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ANNUAL REPORT

OF THE INTER-AMERICAN JURIDICAL COMMITTEE

TO THE GENERAL ASSEMBLY

2002

EXPLANATORY NOTE

Up until 1990, the OAS General Secretariat had published the *Minutes of meeting* and *Annual reports* of the Inter-American Juridical Committee under the series classified as *Reports and Recommendations.* Starting in 1997, the Secretariat for Legal Affairs of the OAS General Secretariat again started to publish those documents, this time under the title *Annual report of the Inter-American Juridical Committee to the General Assembly.*

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

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INTRODUCTION

The Inter-American Juridical Committee is honored to present its *Annual report* to *the General Assembly of the Organization of American States*. This report concerns the activities the Committee carried out in 2002, and is submitted pursuant to the provisions of Article 91.f of the *Charter of the Organization of American States*, Article 13 of the Committee's Statutes and in accordance with instructions contained in General Assembly resolutions AG/RES.1452 (XXVII-O/97), AG/RES.1669 (XXIX-O/99), AG/RES.1735 (XXX-O/00), AG/RES.1787 (XXXI-O/01) and AG/RES.1883 (XXXII-O/02), all of which concern the preparation of the annual reports submitted by the Organization's organs, agencies and entities to the General Assembly.

During the period covered in this *Annual report,* the Inter-American Juridical Committee's agenda included such topics as the following: the Inter-American Specialized Conference on Private International Law (CIDIP); elaboration of an inter-American draft convention on racism and all forms of discrimination and intolerance; juridical dimension of integration and international trade: competition law in the Americas; cartels in the sphere of competition law in the Americas; improving the administration of justice in the Americas: access to justice; preparing for the commemoration of the centenary of the Inter-American Juridical Committee; the International Criminal Court and the Fifth Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS; possible additional measures to implement the Inter-American Convention against Corruption (Caracas); trafficking of firearms based on the decisions taken by the Inter-American Juridical Committee on the matter; the juridical aspects of hemispheric security; the right to information: access to and protection of personal information and data; democracy in the inter-American system; inter-American cooperation against terrorism; study of the system for the promotion and protection of human rights in the inter-American system; and the international abduction of minors by one of their parents.

This *Annual report* mainly contains the work done on the studies associated with the above-cited topics and consists of three chapters. The first discusses the origin, legal bases and structure of the Inter-American Juridical Committee and the period covered in this *Annual report.* The second chapter elaborates upon the issues that the Inter-American Juridical Committee discussed at the 2002 sessions, and the texts of the resolutions approved at both, and the related documents. Lastly, the third chapter concerns the Juridical Committee's other activities in 2002 and the other resolutions it adopted. Budgetary matters are also discussed. Appended to the *Annual report* are lists of the resolutions and documents adopted, subject and onomastic indexes, to facilitate the reader in locating documents in this *Report*.

The Chairman of the Inter-American Juridical Committee, Dr. Brynmor Thornton Pollard, approved the language of this *Annual report.*

CHAPTER I

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

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

Then, in 1933, the Seventh International Conference of American States, held in Montevideo, created the national commissions on codification of international law and the Inter-American Committee of Experts. The latter's first meeting was in Washington, D.C., in April 1937.

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

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

Almost twenty years later, in 1967, the Third Special Inter-American Conference, convened in Buenos Aires, Argentina, adopted the *Protocol of amendments to the Charter of the Organization of American States* or *Protocol of Buenos Aires,* which eliminated the Inter-American Council of Jurists. The latter's functions passed to the Inter-American Juridical Committee. With that, the Committee was elevated to one of the principal organs of the OAS.

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

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

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

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

Although the seat of the Committee is in Rio de Janeiro, in special cases it may meet at any other place that may be designated after consulting the Member State concerned. The Committee is composed of eleven jurists who are nationals of the Member States of the Organization. Together, those jurists represent all the States. The Committee also enjoys the fullest possible technical autonomy.

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

A. Sixtieth regular session

The LX regular session of the Inter-American Juridical Committee was held at its seat in Rio de Janeiro, Brazil, February 25 to March 8, 2002.

The members of the Inter-American Juridical Committee present for that session were as follows, listed in the order determined by the lots drawn at the session's first meeting and in accordance with Article 28(b) of the Committee's Rules of Procedure:

Felipe Paolillo
Brynmor T. Pollard (Vice Chairman)
Sergio González Gálvez
Ana Elizabeth Villalta Vizcarra
Carlos Manuel Vázquez
Kenneth O. Rattray
João Grandino Rodas (Chairman)
Orlando R. Rebagliati
Eduardo Vío Grossi

Dr. Luis Herrera Marcano and Dr. Jonathan T. Fried were unable to attend the session.

Representing the OAS General Secretariat, the following provided technical and administrative support: Enrique Lagos, Assistant Secretary for Legal Affairs; Jean-Michel Arrighi, Director of the Department of International Law; and Manoel Tolomei Moletta and Dante M. Negro, legal officers with the Department of International Law.

The Chairman of the Inter-American Juridical Committee extended a special welcome to Dr. Ana Elizabeth Villalta Vizcarra, whom the OAS General Assembly had elected to a four-year term on the Committee at its thirty-first regular session, in San José, Costa Rica, in June 2001.

The Inter-American Juridical Committee's agenda for this session was the one adopted in resolution CJI/RES.36 (LIX-O/01), specifically:

CJI/RES.36 (LIX-O/01)

AGENDA FOR THE
60TH REGULAR SESSIONS OF THE
INTER-AMERICAN JURIDICAL COMMITTEE

(Rio de Janeiro, Brazil, February 25 to March 8, 2002)

A. Current topics

1 Drafting of an Inter-American Convention against racism and any kind of discrimination and intolerance
Rapporteur: Dr. Felipe Paolillo

2. Possible additional measures to the Caracas Inter-American Convention against Corruption
Rapporteur: Dr. Sergio González Gálvez

3. Preparation for the celebration of the Inter-American Juridical Committee centennial
   Rapporteur: Dr. Eduardo Vío Grossi

4. Specialized Inter-American Conference on Private International Law (CIDIP)
   Rapporteurs: Drs. Brynmor T. Pollard, João Grandino Rodas and Carlos Manuel Vázquez

B. Topics under preparation

1. Possibilities and problems of the statutes of the International Criminal Court
   Rapporteur: Dr. Sergio González Gálvez

2. Trafficking of firearms based on the decisions taken by the Inter-American Juridical Committee on the matter
   Rapporteur: Dr. Sergio González Gálvez

3. Juridical dimension of integration and international trade: competition law in the Americas
   Rapporteurs: Drs. Jonathan T. Fried and João Grandino Rodas

C. Topics under follow-up

1. Juridical aspects of hemispheric security
   Rapporteurs: Drs. Sergio González Gálvez and Eduardo Vío Grossi

2. Right to information: access to and protection of information and personal data
   Rapporteur: Dr. Jonathan T. Fried

3. Democracy in the inter-American system
   Rapporteur: Dr. Eduardo Vío Grossi

4. Inter-American cooperation against terrorism
   Rapporteur: Dr. Luis Herrera Marcano

5. Study of the system for the promotion and protection of human rights in the inter-American system
   Rapporteur:

6. International abduction of minors by one of their parents
   Rapporteur: Dr. João Grandino Rodas

7. Improving the administration of justice in the Americas: access to justice
   Rapporteurs: Drs. Jonathan T. Fried and Brynmor T. Pollard

This resolution was unanimously adopted at the session held on 17 August 2001, in the presence of the following members: Drs. Sergio González Gálvez, Eduardo Vío Grossi, Orlando R. Rebagliati, Brynmor Thornton Pollard, Luis Herrera Marcano, Gerardo Trejos Salas, Carlos Manuel Vázquez and João Grandino Rodas.

Pursuant to Article 12 of the *Rules of procedure of the Inter-American Juridical Committee*, the Chairman of the Juridical Committee submitted his report on the activities carried out during the recess.

B. Sixty-first regular session

The LXI regular session of the Inter-American Juridical Committee was held at its seat in Rio de Janeiro, August 5 through 30, 2002.

The following members of the Inter-American Juridical Committee were present for that regular session, listed in the order of precedence established by lot at the first meeting, pursuant to Article 28(b) of the *Rules of Procedure of the Inter-American Juridical Committee:*

Brynmor T. Pollard (Vice-Chairman)
Jonathan T. Fried
Luis Herrera Marcano
Orlando R. Rebagliati
João Grandino Rodas (Chairman)
Felipe Paolillo
Ana Elizabeth Villalta Vizcarra
Kenneth O. Rattray
Carlos Manuel Vázquez
Sergio González Gálvez

Dr. Eduardo Vío Grossi was unable to attend this session.

Representing the OAS General Secretariat and providing technical and administrative support were Dr. Enrique Lagos, Assistant Secretary for Legal Affairs; Dr. Jean-Michel Arrighi, Director of the Department of International Law; and Manoel Tolomei Moletta and Dante M. Negro, Legal Officers with the Department of International Law.

In accordance with Article 12 of the Committee's *Rules of procedure*, the Chairman of the Inter-American Juridical Committee presented his report on the activities conducted during the Committee's recess.

The Chairman of the Committee also reported that at its thirty-second regular session (Bridgetown, Barbados, June 2002), the OAS General Assembly had elected Dr. Luis Marchand Stens of Peru and Dr. Alonso Gómez Robledo Verduzco of Mexico to membership of the Inter-American Juridical Committee. It also re-elected Dr. João Grandino Rodas of Brazil. Those members will begin their 4-year terms of office on January 1, 2003.

The Chairman also reported that on February 12, 2002, the Permanent Representative of Brazil to the OAS sent a letter to the Secretary General of the Organization to advise him of the Brazilian Government's intention to provide the Inter-American Juridical Committee with office space in Palacio Itamaraty in Rio de Janeiro. The government's gesture was in recognition of the work of the Committee and with a view to releasing funds that could be allocated toward other purposes. This would enable the Committee to continue to meet the costs of a number of its activities, including the Course on International Law. The Chairman of the Committee informed the other members that the Secretary General had brought the communication to his attention on April 30, 2002, and was awaiting any comments that the Committee might wish to make. The Chairman reported that on May 8, he had sent the Secretary General a reply in which he informed the Secretary General that he had visited the premises. He informed the Secretary General that he and the other members of the Committee had arrived at a consensus, that the Committee was very much interested in relocating to the facilities offered by the Government of Brazil. The Committee requested the Secretary General's good offices in conveying its acceptance of the offer at his earliest possible convenience. The Chairman also reported that as of that date, the agreement formalizing the move to the Itamaraty facilities was in the final stages of negotiation and would be signed soon.

During its LXI regular session, the Inter-American Juridical Committee adopted the following agenda in resolution CJI/RES.42 (LX-O/02):

CJI/RES.42 (LX-O/02)

AGENDA FOR THE
61ST REGULAR SESSION OF THE
INTER-AMERICAN JURIDICAL COMMITTEE

(Rio de Janeiro, Brazil, 5 - 30 August 2002)

A. Current topics

1. Extra-contractual responsibility – CIDIP-VII
   Rapporteurs: Drs. Carlos Manuel Vázquez and Ana Elizabeth Villalta Vizcarra

2. Cartels in the sphere of competition law in the Americas
   Rapporteurs: Drs. Jonathan T. Fried and João Grandino Rodas

3. Improving the administration of justice in the Americas: access to justice
   Rapporteurs: Drs. Jonathan T. Fried and Brynmor T. Pollard

B. Topics under follow-up

1. International Criminal Court – 5th Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS
   Rapporteur: Dr. Sergio González Gálvez

2. Preparation for the commemoration of the centenary of the Inter-American Juridical Committee
   Rapporteur: Dr. Eduardo Vío Grossi

This resolution was unanimously adopted at the session held on 8 March 2002, in the presence of the following members: Drs. Felipe Paolillo, Brynmor Thornton Pollard, Ana Elizabeth Villalta Vizcarra, Carlos Manuel Vázquez, Kenneth O. Rattray, João Grandino Rodas and Eduardo Vío Grossi.

At this regular session, the Inter-American Juridical Committee also approved its agenda for the LXII regular session, which appears in resolution CJI/RES.49 (LXI-O/02), *Agenda for the 62nd regular session of the Inter-American Juridical Committee.* In resolution CJI/RES.44 (LXI-O/02), *Date and place of the 62nd regular session of the Inter-American Juridical Committee,* the Committee decided to hold that session at its seat in Rio de Janeiro, March 10 through 21, 2003.

CJI/RES.49 (LXI-O/02)

AGENDA FOR THE
62ND REGULAR SESSION OF THE
INTER-AMERICAN JURIDICAL COMMITTEE

(Rio de Janeiro, Brazil, 10 - 21 March 2003)

A. Current topics

1. Seventh Inter-American Specialized Conference on Private International Law – CIDIP-VII [AG/RES.1844 (XXXII-O/02) y AG/RES.1846 (XXXII-O/02)]
   Rapporteurs: Drs. Carlos Manuel Vázquez and Ana Elizabeth Villalta Vizcarra

2. Applicable Law and Competency of International Jurisdiction with Respect to Extracontractual Civil Liability [CP/RES.815 (1318/02) y CIDIP-VI/RES.7/02]
   Rapporteurs: Drs. Carlos Manuel Vázquez and Ana Elizabeth Villalta Vizcarra

3. Cartels in the sphere of competition law in the Americas [AG/RES.1844 (XXXII-O/02)]
   Rapporteurs: Drs. Jonathan T. Fried and João Grandino Rodas

4. Improving the administration of justice in the Americas: access to justice [AG/RES.1844 (XXXII-O/02)]
   Rapporteurs: Drs. Jonathan T. Fried, Brynmor T. Pollard and Ana Elizabeth Villalta Vizcarra

5. Fifth Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS - International Criminal Court
   [AG/RES.1844 (XXXII-O/02) y AG/RES.1900 (XXXII-O/02)]
   Rapporteur: Dr. Kenneth O. Rattray

B. Follow-up topics

1. Preparation for the commemoration of the centenary of the Inter-American Juridical Committee [AG/RES.1844 (XXXII-O/02)]
   Rapporteurs: Dr. Eduardo Vío Grossi, Luis Herrera Marcano and João Grandino Rodas

This resolution was unanimously adopted at the session held on 22 August 2002, in the presence of the following members: Drs. Brynmor Thornton Pollard, Orlando R. Rebagliati, Felipe Paolillo, Ana Elizabeth Villalta Vizcarra, Kenneth O. Rattray, Carlos Manuel Vázquez and Sergio González Gálvez.

CJI/RES.44 (LXI-O/02)

DATE AND PLACE OF THE 62nd REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS article 15 of its Statutes establishes that two regular sessions be held annually,

RESOLVES to hold its 62nd regular session at the headquarters of the Inter-American Juridical Committee in Rio de Janeiro, Brazil, from March 10 to 21, 2003.

This resolution was unanimously adopted at the session held on 16 August 2002, in the presence of the following members: Drs. Brynmor T. Pollard, Jonathan T. Fried, Orlando R. Rebagliati, João Grandino Rodas, Felipe Paolillo, Ana Elizabeth Villalta Vizcarra, Carlos Manuel Vázquez and Sergio González Gálvez.

In accordance with Article 10 of the *Statutes of the Inter-American Juridical Committee*, the Chairman and Vice Chairman of the Committee were elected at this regular session. Dr. Brynmor T. Pollard was elected Chairman of the Committee, and Dr. Carlos Manuel Vázquez was elected Vice Chairman.

The Juridical Committee also adopted resolutions CJI/RES.47 (LXI-O/02), *Tribute to Ambassador Orlando R. Rebagliati*, and CJI/RES.48 (LXI-O/02), *Tribute to Ambassador Sergio González Gálvez*. Both members would be completing their terms with the Inter-American Juridical Committee on December 31, 2002.

CJI/RES.47 (LXI-O/02)

TRIBUTE TO AMBASSADOR ORLANDO R. REBAGLIATI

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that the term of office of Ambassador Orlando R. Rebagliati as a member of the Inter-American Juridical Committee will end on December 31, 2002;

AWARE of the sterling contribution made by Ambassador Orlando R. Rebagliati in accomplishing the work of the Committee and maintaining its noble traditions;

REAFFIRMING the recognition by the members of the Committee of the particular attributes of Ambassador Orlando R. Rebagliati while serving as a member of the Committee,

RESOLVES:

1. To express its deep appreciation of the contributions made by Ambassador Orlando R. Rebagliati in advancing the work of the Juridical Committee and maintaining its stature in the Inter-American System.

2. To record, in particular, the Committee's gratitude to Ambassador Orlando R. Rebagliati for his unfailing support as lecturer in the Course on International Law conducted annually under the auspices of the Committee and also in preserving its high academic standards.

3. To convey this resolution to Ambassador Orlando R. Rebagliati and to the organs of the Organization.

This resolution was unanimously adopted at the session held on 21 August 2002, in the presence of the following members: Drs. Brynmor T. Pollard, João Grandino Rodas, Felipe Paolillo, Ana Elizabeth Villalta Vizcarra, Kenneth O. Rattray, Carlos Manuel Vázquez and Sergio González Gálvez.

CJI/RES.48 (LXI-O/02)

TRIBUTE TO AMBASSADOR SERGIO GONZÁLEZ GÁLVEZ

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that the term of office of Ambassador Sergio González Gálvez as a member of the Inter-American Juridical Committee will expire on December 31, 2002;

RECOGNIZING the valuable contribution made by him in enhancing the work of the Committee and its stature within and outside the Organization of American States;

ACKNOWLEDGING the high regard and esteem in which he is held by his colleagues on the Committee:

RESOLVES:

1. To record its acknowledgement of the invaluable contributions made by Ambassador Sergio González Gálvez to the work and stature of the Inter-American Juridical Committee.

2. To express the Committee's appreciation, in particular, of the consistent participation of Ambassador Sergio González Gálvez as lecturer in the Course on International Law conducted annually under the auspices of the Committee and also of his contribution to the success of its academic role.

3. To convey this resolution to Ambassador Sergio González Gálvez and to the organs of the Organization.

This resolution was unanimously adopted at the session held on 21 August 2002, in the presence of the following members: Drs. Brynmor T. Pollard, Orlando R. Rebagliati, João Grandino Rodas, Felipe Paolillo, Ana Elizabeth Villalta Vizcarra, Kenneth O. Rattray and Carlos Manuel Vázquez.'

CHAPTER II

ISSUES DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE AT THE REGULAR SESSIONS HELD IN 2002

The Inter-American Juridical Committee held two regular sessions in 2002, both at its seat in Rio de Janeiro. The first was in February-March, and the second in August. At both meetings, the following topics figured on the Committee's agenda: the Inter-American Specialized Conference on Private International Law (CIDIP); preparation of a draft Inter-American Convention against racism and all forms of discrimination and intolerance; cartels under competition law in the Americas; improving the administration of justice in the Americas: access to justice; preparations for the commemoration of the centenary of the Inter-American Juridical Committee; the International Criminal Court and the V Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States; possible additional measures to the Inter-American Convention against Corruption (Caracas); trafficking of firearms based on the decisions taken by the Inter-American Juridical Committee on the matter**;** legal aspects of hemispheric security; right of information: access to and protection of information and personal data; democracy in the inter-American system; inter-American cooperation against terrorism; study of the system for the promotion and protection of human rights in the inter-American system, and abduction of minors by one of their parents.

A description of each of these topics follows. Where appropriate, the documents prepared and approved by the Inter-American Juridical Committee on the subject matter are included.

1. Inter-American Specialized Conference on Private International Law (CIDIP)

Resolutions

CJI/RES.38 (LX-O/02):	Inter-American Specialized Conferences on Private International Law (CIDIPs)
CJI/RES.50 (LXI-O/02):	The applicable law and competency of international jurisdiction with respect to extracontractual civil liability

Documents

CJI/doc.84/02:	Harmonization of laws concerning electronic commerce and cross-border insolvency (presented by Dr. Carlos Manuel Vázquez)
CJI/doc.89/02:	Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI) (presented by Drs. Carlos Manuel Vázquez and João Grandino Rodas)
CJI/doc.97/02:	Recommendations and possible solutions proposed to the topic related to the law applicable to international jurisdictional competence with respect to extracontractual civil responsibility (presented by Dr. Ana Elizabeth Villalta Vizcarra)
CJI/doc.104/02 rev.2:	The desirability of pursuing the negotiation of an inter-American instrument on choice of law and competency of international jurisdiction with respect to non-contractual civil liability: a framework ofr analysis and agenda for research (presented by Dr. Carlos Manuel Vázquez)

At the Inter-American Juridical Committee's LX regular session (Rio de Janeiro, February-March 2002), Dr. Carlos Manuel Vázquez, rapporteur for the topic, presented documents CJI/doc.89/02, *Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI)*, co-authored with Dr. João Grandino Rodas, and CJI/doc.84/02, *Harmonization of laws concerning electronic commerce and cross-border insolvency*. The Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI) was held in Washington, D.C., February 4 to 8, 2002, prior to the LX regular session of the CJI.

At that session, Dr. Carlos Manuel Vázquez made reference to document CJI/doc.74/01 rev.1, *CIDIP-VII and beyond*, which was the report that both he and Dr. João Grandino Rodas presented at CIDIP-VI. He summarized the proceedings of CIDIP-VI, and introduced the other Committee members to the content of the CIDIP-VI resolutions, especially the one in which it resolved to pursue the CIDIP process as a suitable forum for the development and codification of private international law in the hemisphere. In that resolution, CIDIP-VI asked that the General Secretariat, by way of the Secretariat for Legal Affairs, organize a meeting of experts to examine CIDIP's future and the future issues that CIDIP-VII might consider.

The rapporteur pointed out that three of the topics that the Inter-American Juridical Committee had suggested were included on the list of topics on which deliberations will continue until their eventual inclusion on the agenda of the CIDIP-VII, namely, transborder movements and migratory flows of persons, cross-border business

insolvency, and electronic commerce. The other topics, he pointed out, concern development of an inter-American computer-based registry system; transport; investment securities; international legal rights for the transferability of tangible and intangible goods in international trade, and international protection of adult persons whose personal faculties are impaired.

In connection with the three topics that CIDIP-VI addressed, the rapporteur reported that the Model Inter-American Law on Secured Transactions and the negotiable and non-negotiable inter-American uniform bill of lading for the international carriage of goods by road were adopted.

Dr. Vázquez also mentioned the resolution that the Conference had adopted applauding the work of the Inter-American Juridical Committee.

In light of what transpired during CIDIP-VI, Dr. João Grandino Rodas observed that more common law countries should participate in the process, especially the Caribbean countries.

Dr. Ana Villalta said that CIDIP needed to be promoted more within the Organization, precisely in view of what little had been done to publicize these topics. She suggested that a lack of understanding about the way model laws function could be one reason why more countries from Central America and the Caribbean did not take part in the process that had just concluded.

Dr. Brynmor T. Pollard was interested in the new process whereby model laws were produced within CIDIP. He also noted that the shift away from inter-American conventions in favor of model laws was perhaps because governments found model laws to be more advantageous. Dr. Vázquez observed that there might be other reasons for the shift, such as the certainty so essential in areas like international trade. He noted that at CIDIP the sense was that the modality adopted should be dictated by the needs of the issue at hand.

Dr. Kenneth O. Rattray observed that the important thing now was to decide on CIDIP's future, both as regards procedure and substance. He noted that one problem encountered was a certain indifference on the part of some countries to the process in general. Dr. Rattray added that the traditional approach might not be the most prudent one at the present time. He suggested that one or two topics might be selected for a kind of pilot experiment. One might be the issue of electronic commerce. A number of approaches could be tested. This, he said, would obviate one of the basic problems with the entire process, namely that too many issues were on the agenda at any given time.

During this regular session, the Inter-American Juridical Committee decided to designate Dr. Ana Villalta as co-rapporteur for the topic, and adopted resolution CJI/RES.38 (LX-O/02), *Inter-American Specialized Conferences on Private International Law (CIDIPs)*. In that resolution, the Inter-American Juridical Committee was pleased to receive CIDIP-VI/RES.2/02, which praised the work done by the Inter-American Juridical Committee on the subject matter; and took note of and expressed its appreciation for the report presented by the Inter-American Juridical Committee's observers at the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI), Dr. João Grandino Rodas and Carlos Manuel Vázquez (CJI/doc.74/01 rev.1, *CIDIP VII and beyond*). In that same resolution, the Committee underscored its readiness to cooperate in the studies on the "Applicable law and competency of international jurisdiction with

respect to extracontractual civil liability," in the preparations for the Seventh Inter-American Specialized Conference on Private International Law, as provided in resolutions CIDIP-VI/RES.1/02, *Request for the General Assembly to convoke the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)*, and CIDIP-VI/RES.2/02, *Recognition of the work of the Inter-American Juridical Committee*, and in whatever other way the General Assembly should dispose.

On May 2, 2002, the Chair of the Permanent Council sent a letter to the Chairman of the Inter-American Juridical Committee informing him that at its meeting of May 1, 2002, the Council had adopted a resolution titled *Assignment to the Inter-American Juridical Committee of the CIDIP topic regarding the applicable law and competency of international jurisdiction with respect to extracontractual civil liability*. The resolution in question, which was CP/RES.815 (1318/02), was appended to the note.

Later, at its thirty-second regular session (Barbados, June 2002), through resolutions AG/RES.1844 and 1846 (XXXII-O/02), the General Assembly requested the Inter-American Juridical Committee to continue to assist with the preparatory work for the next CIDIP. It instructed the Committee, working with the General Secretariat, to support the consultations among governmental and nongovernmental experts and to prepare the reports, recommendations and other materials necessary for the consultations to conclude.

During the LXI regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2002), Dr. Ana Elizabeth Villalta Vizcarra, rapporteur for the topic, introduced the document CJI/doc.97/02, *Recommendations and possible solutions proposed to the topic relating to the law applicable to international jurisdictional competence with respect to extracontractual civil responsibility*. She observed that the topic was quite complex because of the many points of connection that it involved. She then described the content of her report, stating that it began with a description of the mandate entrusted to the Inter-American Juridical Committee. Her report described the theoretical aspects of the issue, drawing a distinction between contractual and extracontractual civil liability. She observed that extracontractual civil liability was in the realm of international private law because the injured parties were private persons. The rapporteur mentioned the traditional solutions and the current solutions, in other words, the determination of the applicable law and the competent jurisdiction. These, she said, could be examined separately, although experts made the point that the two were intimately related. Dr. Villalta outlined the principles of law most often used in connection with the applicable law, which are *lex fori* (the applicable law being the law of the court hearing the matter, although this criterion was not often used); the principle of *lex domicilii* (which was problematic when a tort committed in one State had effects or damages in another state; the nexus that might eventually prove to be the more important one could be ignored as a result). For these traditional criteria, with very rigid nexus points, Dr. Villalta outlined three methods, applied for the most part in U.S. law: the principle of proximity; the unilateralist attempt to determine the scope of material rules as a function of state interests, and the teleological attempt to achieve desirable outcomes in the resolution of problems caused by external factors. In general, she stated, the tendency was to opt for the "center of gravity" criterion, which was to favor the law of the place that had the most substantive nexus to the cause of action. She cited various examples from a number of international legal instruments, where solutions

of this type had been adopted, with the result that less emphasis was placed on the more traditional nexus criteria. Dr. Villalta observed that the classic criteria need to be made more flexible, so as to include multiple alternatives, to give the judge more criteria to use to decide a case, criteria not anticipated at the time the law was passed.

As for the competency of international jurisdiction, she indicated that criteria could be established to enable the victim to choose the most advantageous course of action, choosing the jurisdiction that best suits his/her purposes.

Finally, she recommended that a convention be adopted on the subject of extracontractual civil liability in general, leaving the most specific issue of cross-border business insolvency for later. The new convention should take into account the criteria of the Hague Conventions and U.S. law, which give the court more scope in establishing the nexuses. She also noted that any such convention should regulate everything related to damages and establish modern criteria of indemnification.

Dr. Carlos Manuel Vázquez, rapporteur for the topic, said that his conclusions on the subject were somewhat different from those of Dr. Villalta. He observed that his principal difference of opinion was that in his view it was too soon to determine whether a convention on the subject was needed and, if so, whether one could recommend that only some of the discussion points be included. He also said that a model law might be a second alternative. Dr. Vázquez noted that whereas the Permanent Council's resolution was not very specific as to how much time the Juridical Committee could take to discuss this issue, 2004 was the date mentioned at CIDIP-VI.

Then Dr. Vázquez summarized the points covered in his document, titled *The desirability of pursuing the negotiation of an inter-American instrument on choice of law and competency of international jurisdiction with respect to non-contractual civil liability: a framework for analysis and agenda for research*, CJI/doc.104/02 rev.2.

One of the central points he raised in his document was the expense created by the lack of uniformity among the jurisdictions and the methods for choosing the applicable law. He therefore suggested that the hemisphere would be well served to have a uniform approach where these matters were concerned. Dr. Vázquez also mentioned that a key problem was the appropriation of resources within the OAS budget, as the process of arriving at an agreement on such a convention would not be a zero-cost undertaking. The rapporteur pointed out that the Inter-American Juridical Committee first had to answer some basic questions: how serious was the problem, given the many approaches taken to its solution; the resources appropriated to do the task; the chances that the problem might be resolved in other venues, and finally, whether a satisfactory solution could even be found at the inter-American level.

The rapporteur pointed out that one possible way to solve these problems was to examine certain aspects relative to the types of situations that might be classified as questions of extracontractual liability, choice of applicable law and competent jurisdiction. If after examining these issues the conclusion was that some type of instrument needed to be adopted, then –the rapporteur said- the next consideration was what type of choice-of-law and jurisdiction rules were needed. In other words, should the method be one that fosters some degree of predictability or should it be something more flexible? Dr. Vázquez also said that the Inter-American Juridical Committee should look into the question of what would be the best vehicle for these rules, a convention or a

model law. This, he said, would depend on which of these vehicles offered some type of advantage.

One of the issues that the rapporteur addressed was the degree of difference separating the various choice-of-law approaches used in the hemisphere in matters involving extracontractual liability. Dr. Vázquez noted that given the many approaches, a study was needed to compile that information. In the case of some countries, the study would also have to examine the laws of a State's provinces or federated units. The research would also have to examine the extent to which a State's choice-of-law varied with the various types of extracontractual civil liability. He observed that a research project of this kind would require extensive resources and that the General Secretariat's assistance would be essential. He also noted that the Permanent Council's resolution seemed to be requesting the Juridical Committee to identify which subsets could best be addressed through an instrument.

Dr. João Grandino Rodas, too, referred to the language of the Permanent Council's mandate and said that the reason for it was a problem that arose during CIDIP-VI on this very subject. He recalled that what was requested was a basic paper capturing a variety of views and as broad as possible, which the States could then use to map their plans. He said that the rapporteurs' papers complemented each other because each had considered the problem from his/her own perspective (common law and civil law). He also expressed the view that the work was, for the most part, moving forward and that the two rapporteurs should combine their two perspectives in order to present a unified document to the members of the Juridical Committee for final consideration.

Dr. Felipe Paolillo recommended that a decision was needed on whether some of the problems mentioned by Dr. Vázquez should or should not be examined, inasmuch as they were basic issues and given the urgency with which the Permanent Council had requested the report from the Inter-American Juridical Committee. In his view, the question whether or not there was the likelihood of an instrument being adopted was not an issue that the Committee had to consider, as that was a political decision that the General Assembly would decide. Dr. Paolillo felt that the Inter-American Juridical Committee should confine itself to the legal aspects of the topic. That alone, he said, was very demanding. He suggested that the Committee should try to narrow the field of study suggested by Dr. Carlos Manuel Vázquez. Lastly, he said that he shared Dr. Vázquez's view that a convention on the subject, as general as the one being proposed, did not seem viable.

Dr. Jonathan T. Fried said that what the Permanent Council wanted from the Inter-American Juridical Committee was a neutral second opinion, because no agreement could be reached during CIDIP-VI. He suggested that the Committee should try to identify what the most relevant issues were, to get a better idea of the nature of the problem and to provide a firmer basis for discussion. This, he said, should be done before attempting to combine the two documents.

Dr. Brynmor T. Pollard wondered whether a regional agreement might be more feasible than a universal one in the area of private international law, and specifically as regards this topic. Dr. Kenneth O. Rattray, for his part, wondered whether the States were really interested in looking at this topic. His view was that generally speaking, the topic was far too broad for the Juridical Committee to be able to complete a rapid

response that was of some value. He suggested that the Committee might begin by adopting a somewhat narrower approach to the subject.

Based on these comments, the Inter-American Juridical Committee adopted resolution CJI/RES.50 (LXI-O/02), *Applicable law and competency of international jurisdiction with respect to extracontractual civil liability*. In that resolution, it expressed its thanks for the studies that the two rapporteurs had presented and requested them to complete, by the appointed date, a draft report for the Juridical Committee to consider at its LXII regular session, taking into account the considerations identified in that resolution.

The following are the texts of the resolutions adopted and the documents presented in the Inter-American Juridical Committee in 2002:

CJI/RES. 38 (LX-O/02)

INTER-AMERICAN SPECIALIZED CONFERENCES ON PRIVATE INTERNATIONAL LAW (CIDIPs)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING the work done by the Sixth Inter-American Specialized Conference on Private International Law, held in the headquarters of the Organization of American States from 4 to 8 February 2002;

MINDFUL of the importance of the Inter-American Specialized Conferences on Private International Law in facilitating relations between the member States in the fields of civil, commercial and other relevant laws, and in closer relations between their populations,

RESOLVES:

1. To welcome, with satisfaction, the resolution CIDIP-VI/RES.2/02 which appreciates the work performed by the Inter-American Juridical Committee on the matter.

2. To take note of and acknowledge the report presented by the Juridical Committee Observers, Drs. João Grandino Rodas and Carlos Manuel Vázquez, at the Sixth Inter-American Specialized Conference on Private International Law (CJI/doc.74/01 rev.1, *CIDIP-VII and beyond*).

3. To renew its willingness to contribute to the study of the topic “Applicable law and competent international jurisdiction in terms of extra-contractual liability” and to the preparation of the Seventh Inter-American Specialized Conference on Private International Law, pursuant to resolutions CIDIP-VI/RES.1/02, *Request for the General Assembly to convoke the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)*, and CIDIP-VI/RES.2/02, *Recognition of the work of the Inter-American Juridical Committee,* subject to the decisions of the General Assembly.

This resolution was unanimously adopted at the session held on 1st March 2002, in the presence of the following members: Drs. Felipe Paolillo, Brynmor Thornton T. Pollard, Sergio González Gálvez, Ana Elizabeth Villalta Vizcarra, Kenneth O. Rattray, João Grandino Rodas and Orlando R. Rebagliati.

CJI/RES.50 (LXI-O/02)

**THE APPLICABLE LAW AND
COMPETENCY OF INTERNATIONAL JURISDICTION
WITH RESPECT TO EXTRACONTRACTUAL CIVIL LIABILITY**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

RECALLING that, in resolution CP/RES.815 (1318/02), the Permanent Council resolves to:

> "1. Instruct the Inter-American Juridical Committee to examine the documentation on the topic regarding the applicable law and competency of international jurisdiction with respect to extracontractual civil liability, bearing in mind the guidelines set out in CIDIP-VI/RES.7/02," and
>
> 2. Instruct the Inter-American Juridical Committee to issue a report on the subject, drawing up recommendations and possible solutions, all of which are to be presented to the Permanent Council as soon as practicable, for its consideration and determination of future steps."

BEARING IN MIND that the guidelines set forth in CIDIP-VI/RES.7/02, to which the Permanent Council refers, provide that:

> "a. The Inter-American Specialized Conference on Private International Law acknowledges the need to consider regulation of applicable law and competency of jurisdiction with respect to extracontractual civil liability. Therefore, the Conference is in favor of conducting a preliminary study to identify specific areas revealing progressive development of regulation in this field through conflict of law solutions, as well as a comparative analysis of national norms currently in effect.
>
> b. That study may refer to such areas of the aforementioned subject matter as proven to be relevant and are likely to be broadly accepted.
>
> c. As regards the issues to be analyzed, the Conference recognizes the advisability of contemplating the reasonable expectation of plaintiffs that they will be able to sue before forums that are accessible and have a legal system in their favor, as well as the reasonable expectations of defendants not to be sued and judged before forums or by laws lacking a reasonable connection with the subject of the suit or with the parties."

2. Requests the Permanent Council to appoint the Inter-American Juridical Committee to examine the documentation on the matter and, taking into account the preceding bases, issue a report, make recommendations and possible solutions, to be submitted to a Meeting of Experts."

HAVING BENEFITTED from a thorough discussion of this subject at its current regular session,

RESOLVES:

1. To welcome the preliminary studies presented by the co-rapporteurs, Dr. Ana Elizabeth Villalta Vizcarra (*Recommendations and possible solutions proposed to the topic related to the law applicable to international jurisdictional competence with regard to extracontractual civil responsibility*, CJI/doc.97/02) and Dr. Carlos Manuel Vázquez (*The desirability of pursuing the negotiation of an inter-american instrument on choice of law and competency of international jurisdiction with respect to non-contractual civil liability: a framework for analysis and agenda for research*, CJI/doc.104/02 rev.2).

2. To ask the rapporteurs to complete a draft report in time for consideration by the Committee at its 62nd regular session, adhering to the following parameters:

a. The report should include an enumeration of the specific categories of obligations that are encompassed within the broad category of "non-contractual obligations." Such analysis will serve to illustrate the enormous breadth and variety of obligations that an Inter-American instrument on jurisdiction and choice of law in this field could potentially affect.

b. The report should focus primarily on the task of identifying specific areas within the broad category of extracontractual liability which might be suitable subjects for an Inter-American instrument regulating applicable law and competency of jurisdiction. Such focus is consistent with the CIDIP resolution referenced by the Permanent Council, to be treated as a Guideline, which specifically asks the Committee to "identify *specific* areas revealing progressive development of regulation in this field through conflict of law solutions." Such focus is also consistent with the conclusion of the Hague Conference on Private International Law, which in 1967 concluded that, because of the great variety of claims within the scope of non-contractual liability, addressing the question of applicable law through a general convention encompassing the entire field was not feasible. Accordingly, the Hague Conference proceeded to pursue the adoption of instruments regulating applicable law in specific subcategories of non-contractual civil liability.

c. The report should complete the project already begun in the preliminary reports of Drs. Villalta and Vázquez, of surveying the approaches to jurisdiction and choice of law currently being employed in the hemisphere in the field of non-contractual liability. With respect to some Members States, the report must focus on the approaches followed by subnational as well as national units. The survey should, where relevant, describe not only the current approaches followed by the Members States, but also the historical evolution of the states' approach to the questions of applicable law and competency of international jurisdiction in the field of extracontractual liability. As far as possible, the report should also address scholarly critiques and proposals for change that have been made in the areas of jurisdiction and choice of law in non-contractual disputes.

d. The report should, as far as possible, address the approaches employed by Members States to decide the applicable law and competency of international juristiction with respect to particular subcategories of non-contractual obligations, to the end of fulfilling the mandate to "identify specific areas revealing progressive development of regulation in this field through conflict of law solutions." Given the wide array of non-contractual obligations, it will not be possible to survey the Members States' approaches to applicable law and competency of international jurisdiction with respect to each and every subcategory of non-contractual obligation. The rapporteurs will accordingly have to limit their research to some subcategories. Having conducted this survey, the rapporteurs should identify the specific subcategories of non-contractual obligations as with sufficient harmony among the Members States to facilitate the successful adoption of an inter-American instrument on the subject.

e. The report should also consider past and present efforts of global, regional, and subregional organizations that have sought, and in some cases continue to seek, conflict of laws solutions in this field. As discussed in the reports of Drs. Villalta and Vázquez, efforts have been undertaken, or are currently being undertaken, by the Hague Conference at the global level, by the European Union at the regional level, and by Mercosur at the subregional level, among other public and private organizations that have studied the problem and in some cases proposed solutions. All of these efforts should be closely studied

for the lessons they might offer and what they might suggest about the likelihood of success or failure.

f. With respect to the particular subcategories of non-contractual obligations that the rapporteurs regard as potentially suitable for treatment in an Inter-American conflict of laws instrument, the report should provide options as to the form and content of such an instrument. With respect to form, the report should consider whether the instrument should take the form of a convention or a model law. With respect to content, the report should set forth the instrument´s possible approaches concerning international jurisdiction and choice of law. Specifically, the report should consider whether, with respect to the particular subcategory of non-contractual obligation being considered, a conflict of laws approach is preferable to an attempt to harmonize the substantive laws of the Member States. With respect to both form and content, the report should discuss the pros and cons of following the various options considered.

g. If the rapporteurs consider it desirable, the report could also set forth the provisions that a conflict of laws instrument might include.

