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IMMUNITIES OF INTERNATIONAL ORGANIZATIONS: DOCUMENT FOR COMMENTS

(Presented by Dr. Joel Hernández García)

1. Background

At the 86th regular session, the Juridical Committee decided to begin an examination of the immunities of international organizations. The study was entrusted to Dr. Joel Hernández García, member of the Juridical Committee and its current Vice Chair.

The initial objective of the Rapporteurship was to draft an instrument containing general principles of international law in the Americas with respect to the jurisdictional immunities of international organizations, however, the rapporteur concluded the relevance of proposing a **Practical application guide on the jurisdictional immunities of international organizations**. In response to the mandate received by the Committee, the Rapporteur submitted three reports[1] that explain the development of the Guide.

With a view to preparing this instrument, the Rapporteur has examined the following sources of law: national laws (in the countries that have enacted them);[2] the treaties establishing the bodies of the inter-American system, the headquarters agreements in force,[3] and case law.[4]

2. Proposed practical application guide on the jurisdictional immunities of international organizations

The examination of the aforementioned instruments yielded two conclusions.

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[1] Joel Hernández, Immunities of International Organizations, document CJI/doc.486/15 of July 30, 2015.

[2] Department of International Law, Immunities of International Organizations, document DDI/doc.5/15 of July 24, 2015.

[3] The second report, presented at the 89th regular session (CJI/doc.499/16), examined 15 international instruments including establishing treaties, privileges and immunities agreements, and the headquarters agreements of regional and subregional bodies.

[4] The third report, presented at the 90th session, listed court decisions from OAS Member States that had adjudicated cases related to the immunities of international bodies. The research shows that such decisions have been issued in 18 States: Argentina, Bolivia, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, the United States of America, Guatemala, Mexico, Panama, Paraguay, Peru, the Dominican Republic, Trinidad and Tobago, Uruguay, and Venezuela.

First, the jurisdictional immunities of international organizations are treated on a case by case basis.

All of the organizations are subject to founding treaties that both establish them and enshrine the decision of the Member States to endow them with the means with which to perform their functions. These founding treaties establish legal relationships among the international organizations and the Member States and create a general legal framework for their respective activities.

In some cases, international organizations enter into headquarters agreements with the host State to specifically define the legal relationship in the country where they are established. The analysis undertaken demonstrates that this second type of treaty makes it possible to set specific conditions for the body's operation in the territory of the host State according to the needs of the organization and the host State's potential for extending immunities, prerogatives, and facilities. Those headquarters agreements are in turn based on the administrative measures and laws of the host State.

Although these instruments include elements common to all types of international organizations, they also contain characteristics specific to each given organization.

Given that the immunities of international organizations are dealt with on a case by case basis, the second conclusion derived from the analysis is that it is impossible, for now, to identify a consistent international practice that would allow for the creation of an instrument with general principles of international law applicable to international organizations in the Americas.

Nevertheless, we can extract the best practices of States and international organizations as well as of national and international courts in order to address the jurisdictional immunities of organizations in a way that allows for them to function and to meet minimum legal standards in the territories where they conduct their activities.

In view of the above, the Rapporteur considers that it may be useful for OAS Member States to draft a **Practical application guide on the jurisdictional immunities of international organizations** with recommendations for handling specific aspects of the jurisdictional immunities of international organizations.

3. Characteristics and scope of the practical application guide on the jurisdictional immunities of international organizations

The draft Guide, presented as an annex, contains practical guidelines accompanied by explanatory notes by the Rapporteur. In addition, it identifies the source of law that supports the guidelines, whether it is a treaty, judicial decision, or provision of national law.

With respect to its content, the draft Guide is limited to the jurisdictional immunities of international organizations and does not include other components of diplomatic law. In other words, it does not consider the privileges, courtesies, and faculties that the States may grant to international organizations unilaterally or by treaty provision. This exclusion is based on the fact that the practice examined does not reflect differences or disputes in the application of privileges such as the inviolability of premises, the inviolability of archives, communications facility, customs facilities, and tax exemptions.

The proposed Guide also does not address the jurisdictional immunities of the staff members of international organizations or the representatives of Member States. With regard to the former, the immunity conferred is functional in nature and the acts they perform in the course of their duties are protected from undue interference. Secretaries General and representatives of the States are treated as diplomatic agents for purposes of privileges and immunities.

