that in order to carry out this work, a close relationship is needed between the legislative and the judicial authorities. He cited as an example the work carried out regarding the model law on access to information. The Secretariat organized workshops with the legislative authorities of States to identify problems that may be imposed on local judges. He confirmed the importance of judicial cooperation in order to face the problems presented by certain types of crimes, such as cybercrimes in pedophilia, fraud, etc. Finally, he referred to the topic of consumer protection and the lack of binding instruments regulating international contracts. In this regard, the drafting of model legislation and of other norms within the OAS may be of help to State actors in proposing solutions and filling in gaps.

III. Proposals of Legal Advisors

The Chairman reiterated his thanks to the legal advisors, and opened up the discussions.

Dr. Ortiz from Paraguay addressed the topic of state immunities', in the light of the problems posed to the Ministries of Foreign Affairs by claims and court decisions in cases filed against States.

Dr. Troncoso from Chile mentioned specifically cases involving labor claims in the area of immunity of States. Although there has been some progress and there is general understanding that jurisdictional immunities cannot be used in cases of this kind, there are still some pending problems.

He said the most serious problem that persists is in reference to immunity from enforcement. A decision favorable to a worker does not necessarily guarantee its full enforcement. Many judges order extreme actions such as freezing of bank accounts of Consulates and Embassies due to lack of knowledge. In such cases, the Ministries of Foreign Affairs are forced to intervene in order to avoid juridic-diplomatic problems. Efforts are needed in order to make judges aware of the application of these immunities.

Dr. Troncoso considered that the situation involving international organizations is far more complex; as in such a case the Vienna Convention is not applicable, parties must rely on headquarter agreements. On many occasions, on matters of labor law there is a lack of norms, which also poses problems for the enforcement of the rights of victims. He cited as an example the development of European jurisprudence in which immunities have been related to concepts involving the rule of law. Accordingly, international organizations must have a system in place that allows workers to file such complaints, which thereby assures due process.

Dr. Ruda, from Peru, was also concerned about jurisdictional immunities and referred as well to cases that involved diplomatic missions of his country abroad. He said that Peru has witnessed the evolution from a system of absolute immunity to one of relative immunity. From a Peruvian perspective, the most difficult questions involved immunity from enforcement, especially in relation to freezing of bank accounts.

He concurred with the opinions of other Legal Advisors in that situations of defenselessness must be avoided, especially in cases involving international organizations.

On the principle of conventionality, Dr. Ruda referred to the need of imposing certain margins for appreciation to each State, considering the specific context of each one.

Dr. Ruda also mentioned the topic of companies, human rights and the environment, underscoring the report of the Committee on social responsibility of companies, and the connection of said topic with the development of bilateral agreements, especially investment agreements.

Dr. Martínez from Mexico expressed having similar concerns. The drafting of a guide on immunities by the Committee would be extremely useful. In this regard, he urged the Committee to carry out an analysis with emphasis on day-to-day practice rather than theoretical issues.

He also referred to the challenges posed by judicial notices. Some States do not accept notices addressed to embassies or consulates, and require instead that this type of communication should be addressed to the States themselves. In such cases, they claim that they have not been properly summoned and therefore do not participate in court proceedings, which lead to trials *in absentia.*

He said that as a rule there should be a relative presumption in favor of immunity, even when that presumption does not exist in labor issues. In these latter cases, countries are in agreement that there is no immunity, as it is an *acta jus gestionis*.

In addition, there is no consistency as regards the interpretation of acts that may be considered as acts taken by management; some interpretations indicate that it is not only a matter of the nature of the act, but must also be related to its purpose.

Finally, he spoke about interpretation of the nature of the act, which should be carried out based on domestic norms. He exemplified with the case of a trust for the acquisition of an asset.

As regards immunity of international organizations, he said this should be applied on a case-by-case base, in the light of headquarter or constituent agreements. He also mentioned the European jurisprudence about a necessary balance between immunity and access to justice that requires an international organization to have mechanisms for the resolution of disputes.

On the topic of consumer rights, he recalled the difficulties encountered during the work of CIDIP-VII. He noted that it is important to define the scope of study for this topic. Obviously, the topic of protection of consumers may be almost as broad as that of commercial contracts. Therefore, it will require consideration of whether to address it as just one theme or to divide it into a series of specific topics, such as electronic contracts, adhesion contracts, and so forth.

Dr. Galindo from Brazil referred to the topic of immunity of international organizations, and said that during a number of negotiations involving headquarter agreements there have been attempts to establish that immunities granted to international staff are also applicable to nationals of the host country. The traditional viewpoint of Brazil is that these immunities do not apply to Brazilian nationals, and therefore it would be interesting to assemble the practices of States, both in cases occurring in our continent as well as in others. The granting of immunities to nationals working in their own country creates discrimination *vis-à-vis* the rest of citizens: those enjoying immunities and those who do not.