This resolution was unanimously adopted at the session held on 23 August 2002, in the presence of the following members: Drs. Brynmor Thornton Pollard, Orlando R. Rebagliati, Felipe Paolillo, Ana Elizabeth Villalta Vizcarra, Kenneth O. Rattray, Carlos Manuel Vázquez and Sergio González Gálvez.

CJI/doc.84/02

HARMONIZATION OF LAWS CONCERNING ELECTRONIC COMMERCE AND CROSS-BORDER INSOLVENCY

(presented by Dr. Carlos Manuel Vázquez)

Resolution CIDIP-VI/RES.1/02 adopted at the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI) recommends eight topics for further study by a group of experts as possible subjects to be treated in the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII). The present document was prepared with a view to supporting the work of the aforementioned group of experts. It discusses the work that has recently been done, or is currently done, by national and international entities with respect to two of the topics listed in said resolution: harmonization of laws concerning electronic commerce and cross-border insolvency.

I. Electronic Commerce

International organizations that have addressed the harmonization of electronic commerce laws include the United Nations Commission on International Trade Law, the Organization for Economic Cooperation and Development, the International Chamber of Commerce, the European Council, the Free Trade Area of the Americas Negotiating Parties, the Hague Conference on Private International Law, the American Bar Association, and the World Trade Organization.

A. United Nations Commission on International Trade Law (UNCITRAL)

The UNCITRAL Working Group on Electronic Commerce has adopted a Model Law on Electronic Commerce with Guide to Enactment.[1] The 1996 Model Law applies to data messages of any kind used in commercial activity.[2] Countries that have adopted domestic

[1] UNCITRAL Model Law on Electronic Commerce with Guide to Enactment, U.N. G.A. Res. 51/62, Dec. 16, 1996, *available at* www.uncitral.org/english/texts/electcom/ml-ecomm.htm (accessed Jan. 23, 2002). The model law was amended in 1998.

[2] *See* UNCITRAL Model Law on Electronic Commerce, *supra* at Art. 1.

legislation based upon the Model Law include Australia, Bermuda, Columbia, France, Hong Kong, India, Ireland, Korea, Mexico, Philippines, Singapore, Slovenia, the States of Jersey, Thailand, and, within the United States, in the State of Illinois.[3] The Model Law has also been used as a guide for other model laws, including the Uniform Electronic Commerce Act, adopted in 1999 by the Uniform Law Conference of Canada, and the Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissions on Uniform State Law in the United States. In 1998, the UNCITRAL Working Group on E-commerce considered and rejected the possibility of a convention on electronic commerce after members voiced fears that a convention would detract from the continued influence of the Model Law.[4]

Last year, the Working Group on Electronic Commerce also adopted a Model Law on Electronic Signatures.[5] The previous year, UNCITRAL adopted Uniform Rules on Electronic Signatures with Guide to Enactment, which set forth standards to ensure that online signatures have the same legal effect as handwritten signatures.[6]

At its March 2002 meeting, the Working Group will be considering the elimination of barriers to electronic commerce imposed by treaties.[7] The Working Group will consider amendments to existing treaties, as well as a draft convention on electronic contract formation.[8]

B. Organization for Economic Cooperation and Development

The Organization for Economic Cooperation and Development (OECD) is engaged in harmonization work on aspects of electronic commerce, including consumer protection and privacy. In 1999, the OECD adopted Guidelines for Consumer Protection in the Context of Electronic Commerce, directed to ensuring that online consumers are at least as informed and empowered as consumers making purchases through other media.[9] In 1980, the OECD adopted Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data, seeking to strike a balance between the protection of personal privacy and the benefits to economic and social development created by free flow of personal data.[10] To promote implementation of the 1980 Guidelines, the OECD maintains an interactive Internet site that allows web site operators to analyze the compliance of their sites with the Guidelines.[11]

C. International Chamber of Commerce

The International Chamber of Commerce (ICC) Electronic Commerce Project (ECP) has established best practices and definitions of key terms used in electronic contracts.[12]

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3 *See* Electronic Data Interchange, Internet and Electronic Commerce, The Hague Conference on Private Int'l Law Preliminary Doc. No. 7, at 5-6 (Apr. 2000), *available at* ftp://hcch.net/doc/gen_pd7e.doc (accessed Jan 23. 2002); *see also Summer, 2001 Meeting of OAS-CIDIP-VI Drafting Committee on Secured Transactions*, 18 ARIZ. J. INT'L & COMP. L 491, 522 (2001) (discussing the influence of the Model Law on Mexican legislation).

4 *See generally* Documents of the Working Group on Electronic Commerce, *available at* www.uncitral.org/english/workinggroups/wg_ec/index.htm (accessed Jan. 23, 2002).

5 UNCITRAL Model Law on Electronic Signatures, U.N. G.A. Res. 56/80, July 5, 2001, *available at* www.uncitral.org/english/texts/electcom/ml-elecsig-e.pdf (accessed Jan 23, 2002).

6 Draft Guide to Enactment of the UNCITRAL Uniform Rules on Electronic Signatures, U.N. Doc. A/CN.9/WG.IV/WC.86, Aug. 18, 2000, *available at* http://www.uncitral.org/english/workinggroups/wg_ec/wp-86.pdf (accessed Jan. 23, 2002).

7 Provisional Agenda for the 39th Session of the UNCITRAL Working Group on Electronic Commerce, U.N. Doc. A/CN.9/WG.IV/WC.92, Dec. 11, 2001, *available at* http://www.uncitral.org/english/workinggroups/wg_ec/wp-92e.pdf (accessed Jan 23. 2002).

8 *See UNCITRAL Group to Begin Discussions on E-Contracting Treaty at March Meeting*, 70 U.S. LAW WEEK 2453 (2002). Drafters of this convention have sought to avoid potentially controversial topics of consumer contracts and software licensing. *See id.* at 2454.

9 Recommendation of the OECD Council Concerning Guidelines for Consumer Protection in the Context of Electronic Commerce, Art. 1, Dec. 9, 1999, *available at* http://www1.oecd.org/dsti/sti/it/consumer/prod/CPGuidelines_final.pdf (accessed Jan. 20, 2002). These guidelines were drafted by the OECD Committee on Consumer Policy of the OECD Directorate for Science, Technology and Industry.

10 OECD Guidelines on the Protection of Privacy and Trans-border Flows of Personal Data, Sept. 23, 1980, *available at* http://www.oecd.org/ E:/droit/doneperso//ocdeprive/priv-en.htm (accessed Jan. 23, 2002).

11 This is available at the OECD web site, www.oecd.org.

12 For more information about the ICC Electronic Commerce Project, see www.iccwbo.org/home/electronic_commerce/electronic_commerce_project.asp (accessed Jan. 15, 2002).

The ECP has produced the 1997 General Usage for International Digitally Insured Commerce (GUIDEC I) and the 2001 GUIDEC II. These two sets of standards establish harmonized definitions and rules for the use of electronic authentication techniques.[13]

D. The European Council

The European Council (EC) has issued many directives related to electronic commerce.[14] In 2000, the EC adopted the Directive on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market.[15] This directive creates a legal framework for electronic commerce in the European Union. In 1999, the EC adopted the Directive on Electronic Signatures, which required implementation by Member States prior to July 2001.[16] This directive creates a general framework for a global market for electronic signature certification and also grants electronic signatures the same legal status as handwritten signatures, including admissibility in court. In 1995 and 1997, the EC adopted Directives on Data Protection.[17] In addition to the EC directives on data protection, the EU Committee of Ministers has issued guidelines to protect privacy in collection and processing of personal data.[18]

E. Free Trade Area of the Americas

The parties negotiating the Free Trade Area of the Americas (FTAA) have established the Joint Government-Private Sector Committee of Experts on Electronic Commerce, a non-negotiating body which studies, reports, and makes recommendations regarding the harmonization of electronic commerce laws. The Committee's Second Report with Recommendations to Ministers provides an overview of harmonization work on electronic commerce and reviews electronic commerce legislation at the national level.[19] The Report does not expressly call for harmonization of laws on electronic commerce within the text of the FTAA agreement. Instead, the Report recommends adoption of the UNCITRAL Model Law on Electronic Commerce. An October 2001 Committee press release states that future work will focus on matters related to "consumer protection, electronic government and other issues."[20]

F. The Hague Conference on Private International Law

The Hague Conference on Private International Law has been studying electronic commerce and its impact on the application of existing Hague instruments. In April 2000 The Hague Conference issued a Preliminary Report on Electronic Data Interchange, Internet and Electronic Commerce.[21] The Report cites work by UNCITRAL on electronic data interchange and work by the European Council, the OECD, and the European Union on data

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13 For more information on the substance of GUIDEC I and II, see www.iccwbo.org/home/menu_electronic_commerce.asp (accessed Jan. 15, 2002).

14 Unlike instruments adopted by other regional harmonization bodies, EC directives require implementation by member states. The EC therefore closely tracks member state implementation of its directives Information on such implementation is generally available on the European Union web site, at http://www.europa.int (accessed Jan. 23, 2002).

15 Directive 2000/31/EEC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, Jun. 8, 2000, 2000 O.J. (L 178) 2.

16 Directive 1999/93/EEC on Electronic Signatures, Dec. 13, 1999, 1999 O.J. (L 013) 12.

17 Directive 1995/46/EEC on Data Protection, Nov. 23, 1995, 1995 O.J. (L 281) 31; Directive 1997/66/EEC on Data Protection, Jan. 30, 1998, 1998 O.J. (L 24) 8.

18 Recommendation No. R(99) 5 of the European Union Committee of Ministers to Member States for the Protection of Privacy on the Internet, *cited in* Heather Rowe, *The Directive on The Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data*, 607 PLI / Pat 179 (June 2000).

19 FTAA Joint Government-Private Sector Committee of Experts on Electronic Commerce Second Report with Recommendations to Ministers, FTAA.ecom/03/Rev.3, Apr. 9, 2001, *available at* http://www.ftaa-alca.org/SPCOMM/derdoc/ec3r3de.doc (accessed Feb. 15, 2002).

20 Press Release of Eleventh Meeting of Joint Government-Private Sector Committee of Experts on Electronic Commerce, Oct. 26, 2001, *available at* http://www.ftaa-alca.org/SPCOMM/press/scecc11e.asp (accessed Feb. 14, 2002). For an overview of e-commerce and the FTAA, see J. Barrett Willingham, Note, Electronic Commerce and the FTAA, 6 NAFTA Law & Bus Rev Americas 483, 505 (2000). Willingham states that, as of 1999, "many of the FTAA recommendations follow WTO agreements or defer to the WTO Work Program on trade-related aspects of electronic commerce."In addition to the tracking of national e-commerce legislation done by the FTAA Joint Government-Private Sector Committee of Experts on electronic Commerce, the law firm Baker & McKenzie maintains a web site with current national e-commerce laws at http://www.bmck.com/ecommerce/intlegis.htm.

21 Electronic Data Interchange, Internet and Electronic Commerce, *supra*.

privacy, suggesting that such instruments produced by other institutions may leave no need for Hague harmonization on electronic commerce.[22] Skepticism of the need for Hague instruments on electronic commerce is echoed in an August 2000 Hague report on Electronic Commerce and International Jurisdiction, which concluded that electronic commerce should be considered as part of the Draft Hague Convention on Jurisdiction and Foreign Judgments, rather than through adoption of a new instrument focused exclusively on Internet jurisdiction.[23]

G. The American Bar Association

Since 1985 the American Bar Association (ABA) has addressed electronic commerce through its Committee on Cyberspace Law. In 1998, the Committee issued a report on Transnational Issues in Cyberspace: A Project on the Law Relating to Jurisdiction.[24]

H. World Trade Organization

The World Trade Organization (WTO) began a work programme on trade-related aspects of electronic commerce in 1998. Although legal harmonization in the electronic commerce area is not a stated purpose of the work programme, as part of the programme the WTO Council for Trade in Goods has been studying standards in relation to electronic commerce.[25] Apart from preliminary general thoughts on standards, the Council has not issued any publicly-available documents or instruments.[26]

II. Cross-Border Insolvency

Because of the need for stability in an increasingly interdependent international financial system, the issue of international insolvency rose to top priority on the international harmonization agenda following financial collapses in emerging markets in the late 1990s.[27] International organizations that have addressed the harmonization of cross-border insolvency law include UNCITRAL, The World Bank, the International Monetary Fund, the European Commission, the American Law Institute, the Organization for Harmonization of African Law, the International Bar Association, and the Working Group on International Financial Crises – G22.

A. UNCITRAL

In 1997, the UNCITRAL Working Group on Insolvency Law adopted a Model Law on Cross-Border Insolvency with a Guide to Enactment.[28] The Model Law "creates a set of procedural rules to be integrated into the substantive bankruptcy law."[29] The purpose of the Model Law is to achieve "limited but effective cooperation, compatible with all legal systems and, therefore, acceptable to all countries. Its goals are to ensure cooperation in cross-border insolvency cases through recognition of foreign decisions and access of foreign liquidators or administrators to local court proceedings."[30] As of August 2001, the Model Law had been adopted in substantive part by Japan, Mexico, and South Africa. In addition, the Model Law "has been approved in principle by the British Parliament, pending a regulation adopting a specific text, and has been recommended for adoption in New Zealand by its Law

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22 *Id.*

23 Electronic Commerce and International Jurisdiction, The Hague Convention on Private Int'l Law Preliminary Doc. No. 12 (Aug. 2000), *available at* ftp://hcch.net/doc/jdgmpd12.doc (accessed Jan. 23, 2002).

24 *See* A.B.A., London Meeting Draft – Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdictional Issues Created by the Internet, *available at* http://www.abanet.org/buslaw/cyber/initiatives/draft.rtf (accessed Jan. 23, 2002).

25 WTO General Council Work Programme on Electronic Commerce, Sept. 25, 1998, *available at* http://www.wto.org/english/tratop_e/ecom_e/wkprog_e.htm (accessed Feb. 14, 2002).

26 *See* Work Programme on Electronic Commerce, Information Provided to the General Council, WTO Doc. G/C/W/158, July 26, 1999.

27 *See generally* Ian F. Fletcher, INSOLVENCY IN PRIVATE INTERNATIONAL LAW: NATIONAL AND INTERNATIONAL APPROACHES (1999) (discussing UNCITRAL Model Law, European efforts, and Latin American insolvency treaties); Harold S. Burman, *Harmonization of International Bankruptcy Law: A United States Perspective*, 64 FORDHAM L. REV. 2543 (1996).

28 U.N. Commission on International Trade Law's Model Law on Cross- Border Insolvency, G.A. Res. 52/158, UNCITRAL, 30th Sess., Supp. No. 17, Doc. A/52/17 (May 30, 1997), 36 I.L.M. 1386.

29 Hannah L. Buxbaum, *Rethinking International Insolvency: The Neglected Role of Choice-of-Law Rules and Theory*, 36 STAN. J. INT'L L. 23, 34 (2000).

30 Legal Dep't, Int'l Monetary Fund, Report on Orderly and Effective Insolvency Procedures: Key Issues, IMF Internal Document, May 1999, *available at* http://www.imf.org/external/pubs/ft/orderly/index.htm (accessed Jan. 23, 2002).

Commission. It has been proposed in the United States Congress as a new Chapter 15 of the United States Bankruptcy Code."[31]

Recently the Working Group on Insolvency Law has considered other approaches to the problem of international insolvency harmonization. Given the "complexity and variety of issues involved in insolvency law and the disparity of approaches taken within the various legal systems," the Working Group writes, harmonization of cross-border insolvency laws "should ensure as much flexibility as possible."[32] Therefore, the principal objective pursued by the Working Group in the past few years has been to identify the features of efficient and effective insolvency regimes. The Working Group is currently elaborating a detailed Draft Legislative Guide on Insolvency Law,[33] slated for completion by 2003.

B. The World Bank

The Insolvency Initiative of The World Bank produced Principles and Guidelines for Effective Insolvency and Creditor Rights Systems in 2001, recommending that nations implement the UNCITRAL Model Law.[34] The Insolvency Initiative also maintains a Global Insolvency Law Database (GILD), assembling the insolvency laws of countries throughout the world and tracking changes to the laws.[35]

C. International Monetary Fund

The International Monetary Fund (IMF) produced a 1999 Report of Orderly and Effective Insolvency Procedures: Key Issues, which outlines broad policy considerations when modernizing a national insolvency system and recommends adoption of the UNCITRAL Model Law.[36] As part of its effort to encourage modernization of national legislation on insolvency, the IMF has received letters of intent to modify bankruptcy systems from Albania, Bulgaria, Guinea, Indonesia, Kazakhstan, Lithuania, Macedonia, Republic of Moldova, Russia, South Korea.[37]

D. The European Commission

In 2000, the EC issued a Regulation on Insolvency Proceedings.[38] The EC has also adopted the 1991 European Convention on Certain International Aspects of Bankruptcy (Instanbul Convention).[39] On the other hand, the European Union Convention on Insolvency Proceedings (1995) failed to be ratified by its 1999 deadline.

E. American Law Institute

Recognizing significant work at the global level by UNCITRAL and a corresponding lack of regional work in the Americas, the American Law Institute (ALI) formed the Transnational Insolvency Project to identify principles and procedures for managing cross-border insolvencies in the NAFTA region. In 2000, the ALI approved the Principles of Cooperation in Transnational Insolvency Cases among Members of the North American Free Trade Agreement.[40]

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31 Jay Lawrence Westbrook, *Symposium-International Insolvency: Bankruptcy in a Global Economy Global Developments, The Transnational Insovlency Project of the American Law Institute*, 17 CONN. J. INT'L L. 99, 101 n. 8 (2001).

32 Report of the Working Group on Insolvency Law on the Work of its Twenty-Fourth Session, U.N. Doc. A/CN.9/504, Aug. 13, 2001, at 3, *available at* http://www.uncitral.org/en-index.htm (accessed Jan. 23, 2002).

33 UNCITRAL Draft Legislative Guide on Insolvency Law, U.N. Doc. A/CN.9/WG.V/WP.57 (Oct. 30, 2001) and U.N. Doc A/CN.9/WG.V/WP.58 (Oct. 5, 2001), *available at* http://www.uncitral.org/en-index.htm (accessed Jan. 23, 2002).

34 The World Bank, Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, Apr. 2001, *available at* http://www.worldbank.org/ifa/Insolvency%20Principles%20and%20Guidelines%20April%202001.pdf.

35 The Global Insolvency Law Database (GILD) can be accessed on the Internet, *available at* http://wbln0018.worldbank.org/legal/gild/entry.nsf/entry?readform (accessed Jan. 23, 2002).

36 Report of Orderly and Effective Insolvency Procedures: Key Issues (Aug. 1999), *available at* http://www.imf.org/external/pubs/ft/orderly/index.htm (accessed Feb. 15, 2002).

37 These letters are accessible on the IMF web site, at www.imf.org (accessed Feb. 15, 2002).

38 European Council Reg. No. 1346/2000 on Insolvency Proceedings (May 29, 2000), 2000 O.J. (L 160) 1.

39 European Convention on Certain International Aspects of Bankruptcy (Istanbul Convention), June 5, 1990, 30 I.L.M. 165 (1991).

40 *See* Westbrook, *supra*.

F. Organization for Harmonization of African Law

The *Organisation pour l' Harmonisation en Afrique du Droit des Affaires* (OHADA) is an organization of sub-Saharan African States that works on the harmonization of commercial laws. OHADA has adopted the Uniform Act for the Organization of Procedures for the Cancellation of Debts, which went into effect in 1999.[41]

G. International Bar Association

Committee J of the International Bar Association (IBA) focuses on the topic of insolvency and creditors' rights. Currently, Committee J is working towards completion of a Model Insolvency Law Project, which seeks to identify general principles and develop model law provisions. In addition, the IBA approved Committee J's Cross-Border Insolvency Concordat in 1996. The Concordat contains general principles to govern parties to cross-border insolvencies.[42] The IBA also adopted a Model International Insolvency Cooperation Act (MICA) in 1989.[43] The IBA reports that the principles contained in these instruments were incorporated into the UNCITRAL Model Law.[44]

H. Working Group on International Financial Crises (G22)

Following the international financial crises of the late 1990s, officials from the G-22 economies met in Washington and established the Working Group on International Financial Crises. In 1998 the Working Group adopted the Key Principles and Features of Effective Insolvency Regimes, which sets forth policies designed to prevent international financial crises and facilitate their resolution.[45]

CJI/doc.89/02

SIXTH INTER-AMERICAN SPECIALIZED CONFERENCE ON INTERNATIONAL PRIVATE LAW (CIDIP-VI)

(presented by Drs. Carlos Manuel Vázquez and João Grandino Rodas)

The Sixth Inter-American Specialized Conference on Private International Law took place in Washington, D.C., during the week of February 4-8, 2002. Drs. João Grandino Rodas, Luis Herrera Marcano, and Carlos Manuel Vázquez represented the Inter-American Juridical Committee at the opening session as observers. This report describes the presentation and reception of the report of the Inter-American Juridical Committee, titled *CIDIP VII and beyond* (CJI.doc.74/01 rev.1), during the course of CIDIP-VI. It also describes in very brief summary the accomplishments of CIDIP-VI, and the mandate that will apparently soon issue to the IAJC as a result of resolutions taken at CIDIP VI.

1. The IAJC Report

Dr. Didier Opertti, the President of CIDIP-VI, emphasized the issue of the future of CIDIP at the opening session. He announced that a plenary session devoted to the topic would be held on Thursday, February 7.

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41 OHADA Acte Uniforme Portant Organisation des Procedures Collectives d'Apurment du Passif, *available at* http://www.ohada.com/textes.php?categorie=588 (accessed Jan. 23, 2002).

42 *See* David H. Culmer, Note, *The Cross-Border Insolvency Concordat and Customary International Law: Is it Ripe Yet?*, 14 CONN. J. INT'L L. 563 (1999) (analyzing the Concordat).

43 *See* Ian Fletcher, *Cross Border Insolvency: Comparative Dimensions*, 12 UNITED KINGDOM COMPARATIVE LAW SERIES 287 (1990) (setting forth text of MICA).

44 *See* Key Achievements of Committee J of the International Bar Association, *available at* http://www.ibanet.org/committees/SBL-Jsubs2.asp#1 (accessed Jan. 23, 2002).

45 Key Principles and Features of Effective Insolvency Regimes, *in* Report of the Working Group on International Financial Crises (Oct. 1998), Annex A, *available at* http://www.imf.org/external/np/g22/ifcrep.pdf (accessed Jan. 23, 2002).

Drs. Grandino and Vázquez presented the IAJC's report at the plenary session of CIDIP on February 7. The IAJC report addressed the future of CIDIP from both a long-term and a short-term perspective. Taking a long-term perspective, the report concluded that the time was ripe for a thorough, in-depth study of the process of private international law codification and private law harmonization in the Americas. This conclusion was based on the views expressed by numerous specialists in private international law in response to the questionnaire disseminated by the IAJC. First, concerns were expressed about the declining rate of ratification of CIDIP instruments. Second, there has been a discernible shift in emphasis in CIDIP-VI from classic private international law approaches to approaches focusing on the harmonization of substantive law. Third, concerns were expressed about the relevance of regional as opposed to global approaches to private law issues. Fourth, concerns were expressed about the duplication of effort that occurs when numerous international bodies are engaged in similar activities. Fifth, it was suggested that the increasing economic integration of the region might warrant a modified approach to issues of private international law. Finally, many respondents recommended an increased commitment of resources to CIDIP. For all of these reasons, we concluded that a thorough study of the future of CIDIP by a group of experts was warranted at this time.

Taking a shorter-term perspective, the report considered several possible topics that might be appropriate for treatment at CIDIP-VII. We noted that the topics that had been suggested most frequently by those who responded to the questionnaire were electronic commerce, consumer protection, migration and free flow of persons, arbitration and dispute settlement, protection of minors, and cross border insolvency.

In the discussion that ensued at the plenary session, there was little reference to our proposal for a thorough study of the future of CIDIP. Some delegates expressed dismay that some of those who responded to the questionnaire questioned the value of CIDIP. With respect to the long-term direction of CIDIP, most of the comments concerned the desirability of the shift in CIDIP-VI from the traditional private international law approaches to an approach focusing on the harmonization of substantive law. President Opertti lamented this shift, noting that only one of the three topics in CIDIP-VI takes the traditional approach. He expressed the view that CIDIP has focused and should continue to focus on private international law and should not become another UNCITRAL. Others argued that CIDIP should be responsive to the needs of the Member States in the area of private law, and that the Member States today appear to perceive the need to harmonize substantive law. Dr. Vázquez observed that most of those who responded to the questionnaire expressed the view that CIDIP should retain the flexibility to adopt either approach, depending on which is more appropriate in the particular context.

The plenary session also included significant discussion of possible topics for CIDIP-VII. With respect to the topics mentioned in the IAJC report, delegates noted that the topic of electronic commerce is a very broad topic encompassing numerous areas. It was stressed that the topic should be given a narrower focus. Other delegations, however, stressed the importance of including electronic commerce among the possible topics for treatment in CIDIP-VII. The delegations also proposed additional topics to be considered for treatment in CIDIP-VII, as reflected in the final resolution adopted in the third plenary session on Friday, February 8.

The future of CIDIP was addressed in resolution 1/02, adopted on February 8. This Conference resolved, in clause 1, "to continue with the CIDIP process as the appropriate forum for the codification and development of private international law in the Hempisphere." In clause 3, it requests the General Assembly to convoke CIDIP-VII. And in clause 4, it "requests the General Secretariat, through the Secretariat for Legal Affairs, to organize a consultation of experts aimed solely at discussing the future of CIDIP and future topics that are appropriate for treatment at CIDIP-VII." The resolution thus parallels the recommendation of the IAJC, with the apparent proviso that the study of the future of CIDIP must take for granted the continuation of the CIDIP process as the appropriate process for codifying and developing private international law in the Americas.

As to the topics for CIDIP-VII, the resolution recommends that further consideration be given to three of the topics that were mentioned in the IAJC report: electronic commerce, cross-border insolvency, and migration and free flow of persons. In addition, the resolution recommends consideration of the following five topics: development of an inter-American computer-based registry system; continuation of CIDIP-VI, Topic I, transportation work to encompass a multi-modal approach, including road, rail, shipping, and air transportation; investment securities; international legal rights for the transferability of tangible and intangible goods in international trade; and international protection of persons with disabilities. Although eight topics were listed in the resolution as topics to be studied by the group of experts, it was stressed by some delegations that no more than two or three topics should ultimately be selected for treatment at CIDIP-VII.

2. Accomplishments of CIDIP-VI

There were three topics on the agenda of CIDIP-VI. Topic 1 concerned a draft bill of lading for carriage of goods by road. Topic 2 concerned a model law on secured transactions. Topic 3 concerned a draft convention on responsibility for transboundary pollution.

The first two topics culminated in the adoption of instruments. With respect to topic 1, the delegations adopted two model laws: a Uniform Negotiable Bill of Lading for Carriage of Goods by Road and a Uniform Non-negotiable Bill of Lading for Carriage of Goods by Road. Two model documents were needed, because the North and South American delegations could not agree on one model document or on a protocol to the 1989 Inter-American Convention on Transport of Goods by Road.

With respect to topic 2, the conference adopted a Model Inter-American Law on Secured Transactions, which is expected to "reduce the cost of borrowing, and . . . facilitate international trade and investment in the region, as well as [assist] small and medium-sized enterprises throughout the Hemisphere." The drafting committee also acknowledged the relevance of laws on electronic commerce and on electronic documents and signatures to its model law and the integration of member states' secured financing systems. To this end, instead of incorporating the Inter-American Uniform Rules on Electronic Documents and Signatures, as proposed in previous drafts of the model law, the delegations resolved to recommend use of the 1996 UNCITRAL Model Law on Electronic Commerce and the 2001 UNCITRAL Model Law on Electronic Signatures and Documents respectively.

With respect to topic 3, the Conference did not achieve agreement on any instrument. Instead, it adopted a resolution calling for further study of the issue of extra-contractual liability by the Inter-American Juridical Committee, including examination of documents and precedents, production of a report, and if appropriate the drafting an international instrument to be presented to a group of experts and subsequently considered by the General Assembly in 2003.

CJI/doc.97/02

RECOMMENDATIONS AND POSSIBLE SOLUTIONS PROPOSED TO THE TOPIC RELATED TO THE LAW APPLICABLE TO INTERNATIONAL JURISDICTIONAL COMPETENCE WITH REGARD TO EXTRACONTRACTUAL CIVIL RESPONSIBILITY

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

I. Mandate handed down to the Inter-American Juridical Committee

In item 3, letter b of its resolution AG/RES.1846 (XXXII-O/02) entitled *Specialized Inter-American Conferences on Private International Law*, the General Assembly of the Organization of American States, OAS requested to "examine, with regard to operative

paragraph 3 of resolution CIDIP-VI/RES.7/02, the report to be prepared by the Inter-American Juridical Committee pursuant to the mandate contained in resolution CP/RES.815 (1318/02)."

In this resolution the Permanent Council assigned the CIDIP topic to the Inter-American Juridical Committee, related to the International Jurisdictional Law and Competence Applicable with regard to Extracontractual Civil Responsibility and also resolved:

> "1. To instruct the Inter-American Juridical Committee to examine the documentation on the topic regarding the applicable law and competency of international jurisdiction with respect to extracontractual civil liability, bearing in mind the guidelines set out in CIDIP-VI/RES.7/02.
>
> 2. To instruct the Inter-American Juridical Committee to issue a report on the subject, drawing up recommendations and possible solutions, all of which are to be presented to the Permanent Council as soon as practicle for its consideration and determination of future steps."

In its resolution CIDIP-VI/RES.7/02, entitled *Applicable law and competency of international jurisdiction with respect to extracontractual civil liability*, the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI) resolved in item 2: "To request the Permanent Council to entrust the Inter-American Juridical Committee with examining the documentation on the subject and, bearing in mind the foregoing guidelines, with issuing a report, in drawing up recommendations and possible solutions, all of which are to be presented to a Meeting of Experts." And in item 3: "To request the General Assembly to convey a Meeting of Experts to consider, on the basis of the IAJC report the possibility of preparing an international instrument on the matter, to be presented to the OAS General Assembly at its regular session in 2003." In its resolution CJ/RES.42 (LX-O/02) issued during its 60th regular session that approved the agenda for the 61st regular session of the Inter-American Juridical Committee to be held in Rio de Janeiro, Brazil, from August 5 through 30, 2002, it was decided to discuss under letter "A. Current topics", item "1. Extracontractual responsibility - CIDIP-VII", appointing as rapporteurs Drs. Carlos Manuel Vázquez and Ana Elizabeth Villalta Vizcarra."

In compliance with the mandates contained in the above-mentioned resolutions, the rapporteur of this topic presents the following report:

II. Doctrine aspects

In the sphere of obligations, Civil Responsibility includes:

a) the Contractual, and

b) the Extracontractual

Civil Contractual Responsibility consists in the obligation of repairing the damage resulting from non-compliance of an obligation resulting from an Agreement.

Extracontractual Civil Responsibility are those obligations that do not arise from a contract but, all to the contrary, arise at the margin of the autonomy of the will expressed by the people, in other words, they originate into obligations that are born outside the conventional framework and may arise from different sources: the quasi-contractual, the illegal, the quasi-illegal and those from a legal source.

It is exactly for this reason that it regulates a very complex and wide-ranging sphere, which covers a multiplicity of suppositions of different nature, including situations such as those resulting from the damages caused by the manufacture of products, accidents caused while circulating on highways, unfair competition, as well as those related to the contribution of sea contamination by hydrocarbons, damages caused by nuclear accidents, contamination of the transborder environment, etc.

In addition to the positive aspects that modern technology can offer, it also has the capacity of generating international damages that may result in international civil

responsibility, corresponding to the discipline of Private International Law. The determination of the law applicable in those cases results from obligations born without a convention.

In this respect, the obligation of repairing the damage has the purpose of protecting people against the risks caused by modern industrial society.

The notion of Extracontractual Civil Responsibility leads us to understand it as an obligation to repair a damage caused. Thus, in some legislations it is defined as "the obligation to repair a damage resulting from the guilty non-compliance of a pre-existent legal behavior or duty that, although the legislation may not determine so expressly, does in fact protect the person legally by establishing a sanction within the positive juridical legal code."

The legislations in force in the different States, as well as the Jurisprudence Doctrine, have decided in favor of several different solutions to determine the legislation applicable to the obligations that are born without a convention, as well as to determine the competent jurisdiction thereof.

Notwithstanding the above, if there is a mutual natural interconnection between the matter of an "applicable law" and the "competent jurisdiction", since in practice the legislative and jurisdictional competence are presented as indissoluble, they will be analyzed separately, although they always show the interrelation that exists between them.

III. Aplicable law

In order to determine the law applicable to the obligation that arises without a convention or which are considered extracontractual, we may refer to the so-called Traditional or Classic Criteria and the Current Solutions.

A. Traditional or classic criteria

a) *Lex fori*

Defines as "Applicable Law" the law of the Court it is getting acquainted with, basing itself mainly on international public order and policy standards.

Those who support the pertinence of the *lex fori* (or the juridical order of the State of the judge who understands the case) argue that this is a common law to the parties and that it has the advantage that the judge applies its own law.

This solution has been supported by Savigny, Miaja de la Muela and Story who sustain: "that in the absence of a contrary doctrine, each country must apply its own laws."

Nevertheless, this criteria has been questioned because it ignores the pure basis of modern Private International Law and because it would lead us to a situation of absolute insecurity prior to the respect due to the rights and obligations of the interested parties.

b) *Lex loci delicti commissi*

Defines as the legislation applicable the "law of the place where the act occurred." Its application approach is based on: the respect of rights acquired and the sovereignty of the States; it has been seen as a natural link that unites all acts with the juridical order of the place where they occur, thus the "Court and natural judge are those where the crime was actually committed."

This traditional and classic criteria has been extremely successful in their application both as regards the law applicable and the competent jurisdiction.

Arguments have been presented in favor of this criterion as a neutral connection point, which is why it would reach a certain degree of balance regarding the rights of the individual and why its application would allow reaching predictability and uniformity of results, while safekeeping certainty and juridical security.

Nevertheless, the ***lex loci delicti commissi*** criteria have been criticized by a portion of the doctrine and jurisprudence mainly "because of its mechanical application and abstract character." The attack is directed against the traditional conflicting technique itself, traditional

for the rigidity with which it only uses one sole connection point to determine the law applicable, namely, "the place where the act occurred," adopting fundamentally the "unique connection approach."

Furthermore, criticism has been made of the inconveniences arising in practice from the application of this traditional criterion, as for example:

1) When the act that generates the damage and the resulting damage itself occur in different States, it becomes more difficult to apply this point of classical connection for this case. Furthermore, it is not always easy or possible to determine where the fact or act generating the damage has been committed, of the emerging damage itself.[1]

This situation has given rise to different solutions that have nevertheless encountered difficulties in practice, for example:

If it is decided in favor of the **law of the place where the act is committed,** said law could prove to be permissive or fail to establish the sanctions necessary to respond for a given act.

The option in favor of the **law of the place where the damage is caused** could lead to an inapplicable connection because of the existence of plural States impacted by the results of the harmful act.

If an **accumulative solution** of both connections is preferred, the case in question will become more complex.

2) The connection criterion is fortuitous and removed from the socio-economic milieu of the parties.

3) The criterion is mechanical in nature, so its application may prove inconvenient when, more then one State has a significant relationship with the act or other aspects of the case, that is to say, "it fails to correspond to the true center of gravity of the various interests in play."

To conclude, the ***lex loci delicti commissi*** has not been deemed appropriate for all cases of application, since this is not always the most relevant law nor the one that has the most meaningful or closest ties to the core of the controversy.

c) *Lex domicilii*

This criterion of connection determines the **Domicile Law** as the applicable law and admits two variants: one referring to the common domicile and the other defining the domicile of the injured party.

The **Common Domicile Law** consists in applying the right to the common domicile to the author of the deed and the victim.

This criterion applies and is beneficial if both parties are domiciled in the same State, since this constitutes the social context common to both and their right would take into account their own interests.

The **Victim's Domicile Law** is a criterion that as a rule prevails when the interested parties do not share the same domicile, so the Victim's Domicile Law is proposed as the applicable criterion.

This criterion is more advantageous to the injured party as regards indemnity and reparation of damage.

Among the legislations that make use of these traditional criteria, we can mention the following:

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[1] Statement of Reasons. *Draft Convention on Applicable Law and Competency of International Jurisdiction with respect to Extracontractual Civil Liability,* (presented by the Delegation of Uruguay - CIDIP-VI/doc.17/02, February 4, 2002).

The Colombian Civil Code, which regulates extracontractual liabilities by adopting the traditional classification of liabilities in: contracts, quasi contracts, felonies, quasi offenses and the law.

Accordingly, in order to solve disputes concerning extracontractual responsibility, the law of the place where the offense was committed is applied, that is to say, the traditional criterion of the *Lex loci delicti commissi.* [2]

Article 2035 of the Civil Code of El Salvador states: "Responsibilities contracted without agreement derive either from the law or from the willful deed of one of the parties.Those deriving from the law are expressed therein".

If this willful deed is licit, it constitutes a *quasi contract.*

If the willful deed is illicit and committed with harmful intent, it constitutes an *offense* or a fault.

If the deed is illicit but committed without harmful intent, it constitutes a *quasi offense.*

This article deals only with quasi contracts derived from the willful deed of one of the parties.

Article 2036 then states: "There are three principal quasi contracts: the officious agency, payment of what is not owed, and the community".

Current solutions

Concerning these traditional criteria with strict points of connection, the **Jurisprudence of the United States** has been highly innovative in pointing to conflicting provisions in cases of Extracontractual Civil Responsibility, especially those related to traffic accidents, where the application of the ***lex loci delicti commissi*** to the case has been replaced by the criterion of the **most significant connection** [3], thus permitting the application of domicile law rather than just the law of the place where the deed has occurred, that is to say, the use of more directly related connection criteria, where account is also taken of political trends.

The most prestigious United States doctrine combines three different methodologies:

a) The proximity principle;

b) Unilateral intent in determining the scope of material provisions based on state interests, and

c) The teleological attempt to reach desirable results in settling problems caused by external trade.

The doctrine of the **Center of gravity** is adopted, inclining towards the law of the place that has a more significant connection with the object of the litigation, because of the fact that applying the traditional criteria can lead to unfair and abnormal results. The Anglo-Americans call this solution ***the proper law of the tort****.*

Current doctrine and jurisprudence claim that the **traditional or classic** rules or provisions of conflict that adopt a strict, mechanical application of conflicting norms are not suitable for the current concept of extracontractual civil liability, with the judges having to analyze the peculiar circumstances of the case as well as the content of the material provisions of competence to attenuate rigid application of the connection criterion opted for.

Pierre Bourel states on the matter:

> Extracontractual civil responsibility can not go on being treated as a homogeneous category, and although there still subsists the old rule of the *lex*

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2 MONROY CABRA, Marco Gerardo. *Tratado de Derecho Internacional Privado*. Ed. Temis, 1999.

3 FELDSTEIN DE CÁRDENAS, Sara Lidia. *Derecho Internacional Privado.* Parte Especial. Buenos Aires: Universidad Buenos Aires, 2000.

loci delicti commissi, its application is not general or exclusive, and is often left aside for the benefit of other connections.

One must therefore bear in mind the most suitable or convenient solutions according to the current development of Private International Law, in order to determine both the applicable law and the competent jurisdiction.

In the light of this problem, the present doctrine of Private International Law offers other alternative solutions in Doctrine and in Comparative Law.

In this sense**, Juenger** claims that "the traditional points of connection are inconvenient if used exclusively, and it is preferable that they be incorporated into an alternative provision."[4]

Afonsín expresses the notion that "alternative rules presuppose that (the connection criterion) will function that favors the person or business in question." This would mean applying the law most favorable to the victim.