In general, the proposed Guide should be seen as a starting point for ongoing consideration as the practice of international organizations is developed.

This Rapporteurship is of the opinion that the conditions do not exist at this time for the Organization of American States to consider drafting a legally binding international instrument on the jurisdictional immunities of international organizations.

The elements gathered at this point make it possible to confirm that there is no standard treatment within the Member States with respect to the immunities of international organizations. The practice of the States is regulated through headquarters agreements on their relationships with the international organizations residing in their territory.

The case by case approach to this matter leads us to conclude, in addition, that the administrative and judicial bodies of the States would benefit from being familiar with the practice of States that reflects and fosters an emerging international custom, in order to guide their own decisions.

It may be useful for the elements of this practical Guide to be incorporated into headquarters agreements, thereby resolving organizations' situations of conflicts in advance.[5]

4. Course of action

During its 91st regular session, the Committee reviewed the draft Guide and decided to circulate the text among interested parties for their comments.

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[5] The International Law Commission of the United Nations attempted unsuccessfully to draft a general instrument on the privileges and immunities of international organizations. See: http://legal.un.org/ilc/summaries/5_2.shtml.

Comments from the legal offices of OAS Member State foreign ministries, and from international organizations, to enrich the attached proposal would be very helpful. Comments and suggestions sent to the Department of International Law of the OAS Secretariat for Legal Affairs before January 31, 2018, will be very gratefully received.

Once such comments are in hand, the Juridical Committee will study a revised version of the Guide for later submission to the OAS policymaking bodies.

It should be emphasized that the Guide will be nonbinding in nature. It is meant solely as a reference document reflecting the practices of states and international organizations in this area. The more the instrument reflects international practice, the more useful it will be to its target audience.

ANNEX

PRACTICAL APPLICATION GUIDE ON THE JURISDICTIONAL IMMUNITIES OF INTERNATIONAL ORGANIZATIONS

(Draft)

Guideline 1

Agreement of the Member States is the source of the jurisdictional immunities of international organizations

The jurisdictional immunities of international organizations are derived from the intent of their Member States, expressed in constituent treaties or agreements on privileges and immunities with regard to the legal relationship between that organization and its members in headquarters agreements governing the legal relationship with the State that hosts the international organization in its territory.

Unlike the immunities of States, the applicable law is not the result of the evolution of a customary rule later codified in international law instruments. The law applicable to international organizations is the result of the agreement of the members of the organization that decide to concede immunity in order to give it operational capacity.

Rapporteur's Notes

By virtue of the principle of *par in parem non habet imperium*, States enjoy immunity before the courts of other States. Pursuant to that principle, States cannot be defendants in court cases. This principle originated as a corollary to the principle of equality between States, and gave rise to the absolute immunity of the State.

The law applicable to international organizations took a different evolutionary course. As a general rule, the constituent instrument is the treaty in which each Member State sovereignly recognizes and grants it legal personality for the accomplishment of its objectives. In addition, most constituent treaties establish and regulate—although very generally—–the prerogatives of the international organization in question. Some organizations draft agreements on privileges and immunities to this end.

Additionally, the specific relationship between the international organization and the State where it is located is governed by headquarters agreements that are negotiated for every activity of the organization, or on an *ad hoc* basis to regulate some specific activity of the organization in the territory of one of its Member States.

There is no treaty that codifies the immunities of international organizations at the global or regional level; rather, each organization enters into a headquarters agreement with each State in which it sets up an office. Thus, each State that accredits an international organization in its territory sovereignly recognizes it and grants diverse rights and obligations, bearing in mind each organization's purposes and objectives. Some States have adopted national laws to regulate the activity of the international organization operating in their territory, lending greater certainty to its legal relationship with those bodies.

The immunities of international organizations are therefore dealt with on a case by case basis. The organizations assert before the national courts the immunities recognized in the treaties entered into with the receiving State or provided for in its national laws.

