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## Workshop Summaries

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## Workshop 1. Legal Education & Professionalism

Location: *Costa Rican Bar Association*

**Panelists:** Jon Mills, Dean Emeritus, Professor of Law, and Director, Center for Governmental Responsibility, Levin College of Law; Rafael González Ballar, Dean, Faculty of Law, University of Costa Rica; Josh Markus, Chair, American Bar Association's Section of International Law & Practice; Chair, International Practice Group, Carlton Fields P.A., Miami; Simon V. Potter, Past President, Canadian Bar Association; Partner, Ogilvy Renault, Montreal; Jaime Cortes Rocha, Council Member, Barra Mexicana, Mexico City, Mexico; Arturo Fournier Facio, President, Costa Rica Branch, Inter-American Bar Association; Pedro A. Malavet, Associate Professor of Law, Levin College of Law; Timothy E. McLendon, Staff Attorney, Center for Governmental Responsibility, Levin College of Law; Elizabeth A. Jenkins, U.S. Magistrate Judge, U.S. District Court for the Middle District of Florida; Chair, Latin America/Caribbean Subcommittee, Judicial Conference Committee on International Judicial Relations; Iliana Arce Umaña, Chair, Board of Directors, Costa Rican Bar Association

### **Summary submitted by Jon Mills & Timothy McLendon:**

The panel discussion and its recommendations were organized into separate legal education and bar association activities. The first group focused on needs and suggested reforms that would help the academic community better support the rule of law in the Americas by equipping lawyers and judges. The second group addressed the concerns of the legal practice, especially with regard to professionalism and service.

#### Education recommendations:

1. The panel agreed that law schools should improve and update their Curricula to give legal education a broader perspective on both ethical issues and international affairs, and that law schools should introduce more practical courses, such as clinics. Legal education should focus on creating professionals who would contribute to the rule of law locally and internationally.

Suggested reforms and improvements would include the creation and incorporation of:

- a. Interdisciplinary programs;
- b. International & comparative law;
- c. Ethics;
- d. Practical courses (Clinics, Alternative Dispute Resolution);
- e. Law as a social right/responsibility, not a commodity;
- f. Awarding credit for pro bono work;
- g. Focusing on the creation of critical thinkers in legal education;
- h. International law programs, including legal anthropology (culture & language); and
- I. Legal exchange (of laws, skills & methods) among faculty and students.

2. The panel agreed that an informal Inter-American Association of Law schools should be established to connect law faculties, perhaps with help from organizations such as the Inter-American Bar and other academic and bar associations.

3. Josh Markus pointed to the proposed Leadership Latin America program as an opportunity that needed to be incorporated into both legal education and the practice of law. This program proposes an annual leadership training program for outstanding young professionals from throughout the Americas, allowing them to exchange ideas and project activities centering on improved rule of law in their respective countries.

4. As a part of cross-border networking, the panel suggested the creation of Institutional Partnerships among law schools in the hemisphere. Also suggested are Guidelines for International Exchange, which should include the establishment of subject-based work groups of professors from various faculties and states.

5. The panel discussed the need for a common language of law that would help bridge the gaps in international understanding, especially between nations of the common law and civil law traditions. The academic community is well-placed to develop this, and would benefit from a greater consideration of comparative perspectives.

6. As a specific academic improvement, the panel suggested the creation of a post-graduate specialization, whether in the form of an LLM or certificate in Latin American Law.

7. To overcome economic hardships, the panel advocated the creation of scholarships to improve access to legal education and make possible the international exchange programs.

8. The panel suggested the establishment of a Justice Center of the Americas in the U.S., modeled after the OAS Center in Santiago, Chile. The U.S.-based center would be headquartered at an American university, and would include academic study of the rule of law and improvements to legal education in the hemisphere as one of its specializations. The U.S.-based center would coordinate with the Santiago center in promotion of rule of law issues in the Americas.

9. To encourage inter-hemispheric links, the panel suggests the recognition of excellence by academics and professionals contributing to the rule of law through the establishment of awards and/or grants. These could be either national or international in nature.

10. Because of the importance of journal articles to academic life, the panel notes the need to provide publication opportunities that would allow international voices and would give academics from smaller nations and universities the chance to publish articles in areas where comparative perspectives would be helpful.

#### Bar Association recommendations:

1. Because law practice continues for many years after formal legal education ends and because of the need for attorneys to be aware of new developments in the law, all bar associations should consider making mandatory continuing education requirements (especially with regard to ethics) and should also undertake other programs to contribute to the professionalism of practitioners.