Uzal proposes that "determining the applicable law should contemplate the necessary harmonization and equilibrium between individual and common interests." [5]

Boggiano defends a methodology of materially oriented option. [6]

Herbert poses the possibility of conciliating "classical conflictualism" and the "methodological flexibilization" based on the Anglo-American criterion of *proper law of the tort*, which would lead to adoption of an alternative rule (for example, with three connection points, these being the place of the act, the place of the effects of the act, and the place of domicile of the parties), guiding the criterion of option together with a substantive teleological criterion, which implies delegating ample powers to the Judge.[7]

The Law of Private International Law in Switzerland inclines towards a particular focus on the concrete case, thereby providing specific norms of teleological conflict on matters such as: responsibility for damage caused by products; unfair competition; contamination of the environment; highway traffic accidents; and violations of the so-called right of personality.

The Portuguese Civil Code of 1966 and the **Federal Austrian Law of 1978** are inclined towards applying the system most closely connected to the situation in question, resorting to making the traditional rules of conflict flexible by means of multiple connection points and inclining towards the "principle of the strongest or most intense connection."

The **Montevideo Treaties of International Civil Law of 1889 and 1940** refer to the "responsibilities arising without an agreement" in the following words: "Responsibilities born without an agreement are ruled by the law of the place where the licit or illicit act in question occurred" (Art. 38 of the Treaty of 1889).

Art. 43 of the Treaty of 1940 states: "Responsibilities that arise without an agreement are ruled by the law of the place where the licit or illicit act in question occurred and in that case **by the law regulating the corresponding legal relations.**

Both provisions obey the traditional solution of the ***lex loci delecti commissi*** as being the applicable legislation.

The Montevideo Treaties refer to the classic traditional solution, and the final section of article 43 of the Treaty of 1940 determines a matter of qualification that should be correctly resolved by the interpreter of same.

The **Private International Law Code of 1928** (the "Bustamante Code") rules on this type of responsibility in article 167, which establishes: "(Responsibilities) arising from offenses or faults are subject to the same law as the offense or fault that cause them," and in

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4 Statement of Reasons, afore mentioned.
5 Statement of Reasons, afore mentioned.
6 Statement of Reasons, afore mentioned.
7 Statement of Reasons, afore mentioned.

article 168, which states that: “(responsibilities) arising from acts or omissions involving guilt or negligence left unpunished by the law will be ruled by the law of the place where such originating guilt or negligence occurred.”

In the framework of **The Hague Conference on Private International Law** to determine the applicable law in Extracontractual Civil Responsibility, the technique of multiple connection points or **accumulating connections** has been resorted to both in the Convention on the Law Applicable to Traffic Accidents of 1971 and the Convention on Law Applicable to Responsibility Derived from Products of 1973.

At present those engaged in drawing up treaties on this matter of analyzing the choice of several connection criteria in order to determine the applicable law, taking into account the situation in question, determine that if the injured party and the presumed responsible party are domiciled in different States, the law to be applied is that of the place where the damage occurred or that the place where the act that caused the damage occurred; if the victim and the presumed responsible party are domiciled in the same State, the applicable law is that of domicile. The general principle in the matter of harmful acts is to make the criteria of connection flexible or to attenuate them through the technique of accumulating connections.

Consequently we are faced with a great deal of connection criteria that determine the law to be applied to rule on the so-called responsibilities born without convention.

These selected criteria or points of connection should cover all the elements of civil liability, including the presuppositions of responsibility, the conditions of responsibility, the fixing of the parameters for indemnity and reparation or compensation for damage.

For this reason the selected point of connection should be accompanied by subsidiary connection points for the purpose of making the rigidity of the main connection point more flexible.

The strong criticism and violent attacks suffered by Extracontractual Civil Responsibility have made it necessary for it to be reformulated with the appearance of new tendencies aimed at helping in good faith those individuals who are more vulnerable in this type of legal situation.

It is in this sense that Chapter X of the **Italian Law of Private International Law of 1945** regulates on “non-contractual liabilities,” which include the responsibility for illicit acts and the extracontractual responsibility for damage to products.

So, the **Responsibility for Illicit Acts** is ruled by the law of the State where the act took place, and the injured party may request that the law of the State where the act that caused the damage be applied. If the illicit act involves only nationals of a State domiciled or resident therein, then the law of this State is applied and the **Responsibility for Damage by Products** is regulated at the discretion of the damaged party.

Chapter VI of the **Venezuelan Law of Private International Law of 1998**, entitled “On Liabilities” and which refers to illicit acts, sets forth the following:

> Illicit acts are governed by the law of the place where its effects are produced. However, the victim may demand that the law of the State where the cause that generated the illicit means be applied.

In this manner the rigidity of this point of connection is attenuated.

The sensitive nature of the topic of “Extracontractual Civil Responsibility” has led to **integrated spaces** or **integration systems** occupying a particularly relevant place because people find themselves impelled to circulate more continually and frequently within their areas, which implies adopting common and uniform rules that ensure a framework of security in making decisions and finding solutions.

In this regard, the **Treaties of the European Union** establish that: “in the matter of Extracontractual Civil Responsibility, the Community must make reparation for damage caused by its Institutions or Agents in performing their functions, in compliance with the general principles common to the laws of the member States.”

Within the sphere of **Mercosur**, the issue of Extracontractual Civil Responsibility is dealt with especially in the **San Luis Protocol** that rules on the question of Civil Responsibility in Traffic Accidents between the States Parties of Mercosur (Mercosur/CMC, Dec. 1/96), where it is set forth that: “the responsibility for traffic accidents will be governed by the internal law of the State Party where the accident took place,” but at the same time states that “if the accident involved or affected only people domiciled in another member State, it will be ruled by the internal law of that State” and proceeds: “whichever law is applied to responsibility, account will be taken of the regulations regarding circulation and safety in effect in that place at the moment of the accident, these being norms that by their nature cannot be supplanted by any means whatsoever.”

This implies that when the parties are each domiciled in each one of the States Parties of the convention, “the internal law of the State Party in whose territory the accident took place” is applied, and when the parties are domiciled in another member State, “the internal law of that State” is applied.

As we can see, the **San Luis Protocol** takes into account the socio-economic *milieu* to which the parties belong, and there is some flexibility in the application of the points of connection.

Within the sphere of **The Hague Conference on Private International Law**, we read with regard to Extracontractual Civil Responsibility: “The Convention on the Law Applicable to Traffic Accidents” of 1971 and the Convention on the Law Applicable to Products Liability” of 1973, both of which are mentioned earlier, where the technique in both Conventions has been to resort to the “Multiple Points of Connection,” that is, the technique of “accumulating connections.”

Accordingly, article 3 of the **Convention on the Law Applicable to Traffic Accidents** claims that:

> The law to be applied will be the internal law of the State in whose territory the accident occurred,” a standard to which the following exceptions are made, pursuant to article 4 of this Convention:
>
> **Article 4**
>
> Subject to Article 5, the following exceptions are made to the provision of Article 3:
>
> *a)* Where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, the internal law of the State of registration is applicable to determine liability
>
> - towards the driver, owner or any other person having control of or an interest in the vehicle, irrespective of their habitual residence,
>
> - towards a victim who is a passenger and whose habitual residence is in a State other than that where the accident occurred,
>
> - towards a victim who is outside the vehicle at the place of the accident and whose habitual residence is in the State of registration.
>
> Where there are two or more victims the applicable law is determined separately for each of them.
>
> *b)* Where two or more vehicles are involved in the accident, the provisions of *a)* are applicable only if all the vehicles are registered in the same State.
>
> *c)* Where one or more persons outside the vehicle or vehicles at the place of the accident are involved in the accident and may be liable, the provisions of *a)* and *b)* are applicable only if all these persons have their habitual residence in the State of registration.

> The same is true even though these persons are also victims of the accident. [8]

In a similar light, article 4 of the **Convention on the Law Applicable to Products Liability** states:

> The legislation applicable will be the internal law of the State in whose territory the damage was done, in the case where that State is also:
>
> the State of habitual residence of the person directly harmed, or
>
> the State in which is located the main establishment of the person to whom responsibility is imputed, or
>
> the State in whose territory the product was bought by the person directly harmed.

While in **article 5** it is stated that:

> Notwithstanding the provisions of Article 4, the applicable law shall be the internal law of the State of the habitual residence of the person directly suffering damage, if that State is also:
>
> *a)* the principal place of business of the person claimed to be liable, or
>
> *b)* the place where the product was acquired by the person directly suffering damage. [9]

As shown in **The Hague Conventions**, in essence the criterion of *lex loci* has been used, attenuated by resorting to the multiple connection points when the elements of the supposition are actually connected to another different system.

All of this indicates the need to use complementary connection points, since using traditional criteria in practice presents serious difficulties, for example:

a) The elements of extracontractual responsibility are shared by territories corresponding to various States, in which case it is necessary to determine which of the co-existing legislations is the competent one,

The hypothesis of a legal act from which a sole extracontractual liability is derived involves a series of acts distributed in places corresponding to various States, in which case it can be claimed that the applicable law is that of the place where the principal activity is carried out or else that of the place of the last occurrence. Now, if the place of the extracontractual activity does not coincide with the place of the result, in this case the applicable law can be claimed to be the law of the place where the act was committed, the law of the place of the damage, and – currently - the option that the injured party has of choosing between one of the two above.

b) The act from which the extracontractual responsibility derived is found to be ruled by no legislation, as would be the case where the deed or the act from which the extracontractual liability derives, occurs in territories not subject to the sovereignty of any State. An example of this would be a maritime boarding at high sea, in which case it is necessary to resort to a subsidiary legislative competence, such as the law of the flag flown by the vessel.

This theme of Extracontractual Civil Responsibility has also already been dealt with in several “international *fora* or meetings,” including:

The **Meeting of the Institute of International Law** in Edinburgh in 1969, where it was recommended that: “the principle of the ***lex loci delicti*** should be maintained, but that this should be open to exceptions when the place of the offense is purely fortuitous, or when the

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[8] *Recompilation of Agreements of The Hague Conference on International Private Law* (1951-1993). Translation to Spanish, ed. Marcial Pons, 1996.

[9] *Recompilation of Agreements of The Hague Conference*, *op. cit*.

social environment of the parties is different from the geographical environment of the offense."

It can be noted that the most significant contracts are privileged and that the application of the traditional criteria is flexible.

In light of the above, we draw the conclusion that in the matter of applicable legislation, the **classic criteria** such as unique and strictly applied connections often prove insufficient and unsuitable.

This makes it necessary to use the classical rules in attenuated form, that is, **by making the methodology flexible and incorporating alternative solutions**. These include the notion that the judge should not decide in an absolutely discretional fashion but rather based on (alternative) criteria that are clearly stipulated by the legislator and which enable him or her to act in a reasonable manner and to adjust the general norm to the requisites of substantive justice of the concrete case, thereby producing a connection that is more significant to the situation in question.

IV. Competent Jurisdiction

Legislative and jurisdictional competence are in practice established "indissolubly," thereby constituting the unity that is the object of Private International Law with regard to the conflict of laws, which implies a natural mutual interconnection.

In practice, this has led some States to tend to hierarchize the issue of opting for a jurisdiction on the applicable law, in the understanding that the judge chosen will necessarily apply the law of the State and thereby elect law and jurisdiction at the same time.

In the light of the above and in view of the fact that both categories respond to their own principles, we nonetheless prefer to analyze them separately, seeing that it is necessary to identify both the law applicable to controversial cases and the State before whose courts the case should be presented.

In the **Montevideo Treaties** of 1889 and 1940, the issue of jurisdiction is regulated in article 56 of both. That of 1889 establishes that: "Personal cases should be presented before the judges of the place to whose law the juridical act involved in the case is subject. They may also be presented before the judges of the defendant's domicile."

In the 1940 Treaty, the matter is similarly regulated, that is, attributing competence to the judges of the State where the licit or illicit deed was carried out, while the second clause offers the plaintiff the option of presenting the case before the judges of the defendant's domicile.

The 1940 Treaty also states that "the territorial extension of the jurisdiction is granted if after the action has been presented, the defendant admits it voluntarily, whenever it is a case of actions involving personal patrimonial laws. The defendant's will must be expressed positively rather than artificially."

The **Code of Private International Law** of 1928 (the *Bustamante Code),* sets forth in article 340 that: "to try and judge offenses and faults, the judges and courts of the Contracting State where these have been committed are competent". Article 341 of the same Code states: "Competence extends to all the other offenses and faults to which the criminal law of the State must be applied in accordance with the provisions of this Code."

Article 7 of the **San Luis Protocol**, dealing with the question of civil responsibility involved in traffic accidents among member States of Mercosur (CMC/Dec.1/96), sets forth that: "For the purpose of presenting actions, the plaintiff will choose the competent courts of the Party State:

1) where the accident took place;

2) of the defendant's domicile; and

3) of the plaintiff's domicile."

In other words, the plaintiff chooses to whom to grant competence.

Both of **The Hague Conventions** on the Law Applicable to Traffic Accidents (1971) and the Law Applicable to Products Liability (1973) establish in article 1 that legislative and jurisdictional competence constitute in practice a unity and maintain a natural interconnection.

Thus, article 1, clause 1 of the **Convention** of 1971 states that: “This Convention determines the law applicable to extracontractual civil responsibility as a result of highway traffic accidents, no matter what type of jurisdiction is assigned to try the case.”

The 1973 **Convention**, also in article 1, clause 3, rules that: “This Convention will be for application independently of the jurisdiction or authority that tries and judges the litigation.”

Article 19 of the 1993 **Lugano Convention on Civil Responsibility for damage as a result of activities dangerous for the environment** establishes that: “Actions for compensation will be subject to the jurisdiction of the State in which the damage was perpetrated; where the dangerous activities were carried out or where the defendant has his or her habitual abode.”

Article 2 of the **Federal Law of Switzerland** declares: “The Swiss judicial or administrative authorities of the domicile of the defendant are competent, save for special provisions of the same law.”

Article 3 speaks of a “**forum of necessity:**” “When the law provides for no jurisdiction in Switzerland and it is deemed impossible to conduct a procedure abroad or it can not reasonably be demanded that this procedure be carried out in another State, the Swiss judicial or administrative authorities **of the place with which the cause presents sufficient connection** are competent. Authorization is granted to extend competence and the tribunal elected cannot decline it.

In the sector that regulates illicit acts, Swiss law contains a standard of a general nature and another of a particular nature. Article 129 establishes that the Swiss courts of the domicile, or in the absence of a domicile, those of the defendant's usual abode or establishment, will be competent for trying actions based on an illicit act. When the defendant has no domicile or usual abode or establishment in Switzerland, the action may be presented before the Swiss court of the place of the act or of the effect. If several defendants can be investigated in Switzerland and if the pretensions are essentially based on the same juridical deeds and motives, then the action may be presented against all before the same competent judge; the judge who first intervened will enjoy exclusive competence.

The attribution of competence in favor of the local “forum of necessity” has also been adopted by the **Law of Quebec**, whose article 3136 sets forth that: “although a Quebec authority is not competent to try a litigation, in the event of it being impossible to present an action abroad or if it cannot be demanded that the action be introduced abroad, he or she may assume competence if the question has a sufficient connection with Quebec.”

That is, whenever it is impossible to set up a trial abroad, this circumstance will be considered as a sufficient connection to initiate the action before the local courts, which is what the doctrine calls the “forum of necessity” in favor of the local jurisdiction.

In view of the above, the most convenient thing to do in jurisdictional issues is to present a series of **options** to the plaintiff. This would **facilitate his access to justice**, taking into account that he is the victim who has suffered the damaging consequences of an act or fact performed by the defendant.

V. Consideration of an international instrument on the law applicable and the internationally competent jurisdiction regarding issues related to extracontractual civil liability

It would be convenient for the Inter-American System to adopt a general regime (Convention) to rule on Extracontractual Civil Responsibility, with a wide **range of application**, in other words, that it would in principle regulate all those obligations that are born without a Convention.

This instrument must strictly circumscribe to relations of a private nature (Civil Responsibility), to the exclusion of the International Responsibility of the States.

An international instrument of this type will allow the arbiter to apply the right to qualify an infinity of legal relations arising daily from the reality of life, and which would be impossible for the legislator to foresee or regulate individually.

As this is a topic inherent to the conflict of laws arising in Private International Law, the Convention must solve it by establishing an **applicable law** and a **competent jurisdiction** concerning the claims filed by private individuals.

This regulation on the Law Applicable and the Competent International Jurisdiction applies whenever the act that generated it occurred in a State Party and the damaging effects resulting from it are produced or not in that same State or may cause effects on other States Parties of the Convention.

Thus, the current solutions that have been proposed by the doctrine, jurisprudence and comparative law must be taken into account, as their texts establish a flexibility and attenuation of the classic or traditional criteria used and the adoption of multiple connections, which would be alternatively applied taking into account the most significant connection related to the case presented. This would empower the injured party to chose among one or the other point of connection in order to point out the **applicable law**, which would allow the judge to adjust the general norm to the requirements of substantive justice to the actual case in a more reasonable rather than an arbitrary manner.

Similarly, when determining the competent jurisdiction, the plaintiff should also be granted – taking into account that he/she is the victim of the damaging act – a series of options to facilitate access to justice.

As such, both in the determination of the law applicable as in the competent jurisdiction, the domicile may be considered the feasible point of connection. It is not necessary to include in the international instrument under study an explanation that refers to the concept of domicile, since the Inter-American scenario contains the Inter-American Convention on the Domicile of Individuals of Private International Law dated 1979, which regulates precisely the question of domicile.

It is also convenient that the text of the Convention should regulate matters related to **Objective Civil Liability**, which is the one that applies to the perpetuator of the damage regardless of his or her guilt, since for liability to exist, it suffices to place others in risk, as compensation should be paid with one single damage caused.

This responsibility must contain the following elements:

- The existence of a fault or blame, in other words, an illicit act;
- The presence of the damage that must have a precise and personal nature;
- The relation of causality between the illicit act and the damage.

The existence of damage is an essential factor of the compensation or reparation.

Although it is true that a convention of this nature would be a challenge for the Inter-American System, the regulation of specific areas or sub-categories wherein a progressive

development of Private International Law could be found would represent a greater challenge, as its very specificity requires an independent regulation of its own, one more suitable to its needs.

These areas could include those related to highway traffic accidents, the responsibility of the manufacturer of the product, and transborder contamination.

With regard to highway traffic accidents and responsibility for products, the Hague Conference on Private International Law rules on these in specific conventions already referred to in this report: the Convention on the Law Applicable to Traffic Accidents, dated 1971, and the Convention on Law Applicable to Products Liability, dated 1973.

The Hague Conference opted for specific regulations, since in 1967 the Secretary General of its Permanent Bureau mentioned the possible difficulty of establishing a general regime for Extracontractual Responsibility, following the guidelines adopted by the conventions in specific areas.

Within the framework of MERCOSUR, the issue of highway traffic accidents was regulated through the San Luis Protocol for Matters of Civil Responsibility in Traffic Accidents between the Mercosur States Parties which has been mentioned earlier.

Accordingly, both the Hague Conference on Private International Law and the Delegation of Uruguay on the occasion of the Inter-American Specialized Conference on Private International Law (CIDIP) have expressed their concern to establish a Law Applicable to Civil Responsibility for damage caused to the environment as a specific sub-category of Extracontractual Civil Responsibility.

At the Hague Conference this concern appeared in 1992 in a note sent by the Permanent Bureau to the Conference's Special Commission for General and Political Affairs, and which was taken up again at the Eighteenth Session of the Conference in June 1995, when it was recommended to consider the theme on the Law Applicable to the Matter of Responsibility for Damage Caused to the Environment. However, objections were made by some countries who claimed that this was a complex theme related to highly sensitive political questions.

At the Fifth Inter-American Specialized Conference on Private International Law (CIDIP V) held in March 1994, the Delegation of Uruguay requested the inclusion of theme 4 related to other matters: "International Civil Responsibility for Transborder Contamination." In Resolution No. 8/94 of this Conference, the recommendation was made for the General Assembly of the OAS to incorporate into the Agenda of CIDIP VI the theme "International Civil Responsibility for Trans-border Contamination: Aspects of Private International Law."

The theme was of course proposed in the two main *fora* in charge of the progressive development of Private International Law, namely, the Hague Conference and the CIDIP, because of the importance that environmental contamination currently has in the scope of this Law, seeing that its harmful effects not only jeopardize people and their property but also deeply affect the economy in this sense that environmental contamination knows no frontiers.

As regards all that has been presented in this report, we conclude that it is convenient that the Inter-American System should adopt a convention that rules on the topic of Extracontractual Civil Responsibility in broad and general terms. A Convention of this nature could later produce other Conventions relating to the various sub-categories.

In this sense the **Inter-American Draft Convention on Applicable Law and Internationally Competent Jurisdiction on matters of Extracontractual Responsibility** prepared and presented by the Delegation of Uruguay on the occasion of the Inter-American Specialized Conference on Private International Law (CIDIP-VI) and circulated in document OEA/Ser.K/XXI.6, CIDIP-VI/doc.16/02, 4 February 2002, in Spanish, regulates the themes we have mentioned in accordance with the current tendency of Private International Law. That is, flexibilization and attenuation of the classic or traditional criteria are recommended, as well as adopting multiple connections to be applied alternatively, taking into account the

“most significant connection” and offering the judge the option concerning the victim or injured party, as reflected in **article 2** of the Draft, on establishing the Applicable Law:

The applicable law will be at the judge’s discretion according to what is most favorable to the injured party [or according to the plaintiff’s option], that of the State Party:

a) where the act producing the responsibility was performed, or

b) where the damage was perpetrated against the injured party as a result of this act, or

c) where the involved parties have their common domicile.

Likewise, when the Competent Jurisdiction is regulated, a series of options are offered to the plaintiff to make access to justice easier (**Article 4** of the Draft).

This more flexible methodology by incorporating alternatives presented by the Draft and enabling the judge to choose based on criteria clearly set down by the legislator, will allow him or her to act in a reasonable manner and adjust the general standard to the requisites of the substantive justice of the concrete case, thereby creating a more significant connection to the situation, and also taking into account the socio-economic context to which the parties belong.

In this sense, **Article 4** of the draft declares:

The courts competent for actions founded on this Convention, at the option of the plaintiff, will be:

a) those of the State Party where the act that caused the damage was performed,

b) any of the States Parties where the damage resulting from this act was caused,

c) the State Party where the plaintiff or defendant have their domicile, usual abode or commercial establishment.

With regard to the scope of application, **Article 1** of the Draft answers the expectations required of this type of Convention, being broad enough to include extracontractual liabilities in general, that is, all those liabilities born without a Convention, including offenses, quasi offenses and quasi contracts.

The Draft also incorporates material relating to Civil Responsibility and its effects, to be regulated in accordance with the law that proves applicable in article 2 of the Draft, such as established in **Article 3** of the Draft, which reads:

> The law that proves applicable to civil responsibility, in accordance with the previous article, will regulate on the following, among others:
>
> a) the conditions and scope of responsibility,
>
> b) the causes of exoneration, the limits and distribution of responsibility,
>
> c) the existence and nature of repairable damage,
>
> d) the forms and amount of indemnity,
>
> e) [transmissibility of the right to indemnity],
>
> f) subjects liable to indemnity,
>
> g) [the responsibility of the commissioner because of his or her position] and
>
> h) prescription and lapsing.

Article 5 of the Draft refers to “General Provisions,” which are drawn up according to the standards of the Inter-American Conventions.

Concerning the formal aspects of the Draft, we suggest that the themes be divided by title rather than in articles, so that the Draft Convention will bear the following titles: Scope of Application; Applicable Law; Aspects regulated by the Applicable Law; Competent

Jurisdiction and General or Final Provisions. Another suggestion is that the beginning should include the corresponding Exposition or Consideration Part of the Convention.

Finally, this report, being mindful of the current importance of the theme of Extracontractual Civil Responsibility within Private International Law and the need to regulate it, recommends that all necessary efforts be made for the Inter-American System to have a General Convention that regulates Applicable Law and Competence of International Jurisdiction regarding Extracontractual Civil Responsibility, taking as a fundamental basis the draft presented by the Delegation of Uruguay at the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI) held 4 to 8 February 2002 in Washington, D.C.. The recommendation is also made that work be later carried out on preparing international instruments to rule on specific sub-categories, mainly those relating to Traffic Accidents, Responsibility for Products and Transborder Contamination.

CJI/doc.104/02 rev.2

THE DESIRABILITY OF PURSUING THE NEGOTIATION OF AN INTER-AMERICAN INSTRUMENT ON CHOICE OF LAW AND COMPETENCY OF INTERNATIONAL JURISDICTION WITH RESPECT TO NON-CONTRACTUAL CIVIL LIABILITY: A FRAMEWORK FOR ANALYSIS AND AGENDA FOR RESEARCH

(presented by Dr. Carlos Manuel Vázquez)

On May 1, 2002, the Permanent Council asked the Inter-American Juridical Committee to consider the desirability of embarking on the negotiation of an inter-American instrument addressing jurisdiction and choice of law in the area of non-contractual liability. The Committee has designated as rapporteurs of this topic Dr. Ana Elizabeth Villalta Vizcarra and the undersigned.

This report proposes a framework for analyzing the question posed to the Committee, as well as an agenda for the research that will have to be conducted before the Committee will be in a position to draw any conclusions. The Permanent Council has asked that the Committee's report be submitted "as soon as practicable." Given the complexity of the subject and the need for an in-depth study, the Committee should endeavor to complete its report at its 63rd regular session in August of 2003.

The question posed to the Committee should not be understood as a simple binary choice, demanding a yes-or-no answer. A great variety of options should be considered. The Committee could conclude that an instrument on jurisdiction should be pursued but not a convention on choice of law, or vice versa. It could conclude that it would be unwise to pursue a general instrument on jurisdiction or choice of law for all forms of extra-contractual liability, but that an instrument on jurisdiction or choice of law should be pursued for specific torts. It could conclude that it would be preferable to pursue a model law on one or more of these subjects, as opposed to a convention. It would be well within the scope of the mandate for the Committee to endorse any of these projects, or others. Of course, the Committee could also endorse the negotiation of a general instrument on jurisdiction and choice of law for torts, or conclude that neither a general nor a specific convention nor a model law should be pursued.

Before proceeding to propose a framework for analysis, it is necessary to clarify the nature of the question posed. The question, as I understand it, is *not* whether it would be desirable to have an inter-American convention unifying the law of jurisdiction and choice of law in non-contractual disputes within the hemisphere. Answering that question is comparatively easy. It is apparent that national laws regarding these subjects are not already uniform within the hemisphere. There appears to be no benefit to disuniformity in the fields of jurisdiction and choice of law. In this respect, it is useful to draw a distinction between the law of jurisdiction and choice of law, on the one hand, and substantive areas of law, such as

the law of torts or the law of contracts, on the other. With respect to substantive law, a lack of uniformity is not in itself necessarily a bad thing. Theories of federalism and subsidiarity are premised on the idea that it is good for people to be governed at the level of government closest to them. Disuniformity in substantive law is the price we pay for that benefit. The benefits of local governance will sometimes be outweighed by the need for uniformity in certain areas of substantive law, but assessing this trade-off will often be difficult.

Disuniformity in the law governing international jurisdiction and choice of law, however, cannot be justified as the corollary of the benefits of local governance. By definition, the law of jurisdiction and choice of law applies only when a dispute has connections with more than one State. Usually, the disputes involve people from different States. By hypothesis, at least one of the parties will not be governed by the government closest to him; he will be governed instead by foreign courts or foreign law. In short, the benefit of local governance does not provide a good justification for disuniformity in the law of jurisdiction and choice of law because, by its nature, this law applies only to non-local disputes. There appears to be no inherent benefit to disuniformity in international jurisdiction and choice of law.

On the other hand, there are significant costs to disuniformity in the law of jurisdiction and choice of law. If different States follow different approaches to determining the applicable law, and a plaintiff has the choice of more than one forum in which to litigate his claim, then the applicable law will not be known until the forum is chosen. Disuniformity in choice of law thus creates uncertainty in legal relations. Such disuniformity

> frustrates rational planning. Parties cannot know when they act what law governs their behavior, for that depends upon post-act events such as the plaintiff's choice of forum. Granted, not every act that gives rise to a lawsuit is planned in advance, but some are. Institutional actors, for example, must decide how much to invest in making their activities safer, and what activities to avoid because the liability risks exceed the benefits. And even acts that are not planned are often insured against in advance. There are significant costs when actors -- especially risk-averse actors -- are forced to make decisions without knowing what law governs their actions.[1]

Disuniformity in jurisdiction similarly produces legal uncertainty. Because States generally will enforce judgments only if the judgment was rendered by a State that, in its view, had jurisdiction over the case, disuniformity in jurisdictional rules results in judgments rendered by one State often not being enforceable in the courts of other states.

In view of the costs of disuniformity in jurisdiction and choice of law and the lack of any counterbalancing benefits, it seems evident that it would be desirable to have a uniform approach to jurisdiction and choice of law in the hemisphere.[2]

This, however, is only a part of the question before the Committee. The question posed to the Committee is whether the OAS should embark upon the negotiation of an inter-American instrument unifying this subject, or some portion of it. This is ultimately a question of allocation of resources. If a binding instrument unifying the law of jurisdiction and choice of law in the hemisphere could be achieved at no cost, the hemisphere would almost certainly be better off with such an instrument than without one. But achieving an agreement on such an instrument is not a costless enterprise. Indeed, there is no guarantee that, once the costs are incurred, an agreement will ultimately be reached. This Committee is, of course, in no position to judge whether the effort to negotiate such an instrument is more deserving of Organization's resources than other pressing matters. We can, however, help the appropriate organs of the Organization make that judgment by examining several important

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1 GOTTESMAN, Michael. *Draining the dismal swamp: the case for federal choice of law statutes.* 80 GEO.L.J. 1, 11 (1991).

2 Another reason sometimes given for preferring divergent local laws is that this permits local experimentation, and that such experimentation is necessary to permit the best solution to a particular legal problem to emerge. With respect to torts in general, there have already been centuries of experience with divergent approaches to jurisdiction and choice of law. It is unlikely that new approaches will emerge at this late date. However, with respect to particular subfields of torts, such as those occurring on the internet, there may well be a need for further experimentation at the national level.

questions: First, how severe is the problem attributable to the diversity of approaches currently being followed in the hemisphere concerning jurisdiction and choice of law? Second, how likely is it that this problem will be corrected, without expenditure of OAS resources, or that a satisfying solution has already been found by other entities working on the topic? Finally, if a satisfactory solution is not produced by other entities, how likely is it that a satisfactory solution will be found at the inter-American level?

What follows is an outline of the issues that will have to be examined to produce answer to those three fundamental questions. I shall begin by discussing the questions relevant to an inter-American instrument on choice of law for non-contractual obligations. Thereafter, I shall address the questions relevant to an inter-American instrument on jurisdiction in disputes about non-contractual obligations.

I. What Sorts of Legal Obligations Fall Within the Scope of "Non-Contractual Obligations"?

To assess the severity of the problem that would be addressed by an inter-American instrument on jurisdiction and choice of law in the area of non-contractual liability, and the likelihood that an agreement can be reached on a solution, the first necessary task is to consider the variety of different subjects that fall within the field of non-contractual liability. Defining of the scope of the field and examining the various types of claims that fall within it is relevant to a number of the questions that will have to be considered in reaching a conclusion about the feasibility of an instrument and about the sort of instrument that would be desirable. For example, an instrument establishing general principles broadly applicable to all claims within the field would appear to be less suitable if the field is broad and includes diverse sorts of claims. Furthermore, the negotiation of such an instrument would appear to be far more risky politically if the field includes numerous diverse sorts of claims, as the views of a very large number of interest groups would have to be taken into account and accommodated during the negotiation and ratification processes.

The field of non-contractual liability appears to be very broad indeed, covering literally all forms of liability that are not based on a contract. In a report prepared in 1967 considering the feasibility of pursuing the negotiation of a general convention on jurisdiction and choice of law in cases of non-contractual liability, The Hague Conference on Private International Law illustrated the breadth and diversity of legal claims that fall within this field by offering a partial list of the sorts of claims that it encompasses. The Hague Conference noted that, besides the well-known torts, the list of non-contractual obligations included such diverse obligations as those of fiancés and married couples towards each other, the responsibilities of natural fathers towards their offspring (e.g., paternity actions), business torts, compensation for accidents in the workplace, claims based on accidents at sea, rail, or roads, and in the air, products liability, and claims against public officials. I might add that each of these categories itself includes a number of different sorts of claims. The category of business torts, for example, includes copyright and trademark infringement, patent infringement, theft of trade secrets, interference with contract or with prospective contractual relations, unfair competition, not to mention illegal restraints of trade and other obligations of cartels and monopolies.

The Hague Conference concluded in 1967 that a general convention addressing the law applicable to all non-contractual obligations was not feasible because of the wide diversity of subjects falling within this field. It instead pursued a series of more specific conventions on particular subcategories of non-contractual claims, such as traffic accidents and products liability.[3] Since 1967, the field has grown even more diverse. Technological advances have produced entirely new categories of torts, such as the business torts of e-commerce. The torts themselves are familiar, but the e-commerce context has required novel legal solutions. The harmonization of approaches to jurisdiction in the e-commerce field has proved to be an intractable problem. Lack of agreement with respect to this issue has almost single-handedly killed the proposed Hague Convention on Jurisdiction and

[3] DUTOIT, Bernard M. *Mémorandum relatif aux actes illicites en droit international privé (Secrétaire du Bureau Permanent).* In: Actes et documents de la Onzième session, 7 au 26 octobre 1968. t.3. La Haye: Bureau Permanent de la Conférence, 1970.

Enforcement of Judgments. Although the effort continues, the most likely result will be a narrower convention covering only physical-injury torts.

In addition, there has been legislative activity in many countries producing wholly new categories of non-contractual claims. In the United States, for example, the federal and state legislatures have been active in enacting new laws imposing civil liability for discrimination on the basis of race, gender, religion, nationality, disability, and other characteristics. Statutes have also been enacted imposing civil liability for sexual harassment and other offensive workplace conduct. Other "new" torts that have emerged in the North American legal system include loss of consortium, wrongful interference with the doctor-patient relationship, pharmacy malpractice, borrower harassment, and lender liability.

The preparation of a list of non-contractual obligations recognized in the hemisphere is thus a necessary first step. Such a list should not be too difficult to produce.

II. Choice of Law

The Permanent Council has specifically instructed the Committee to consider whether we regard it as advisable to pursue the negotiation of some instrument unifying choice of law in the hemisphere with respect to non-contractual disputes. It has also specifically asked us to "identify specific areas revealing progressive development of regulation in this field through choice of law solutions", and to conduct "a comparative analysis of national norms currently in effect". This section sets forth a framework for analyzing this set of questions and an agenda for further research.

A. The Nature and Severity of the Problem

1. How Divergent Are the Substantive Laws in the Hemisphere Regarding Non-Contractual Obligations?

Choice of law issues can arise in disputes having connections to more than one state if the laws of the relevant states differ with respect to some aspect of the claim. Therefore, in quantifying the severity of the problem that would be addressed by an instrument unifying choice of law in the hemisphere for non-contractual disputes, the first question that presents itself is: To what extent do the laws of the hemisphere governing non-contractual liability differ? Answering this question would, of course, be an immense undertaking. Given the breadth of the category of non-contractual liability, it is probably safe to assume that there is a significant degree of divergence among the substantive laws of the hemisphere with respect to many forms of non-contractual liability. The fact that the hemisphere includes both common-law and civil law legal systems is probably sufficient to guarantee a significant degree of diversity. In fact, as those of us from federal systems can attest, there is a significant degree of diversity in the laws governing non-contractual liability even among common law and among civil law states. We should therefore proceed under the assumption that there is a significant degree of diversity among the substantive laws governing non-contractual obligations in the hemisphere.

2. How Divergent Are the Choice of Law Approaches Followed in the Hemisphere in Non-Contractual Disputes?

The next question is the extent to which the approaches to choice of law in non-contractual disputes differ within the hemisphere. An instrument unifying such law would, of course, be necessary only if there were disuniformity among Member States in the way they handle conflicts of substantive law. Here again, we can safely assume that a significant amount of disuniformity exists. Just within the United States, seven different approaches to choice of law are followed by the various sister states. Twenty two states follow the "most significant relationship" test of the Second Restatement; ten states follow the traditional *lex loci delicti rule*; five states follow the "better law" approach; three states follow interest analysis; three states follow the "significant contacts" approach; and three states apply the *lex fori*.[4] Thus, even if the choice of law approaches followed in the remainder of the

[4] See SYMEONIDES, Symeon C. *Choice of law in the American courts in 2000: as the century turns.* 49 AM.J.COMP.L. 1, 13 (2001).

hemisphere were perfectly uniform, an inter-American instrument unifying choice of law in international cases would be useful if the United States were a party if only because it would unify the choice of law approaches followed by courts in the United States in international cases. The reality, of course, is that there is significant diversity among the approaches followed by the other states of the hemisphere as well.

Nevertheless, a thorough survey of the choice of law approaches followed in the hemisphere cannot be avoided for several reasons. Such a study is required, first, because we are not merely seeking some assurance that there is enough disuniformity to make the expenditure of resources on this project worthwhile; we are also seeking assurance that the extent and nature of the diversity that exists in the hemisphere is not so great as to make it unlikely that an agreement will ultimately be reached on a uniform approach. A thorough description of the various approaches followed in the hemisphere is also necessary to give us some indication of the approaches that will be contending for adoption if and when the time comes to draft an instrument. Third, an understanding of the experience of the Member States with the approaches they have used will be important if and when the time comes to select among the contending approaches. Finally, the CIDIP resolution, which the Permanent Council has instructed us to treat as a guideline, specifically calls for "a comparative analysis of national norms currently in effect".

For certain Member States, the survey must focus on the law of subnational units. That is the case with respect to the United States, where choice of law is generally governed by the laws of the sister states, even in international cases.

The survey should also consider the extent to which states apply different approaches to choice of law with respect to different categories of non-contractual liability. This analysis will be of central importance in examining the question whether a general convention on choice of law for non-contractual obligations is feasible. A wide divergence in the choice of law approaches employed by states for the diverse categories of non-contractual obligations would of course make it less likely that the field can be successfully addressed in a single general convention. The analysis of the choice of law approaches employed by states in the various subcategories of non-contractual liability will also be important to determining which of those subcategories is suitable for a narrower convention, should we conclude that a general convention is infeasible or otherwise inadvisable. As the Permanent Council has suggested, the suitability of a subcategory of non-contractual obligation for treatment in a choice of law instrument will depend upon the degree of harmony that has been reached among the states of the hemisphere with respect to choice of law within that subcategory. Too wide a divergence of approaches to choice of law in a given subcategory would indicate that the field is not ripe for treatment in an inter-American instrument.

Ideally, the survey should also discuss the historical experience of the various Member States whose approaches to choice of law have evolved over the years. For example, the United States' experience regarding choice of law in tort cases may be instructive:

In the United States, choice of law in torts was once governed in virtually all states by the traditional *lex loci delicti* rule, as set forth in the First Restatement of Conflict of Laws. The First Restatement approach was severely criticized in the early part of the XXth Century as being excessively formalistic and producing arbitrary and unjust results. The famous 1963 decision of the New York Court of Appeals in Babcock v. Jackson[5] initiated a choice-of-law revolution. State after state abandoned the traditional rule and adopted one or another version of interest analysis. The central idea behind interest analysis is that the choice-of-law issue involves, as a threshold matter, a determination of which of the various states whose laws are contending for application have an interest in having their law applied in a given case. For example, if a state's law places limits on recovery, courts engaging in interest analysis typically conclude that the state has an interest in applying such law only if the defendant is a domiciliary of that state, because the purpose of a law limiting liability is to protect defendants and presumably the state only has an interest in protecting defendants

[5] 191 N.E. 2d. 179 (N.Y. 1963).

who are domiciliaries. If only one state has an interest in applying its law, then we have a false conflict, and the law of the only interested state should be applied. If more than one state has an interest in applying its law, then we have a true conflict and some mechanism is required to resolve the conflict. A number of different approaches have been proposed by scholars and adopted by states to resolve true conflicts. Under one approach, the forum would always apply its own law. Under another approach, the court would apply the law of the state whose policy would be impaired to a greater extent if it were not applied to the case. Under still another approach, the court would apply the law that it regarded as the better law on the merits.