As a general rule, a State cannot subject its acts to the national courts of another State, because there is a legal relationship between equals. In the case of the immunities of international organizations, a legal relationship is established whereby that system is subservient to the intent of the Member States contained in treaties or national laws.[6]

Guideline 2

Objective of jurisdictional immunities

[6] See Judgment 305:2150. Supreme Court of Justice of Argentina, Cabrera, *Washington Julio Efraín v. Comisión Técnica Mixta de Salto Grande*. (December 5, 1983). "Inter-governmental international organizations are now recognized as 'subjects' of international law. That status, however, emanates or is derived from the common intent of their Member States, based on which organizations enjoy or do not enjoy the privilege of jurisdictional immunity in accordance with the provisions of the respective constituent treaties and, if appropriate, the pertinent headquarters agreements (the latter being entered into by the international organization and the State in whose territory the organization's bodies are located and operate)."

Immunities are granted to international organizations to enable them to accomplish their objective and purpose. Immunities are eminently functional in nature and no benefit is granted to any person.

Rapporteur's Notes

The constituent treaty of an international organization results in the creation of a legal entity with legal personality and its own assets. By establishing that "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes," Article 104 of the Charter of the United Nations established a fundamental criterion for every international organization. Privileges and immunities are granted in order for them to be able to carry out the functions for which they were created. Thus, in Article 105(1), the Charter States: "The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes."

In the inter-American sphere, Article 133 of the Charter of the Organization of American States similarly establishes that the OAS "shall enjoy in the territory of each Member such legal capacity, privileges, and immunities as are necessary for the exercise of its functions and the accomplishment of its purposes."[7]

The Agreement Establishing the Inter-American Development Bank states that, "To enable the Bank to fulfill its purpose and the functions with which it is entrusted, the status, immunities, and privileges set forth in this article shall be to the Bank in the territories of each member."[8]

In sum, the immunities and privileges are eminently functional in nature and are granted in order for the organization to be able to accomplish its object and purpose.

Guideline 3

Scope of jurisdictional immunities

International organizations, their property, and assets enjoy immunity from all judicial proceedings concerning acts carried out in the pursuit of their object and purpose, to the extent provided by applicable agreements, except in cases in which the organization expressly waives that immunity.

Rapporteur's Notes

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[7] Charter of the Organization of American States, signed in Bogotá on April 30, 1948 and amended by the Protocol of Buenos Aires in 1967, by the Protocol of Cartagena de Indias in 1985, by the Protocol of Washington in 1992, and by the Protocol of Managua in 1993.

[8] Agreement establishing the Inter-American Development Bank (IDB), adopted in Washington D.C. on April 8, 1959, Article XI, Section 1.

The texts examined grant jurisdictional immunity to international bodies, their property and assets, the representatives of the Member States, and the staff of the organization's secretariat.

Although functional, this immunity is absolute with respect to acts carried out to accomplish the organization's objective and purpose. The statutes of every organization establish the acts related to the objectives of the organization and, therefore, covered by immunity.

The ultimate purpose of that jurisdictional immunity is to ensure the organization's independence and prevent undue influence in the performance of its mandate. Otherwise, an organization would be subject to all types of lawsuits that would make its work impossible. In the case of *Amaratunga v. Northwest Atlantic Fisheries Organization,* the Supreme Court of Canada held that, without immunity, an international organization would be vulnerable to interference in its operations by the receiving State and its courts.[9]

Jurisdictional immunity also extends to the country offices of the Member States of the international body. Generally, the representatives of the Member States enjoy the same degree of jurisdictional immunity as that to which diplomatic agents are entitled under international law.

With respect to the personnel of the General Secretariat of an international organization, immunity varies according to the administrative level of the staff member. For instance, the Secretary General and the Assistant Secretary General of the OAS enjoy privileges and immunities equivalent to those granted to diplomatic agents.[10] For the rest of the staff, jurisdictional immunity is a more limited nature. In other words, staff members enjoy immunity from all legal proceedings concerning acts carried out in their official capacity.

Therefore, jurisdictional immunity is limited by two factors. First, that immunity is limited to acts performed to accomplish the organization's object and purpose—that is, acts of *iure imperii.* As established in the section below, it is not applicable to non-sovereign acts, or acts *iure gestionis*. The second limit arises in specific situations when the international organization waives its immunity.[11]

Guideline 4

Limits to jurisdictional immunities

[9.] Docket 34501. Supreme Court of Canada. *Amaratunga v. Northwest Atlantic Fisheries Organization,* 2013 SCC 66, [2013] 3 S.C.R. 866.

[10.] Agreement on Privileges and Immunities of the Organization of American States, adopted in Washington on May 15, 1949, Article 7, first paragraph and clause (g); and Article 8.