2. Because of the inter-dependency of law practice and the rise of disputes affecting multiple jurisdictions, bar associations should consider ways to facilitate the accreditation of attorneys across borders, while also maintaining necessary standards and qualifications.

3. Because the practice of law needs to be seen as contributing to the lives of the community and because the rule of law demands access to justice for all, bar associations should consider ways to require the reporting of pro bono activities, and encouraging lawyers to participate in pro bono activities, especially with regard to legal aid to the poor and those not serviced by lawyers.

4. Judge Jenkins suggested the American “Inns of the Court” as a model of mentoring that may be applied internationally to bring together professionals, judges, academics and students with a wide range of ages and experiences.

5. The panel suggested the need for a cooperative effort on judicial and legislative reform on rule of law issues across borders. This would allow professionals in one nation to benefit from the ideas and experience of those in other nations, and would promote the spread of best practices and greater respect for other nations’ efforts.

6. As a final issue, the panel considered the question of public legal education: how best to make the public aware of their rights, and explain and de-mystify the legal process for citizens. As part of this, bar associations should consider public education and awareness campaigns, making summary information about the law, process and citizens’ rights broadly available.

## Workshop 2. The Human Right to Property and Sustainable Development

Location: *InterAmerican Institute for Human Rights*

**Panelists:** Tom Ankersen, Legal Skills Professor; Director of Conservation Clinic and Costa Rica Program, Center for Governmental Responsibility, Levin College of Law; Rosemary Coombe, Tier I Canada Research Chair in Law, Communication and Culture, York University, Toronto, Canada; Roberto Cuellar, Executive Director, InterAmerican Institute for Human Rights, San Jose, Costa Rica; Victor Rodríguez Rescia, Program Officer, Department of Public Institutions, InterAmerican Institute for Human Rights, San Jose, Costa Rica; Luis Ricardo Zeledón, Director of Post-Graduate Program in Agrarian and Environmental Law, University of Costa Rica School of Law; Magistrate, Supreme Court of Costa Rica; Berta Esperanza Hernández-Truyol, Levin, Mabie and Levin Professor of Law, Levin College of Law; Carmen Diana Deere, Professor of Economics & Director of the Center for Latin American, Caribbean and Latino Studies, University of Massachusetts, Amherst (Dr. Deere assumed the position of Director of the Center for Latin American Studies at the University of Florida August 15, 2004); Jeffrey Wade, Director, Environmental Studies Division, Center for Governmental Responsibility, Levin College of Law

### **Summary submitted by Thomas Ankersen, Rosemary Coombe & Thomas Ruppert:**

This conference workshop focused on issues related to real, personal, and intellectual property in the context of international law and sustainable development. The panel workshop took place at the Instituto Inter-Americano de Derechos Humanos (IIDH)(Inter-American Institute for Human Rights). An introduction to the IIDH and its work was given by Victor Rodriguez, IIDH attorney.

All of the papers in the workshop addressed property issues from a human rights perspective and agreed that through a human rights lens, property is not merely an individual right of possession (a civil right), but a social, economic, and cultural right. The ways in which property is recognized and allocated shape the possibilities for social development and whether societies can develop sustainably.

Thomas Ankersen, Director of the Conservation Clinic at the University of Florida, along with Thomas Ruppert, research assistant at the Conservation Clinic, gave the first presentation. The presentation traced the development of the treatment of communal property in the western legal tradition and, more specifically, the genesis of protections for communal property in the Inter-American human rights system. The presentation put property protections in an historical context beginning with Roman law to the split between the common law (Magna Carta in 1215) and civil law (Siete Partidas also during the 13<sup>th</sup> century) through the Enlightenment period. The presentation noted the legal and philosophical rationales used to dispossess indigenous peoples of their communal properties before tracing domestic and international precedents that began to discredit the notion that communal lands of indigenous peoples could qualify for inclusion under the *terra nullius* doctrine of international law (stating that a nation could claim land that was “unoccupied”).

Rosemary Coombe then addressed issues of the use by modern, western corporations and governments of the knowledge, art, and other products of indigenous cultures. While this typically falls under the rubric of intellectual property law in the western legal system, Coombe used examples of difference in cultural make up and organization to demonstrate how even the terminology of western intellectual property law does not fit appropriately with most indigenous groups' own conception of their rights regarding their cultural art and images and knowledge. Coombe then pointed out that protection of cultural knowledge of indigenous peoples is essentially *sui generis* in nature and requires the western legal system to consider fundamentally different concepts and methods for protecting the rights and integrity of indigenous cultures to the images, knowledge, and culture that they have developed.