In the 1970's, the American Law Institute drafted the Second Restatement of Conflict of Laws, which sets forth an eclectic approach, according to which the law that applies is the law of the state that has the "most significant relation" to the issue on which the laws diverge, an approach that resembles the British "proper law" approach. The Second Restatement sets forth a non-exhaustive list of factors that should be taken into account by the court in determining which state has the most significant relationship. Courts are thus given wide discretion to apply the law that they regard as most appropriate in any given case. The Second Restatement approach has been popular among courts, which is not surprising, as courts can be expected to be attracted to an approach that leaves them with virtually unfettered discretion. But the Second Restatement has not achieved state-wide acceptance. Indeed, fewer than half of the states (22) have adopted the Second Restatement approach. A number of others apply one or another version of interest analysis, and ten states continue to adhere to the traditional *lex loci delicti* rule.

The modern approaches have been subjected to severe scholarly criticism because they provide no certainty or predictability in legal relations. Professor Michael Gottesman has succinctly described the disadvantages of this approach:

> The system is wasteful. In the states that have adopted one of the modern choice of law approaches, the parties may litigate at length over the application of indeterminate criteria such as the "interests" that are to control under interest analysis or the combination of interests and contacts that are to be consulted under the second Restatement ... This is both expensive and time-consuming. What is more, after the parties have expended resources litigating the issue before the trial court, and that court has ruled that the law of State *A* controls, the ensuing trial may prove wholly useless if the appellate court later determines that the choice of law was error and State *B*'s law controls.[6]

Critics of the modern approaches prefer a more determinate rule that resembles *lex loci delicti*. On the other hand, the approaches to choice of law that produce determinate results are often criticized as producing arbitrary or unjust results. Many scholars believe that certainty and predictability in the field of choice of law can only be gained at the expense of justice and fairness in individual cases. The debate between proponents of choice of law rules that produce determinacy and defenders of choice of law approaches that produce fair and just results has been a perennial one in the United States. The debate would undoubtedly reproduce itself in the context of the negotiation of an inter-American instrument seeking to unify choice of law.

The choice of law experience in the United States illustrates not only the severity of the problem in microcosm, but also the difficulty of achieving a solution. The current situation is widely regarded as chaotic. William Prosser, the author of the famous Treatise on Tort Law, has written:

> The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.[7]

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6 GOTTESMAN, Michael. *Draining the Dismal Swam: The Case for Federal Choice of Law Statutes,* 80 GEO. L.J. 1, 11 (1991).
7 PROSSER, William. *Interstate Publication,* 51 MICH L. REV. 959, 971 (1953).

Prosser wrote those words before the choice of law revolution. Since that time, the situation has gotten much, much worse. Scholars have called for Congress to step in and enact a federal choice of law statute that would apply uniformly throughout the state, as it clearly has the power to do.[8] Others have called for the elaboration of a model choice of law statute, to be adopted by the state legislatures.[9] Others have argued that, at the very least, a Third Restatement should be drafted.[10] None of this has come to pass.

The reasons for this failure may be relevant to the question whether agreement can be reached at the Inter-American level. It certainly bears on whether sufficient support for a single approach can be mustered within the United States to enable the United States to adhere to such an instrument. There are a number of possible reasons for the persistence of the clearly unsatisfactory state of choice of law in the United States. Congress' failure to address the matter is no doubt caused by the great number of important matters competing for a place on its agenda. Choice of law is a relatively esoteric problem that the vast majority of voters have absolutely no cognizance of. Additionally, the failure of Congress to act may reflect the view that this field is properly left to the states, which have traditionally dealt with the subject. The explanation for the failure of the Uniform Law Commission to pursue a uniform [i.e., model] law in the area of choice of law is less obvious. It may reflect political impasse, with the trial lawyers' association fighting for a rule that helps plaintiffs, and corporations and other likely defendants fighting for a contrary approach. It may reflect the belief that the choice of law problem is intractable, and that it is accordingly more promising to tackle the problem of disuniformity by attempting to harmonize substantive laws in various fields. In any event, the reasons for the United States' failure thus far to address the problem of choice of law in torts despite the fact that it is widely regarded as a dismal swamp would appear to be relevant to the question whether the attempt to attain a general or specific inter-American instrument on the topic would be likely to succeed. The survey should thus also address the reasons for this failure.

In summary, an in-depth survey of the approaches that have been followed over the years by the various states of the hemisphere (and subnational units, where relevant), is necessary to permit us to assess the severity of the problem that would be addressed by an Inter-American instrument unifying choice of law for non-contractual disputes in the hemisphere. Such a survey would also help us determine whether agreement is likely to be reached on a uniform solution, and to identify the most promising solution.

The sort of survey that I propose here would be, without doubt, an enormous undertaking. Especially burdensome would be the attempt to describe the approaches used by the states of the hemisphere (and subnational units, where relevant) with respect to the numerous categories of non-contractual obligations. The rapporteurs would have to count on assistance from the Secretariat of Legal Affairs and perhaps others. If a survey of the hemispheric approaches to choice of law with respect to all of the categories of non-contractual obligations is regarded as infeasible in light of resource constraints, the survey could perhaps be limited to those categories that have given rise to the greatest number of international disputes in which choice of law has been at issue. I should note, however, that, if such a broad study were infeasible, this very fact would itself be a reason for concluding that a general instrument regulating choice of law for all such categories is imprudent. It would be foolhardy to propose a general instrument regulating choice of law in all such fields if we lacked the resources or wherewithal to study how the numerous types of obligations would be affected by such an instrument. Instruments whose adoption would require a leap of faith tend not to be adopted and, if adopted, not ratified.

One the other hand, we would be justified in limiting our survey to selected categories of non-contractual obligations if we concluded after a preliminary analysis, such as that undertaken by The Hague Conference in 1968, that a general convention addressing choice of law for all non-contractual disputes would be infeasible. The enormous cost of the

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8 GOTTESMAN, Michael. *Op.cit*; BAXTER, William F. *Choice of law and the federal system.* 16 STAN. L. REV (1963).

9 E.g., KRAMER, Larry. *On the need for a uniform choice of law code*. 89 MICH.L.REV 2134 (1991).

10 E.g., SYMEONIDES, Symeon C. *The need for a third conflicts restatement (and a proposal for torts conflicts).* 75 IND. L. J. 437 (2000).

preparatory work that would be necessary to justify embarking on the negotiation of a general convention may itself be a sufficient reason to conclude that the negotiation of such a convention is inadvisable.

3. The Nature and Severity of the Harm Sought to Be Addressed

Finally, assessing the potential benefit of an Inter-American Convention on Choice of Law for non-contractual claims requires not just a determination of the degree of disuniformity in the existing approaches to this issue in the hemisphere, but also a judgment about the severity of the problem caused by such disuniformity. This requires, first, identification of the nature of the harms caused by disuniformity in choice of law approaches, and a judgment about how severe that harm is in the context of claims for non-contractual liability.

The costs of disuniformity in choice of law was addressed above. Such disuniformity is thought to be harmful because it produces uncertainty in legal relations. If different states apply different choice of law rules to determine the legal consequences of a given act having international connections, the persons involved cannot know in advance the extent to which such acts will give rise to liability. The law that applies cannot be known without knowing what the forum is. If more than one forum has jurisdiction, the plaintiff will determine the applicable law by choosing the forum. This produces the phenomenon of forum-shopping, which many though not all commentators regard as undesirable. For the persons involved, such a situation is thought to produce legal uncertainty. Moreover, since the plaintiff can be expected to choose the forum that will apply the most favorable law, such diversity tends to produce a trend towards more expansive liability. This trend tends to nullify the public policies of the states that favor less expansive liability.

Once the harms produced by disuniformity in choice of law are identified, the question becomes whether these problems are of concern in the field of non-contractual liability. The need for legal certainty, for example, is thought to be most important for contractual matters, as people rely on the applicable law in structuring their transactions. Because people do not generally plan to have accidents, the need for legal certainty is arguably less pressing in the field of non-contractual liability addressing liability for accidents. On the other hand, people do buy insurance to protect themselves against the risk of non-contractual liability. Insurance companies rely on the applicable law in setting their rates. The uncertainty produced by divergent choice of law rules may produce higher insurance premiums if insurance companies structure their premiums on the assumption that disputes will be governed by the law most favorable to the claimant.

An in-depth analysis of the reasons disuniformity in choice of law is thought to be problematic, and the extent to which such harms are matters of concern in the field of non-contractual liability, is necessary not just to assess the extent of the problem that would be addressed by an inter-American instrument, but also to provide a yardstick against which to measure any proposed solution. If the problem sought to be addressed by an instrument unifying hemispheric approaches to choice of law is the uncertainty and unpredictability of legal relations produced by disuniformity, then the instrument we propose (if we decide to propose one) should adopt an approach to choice of law that offers certainty and predictability. As I mentioned above, the modern approaches to choice of law followed in the United States have been severely criticized by scholars because they dispense entirely with certainty and predictability. They are so indeterminate that it is impossible to know which law governs one's conduct until well after one has acted, when the judge decides *post hoc* which legal rule one was supposed to have complied with. If the point of law is to guide human conduct, then indeterminate choice of law rules seem fundamentally incompatible with the rule of law.

In any event, if the contemplated instrument seeks to correct the problem of disuniformity because of the lack of certainty and predictability caused by such disuniformity, then the uniform adoption of an indeterminate choice of law rule would do little or nothing to correct the problem. Indeed, the uniform adoption of an indeterminate approach to choice of law in the hemisphere could well make matters worse.

On the other hand, as already noted, determinate approaches to choice of law are often criticized because they sometimes produce arbitrary and unjust results. I suppose it is possible that an inter-American instrument might be desired not for the purpose of achieving uniformity as such, but rather for the purpose of finally getting rid of the traditional *lex loci delicti* approach to choice of law that continues to prevail in some states, and thus to eliminate the arbitrary and unjust results sometimes produced by that approach. It seems quite odd, however, to promote an international instrument unifying the law of choice of law in the hemisphere for the purpose of *decreasing* the certainty and predictability in legal relations that is so conducive to international commerce. I do not mean to suggest that fairness and justice should be entirely sacrificed for the sake of certainty and predictability. The challenge is to find a middle ground – to find an approach that offers a significant degree of certainty and predictability while providing tolerably fair and just results overall. This has been the aim of United States choice of law scholars for the past decades. After the pendulum swung from one extreme to the other, scholars (and some courts) have been seeking a middle ground, but without discernable success. Most likely, a choice will ultimately have to be made about whether the primary concern in choice of law should be promoting certainty or predictability in legal relations or enabling courts to achieve fairness and justice in individual cases.[11] In any event, the question for the Committee is whether a satisfactory middle ground is more likely to be found at the inter-American level in a general convention or in a series of more specific conventions. My tentative view is that the middle ground will be achieved through somewhat different approaches in the disparate categories of non-contractual obligations and that, accordingly, narrower instruments will be more likely to achieve that goal.

B. Past and Ongoing Efforts of Other Organizations

The next task is to consider the past and ongoing efforts of global and regional organizations that have undertaken attempts to unify choice of law for non-contractual disputes. If past efforts of such organizations have failed, the reasons for their failure may prove instructive. If past efforts of global organizations have succeeded in producing instruments in this field, but states of the hemisphere have not become parties, it is necessary to determine the reasons for such lack of ratification. It may be the case that the solution to the problem is simply to urge the ratification of existing global instruments. If the states of the hemisphere have failed to ratify because they regard the instruments as unsatisfactory, it is important to know why they have been dissatisfied. If past efforts of regional organizations have succeeded, the resulting instruments might provide a useful model for an inter-American instrument. Finally, if the efforts of global organizations are ongoing, it may be prudent to await the results of such efforts before proceeding with an effort to negotiate an inter-American instrument. Many of the hemisphere's states are Members of such organizations and participate actively in their work. Even those who do not participate stand to benefit from the work of the global organizations, as the instruments they produce are generally open for signature by all states. Similarly, if other regional organizations are undertaking efforts on the same subject, the instruments they adopt might serve as useful models for an inter-American instrument; and their failure to reach agreement on any instrument might bode ill for the prospects of success in the Americas.

As already noted, The Hague Conference has studied the desirability of pursuing the negotiation of a convention on choice of law in the area of non-contractual liability. It concluded in 1968 that, given the broad diversity of subject-matter and legal claims encompassed within the field of non-contractual liability, a single general convention addressing choice of law in this field was infeasible. The Conference decided instead to pursue narrower conventions on choice of law for specific topics. In 1971, The Hague Conference adopted a Convention on the Law Applicable to Traffic Accidents, and in 1973, it adopted a Convention on the Law Applicable to Products Liability. Both Conventions are in force. Nineteen states are parties to the Convention on Traffic Accidents, and thirteen are

[11] I should emphasize that the sort of justice to which I am referring here is not substantive justice. In other words, I am not suggesting that judges should be free to apply whatever substantive rules they believe are most fair and just. Rather, I am referring to what is known as "conflicts justice," that is, fairness with respect to which of various contending laws should govern a particular dispute. See generally JUENGER, Friedrich K. CHOICE OF LAW AND MULTISTATE JUSTICE (1993).

parties to the Convention on Products Liability. However, none of the states of this hemisphere is a party to either of the two conventions. It is important to determine whether the reasons that led The Hague Conference to conclude that a general convention was infeasible at the global level are convincing and applicable as well at the inter-American level. It is also important to determine why the two specific conventions have not been ratified by any states of this hemisphere.

At the regional level, the European Union has sporadically attempted to codify choice of law with respect to non-contractual obligations. In the early 1970's, the European Community produced a Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations. Articles 10-14 set forth rules on choice of law for non-contractual obligations, taking an approach that resembles that of the Second Restatement in the United States. The provisions of the draft convention relating to contractual obligations were adapted into the Rome Convention on the Law Applicable to Contractual Obligations of June 19, 1980. Work on a convention in relation to the law applicable to non-contractual obligations lay dormant until the Groupe Européen de Droit International Privé, an association of prominent scholars, completed a proposal for a Convention on the Law Applicable to Non-Contractual Obligations (which formed the basis for the Green Paper that became known as "Rome II"). The proposal was sent to the Secretariat General of the European Council, which set up a working group on the matter. After much delay, primarily attributable to controversies having to do with e-commerce, the European Council in May 2002 issued a second Green Paper seeking comments on a proposed Council Regulation on the Law Applicable to Non-Contractual Obligations. This new Rome II proposal leaves non-contractual choice of law in disputes relating to e-commerce to be governed by the rules of the EU's E-Commerce Directive. The comments on this proposal are due in September of this year. The European experience in attempting to unify choice of law for non-contractual obligations should be studied closely, as should the comments received on the Rome II proposal.

Subregionally, MERCOSUR has attempted to address the question of choice of law for non-contractual obligations, as discussed in the report by Dr. Villalta Vizcarra. These and other efforts should be closely scrutinized as well for what they might tell us about the prospect of reaching agreement on this matter at the inter-American level.

C. Likelihood of a Successful Negotiation at the Inter-American Level

If the efforts of other organizations have failed or are likely to fail to produce agreement on a useful instrument, the next question is: How likely is it that a successful product will be negotiated at the inter-American level? Some aspects of this question have already been mentioned. As far as a general agreement on the law applicable to non-contractual liability is concerned, are the reasons that led The Hague Conference to conclude that such an agreement was infeasible at the global level applicable as well to the regional level? Europe's experience with Rome II may provide some insight into that question. If the Europeans fail to produce agreement, despite their greater degree of economic integration, the chances that agreement will be reached in the Americas may be slim.

The question here is whether there are grounds for being optimistic that we in the Americas will succeed where others before us have failed. There may be such grounds if our legal systems were more harmonious than those of others who have tried, or if our states had a stronger desire to achieve a solution to the problem and a greater willingness to compromise to that end. Although greater research is necessary, my belief is that our legal systems with respect to choice of law are at least as diverse as those of Europe, and perhaps as diverse as the states who typically participate in the Hague Conference. Moreover, it seems likely to me that our hemisphere includes numerous powerful interest groups that could effectively thwart compromise if they wished to do so. For these reasons, I believe that agreement would be very hard to reach on a convention purporting to regulate choice of law for all non-contractual disputes.

On the other hand, there might be greater reason for optimism that agreement might be reached on an instrument unifying choice of law for a specific category of non-contractual obligation. Within a narrow category, the choice of law approaches within the hemisphere might be more harmonious, or a solution might be available that would appeal to a broader range of interested persons.

If we conclude that a choice of law agreement might be feasible with respect to a particular category of non-contractual obligation, another question must be considered: would the problem be more easily and more satisfactorily corrected through an instrument harmonizing the substantive law on the subject within the hemisphere. As noted, a choice of law problem arises only if the substantive laws on the topic differ. Disuniformity in choice of law approaches is undesirable for the reasons already described. One way to deal with such disuniformity would be to unify choice of law approaches. Another way to deal with the problem would be to harmonize the substantive laws, thus obviating the choice of law issue. Harmonizing the substantive law relating to all categories of non-contractual obligations would of course be inconceivable. Harmonizing the substantive law in one particular category of non-contractual obligations may be possible. Harmonization of substantive law may be an even more attractive solution to the problem because it produces even more certainty and predictability in cross-border legal relations. In the United States, there has been a noticeable trend towards such harmonization, either imposed by the federal government or negotiated among the states. There has been a similar trend in the Americas. Indeed, in CIDIP-VI, the only two successful projects involved the harmonization of substantive law. Thus, before recommending the negotiation of an inter-American conflict of laws instrument on a specific category of non-contractual obligations, we should consider whether it would be better to solve the problem by harmonizing the substantive law.

III. Jurisdiction

We have also been asked to consider the desirability of embarking on the negotiation of an inter-American instrument regulating jurisdiction in non-contractual disputes. My discussion of this issue will be relatively brief.

The purpose of an instrument regulating jurisdiction will depend on whether or not it is a part of an instrument that also regulates choice of law. If it is not part of an instrument regulating choice of law, the principal significance of the jurisdictional instrument would be to regulate choice of law indirectly. As we saw, disuniformity of choice of law approaches is a problem when plaintiffs have the choice of more than one forum. In such circumstances, plaintiffs can engage in forum shopping, choosing the forum that they believe will apply the most favorable law. An instrument that limits the forums that have jurisdiction over a particular case will indirectly limit choice of law by limiting the places in which the plaintiff can choose to bring his case. Usually, choice of law will be the most important consideration for plaintiffs in choosing a forum. Thus, in the absence of an instrument regulating choice of law, the principal importance for private parties of an instrument regulating jurisdiction will be its indirect regulation of choice of law.

On the other hand, if the jurisdictional instrument includes provisions regulating choice of law, and the choice of law provisions are relatively determinate, then choice of forum will not play nearly as great a role in determining the applicable law. The point of an instrument establishing a determinate choice of law rule is to provide certainty and predictability as to the applicable law by setting forth a choice of law rule that would be applied by the courts of all states that are parties to the instrument. The result would be that the applicable law would not change depending on the plaintiff's choice of forum. The same law would be applied regardless of the state in which the suit is brought. In such circumstances, the regulation of jurisdiction plays a far less significant role. The choice of forum will still determine choice of law with respect to some issues. For example, even when the law of another state is applicable on substantive issues, the forum will apply its own procedural rules. With one major exception, however, procedural rules will not typically be very important to the litigants. Thus, jurisdictional provisions attached to a choice of law instrument which provides a determinate choice of law rule will serve primarily to guarantee the defendant a forum that is relatively convenient.

The one exception involves certain procedural rules of the United States. As is well-known, in the United States, civil suits are usually decided by a jury. Jury trials are often very attractive to plaintiffs and very frightening to defendants. Whether the trial will be before a jury or a judge is a procedural issue as to which the forum will apply its own law regardless of whether foreign law applies to the substance. Thus, plaintiffs might want to choose a court in the Untied States, even if a foreign law would be applicable to the substance of the claim, just to get the benefit of a jury trial. Jurisdictional provisions of an instrument that also regulates choice of law may thus have great significance to the outcome of a case that involves plaintiffs who wish to sue in the United States.

If the jurisdictional provisions are attached to an instrument that regulates choice of law by establishing a highly indeterminate choice of law rule, its significance would be about the same as if the instrument did not address choice of law at all. If the applicable choice of law rule is highly indeterminate, it is impossible to tell in advance how the judge will rule. As scholars have noted, however, there is a distinct tendency for judges applying such rules to apply the law of the forum. These indeterminate approaches thus have a tendency to approximate a *lex fori* approach, under which a state's courts always apply the law of that state. (Thus, while the governing law will be known as soon as the plaintiff selects the forum, it still produces uncertainty and unpredictability before the plaintiff has chosen where to sue.) Under such circumstances, the plaintiff's choice of forum will indirectly determine the choice of law, just as it would if there were no instrument regulating choice of law.

What does this analysis tell us about the likelihood of successfully negotiating an instrument regulating jurisdiction in non-contractual disputes? It suggests that agreement on jurisdictional principles will be relatively easy if they are part of an instrument that also regulates choice of law by establishing a determinate choice of law rule (except perhaps for cases in which a jury trial is a possibility). On the other hand, if agreement on a choice of law rule proves unattainable, agreement on jurisdictional provisions is likely to be difficult as well because, under such circumstances, the jurisdictional provisions would serve as an indirect regulation of choice of law (The same would be true if the instrument included choice of law provisions adopting an indeterminate rule.)

This prediction is borne out by the ongoing attempt by the Hague Conference to negotiate a convention regulating jurisdiction and enforcement of judgments (but not choice of law). The negotiations reveal that the jurisdictional rules are being treated as de facto regulations of choice of law, and have been very divisive precisely for that reason.[12] As noted, the Hague negotiations, though technically ongoing, appear to be at an impasse. Among the most intractable disagreements have involved the provisions relating to jurisdiction over torts. These provisions have raised significant concerns insofar as they would apply to certain torts, such as those relating to e-commerce. The Hague Conference's experience attempting to negotiate a global treaty on jurisdiction and enforcement of judgments over the past decade should be studied closely for the lessons it might offer. Specifically, we should try to determine the extent to which the impasse is attributable to problems relating to non-contractual obligations, and the extent to which the impasse is likely to reproduce itself in this hemisphere. Although further study is required, my research so far has suggested that the impasse has been related to the torts provisions and that, while the principal antagonists in this regard have been the United States and Europe, the Latin American states that have participated in the negotiations have tended to agree with the Europeans. If so, the prospects of an impasse at the inter-American level appears high.

In short, the answer to the question put to us concerning the desirability of embarking on the negotiation of an instrument regulating jurisdiction in non-contractual cases is directly related to the answer we give to the question concerning the desirability of an instrument concerning choice of law in such cases. If success is unlikely to be achieved in the negotiation of an instrument on choice of law establishing a determinate rule, the prospects of successfully negotiating an instrument on jurisdiction would appear to be bleak. On the

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[12] *See*, e.g. Hague Conference on Private International Law, Preliminary Document no. 17, of February 2002, *The impact of the internet on the judgements project: thoughts for the future* (submitted by Avil D. Haines for the Permanent Bureau).

other hand, if we conclude that the negotiation of such a choice of law instrument is likely to be successful, the prospects of success in the negotiation of a jurisdictional instrument would likely be high.

IV. Other Questions

If we concluded that the negotiation of some sort of instrument is worth pursuing, other questions would have to be confronted. First, and most obviously, we would have to consider the content of such an agreement. What sort of choice of law and jurisdictional rules should it establish? As noted, in the choice of law area, a debate has raged between proponents of determinate rules that produce certainty and predictability and proponents of flexible rules that permit judges to promote their notions of justice and fairness in individual cases. The proposed instrument will ultimately have to take some position on the debate. Furthermore, as noted, an instrument may be worth pursuing only if it contains relatively determinate rules. In any event, we will come closer to an answer about the content of the relevant instrument or instruments as we seek to answer the question whether an instrument, or several narrower instruments, are worth pursuing in the first place.

Additionally, there is the question whether the instrument should take the form of a convention or, instead, a model law. In the past, private international law instruments have tended to take the form of conventions, whereas attempts to harmonize substantive law have taken the form of model laws. This, however, is not a necessary correlation. I see no reason in principle why a private international law instrument cannot take the form of a model law. Whether one or the other form is preferable will turn to a significant extent on which form is more likely to succeed. Model laws have been popular because they do not require the elaborate ratification processes that often apply to treaties. In the case of the United States, model laws may be preferable as well because of federalism concerns. As noted, choice of law has traditionally been governed by the laws of the sister states. While there is no doubt that the federal government can impose on the states a single choice of law rule to be followed in international cases, there will be considerable reluctance to do so, either by way of treaty or statute. A model law may thus be preferable because it could in theory be adopted either by the federal government or by the individual states.

2. Preparation of a draft Inter-American convention against racism and all forms of discrimination and intolerance

	Resolution
CJI/RES.39 (LX-O/02):	Elaboration of a draft Inter-American convention against racism and all forms of discrimination and intolerance
Annex: CJI/doc.80/02 rev.3 corr.1	Elaboration of a draft Inter-American convention against racism and all forms of discrimination and intolerance: report of the Inter-American Juridical Committee (rapporteur: Dr. Felipe H. Paolillo)

During the LX regular session of the Inter-American Juridical Committee (Rio de Janeiro, February-March 2002), Dr. Felipe Paolillo, rapporteur for the topic, presented document CJI/doc.80/02, *Proposed ideas and structure for the document related to the need for a convention on racism and other forms of discrimination and intolerance requested to the IAJC by the General Assembly*. He observed that the document was not about a substantive issue; instead, it concerned procedure, trying to work with a number of hypothetical proposals, since the General Assembly's mandate was not altogether clear. In that document the rapporteur mentioned a number of precedents at both the global and inter-American levels. He also analyzed the member States' responses to the questionnaire that the Department of International Law prepared on the subject and the results of the World Conference against Racism, Racial Discrimination, Xenophobia, and All Forms of Discrimination, held in Durban, South Africa, in September 2001. In his document the rapporteur concluded that the first order of business was to define more clearly the scope that the eventual convention would have; in other words, what causes of discrimination did the General Assembly believe needed regulation. In their responses, the member States underscored some forms of racism that needed to be taken into account, such as the racism spread by way of the Internet. The member States recommended that new vulnerable groups needed to be addressed, such as migrant workers, the poor, homosexuals, the elderly, women, the disabled, and others. However, the rapporteur went on to say that these groups did not fall into the category of racial discrimination. One group that the rapporteur attached special importance to, however, were indigenous peoples, and regarded it as an area in need of much more in-depth exploration.

Based on everything said, his conclusion was that a general convention on racism would be redundant, since there were already many instruments that dealt with specific aspects of the subject matter. He added, however, that these instruments had relatively few ratifications. The document in question suggested some new tendencies, especially new forms of racism, racism spread via the internet. He mentioned that another possible direction that a convention on this subject could take would be to establish a mechanism to monitor for observance.

Dr. Sergio González Gálvez said that the practice of adopting instruments at the regional level when universal instruments had already been adopted was not one that should be encouraged. Having said this, he went on to raise indigenous peoples and the disabled as possible subjects of a convention on discrimination. He said that before

issuing any opinion advising against the adoption of a general convention, certain aspects of discrimination not covered by the existing legal instruments should be explored and a study made to determine whether the existing instruments had a significant number of ratifications. If an inter-American convention was deemed inadvisable, he suggested a regional declaration of interpretation of the *Universal Declaration of Human Rights* in this regard. As an alternative to amendment of the Universal Declaration or adoption of a general inter-American convention, he suggested that a number of conventions might be drafted in several specific areas.

Dr. João Grandino Rodas said that from time to time it was important to have a convention that pulled together all the recent legal developments on a given subject. He observed that the political reason for having such an instrument was frequently that the other similar legal instruments may have been adopted to address different needs or in different settings. He recommended that the Inter-American Juridical Committee should include the more general definitions already included in other conventions, even when putting together a draft on a more specific aspect of the problem.

Dr. Orlando Rebagliati suggested the adoption of a general declaration as an alterative to a convention on the subject.

The Assistant Secretary for Legal Affairs advised that the language of the Juridical Committee's mandate had been worded to take into account the position of those countries that saw no real reason to undertake an exercise that would result in another convention. He pointed out that the Permanent Council was looking to the Juridical Committee's pronouncement for a clearer idea on how best to proceed from here.

Based on these observations, the Inter-American Juridical Committee adopted document CJI/doc.80/02 rev.3 corr. 1, *Elaboration of a draft inter-American convention against racism and all forms of discrimination and intolerance: report of the Inter-American Juridical Committee*, attached to resolution CJI/RES.39 (LX-O/02), *Elaboration of a draft inter-american convention against racism and all forms of discrimination and intolerance*. In that resolution the Inter-American Juridical Committee expressed its concern over the escalation in the incidence of acts of racism and intolerance worldwide and asserted the need to make common cause against these manifestations of intolerance by increasing cooperation among the States to wipe out such practices. It also listed conclusions, which appear at the end of document CJI/doc.80/02 rev.3 corr.1. The document was forwarded to the Chairman of the Permanent Council.

The following is the text of the resolution and of the document herein mentioned:

CJI/RES.39 (LX-O/02)

ELABORATION OF A DRAFT
INTER-AMERICAN CONVENTION AGAINST RACISM
AND ALL FORMS OF DISCRIMINATION AND INTOLERANCE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING resolution AG/RES.1774 (XXXI-O/01), *Preparation of a draft inter-American convention against racism and all forms of discrimination and intolerance*, by

which the General Assembly requested that the Committee prepare an analytical document for the purpose of contributing and furthering the work of the Permanent Council on the need to draw up an inter-American convention to prevent, sanction and eradicate racism and all forms of discrimination and intolerance;

CONSIDERING also that in order to prepare this analytical document, the General Assembly asked that account be taken of the provisions set forth in the international juridical instruments on the matter, the responses of the member States to the questionnaire on *Drawing up an inter-American draft convention against racism and all forms of discrimination and intolerance* (CP/CAJP-1687/00 rev.1), the declarations and recommendations produced at the World Conference against Racism, Racial Discrimination, Xenophobia and Related Forms of Intolerance held in South Africa in 2001, as well as the Regional Conference of the Americas preparatory to this World Conference held in Chile in 2000, and any other contributions to be made by other organs of the inter-American system and civil society;

HAVING CONSIDERED the theme at its 60th regular sessions held in Rio de Janeiro, Brazil, from 25 February to 8 March 2002, on the basis of document CJI/doc.80/02 rev.3 corr.1 entitled *Elaboration of a draft inter-American convention against racism and all forms of discrimination and intolerance: report of the Inter-American Juridical Committee*, prepared by Dr. Felipe Paolillo, member designated by the Juridical Committee as rapporteur of the theme;

HAVING IN MIND working documents *References to discrimination and racism in the constitutions of the member States of the OAS* (SG/SLA DDI/doc.9/01), and *Elaboration of a draft inter-American convention against racism and all forms of discrimination and intolerance: a study of the theme in the inter-American system and in other international systems* (SG/SLA DDI/doc.6/01), prepared by the Department of International Law of the Secretariat for Legal Affairs,

RESOLVES:

1. To express its concern with regard to the increase in the number of acts of racism and intolerance throughout the world and to confirm the need to make a common cause in opposition to such manifestations by intensifying cooperation among the States in order to eradicate these practices.

2. To formulate the conclusions that appear at the end of document CJI/doc.80/02 rev.3 corr.1, *Elaboration of a draft inter-American convention against racism and all forms of discrimination and intolerance: report of the Inter-American Juridical Committee*, and convey that document, attached to this resolution, to the Chairman of the Permanent Council.

This resolution was unanimously adopted at the session held on 6 March 2002, in the presence of the following members: Drs. Felipe Paolillo, Brynmor Thornton Pollard, Ana Elizabeth Villalta Vizcarra, Carlos Manuel Vázquez, Kenneth O. Rattray, João Grandino Rodas, Orlando R. Rebagliati and Eduardo Vío Grossi.

CJI/doc.80/02 rev. 3 corr.1

ELABORATION OF A DRAFT INTER-AMERICAN CONVENTION AGAINST RACISM AND ALL FORMS OF DISCRIMINATION AND INTOLERANCE

Report of the Inter-American Juridical Committee

(rapporteur: Dr. Felipe H. Paolillo)

I. MANDATE OF THE INTER-AMERICAN JURIDICAL COMMITTEE

In its resolution AG/RES.1774 (XXXI-O/01) entitled *Preparation of a draft inter-American convention against racism and all forms of discrimination and intolerance*, the General Assembly requested the Inter-American Juridical Committee "to draft an analysis document in order to foster and further the works of the Permanent Council" and asked it to bear in mind, when carrying out this task, the international juridical instruments on this

matter, as well as the replies from the member States to the questionnaire on this issue prepared by the Department of International Law (DDI) of the Secretariat for Legal Affairs (SLA) at the request of the Committee for Juridical and Political Affairs (CAJP), in addition to the outcome of the World Conference Against Racism, Racial Discrimination, Xenophoby and pertinent Forms of Intolerance (Durban, South Africa, 2001) and the Regional Conference of the Americas (Santiago de Chile, 2000).

The resolution does not provide any other information or guidelines allowing the IAJC to identify the contents of the "analysis document" requested with greater accuracy, but it does stipulate expressly that its purpose should be to "foster and further" the tasks assigned to the Permanent Council. These "tasks" are those assigned to this entity by the General Assembly in this same resolution, meaning an analysis of the need for an inter-American convention to prevent, sanction and eradicate racism and all forms of discrimination and intolerance (§ 1).

Consequently, the rapporteur understands that the Juridical Committee should not at this stage begin to analyse substantial issues related to racism and racial discrimination, as what should be done is to examine the issue of the need to complete the inter-American convention on racism and all forms of discrimination and intolerance, taking into account the progress that has been achieved in this matter not only at the inter-American level but also at on a broader scale at the international level, and that the General Assembly should be advised of its opinion on this matter.

II. PURPOSE OF THE DRAFT CONVENTION

In order to issue this opinion, it is necessary to decide in advance and as accurately as possible the scope of the proposed draft convention, meaning the aspects of racism and racial discrimination that the General Assembly felt could be made subject to regulations and would justify the drafting of a new convention. This decision should logically be taken on the basis of the wording of resolution AG/RES.1774 (XXXI-O/01), although this is not completely clear with regard to the field to be covered by the proposed convention.

In fact, some of its provisions, if interpreted quite literally, would lead to the conclusion that a new inter-American convention is under consideration for the elimination of *all* types of discrimination, including racial discrimination. For instance, resolutive paragraph 1 of the resolution requests the Permanent Council to consider the need to sign an inter-American convention in order to prevent, sanction and eradicate "racism and *all* forms of discrimination and intolerance" (our italics). An identical phrase was used in resolution AG/RES.1712 (XXX-O/00). A strict interpretation of this phrase would lead to the conclusion that the future international instrument should have the purpose of eliminating discrimination based on all types of causes (race, colour, gender, language, religion, political opinions or other views, national or social origin, economic status, place of birth, age, disabilities, etc.), with racial discrimination being only one of its manifestations. In support of this interpretation, the eighth preambular paragraph in the resolution 1774 could be invoked, which speaks of "expanding the international juridical framework… in order to eliminate *all* forms of discrimination that still exist in the hemisphere" as well as paragraph ten in the preamble, stating that the Organization should issue a clear political indication in favour of the "elimination of *all* forms of discrimination".

This seems to be the interpretation of some Governments that replied to the questionnaire drawn-up by the DDI. Although the reply to question 1 on the need for a new convention alludes solely to racial discrimination, some of the replies to the second question (what aspect should be included in the draft convention) mention the establishment of mechanisms for the inclusion of "racial, religious or sexual minorities" (Brazil); the upsurge in neo-Nazism and anti-Semitism (Brazil); traffic in women and children (Brazil); aspects related to discrimination against the disabled (Panama).

On the other hand, even when §1 of the resolution alludes to all forms of discrimination and intolerance, the eleventh paragraph in its preamble, when invoking the declaration of the Heads of State at the III Summit of the Americas (Canada, April 2001), referred to "all forms of discrimination, including racism, discrimination and other *connected*

forms of intolerance". Furthermore, other precedents mentioned in both the preamble as well as the provisions of the resolution are tools that refer specifically to racism, racial discrimination and xenophobia, where other forms of discrimination appear only as concurrent or aggravating factors of discrimination based on race.

Consequently, the Juridical Committee concludes that the General Assembly requested indications on the need to adopt a convention at the inter-American level for the prevention, punishment and eradication of racism and connected forms of discrimination and intolerance. Added to the reasons listed above to reach this conclusion are others of a practical nature, such as conducting the negotiations and completion of an inter-American convention to combat and sanction all forms of discrimination practised in the hemisphere would constitute far too ambitious a task that would demand broad-ranging political and diplomatic efforts.

III. PRECEDENTS TO BE BORNE IN MIND

The General Assembly requested the Juridical Committee to take a series of precedents into account, which are examined in the following paragraph:

1. International instruments

The DDI drafted a document containing ample information on the main instruments that are being adopted on this issue, not only within the inter-American system but also other international systems. These instruments will not, however, be examined here. The Inter-American Juridical Committee will refer to this document and merely offer some general remarks that it considers are relevant for this Report at the universal level.

a) *At the universal level*

The adoption of the *Universal Declaration of Human Rights* in 1948 was the starting-point for a process of preparing rules and regulations within the field of protection of broad-ranging human rights, with extraordinary repercussions on the lives of large sectors of humankind. From that year onwards, the States have adopted countless instruments containing political commitments on this matter and the promotion of human rights, and have signed several agreements, many of which establish international mechanisms for guaranteeing their protection. If the development of national legal systems has been encouraged in order to ensure the effective application within the States of the rules and principles adopted at the international level, the competent international entities have adopted several resolutions that have helped to strengthen the international system for protecting human rights. Other than the entities charged with surveiling compliance with the obligations undertaken by the States on this matter, *ad hoc* international tribunals have begun to function, hearing cases on violations of certain human rights. The eventual establishment of the International Criminal Court will constitute the culmination of the process of establishing international institutions in order to ensure universal respect for human rights and punishment for those who commit the most serious violations of these rights.

Under the aegis of the United Nations, efforts to protect human rights were concentrated initially on combating racial discrimination found in territories that were still subject to colonial rule, and in non self-governing territories. It is felt that this discrimination came to an end with the completion of the decolonisation process**.**

The main universal instruments on this matter are the following:

i) *Universal Declaration of Human Rights*, December 10, 1948. All rights and freedoms proclaimed in this Declaration are acknowledged for everyone, with no distinction made on grounds of race (article 2).

ii) *International Covenant on Economic, Social and Cultural Rights,* December 16, 1966. Twenty six (26) members of the OAS have ratified this Covenant.

The States Parties agree to guarantee the exercise of the rights listed in the Covenant "with no discrimination whatsoever for reasons of race, colour… national origin…" (article 2, § 2).

iii) *International Civil & Political Rights Covenant,* December 16, 1966. This Covenant has been ratified by 27 Member States of the OAS.

The States Parties agree to respect and guarantee the rights acknowledged in the Covenant "with no distinction whatsoever of race, colour… national origin…" (article 2, § 1).

iv) *Optional Protocol of the International Covenant on Civil and Political Rights,* December 16, 1966. This Protocol has been ratified by 21 Member States of the OAS.

The States Parties to the Protocol acknowledge the competence of the Human Rights Commission to receive and analyse communications from individual persons claiming to be the victims of violations of the rights listed in the Covenant on Civil and Political Rights (article 1).

v) *Convention for the Prevention and Sanction of the Crime of Genocide,* December 9, 1948. Twenty-three (23) member States of the OAS are parties to this Convention. It lists acts constituting genocide when committed with the intention of totally or partially destroying "a national, ethnic, racial or religious group" (article II).

vi) *Declaration on the Elimination of all Forms of Racial Discrimination,* adopted by the United Nations General Assembly on November 20, 1963.

This Declaration condemns discrimination for reasons of race, colour or ethnic origin as this constitutes a violation of human rights and breaches the fundamental freedoms (Article I). It prohibits any act constituting racial prejudice or discrimination and obligates the States to introduce a series of measures to prevent or suppress racial or ethnic discrimination (articles 2 to 11).

vii) *International Convention on the Elimination of all Forms of Racial Discrimination,* December 21, 1965. Thirty (30) States in the hemisphere have ratified this Convention.