[11]. See Guideline 11 *infra.*

International organizations lack jurisdictional immunity from actions arising from non-sovereign acts, or acts *iure gestionis*, including employment disputes, except when said immunity is necessary to preserve the autonomy of the organization.

Rapporteur's Notes

In the case of both States and international organizations, customary law excludes non-sovereign acts (acts *iure gestionis*) from jurisdictional immunity. Nevertheless, two aspects must be resolved. First, we must determine private law acts that should be excluded from the scope of immunity. Second, in order to make that determination we must specify the threshold required to exclude non-sovereign acts from the scope of immunity.

In the first case, we must distinguish strictly commercial non-sovereign acts that might be performed by international organization like any other actor in the market. This category encompasses the procurement of goods and services, including the hiring of employees that provide support to the international organization in the receiving State.

The Agreement Establishing the Inter-American Development Bank allows for legal actions to be brought against the Bank under certain circumstances.[12] If the Bank's purpose is to provide financing to Member States for development projects, the acts are commercial in nature. Immunity, then, should be strictly functional and allow for legal actions in certain cases.

On the other hand, the practice has excluded from this limitation those non-sovereign acts that are related to the accomplishment of the organization's aim. In the case of *Broadbent v. Organization of American States,* the U.S. Court of Appeals for the District of Columbia held that the hiring of civil service employees by the OAS is not a commercial activity and, therefore, covered by immunity for purposes of preventing undue interference.[13]

The case law has also granted immunity to international organizations in tort cases. Even though the payment of damages for acts caused by an international organization pursuant to its mandate can be a civil action, in the case of *Georges v. United Nations*, the U.S. Court of Appeals recognized the jurisdictional immunity of

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[12] Ibíd. "Solamente se podrán entablar acciones judiciales contra el Banco ante un tribunal de jurisdicción competente en los territorios de un país miembro donde el Banco tuviese establecida alguna oficina, o donde hubiese designado agente o apoderado con facultad para aceptar el emplazamiento o la notificación de una demanda judicial, o donde hubiese emitido o garantizado valores." Artículo IX, Sección 3, párrafo primero.

[13] *Broadbent v. Organization of American States*, United States Court of Appeals for the District of Columbia Circuit, January 8, 1980. 628 Fed.Rptr.2d 27 (1980).

the United Nations, dismissing the claim filed by victims of the cholera epidemic attributed to the MINUSTAH "blue helmets" in Haiti in 2010.[14]

In order to support jurisdictional immunity in disputes governed by private law, the threshold of "necessity" must be met. In the case of *Amaratunga*, the Canadian Court of Appeals found that immunity is "necessary" to preserve the autonomy of the organization. In the context of employment disputes, to the extent that employee's tasks are closer to the central function of the organization, the more likely it is that the organization's autonomy is at stake, and therefore, immunity is generally required.[15]

This criterion was expanded by the Supreme Court of Canada to hold that the Northwest Atlantic Fisheries Organization must be protected from "undue interference," which is determined on a case by case basis. The Court held that the NAFO must be authorized to manage its employees, especially its senior staff, in order to prevent "undue interference" in its operations.[16/]

Undoubtedly, employment disputes are of central concern to the Member States. The practice examined demonstrates a tendency to limit immunity in those cases, provided that they involve the hiring of personnel as part of a commercial activity.

Immunity is maintained in cases involving the organization's civil service staff, or those who hold positions central to the mandate of the organization. As examined in Guideline 5 *infra*, the organization should in any case provide dispute resolution mechanisms so that the individual is not left defenseless.

Guideline 5

Dispute resolution mechanisms in private law

International organizations should provide means of dispute resolution under private law in order to guarantee access to justice to individuals involved in a controversy of that nature.

Rapporteur's Notes

The long-standing practice in organizations is to establish a dispute resolution mechanism to handle claims governed by private law. The UN[17] and OAS[18]

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[14].Georges *v*. United Nations, United States Court of Appeals of the Second Circuit, On Appeal from the United States District Court for the Southern District of New York, August 18, 2016.

[15] Docket CA 343395, Nova Scotia Court of Appeal, *Northwest Atlantic Fisheries Organization v. Amaratunga*, 23, 08, 2011.

[16.] Docket 34501. Supreme Court of Canada. *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 S.C.R. 866.