Carmen Diane Deere presented intensively data-driven research on Latin American laws regarding women, property, and marriage. The research demonstrated the abysmal discrimination that women faced under the laws of Latin America in the past and then, through more recent laws, allowed Deere to trace for the audience the different progress of various countries' laws and their strengths and weaknesses. The research impressed the panel with the richness of the analysis available through such exhaustive investigation of women's property rights across both countries and time. Many agreed that this serves as a model for further comparative law research.

Berta Hernandez-Truyol then addressed possible avenues for pursuing human rights claims, especially claims of violations of the human rights of women and sexual minorities. She identified three distinct levels at which human rights claims can typically be pursued: the local, national, and international levels.

Jeff Wade first gave some context to the importance of property rights as a critical tool in the struggle to move toward sustainable development. He used Brazil's situation as an example of how insecure land tenure and inequitable land ownership patterns maintain destructive social patterns such as poverty and environmental degradation. He then discussed the possibility for land reform as a way to overcome these problems in Brazil. Operating on the assumption that effective land reform would improve the situation, he then outlined the history of land reform in Brazil. Unfortunately, the outlook for effective, equitable, and efficient land reform is not good in Brazil; after many years of effort and a recent push to attempt a new reform paradigm that includes market forces, land distribution statistics have improved little in Brazil.

Luis Ricardo Zeledón discussed the issues and the crucial role that legal and cultural views of property home to Costa Rica. He explained how property and its ownership have reflexive effects on culture by tracing the history of property ownership patterns in Costa Rica from early European settlement to the present while outlining the effects that such ownership and changes have had on Costa Rica. Costa Rica made an excellent case study for this as its property ownership history is unique in Central America because of the preponderance of small land owners during even early times of European settlement.

The panel concluded that equality of access to property must be a fundamental priority to promote the participation of all individuals and groups in sustainable development. Three points were agreed upon for further research: 1) the need to attend to the ways in which specific groups

of individuals are deprived of access to property – for example, the institution of marriage may be used to deprive married women and sexual minorities of property; 2) the state must provide means to enable property to be used both productively and sustainably for present and future generations. (This may involve limiting what can be done with property to prevent environmental harm and activities dangerous to human health); 3) the need to recognize and affirm alternative forms of holding and valuing property that have been devalued, marginalized or denigrated by modern Western legal traditions – especially communal property and collective property holding traditions such as the subsistence economies of Afro-Colombians and the distinctive collective rights and obligations of indigenous peoples with respect to their territories.

## Workshop 3. Decentralization, Property Taxation and Valuation

Location: *Instituto de Fomento y Asesoría Municipal (IFAM)*

**Panelists:** Edward A. Crapo, Past President, International Association of Assessing Officers; Alachua County (Florida) Property Appraiser; Richard Hamann, Attorney, Researcher, and Teacher, Center for Governmental Responsibility, Levin College of Law; Grenville Barnes, Associate Professor, Civil Engineering, Geomatics Program, University of Florida; Maribel Sequeira, Executive Director, Instituto de Fomento y Asesoría Municipal, San Jose, Costa Rica; Enrique Ulate Chacón, Professor of Agrarian Law, University of Costa Rica, Superior Agrarian Judge, Costa Rica

### **Summary submitted by Grenville Barnes:**

Decentralization has become an important theme in Costa Rica and throughout Latin America. Municipal and local governments are being given more powers, but more fiscal responsibilities are also being passed down. Property taxation has therefore become synonymous with decentralization and is a theme that is attracting increasing attention in the region. The experience of the US in using taxation devices to promote public policy is particularly relevant to Costa Rica as they begin to develop local property taxation systems.

This workshop met at the offices of the *Instituto de Fomento y Asesoría Municipal*<sup>1</sup> (IFAM), a national umbrella organization focused on providing technical assistance to municipal governments in Costa Rica. In attendance were employees from IFAM, students from the Conservation Clinic, and the presenters (approximately 20 individuals). The workshop was structured around four formal presentations that addressed property taxation systems and the use of these taxation devices to facilitate policy goals. Discussion periods for each of these themes were included in the formal workshop program. The workshop was facilitated by Dr. Grenville Barnes.

The objectives of the workshop were to (1) exchange information, knowledge and experiences between the two countries, (2) identify key areas of common interest, and (3) to identify potential areas of future collaboration.