In addition to defining the phrase "racial discrimination" (article 1) in a very broad-ranging manner, the *International Convention* lists a series of commitments that the States undertake in order to prevent and eliminate racial discrimination (articles 2 , 4, 6 & 7), declaring that people of all races are equal before the law and in terms of their enjoyment of human rights (article 5); it also establishes the Committee for the Elimination of Racial Discrimination, the first human rights body established within the framework of the United Nations, that is responsible for overseeing compliance with the obligations undertaken by the States Parties to the Convention, receiving and analysing complaints by the States over compliance with these obligations, and receiving communications from persons or groups of people who consider that they are the victims of violation of the rights stipulated in the Convention committed by the States Parties that have expressly acknowledged the competence of the Commission to adjudicate on this type of complaint.

Both the definition of the expression "racial discrimination" and the obligations that the Convention imposes on Member States to prevent and eliminate racial discrimination have been stated in very broad terms. It is the understanding of the Committee that this makes it unnecessary to conclude a convention of regional scope for the purpose of declaring the equality of individuals of all races, condemning in general the different ways in which racial discrimination can be manifested, or formulating general rules that have already been incorporated into this Convention or into other instruments. In the light of the experience of the last 30 years, the general principles and the obligations that States should assume with regard to preventing and eliminating racial discrimination could probably be formulated differently, and perhaps more completely. The content, however, would not vary in any substantial manner, which is why there is no justification for the enormous diplomatic effort nor for the complicated and usually lengthy negotiations required to conclude a new convention on this matter.

viii) *Declaration of the General Assembly of the United Nations on the Human Rights of Individuals who are not Nationals of the Country in which they live,* December 13, 1985.

ix) *Convention on the Protection of the Rights of all Migrant Workers and their Families*, December 18, 1990. Five (5) countries in the hemisphere have ratified this Convention.

x) *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,* December 18, 1992. This is the only United Nations instrument that refers specifically to the special rights of minorities. It lists a series of minority rights, including the right to develop their own culture without interference and the right to participate effectively in decisions taken at the national level[1].

Overseeing fulfillment of the obligations that States assume with regard to minorities is shared by the Committee on Human Rights, the Sub-committee for Promoting and Protecting Human Rights, the Committee on Economic, Social and Cultural Rights, and the Committee for Eliminating Racial Discrimination. In addition, there is a Working Group on Minorities which makes assessments of how the Declaration is being complied with[1].

b*) At the Inter-American level*

i) *Charter of the Organization of American States.* This acknowledges the right of all human beings with no distinction of race, gender, nationality, creed or social status to material well-being and spiritual development under conditions of freedom, dignity, equal opportunity and economic security (article 45)

ii) *American Declaration on the Rights and Duties of Man.* Declares the freedom and equality in dignity and rights of all men (Preamble) and acknowledges that everyone is equal before the law, with rights and duties enshrined in the Declaration with no distinction of race, gender, language, creed or any other aspect (article 2).

iii) *American Convention on Human Rights.* Twenty-five (25) States are parties to the American Convention.

This binds the States to respect human rights and the fundamental freedoms acknowledged by the Convention and to guarantee their exercise "with no discrimination whatsoever for reasons of race, colour… national origin…" (article 1). Other provisions in the Convention ban the "apology for national, racial or religious hate that encourages violence or any other similar unlawful action against any person or group of persons for any reason whatsoever, including race, colour… or national origin.." (article 13, § 5), and the expulsion of foreigners whose right to life or personal freedom is at risk of violation due to race, nationality..... (article 22, § 8); it enshrines the quality of all persons before the law (article 24), and allows certain cases of suspension of the obligations established by the Convention whenever this "does not involve any discrimination whatsoever granted for reasons of race, colour or social origin" (article 27, § 1).

iv) *Additional Protocol to the American Convention on Human Rights, "San Salvador Protocol".* Twelve (12) States in the region have ratified the San Salvador Protocol.

This Protocol reiterates the obligation of the State parties to guarantee the exercise of the rights acknowledged in the Protocol "with no discrimination whatsoever for reasons of race, colour… national origin…" (article 3). The Protocol also establishes that education should, among other things, foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups" (article 13, § 2).

v) *Resolutions adopted by the General Assembly*. In addition to resolution AG/RES.1774 (XXXI-O/01), the General Assembly has adopted many resolutions that mention racism and racial discrimination (see DDI document).

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[1] Mention should also be made of the following instruments: *Convention (N°. 111) Relating to Discrimination in Employment and Occupation*, adopted by the General Conference of Organization of Labor on 25 June 1958; the *Declaration on Race and Racial Prejudice,* appoved by the General Conference of UNESCO on 27 November 1978.

vi) *Declarations at the Summits of the Americas*

In the declarations issued by the hemispheric summits, the adoption of various measures is proposed in order to strengthen the American human rights system, such as reviewing and developing national legal systems, promoting legal, educational and social measures, finding, ratifying or adhering to international instruments on human rights, as well as implementing initiatives and other specific measures designed to strengthen the inter-American system of human rights. Nevertheless, none of the Plans of Action adopted by the Summit meetings has proposed the adoption of new conventions on human rights, not even the Third Summit that met in Quebec in April 2001, and at which the Head of States agreed to eradicate all forms of discrimination, including racism, racial discrimination, xenophobia and other connected forms of related intolerance. The commitments undertaken consisted of complying with their international obligations and the adoption of specific measures at the national level in order to foster and strengthen respect for human rights and the fundamental freedoms.

The earlier Summit meetings did not even mention the possibility of adopting new conventions against racial discrimination. Instead, the Heads of State agreed, among other matters, to review and strengthen the laws protecting the right of minority groups and indigenous communities and populations, ensuring access to education with no discrimination on grounds of race, nationality or origin or gender (First Summit of the Americas, Miami, December 1994); and to develop specific programs for groups lagging behind in matters of education, particularly minorities, among others, applying educational strategies that are pertinent to multi-cultural societies in order to build up bilingual, intercultural basic education models with indigenous communities and migrant groups (Second Summit of the Americas, Santiago de Chile, April 1998).

2. The replies of the member States

The resolution requests the Juridical Committee to bear in mind the replies from the Governments to the questionnaire drafted by the DDI. These replies are reproduced and analysed in the DDI documents.

From the 13 countries that replied, two declared categorically against the idea of completing a new inter-American general convention against racism, grounded on similar reasons: the existing international instruments particularly the United Nations *Convention on the Elimination of Racial Discrimination* are sufficiently broad-ranging to make any convention on this same topic quite unnecessary. What is required is not a new convention that would inevitably regulate a matter that has already been regulated, but rather that the countries in the hemisphere that have not yet ratified the existing instruments should do so, and should comply with the obligations contained therein (see replies from Antigua and Barbuda and the United States).

Eleven countries were in favour of signing a new convention on racism. Most of them consider that this new convention should include the topics suggested by the DDI, which are wide-ranging (see page 13 of the DDI document). Brazil sent a reply that was very much in favour of a general convention, the purpose of which would be to expand the scope of the existing international instruments. However, some countries indicated that redundancies or overlapping functions should be avoided (Argentina, Costa Rica). Others indicated the specific topics that should be covered by a new inter-American convention (see below).

3. The World Conference against Racism, Racial Discrimination, Xenophobia and Connected Forms of Intolerance

The World Conference against Racism, Racial Discrimination, Xenophobia and Connected Forms of Intolerance was held in Durban, South Africa in September 2001. The need to convene this World Conference was justified by the frequency and severity of incidents prompted by racism, racial discrimination, xenophobia, and connected forms of intolerance occurring worldwide. Alarming manifestations of racial prejudice and hate persist in many countries. These old hatreds and prejudices are sometimes employed under new

names (ethnic cleansing) and are disseminated through modern communication and information technologies.

Nevertheless, it does not seem that the persistence of racist and xenophobic manifestations is due to the lack of international instruments for combating racism. Proof of this lies in the objectives of the World Conference, which did not include the formulation of new conventions against racism. The World Conference was held, among other reasons, to examine the progress achieved in the struggle against racism, assessing the stumbling-blocks hampering its progress, examining mechanisms that will ensure better application of the existing instruments, and examining factors leading to racism and racial discrimination. No regulatory tasks were required of the Conference.

In the texts issued by the Conference, no mention was made of a call to formulate new instruments against racism and racial discrimination in general. The *Declaration* and *Plan of Action* adopted by the Conference invite the States or the General Assembly of the United Nations to draft conventions related to specific aspects of racism and racial discrimination (see below), but contain no mandate or recommendation referring to the completion of a new general convention on this topic. Instead, it affirms that universal adherence and the complete implementation of the *Convention on the Elimination of All Forms of Racial Discrimination* is a matter of the utmost importance for fostering equality and non-discrimination throughout the world (*Declaration* § 7), recalling the importance attached to the States complying with the provisions in the international treaties and other instruments that ban discriminatory processes (*ib*. § 108). Furthermore, it exhorts those States that have not yet done so to ratify or adhere to a series of covenants or international conventions on racism and human rights, listed in §§ 75, 77 and 78 of the *Plan of Action*.

The Conference invited the General Assembly of the United Nations to consider drafting a broad based international convention for protecting and promoting the rights and dignity of disabled people (*Plan of Action*, § 183), and urged the Governments to negotiate bilateral or regional agreements on migrant workers (*ib.,* § 185), concluding bilateral, sub-regional, regional and international agreements on the traffic in women and children (*ib.,* § 189), speeding up the approval of a declaration on the rights of indigenous peoples (*ib.*, § 209)... In counterpart, the international community agreed that the stumbling-blocks hampering the complete elimination of racial discrimination and achieving equality for all races lie in the lack of the political will of the States and the inadequacy of their anti-racist legislation, as well as the lack of implementation strategies and specific ant-racist actions (*Declaration*, § 77).

Nevertheless, the regional Conference held in Santiago as a preparatory meeting of the World Conference urged that an inter-American convention against racism, racial discrimination, xenophobia and connected forms of intolerance should be drawn up under the aegis of the OAS, “expanding the scope of the existing international instruments through the inclusion of provisions on new manifestations of racism, racial discrimination, xenophobia and connected forms of intolerance, and the establishment of follow-up mechanisms”. The regional Conference of the Americas focused on racial discrimination, xenophobia and *connected* forms of intolerance, and when referring to other causes of discrimination, such as age, gender, sexual preference, disabilities and social or economic status, did so by rating them as factors that worsened discrimination based on race. Canada and the USA submitted comments that appear in Annex V to the documents issued by the regional Conference.

IV. POSSIBLE APPROACHES

The negotiation and adoption of an inter-American convention against racism and racial discrimination, which seems to be an objective desired by a significant number of Member States of the OAS, imply broad-ranging political and diplomatic actions. If it be decided to proceed with this enterprise, efforts should be made to avoid the results of this action being redundant, or incompatible with existing conventions, and not to create problems of interpretation or application that might arise because of the existence of treaties already in place that regulate the same matter.

The way to minimise this risk is to identify specific aspects of racism, racial discrimination, xenophobia and connected forms of intolerance that have not yet been regulated, or have been regulated insufficiently, which could constitute the purpose of this convention. This is tantamount to saying that perhaps it would be convenient to abandon the idea of a new general convention against racism and adopt an approach focused on specific issues. The replies of the Governments to the DDI questionnaire, even though supporting the idea of general convention, suggested the need for international regulation of certain specific issues, some of which are listed below.

a) *New forms of racism*

Several governments proposed that the regulation of new forms of racism should be covered by a new inter-American convention. But in attempting to define these new forms, it was found that they basically refer only to the use of the electronic communications media and information. This is an issue of the utmost importance, but probably of limited scope to justify an inter-American convention.

Argentina proposes that a new document should extend the scope of the existing national instruments "to the new types and causes of discrimination… as well as the Internet, genetic manipulation, access to health care facilities". Argentina also mentioned, as issues to be possibly covered by the future convention, measures against the "urging of discriminatory acts or theories, for instance over the internet". Brazil mentioned "the use of the Internet as a means for disseminating racist propaganda". Colombia states that the new types of discrimination should be dealt with arising from circumstances prompted by globalisation "particularly the Internet and scientific progress in terms of access to the human genome". Similarly, Mexico adds to the issues suggested by the DDI in the questionnaire "the improper use of new communication technologies such as the Internet in order to foster racial discrimination, xenophobia and connected forms of intolerance". In more general terms, Brazil refers to traditional and contemporary forms of racism and intolerance. Costa Rica postulates the new types of racism as issues that have not been covered by the International Convention, giving examples of discrimination for reasons of religion, culture and language. Guatemala alludes to contemporary forms of racism, such as xenophobia and intolerance.

In the Durban *Declaration*, xenophobia against foreigners is acknowledged, particularly immigrants, refugees and those seeking asylum as one of the main sources of contemporary racism (§ 16), and draws attention to new manifestations of racism, racial discrimination, xenophobia and connected intolerance, although without specifying these new forms (§ 17). However, it also expresses concern over the use of new information technologies for purposes undermining respect for human values. In the *Plan of Action*, mention is made as an example of these new forms of using the new communication and information technology, including the Internet to disseminate ideas of racial superiority (§ 146). Furthermore, it urges the States to impose penalties for encouraging racial hatred through the new communication and information technologies (*ib*., § 148).

The Conference of the Americas also proposes in its *Plan of Action* "…to adopt measures to prevent scientific and technological progress in the field of genetic research being used to promote racism, racial discrimination, xenophobia and other connected forms of intolerance, as well as protecting the personal privacy of the information contained in the human genetic code".

In the European Union, talks have been initiated on this issue, although not in order to adopt an international convention, but rather a "Framework decision" containing standards and rules declaring racism and xenophobia illegal both on the Internet and offline, and establishing "effective, proportional and dissuasive penalties for committing racist acts". This draft contains a definition of xenophobia and racism that is simpler than that contained in the International Convention. In effect, both expressions are defined as "the belief that race, colour, descent, religion or belief, ethnic or national origin, as a factor determining aversions towards individuals or groups".

Combating racist propaganda through the electronic communications and information media through international regulation is difficult, due to the reluctance of certain countries to

allow intervention over the Internet, which would constitute a violation of certain freedoms that are guaranteed by their constitution. Precisely for this reason, any one wishing to set up a website to disseminate racist propaganda does so in countries that do not permit any control or constraints to be imposed over electronic communications.

b) *Particularly vulnerable groups*

In their reply to the questionnaire, some governments drew attention to the problem of discrimination against particularly vulnerable groups. As vulnerable groups, Brazil identifies "negroes, indigenous peoples, immigrant workers, the poor, homosexuals, the elderly and women". Costa Rica speaks of the "peoples descendent from Africans and the indigenous communities". Ecuador mentions the "minority ethnic groups". Panama proposes that the convention should cover "aspects enshrined in the *Inter-American Convention for the Elimination of All Forms of Discrimination against the Disabled*".

c) *Indigenous peoples*

The particular situation of the indigenous peoples warrants a special mention, as their status in many of the OAS countries is endowed with specific characteristics. In general, the indigenous peoples are in a situation of obvious disadvantage in relation to other sectors of the population consisting of the descendants of the colonizers, even in countries where the indigenous population is in the majority. In States with a multi-ethnic population – like many of the countries in the region – the majority or dominant ethnic groups tend to impose their culture on other groups. Imposing uni-culturalism in multi-ethnic societies will violate the rights of the minority groups.

Recent studies by the United Nations describe the precarious situation of indigenous communities and modern forms of discrimination against them. Efforts are made to acknowledge the rights of indigenous peoples in many countries, and furthermore to seek reconciliation for past harm and injury inflicted, and even to offer compensation for loss and damage.

The rights acknowledged by the Convention of San Jose, Costa Rica and its Protocol as well as the other inter-American instruments that are related to human rights, logically benefit indigenous peoples of the continent, who have the right to use the mechanisms established in order to ensure respect for human rights (see section d *infra*). At the moment, efforts are being made to approve a universal declaration acknowledging the rights of indigenous peoples, including the maintenance of their own life-styles, cultures, traditions and economic structures and the right to administer their own lands and natural resources (see § 38 to 44 of the Durban *Declaration*).

d) *New oversight and compliance mechanism*

Among the 11 countries supporting a new convention, Panama was against the introduction of new institutions with powers to ensure compliance with the instruments. The majority suggested establishing new entities or procedures (Costa Rica, Colombia, Ecuador, Guatemala, Mexico, Peru and Uruguay) or conferring jurisdiction to hear issues related to racial discrimination, on existing entities within the inter-American system (Argentina, Brazil). Brazil proposed that a mechanism be established for fostering the inclusion of black and indigenous peoples, as well as other racial, religious or sexual minorities.

No specific comments were received from: Dominica, Ecuador, Mexico, Panama, Peru and Uruguay.

The International Convention establishes a Committee to examine the reports that the States Parties are obliged to submit regularly, relating to the measures adopted by them in order to comply with the obligations arising from the Convention (article 9), as well as to receive communications from the States Parties on non-compliance with the provisions of the Convention by any other State Party (articles 11, 12, 13). Furthermore, the Committee can receive and examine claims received by individuals or groups of individuals on violations of the human rights of those considering themselves to be victims of acts committed by any State Party in whose jurisdiction they are found, whenever this State Party has declared that

it accepts the jurisdiction of the Committee to hear such claims and complaints (article 14, § 1). Nevertheless, so far, only 5 countries in the region (Chile, Costa Rica, Ecuador, Peru and Uruguay) have accepted the Committee's jurisdiction, in accordance with the mentioned article 14.

An analysis should be carried out to determine whether the mechanisms established by the International Convention against Racial Discrimination should be extended by the mechanisms of the inter-American system of human rights, checking whether this is sufficient to ensure compliance with the obligations of the States in terms of non-discrimination, sanctioning those who fail to meet these obligations and providing reparations for the victims of racial discrimination. It should be recalled here that on August 31, 2001, the Inter-American Court of Human Rights delivered a decision upholding a claim filed by the Awas Tingni indigenous community against the Government of Nicaragua over its rights to the tract of land settled by the tribe. The Court declared that the Government of Nicaragua had violated the *Inter-American Convention on Human Rights* by ignoring the rights of the indigenous community to property and equality before the law.

e) *Protection of migrants*

The General Assembly of the United Nations approved resolution 40/144 in 1985, containing a Declaration on the human rights of persons who are not nationals of the countries in which they live (migrant population). This issue is considered every year by the General Assembly, which adopts resolutions condemning all forms of racial discrimination and xenophobia reflected, among other matters, in terms of access to jobs and vocational training, reiterating the general principles on the protection and exercise of the human rights of migrants.

The Durban Conference recommended these States to participate in regional dialogues on migration problems and invited them to consider the possibility of negotiating bilateral and regional agreements on immigrant workers, formulating and implementing programs with the States and other regions in order to protect migrant rights (§ 185).

The Juridical Committee feels that this topic, like the matter that follows, although closely linked to the issue of racism, should remain outside the scope of the future inter-American convention, as – already explained above – the General Assembly seems to have referred solely to racial discrimination and other related forms of discrimination, but not to xenophobia.

f) *Immigrant workers*

The *International Convention on the Protection of the Rights of all Migrant Workers and their Families* was adopted on December 18, 1990, entering into force three months after the 20th instrument of ratification or adherence was deposited. So far, only 17 States have ratified or adhered to the Convention, five of them being in Latin America. In the inter-American sphere, there are no similar conventions or instruments on this issue.

V. CONCLUSIONS

Based on the preceding considerations, the Inter-American Juridical Committee has reached the following conclusions:

1. Racism and related forms of discrimination and intolerance remain a significant and widespread problem adversely affecting the lives of large segments of the people who live in this Hemisphere. The Inter-American Juridical Committee fully shares the view of the General Assembly and other organs of the OAS that it is important to address this urgent problem at this time. The elaboration of a new inter-American convention against racism and related forms of discrimination is one of several possible ways to address this problem (other strategies for addressing the problem are noted below in paragraph 7). In determining whether to proceed with the elaboration of such a convention, it is necessary to determine not only whether such a project would help to produce a solution to the problem, but also whether such a project would divert resources from other, more effective ways of addressing the problem.

2. If it is decided to conclude a new inter-American convention on racism, racial discrimination and other pertinent forms of intolerance, this should be a complementary instrument to the universal and regional conventions that exist on the matter, that is to say, it should cover any general aspects not covered by those conventions or that typify forms of racism, racial discrimination or intolerance not yet dealt with in specific international instruments. An overly broad focus should be avoided (such as drawing up a convention aimed at all forms of discrimination and intolerance, which would cover practically the entire spectrum of human activity), or else, if a more restricted focus is adopted (concentrating, for example, only on racial discrimination, as appears to be the intention of the General Assembly), then care should also be taken to avoid too general a focus that would produce an instrument full of repetitions and overlapping. The Juridical Committee is therefore of the opinion that it is not advisable to undertake to negotiate and conclude a general convention to prevent, sanction and eradicate racism and all forms of discrimination and intolerance, insofar as it would be repetitive, producing overlapping that would lead to serious and inevitable problems of interpretation and generate doubts and confusion as to which were the obligations and rights of the Member-States parties to the former conventions and the new convention.

3. The Juridical Committee also feels that in adopting a more precise focus, then perhaps it is opportune to examine in greater detail which areas within the domain of racism and racial discrimination that have not been regulated internationally, or which have been insufficiently regulated, might be the object of an inter-American convention to complement the instruments that are in effect in the region and might possibly be accepted by all the Member-States. This would involve identifying *concrete aspects* of prevention, sanction and eradication of racism and racial discrimination, *specific groups* that are subjected to discrimination or *particular forms* of discrimination.

4. The Governments that answered the DDI questionnaire suggested numerous aspects that could be the object of a future inter-American convention. Some of them (for instance, discrimination motivated by religion, culture or language, vulnerable groups such as the poor, homosexuals, the elderly and women), while obviously related to the question of racism in that they are part of the general domain of protection of human rights, fail to constitute, in the mind of the Juridical Committee, themes that could normally be considered specific themes of the problem of racism and racial discrimination.

5. In certain paragraphs of this report, the Juridical Committee has suggested certain concrete themes, some of which were also suggested in the answers of Governments to the DDI questionnaire, which could be the object of a future inter-American regulatory convention. The themes suggested by the Committee are as follows:

- strengthening oversight and compliance mechanisms for the conventions on human rights;
- specific groups such as indigenous populations and ethnic minorities;
- contemporary forms of racism and racial discrimination.

It is the understanding of the Juridical Committee that one of the themes suggested (as well as those that are suggested by the Member-States or agencies of the Organization) could become the subject of a future inter-American convention, by having consultations on the need for or interest in adopting such a convention and the difficulties facing the adoption of such an instrument.

6. However that may be, if it is decided to proceed to develop an inter-American convention aimed at a particular aspect of the matter of racism and racial discrimination, the Juridical Committee considers that such a convention should fall within the more general framework allowed by the *International Convention on the Elimination of All Forms of Racial Discrimination* and other universal and regional conventions on the same matter, which means making express reference to these in the text of the new convention.

7. The Juridical Committee considers that it is opportune to recall that, in addition to the conclusion of an inter-American convention, there exist other possible procedures for

regulating matters relating to racism and racial discrimination, particularly if it is the matter of adopting complementary provisions to instruments already in place or regulating specific aspects of limited scope. In this sense, mention could be made, for instance, of adopting amendments to existing conventions, adopting interpretative declarations of same, and drawing up additional protocols. Furthermore one must bear in mind the possibility of resorting to procedures of a political nature, such as those recommended by the First and Second Summits of the Americas (Miami, 1994 and Santiago de Chile, 1998), respectively, and by the World Conference on Racism, Racial Discrimination, Xenophobia and related forms of Intolerance, Durban 2001. Choosing the appropriate juridical or political means will naturally depend on the matter to be ruled on and the political and legal force intended for the regulation.

8. Some Juridical Committee members also consider that in view of the fact that some conventions on racism and racial discrimination and related themes have not been ratified by all members of the OAS, the agencies of the Organization might consider it convenient to formulate requests to the States that have not yet done so to ratify or adhere to said conventions. It was thus understood that the recommendation could be made for the American States that are parties to the conventions against racism and racial discrimination, to take the necessary steps to comply with the obligations arising from them, including the adoption of national laws and regulations.

3. Cartels and competition law in the Americas

Resolution

CJI/RES.45 (LXI-O/02):	Cartels in the sphere of competition law in the Americas

Documents

CJI/doc.102/02:	Cartels and competition law in the Americas: hard core and export cartels (presented by Dr. Jonathan Fried)
CJI/doc.106/02	Cartels in the sphere of competition law in the Americas(presented by Dr. João Grandino Rodas)
CJI/doc.113/02 rev.3	Inter-American Juridical Committee. Questionnaire on competion policy and cartels

At the LX regular session of the Inter-American Juridical Committee (Rio de Janeiro, February-March 2002), Dr. João Grandino Rodas, rapporteur for the topic, informed the Committee that the Permanent Council had been very interested in this topic at the time the Juridical Committee's 2001 *Annual report* was presented. It had suggested that the title of the topic on the Juridical Committee's agenda be changed to add the word "cartels", while keeping the topic on the agenda for follow up.

At its XXXII regular session (Bridgetown, Barbados, June 2002), the General Assembly adopted resolution AG/RES.1844 (XXXII-O/02) wherein it again asked the Inter-American Juridical Committee to pursue its studies on the subject of competition law and the various forms of protectionism in the Americas, so that the results of those studies could be included in its next annual report to the General Assembly, bearing in mind the efforts already under way in the Organization and other international institutions.

At the Inter-American Juridical Committee's LXI regular session (Rio de Janeiro, August 2002), Dr. João Grandino Rodas summarized the topic, indicating that it first made its appearance under the more general heading of competition law. Then, at the Committee's previous session, it was decided to narrow the topic to the question of cartels, given how serious the problem was and how difficult it was to combat within a given country or economic block and even at the global level. He recalled that two reports on this subject had already been presented in the Inter-American Juridical Committee. He then introduced the document CJI/doc.106/02 titled *Cartels in the shpere of competition law in the Americas*. It was provisional in nature, he said, as the laws of certain countries that did not yet appear in the document would need to be added to make the document complete. The rapporteur described the document's layout, stating that it covered the following points: cartels and international cartels; domestic laws on this subject (United States, Canada, Brazil, Chile, Germany, France and Italy – the rapporteur asked the other members to make an effort to obtain the laws of other countries); recent amendments to the laws and policy of the countries on this subject; the practice and enforcement of these laws; problems with regulation, and international economic agencies that concern themselves with this topic at both the regional and global levels. The rapporteur stated that it was his intention to include competition-related cases that occurred and were decided within the last three years in the countries of the hemisphere, to add to the information already reported in other documents.

Dr. Grandino Rodas described the work being conducted in UNCTAD, the OECD, the WTO and the FTAA. He concluded that this issue was important to all countries of the hemisphere –not just a few- and suggested that the Committee's final paper be published.

Dr. Jonathan Fried presented document CJI/doc.102/02, *Cartels and competition law in the Americas: hard core and export cartels*. There he described the history of this topic within the Juridical Committee and discussed export cartels and their market-skewing effects. He also said what international organizations like the OECD, the WTO and the FTAA have had to say about these cartels and recommended that the Inter-American Juridical Committee send the work it had done thus far on the competition laws and policies in the Americas to the suitable organs of the Organization, with the indication that the Committee was ready to share its experience and knowledge with those responsible for the FTAA negotiations.

Dr. Fried observed that not all cartels should be viewed as harmful or anti-competitive. The main question was how to better regulate the way in which cartels that could have some cross-boundary effect operate. He cited the example of a cartel that might be positive for one country but harmful to another, which would invariably create a conflict in the application of the laws.

The rapporteur suggested that a second type of cartel posed an even greater challenge: cartels formed to product effects in the countries to which their products were exported, thereby creating a problem for the countries that imported the material. In a system that encouraged free commerce, the question was whether the national authorities' acceptance of cartels of this type should be regarded as something healthy, unhealthy or neutral.

During this session, Dr. João Grandino Rodas, rapporteur for the topic, presented document CJI/doc.113/02 to the Committee's other members. It contained a proposed questionnaire intended for the authorities on cartels in the OAS member States. Dr. Jonathan T. Fried stated that the topic should focus on export cartels. As the approach proposed by the co-rapporteur was a different one, a new questionnaire was prepared during the recess period and sent to the Permanent Missions to the OAS and different agencies and national institutes by the end of October, contained in document CJI/doc.113/02 rev.3 *Questionnaire on competition policy and cartels*, which is presented in this *Annual report*. Lastly, the Inter-American Juridical Committee adopted resolution CJI/RES.45 (LXI-O/02), *Cartels in the sphere of competition law in the Americas*, which welcomed the studies presented by the two rapporteurs at this regular session. In that resolution the Committee also asked the national authorities of the OAS member States competent in competition-related matters, through the Secretariat for Legal Affairs, to supply information about laws, recent cases and practices, to be passed on to the rapporteurs; it asked the rapporteurs to prepare a revised, combined report, taking into account the exchange of views within the Juridical Committee and the information received from the national authorities, which would be conveyed to the General Secretariat as soon as possible. The Inter-American Juridical Committee also resolved to continue to examine this topic at its next regular session, based on the rapporteurs' final report, so that the Inter-American Juridical Committee could adopt

appropriate recommendations and publish a final report, which would then be distributed among the member States.

This resolution and the reports presented by the rapporteurs appear below:

CJI/RES.45 (LXI-O/02)

CARTELS IN THE SPHERE OF COMPETITION LAW IN THE AMERICAS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

RECALLING the request of the General Assembly in resolution AG/RES.1844 (XXXII/O/02) that the Committee continue to pursue its study on various aspects of competition law in the Americas**;**

RECOGNIZING the desirability of promoting more effective control over anti-competitive practices in the Americas;

DESIRING to contribute to better understanding of the laws and policies relevant to the regulation of cartels in this regard;

HAVING BENEFITTED from a thorough discussion of this subject at its current regular session,

RESOLVES:

1. To welcome the preliminary studies presented by the co-rapporteurs, Dr. João Grandino Rodas (*Cartels in the sphere of competition law in the Americas*, CJI/doc.106/02) and Dr. Jonathan T. Fried (*Cartels and competition law in the Americas: hard-core and exporting cartels*, CJI/doc. 102/02).

2. To request the national competition authorities of the members States of the OAS, through the Assistant Secretariat for Legal Affairs, to provide the rapporteurs with information on legislation, recent cases and practices.

3. To request the rapporteurs to prepare a revised, consolidated report, in the light of the Committee's exchange of views and the information received from the national authorities, for delivery to the General Secretariat as soon as possible.

4. To continue its consideration of this subject at its next regular session, on the basis of a final report of the rapporteurs, with a view to adopting appropriate recommendations and publication of a final report of the Committee for distribution to member States.

This resolution was unanimously adopted at the session held on 16 August 2002, in the presence of the following members: Drs. Brynmor Thornton Pollard, Jonathan T. Fried, Orlando R. Rebagliati, João Grandino Rodas, Felipe Paolillo, Ana Elizabeth Villalta Vizcarra, Carlos Manuel Vázquez and Sergio González Gálvez.

CJI/doc.102/02

CARTELS AND COMPETITION LAW IN THE AMERICAS: HARD CORE AND EXPORT CARTELS

(presented by Dr. Jonathan T. Fried)

I. Background

The evolution of consideration of the subject of competition laws in the Americas summarized well in Secretariat document OAS/GS.DDI/Doc.03/02 of June 13, 2002. As noted

therein, during its 60th regular session, the Juridical Committee reviewed various aspects raised in documents CJI/doc.23/00, *Considerations relevant to a proposal to include 'competition law' as a topic to be studied by the Inter-American Juridical Committee,* and CJI/doc.78/01, *International regulations on defense of competition*. Following the recommendation of the co-rapporteur, Dr. João Grandino Rodas, the Juridical Committee decided that an appropriate focus for further study was the area of cartels.

During its 32nd regular session (Barbados, June 2002), the General Assembly approved resolution AG/RES.1844 (XXXII-O/02), whereby it renewed its request to the Inter-American Juridical Committee to pursue its study of the issue of competition law and the various types of protectionism in the Americas, and include the results of those studies in its next annual report, taking into account the work already done by the OAS and other international institutions.

This report, prepared with the able research and drafting assistance of Ms. Mary-Ellen Cavett, counsel in the Trade Law Division of Canada's Department of Foreign Affairs and International Trade, provides an overview of recent developments in various international forums regarding cartels, and proposes that, in the light of the substantial work already underway, including in particular in the context of negotiations on a proposed Free Trade Agreement of the Americas, that the Inter-American Juridical Committee conclude its self-initiated work on the subject, while indicating its willingness to respond to requests from other organs of the organization to assist.

II. Overview

Recently, various international organizations have discussed the anti-competitive practices and trade-distorting effects of international cartels. Some of these organizations are now beginning to consider whether export cartels are trade-distorting.

1. What Are Export Cartels?

A cartel is a form of co-ordinated behaviour between firms that would otherwise be in competition.[1] Cartels are usually divided into two categories:

> "hard core" cartels which engage in price-fixing, output restraints, market division, customer allocation and bid rigging which may be expected to reduce or eliminate competition;[2] and cartels which may not harm competition significantly, may be pro-competitive, or have beneficial effects outweighing any anti-competitive effects. This category of cartels could include research and development, and specialization or rationalization agreements.[3]

Hard core cartels may also include import and export cartels. Import cartels aim to regulate the price or other terms of goods or services that are imported into the participating firms' home markets. For example, an import cartel may manage demand and price of crucial inputs, such as resource commodities.

Export cartels are co-operative arrangements among firms attempting to market their goods and services abroad, to enter new markets, to expand their share of existing markets, or to fix prices or outputs in export markets.[4] Export cartels vary in scope and composition.

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1 A "cartel" can be defined as agreements between firms that would otherwise be in competition with each other that aim to fix prices, reduce output or allocate markets or that involve the submission of collusive tenders. See: WTO, *Provisions on Hardcore Cartels: Background Note by the Secretariat* ("Background Note"), WT/WGTCP/W/191, dated 20 June 2002, at § 3.

2 A hard core cartel is defined by the OECD as "an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce. See: OECD, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels* ("OECD Recommendation"), C (98)35/Final, dated 13 May 1998, at § 2.

3 Competition Bureau (Canada), *Options for the Internationalization of Competition Policy: Defining Canadian Interests* at p. 13. This paper is available on-line at http://strategis.ic.gc.ca/SSG/ct01519e.html.

4 An export cartel may not necessarily allocate market shares or fix prices, but may limit its actions to promotion and marketing.

Pure export cartels are directed exclusively at foreign markets whereas mixed export cartels may restrain competition in the exporting country's home market as well as foreign markets. National export cartels consist of suppliers from one country, while international export cartels are comprised of suppliers from several countries.[5] Finally, an export cartel may be private (that is, the firms comprising the cartel are independent from government) or public (the cartel is established and operated by government).

International hard core cartels generally fix prices, outputs or other elements of competition across a number of national markets, often including the home countries of the participating firms; in contrast, export cartels may undertake the same activities in export markets, not their home markets. Further, export cartels are exempted from the national competition laws of many countries (in some cases on condition of public registration) whereas hard core cartels often are illegal and typically are carried on in secret unless or until investigated and disclosed.[6]

2. Trade Distorting Effect of Cartels

Most countries appear to accept that hard core cartels can have the effect of undermining the benefits that should flow from international trade liberalization. For example, international hard core cartels can have an impact on market access by allocating national markets among the participating firms. Further, hard core cartels impose heavy costs on consumers and the economies of countries, including both developed and developing countries, and adversely affect the development prospects of developing countries.[7]

Some academics and international organizations have suggested that export cartels could potentially have a trade-distorting effect.[8] For example, the WTO Working Group on the Interaction between Trade and Competition Policy has suggested that an export cartel, which resulted in discrimination between the domestic market and the export market, could have a negative effect on other WTO Members.[9] However, the WTO Secretariat notes that "the view has been expressed that the extent of harm caused by export cartels is less than is sometimes thought, in that not all export-related consortia or similar arrangements fix prices or exercise market power."[10]

The issue of export cartels may be linked to that of import cartels. An import cartel could be used to limit imports, such as through voluntary export restraints imposed against a country's exports to another country.[11] International organizations do not appear to have considered the possible trade-distorting effects of import cartels, although the U.S. International Competition Policy Advisory Committee recently suggested that governmental practices that tolerate private anticompetitive conduct, such as import cartels, may be seen as a *de facto* or *de jure* substitute for traditional protection for imports.[12]

See: Simon J. Evenett, Margaret C. Levenstein, and Valerie Y. Suslow, "International Cartel Enforcement: Lessons from the 1990s", *The World Economy*, vol. 24, no. 9 (September 2001), at pp. 1221-1245, fn. 3 ("Evenett, *International Cartel Enforcement*"). This paper is available on-line at: http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID265741_code010403580.pdf?abstractid=265741

5 Department of Foreign Affairs and International Trade (Canada), *Competition Policy Convergence: The Case of Export Cartels* ("Competition Policy Convergence"), Policy Staff Paper No. 94/03, dated April 1994. This paper is available on-line at http://www.dfait-maeci.gc.ca/english/foreignp/dfait/policy_papers/1994/94_03_e/94_03_e.html#s3.

6 Background Note, at § 5.

7 See: OECD, *New Initiatives, Old Problems: A Report on Implementing the Hard Core Cartel Recommendation and Improving Co-operation*, DAFFE/CLP(2000)3/Rev1, dated 23 March 2000, at page 2; and WTO, *Report (2000) of the Working Group on the Interaction between Trade and Competition Policy* ("2000 Report"), WT/WGTCP/4, dated 30 November 2000, at § 39.

8 See, for example, Sadao Nagaoka, *International Trade Aspects of Competition Policy*, NBER Working Paper 6720, dated September 1998, (this paper is available on-line at http://www.nber.org/papers/w6720), and Evenett, *International Cartel Enforcement*.

9 WTO, *Report (1999) of the Working Group on the Interaction between Trade and Competition Policy*, WT/WGTCP/3, dated 11 October 1999, at § 26.

10 Background Note, at § 14.

11 Competition Policy Convergence, Annex.

12 International Competition Policy Advisory Committee (Antitrust Division), *Final Report to the Attorney General and Assistant Attorney General for Antitrust*, dated 28 February 2000, at p. 206. This document is available on-line at

3. Domestic Competition Law and Export Cartels

Over 90 countries have domestic competition legislation; the vast majority of these countries have some kind of ban against hard core cartels in their domestic legislation.[13] There appears to be a consensus – at least among OECD members – that hard core cartels are harmful to domestic economies and should be prohibited.

Most countries do not address the activities of export cartels in their domestic competition legislation. Some countries – such as Canada and Sweden – permit export cartels by exempting these cartels from the disciplines of domestic competition law.[14] The rationale for this exemption appears to be that domestic competition laws cover activities affecting domestic markets; typically, export activities are presumed not to affect domestic markets. Traditionally, a country's domestic competition law has been limited to activities occurring in its territory and does not address conduct that does not have an effect in its territory. In the United States, however, the Antitrust Division of the Department of Justice has observed, in its 1992 and 1995 *Guidelines for International Operations,* that the Antitrust Division will challenge foreign conduct that harms U.S. exports even if U.S. consumers are not harmed. Example D in the Guidelines state that the agencies would assert jurisdiction over foreign companies that agreed not to purchase or distribute U.S. products and agreed to take all feasible measures to keep a U.S. competitor out of their market. Such agreements would have 'direct' and 'reasonably foreseeable' effects on U.S. export commerce.

Various countries, such as the United States and Japan, require that firms organizing an export association or export cartel formally register with a governmental agency to receive an exemption.[15] The author is not aware of any country prohibiting export cartels under its domestic competition law.

As noted above, typically a country's domestic competition law does not address anticompetitive behaviour that does not affect its territory. Increased international coordination and cooperation by countries in the enforcement of competition policy has helped address some cross-border enforcement issues. However, as discussed below, some international organizations are considering the internationalization of competition policy and whether to adopt international competition rules, including rules governing the conduct of export cartels.