[17] Convention on the Privileges and Immunities of the United Nations of 13 February 1946, Article VIII, section 29.

agreements on privileges and immunities have provided dispute resolution mechanisms to resolve private law disputes or disputes involving employees that enjoy immunity. Administrative courts have been established in both cases.

This solution reinforces the functional nature of the immunities that international organizations enjoy. Furthermore, it makes it possible to strike a balance between immunities and the right to access to justice of private individuals who cannot avail themselves of the national courts.

A lacuna, however, in the UN and OAS agreements on privileges and immunities is that the availability of dispute resolution remedies is limited to staff members who enjoy immunity. A different solution in other organizations has been to establish the general obligation to have private law dispute resolution mechanisms.

Guideline 6

Characteristics of dispute resolution mechanisms

Dispute resolution mechanisms established by international organizations to resolve private law disputes must be adequate and effective.

Rapporteur's Notes

In the case of *Waite and Kennedy v. Germany,*[19] the European Court of Human Rights held that immunity depends on the availability of adequate and effective remedies. The European Court has specified three requirements for maintaining immunity: (i) immunity must not restrict or diminish the right to due process; (ii) the limitations to immunity must pursue a legitimate aim; (iii) there must be a reasonable relationship of proportionality between the means used and the aim accomplished.

The functional nature of immunities requires that individuals' right of access to justice be preserved. Therefore, the mere obligation to establish dispute resolution mechanisms is insufficient; these mechanisms must be adequate and effective.

Guideline 7

Absence of previously established dispute resolution mechanisms

International organizations should provide alternative means composed of impartial people to handle private law claims in the event that their statutes do not provide for dispute resolution mechanisms.

Rapporteur's Notes

There are some organization-founding instruments, and some agreements on privileges and immunities, that do not provide dispute resolution mechanisms, or that do so only in a limited way. This situation should not exempt such organizations

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[18] Ibid, note 10 *supra*, Article 12.

[19] Application No. 26083/94, European Commission of Human Rights, 2 December 1997.

from the general obligation to abide by due process when private parties lodge a claim under private law.

Without prejudice to the immunity of organizations, one good practice has been to provide alternative dispute resolution when an organization does not have specific mechanisms. For example, organizations could reach friendly settlement agreements, or could purchase insurance to cover contingencies.

Guideline 8

Cooperation with the receiving State in the administration of justice

Organizations and their staff members shall cooperate at all times with the Member States to facilitate the proper administration of justice, guaranteeing the observance of mandatory rules and preventing the occurrence of any abuse in the enjoyment of immunities, exemptions, and privileges.

Rapporteur's Notes

A consistent practice in the agreements governing international organizations is their obligation to cooperate with local authorities in respect for national laws and administrative measures. This principle, borrowed from the immunities of States, allows for a balance between such obligations and jurisdictional immunities for purposes of maintaining the strictly functional nature of immunities.

Section 21 of the Convention on the Privileges and Immunities of the United Nations limits that obligation of the United Nations to cooperate with respect to the acts of its officials, precisely to prevent abuses in connection with the enjoyment of immunities. Similarly, in the case of the OAS, Article 11 of its Agreement on Privileges and Immunities establishes the obligation of the Pan American Union to cooperate with authorities to prevent abuses by their personnel.

An obligation to cooperate with local authorities should be general and not limited to the acts of staff members. The practice followed by Mexico in its headquarters agreements is to include that obligation to cooperate generally with local authorities.[20]

[20]. e.g., Agreement between the United Mexican States and the International Bank for Reconstruction and Development (IRDB) for the establishment of an office in Mexico City. Mexico City, July 31, 1987, Article 13.

Guideline 9

Appearance before national courts

Without prejudice to their jurisdictional immunity, international organizations must appear before national courts to assert their immunity or present a defense.

Rapporteur's Notes

An analysis of the case of *Georges v. United Nations*[21] and other cases shows a consistent practice by international organization of refusing to appear in court when summonsed, invoking jurisdictional immunity. In the opinion of the Rapporteur, a best practice would be for the international organization to be obligated to appear in its own interest.

This appearance would be consistent with the general obligation to *cooperate with national authorities as developed in Guideline 8,* supra, and it would provide the opportunity for the organization to assert its immunity.

Guideline 10

Immunity from enforcement

International organizations, their property, and assets are protected from enforcement measures.