After a short welcome by Lico. Juan José Echeverría, Executive President of IFAM, Maribel Sequeira, the Executive Director of IFAM, provided a broad overview of the structure, nature and functioning of the municipal property taxation system in Costa Rica. Ed Crapo, the Alachua County Property Appraiser, provided a similar description for the system in Alachua County, outlining the eight steps in the assessment and taxation process (discovery, listing, valuation, notification, appeal, extension, billing and collection). The questions and discussion that ensued on this theme focused on such aspects as (1) how are assessment information and taxation values updated, (2) what role do the owners play in defining property value, (3) what mechanisms are in place for property owners who fail to pay their taxes and what % of property owners fall into this category, (4) how are tax resources distributed, and (5) what assistance do poorer municipalities

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<sup>1</sup> Institute for Municipal Promotion and Advice

or counties receive, given that property values and taxes will vary considerably between these units of government.

In the second section of the workshop Richard Hamann described how the US uses taxes as a means of providing incentives and disincentives to promote public policy. In particular he referred to the use of taxation to promote the “highest and best use” of the land, including environmental services and biodiversity. He described the system of tax increment financing where increases in property taxes on a property (due to increasing value) are set aside for specific purposes, such as urban renewal or the provision of affordable housing in an area. Enrique Ulate’s presentation highlighted the need for an interdisciplinary approach and the balancing of private versus community interests. He also described the existing legal framework controlling property taxation and some of the challenges facing Costa Rican municipalities. The discussion in this section revealed that the use of property taxation for promoting public policy has not been applied much in Costa Rica and many of the participants found this to be a new area. There was general agreement that it had much potential within Costa Rica and that the experiences of other countries like the US were valuable.

In comparing property taxation in Alachua County and Costa Rica it was established that Alachua County collects roughly 10 times the amount of tax for an area and population that is approximately 1/20<sup>th</sup> the size. The comparative data is presented in Table A.

Table A. Comparison of Property Taxation in Costa Rica and Alachua County, Florida

Factors	COSTA RICA	ALACHUA COUNTY	PROPORTION (approx.)
Number of Counties	81	1	1/80 <sup>th</sup>
Population	4,000,000	230,000	1/20 <sup>th</sup>
Area (square miles)	20,000	965	1/20 <sup>th</sup>
Total taxes collected (2003)	\$20.6M	\$208M	10

**Recommendations:**

The recommendations relate to potential research questions as well as to more specific actions for promoting decentralization, property taxation and valuation. Our recommendations are:

1. Undertake a comparative analysis of the legal frameworks affecting property taxation in the US and Costa Rica.
2. Use scenario development to understand the potential impacts of different tax policies on municipalities.
3. Analyze the effectiveness of decentralization in terms of fiscal sustainability.
4. Examine different attitudes towards open records and freedom of information in the context of property and taxation information.

5. In future conferences define the workshop theme more narrowly, perhaps by focusing it on specific questions.
6. Provide more reference material to workshop participants prior to the workshop so that everyone is “on the same page”.
7. Invite IFAM leadership to Alachua County to physically see the property assessment system (infrastructure, buildings, staff, technology).

## Workshop 4. Conflict Resolution

Location: *Hall of Ex-Presidents, Supreme Court of Costa Rica*

**Panelists:** Michael W. Gordon, Chesterfield Smith Professor of Law, Levin College of Law; José Manuel Echandi, Ombudsman, Costa Rica; Jose Antonio Montes, Attorney and Director, Institutional Provisions and Dispute Settlement Group, CAFTA Negotiating Team, Guatemala; Don Peters, Professor of Law, Trustee Research Fellow, & Director of the Institute for Dispute Resolution, Levin College of Law; John Upchurch, CEO, Upchurch Watson White & Max, Florida/Alabama; Ingrid Palacios Montero, Faculty of Law, University of Costa Rica; Aaron Montero Sequeira, Lawyer, member of E-Print Law Firm; Professor of Intellectual Property, University of Costa Rica

### **Summary submitted by Don Peters & Michael Gordon:**

The conflict resolution workshop consisted of two different panels and discussions: one discussion focused on mediation and the other focused on dispute resolution in an international commercial setting.