4. Consideration of Export Cartels by International Organizations

a) OECD

In 1998, the OECD adopted the *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels* ("OECD Recommendation").[16] The OECD recommended that member countries enact anti-cartel laws that effectively deter hard core cartels (such as by providing for effective sanctions and enforcement procedures and institutions with power to detect and remedy hard core cartels) and set out principles to guide co-operation between competition authorities. The OECD Recommendation did not encompass export cartels.[17]

Recently, the Joint Group on Trade and Competition in the OECD has addressed the application of the principles of transparency, non-discrimination and procedural fairness to a

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http://www.usdoj.gov/atr/icpac/finalreport.htm.

13 WTO, *Report (2001) of the Working Group on the Interaction between Trade and Competition Policy to the general council* ("2001 Report"), WT/WGTCP/5, dated 8 October 2001, at § 100.

14 Evenett, *International Cartel Enforcement*, Table 3.

15 Evenett, *International Cartel Enforcement*, Table 3.

16 C(98)35/Final, 13 May 1998.

17 The definition of hardcore cartel used in the OECD Recommendation specifically excludes "agreements, concerted practices, or arrangements that … are excluded directly or indirectly from the coverage of a Member country's own laws". As noted in Section D, most countries exclude export cartels from the disciplines of their domestic competition law.

possible future multilateral framework on competition.[18] In a paper issued earlier this year, the Joint Group considered *de jure* discrimination – that is, whether domestic competition laws or regulations embody discriminatory principles which, if applied consistently, would result in discrimination against foreign entities on the basis of nationality. The Joint Group suggested that domestic competition laws that permit export cartels, either expressly or implicitly, result in *de jure* discrimination. The Joint Group noted that:

> [o]f course, it can be argued that this differing treatment of different types of cartels is not discrimination. Competition laws are meant to protect domestic consumers, or put another way, such laws do not protect foreign consumers. The justification for permitting export cartels is that, in principle, they do not harm domestic consumers. Moreover, one could argue that there is not a contravention of the national treatment principle if foreign and domestic enterprises are treated equally in terms of their participation in export cartels. On the other hand, there may be a cross-subsidization effect in favour of domestic producers from export cartels. That is, excess profits resulting from an export cartel could be considered as a subsidy for domestic producers that is not available to foreign producers of the same product.
>
> .....…
>
> In virtually every country there are exemptions of various kinds from the prohibition against cartels…. State-owned enterprises are not subject to competition laws in some (but not all) countries, and certain commercial activities of governments, both national and local, may enjoy an exemption. In some countries, "crisis cartels" are permitted. If these exemptions are available only to domestic firms they are, on their face, discriminatory. One could imagine in most of these situations that a foreign entity could be held liable for cartel activity that an exempted domestic enterprise would not be prosecuted for.[19]

At the conclusion of its paper, the Joint Group questioned whether "tolerance by governments of export cartels constitutes 'discrimination'?" The Joint Group suggested that, regardless of whether such action would be considered to be discriminatory conduct under the WTO Agreement, the issue is how such action should be treated in a multilateral framework on competition.[20]

b) WTO

The WTO has recognized the importance of competition principles in trade liberalization agreements. A number of the WTO Agreements contain provisions related to competition policy.[21] Further, the WTO Working Group on the Interaction between Trade and Competition Policy, which was established at the 1996 Singapore Ministerial, is studying issues relating to the interaction between trade and competition policy, including provisions for hard core cartels, as mandated by the 2001 Doha Ministerial Declaration.[22]

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[18] The principle of non-discrimination is embodied in national treatment and most-favoured nation (MFN) treatment obligations in the WTO. The national treatment obligation requires that a WTO Member treat the goods or services of another WTO Member no less favourably than it treats its domestic goods or services. The MFN treatment obligation requires that a WTO Member treat the goods or services of another WTO Member no less favourably than it treats the goods or services of any other WTO Member.

[19] OECD, *Applying Core Principles in a Multilateral Framework on Competition* ("Applying Core Principles"), COM/DAFFE/TD (2002)49, dated 10 May 2002, at §§ 59 – 61.

[20] Applying Core Principles, at § 99.

[21] For example, Article 40 of the *Agreement on Trade-Related Aspects of Intellectual Property* provides that Members are authorized to enact domestic laws to combat restrictive provisions involved in technology licensing agreements and Article 3.5 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Antidumping Agreement") states that the administering authority of a Member must take into consideration any restrictive business practices when determining injury to a domestic industry.

[22] Paragraph 25 of the Doha Ministerial Declaration instructs the Working Group on the Interaction between Trade and Competition Policy, in the period until the Fifth Ministerial scheduled for September 2003, to "focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary co-operation; and support for progressive reinforcement of competition institutions in developing countries through capacity building". The Ministerial Declaration is available on-line at

Recently, the Working Group has considered various ways in which to promote greater coherence between trade policy and competition policy, including possibly more firmly integrating competition policy within the WTO. The Working Group has suggested that

> [t]he types of anti-competitive practices that were being discussed such as international cartels, export cartels, import cartels and abuses of a dominant position that had transboundary effects all had an international dimension and had clear adverse effects upon international trade and development. Moreover, in view of the criticism often levelled at the WTO that it created enhanced freedom for producers without necessarily providing due protection for other members of society, it would be difficult to explain that Members had come to the conclusion that anti-competitive business practices that distorted international trade were not a proper concern for the WTO to address.[23]

In a Background Note prepared earlier this year by the WTO Secretariat, the Secretariat referred to exemptions or exceptions for certain types of cartels in domestic competition laws, such as structural adjustment cartels, rationalization cartels, and import and export cartels. Some WTO Members have suggested that such exemptions "should be kept to a minimum and, ideally, phased out over time."[24]

c) FTAA

The Negotiating Group on Competition Policy has been negotiating a draft chapter on competition policy which is intended, among other things, to advance the establishment of a competition policy at the national or sub-regional level that proscribes the carrying out of anti-competitive business practices. As part of the negotiations, proposals have been made to include provisions on hard core cartels and to permit certain exemptions and exceptions from national competition laws.

Conclusion and Recommendations

Significant analysis of cartels, including identifying and ascertaining the possible trade-distorting effects caused by export cartels, has been undertaken in both the public and private sectors. Possible improved disciplines, both under domestic and international law, are under discussion in various negotiating forums, including the OECD, the WTO and the FTAA.

In the light of these developments, it is recommended that the Inter-American Juridical Committee forward its work to date on competition law and policy in the Americas to the appropriate organs of the organization, and indicate that, rather than any further work being undertaken by the Committee on its own initiative, the Committee stands ready to assist those responsible for FTAA negotiations and others who may wish to draw on the Committee's expertise in this field.

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http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm.

[23] 2001 Report, at § 101.

[24] Background Note, at § 15.

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CARTELS IN THE SPHERE OF COMPETITION LAW IN THE AMERICAS

(presented by Dr. João Grandino Rodas)

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INTRODUCTION

1.1 Cartels

A cartel is an association by agreement among a group of companies that is designed to prevent competition. Illegal cartel activity includes price-fixing, bid-rigging, and allocation of volume, markets or customers. It is general knowledge that cartels harm consumers and have pernicious effects on economic efficiency. A successful cartel raises prices above the competitive level and reduces output. Consumers choose either not to pay the higher price for some or all of the cartelized product that they desire, thus forgoing the product, or they pay the cartel price and thereby unknowingly transfer wealth to the cartel operators. Further, a cartel shelters its members from full exposure to market forces, reducing pressures on them to control costs and to innovate. All of these effects adversely affect efficiency in a market economy.

It is difficult to quantify the effects cartels have on the market. It would require comparing the actual market situation under the cartel with that which would exist in a hypothetical competitive market. Competition officials usually do not undertake to make such a calculation, both because it is difficult to do and because their laws usually do not require it. When an estimate of harm is necessary, however, most officials employ a proxy, which is the unlawful gain accruing to the cartel members from their activity. In its simplest form, this estimation is the product of the cartel “mark-up” above the competitive price and the commerce affected (in units) by the cartel agreement. Even this calculation can be difficult, as it requires an assessment both of the amount of “affected commerce” and of what the “competitive” price would have been without the agreement.

The 1998 Recommendation of the Organisation for Economic Cooperation and Development (OECD) Council Concerning Effective Action Against Hard-Core Cartels (“Cartel Recommendation”) noted in its preamble that “hard-core cartels are the most egregious violations of competition law and…they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others.” The preamble notes further that hard-core cartels “create market power, waste, and inefficiency in countries whose markets would otherwise be competitive.” The Recommendation calls on OECD members to provide for “effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels.”

The 2000 Cartel Report of the OECD noted that an important step in enhancing anti-cartel enforcement is “overcoming the knowledge gap concerning the harm done by hard-core cartels.” Improving public knowledge about the nature of this conduct and the harm that it causes would bolster popular support for more effective action against it. The Report also

called for further work on sanctions against cartels, recognizing that the principal purpose of such sanctions is deterrence.

1.2 International Cartels

Cartels are universally recognized as the most harmful of all types of anti-competitive conduct, especially by OECD. Moreover, they offer no legitimate economic or social benefits that would justify the losses that they generate. Thus, they are condemned in all competition laws; in some countries they are classified as a crime. Sophisticated cartel operators know that their conduct is unlawful and so they conduct their business in secret, sometimes taking great pains to keep their agreements from the public and from law-enforcement officials.

More recently, however, competition agencies have begun to uncover and prosecute large international cartels, whose participants are multinational companies headquartered in different countries. Several of the international conspiracies had devised complex price fixing schemes, which were augmented and made more transparent for their members by market allocation agreements, either in the form of quotas or territorial agreements. In some cases involving both domestic and international cartels, the cartel operators had designed elaborate mechanisms to enforce the agreement and punish cheating.

2. RELEVANT LAW[1]

1.1 Americas

2.1.1 Argentina

In Argentina, there was a significant development on the policy level with the introduction of the Law for the Defence of Competition 25.156 (*Ley de Defensa de la Competencia*). This law was designed to modernize the National Commission for the Protection of Free Competition (CNDC) by specifically defining illegal anti-competitive practices as any practice that limits, distorts or restricts competition or is an abuse of a dominant market position. It also provided the CNDC with clearer guidelines on the formation of mergers and a monetary level at which such reviews were compulsory. Law 25.156 also established the National Court for the Defence of Competition, which was given the power to resolve conflicts and administer punishments in case of law violation. This and other aspects of institutional strengthening were the key aspects of this new law.

2.1.2 Canada

Canada has only main statute governing all aspects of competition law, the Federal Competition Act ('the Act'). The Act is administered and enforced by the Commissioner of Competition who serves as the head of the Competition Bureau, a unit of the Ministry of Industry. The Criminal Matters Branch of the Competition Bureau, consisting of approximately 30 officers, investigates all matters relating to cartels and conspiracies. In order to take jurisdiction over activities occurring outside Canada, a Canadian court will have to find that it has both subject matter or substantive jurisdiction with respect to the alleged offence and personal jurisdiction over the accused person.

Section 45 of the Act forms the core of Canadian cartel law. This provision states that: every one who conspires, combines, agrees or arranges with another person, (i) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product; (ii) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof; (iii) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property or; (iv) to otherwise restrain or injure competition unduly, is consequently guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

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[1] *Report on Developments and Enforcement of Competition Policy and Laws in the Western Hemisphere - Tripartite Committee Organization of American States Trade Unit* and "www.gettingthedealthrough.com"

Conspiracies are not *per se* illegal in Canada. Rather, the Act prohibits only those conspiracies that have serious - "undue" - competitive effects, as determined under a "partial rule of reason" analysis. There is no statute of limitations for Section 45 offences.As with most other criminal offences, a conviction under the Act requires the Crown to prove beyond reasonable doubt both the *actus reas* (illegal acts) and the *mens rea* (guilty mind) of the offence. The *actus reas* is established by demonstrating that (i) the accused was a party to a conspiracy, combination, agreement or arrangement, and (ii) the conspiracy, combination, agreement or arrangement, if implemented, would likely prevent or lessen competition unduly. In determining whether the agreement would or did cause an "undue" lessening of competition, the court will consider the structure of the market and the behaviour of the parties.

Proof of the *mens rea* of the offence is also a two-part test. First, the prosecutor must demonstrate that the accused subjectively intended to enter into the agreement and had knowledge of its terms. Second, the prosecutor must establish, using an objective test, that a reasonable businessperson would have or should have known that the likely effect of the agreement would be to cause an undue lessening of competition.

While Section 45 investigations traditionally have focused on price fixing, the section is broadly worded and potentially catches many forms of cooperation amongst competitors, including behaviour such as joint ventures and strategic alliances. The Act also prohibits Canadian corporations from implementing directives from an affiliated corporation for the purpose of giving effect to conspiracies entered into outside Canada (Section 46), bid-rigging (Section 47) and both horizontal and vertical price maintenance (Section 61).

The issue of substantive jurisdiction over conduct taking place outside of Canada has not been specifically canvassed in a contested criminal proceeding under the Act and, as a result, some uncertainty remains regarding the assumption of substantive jurisdiction by the courts over such conduct in criminal prosecutions under the Act. On the other hand, the general principle governing a Canadian criminal court's assumption of personal jurisdiction is that a person who is outside Canada and not brought by any special statute within the jurisdiction of the court is *prima facie* not subject to the process of that court. In other words, if the statute under which the proceedings are brought does not make special provision for the service of a summons outside the jurisdiction, then the court does not have jurisdiction and cannot try the accused, unless the person or attorneys to the jurisdiction of the court are present in Canada. For individuals who are not resident in Canada, a summons compelling attendance before a Canadian court cannot be served abroad for an offence under the Act. If no service has occurred, then Canadian courts will not have jurisdiction.

In international cartel cases, the Competition Bureau will often cooperate closely with other competition agencies, either through formal processes or informally. Formal procedures involve the invocation of Mutual Legal Assistance Treaties (MLATs), with the United States and numerous other countries or, less formally, under competition Cooperation Agreements, such as the Canada-USA and Canada-EU Agreements. Furthermore, there may be very wide-ranging informal contacts among Canadian and foreign investigative agencies on common issues during an inquiry. While it has been used sparingly, Canada may cooperate with countries and undertake formal procedures in their own jurisdictions to obtain evidence for a foreign investigation. These arrangements also permit Canadian and other antitrust-enforcement agencies to coordinate their enforcement activities, exchange confidential information and meet regularly to discuss case-specific matters.

During the years 1998 and 1999, the Competition Bureau experienced a busy year as a result of better detection methods and of granting immunity or favourable treatment to cooperating parties. More than $42 million was levied in fines. In addition, a number of cases were discontinued for lack of evidence or for other reasons after formal inquiries were conducted. The types of anti-competitive behaviour investigated by the Bureau are defined in four separate Acts: the *Competition Act*, the *Consumer Packaging and Labelling Act,* the *Precious Metals Marking Act*, and the *Textile Labelling Act*. These investigations included such important sectors as services, electricity, telecommunications, marketing and heavy

industries, such as steel. These types of cases were pursued on both the domestic and international level.

2.1.3 Brazil

Relevant legislations is Law no. 8.884 of June 11th, 1994, at some points modified or complemented by Law 10.149 of December 20th, 2000, and both contain all the general provisions regarding antitrust or competition matters. Brazilian law establishes both merger-control rules and how to define, deter and punish anti-competitive conduct, including, although not limited to, cartels. There is also Resolution no. 20, of June 9th, 1999, issued by *Conselho Administrativo de Defesa Econômica*, (CADE), which contains some definitions of anti-competitive conducts.

It is interesting to remark that, until the beginning of the 1990s, price control by the Federal Government made cartel enforcement totally unimportant. With Federal Government control over prices, the pricing authorities were obviously more in control of the market than the antitrust or competition authorities. Price control has a tendency to create cartel-like conduct, and they were, in effect, stimulated by the Government.

Nowadays, with the establishment of a free market by the Brazilian Federal Constitution, cartel enforcement has become a main concern of competition authorities. Enforcement of the competition law in Brazil is done by CADE, together with the *Secretaria de Direito Econômico* of the Ministry of Justice and *Secretaria de Acompanhamento Econômico* of the Ministry of Finance, all administrative authorities, although CADE is the only one that is independent from the Federal Government. Cartel is also a criminal offence governed by Law 8.137, of December 27th, 1990, which deems basically the same facts, described as administrative offences, to be crimes. However, the approach is substantially different. Administrative offences are punished by the competition or antitrust authorities, whereas crimes are investigated by the police, who present their conclusion to the State Attorney who, if and when he judges that a crime has been committed, will sue the persons who acted in the name of the relevant companies. Usually, and by the nature of their role, State Attorneys do not adopt a very economics-oriented approach to such investigations.

The regime captures actions outside the jurisdiction that have effects in Brazil, *eg* global cartels or cartels arranged outside Brazil so as to have effects in Brazil. The first condemnation of a hard-core cartel by CADE occurred in 1999 (Steel cartel). In addition, the cooperation agreement with United States, permitted administrative procedures to be initiated against two international cartels.

In Brazil, all competition authorities have been working jointly with Federal Regulatory Agencies (National Agency for Electric Energy, National Agency of Telecommunications, National Agency of Supplementary Health, etc.) in order to update or eliminate excessive rules, aiming to stimulate concurrence. In addition, actions have been taken to identify errors in current regulatory structures and some proposals of regulatory measures to stimulate concurrence have been made: participation in Law nº 9.787/99 to promote concurrence in the pharmaceutical sector, the participation in Project of Law nº 266/96 to increase efficiency and productivity in the sanitary sector, analysis of deregulations in civil aviation, participation in discussions about new models to adjust tariffs on federal toll roads, and in the case of oil derivates, to undertake measures aimed to continue the deregulation process to liberalize prices.

Recent developments in Brazilian law include: CADE's resolutions and SEAE's Directives and Acts. Together, these acts provide a guide for economic analysis of mergers, criteria to penalize companies that delay or deny requested information during anti-competitive investigations, and regulate the investigation faculties of antitrust agencies in anti-competitive and merger cases. Lastly, recent Law nº 9.781/99 establishes procedural taxation for competence processes at CADE.

2.1.4 Chile

Antitrust legislation in Chile is Law Decree 211/1973 on the defence of free competition ('the Free Competition Act'). The Free Competition Act contains rules prohibiting

anti-competing agreements, the abuse of dominant position, and other restrictive practices against free competition.

Competition rules in Chile are enforced by three antitrust agencies: the National Economic Prosecutor's Office (*Fiscalía Nacional Económica*), the Antitrust Commission (*Comisión Resolutiva*) and the Preventive Commissions (*Comisiones Preventivas*). The National Economic Prosecutor's Office is a permanent public service, independent of any other authority, created to investigate any conduct, act or agreement that tends to damage, restrict, or eliminate economic competition in the market, and require that either a Preventive Commission or the Antitrust Commission, as the case may be, take appropriate steps to remedy the situation.

The Antitrust Commission, an independent entity, is the highest antitrust tribunal. The Antitrust Commission is empowered to (i) investigate *ex officio* or at the request of the National Economic Prosecutor any facts that may involve an act or agreement against free competition; (ii) issue a decision and resolve, in each case, if necessary, the adoption of measures to modify or terminate acts, contracts, agreements or systems which are contrary to the Free Competition Act; (iii) order the modification of the by-laws of any private legal entity or its dissolution, the declaration of the inability of individuals to be appointed as officers in professional organizations; and (iv) request the modification or derogation of legal or regulatory stipulations that restrict or eliminate free competition, and the imposition of fines on the liable parties.

There are 12 Regional Preventive Commissions located in each administrative Region, and one Central Preventive Commission located in Santiago, the Chilean capital. The Central Preventive Commission handles cases involving more than one Region, in addition to the cases arising in the Santiago metropolitan area. The Preventive Commissions are empowered to inform, answer questions and determine how individuals, corporations and government agencies must deal with situations that hamper or restrict free competition. No complaint can be filed with respect to practices or agreements previously submitted to and approved by a Preventive Commission, unless the complaint is based on new evidence.

The Free Competition Act prohibits the execution or entering into of any act or agreement that tends to prevent free competition in economic activities within the Chilean territory. This prohibition encompasses both domestic acts or agreements and those related to external trade, the effects of which are produced within Chile. It is not necessary that the relevant acts or agreements effectively restrict or cause damage to free competition. The Free Competition Act would apply if certain acts or agreements are capable of, or tend to, hamper, restrict or eliminate free competition. In this regard, the Chilean antitrust authorities have not limited their jurisdiction to private entities but have also investigated acts or agreements executed or entered into by state-owned legal entities and regulated state activities, such as fixing tariffs for public services.

The Free Competition Act sets forth certain acts and agreements that may be unlawful, if they hamper, inhibit or prevent competition or tend to do so. The following acts and agreements are included: control, reduction or stopping of production, markets or sources of supply; the assignments of market zones for trading or distribution; the fixing of prices, whether directly or indirectly; any restrictions on the freedom to work or the freedom of workers to organise, assemble or enter into collective bargaining agreements within each company; and any interference with the legitimate access to an activity or job.

Monopoly concessions granted by the State in favour of individuals are against the Free Competition Act although monopolies can be granted by law to state-owned businesses or public institutions. No *de facto* monopolies are *per se* illegal.

The Free Competition Act penalises any person who executes or enters into, individually or collectively, any deed, act, or agreement that tends to prevent free competition within Chile in economics activities, both those of an internal nature and those relating to foreign trade.

Chile has entered into free-trade treaties with Canada and Mexico. In such treaties, the signatory countries formally agree to inter-agency cooperation and coordination between their antitrust authorities to further effective competition law enforcement in the free-trade area. Such countries must cooperate on issues of competition law-enforcement policy, including mutual assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free-trade area.

2.1.5 Colombia

In Colombia, the new Decree 2666, 2000, rules the participation of the Superintendency of Industry and Commerce in cases of mergers and acquisitions. It also rules the procedure for decision-making for the Competition Agency in cases of anti-competitive practices.

2.1.6 Costa Rica

In Costa Rica, although there were no changes in relevant competition Law no. 7.472, there is a project in the legislature to reform some of its content.

2.1.7 Jamaica

In Jamaica, the Commission regulates competition in many sectors vital to its economy, and also plays an important role in the development of competition policy within the CARICOM nations as a representative in the Free-Trade Agreement Area negotiating sessions on competition policy. Domestically, the Commission rules on sectors that included telecommunication, financial services and automotive sales. Although there are no recent official changes to the policies governing the Federal Trade Commission, there are several proposed changes that are worth noting. Draft amendments have been submitted to the Chief Parliamentary Counsel (CPC). These amendments are expected to be tabled in Parliament during the 2000/2001 Financial Year. The amendments are designed to clarify the legal jurisdiction of the Commission, strengthen its enforcement capabilities and lead to greater uniformity in the FCA. Also, The Draft of the Fair Competition (Notice and Procedures) Regulations 2000, which includes The Notice of Examination, Notice to Produce Documents and Settlement Procedures was completed by the CPC and will shortly come into force.

2.1.8 Mexico

In Mexico, a Code of Regulations was issued in order to further implement the Federal Law of Competition which effectively established mechanisms to enforce the Law with regard to monopoly practices, concentrations and barriers to inter-state commerce. In addition to helping to simplify many aspects of the Commission's procedures, this widely applied Code also aided in the promotion of greater transparency through the official gazette (*Diario Oficial de la Federación*) in broadening participation of economic agencies in the proceeding and increasing efficiency in identifying prohibited actions and the laws that correspond with those acts. Investigations of monopolistic conduct and other restrictions on competition, as well as attention to consultations from economic agents, are an upward tendency. The Commission rules on a wide number of issues ranging from absolute monopoly practices, such as price agreements, to relative monopolistic practice and interstate trade. These ruling included, but were not limited to, sectors such as agro-industry, information technology, banking and financial services, and the telecommunications industry.

2.1.9 Panama

In Panama, although there were no new laws or regulations specifically pertaining to competition policy, a law was passed that made March 15 the "Day of the Rights of the Consumer." The public-affairs initiative focuses on education to guarantee that Panamanian consumer are properly informed of their rights that are guaranteed by law. This initiative aims to point out the importance of maintaining open competition and equal access to all markets. Major cases in anti-competitive practices (cartels or otherwise) dealt with industries such as flour production, newspapers and airlines.

2.1.10 Peru

In Peru, in 1998 the Regulation for the Notification process for mergers in the Electric Sector strengthened the powers of the Commission on Free Competition, an act for which delineated a specific process for the authorization of merger operations in the aforementioned sector. Law nº 26976, the Antitrust Act, applicable in the Electricity Sector established this Regulation, and subsequently contains all provisions stipulated in that Law. This Regulation describes the legal process for notification in both horizontal and vertical mergers, a concrete manner and criteria for evaluations of the operation, a series of legal recourses for the Commission if a company does not comply with the Antitrust Act, the Regulation or the Decisions of the Commission or the Court. In addition to the tasks of monitoring markets, conducting investigations and analysing cases, and the effects of the new Regulation, the Commission plays a role in activities in the area of privatisation. As a result of the recent privatisation of the electric sector, a large number of the cases dealt with by the Commission had to do with matters relevant to this privatisation.

2.1.11 United States of America

Relevant law on competition is Section 1 of the Sherman Act, 15 USC § 1. The Antitrust Division of the Department of Justice ('DoJ') enforces it. The Litigation Section of the DoJ handles investigation and prosecution of cartels. These attorneys report to an Assistant Attorney General. The Associate Attorney General of the United States oversees the Antitrust Division.

The number and importance of successful international cartel prosecutions brought by the Antitrust Division has increased since the early 1990s. Since 1995, the Antitrust Division has made the prosecution of international cartels one of its highest priorities. Consequently, it has devoted more of its resources to uncovering international cartel behaviour that has significant economic consequences for American consumers. During fiscal year 2000, the Antitrust Division conducted approximately 30 grand-jury investigations into suspected international cartel activity. Currently, approximately one-third of the Antitrust Division's criminal investigations involve suspected international cartel activity.

Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade". It does not specifically identify the type of conduct that is illegal. (However, the conduct described above has been found to violate Section 1.) Cartel behaviour can be criminal under Section 1. In addition, cartel members may be liable in private civil suits under Section 4 of the Clayton Act.

An international cartel arrangement that provides for price-fixing, bid-rigging or allocation of volume, markets or customers, constitutes a *per se* violation of Section 1.

The US antitrust laws apply to conduct that occurs outside the United States that produces a substantial effect within the United States. The 1995 DoJ and Federal Trade Commission (FTC) Antitrust Enforcement Guidelines for International Operations ('the International Guidelines') state that "[a]nti-competitive conduct that affects US domestic or foreign commerce may violate the US antitrust laws regardless of where such conduct occurs or the nationality of the parties involved".

However, there are two significant challenges to successfully investigating and prosecuting international cartels: (i) gaining access to evidence and witnesses that are located abroad – out of the reach of US subpoena power and search-and-seizure authority; and (ii) obtaining jurisdiction in the US courts over not only the case itself, but also over foreign defendants.

The Antitrust Division cooperates with foreign enforcement agencies and enlists their support in assisting with investigations. This cooperation may range from (i) case-specific arrangements, such as executing search warrants and sharing investigative information; (ii) antitrust cooperation agreements with certain countries; to (iii) treaties.

The DoJ has several types of cooperation arrangements with foreign antitrust enforcement authorities. These range from informal, case-specific arrangements to

cooperation agreements to treaties. The United States has antitrust agreements in place with Australia, Germany, the European Union, Canada, Japan, Israel (signed but not in effect), Brazil (signed but not in effect) and Mexico (signed but not in effect). These are 'soft' agreements that do not override applicable national laws of either party. In particular, 'soft' agreements do not permit sharing confidential information that could not otherwise be disseminated pursuant to national laws.

Pursuant to the International Antitrust Enforcement Assistance Act (IAEAA), the United States signed an agreement with Australia that permits the two nations' antitrust enforcement agencies to share confidential information on both criminal and civil matters. This agreement is considered 'hard' because it not only overrides otherwise applicable national laws but is also binding on each country.

In addition to these bilateral arrangements, the DoJ has been working with the OECD toward building a multilateral consensus among the former's Member States on a wide range of antitrust and competition matters. For example, in 1998, the OECD ministers endorsed a DoJ-introduced Recommendation on Hard-Core Cartels that encourages OECD member countries to enact and enforce laws prohibiting hard-core cartels and to enter into agreements with other countries to permit sharing evidence with foreign antitrust authorities to the extent permitted by national laws.

Also, the FTC announced changes in the two thresholds of Section 8 of the Clayton Act that define when it is unlawful for an individual to serve as an officer or director of two or more competing corporations. These interlinking directorates would be illegal if each of the two companies has capital, surplus, and undivided profits in excess of $14.73 million and the competitive sales of each corporation exceed $1.473 million.

2.1.12 Venezuela

In Venezuela, *Resolución* Nº SPPLC/039 – 99 further defined the criteria for determining if a concentration violates Article 11 of the Law to Promote and Protect Open Competition. The legislation created a concrete process to evaluate if a concentration generates negative effects on open competition in a particular market. In order to accomplish this goal, the legislation describes a series of criteria used to evaluate a concentration. These criteria include provisions that define the relevant market for the concentration, the market share before and after the concentration and the barriers to entry in the market. Additionally, the legislation considers the economic benefits that result from such a concentration. The majority of the cases handled by the Superintendency, in years 1998-1999, dealt with complaints about price-fixing, collusion and other types of anti-competitive practices. The Superintendency also prepared sectoral reports on agriculture, telecommunications, electricity and others, and participated in various projects and political discussions related to deregulation throughout the economy.

2.2 Europe

European Union laws and those of some European countries are referred to hereunder in order to make the present study broad and authorize comparison.

2.2.1 European Union (EU)

Within the European Union Member States, both national and EU competition laws apply to cartels. As far as EU competition law is concerned, the relevant provision is Article 81 of the EC Treaty. The rules regarding enforcement procedures are contained in Regulation 17.

The principal enforcement agency is the European Commission (the Commission). DG Competition is the service responsible for the enforcement of the competition rules. There is a special cartels unit within DG Competition, which investigates suspected cartels. Investigations can also be carried out by the sectoral units in DG Competition within their respective area of responsibility. Over the past three years the Commission has reaffirmed various times its commitment to detecting and punishing 'hard-core' cartels.

Article 81 is also capable of enforcement before the national courts in all the EU Member States and, in some Member States, by the national competition authorities. Article 81 can apply to agreements concluded between undertakings located outside the EU but which have an effect on competition within the EU.

The EU has cooperation agreements (either multilateral or bilateral) with certain non-EU countries, notably the US, Canada, Australia, Japan and Switzerland. The most significant of these cooperation agreements is the US mutual-assistance agreement which provides for the EU and US authorities to notify each other where their enforcement activities may affect the interests of the other, to assist each other in their enforcement activities and to cooperate regarding the investigation of anti-competitive activities in the territory of one party adversely affecting the interests of the other. As a result there has been growing cooperation between the EU and US in cartel matters recently (*eg* in Lysine, Graphite Electrodes and Vitamins). Contacts between the Commission and the US authorities have become commonplace and there has been a number of staff visits. The cooperation agreements do not allow the Commission to disclose confidential information received from companies in the course of its investigations.

As regards the interplay between the EU and the national authorities in the Member States, there is generally cooperation between the different authorities as to whether cases are pursued at the national or EU level. There is no formal rule on avoiding double sanctions in the event that there are dual investigations at the EU and national level.

2.2.2 France

Long-standing case law allows the application of the prohibition on cartels to behaviour which has an effect on French territory, even though the participants in the cartel are located outside French territory. This construction has been endorsed recently by the Law on the New Economic Regulations. This Law amended Article L 420-1 of the New Commercial Code by specifying that cartels are prohibited “even [when] directly or indirectly [implemented] by a company of a group located outside France”.

At the European level, the Competition Council may assist foreign authorities in specific antitrust cases, in particular the European Commission. As a result, at the European Commission’s request, the French authorities may initiate investigations that the European Commission deems necessary (Article 14(1) of Regulation 17/62) or even execute orders, pursuant to a specific decision (Article 14(3) of Regulation 17/62).

If they affect trade between Member States, anti-competitive agreements having an effect within French territory may be subject to both EU law (Article 81) and French law (Article L 420-1 of the Commercial Code). Consequently there is a risk of a conflict between the decisions of the French authorities and those of the European Commission. To ensure the uniform application of EU Law, the Competition Council should normally suspend its decision until the European Commission renders its final decision.

Theoretically, the Competition Council may render a decision under French law penalizing an anti-competitive practice, while the European Commission is able to punish similar practices under EU Law. However, the Competition Council has often postponed its decision until the decision of the European Commission is adopted.

Pursuant to the new Article L 462-9 of the Commercial Code, cooperation between the European Commission and the French authorities regarding the communication of information and documents and the conduct of investigations has been given a legal basis.

2.2.3 Germany

The relevant legislation applies to all restraints of competition which have effects within Germany (effects doctrine, Auswirkungsprinzip, Act Against Restraints of Competition § 130(2). Foreign undertakings, therefore, are subject to the GWB to the extent that they participate in restrictive agreements or concerted practices having effects on the German market. The GWB may be applied to foreign undertakings even though they have never been directly active in the German market, let alone maintained a German subsidiary,

branch or other business establishment. § 1 GWB applies if horizontal restraints on competition are likely to affect the German market. Actual effects are not required.

Since 1958, rules on cartels have been an essential part of the Act Against Restraints of Competition, or Gesetzgegen Wettbewerbsbeschränkungen (GWB), in Germany. The GWB has been amended six times. The latest amendment in 1998 attempted to harmonise German with EU law.

In addition to cooperation agreements with the US and France, the European convention on the service of documents relating to administrative matters of 1977 provides for mutual assistance concerning the service of administrative letters in foreign jurisdictions (contract parties: Austria, Belgium, France, Germany, Italy, Luxembourg and Spain).

In practice, however, of greater practical importance, by contrast, is the close (informal) cooperation between the national authority and the European Commission, which most recently has been extended to the competition authorities of the other EU Member States: since spring 2001, the competition authorities of the EU Member States and the Commission have adopted a measure on closer cooperation, which is called ECA. This (informal) cooperation includes meetings of senior officials every six months and working groups on specific topics. So far, the European competition authorities have for example discussed their leniency programmes and their approach to multiple merger filings.

As a matter of principle, the fact that certain cartels are investigated in other jurisdictions may trigger similar investigations in Germany, provided the cartel is active or has effects in Germany as well. The fact that an undertaking or individual may have already been punished or fined in another country does not prevent the German cartel authorities conducting an investigation and levying fines, and in calculating the amount of the fine they will not necessarily take into account the fine already imposed in another country. As investigations by national cartel authorities frequently concern the effects of a cartel within different jurisdictions and markets, the problem of double punishment (*no bis in idem*) will generally not arise. With regard to parallel investigations by the German cartel authorities and the European Commission, the German cartel authorities may in principle investigate and fine a cartel in parallel with the Commission (taking into account fines already imposed by the Commission) but will normally refrain from conducting their own investigation if the Commission investigates the case.

2.2.4 Italy

The Italian Competition Authority has been applying a *per se* rule in condemning cartels, stating that when agreements between undertakings, even only potentially, reduce competition substantially within the national market or in a substantial part of it, they are prohibited (Article 2 of the Act). Vertical agreements may also be prohibited under Article 2. The Authority, however, has often applied a rule of reason when investigating distribution agreements and other kind of vertical arrangements

Pursuant to Article 2 of the Act, agreements are prohibited between undertakings which have as their object or effect the appreciable prevention, restriction or distortion of competition within the national market or within a substantial part of it. For the purpose of triggering the Italian jurisdiction, one has to look at the effects of the conduct in the Italian market and not where the conduct takes place. It follows that even if the conduct occurred abroad, but produced anti-competitive effects in the Italian market, the conduct is caught under Article 2.

The Authority is a member of the various advisory committees set up by the Directorate-General for Competition of the European Commission to receive the non-binding opinions of the antitrust authorities of different Member States with regard to draft decisions on Community cases relating to agreements, abuses of dominant position and concentrations.

There are other forms of cooperation between the Authority and the Commission, including the two-way exchange of information, and activities by the Authority to support the Commission when inspections are conducted on companies in Italy. In compliance with Section 54 of Law No. 52 of February 6 1996, issued in order to fulfil the obligations deriving

from Italian membership in the Community, the Authority can enforce Articles 81 subsection 1 and 82 of the Treaty establishing the European Economic Community having powers and acting according to the procedures provided for the enforcement of the national legislation.

3. CROSS REFERENCE

3.1 UNCTAD

The international measures developed by the United Nations Conference for Trade and Development, in its Set of Principles and Rules, suggest that collaboration at the international level should aim at eliminating or effectively dealing with restrictive business practices, including those of transnational corporations, through strengthening and improving controls over restrictive business practices adversely affecting international trade, particularly that of developing countries, and the economic development of these countries. In this regard, action should include: (i) work aimed at achieving common approaches in national policies relating to restrictive business practices compatible with the Set of Principles and Rules; (ii) communication annually to the Secretary-General of UNCTAD of appropriate information on steps taken by States and regional groupings to meet their commitment to the Set of Principles and Rules, and information on the adoption, development and application of legislation, regulations and policies concerning restrictive business practices; (iii) continued publication annually by UNCTAD of a report on developments in restrictive business-practices legislation and on restrictive business practices adversely affecting international trade, particularly the trade and development of developing countries, based upon publicly available information and as far as possible other information, particularly on the basis of requests addressed to all member States or provided at their own initiative and, where appropriate, to the United Nations Centre on Transnational Corporations and other competent international organizations.

Yet according to the Set of Principles and Rules: (i) consultations should happen where a State, particularly of a developing country, believes that a consultation with another State or States is appropriate in regard to an issue concerning control of restrictive business practices. Accordingly, it may request a consultation with those States with a view to finding a mutually acceptable solution. When a consultation is to be held, the States involved may request the Secretary-General of UNCTAD to provide mutually agreed conference facilities for such a consultation; (ii) States should accord full consideration to requests for consultations and, upon agreement as to the subject of and the procedures for such a consultation, the consultation should take place at an appropriate time; (iii) if the States involved so agree, a joint report on the consultations and their results should be prepared by the States involved and, if they so wish, with the assistance of the UNCTAD secretariat, and be made available to the Secretary-General of UNCTAD for inclusion in the annual report on restrictive business practices.

It is also believed there should be continued work within UNCTAD to the elaboration of a model law or laws on restrictive business practices in order to assist developing countries in devising appropriate legislation. States should provide necessary information and experience to UNCTAD in this connection. Besides, UNCTAD considers it advisable to implement within or with facilitation by UNCTAD - and other relevant organizations of the United Nations system in conjunction with UNCTAD - technical assistance and advisory and training programs on restrictive business practices, particularly for developing countries. Therefore, experts should be provided to assist developing countries, at their request, in formulating or improving restrictive business-practices legislation and procedures and seminars, training programs or courses should be held, primarily in developing countries, to train officials involved or likely to be involved in administering restrictive business-practices legislation and, in this connection, advantage should be taken, *inter alia*, of the experience and knowledge of administrative authorities, especially in developed countries, in detecting the use of restrictive business practices. A handbook on restrictive business-practices legislation should be compiled and relevant books, documents, manuals and any other information on matters related to restrictive business practices should be collected and made available, particularly to developing countries. Exchange of personnel between restrictive business-practices authorities should be arranged and facilitated and international

conferences on restrictive business-practices legislation and policy should be arranged, as well as seminars for an exchange of views on restrictive business practices among persons in the public and private sectors.

Lastly, it is the view of UNCTAD that International Organizations and financing programs, in particular the United Nations Development Program, should be called upon to provide resources through appropriate channels and modalities for the financing of activities set out above. Furthermore, all countries are invited, in particular the developed countries, to make voluntary financial and other contributions for the above-mentioned activities.

3.2 OECD[2]

Laws of most OECD Member countries provide for the possibility of large fines against enterprises found to have participated in a cartel. Maximum permissible fines may be expressed either as a specific monetary amount or as a percentage of some measure of turnover, or both. In the first category are Australia (AUD 10 million), Canada (CAD 10 million per count for conspiracies and discretionary for bid-rigging) and Mexico (375,000 times the minimum general wage prevailing in the Federal District, currently the equivalent of about USD 1.5 million). In the second category, maximum fines expressed as a percentage of turnover, are France (10% of world-wide turnover), European Union (10% of previous year's global turnover), Hungary (10% of previous year's turnover), Italy (10% of previous year's turnover), Sweden (10% of annual revenue), and United Kingdom (10% of UK turnover for the duration of cartel, maximum three years).