Rapporteur's Notes

Immunity from enforcement is a recognized practice. Even in disputes governed by private law that reach the national courts, immunity from enforcement is fully accepted. In the case of the UN and the OAS, immunity from enforcement is provided for expressly in their agreements on privileges and immunities.[22]

Guideline 11

Waiver of jurisdictional immunity

International organizations should consider the waiver of their jurisdictional immunity or that of their employees a corollary to their obligation to cooperate with the competent authorities of Member States. That waiver of jurisdictional immunity does not include *ipso facto* the waiver of immunity from enforcement.

Rapporteur's Notes

The waiver of immunity is a remedy available to organizations to prevent immunity from preventing justice in certain cases. The waiver maintains the functional nature of the immunities and is a corollary to their obligation to cooperate with the competent authorities of the Member States.

[21.] See note 13 *supra*.

[22.] Article II, section II of the United Nations Convention and Article 2 of the OAS Agreement on Privileges and Immunities.

One constant theme in cases involving the waiver of jurisdictional immunity has to do with the means of enforcement. In the instruments examined, the waiver of jurisdictional immunity does not *ipso facto* include immunity from enforcement. For instance, Article 5, paragraph two of the headquarters agreement between the Eastern Republic of Uruguay and MERCOSUR for the operation of its administrative secretariat indicates that a separate statement will be required for a waiver of immunity from enforcement.

As stated earlier, the waiver of jurisdictional immunity must be express. By the same token, merely appearing before a court does not entail the waiver of immunity if the organization has asserted it.[23]

2. Law Applicable to International Contracts

At the 84th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2014), Dr. Elizabeth Villalta 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

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[23]. Final Judgment 2.440/2010. Supreme Court of Justice of Uruguay. *Sienra Castellanos, Félix, et al. v. Unión Postal de las Américas*, *España y Portugal- U.P.A.E.P. – Cobro de pesos y daños y perjuicios – CAUSA DIPLOMATICA*, December 24, 2010, CASE FILE 1-100/2009 "The waiver of jurisdictional immunity operates if that waiver has been made expressly; that is essential. The lawsuit enjoys jurisdictional immunity unless immunity is waived, and that has not been proven in the instant case; on the contrary, the respondent expressly affirmed that such immunity had not been waived."

ratification of the Conventions was a priority. He added that doing protocols or amendments to conventions already signed and ratified would depend on the willingness of States Party. A review of the Convention of Mexico should therefore be proposed by Mexico or Venezuela - the only ones to have ratified it. Finally, he noted the important role played by the Inter-American Juridical Committee in creating a network of experts who supported initiatives in this area.

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

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

During the 85th Regular Session 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 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 Araújo, 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 consider reasonable suggesting a model law.

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

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

Dr. Mata Prates 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.

During the 90th Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, March 2017), both rapporteurs, Drs. Elizabeth Villalta and José Moreno, shared their views on developments on the subject matter. Dr. Moreno mentioned efforts concerning the law of contracts and the 1980 Rome Convention in Europe and developments in the regional arena, with the Bustamante Code, the Montevideo Code and the work of the Inter-American Conferences on International Private Law (CIDIPs). In fact, he established that in the Americas, the 1994 Mexico Convention (MC) had a similar importance to that of the Rome Convention earlier in Europe. It offered solutions that in some ways were better than those proposed by the Rome Convention, although the MC is an instrument ratified by only two countries - Mexico and Venezuela. He did clarify that Paraguay recently incorporated it into its domestic law. Dr. Moreno then explained the developments of The Hague Conference on Private International Law (PIL) in the area of contracts and, in particular, The Hague Principles, which are intended to aid legislators in their efforts to modernize contract rules. In fact, he noted that both the advances of The Hague and of the regional Convention have been a catalyst for the legislative changes in his country, Paraguay.

Dr. Moreno explained that because Dr. Villalta was concerned over the low number of ratifications and the meager progress of the region on this topic, she prepared a questionnaire on the subject, which was distributed to the States and to academics. The Committee has also looked at the possibility of writing a model law and finally settled on a guide, that would be for more than just legislative purposes, but would also recount the progress made over the past 20 years and would also be available to a wide body of users, including students, arbitrators, etc.