Regarding the problem involving immunity from enforcement of international organizations, he noted that in addition to the concept of the rule of law, there is also an understanding in favor of the search of alternative means for the resolution of disputes. If enforcement proceedings against assets are not permitted, then some other solution should be offered.

He cited as an example a case in which UNESCO had reached an agreement with France that allowed arbitration in a large number of labor cases that lacked resolution as the headquarter agreement lacked effective mechanisms for resolving this type of problem.

With relation to the principle of conventionality, Dr. Galindo highlighted the possible effects *erga omnes* of decisions of the Inter-American Court, in light of some decisions of the Court that impose the application of its jurisprudence internally to countries in all similar cases,

including when they have not been part of the litigation. This could create a situation of *erga omnes* effects of the Court's decisions.

As to the question of the manner by which to disseminate knowledge of international norms throughout the judiciary, he saw difficulties in establishing close connections with judges. Some of them assumed positions reluctant to the application of international law. The institutional pathways seem to be eminently inefficient. The dialogue tends to be dependent upon the degree of openness towards international law on the part of each judge. The only solution, in his opinion, would not be through an institutional forum of communication, but rather, by initiatives for the dissemination of and education in international law.

He pointed out that the topic of consumer protection has a high level of importance in Brazil (*ordre public*). The Brazilian perspective is that these rights have the character of fundamental rights and suggested that this perspective be taken into consideration.

Dr. Trancoso of Chile returned to the topic of notification and explained the practice adopted by Chile, which obliges one to proceed through the Ministry of Foreign Affairs, the purpose being to avoid possibilities that Embassies argue against taking part in the case or simply do not participate and thereby create problems of defenselessness.

He observed that there is a type of informal mediation that is carried out by the Ministry of Foreign Affairs, aimed at respecting the rights of the victim in situations of immunity from enforcement such that it does not serve to exempt payment. It also offers protection in relation to assets of Embassies and Consulates that cannot be impounded.

He reported that in some cases the executive power participates with the aim of indicating that immunity is recognized, a duty carried out by the Prosecutor, and whose intervention is made in compliance with the law.

Dr. Hernández García pointed out that the intention of the Rapporteur on immunity of international organizations is to provide a document that will serve as a reference guide for member states as well as international organizations. He thanked the Legal Advisors for their proposals that demonstrate not only the importance of jurisprudence, but also of administrative practices and he committed himself to compile in his report a set of best practices.

As regards the aforementioned jurisprudential trend of the European Court, Dr. Hernández referred to a case from among those analyzed in his second report concerning an agreement between Mexico and the Pan-American Sanitary Bureau (*Oficina Sanitaria Panamericana*), which established the obligation to provide adequate mechanisms for resolving disputes. He also mentioned a case which established the obligation of respecting domestic law, corresponding to an agreement between Argentina and the Latin Union Organization. This is not the norm usually applied, but is an option that should be explored.

Dr. Ruda agreed with the proposal of the Legal Advisor from Chile that notices be sent through the Ministry of Foreign Affairs, although this does not always occur.

In the case of Peru, one seeks not to interfere with judicial powers, but on many occasions it is necessary to explain that the Peruvian State has international obligations. There is no intervention in the process itself, but the State is obliged to provide information.

He observed that it would be helpful to reinforce the pedagogical process, by means of training, workshops and other methods such as on-line presentations, live or recorded that could be proposed by the Inter-American Juridical Committee or the Department of International Law.

Dr. Martínez of Mexico highlighted that in the case of immunity from enforcement, diplomatic work is also carried out informally in his country to help to reach agreements with States and Organizations that have been sued.

He concurred with Dr. Galindo´s explanation as to avoid signing agreements with international organizations that demand immunity for nationals, as he also believes that this generates different treatment for those locals who work for international organizations in the domestic territory.

As regards electronic warehouse receipts, he noted that this can be developed on a regional level with the possibility of becoming internationalized at a later stage, and for this reason he considered that the Committee should give attention to this matter. The topic of secured transactions is an example of a product initiated at the regional level by the OAS and was then developed later at the international level.

In the field of immunities of international organizations, Dr. Mata Prates described a case that took place in Uruguay and concerned the Latin-American Integration Association (*Asociación Latinoamericana de Integración* - ALADI), an organization that, after dismissing 20 of their employees, was sued before the Supreme Court of that country; a lower court had assumed jurisdiction because ALADI did not have an administrative tribunal. However, in the meantime, ALADI had created an administrative tribunal, hence the Supreme Court refused to take jurisdiction.