Several countries have both types of "maximum" fines: Czech Republic (CSK 10 million or 10% of "net turnover" for previous year), Finland (EUR 672,752 or 10% of previous year's global turnover), Ireland (EUR 3,809,214 million or 10% of previous year's turnover), Japan (administrative surcharge of up to 6% of cumulative sales of products subject to the agreement, maximum three years, criminal fine of up to JPY 100 million), Korea (surcharge of 5% of turnover affected by cartel or KRW 1 billion, criminal fine of up to KRW 200 million), Netherlands (EUR 450,000 or 10% of turnover), Poland (the lesser of EUR 5 million or 10% of previous year's turnover) Slovak Republic (SKK 10 million or 10% of previous year's turnover), Spain (EUR 901,518 or 10% of previous year's turnover) and Turkey (TRL 200 million or 10% of previous years gross income). Two countries also provide alternatives, but instead of total turnover the maximum is stated in terms of unlawful gains: Germany (administrative fine of EUR 511,292 or three times additional profit from the cartel, and United States (USD 10 million or twice the gain to the cartel or loss to the victims). A recent amendment to the New Zealand law provided for three alternatives: the greater of NZD 10 million, three times the illegal gain, or if the illegal gain is not known, 10% of the enterprise's annual turnover. Denmark and Norway provide for fines, but maximums are not stated. In Norway a court can also order confiscation of the cartel gains.

Competition laws of OECD's countries provide for a wide range of sanctions against cartel participants, and by their terms they permit the imposition of heavy penalties. There is a clear trend in several countries toward stronger sanctions in cartel cases, and other countries are reviewing their laws and policies to provide for enhanced sanctions against cartels.

The principal purpose of sanctions in cartel cases is deterrence. The decision to form or join a cartel is primarily a financial one – cartels can rapidly and substantially improve their participants' profitability. An effective deterrent, therefore, is one that promises, on average, to take away the financial gains that otherwise would accrue to the cartel members. Sanctions have another, related purpose in the cartel context – that of providing an incentive for cartel participants to defect from the secret agreement and provide information to the investigators.

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[2] *Report On The Nature And Impact Of Hard-core Cartels And Sanctions Against Cartels Under National Competition Laws* - DAFFE/COMP(2002)7

The “carrot and stick” approach to cartel investigation requires that the “stick” – the possible sanction – be sufficiently severe to give effect to the “carrot” – the opportunity to avoid the sanction by co-operating. Thus, for both deterrence and co-operation purposes the potential sanction must be substantial if it is to be effective.

3.3 Doctrine remarks and WTO[3]

The enforcement record of the 1990s has demonstrated that private international cartels are neither relics of the past nor do they always fall quickly under the weight of their own incentive problems. Even where cheating eventually undermines a cartel, consumers may have been burdened by years of increased prices, and enduring barriers to entry have often been created by strategic cartel behaviour. Of a sample of forty such cartels prosecuted by the USA and EU in the 1990s, twenty-four lasted at least four years. And for the twenty cartels in this sample where sales data are available, the annual worldwide turnover in the affected products exceeded US$30 billion. Prevailing national competition policies are oriented towards addressing harm done in domestic markets, and in some cases merely prohibit cartels without taking strong enforcement measures. Aggressive prosecution of cartels can deter collusion, but only where sufficient international cooperation exists to gather evidence and prosecute offenders so that cartel participants actually have something to fear.

In its 1997 Annual Report, the World Trade Organization (WTO) highlighted the growing significance of international cartels for policy-makers, noting “there are some indications that a growing proportion of cartel agreements are international in scope.” Increasing trade liberalization may, by increasing competition in formerly protected national markets, have increased firms’ incentive to participate in cartels. These cartels undermine international integration and decrease the benefits of liberalization to consumers.

Export cartels are also a problem to be dealt with. They exist when associations of firms cooperate in the marketing and distribution of their product to foreign markets. The competition laws of virtually all countries exempt such export cartels from prosecution by domestic authorities. In some legislation, exemptions for export cartels are explicitly motivated by mercantilism: a desire to increase national exports and give national firms a competitive advantage relative to firms based in other countries. In most cases, however, this exemption is implicit in national competition laws, which cover only those activities affecting the domestic markets and typically export activities are presumed not to affect domestic markets. Several countries do, however, provide specific exemptions from domestic laws for cartels that would otherwise violate domestic laws as long as their activities are restricted to export markets. In most cases, however, no registration is required, so there is very limited information regarding the number or activities of export associations. When the USA passed the Webb-Pomerene Act in 1918, exempting American export cartels from some of the USA legal provisions against cartelisation, most of its trading partners did not prohibit cartels. The USA was then a relatively small player in many international markets, and those markets were effectively controlled by legal international cartels dominated by large European producers. Foreign cartels took actions to bar entry from non-members, but USA firms were not allowed by USA law to join these international cartels. USA firms were therefore blocked from exporting to these markets. In such an environment, exemptions for export cartels were most likely export-promoting, even if they did not necessarily increase substantially competition in foreign markets.

Presently, the likely effect of these exemptions for export cartels is to make it more difficult for national governments to exchange information and evidence regarding the activities of suspected international cartels. This is because nations are reluctant to provide information about those acts that their exporters engage in which they consider to be legal under their own laws. However, recent reforms of competition law in EU countries have restricted or eliminated export cartel exemptions in some member states. For example, Germany’s new competition law explicitly omits its earlier provision for exemption and registration of export cartels. The UK’s 1998 competition law omits mention of the Fair

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[3] *International Cartel Enforcement: Lessons from the 1990s* - Simon J. Evenett, Margaret C. Levenstein, and Valerie Y. Suslow

Trading Law's provisions for exemption and registration of export cartels. Where countries have provided explicit exemptions for export cartels, these do not appear to be widely used by international cartels. For example, there is no mention of the existence of a Webb-Pomerene Association in any of the recent international cartel convictions obtained by the US Justice Department. The registration requirement may deter cartel participants from availing themselves of the exemption. Firms engaged in price-fixing may prefer secrecy to a limited immunity that might bring them to the attention of competition officials.

International cartels are a non-trivial impediment to the flow of goods and services across borders. Recent enforcement experience suggests that widespread cartelisation in certain industries has affected many nations' markets. This might not be a concern if national antitrust laws provided a sufficient deterrent to international cartels — however, both *a priori* reasoning and the fragmentary record of international cooperation in this area suggests that this is not the case. In particular, three aspects of cartel enforcement need reform. First, the probability of a cartel being punished is considerably reduced by the current patchwork of bilateral cooperation agreements on evidence collection and sharing with foreign jurisdictions. Second, penalties based on national assessments of the pecuniary gains to cartelisation are unlikely to deter cartels that operate in many countries' markets. Third, vigilance should not end with a cartel's punishment, as former price-fixers often try to effectively restore the *status quo ante* by merging or by taking other steps that lessen competitive pressures and raise prices. Unless a pro-efficiency approach drives all competition policy enforcement, the benefits created by keen international cartel enforcement will be eroded by lax enforcement in other areas.

Following recommendations suggested by Simon J. Evenett, Margaret C. Levenstein, and Valerie Y. Suslow[4], any proposed reform to international cartel enforcement should be assessed, in large part, on the deterrent it provides to firms to cartelise markets in the first place. That deterrent's strength depends on the firms' perceptions of the probability of getting punished and the size of any expected penalty. Although the pecuniary gains from cartelisation may result from raising prices across the globe, recent enforcement experience suggests that much of the evidence and many of the people responsible for international cartelisation are to be found in the nations where the headquarters of globally-oriented firms are located. This suggests that although calculations of the pecuniary harm should in principle shift from the national to the global, at present reforms to the "investigative technology" probably need only focus on cooperation between the industrial nations. As a first response, it is tempting to advocate creating a global enforcement authority with powers to collect evidence, conduct interviews, and then compute the global gains from cartelisation and levy the appropriate fines. In principle, such a proposal could overcome the deficiencies of the current system of national enforcement and bilateral cooperation. However, at this juncture no nation appears ready to pool sovereignty in such an aggressive manner, or to allow its citizens and firms to be punished by such a body. The EU's relatively weak enforcement powers against price-fixing and the like are a testament to the reluctance of EU members, who have been pooling sovereignty in other areas for decades, to cede powers in cartel cases—even though the distortions to the free flow of goods and services across European borders that cartels can engender are widely acknowledged. So, we should turn our attention to more modest and perhaps more likely reform options. One option would be to address the deficiencies of the current system of national corporate-leniency programs. First, a provision should be introduced so that firms can simultaneously apply for leniency in multiple jurisdictions and have those applications evaluated on the totality of the evidence of cartelisation presented. Second, to reduce the uncertainty faced by the "first" firm to come forward with evidence about a currently uninvestigated international cartel, corporate-leniency programs should state the minimum (non-zero) degree of relief from penalties. Such a reform would further increase the incentive of any cartel member to "defect," making cartelisation harder to sustain. Another option takes initial steps to remedying this deficiency. Once the investigation turns to the matter of calculating pecuniary gain, this inevitably controversial step could be turned over to a pre-selected panel of qualified and independent

[4] *Idem.*

experts, who would reside in the signatories to a plurilateral agreement. This panel would present estimates (with associated estimated standard deviations) of the cartel's gains across all the affected nations that are parties to this agreement. The panel would break down its estimate of the total gains to the cartel from each nation's markets, which enforcement authorities would take into account when penalizing cartel members or when making their case to a court to penalize cartel members. The obvious disadvantage of this latter reform option is that gains from cartelising nonsignatories' markets are not taken into account. Given the non-trivial amounts of information required to come up with a sensible estimate of cartel's pecuniary gains, it is naïve to blithely insist that any supra-national panel estimate the global consequences of a cartel. Instead, a plurilateral agreement should have open accession clauses to enable non-members that have developed both national enforcement capabilities and which have attained a pre-specified degree of international anti-cartel cooperation to join. Furthermore, thought could be given to informing non-signatories that their interests are affected by a cartel in return for a commitment to treat leniently any firm that has volunteered information during the investigative stages. Taking these proposals together, a reform process could unfold over time in which industrial countries move from their current arrangements to the first through third options. Strengthening national anti-cartel laws and commitments to enforcement are a necessary prerequisite. The enhanced cooperation will foster trust between antitrust agencies, which is essential if agencies are to have any faith in the intent and capacity of others to use the ample discretion built into most anti-cartel laws to successfully conduct international cartel investigations. Admittedly such a process would not immediately lead to the creation of a supra-national anti-cartel agency.

An alternative to these reform options that has been proposed is a plurilateral or multilateral agreement at the World Trade Organization (WTO). Such an agreement could involve commitments to enact and enforce an anti-cartel law, and to cooperate with investigations launched abroad. As there is less than ten years of experience with international anti-cartel investigations, it is doubtful that best practices in enforcement have evolved to such a stage that they could be codified in an agreement. This implies that any such multilateral agreement would probably have to be based on minimum substantive standards and implementation procedures. Investigative and prosecutorial discretion are likely to remain and it is not obvious how a WTO dispute panel might assess whether a government used that discretion in a manner entirely consistent with the agreement. The likely outcome is that only those antitrust authorities that have not followed certain minimal procedural steps would be found in violation, an outcome that is unlikely to result in significant increases in the probability that cartel members will be punished. Finally, such a WTO agreement is unlikely to ensure that the penalties for cartelisation are based on the worldwide pecuniary gains. For all of these reasons a WTO agreement is, at present, unlikely to remedy the deficiencies of national anti-cartel enforcement. However, the international agreements described earlier could provide the basis for strengthening anti-cartel enforcement in countries that currently are not willing or able to adopt and enforce stronger anti-cartel laws. A WTO agreement could be crafted to explicitly address two forms of privately-orchestrated and trade-related cartels. First, laws which permit recession cartels, where firms under considerable competitive pressure — potentially from imports — to engage in market division, could be banned on the grounds that the WTO already has well-established safeguard mechanisms. Second, disciplines could be placed on legally sanctioned export cartels. There appears to be a justification for letting small firms share the considerable fixed costs of marketing and exporting; the objective should be to prevent such arrangements from resulting in consumer welfare losses. Two disciplines could be imposed on laws granting exemptions for export cartels: notification and unimpeded entry. Notification would involve the publication of the names of the members of such cartels, which will facilitate monitoring by antitrust officials in the importing country. A requirement that entry to such arrangements be unimpeded would help both reduce any market power that is enjoyed by existing members, and make coordinating any restrictive business practices more difficult.

3.4 Discussion to date at the FTAA Competition Group

The Negotiating Group on Competition Policy of the Free Trade Agreement Area (FTAA) has been working towards consensus regarding competition and has already established that national law and jurisdiction should always be respected at the FTAA. Also, principles such as the due process of law and transparency regarding competition law enforcement have already been agreed upon. On the other hand, international cartels pose one of the most intriguing problems to the negotiating countries.

The seventeenth meeting of the Negotiating Group on Competition Policy of the Free Trade Agreement Area was held in Panama from July 11th 1o 12th, 2002. Representatives from 23 countries of the hemisphere were in attendance: Argentina, Bahamas, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Jamaica, Mexico, Panama, Paraguay, Peru, St. Kitts & Nevis, Trinidad and Tobago, USA, Uruguay and Venezuela. The following is a list of the mains items that were discussed:

- Open exchange of ideas on the general issues and aspects associated with the Draft Chapter on Competition Policy
- Review of the terms of reference and bibliography presented by the Tripartite Committee, for a subsequent study on Special and Differential Treatment
- Review of the civil-society contributions that the delegations believed the Group should evaluate
- The Group drafted a Work Plan to take them through to July 2003; it will be submitted to the TNC for consideration
- Review of the Report to the TNC on the work carried out by the Group from May 2001 to July 2002 on all the mandates set out in the Buenos Aires Ministerial Declaration, which reflects their concerted efforts to eliminate an increasingly greater number of brackets.

4. CONTRIBUTION TO FTAA DISCUSSION

Given the discussions that have been going on at the Negotiating Group on Competition Policy of the FTAA, it should be interesting to highlight the main concerns that could be addressed at that Group in order to achieve the best consent possible:

(i) Should a cartel be condemned *per se* or should the rule of reason apply?

(ii) Should the countries involved in the FTAA adopt a positive comity when it comes to enforcement of their national competition law?

(iii) To what degree should cooperation exist between FTAA countries regarding investigation, judgement and/or sanction of cartels?

(iv) Should information exchange between FTAA countries regarding competition matters be mandatory or discretionary? What about confidential information?

(v) Is it possible for FTAA countries to create some legal mechanism to facilitate punishment of international cartels without violating the already agreed upon respect to national sovereignty?

(vi) How will State monopolies be dealt with in view of the competition principles already agreed upon by the FTAA?

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INTER-AMERICAN JURIDICAL COMMITTEE
QUESTIONNAIRE ON COMPETITION POLICY AND CARTELS

QUESTIONS TO BE SENT TO OAS MEMBER STATES:

Note: If the information requested in questions 1 (a), 2 and 3 is included in a publicly available document (such as the document prepared by the FTAA Negotiating Group on Competition Policy entitled *Inventory of Domestic Laws and Regulations relating to Competition Policy in the Western Hemisphere*, FTAA.ngcp/inf/03/Rev.2, dated March 22, 2002), and that information is up-to-date, complete and accurate, please provide a reference to the appropriate section of that document.

Answers to be sent to OAS Member States:

1. (a) Does your country have legislation and/or regulations dealing with competition policy? If so, please provide a brief description of your domestic competition law

   (b) If your country does not have a domestic competition regime, is your country currently considering adopting such a regime? If so, have you drafted legislation and/or regulations to establish a competition regime? What is the status of the draft legislation and/or draft regulations?

2. Please identify the domestic legislative, or regulatory, provisions that address cartel activity (such as price fixing, market allocation, and bid rigging). Please provide a description of these provisions.

3. Please provide information with respect to:

   (i) the government department or governmental agency responsible for administering and enforcing your competition regime;

   (ii) the composition and role of this department or agency;

   (iii) whether the functions of this department or agency are administrative or judicial in nature;

   (iv) whether decisions of the department or agency subject to review by a tribunal or court;

   (v) the process pursuant to which such decisions can be reviewed; and

   (vi) the grounds for any such review.

4. Please summarize any recent significant decisions, either by the department or agency, or by the tribunal or court, made with respect to cartels.

5. (a) Are certain cartels (such as, for example, export and import cartels) exempt from your domestic competition regime? Please identify the types of cartels exempted from your competition regime and explain the rationale for that exemption.

   (b) Please describe the process pursuant to which a cartel can be exempted from your domestic competition regime, including the government agency responsible for exempting cartels, the grounds on which such exemptions can be granted or refused, and the number of cartels were exempted within the past 5 years.

6. Does your domestic competition law regime provide that firms organizing an export association or export cartel (or an import association or import cartel) must register with a government agency to receive an exemption from your competition regime? If so, please identify the government agency and indicate how many export associations or export cartels (or import associations or import cartels) were registered by that agency in the past 5 years.

7. Are there provisions in your competition regime that permit enforcement action to be taken with respect to cartels having an effect in other jurisdictions?

8. What have been the areas of greatest difficulty and concern in the application of your policies on cartels in your jurisdiction?

9. What governmental and/or nongovernmental efforts have been undertaken in training or generally promoting awareness and public knowledge about cartel policies within your jurisdiction?

Questions to be sent to the various regional trading blocks:

NAFTA, CARICOM, ANDEAN PACT, MERCOSUR, SICA (Central American Integration System)

Note: If the information requested in questions 1, 2 and 3 is included in a publicly available document (such as the document prepared by the FTAA Negotiating Group on Competition Policy entitled *Inventory of the Competition Policy Agreements, Treaties and Other Arrangements in the Western Hemisphere*, FTAA.ngcp/inf/03/Rev.2, dated March 22, 2002) and the information is up-to-date, complete and accurate, please provide a reference to the appropriate section of that document.

1. Has your organization adopted obligations with respect to competition policy applicable within the territory of your organization?

2. Please identify the provisions of this competition policy that address cartel activity, such as price fixing, market allocation, and bid rigging. Please provide a description of these provisions.

3. Please identify the regional agency (or, if appropriate, the governmental agency in each country) responsible for implementing, administering and enforcing these obligations, and describe the composition and role of this agency.

4. Please summarize any recent significant decisions or developments of this agency with respect to cartels.

4. Improving the administration of justice in the Americas: access to justice

Resolution

CJI/RES.40 (LX-O/02) *Improving the administration of justice in the Americas: access to justice*

At the Inter-American Juridical Committee's LX regular session (Rio de Janeiro, February-March 2002), Dr. Brynmor Pollard, rapporteur for the topic, delivered a brief oral report. Dr. Pollard pointed out that the issue of access to justice had taken on increasing importance in recent years, and underscored the need to take measures in this regard. The rapporteur noted that this topic had been on the agenda of the Meetings of Ministers of Justice or of Ministers or Attorneys General of the Americas (REMJAs), alongside such other topics as cyber crime and terrorism.Dr. Brynmor Pollard referenced the document prepared by the General Secretariat, GE/REMJA/doc.77/01, *Alternative conflict settlement mechanisms in the justice systems of the American countries.* Dr. Pollard again emphasized the importance of the relationship between the Inter-American Juridical Committee and the Justice Studies Center for the Americas. He reported that some measures had already been taken to build up cooperation between the two. Finally, he made reference to REMJA IV, which was held in Trinidad and Tobago, March 10 through 13, 2002.Several members of the Inter-American Juridical Committee spoke to the importance of alternative conflict settlement mechanisms and also noted how important it was to see the Inter-American Juridical Committee's recommendations incorporated into the REMJA resolutions. Dr. João Grandino Rodas noted that alternative conflict settlement mechanisms and access to justice were two different topics. He noted that while they might have certain areas in common, the Committee would be well advised to deal with them separately. He suggested that a new topic could be added to the Committee's agenda; at the very least, they had to be distinguished in some way. Dr. Kenneth Rattray explained that access to justice was in part a question of whether individuals had the means to access the courts, it could also become a problem of procedures, as all too often the goal of swift and effective justice was trapped in a procedural quagmire. Dr. Eduardo Vío Grossi observed that this topic was so important that two bodies had already been created to address it immediately, namely REMJA and the Justice Studies Center for the Americas. He was, therefore, of the view that to be effective, the Committee had to find its own angle on this question. He suggested the idea of working on an eventual inter-American charter on the administration of justice, spelling out basic, generally accepted principles of inter-American law that would enable States to make progress on this front.

Finally, the Inter-American Juridical Committee approved resolution CJI/RES.40 (LX-O/02), *Improving the administration of justice in the Americas: access to justice*, whereby it decided to keep this topic on its agenda, taking particular note of any relevant decision forthcoming from the IV Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas, held in Trinidad and Tobago, March 10 through 13, 2002. It also asked the rapporteurs that they take those decisions and any consultation to be made with the Executive Director of the Justice Studies Center for the Americas into account when preparing their proposals pertaining to the Inter-American Juridical Committee's future work on this topic, so that those proposals could be submitted to the Committee for consideration at its LXI regular session, scheduled for August 2002.

In resolution AG/RES.1844 (XXXII-O/02) adopted at its thirty-second regular session (Bridgetown, Barbados, June 2002), the General Assembly asked the Inter-American Juridical Committee to continue cooperating with the work requested of it in the future.

At its LXI regular session (Rio de Janeiro, August 2002), the Inter-American Juridical Committee decided to make Dr. Ana Elizabeth Villalta co-rapporteur for this topic.Dr. João Grandino Rodas observed that perhaps the examination of the more general topic should also include the vehicles of specialized justice that facilitate access to justice. Dr. Kenneth Rattray wondered what was the "justice" to which access was sought and what were the means either available or aspired to in order to administer that justice. These, he thought, were important issues to examine within the larger scheme of the topic. He observed that the means available to guarantee justice and administer it had to be central to any analysis. Dr. Felipe Paolillo observed that one important consideration was the access that disadvantaged persons had to justice. Dr. Paolillo was of the view that a necessary starting point for any exploration of this issue was to examine the reasons why access to justice was problematic, noting that this kind of information could surely be gotten from studies already done on this subject in various countries. Dr. Carlos Manuel Vázquez said that in his opinion, access to justice was mainly a problem of finances. Dr. Orlando Rebagliati suggested that when discussing this issue, the Inter-American Juridical Committee should be careful not to duplicate work being done in other political bodies and at the Justice Studies Center for the Americas.Finally, the Inter-American Juridical Committee decided to continue discussion of this subject, with particular emphasis on access to justice. The following is the text of the resolution that the Inter-American Juridical Committee approved at its LX regular session:

CJI/RES.40 (LX-O/02)

IMPROVING THE ADMINISTRATION OF JUSTICE IN THE AMERICAS: ACCESS TO JUSTICE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING the mandate of the Thirty-First Regular Session of the General Assembly in San José, Costa Rica, in June 2001, that the Inter-American Juridical Committee continue its research into various aspects related to improvement in the administration of justice in the Americas, in particular, the issue of access to justice by individuals;

MINDFUL of the need to take account of decisions of meetings of Ministers of Justice or of Ministers or Attorneys General of the Americas relating to improving the administration of justice in the Americas;

RECOGNIZING the contribution to be made to this subject by other bodies of the Organization of American States, in particular, the Justice Studies Center for the Americas,

RESOLVES:

1. To retain the matter relating to "Improving the Administration of justice in the Americas: access to justice" on the agenda of the Inter-American Juridical Committee, particularly to take account of any relevant decisions of the Fourth Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas, scheduled to be held in Trinidad and Tobago during the period of 10 to 13 March, 2002.

2. To ask the rapporteurs, taking account of any such decisions and any consultations with the Executive Director of the Justice Studies Center of the Americas, to

prepare for consideration at the 61st regular session of the Inter-American Juridical Committee in August 2002 proposals for further work on the subject-matter by the Committee.

This resolution was unanimously adopted at the session held on 8 March 2002, in the presence of the following members: Drs. Felipe Paolillo, Brynmor Thornton Pollard, Ana Elizabeth Villalta Vizcarra, Carlos Manuel Vázquez, Kenneth O. Rattray, João Grandino Rodas and Eduardo Vío Grossi.

5. Preparation for the commemoration of the centennial of the Inter-American Juridical Committee

Resolution

CJI/RES.43 (LX-O/02) *Preparation for the commemoration of the centenary of the Inter-American Juridical Committee*

At the LX regular session of the Inter-American Juridical Committee (Rio de Janeiro, February-March 2002), Dr. Eduardo Vío Grossi, rapporteur for this topic, mentioned the three phases in the plan to mark the centennial year of the Inter-American Juridical Committee, as contained in resolution CJI/RES.26 (LVIII-O/01).

The Inter-American Juridical Committee approved resolution CJI/RES.43 (LX-O/02), *Preparation for the commemoration of the centennial of the Inter-American Juridical Committee*, wherein it amended resolution CJI/RES.26 (LVIII-O/01); the General Secretariat was instructed to carry out the provisions of 1.d, in accordance with some of the guidelines therein established. In that resolution, Dr. Vío Grossi was named to coordinate the program outlined in resolution CJI/RES.26 (LVIII-O/01), and was asked to present a report on how the work was progressing at the Committee's next regular sessions. The General Secretariat was asked to transmit this resolution, as soon as possible, to the competent organs of the Organization, so that it might be considered together with the Committee's Annual Report for 2002.

In resolution AG/RES.1844 (XXXII-O/02), adopted at its thirty-second regular session (Bridgetown, Barbados, June 2002), the General Assembly encouraged the Inter-American Juridical Committee to continue to put forth its best efforts to develop that program.

Because the rapporteur for the topic, Dr. Eduardo Vío Grossi, was not present at the LXI regular session (Rio de Janeiro, August 2002), the decision was to prepare a summary of the Inter-American Juridical Committee's discussions and to send it to the rapporteur so that he might use it to move ahead with the preparatory works.

The Director of the Department of International Law reported that a note had been sent out to the members and former members of the Inter-American Juridical Committee in order to be able to plan publication of the centennial-commemorative book. He said that he had already received some replies. As for the Inter-American Network, the Director of the Department of International Law stated that a survey was being done of all institutions and centers of learning in the Americas. He asked for any cooperation that the members of the Committee might be able to offer him in putting that list together.

Finally, Dr. Carlos Manuel Vázquez was asked to contact the American Society for International Law and the American Bar Association to explore how the Inter-American Juridical Committee could use its contact with these two institutions to commemorate its centennial year.

What follows is the text of the resolution that the Inter-American Juridical Committee adopted at its LX regular session:

CJI/RES.43 (LX-O/02)

PREPARATION FOR THE COMMEMORATION OF THE CENTENARY OF THE INTER-AMERICAN JURIDICAL COMMITTEE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING its resolution CJI/RES.26 (LVIII-O/01) of 22 March 2001 on Preparations for the Commemoration of the Centenary of the Inter-American Juridical Committee, which dealt with the Program to be carried out on that occasion and

BEARING IN MIND the provisions set forth in resolution AG/RES.1773 (XXXI-O/01), adopted by the General Assembly of the Organization of American States at the 31st regular session to request that the Inter-American Juridical Committee proceed with preparations for a program such as that contained in resolution CJI/RES.26 (LVIII-O/01), to be included in its Annual Report for the year 2001,

RESOLVES:

1. To modify its resolution CJI/RES.26 (LVIII-O/01) of 22 March 2001 regarding the Preparations for the Commemoration of the Centenary of the Inter-American Juridical Committee, as follows:

a) to include in paragraph i of section d) of number 1 of the resolution part of same, after the word “universities” and a comma, the terms “institutes, teaching centers, commissions and national and international entities dedicated on the Continent to the study, research, teaching and diffusion of the juridical matters of international interest” and to consequently suppress in the same letter the expressions “of the Continent” that appear after the word “universities”;

b) to add, in paragraph iv of section e) of the same number 1, the denominations “Inter-American Children’s Institute”, “Inter-American Indian Institute”, “Central-American Court of Justice” and “Central-American Integration System.”

2. To ask the General Secretariat to undertake the provisions set out in section d) of the same number 1, according to the following indications:

a) to lend special emphasis during the current year to the constitution of the RICEDI with the universities of the Continent, addressing them for this effect through the Permanent Missions of the Member States before the Organization;

b) the Book will contain articles submitted by all the members of the Inter-American Juridical Committee, ex-members of the same who so desire, and the staff of the General Secretariat that also accept, which in any event, will focus on the work carried out by or relating to this organ, to which end contact should be made with the possible authors of these articles and a draft presented on the matter, including, among other things, a budget, format, venue and date for printing, considering for this effect the month of January 2005 as the deadline to receive the material to be edited;

c) to submit a proposal for the design and printing of the poster;

d) to report at the next regular sessions on the status of these matters.

3. Without interfering in the functions of the Chairman and Vice-Chairman of the Inter-American Juridical Committee and the requests made of the General Secretariat, to designate Dr. Eduardo Vío Grossi as coordinator of the program referred to in aforementioned resolution [CJI/RES.26 (LVIII-O/01)], in which capacity he should present, at the following regular sessions, a report on the progress of this matter.

4. To request the General Secretariat to send this resolution as soon as possible to the competent organs so that it might be considered together with its Annual Report for the year 2001.

This resolution was approved unanimously at the session held on 8 March 2002 in the presence of the following members: Drs Felipe Paolillo, Brynmor Thornton Pollard, Ana Elizabeth Villalta Vizcarra, Carlos Manuel Vázquez, Kenneth O. Rattray, João Grandino Rodas and Eduardo Vío Grossi.

6. International Criminal Court: V Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States

Resolution

CJI/RES.37 (LX-O/02):	International Criminal Court

Documents

CJI/doc.82/02 rev.1	Reflections on the future of the International Criminal Court (presented by Dr. Sergio González Gálvez)
CJI/doc.98/02	Effects of the link between the International Criminal Court and the Security Council of the United Nations, according to article 16 of the Statute of the International Criminal Court (presented by Dr. Sergio González Gálvez)

At the Inter-American Juridical Committee's LX regular session (Rio de Janeiro, February-March 2002), the rapporteur for this topic, Dr. Sergio González Gálvez, introduced document CJI/doc.82/02 rev.1, *Reflections on the future of the International Criminal Court*, the first part of which set out the reasons why this topic was included on the agenda of the Inter-American Juridical Committee. The goal was to understand the problems that the Statute, as adopted, might pose and to find possible solutions. The rapporteur pointed out that this was in no way an attempt to erode the Statute's stature or to amend it. He made brief reference to the two questions included in his document and pointed out that some of them articulated concerns expressed by some States in the region. He also made reference to his conclusions, wherein he directed the reader's attention to a document presented by the President of the International Court of Justice to the United Nations Sixth Committee, expressing concern over the proliferation of juridical organs at the international level.

Dr. Eduardo Vío Grossi recalled that the Inter-American Juridical Committee had been given a mandate by the OAS General Assembly regarding this topic, which should be interpreted within the context that inspired the resolution. Dr. Vío Grossi voiced his concern that the approach being taken to the topic within the Juridical Committee might be construed as a recommendation against the Statute's ratification, by pointing to problems that the Statute posed. This was not the sense of the General Assembly resolution. He went on to say that the General Assembly mandate did not ask the Committee to include this topic on its agenda; it asked that the topic be included on the agenda of the Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States, as it pertained to the examination of the mechanisms for dealing with and avoiding recurring egregious violations of humanitarian international law and the international law of human rights, as well as the role that the International Criminal Court played in this process. Dr. Vío Grossi added that the international debate on this issue had concluded with adoption of the Statute, which was now before the parliaments of every State for discussion and ratification. He also suggested that the theme of the Declaration on the Centennial of the Inter-American Juridical Committee should also figure on that meeting's agenda.

Dr. Orlando Rebagliati proposed that the Joint Meeting take a descriptive approach to the current state of the Statute and discuss the progress made on the Preparatory Commission. One of the principal concerns, he said, was whether the Assembly of States Parties had been held by the time the Joint Meeting was held. From there, the Meeting could examine the Statute's prospects of becoming a universal instrument and suggest possible alternatives should those prospects not be promising.

Dr. Ana Villalta stated that a number of States were wrestling with the problems described in the rapporteur's document. Those problems, she said, were hurdles that would have to be cleared for a State to become party to the Statute. An appropriate contribution for the Committee to make, she believed, would be to suggest the possibility of providing interpretative statements on all these issues inasmuch as the Statute did not allow reservations.

Dr. Kenneth Rattray observed that the potential problems any juridical instrument could pose could be addressed while the instrument was being negotiated and subsequent to its adoption. The best time to find out what problems the instrument might create for States was when it was already in effect. Only then could it be determined whether the instrument was suited to the ends it proposed to achieve. He pointed out that the rapporteur's document could be an important reference point for the future, especially for the Joint Meeting.

Dr. Carlos Manuel Vázquez observed that it should be very clear that the criticisms of the Rome Statute included in the document presented by Dr. Sergio González Gálvez were not being fully endorsed by the Inter-American Juridical Committee. He said that he himself was not in agreement with some of the conclusions therein expressed. He particularly disagreed with item 6 in the document, which concluded that the role that the Rome Statute gave to the Security Council was a violation of the principles of *ius cogens.*

Finally, and in light of the suggestions herein recounted, the Inter-American Juridical Committee adopted resolution CJI/RES.37 (LX-O/02), *International Criminal Court*, wherein it resolved to include the topic "International Criminal Court" on the agenda of the Fifth Joint Meeting with the Legal Advisors of the Ministers of Foreign Affairs of the Member States of the Organization of American States, pursuant to the provisions of General Assembly resolution AG/RES.1770 (XXXI-O/01); to keep this as a follow-up topic on the agenda of the Inter-American Juridical Committee; to take note of document OEA/Ser.Q CJI/doc.82/02 rev.1, *Reflections on the future of the International Criminal Court*, presented by the rapporteur for the topic, Dr. Sergio González Gálvez; and to request the General Secretariat to present, prior to that Joint Meeting, a report that included the *status* of the signatures, ratifications and adherences to the Rome Statute, the pertinent references to the instruments adopted by the Preparatory Commission of the International Criminal Court, and any other information and commentary that might be relevant for that meeting.

In resolutions AG/RES.1844 and 1900 (XXXII-O/02), adopted at the XXXII regular session (Barbados, June 2002), the OAS General Assembly resolved to continue to sponsor these periodic meetings. It also asked the Committee to ensure that the agenda for the next Joint Meeting includes a discussion of mechanisms to address and prevent

the recurrence of serious violations of international humanitarian law and international human rights law, as well as the role of the International Criminal Court in that process.

At its LXI regular session (Rio de Janeiro, August 2002), the Inter-American Juridical Committee decided to hold the V Joint Meeting the first week of August 2003. Several members of the Committee promised to take the necessary steps so that the Foreign Ministries would send their legal advisors to the meeting. Dr. Luis Herrera Marcano was asked to join the rapporteur for the topic, Dr. Eduardo Vío Grossi, in making the necessary arrangements to ensure the meeting's success.

For his part, Dr. Sergio González Gálvez introduced document CJI/doc.98/02, *Effects of the link between the International Criminal Court and the Security Council of the United Nations according to Article 16 of the Statute of the International Criminal Court*, the text of which appears below, as do the documents presented to and adopted by the Inter-American Juridical Committee during its LX regular session:

CJI/RES.37 (LX-O/02)

INTERNATIONAL CRIMINAL COURT

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING resolution AG/RES.1770 (XXXI-0/01), *International Criminal Court,* of the General Assembly adopted on 5 June 2001;

MINDFUL of its resolution CJI/RES.19 (LVII-0/00), *International Criminal Court,* adopted on 19 August 2000;

STRESSING the importance of the Statute of Rome and the advisability that the process of its coming into force and its evolution during its first few years proceed in a fashion that it facilitates a universality of participation in the Statute,

RESOLVES:

1. To include the topic "International Criminal Court" in the agenda of the 5th Joint Meeting of Legal Advisors to the Ministries of Foreign Affairs of the Member States of the Organization of American States, pursuant to resolution AG/RES.1770 (XXXI-O/01) of the General Assembly.

2. To maintain that topic as a topic in question in the agenda of the Inter-American Juridical Committee.

3. To take note of the document OEA/Ser.Q CJI/doc.82/02 rev.1, *Reflections on the future of the International Criminal Court Statutes*, presented by the rapporteur of the topic, Dr. Sergio González Gálvez.

4. To request the General Secretariat to present to the Juridical Committee, before the aforementioned Joint Meeting, a report including the status of signatures, ratifications and accessions to the Statute of Rome, references relating to the instruments adopted by the Preparatory Commission of the International Criminal Court, and any other information and comments that could be relevant to such a Meeting.

This resolution was unanimously adopted at the session held on 1st March 2002, in the presence of the following members: Drs. Felipe Paolillo, Brynmor Thornton Pollard, Sergio González Gálvez, Ana Elizabeth Villalta Vizcarra, Kenneth O. Rattray, João Grandino Rodas and Orlando R. Rebagliati.

CJI/doc.82/02 rev.1

REFLECTIONS ON THE FUTURE OF THE INTERNATIONAL CRIMINAL COURT

(presented by Dr. Sergio Gonzálvez Gálvez)

During the 57th regular session, the author hereof submitted reflections on the topic reproduced in the document CJI/doc.21/00. At the same session the Juridical Committee decided to include in its Agenda "Possibilities and problems of the *Statute* of the International Criminal Court" and appointed the author hereof as rapporteur on the theme. Meanwhile the General Secretariat was requested to obtain from the United Nations General Secretariat the reports of the Preparatory Committee of the International Criminal Court to submit them to the Juridical Committee together with any other documentation considered relevant, in consultation with the rapporteur.

Given the size of the documentation available and its ongoing updates, on 16 October 2000, the OAS Department of International Law informed the Juridical Committee members of the Internet address for rapid inquiries to the aforementioned preparatory papers.

During the 58th regular session of the Inter-American Juridical Committee, the Secretariat distributed among the members two large supporting documents on the topic.

Since the beginning of the study on this theme, the rapporteur expressed the importance of having to ensure validity of a permanent International Criminal Court independent of any other international body or organization, as a fundamental premise for ensuring the support that an international court of this nature requires.

Consequently, the rapporteur explained, the intention to include this topic is not to undermine the importance of this international instrument but rather to endeavor to fully understand the problems that the *Statute* may raise as it was approved and, in its case, analyze possible interpretations of those clauses that in the light of the practice of the States, could cause some problem in the future.

The Juridical Committee thereby estimated, according to the decision taken, that it could make an important contribution to the analysis of some of the topics relating to the validity of the *Statute* of the International Criminal Court, which could be discussed at a later Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the Member States of the Organization, as recommended by the General Assembly of the Organization of American States (OAS) itself.

With this mandate in mind I make the following comments:

1. It is fundamental that the States Parties to the *Statute* fully understand that the Court is complementary to the legislation of each country. That is, each country which accepts the *Statute* of the International Criminal Court must adapt its legislation to what this Convention provides, otherwise the International Court would be competent to know of all cases in which some of the crimes included therein could be classified because there would be no applicable national criminal jurisdiction.

I would like to mention one of the clearest explanations on the principle of the complementary nature of the *Statute* of the International Criminal Court, in the article written by Dr. Cláudia Perrone Moisés from the Department of International Law, Law Faculty of São Paulo University, published in the Brazilian magazine *Política Externa* in its March/April/May edition v.8, no. 4, by Paz e Terra, São Paulo, in 2000. She is right when she says that the jurisdiction on crimes provided in the *Statute* is based, on one hand, on the obligation to exercise criminal jurisdiction in relation to those responsible for international crimes referred to in paragraph 6 in the preamble of the aforementioned international instrument. On the other, the complementary principle is inspired necessarily on the principle of universal

jurisdiction applicable to crimes considered serious "for their particular cruelty, savagery and atrocity", as mentioned in the International Law Committee of the United Nations when studying the subject in 1984.

The aforementioned Brazilian jurist also mentions that the *raison d'être* of the International Court is after all, for political reasons, to prevent underlying economic interests or structural problems of internal jurisdictions that those accused of such crimes go unpunished for the crimes committed by them.

The principle of complementariness expressly acknowledged in paragraph 10 of the Preamble of the *Statute* and article 1 thereof is provided in detail in article 17, which addresses "Issues of admissibility" namely in paragraphs 2 and 3 thereof. Yet because of its importance and consequences, the States should be alerted to the need to update, before or after the *Statute* prevails for them, their relevant military and penal laws and also create in the Inter-American Juridical Committee a group of advisors who can support the countries in this task.