Dr. Moreno then provided an update on the status of the project under his rapporteurship, including an outline of the guide prepared by the Department of International Law, which incorporated the rich responses to the questionnaire that had been received from throughout the region. The draft guide, currently consisting of 150 pages, is intended to explain the guidelines in a simple way, using examples and comparisons in order to assist in each one of our States. He proposed submitting the first draft to the Committee at the next meeting and concluded by expressing hope that the final work product, after considerable fine-tuning, will become what was intended in 1994, but was never achieved.

Dr. Villalta elaborated on her report, document CJI/doc.525/17, emphasizing the interest in the topic and explained the efforts made by the Committee on the subject matter. She stressed that the questionnaires had been sent to all of the OAS Member States and noted that several international public law experts had commended the Committee for taking up the topic. She further noted that the guide was needed for our own region in order to bring together elements of the Mexico Convention, The Hague Principles and the codes of the OAS Member States themselves. She concluded her presentation by reviewing the list of common aspects to the Mexico Convention and The Hague Principles. She explained that these were elements that would be used in the guide.

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

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

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

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

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

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

He has found that many legislators, even professors, did not have much of an understanding of private international law and, for this reason, the guide was intended to simplify the material and make it more accessible. He was concerned that legislators could take 25 to 30 years to amend domestic laws and regulations; while arbitrators, judges and many others could truly benefit right now from the guide. What was being created by this document, he stated, was essentially "soft law."

Dr. Moreno agreed with the comment of Dr. Hernández that the guide had been originally conceived of for commercial contracts. He noted that even though the current draft was long, it covered a great deal of material; even though it was intended to be simple and comprehensive, it just could not be both at the same time. He pointed out that such a document could also spur legislatures to take action. In 1994, the attitude was: "Don't get involved! The Mexico Convention is too new, we don't understand it!" Circumstances have changed and this guide may prompt further ratifications.

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

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

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

Dr. Villalta specified as well that the objective was to harmonize laws in the Americas so that States know how to act with respect to international commercial contracts. She suggested perhaps a document listing all of the regulations and explaining them all.

Dr. Correa understood that the guide was not only intended for legislative purposes, but was also intended to be sufficiently explanatory to be useful in other areas. She thought that the work, as conceived, was fantastic.

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

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

example of the need for caution when embarking on a codification process, which requires a great deal of effort and resources.

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

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

The Chairman recognized the importance of this work and clarified that his remarks were intended to highlight the function of the Committee, which is not the same as that of other bodies. He understood this document to entail enriching the Mexico Convention with The Hague Principles and, from his point of view it would be a guide to aid legislative bodies because it is grounded in facts.

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

During the 91st Regular Session of the Inter-American Juridical Committee (Rio de Janeiro, August 2017), the Rapporteur on the subject, Dr. José Moreno, elaborated on his report, "First draft of the guide on international contracts in the Americas," document 540/2017 corr.1. On this occasion, Dr. Moreno explained the subject background, noting in particular the initiatives of the Committee and the contribution of the Department of International Law in the research it conducted. He also noted that the report reflects a collective effort in which many experts from different countries of the Hemisphere have taken part, such as accomplished professors from Argentina, Brazil, Canada, the United States, and Uruguay.

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

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

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

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

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

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

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

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

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

Dr. Villalta was pleased with the draft document, which follows the evolution of private international law, an area that has been very relevant to the work of the Committee in the past. She mentioned the usefulness of the guide to different stakeholders in light of recent processes of integration. She highlighted the positive influence of the Mexico Convention both at the universal and regional level and the Committee's potential to make a new contribution through the Guide.

Dr. Carlos Mata Prates thanked the rapporteurs for contributing novel private law solutions anchored in public international law, notably arbitration and dispute resolution clauses, noting the positive effect on national and international courts. He concluded by voicing his support for the adoption of a guide by the Committee, whose contribution will be effective to the extent that it is disseminated among operators and is accepted by them, given that this type of instrument is not binding.

Dr. Hollis expressed his gratitude to the rapporteurs noting the wide-range of material covered by the report. He asked whether it was pertinent to include historic aspects in a document of this nature. In the English version, he said, the explanation of the motivation of the guide is not very clear, perhaps because it does not take into account the audience it is targeting. Lastly, he found it necessary to draw a distinction between the descriptive and the normative parts, and commented that this should be reflected equally throughout the report. In this regard, he requested brief summaries to be included. As to the contribution of the Committee, he expressed the need to list available alternatives with their respective explanations and reasoning, which means a decision must be taken as to whether we want a document of a normative nature or a compilation.