Panelists at the mediation workshop shared their experiences, concerns and objectives. Several key points were raised:

1. Extending the use of voluntary mediation/conciliation does not occur as frequently as we think it should.
2. A strong need exists to expand access to mediation/conciliation beyond wealthier citizens.
3. The need to educate the legal community (judges and lawyers), citizens, and companies about mediation/conciliation.
4. Lawyers who experience mediation/conciliation see the value and are more likely to support and use it.
5. Mediation/conciliation works well in intellectual property cases, although strong feelings and internal decision-making dynamics exist. Other kinds of commercial cases are easier to resolve and an important focus area.
6. The practice of judges' trying to mediate/conciliate cases they are adjudicating raises concerns about their impartiality, chills their willingness to share information in caucuses, and makes lawyers anxious.
7. Costa Rica is well situated to host a free-standing, business-to-business dispute resolution institute that delivers mediation/conciliation services to resolve disputes quickly, effectively, and in commercial-relationship preserving ways.

8. The evolution of general acceptance of mediation/conciliation that is connected to the court system is likely to be slow requiring patience, perseverance, and tenacity.
9. Good collaborative ideas exist; resources are needed to implement them.

The panelists discussed specific Costa Rican concerns and some possible responses based on U.S. experiences. These include the challenges of: 1) changing document-based traditions; 2) reducing suspicions about oral processes; 3) possibility of calling for development of a documentary component, including pre-mediation/conciliation summaries and common agreement forms; 4) whether and how mediation/conciliation should be coordinated and systematized; 5) whether the proliferation of the alternative dispute resolution center is wise (relating to the risks of focusing too excessively on subject-matter expertise).

United States research suggests that neither a mediator's knowledge of the dispute subject matter nor the number of years they have practiced statistically correlates to: 1) settlement rates, and 2) the litigants' perception of procedural justice which includes opportunities to tell their stories, be heard and understood, and be treated with respect.

In Costa Rica, there are no formal court-ordered mediation/conciliation efforts underway, and no court-ordered mediation/conciliation is occurring, except when judges arrange sessions that they conduct. While a broad initiative to add court-connected mediation/conciliation, like Florida did in 1987, is likely to generate too much resistance, confusion, and shock to succeed, smaller initiatives could be more appropriate. These could include individual judge-based pilot projects or specific court-focused pilot projects, such as small claims or contested family issues involving children.

The workshop participants identified several possible next steps in the relationship between the University of Florida (UF) and the University of Costa Rica (UCR), including:

1. Invite UCR law faculty to UF for mediation/conciliation training, including the existing three-week intensive seminar beginning each fall term, which provides Florida Supreme Court certification training for county courts and chances to observe actual small-claims mediation.
2. Coordinate a judge/lawyer study visit to UF and Tallahassee and Daytona Beach in Florida.
3. Initiate, cooperate, coordinate, and collaborate with the education and mediation/conciliation training initiatives of the Costa Rican and Inter-American Bar Associations.
4. Participate in effort to diversity and cultivate key business interests to gain support for dispute resolution methods.
5. Identify funding sources to support the proposed UCR dispute resolution institute and to continue the UF/UCR collaboration.

6. Add a dispute resolution course and component to the UF/UCR joint summer abroad program.

In the discussion of the use of conflict resolution in commercial cases, the Ombudsman process in Costa Rica was explained. The Ombudsman's office is being used more frequently, and, as a result, it is overloaded with cases.

In the case of international dispute resolution, it was noted that traditional methods of resolving disputes do not work well. The use of domestic rules of procedure does not work in international disputes.

## Workshop 5. Economic Integration in the Hemisphere

Location: *Costa Rican Foreign Ministry*

**Panelists:** Buddy MacKay, Jr., former Special Envoy for the Americas in the Executive Office of the President of the United States; former Florida Governor, Lieutenant Governor, and U.S. Congressman; adjunct professor of law, Levin College of Law; Stephen J. Powell, Lecturer in Law and Director of the International Trade Law Program, Center for Governmental Responsibility, Levin College of Law; former Chief Counsel for Import Administration, U.S. Department of Commerce; Dennis C. Jett, Dean, International Center, University of Florida; Former United States Ambassador to Peru and to Mozambique; former Senior Advisor to the U.S. Department of State on Africa; Terry McCoy, Director of the Latin American Business Environment Program; Associate Director, Center for International Business Education and Research, University of Florida; Gabriela Llobet Yglesias, Vice-Minister of Foreign Trade of Costa Rica; Adrián Jorge Makuc, Director of Foreign Trade Division, Ministry of Economy, Argentina

### **Summary submitted by Stephen J. Powell:**

As we noted at the beginning of the Conference, the charge of the Economic Integration Workshop was to look at ways in which regional free trade agreements (FTA) may, through provisions that require governments to conduct their activities through a more transparent and expeditious process, a process that relies exclusively on an administrative record created with input from all affected members of civil society, and one whose rules, as well as their implementation by government agencies, are subject to substantive review by an independent and accessible judiciary, contribute to enjoyment by civil society in general, not solely to those involved in international trade, of the “Rule of Law,” a term we define as “formal justice that promotes liberty.”