With regard to notifications, he indicated that Uruguay interprets the Convention on Consular Relations (1963), in a manner that requires notification through diplomatic means.

He also explained that in Uruguay, as in other countries, informal negotiations are carried out in the case of labor disputes and may take place at the beginning of the process, just after the presentation of the initial briefings, and not necessarily only after there has been a ruling made against the State.

Dr. Botet of the United States underlined the importance of this meeting, and reflected that in 20 years there had not been a similar opportunity. She emphasized the productivity of the Inter-American Juridical Committee, referring in particular to the topics of personal data protection and the model law for simplified stock corporations.

In her presentation she outlined five points of interest of her delegation:

1. To prioritize work of the Committee that provides practical benefits that have direct impact, such as topics in the field of private international law;

2. To continue discussions in topics that have already been initiated, such as electronic warehouse receipts and the law applicable to international contracts;

3. To intensify coordination with other international organizations working on topics of mutual interest, for example, the United Nations Commission on International Trade Law (UNCITRAL) on the subject of e-commerce. She also urged work be undertaken on topics proposed by Asia-Pacific Economic Cooperation (APEC);

4. The Committee should also work on cross-border initiatives, for example issues regarding credit cards and *small claims*; and,

5. To develop guides and model laws.

She recalled that next year doctor Hollis from the United States would become a new member on the Committee, and that he has extensive experience on topics related to cyber security.

Dr. Troncoso proposed examination of the work format of the Inter-American Juridical Committee. In this respect, he concurred with many of the points raised by doctor Botet. In particular, he explained that he found it important to avoid duplication of efforts, as usually occurs with other international organizations. He suggested coordinating with other international organizations to share topics and information by electronic means, when to hold meetings in person would be difficult.

As regards the topic on regulation of business in the area of human rights, he considered it important for the Committee to organize a dialogue with the Inter-American Commission of Human Rights.

The Chairman pointed out that the Committee has many contacts with other organs both within the OAS, as in the case of the Committee on Political and Juridical Affairs, the Permanent Council and the Inter-American Commission on Human Rights, and other organizations at the international level, such as the UN International Law Commission (ILC), whose contacts go back

for decades. He indicated that the maintenance of these contacts requires large human and financial effort and that the Committee always intends to maintain them. He also explained that the mandate concerned with business and human rights emanates from the OAS General Assembly, and includes actions both for the Inter-American Juridical Committee and for the Inter-American Commission on Human Rights.

Dt. Ortíz suggested that the Inter-American Juridical Committee prepare an operational manual on the topic of immunities that could be used by the judiciary of countries. On the topic of representative democracy, he proposed that the document be prepared in common language, directed to the general population and not only experts.

Dr. Moreno commented that at the March session there had been ample discussion of the points expressed by Drs. Botet and Troncoso on the need to avoid duplication of efforts. He explained that during the course of the CJI's work on the Mexico Convention thought has been given to coordinate the solutions of said Convention with the most recent modern principles, such as the Hague Principles and the recommendations of UNCITRAL. Moreover, he recalled that the Committee has given a mandate to the Secretariat to strengthen cooperative ties with the secretariats of the aforementioned *fora*.

He explained that in a study by The Hague Conference it has been stated that the most underdeveloped regions of the world, in regards to international contacts, are some parts of Africa and Latin America. This is the reason why these topics must be developed within the OAS.

Dr. Ruda suggested that this type of exercise should be carried out within the Committee with the Legal Advisors more often to facilitate this dialogue. He added his voice to the proposal made by other Legal Advisors on the importance of useful subject matter for the work of the Inter-American Juridical Committee. In his opinion, although there are subjects that are very important at the academic level, an institution like the Committee should strive to provide practical and useful solutions.

He urged the Committee to work on the topic of corporate responsibility in the area of human rights as well as on topics relating to the protection of the environment, and in particular, the marine environment and high seas.

Dr. Baena Soares thanked all of the Legal Advisers for their participation and excellent contributions. He explained that he was not worried about the duplicity of topics, considering that the Committee responds to its mandates in a short space of time, compared with other forums dealing with international law,. He also mentioned another important difference is that the scope of application of the Committee's activities is limited to this Hemisphere.

Dr. Martínez urged the Committee to follow up with the OAS political organs as regards their finished work; this may have a direct consequence on the participation of States when requested to answer questionnaires or when involved with General Assembly mandates.

With reference to specific topics, he explained that the work of the Inter-American Juridical Committee contributes to the progressive development and codification of international law, and must adapt to changes, and in this sense a *rapprochement* towards new niches of work should, of course, involve topics in the field of private international law, but not be limited to that field.