Dr. Hernández expressed his appreciation for the impressive document, in addition to commending Dr. Villalta for the explanation about the motivation for the Guide, which is to aid operators in making decisions on the subject of contracts and not pursue further ratification of the Mexico Convention, in view of the fact that treaties should not be considered the only legal solution. As to the content of the report, he thinks that the document could be adopted as presented by the Committee, but he fears that in its current version it would not achieve the intended purpose, because we are not seeking an academic but rather a practical document. For this reason, it must be more concise, clearly identify the normative part and explain the principles and solutions to be promoted based on benchmarks that were found.

The Chairman reiterated his congratulations to the rapporteurs and cited the solutions proposed by global and regional instruments. He urged the rapporteurs to create a report that moves on to a second normative sphere, identifying the norms from which contracts in the region should draw.

Dr. Baena Soares endorsed the comments in favor of a proposal that offers practical aspects to aid operators of the law in their work, supporting the adoption of a guide. While he regards himself as a neophyte in the subject matter, he asked the rapporteurs to continue with their work.

Dr. José Moreno asserted that even though it is not the intention of the rapporteurs, the Guide could lead to ratification of the Convention. With respect to the comments of Dr. Mata Prates, the Rapporteur agreed with its usefulness in the area of arbitration, and that it could serve as an important benchmark for the States, and the specialized institutions, in the same way that The Hague Conference and UNCITRAL have, and this can help to disseminate and support it.

As to the comments of Dr. Hollis, he explained that mention of historic background is necessary because of the lack of familiarity with it by operators. He clarified that the Secretariat is cleaning up the English version. Regarding the audience, the expectation is that these instruments serve a broad range of stakeholders, actors such as legislators, judges, parties and, therefore, the ideal thing would be to make clear throughout the document that the operator is very much at the forefront. He clarified that the Guide aims to provide a reasonable and well-founded explanation about the status of the issue in each particular case. The Rapporteur is intending to provide a collection of the positions of the States. As for the normative part, he fears that in seeking to take a position on certain points, a choice has to be made between the Mexico Convention and The Hague Principles and, consequently, this alternative should be seriously evaluated. Today's guides are complex, technical and extensive and the Rapporteur has taken particular care in drafting a more brief and to-the-point product; in fact, it was shortened from 300 to 120 pages. With relation to corrective solutions, he proposed revisiting principles of the Mexico Convention, although the Conference also offers good options. In response to Dr. Hernández, he agreed about the need to produce a practical report, but that it cannot be shortened more than it already has been. He noted that we do not have the same conditions as The Hague Conference, which was supported by other institutions and experts from all over the world and was conducted over a much longer period of time. He proposed keeping the text in its current form, while considering the technical aspects of it, and voiced the need for the region to have an instrument available in the near future.

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

Dr. Richard expressed his appreciation for the work in support of Dr. Hernandez's remarks, and mentioned the complexity of the proposed topics in the report and, in his case, even more so because they are not in French. He asked for these reports to be translated to enable wider dissemination of the Committee's work among experts from his country, in addition to international organizations such as the African Union.

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

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

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

Dr. Ruth Correa highlighted the comprehensive compilation put together by Dr. Moreno, and, echoing her colleagues who spoke earlier, she felt it is necessary to find possible solutions to applicable norms and procedures. Concretely, she suggested not including topics of arbitration in the study, because they involve issues that could be categorized as quasi-contractual. This topic could actually give rise to a separate paper. In fact, she asked the plenary for further explanations on the elements that a guide should include. If we are asking the rapporteurs to imply which ones are the best solutions through definitions, then she will go that route in her report.

Dr. Villalta supported Dr. Correa regarding the issue of the nature of the guide in order to achieve uniformity in the work of the Committee. Likewise, she invited Dr. Moreno to determine what is most relevant to private international law today, in addition to identify applicable law in each case, so a principle can be issued based on the issue.

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

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

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

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

Dr. Ruth Correa asked about the level of confidentiality of these documents, and whether the rapporteurs are able to consult with experts prior to presenting them to the plenary of the Committee, to which the Chairman responded in the affirmative and said the rapporteurs may consult on an individual basis with anyone they deem pertinent and also propose engaging in consultations with other bodies, which must be approved by the plenary.

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

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