We undertook our task aware that some members of civil society, including those protesting here in San José against adoption of the Central America - U.S. Free Trade Agreement (CAFTA), strongly believe that FTA's actually are harmful to the rule of law, and human rights law generally, because they weaken the ability of governments to protect health, education, and the environment, and favor international trade over human rights goals. We also recognized going in that the governments who negotiated these trade agreements would not naturally be comfortable with the notion that imbedding rule of law principles into their societies, a role that uniquely belongs to national governments, should be served, even as a “second best solution,” by international law in general, or trans-national trade agreements in particular.

Against this background, we began with an impassioned, articulate, and quite civil debate about the CAFTA between Costa Rica's Vice Minister of Trade, my old friend, Gabriela Llobet, and the head of the Citizen Action Party, my new friend, Otton Solis. A couple of things were especially notable about this vigorous discussion. One is that, although labor and the environment – the principal sources of secular concern in the United States as to the CAFTA – surely could be counted among the points of conflict in Costa Rica, the debate in this country, as Ambassador Frank McNeil told us last night in his insightful comments, is much more about loss

of sovereignty than protection of the environment and labor rights. I refer not to loss of sovereignty exclusively in the traditional sense of the transfer of power by governments to supra-national bodies, but loss of sovereignty in the more modern, anti-globalization backlash sense of disenfranchisement of the people – civil society – in favor of multi-national corporations.

This revelation led inevitably to the second notable aspect of the debate: Even before our panel turned expressly to the question whether an FTA, once approved by legislatures, contributes to the rule of law, we saw that trade and human rights issues, including the rule of law, formed the core debate over whether this FTA – the CAFTA – has value for Costa Rica's citizens. I do not think it would be an exaggeration to state that human rights issues now shape the debate about the value of FTA's. I will return to this point in a moment.

Our discussion revealed that some evidence exists that trade agreements have no legitimate role in examination of progress in rule of law principles, either because (1) human rights issues interfere with obtaining maximum economic benefit of the agreement; or (2) rule of law deficiencies, whether reflected in weak judiciaries or corrupt licensing systems, persist because powerful interests want them that way, and no glancing blow from an impartiality provision in an FTA will change that weakness in the system; or (3) social developments such as rules-based governance, like other aspects of nation-building, legitimately may be accomplished only from within the country, although, admittedly, outside forces (such as FTA's) can facilitate the process.

The theory also was proposed that the extra-judicial remedies provided in FTA dispute settlement systems could actually work to undermine needed reforms of deficient Latin American judicial systems by providing an escape route from these deficient systems for foreign investors, thus removing these powerful companies as proponents of judicial improvement.

Some evidence, in particular in Mexico, Costa Rica, and Argentina, suggests that trade agreements have visibly improved rules-based governance for civil society generally, especially through record-keeping, transparency, and timeliness provisions. Other data sources were found that may offer more conclusive proof one way or the other and I was asked to investigate these sources.

We agreed that any attempt to increase these positive benefits were doomed to failure if account could not adequately be taken of the negative feelings created in the South when the North swoops in to impose its view of the world on Latin America's legal system. There is no single model that can be expected to work everywhere. Care must be taken for this reason to study the values, norms, and other manifestations of the country's cultural heritage in designing trade provisions to make civil society a "free rider" in the rule of law benefits that producers and investors receive from FTA's.

An equally important pre-requisite is recognition that FTA's cannot of course directly inject rules-based governance into a country. Only national governments can ensure the success of the rule of law in their countries. As the responsible authorities in a democratic nation, Governments are charged with making and enforcing laws for their citizens. Moreover, Governments also are obliged to design and implement their economic programs, including

negotiating trade treaties, with the aim of achieving the best results for the country and all its citizens. Outside sources such as international treaties can influence the rule of law only as implemented by governments, which necessarily must then be committed to the agreement's rule of law principles as contributions to those previously-set national objectives.

In a related point, we concluded, as had Professor Hernández in her presentation yesterday morning (during the plenary session), that the problem of how to define "the rule of law" and to translate the concept accurately into Spanish, was even deeper than some of us had imagined. Not only must any model for promoting the rule of law take careful and explicit account of the cultural heritage of each country, but we first must dispel the bitterly destructive impression that the rule of law concept is yet another ploy by big countries to impose their will on the less mighty in order to promote the big country's interests. An important aspect of cultural heritage is Latin America's legal tradition of Roman or civil law, which further complicates the definition/translation issue, and implicates the loss of sovereignty from FTA's felt by some civil society groups.