As a new topic, he proposed to follow-up on reservations and declarations of Inter-American treaties, similar to the work of the European Council.

Lastly, he identified the Law of the Sea as an important topic to be developed. Specifically, he recalled that UNCLOS delegates to States the drafting of internal norms regarding scientific marine research, but very few States have legislation on the matter. There could be a practical guide or model law on the subject. Similarly, research on the topic of protection of the marine environment would appear to be quite pertinent. In this context, he mentioned other topics of interest such as: environmental impact assessment, maritime waste, and contamination by land sources or other oceanic activities, which could contribute to a best practices.

Dr. Hernández expressed thanks for the feedback presented and said that the Legal Advisors are the first readers and the best critics of the work of the Inter-American Juridical

Committee. Doctor Hernández also highlighted the importance of active participation by delegations when the reports of the Inter-American Juridical Committee are analyzed at the Committee on Juridical and Political Affairs (CAJP) as well as at the General Assembly. He emphasized that dialogue with the Inter-American Juridical Committee is also a responsibility of States.

Dr. Villalta also thanked the Legal Advisors for their participation. She stressed that topics of private international law are part of the Committee´s agenda and explained that, in this respect, in this working session the Committee would hold a joint event with professors and experts to address some important topics in that area. She also suggested that it would be advisable to think about a mechanism for the regular follow-up of the work of the Committee within the OAS and within the CAJP, as an example.

As regards the topic of the Law of the Sea, she considered it very important to have a Hemispheric vision and to bring that vision into the discussions that are taking place at the UN towards a binding legal instrument for the protection of marine resources in the high seas.

Dr. Galindo also expressed his thanks for the possibility of dialogue with the members of the Inter-American Juridical Committee, and was in favor of the proposal to hold more meetings of this kind.

Regarding the topics of interest for the Legal Advisors in his country that might be addressed by the Committee, he asked for a review of the practice of States regarding memoranda of understanding that are adopted by various national agencies and sent to Congress for approval. In this regard, he suggested the development of general principles or a guide of best practices.

Dr. Salinas was thankful for the variety of topics proposed, and highlighted the ability of the Committee to propose new mandates for the agenda. Thus, this type of dialogue is highly enriching.

In relation to the topic mentioned by Dr. Galindo, he considered it highly practical, as these instruments are now in a juridical *limbo*, without clear regulation.

Dr. Troncoso was also grateful for the experience of dialogue with the members of the Committee. He returned to the topic of memoranda of understanding and shared the experience of the Chilean Ministry of Affairs where documents have been adopted when there had not been much time for negotiation and which had implicated inter-institutional agreements. Therefore, it would be convenient to have a guide on best practices.

He explained that in his country a draft law is being considered in the area of treaties and international agreements, following the example of the law approved recently in Spain.

Dr. Ortíz said that the problem involving memoranda of understanding was very common in his country as well. He said that in order to determine whether or not they are to classified as treaties would require reflection on the importance of provisions such as a date of entry into force and the need for the approval by Congress.

Dr. Mata Prates considered the meeting to have been very productive and invited implementation of a system of cooperation that would be more frequent to establish these points of practice and usefulness for States.

Dr. Ruda also shared his experience on the constant signing of memorandums of understanding, approved both by central governments and by provincial/municipal governments.

He reported that the Peruvian Ministry of Foreign Affairs has drafted a "*vademecum"* that is used as a reference, such as information circulars, with the aim of establishing best practices and restrictions for the signing of that kind of agreements.

The Chairman thanked the members and Legal Advisors for their participation and suggested that other advisors throughout the Americas be informed about these meetings. He also asked the Legal Advisors of the Ministries of Foreign Affairs to take note of requests for information and urged them to reply to the questionnaires forwarded by the Inter-American Juridical Committee.

The meeting with the Legal Advisors from the Ministries of Foreign Affairs was concluded at 5:54 pm.

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10) October 7, 2016: Round Table on Private International Law.

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

The plenary of the Committee participated in this event, which featured presentations by accomplished national and foreign professors, members of the Committee and officials from the Department of International Law, who were joined by about one hundred students. Among the invited Professors we may highlight the following: Mercedes Albornoz (Center for Economic Research and Teaching - CIDE); Claudia Lima Marques (Federal University of Rio Grande do Sul - UFRGS); Juan José Cerdeira (University of Buenos Aires); Verónica Sandler (University of Buenos Aires); Marilda Rosado (UERJ); Raphael Vasconcelos (UERJ); Nádia de Araújo (Pontifical Catholic University of Rio de Janeiro); Lauro Gama (Pontifical Catholic University of Rio de Janeiro), and Luciana Klein (Pontifical Catholic University of Campinas).

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