I promised to return to the notion that human rights issues are prominent in the concerns about the value of FTA's. The case can be made that we have seen a paradigm shift in the conduct of trade negotiations both globally and in the Hemisphere. The question is whether the insistence of civil society – and by natural extension we could include here lesser developed countries – that their needs become a part of the trade equation can any longer be denied. Many of us were of the view that the failure actually – not solely by unmet promise – to satisfy these needs would mark the end of the FTA factories that many countries have become in the last half-decade.

Finally, while our group did not believe that we are prepared to make recommendations to governments, we need to gather additional data and analysis to answer the following questions:

1. What methodology, or existing data bases, might assist in approximating the actual impact of FTA's on rule of law in the Americas?
2. Do the IDB graphs on pp. 15-16 of the draft essay for our workshop, contending that Latin America ranks low in rule of law and other governance factors, put the lie to our basic premise in light of the proliferation of FTA's in the Americas, or might the situation reflect the fact that, although the Americas has witnessed economic integration efforts since at least the 1950's, until the 1990's these attempts at free trade have yielded to protectionist economic policies?<sup>2</sup>
3. In what ways does our essay need better to reflect the views of some civil society groups that trade agreements weaken labor, health, education, and other human rights, as well as lessen the power of governments to protect against adverse environmental and health effects and provide affordable infrastructure services such as telecommunications and electricity?
4. What are the steps trade negotiators should take to account for "the context of specific cultural premises and . . . substantive norms that frame the concept [of the rule of law] for

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<sup>2</sup> See Thomas Andrew O'Keefe, *LATIN AMERICAN TRADE AGREEMENTS* 1-1 (Transnational Pubs. 2001).

use in a particular society” (p.9)? Is it realistic to expect that one could discover a confluence of such premises and norms within a region, e.g., Central America or the Caribbean, or must each country be addressed separately?

5. Are trade agreements, despite their importance to society as mechanisms to spur economic growth, simply unsuited as instruments to improve human rights for civil society in general, because their expertise lies in reducing barriers to open trade and such agreements rely on nondiscrimination principles to accomplish this purpose?
6. When we say on p. 12 that “regional FTA’s may contribute to the rule of law . . . only with the active indulgence of the national governments that have subscribed to these international contracts,” are we underestimating the indirect influences of trade agreements even in the face of government unwillingness readily to cede power to civil society?
7. We have identified 6 major areas on pp. 14-40 in which regional FTA’s may contribute to the rule of law (transparency, accountability, due process, timeliness, impartiality, and record keeping). What mechanisms have we missed and which have we overestimated as promoting the rule of law for civil society generally?
8. To what extent is it likely that the availability to foreign investors and traders of binding and independent dispute settlement systems under regional trade agreements has encouraged reform of the time disciplines and impartiality of national judicial structures?

## Workshop 6. Proportional Response Under Rule of Law to Organized Crime & Terrorism

Location: *Ministry of Public Security*

**Panelists:** Fletcher Baldwin, Chesterfield Smith Professor of Law; Director, Center for International Financial Crimes Studies, Levin College of Law; Alan Lambert, Consultant with the British Foreign & Commonwealth Office and the Caribbean Anti-Money Laundering Programme; former Detective in the United Kingdom; Peter German, Chief Superintendent and a member of the Royal Canadian Mounted Police; Pablo Barahona Kruger, Consultant and Independent Investigator, Costa Rica

### **Summary submitted by Fletcher Baldwin:**

The task of the panel discussion was to focus upon the question of whether nations of the Americas continue to adhere to the concept of the Rule of Law post 9/11, or has one of the many collateral victims of 9/11 been the Rule of Law?

The panel discussed the role of the Rule of Law in combating terrorism. The Rule of Law is representation coupled with the nuances of relationships, customs, opinions, beliefs and rules. In order for the Rule of Law to serve a legitimate function within the society, it must reflect that society's perceptions and beliefs in tandem with their willingness to acquiesce to it (i.e., law regulating speed limits, use of illegal drugs, insider trading, etc.). If the Rule of Law is to be accepted as legitimate and representative, it must in turn lend itself to the will of the society, including its advocacy for change, overthrow, or rebellion. Both formal and informal rules, agreements, and obligations within a democracy facilitate order through expectations; this makes it possible for the society to organize itself in a predictable, peaceful, and secure fashion.

Furthermore, international agreements such as the OAS convention on Terrorism serve a similar function; they establish procedures and rules intended to provide peace and security among the member states. For the most part, international laws deal directly with state entities. However, international laws may, and often do, have a direct and/or indirect effort upon individuals, groups, and cross-border transnational governmental exchanges that operate within and between states.

Terrorism by its very nature disputes international peace and security through premeditated, political violence. The September 11<sup>th</sup> attacks on the World Trade Center and the Pentagon disrupted the global economy. The attacks spawned and facilitated widespread personal fear, panic, and economic dislocation. According to the United Nations Security Council, one of the objectives of the terrorists was to create a state of global anarchy by means of influencing the conduct of governments vis-à-vis intimidation and coercion.

The panel discussed the institution of the United Nations which serves as an international conduit whose goals include not only preventing terrorism but also preventing, eliminating, and/or eradicating genocide, famine, and other humanitarian concerns. Thus, it is the responsibility of every member state according to its ability to contribute aid and resources

(either economically, through social transnational rehabilitation, or both) in order to elevate the global stature of the United Nations. This, in turn, improves the UN's ability to conduct its international functions in a more efficient and effective manner to the benefit of all member states. The UN's international political stature and global field of influence can be embraced with the full understanding that such support does not negate a state's legitimate right of self-defense and, therefore, support of state and UN are not at all mutually exclusive concepts.

While nation states recognize that law is a necessary and important component of social control, such social control is to be employed with an understanding that its legitimacy is intricately linked with the concept of governance. The principle of proportionality in general compliments the notion of governance that expects and requires that punishment of wrongdoers be based upon the comparison of the gravity of the offense against the state to the severity of the punishment. On balance, how must proportionality operate within the context of organized terrorists' activities? Terrorists intend their results to accomplish social and economic disintegration by disrupting lawful control and muting the notion of governance. One cannot predict with any degree of certainty the type, time or consequences of attacks; however, one can predict some of the intended consequences. As the United Nations Security Council Resolution 1371 noted, a nation state has the legitimate right of self-defense when threatened by the acts of terrorists bent upon economic, social and political de-stabilization because de-stabilization can lead to the collapse of legitimate governance. Governance implies policy, which in turn implies choice and decisions, expectations and opportunity; however, it excludes terrorism and anarchy. Knowledge of the rules and expectations, and the opportunity to have input in the development and revision of the rules are major factors. Expectations and political participation are within the citizen's frame of influence and are generally translated into democratic rule.

From these initial observations the panel developed a focus of the Rule of Law within the context of terrorism and organized crime:

- 1) No nation within the Americas should aspire to return to a Rule by Law.
- 2) As far as one can tell 9/11 was carried out by privatized terrorists employing user-friendly banks.
- 3) The War on Drugs and the War on Terrorism threaten the Rule of Law because there is no beginning and no ending. A liberal democracy will have grave difficulty retaining a Rule of Law if the absolute goal is the defeat of terrorism.
- 4) As one of the panelists noted, Canada has in place new legislation aimed at those who are assisting terrorist. The legislation pays respect to the continued viability of the Rule of Law.
- 5) International Conventions such as the Inter-American Convention on Terrorism (June 3, 2002) reject the subjugation of the Rule of Law.
- 6) Key questions raised by the panel and audience include:  
In the present struggle, what is the role of:

- (i) The European Union in the fight against terrorism?
- (ii) African Union Action Plan?
- (iii) Commonwealth of Independent States?
- (iv) Association of S.E. Asian Nations?
- (v) Organization of American States?

The answer is quite simple: All reaffirm the Rule Of Law and reject the Rule By Law. All agree, however that fighting terrorism involves far different strategies and different ground rules. All agree that most nations vastly underestimated terrorists potential.

There is still a great gulf between words and acts. Training law enforcement is an essential element within the Rule of Law model.

- 7) One speaker raised the very important question of why do we not look for root causes producing terrorists? How do we factor in poverty? Is there a lack of governmental will to examine social issues? What about corruption? Why are so many non-indigenous organized crime gangs settling in Latin America? Why are they linking with terrorists?
- 8) Some conclusions from the panel on the question of the need to redesign liberal democracies:  
First, they are not suicide pacts?  
Second, there cannot continue to be a great gulf between theory and practice.  
Third, courts should be reintroduced to their respective constitutional history.  
Fourth and most important, if we remain steadfast within the Rule of Law the Republic(s) will survive.