2. The text of article 20 of the *Statute* could put in doubt the validity of the principle of *res judicata* or *non bis in idem;* hence this is when an exchange of viewpoints on the matter would seem convenient.

3. It is of the utmost importance to interpret the scope of article 54 of the *Statute* which states that the Attorney General of the International Criminal Court may undertake investigations in a territory of a State, even without the necessary consent of the corresponding national Attorney General. If this interpretation is not correct perhaps an exchange of points of view would be fitting at this moment.

4. The *Statute* includes as a penalty “Life imprisonment when the extreme gravity of the crime so justifies and the personal circumstances of the convicted person", a precept which undoubtedly could clash with those laws that prohibit life imprisonment, which is without a doubt, an increasingly more widespread opinion worldwide.

5. By a strange parliamentary circumstance, a definition was included in the *Statute* of "non-international armed conflict" taken from a decision in the Appeal Chamber of the International Criminal Court for former Yugoslavia in the Tadic case which literally says “It applies to armed conflicts occurring in a State territory, when there is a prolonged armed conflict between the government authorities and organized armed groups or between such groups". This definition goes in fact much farther than the definition which includes the *Protocol II on Non-International Armed Conflicts*.

That clause could cause problems to some States which have action by different kinds of territory armed rebel groups in their territory and which, for different reasons, do not consider it in their interest to apply this definition to those groups.

6. If, as we all expect, the Court will be an independent institution, the link between State and the UN Security Council should concern us, which gives the agency in question the option to ask the Court to postpone for renewable twelve months (article 16) the investigation or early stages of judgement of a crime. This point in our opinion requires careful analysis and on the matter we would like to mention the point of view of the American Association of Jurists on this topic. It considers that a treaty by which it is intended to set up an international court which includes clauses subordinating the jurisdiction activity of the court somehow or other to decisions of another agency and international organization, either to promote it, suspend its action, delay or paralyze it, could be lawfully null, pursuant to article 53 of the *Vienna Convention on the Law of Treaties*, which establishes a sanction for any convention that is in opposition to an imperative rule of *ius cogens* general international law.

As the aforementioned American Association of Jurists states, clauses that establish this subordination to the Security Council are against the principle of independence of the judiciary and the right of any person to appeal to an independent court to settle the question, which is an imperative rule provided in Articles 10 of the *Universal Declaration of Human Rights*, 14 of the *International Pact of Civil and Political Rights* and 1 and 2 of the *Basic*

Principles relating to the Independence of the Judiciary, approved by the UN General Assembly in its resolutions 40/32 and 40/46 of 1985.

7. Another problem raised by the *Statute* and which is relevant in the light of the current international situation, is the fact that the chapter on “War crimes” includes, for example, poisoned weapons and does not include mass destruction weapons, such as nuclear, chemical and bacteriological weapons due to the opposition by some countries on this issue. This could mean that should the *Statute* prevail and an attack of bacteriological, chemical or nuclear weapons occur, as in the fear that it would occur after the terrorist attacks against the USA on 11 September last year, it would be impossible to accuse those responsible before that Court.

8. There are undoubtedly other considerations to be studied, although not with the priority of those mentioned above. I refer, for example, to the provision in article 72 of the *Statute* referring to the cases where dissemination of information or documents of a Party State, at its discretion, could affect its security. Paragraph 5 thereof determines the measures that the acting State may take to satisfy its concern on disseminating information that affects its security interests, among which is included item d) according to which, among the constraints, the procedure could be adopted behind closed doors or unilaterally**,** which could be incompatible with the minimum guaranties that most laws grant the accused.

9. Likewise, there are clauses, such as those included in article 8 and in article 124 which clearly favor the military powers who have troops beyond their borders, when it states in the chapter on “War crimes” that the International Criminal Court will be competent regarding this type of crime “when they are mentioned as part of a plan or policy or as part of the large scale perpetration of such crimes” which suggests that, if it is an isolated act, despite its seriousness, the phrasing would not apply to the *Statute*, to which in fact the International Committee of the Red Cross objected at the Conference. In the second article mentioned herein there is another provision, also in the chapter on “War crimes”, with respect to a country signing the Convention can state that during a seven-year period, the competence of the Court will not apply, when the perpetration of one of these crimes described in the *Statute* is denounced by its citizens or in its territory; a safeguard which does not apply to other crimes included in the *Statute*, thereby giving unfair benefit to the military powers.

10. Lastly, mention must be made of the concern of some countries for the apparent incompatibility between the so-called "handing over" clause of the accused person before the International Court and the common precept in many constitutions regarding the prohibition against extraditing citizens.

In conclusion, the purpose of considering this topic should, in the best of cases, produce a document that alerts our Councilors to some of the problems that may arise once the *Statute* enters in force. It is not to discuss whether it should enter in force, which could in its case mean presenting interpretative statements from those who have not yet ratified. Or it could mean to outline a common strategy with a view to the first reviewing conference of the *Statute* which, according thereto, shall be called seven years after the aforementioned international document enters in force. Nor should the existing concern be forgotten before the proliferation of international juridical bodies, to which the President of the International Court of Justice, Judge Gilbert Guillaume refers in a UN General Assembly in October 2000, in a document entitled *The proliferation of international juridical bodies: the outlook of the international legal order*.

Finally, I would like to request that, as my term of office on the Juridical Committee ends this year, another distinguished member of the Juridical Committee be appointed to assume the responsibility of rapporteur, should the topic continue on the Agenda.

CJI/doc.98/02

EFFECTS OF THE LINK BETWEEN THE INTERNATIONAL CRIMINAL COURT AND THE SECURITY COUNCIL OF THE UNITED NATIONS, ACCORDING TO ARTICLE 16 OF THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT

(presented by Dr. Sergio González Gálvez)

The adoption of resolution 1422 (2002) by the United Nations Security Council on 12 July concerning the non-application of the *Statute of the International Criminal Court* for the next 12 months renewable to military personnel taking part in a United Nations peace-maintaining operation, when these troops are sent by countries that have not ratified the above-mentioned international instrument, has led to the following observations which I now submit to the appreciation of the Inter-American Juridical Committee, which has a theme on its agenda linked to this very matter.

It is regrettable that this resolution of the Security Council has come to confirm in full the author's fears, as President of the Mexican Delegation to the Rome Conference that drew up the *Statute of the International Criminal Court*, with regard to the political restrictions that it places on the activity of the Court.

At the Rome Conference we argued that the inclusion of Article 16 in the *Statute of the International Criminal Court* created an undesirable situation of the Court being dependent on the Security Council. It will be recalled that Article 16 of the *Statute* establishes precisely the following: "No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions."

During the debate at the Rome Conference, we pointed out with regard to Article 16 that we shared the point of view of the American Association of Jurists, which upholds that a treaty by which it is intended to set up an international tribunal that includes clauses that in some way or another subordinate the Court's jurisdictional activity to decisions of another international body or organization, either for the purpose of promoting or suspending such activity, delaying or paralyzing it, could be absolutely null, in accordance with Article 53 of the Vienna Convention on the Law of Treaties, which stipulates this sanction for any Convention that stands in opposition to an imperative norm of general international *jus cogens* law.

As the American Association of Jurists claims, clauses that establish this subordination are contrary to the principle of independence of the Judiciary and the right of all persons to appeal to an independent court to settle the question, a concept that in itself constitutes an imperative norm, based on the provisions of articles 10 of the *Universal Declaration of Human Rights*, 14 of the *International Pact of Civil and Political Rights* and 1 and 2 of the *Basic Principles Relating to the Independence of the Judiciary*, approved by the General Assembly of the United Nations in its resolutions 40/32 and 40/46 of 1985.

The above-mentioned resolution of the Security Council could also mean, as we have already stated, that no citizen of the Permanent Members of the Security Council will ever be prosecuted by that Court, which leads me to wonder: is this the kind of international court we want to belong to?

We have seen in the mass media some articles on the advisability of all countries ratifying the *Statute* of this court at once, yet, with very few exceptions, the commentators have concerned themselves with analyzing the flaws of the *Statute* and the effects caused by becoming Parties of the above-mentioned Statute; the dilemma here is: should we go ahead and ratify, explaining at the very start the changes that we shall demand be made to the first revising meeting of the *Statute* to take place 7 years after it came into effect, in order to try to

repair the serious lacunas of the *Statute*[1], or should we wait to analyze how the Tribunal works in practice and then decide what to do?

I leave these comments for consideration when the theme of the International Criminal Court is examined at the next dialogue with the Legal Advisors of the Member States of the Organization of American States.

* * * * *

Resolution 1422 (2002)
(Adopted by the Security Council at its 4572nd meeting,
on 12 July 2002)

The Security Council,

Taking note of the entry into force on 1 July 2002, of the Statute of theInternational Criminal Court (ICC), done at Rome 17 July 1998 (the Rome Statute);

Emphasizing the importance to international peace and security of United Nations operations;

Noting that not all States are parties to the Rome Statute;

Noting that States Parties to the Rome Statute have chosen to accept its jurisdiction in accordance with the Statute and in particular the principle of complementarity;

Noting that States not Party to the Rome Statute will continue to fulfil their responsibilities in their national jurisdictions in relation to international crimes;

Determining that operations established or authorized by the United Nations Security Council are deployed to maintain or restore international peace and security;

Determining further that it is in the interests of international peace and security to facilitate Member States' ability to contribute to operations established or authorized by the United Nations Security Council;

Acting under Chapter VII of the Charter of the United Nations,

1. *Request*s, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise.

2. *Expresses* the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary.

3. *Decides* that Member States shall take no action inconsistent with paragraph 1 and with their international obligations.

4. *Decides* to remain seized of the matter.

[1] Our objections include: the need to typify weapons of massive destruction as war crimes; the dangers raised by inadequate definition of non-international armed conflicts; recognition of the General Assembly of the United Nations as the forum for maintaining international peace and security; limiting the exercise of the powers of a country that ratifies in order not to observe for 7 years the obligations set by the chapter on "war crimes" (art. 124); and provisions considered to be incompatible with Mexican legislation and that should be analyzed and adjusted.

7. Possible further measures to the Inter-American Convention against Corruption (Caracas)

Document

CJI/doc.81/02 Possible further measures to the Inter-American Convention against Corruption (Caracas)
(presented by Dr. Sergio González Gálvez)

At the Inter-American Juridical Committee's LX regular session (Rio de Janeiro, February-March, 2002), Dr. Sergio González Gálvez, rapporteur for the topic, presented document CJI/doc.81/02, *Possible further measures to the Inter-American Convention against Corruption (Caracas)*. In this connection, he mentioned the Report of Buenos Aires on the Mechanism for Follow-up of Implementation of the Inter-American Convention against Corruption and noted that at its regular session in San José, Costa Rica (June 2001), the General Assembly adopted the Declaration of the States Parties of the Inter-American Convention against Corruption, which included that mechanism.

Dr. González Gálvez emphasized that corruption was one of the most serious problems that democracy faced and stated that while the mechanism created a group of experts similar to the OECD's evaluation procedure, it did not cover all the problems that corruption caused. His view was that the Inter-American Juridical Committee could undertake that study, being careful to avoid any duplication. He recalled that there was criticism of the inclusion of the notion of the responsibility of States in the fight against corruption and that some had expressed doubts as to whether the issue of campaign financing should be discussed. In conclusion, he noted that the document presented was just a preliminary document.

Dr. Rattray stated that this topic was a question of the State's exercise of power and the proper use of the resources available to it. He added, however, that he did not expect this exercise to produce much in the way of positive results in the near term. Dr. Rattray observed that the responsibility of the State could not be narrowed down to purely State acts. Given the new wave of privatization, the presence of corruption could not be established simply by investigating the conduct of civil servants. Many areas once controlled by the State, and still just as essential, were now in private hands. Such businesses could also fall prey to corruption. Finally, he noted that the issue of financing was essential, since a democratic government's heavy reliance on financial support could lead to corruption. Dr. Rattray noted that no solution to this problem had been found thus far.

Dr. Eduardo Vío Grossi was of the view that the Inter-American Juridical Committee should approach the topic from the juridical standpoint, especially from the perspective of the international responsibility of the States Party to the Convention, determining whether the obligations undertaken had been honored. He observed that the difference between behavioral obligations and performance-related obligations had to be considered when examining the content of those obligations. He stated that like any other juridical instrument, the Convention could lend itself to interpretations as to the function of the follow-up mechanism. Dr. Vío Grossi also wondered whether the multilateral mechanism precludes bilateral action in the event of noncompliance. He

believed it would be a good idea to examine how the anti-corruption laws have been applied within the States, especially how the domestic courts have applied them.

Dr. João Grandino Rodas asked the rapporteur whether these additional measures would necessitate an amendment to the Inter-American Convention or would they simply be recommendations for the States. The rapporteur was of the view that States party did not have to consider these measures. He suggested that the Inter-American Juridical Committee ought not to depend on the follow-up mechanism's group of experts as the sole source of the information it needed to perform its work. Instead, irrespective of the results of that group's work, the Committee should decide what measures it would recommend.

This topic was not on the agenda of the Inter-American Juridical Committee's LXI regular session. What follows is the text of the document presented by Dr. Sergio González Gálvez:

CJI/doc.81/02

POSSIBLE FURTHER MEASURES TO THE INTER-AMERICAN CONVENTION AGAINST CORRUPTION
(presented by Dr. Sergio González Gálvez)

As one of Mexico's specialists on anti-corruption, Roberto Casellas clearly points out in one of his papers on the theme "Corruption is a pernicious form of simulation that erodes the basic rules of co-existence, and incurs heavy costs for society". In a democracy – Casellas proceeds – corruption distorts the relationship between the governing and the governed, causes permanent annoyance and when it is associated with impunity, undermines the citizens' confidence in the institutions, seriously affecting the social structure.

Hence the importance of this theme included in the Agenda of the Inter-American Juridical Committee during its 57th regular session, and which is certainly being considered by other OAS bodies, including the Permanent Council.

During the 58th regular session of the Juridical Committee, the author hereof, as joint rapporteur of the theme, advanced as preliminary a list of possible subjects to be discussed, as contribution to the task of achieving a fuller and more comprehensive application of the *Inter-American Convention on Corruption.*

Consequently, I hereby submit for the appreciation of the Inter-American Juridical Committee the following proposal:

> MINDFUL that, the Inter-American Juridical Committee has had on its agenda the topic of corruption since 1992 when the question entitled "First approach to the legal focus on corruption in the Americas" was included, and in 1995, in response to a resolution of the OAS General Assembly (AG/doc. 3287/95), it commented on the Preliminary Draft Inter-American Convention on Corruption, entrusting it to the Work Group appointed by the Permanent Council;
>
> ALSO RECALLING the major contribution of the Inter-American Juridical Committee in the presentation of a guide to "Model legislation on illicit enrichment and transnational bribery";
>
> TAKING INTO ACCOUNT the work performed by the Work Group on Probity and Civil Ethics of the Permanent Council, as a mechanism following upon the implementation of the Inter-American Convention on Corruption (CP/RES.783 (1260/01) of 18 January 2001, which was submitted to the appreciation of the member States as a recommendation,

THE INTER-AMERICAN JURIDICAL COMMITTEE:

1. Decides to begin examining possible further measures to the *Inter-American Convention against Corruption*, in the light of articles II, determining the Proposals of this international instrument, and XXVII, which raises the possibility of approving Additional Protocols of the Convention in order to contribute to the provision in the aforementioned article II.

2. Among the points to be studied in a preliminary appreciation, I hereby propose the following:

a) to develop the scope of the concept of responsibility of the States in the fight against corruption, to which the second last paragraph of the Convention's preamble refers;

b) to undertake comparative studies of the legal rules of the member States in order to identify the similarities, differences and legal gaps that might exist;

c) to identify other aspects that may lead to draft model laws which include the most advanced techniques adopted against corruption;

d) To consider the problem of laundering of property or goods resulting from corruption, considering activities that permit the States to classify as a crime, if still to be classified, activities of laundering gains from corruption in order to put in practice the commitment assumed in article VI.1.d) of the *Inter-American Convention on Corruption*;

e) to draft guidelines for organizing a Unit in the OAS to be a source of legal information and, in general, a means of disseminating and training on the subject of anti-corruption;

f) to approve the creation of a multilateral monitoring mechanism to perform the convention based on the recommendation of the General Assembly of OAS. The mechanism must be based on similar schemes created elsewhere in the world, guaranteeing equal participation of all States Parties to the Convention;The mechanism must operate based on consensus and the assessment must be fair and objective and preferably include a dispute settlement mechanism, should disputes fail to be settled by consultancy;

g) to analyze such topics as public procurement, including rules for bids; incompatibility between a public function and private sector and the technical autonomy that anti-corruption authorities must have;

h) to study the link between the fight against corruption and the international rules of human rights and financial and commercial cooperation agreements (for example, eliminate the practice of including bribery as tax deduction; rules for public procurement, etc.);

i) guidelines to be adopted on the matter of election financing, which could begin with a seminar attended by specialists from the OAS member countries (possibly in Mexico).

Lastly, it is suggested that if the Inter-American Juridical Committee decides to begin the study on this topic, a report is first requested from the OAS General Secretariat on the status of discussion of this topic in other agencies of the inter-American system.

8. Traffick of firearms based on the decisions taken by the Inter-American Juridical Committee on the matter

Document

CJI/doc.86/02 rev.1	Armamentism: based on the decisions taken by the Inter-American Juridical Committee (presented by Dr. Sergio González Gálvez)

At the Committee's LX regular session (Rio de Janeiro, February-March 2002), Dr. Sergio González Gálvez, rapporteur for the topic, explained that at previous sessions, he had asked the General Secretariat to obtain information on the fate of a draft inter-American convention for the prohibition of certain weapons and methods of combat, prepared by the Inter-American Juridical Committee back in 1985. He told the Committee that he did not know what had happened to the draft, but that the Permanent Council may have suspended any further discussion because the topic was so complex. At the time, the Committee had thought that with this draft it could make a significant contribution to the development and codification of international law on this subject, especially given the armed conflicts raging at the time. The rapporteur was of the view that this topic was still very current, although he said that it perhaps should not be kept on the Committee's agenda because there were other more pressing topics to consider.

The rapporteur for the topic also observed that the Inter-American Convention on Transparency in Conventional Weapons Acquisitions had been approved within the inter-American system. However, he did not believe this convention solved the problem of the arms buildup.

The Director of the Department of International Law explained that the only document containing information on that draft convention was CP/doc.1602/85 rev.1, *Report of the Committee on Juridical and Political Affairs on the examination of the Annual report of the Inter-American Juridical Committee to the General Assembly*, where reference is made to that draft. However, he indicated that the General Assembly resolution made no mention of the topic, which would suggested that its intention was not to pursue the matter.

Dr. Sergio González Gálvez also introduced document CJI/doc.86/02 rev.1, *Armamentism: based on the decisions taken by the Inter-American Juridical Committee*, which summarizes the Inter-American Juridical Committee's discussions on the topic at that regular session. The Committee approved the document and asked the General Secretariat to forward it to the political bodies of the Organization. What follows is the text of the report. This topic was not included on the agenda for the LXI regular session.

CJI/doc.86/02 rev.1

ARMAMENTISM: BASED ON THE DECISIONS TAKEN BY THE INTER-AMERICAN JURIDICAL COMMITTEE

(presented by Dr. Sergio González Gálvez)

The Inter-American Juridical Committee recalled the important work done by this body regarding the Draft Inter-American Convention for the Prohibition of the Use of Certain Weapons and Means of Warfare (CJI/RES.I-04/1985), which was submitted on 7 February, 1985 for consideration of the Permanent Council of the OAS.

The Juridical Committee has decided that the topic should be reconsidered when the circumstances so recommend.

9. Juridical aspects of hemispheric security

The Inter-American Juridical Committee did not examine this topic at its LX and LXI regular sessions (Rio de Janeiro, February-March and August 2002).

10. Right to information: access to and protection of information and personal data

The Inter-American Juridical Committee did not take up this topic at its LX and LXI regular sessions (Rio de Janeiro, February-March and August 2002).

11. Democracy in the Inter-American System

Resolution

CJI/RES.41 (LX-O/02) Democracy in the inter-American system

At the Inter-American Juridical Committee's LX regular session (Rio de Janeiro, February-March 2002), Dr. Eduardo Vío Grossi made reference to the approval of the *Inter-American Democratic Charter*, which had adopted many of the suggestions made at the time by the Inter-American Juridical Committee. He recalled two of the most important points contained in the Committee's report on the subject.

As to how the Juridical Committee should now pursue its discussion of the topic, the rapporteur suggested that the Committee should perhaps wait for new guidelines from the OAS General Assembly, whose regular session would be held in Barbados in June 2002, and thereby await consolidation of the *Inter-American Democratic Charter.*

The Inter-American Juridical Committee also approved resolution CJI/RES.41 (LX-O/02), *Democracy in the inter-American system*, wherein it welcomed the adoption of the *Inter-American Democratic Charter;* expressed its deep appreciation to the Secretary General of the Organization and other dignitaries present on that occasion for their public acknowledgement of the Inter-American Juridical Committee's role in the process that culminated with adoption of the *Inter-American Democratic Charter;* suggested the advisability of undertaking a campaign to publicize the *Inter-American Democratic Charter* as a juridical instrument embodying the applicable principles on the subject; and reiterated its readiness to continue to perform, on this and other subjects, its function under the *Charter*, which is that of the OAS' advisory body on juridical matters. The following is the text of that resolution:

CJI/RES.41 (LX-O/02)

DEMOCRACY IN THE INTER-AMERICAN SYSTEM

THE INTER-AMERICAN JURIDICAL COMMITTEE,

TAKING DUE NOTE of resolution AG/RES.1 (XXVIII-E/01), dated 11 September 2001, approved by the Ministers of Foreign Affairs and Heads of Delegation gathered in Lima, Republic of Peru, at the 28th Special Session of the General Assembly of the Organization of American States, and by means of which the *Inter-American Democratic Charter* was adopted;

CONSIDERING that the preamble of the *Inter-American Democratic Charter* points out that its approval "bore in mind the progressive development of International Law and the convenience of identifying the provisions contained in the *Charter of the Organization of American States* and basic instruments related to the preservation and defense of democratic institutions in accordance with established practice";

BEARING IN MIND that during the development of the 28th Special Session of the General Assembly, the Secretary General and other distinguished dignitaries testified to the contribution of the Inter-American Juridical Committee in the process of elaboration of the *Draft Inter-American Democratic Charter* approved on that occasion;

MINDFUL that the Inter-American Juridical Committee has adopted several resolutions concerning democracy in the Inter-American system, special mention being due to resolution

CJI/RES.I-3/95 of 23 March 1995, which affirms the principles and norms that the Organization of American States and its member States observe in respect to the effective exercise of representative democracy; resolution CJI/RES.17 (LVII-O/00) of 19 August 2000, which refers to the need for an instrument, declaration or inter-American treaty on democracy to be drawn up as a methodological approach; resolution CJI/RES.23 (LVIII-O/01) of 22 March 2001, deciding on elaborating a draft inter-American declaration on democracy; and finally, resolution CJI/RES.32 (LIX-O/01) of 16 August 2001, which approves the report *Observations and Comments of the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter* (CJI/doc.76/01), prepared by the Working Group of the Permanent Council of the Organization;

RECOGNIZING that the *Draft Inter-American Democratic Charter* presented by the Permanent Council of the Organization to the 28th Special Session of the General Assembly of the Organization and approved by aforementioned resolution AG/RES.1 (XXVIII-E/01), accepts in large measure the criteria and suggestions formulated by the Inter-American Juridical Committee in the resolutions mentioned above,

RESOLVES:

1. To express its deep satisfaction for the adoption of resolution AG/RES.1 (XXVIII-E/01) of 11 September 2001, which approved the *Inter-American Democratic Charter*, with the agreement of the Ministers of Foreign Affairs and Heads of Delegation gathered in Lima, Republic of Peru, at the 28th Special Session of the General Assembly of the Organization of American States.

2. To express its heartfelt thanks to the Secretary General of the Organization and other dignitaries present on this occasion, for the public recognition of the participation of the Inter-American Juridical Committee in the process that culminated in the adoption of the *Inter-American Democratic Charter*.

3. To recommend that the Permanent Council of the Organization adopt a program of wide diffusion of the *Inter-American Democratic Charter* as the juridical instrument that deals with the norms that are applicable to the matter.

4. To reiterate its disposition to continue in this and other matters in which it is summoned, in accordance with the provisions of the *Charter of the Organization*, to fulfil its function as the consultative body of the OAS on legal affairs.

This resolution was unanimously adopted at the session held on 8 March 2002, in the presence of the following members: Drs. Felipe Paolillo, Brynmor Thornton Pollard, Ana Elizabeth Villalta Vizcarra, Carlos Manuel Vázquez, Kenneth O. Rattray, João Grandino Rodas and Eduardo Vío Grossi.

12. Inter-American cooperation against terrorism

The Inter-American Juridical Committee did not take up this topic at its LX and LXI regular sessions (Rio de Janeiro, February-March and August 2002).

13. Study of the system for the promotion and protection of human rights in the inter-American sphere

The Inter-American Juridical Committee did not address this topic at its LX and LXI regular sessions (Rio de Janeiro, February-March and August 2002).

14. Abduction of minors by one of their parents

The Inter-American Juridical Committee did not take up this topic at its LX and LXI regular sessions (Rio de Janeiro, February-March and August 2002).

At its thirty-second regular session (Bridgetown, Barbados, June 2002), the General Assembly adopted resolution AG/RES.1891 (XXXII-O/02) wherein it invited the Inter-American Juridical Committee and the Inter-American Court and Commission of Human Rights to lend their support and legal and technical assistance, within their respective spheres of competence, for the organization and holding of the meeting of government experts (Montevideo, August 12 and 13).

CHAPTER III

OTHER ACTIVITIES

Other activities carried out by the Inter-American Juridical Committee in 2002

A. Presentation of the *Annual report of the Inter-American Juridical Committee*

At the Inter-American Juridical Committee's LX regular session (Rio de Janeiro, February-March 2002), Dr. João Grandino Rodas reported on the presentation of the Committee's *Annual report* to the OAS Permanent Council's Committee on Juridical and Political Affairs. That report was an account of the IAJC's activities in 2001. The presentation was on February 7, 2002. He said that he was accompanied by Dr. Luis Herrera Marcano and Dr. Carlos Manuel Vázquez, in response to the Committee's request the previous year that as many members of the Inter-American Juridical Committee as possible participate in the *Annual report*'s presentation. The Chairman noted that the presentation coincided with CIDIP-VI, being held at the Organization headquarters. He noted that a number of delegations thanked the Inter-American Juridical Committee for its role in helping to get the *Inter-American Democratic Charter* adopted. They emphasized the need to support preparations for the Inter-American Juridical Committee's centennial celebration.

At its LXI regular session (Rio de Janeiro, August 2002), the Vice Chairman of the Inter-American Juridical Committee, Dr. Brynmor Pollard, reported on his participation in the XXXII regular session of the OAS General Assembly (Barbados, June 2002)

In his remarks, Dr. Brynmor Pollard mentioned the topics of freedom of information, democracy in the inter-American system, preparations for the centennial of the Inter-American Juridical Committee, inter-American cooperation against terrorism, the draft convention to eliminate all forms of discrimination and intolerance, and the CIDIP. He elaborated upon the points already included in the *Annual report*. He also noted that the Declaration of Bridgetown adopted at that session of the General Assembly concerned hemispheric security, the multidimensional facets jeopardizing security in the hemisphere and requiring united cooperation on the part of the member States. He said that a special conference on this subject would be held in Mexico in May 2003. Dr. Brynmor Pollard's remarks before the OAS General Assembly appear in document CJI/doc.100/02 rev.1, *Report by the Vice-Chairman of the Inter-American Juridical Committee on the 32nd session of the OAS General Assembly*, transcribed below:

CJI/doc.100/02 rev.1

REPORT BY THE VICE-CHAIRMAN OF THE INTER-American Juridical Committee ON THE 32ND SESSION OF THE OAS General Assembly (Bridgetown, Barbados, June 2-5, 2002)
(presented by Dr. Brynmor T. Pollard)

Mr. Chairman, Distinguished Delegates,

I take this opportunity, Mr. Chairman, to extend to you my congratulations on your election to Chair the proceedings of this General Committee of the 32nd regular session of the OAS General Assembly. I bring you greetings from the Chairman of the Inter-American Juridical Committee, Dr. João Grandino Rodas, for whom I am deputizing in his unavoidable absence and for which he asked me to convey his regrets. On behalf of the Inter-American Juridical Committee, I am pleased to present to the General Committee a summary of the activities of the Juridical Committee for 2001 as reflected in the Committee's Annual Report.

The work of the Committee consists of responses to the priorities indicated by member States of the Organization and also tasks undertaken by the Committee on its own initiative in fulfillment of its mandate under the *Charter of the Organization*. In particular, the Juridical Committee deliberated on the following topics during its two regular sessions in 2001 and its regular session in February-March 2002, to complete consideration of some of them:

a) Improving the Administration of Justice in the Americas: Access to Justice;

b) The Right to Information: Access to and Protection of Information and Personal Data;

c) Democracy in the inter-American System;

d) The Inter-American Democratic Charter;

e) Preparations for the Commemoration of the Centennial of the Inter-American Juridical Committee;

f) The Juridical Aspects of Hemispheric Security;

g) The International abduction of minors by one of their parents;

h) Inter-American Cooperation Against Terrorism;

i) The Draft inter-American Convention against Racism and All Forms of Discrimination and Intolerance;

j) The Specialized Inter-American Conference on Private International Law (CIDIP);

k) Additional measures for implementation of the Inter-American Convention against Corruption.

With regard to "a) Improving the Administration of Justice in the Americas", the General Assembly, at its 31st regular session at San José, Costa Rica, in June 2001, requested the Inter-American Juridical Committee to continue its study of the different aspects of the administration of justice in the Americas focusing its efforts on access of individuals to justice, at the same time, maintaining the necessary coordination and the highest possible degree of cooperation with other organs, agencies and entities of the Organization involved in this area of activity, especially with the Justice Studies Center of the Americas in Santiago, Chile.

At the 59th regular session of the Inter-American Juridical Committee, it received a visit from Dr. Juan Enrique Vargas, Executive Director of the Justice Studies Center of the

Americas. The Chairman of the Inter-American Juridical Committee extended an invitation to the Center to send a representative to participate as a professor in the Committee's Course on International Law, in Rio de Janeiro, in August 2002, in implementation of a program of cooperation between the Center and the Committee.

At its 60th regular session held during 25 February to 8 March 2002, the Inter-American Juridical Committee decided to retain the subject-matter on its agenda, particularly in the light of the Fourth Meeting of Ministers of Justice or of Ministers or Attorneys-General of the Americas Scheduled to be held in Port-of-Spain, Trinidad, in order to take account of decisions of the Meeting and in consultation with the Executive Director of the Justice Studies Center, the rapporteurs for the subject were requested to prepare for the consideration of this 61st regular session of the Committee proposals for further work by the Committee on this subject-matter.

At the Fourth Meeting of Ministers of Justice or of Ministers or Attorneys-General of the Americas (REMJA-IV), held in Trinidad during 10-13 March 2002 the Meeting resolved that the topic be renamed "Improving the systems for the administration of justice".

With regard to "b) The right to information: access to and protection of information and personal data", at the 57th regular session of the Inter-American Juridical Committee, the rapporteur of the topic presented a document (CJI/doc.25/00 rev.1) entitled *Right to information: access to and protection of information and personal data in electronic form*. After in-depth consideration of the document, the Inter-American Juridical Committee approved resolution CIJ/RES.13 (LVII-O/00), *Right to information: access to and protection of information and personal data.* In that resolution, the Committee requested the General Secretariat, through the Secretariat for Legal Affairs, to send the two reports prepared by the rapporteur on the topic to member States and, at the same time, requesting them to provide information on existing or proposed national legislation and also rules and policies governing access to personal information and its protection. The resolution also requested the rapporteur, with the assistance of the General Secretariat, through the Secretariat for Legal Affairs, to prepare a summary of applicable principles and the most important considerations relating to national laws in this area. The Inter-American Juridical Committee also decided that at its next regular session (58th), it would consider any additional information received from member States and would also examine options for further work on the topic, including the possibility of developing basic principles and guidelines or recommendations for the possible creation of international instruments in this area. No responses were received from member States to the dispatch of the reports that were circulated to them through the Permanent Missions to the OAS. During its 58th regular session in Ottawa, Canada, in March 2001, the Inter-American Juridical Committee decided to conclude its consideration of the topic at its next regular session in August 2001 on the basis of responses received from member States by that time.

At its 59th regular session, in August 2001, the Inter-American Juridical Committee, by majority decision adopted a resolution confirming its agreement with the general principles set out in the provisional reports drafted by the rapporteur, Dr. Jonathan T. Fried, and decided to consider the possibility of undertaking additional work on the subject during the 60th regular session. The Committee also resolved to recommend to the Permanent Council that it urge member States to adopt national legislation reflecting the principles presented in the relevant reports which were dispatched previously to the Permanent Missions to the OAS by the Department of International Law.

With regard to c) and d), "Democracy in the inter-American System" and "The Inter-American Democratic Charter", at its 55th regular session in August 1999, the Inter-American Juridical Committee decided to include in its agenda the item "Democracy in the inter-American System" with its rapporteur, Dr. Eduardo Vío Grossi. A preliminary report was presented by the rapporteur discussing the possibility of arriving at a consensus on a draft instrument, whether as a Declaration or Treaty on Democracy in the Inter-American System, with the expectation that there might evolve a juridical obligation on the part of States in the inter-American System to ensure the effective exercise of representative democracy. The investigation would involve an analysis of the characteristics required of a State in order to be

considered a democratic State. The study was also expected to reveal whether or not there are applicable laws declaring that democracy is a right and an obligation.

Members of the Inter-American Juridical Committee were later pleased that the Chairman of the Permanent Council's Working Group on the Democratic Charter invited the Committee to support the work of the Working Group in whatever way the Committee considered appropriate. The Inter-American Juridical Committee was honoured to be associated with the process of developing the Charter and responded by adopting a resolution entitled *Observations and comments of the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter,* which was transmitted to the Chairman of the Permanent Council by letter of August 16, 2001.

From all indications, it appears that the contributions of he Inter-American Juridical Committee were well received and the Committee was privileged to be represented by Dr. Eduardo Vío Grossi at the 28th special Session of the OAS General Assembly, in Lima, Peru, on 10 and 11 September, 2001, when the Inter-American Democratic Charter was adopted. At its 60th regular session held during 25 February to 8 March 2002, the Inter-American Juridical Committee adopted a resolution expressing its recognition of the fact that the *Inter-American Democratic Charter* constitutes "an updated expression of the sources of international law with regard to democracy and the exercise of it within the system of the Inter-American System". With regard to democracy, it must be mentioned that the 37th session of the General Assembly adopted a resolution on the promotion of democracy generally within the OAS and also a declaration on democracy in Venezuela. A resolution on the situation of Haiti was also adopted by the General Assembly.

With respect to "e) Preparations for the commemoration of the Centenary of the Inter-American Juridical Committee", the Committee wishes to draw attention to the resolution of the 31st regular session of the General Assembly (AG/RES.1773 (XXXI-O/01), by which the General Assembly requested the Inter-American Juridical Committee to proceed with preparations for the programme of activities for the occasion as contained in that resolution, but adopting some additional matters, in particular, stipulating that the Book to be published for the Centennial should contain articles by all members of he Committee, former members and members of the staff of the General Secretariat desirous of submitting articles on the work of the Committee. The resolution also mandated the submission of a proposal for the design and printing of a poster for the occasion.

With respect to "f) The Juridical Aspects of Hemispheric Security", this subject was under investigation by the Inter-American Juridical Committee in the context of the regional and global situations since the entry into force of the of the relevant instruments at the regional and international levels. The Committee in the light of the mandate undertaken by the Permanent Council in this regard did not pursue the investigation of this subject.

With respect to "g) The International Abduction of Minors by one of their Parents", the Inter-American Juridical Committee, at its 58th regular session, expressed its deepest concern about the international abduction of children by one of their parents and, after acknowledging with gratitude documentation received from the Inter-American Children's Institute, resolved to suspend further consideration of the topic pending the receipt of more specific instructions from, or the conduct of further consultations with the political organs of the Organization or the Inter-American Children's Institute.

With respect to "h) Inter-American Cooperation against Terrorism", the 32nd regular session of the OAS General Assembly adopted the *Inter-American Convention against Terrorism*, which was open for signature by member States.

With respect to "i) The Draft Inter-American Convention against Racism and all Forms of Discrimination and Intolerance", requested by the General Assembly as "an analytical document for the purpose of contributing and furthering the work of the Permanent Council on the need to draw up an Inter-American Convention to prevent, sanction and eradicate racism and all forms of discrimination and intolerance". the Inter-American Juridical Committee, at its 60th regular session during 25 February-8 March 2002, concluded that there was no need to develop such a convention but that the opportunity could be taken to produce

an instrument encompassing other forms of unacceptable and reprehensible conduct which were manifest. Such an instrument will be supplementary to those in existence.

With respect to "j) The Specialized Inter-American Conference on Private International Law", the CIDIP process, the Committee noted proposals for a restructured process and the role to be assigned to the Inter-American Juridical Committee.

With respect to "k) Additional measures to supplement the Inter-American Convention against Corruption", the Inter-American Juridical Committee STARTED A preliminary discussion on the compilation of a list of topics which might engage the attention of the Committee as follow-up work in order to implement the Convention. The topics include matters that could lead to the preparation of appropriate model law, the problems of the laundering and other means of distributing the proceeds of corruption, the participation of corporate bodies in acts of corruption and the introduction of mechanisms for effective monitoring to promote or assess the implementation of the Convention.

The 32nd regular session of the General Assembly adopted the Declaration of Bridgetown on the Multidimensional Approach to Hemispheric Security in pursuance of one of the essential purposes of the Organization, namely, to strengthen the peace and security of the continent. The Declaration affirmed that the Ministers of Foreign Affairs and Heads of Delegations during their dialogue at the 32nd regular session of the General Assembly recognized that security threats, concerns and other challenges in the hemispheric context are of a diverse nature and multidimensional in scope and that the traditional concept and approach must be expanded to encompass new and non-traditional threats which include political, economic, social, health and environmental aspects requiring appropriate hemispheric cooperation and responses. The General Assembly called for the convening of the special Conference on Security called for by the Third Summit of the Americas to consider these issues. Indications are that the Conference is scheduled to be held in Mexico in May 2003.

On the final day of the meeting, with the permission of the Chair, I made a brief statement to the Assembly *inter alia* declaring the Inter-American Juridical Committee's readiness to assist in whatever way may be deemed necessary and within its competence to further the objectives of the Organization and, in particular, the implementation of the mandates from the 32nd regular session of the General Assembly. Brief presentations were also made by the President of the Inter-American Court of Human Rights and the President of the Inter-American Commission on Human Rights. The text of my statement is annexed.

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ANNEX

REMARKS BY THE VICE-CHAIRMAN OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE FOURTH PLENARY AT THE THIRTY-SECOND REGULAR SESSION OF THE GENERAL ASSEMBLY

(presented by Dr. Brynmor T. Pollard)

Madam Chair,

I am deeply honoured to have been afforded the privilege of addressing this Thirty-Second Regular Session of the General Assembly in my capacity as the Vice-Chairman of the Inter-American Juridical Committee, in the unavoidable absence of the Chairman, Dr. João Grandino Rodas, of Brazil, who, nevertheless, asked me to bring greetings and best wishes for the successful deliberations of this session.

Madam Chair, as the distinguished representatives are no doubt aware, the Inter-American Juridical Committee is the oldest juridical body of our inter-American System. The functions of the Committee include responding to mandates of the organs, agencies and

entities of the organization falling within its competence. The Inter-American Juridical Committee was pleased and honoured to have been requested by the Chair of the Permanent Council to contribute towards the development of the Inter-American Democratic Charter which has now been approved by Member States and can be regarded as an important instrument for this Organisation, for the maintenance of democracy and the good governance of Member States.

The Members of the Juridical Committee cherish the hope that our involvement will be sought in future situations of such importance. I can assure you, Madam Chair, that the Inter-American Juridical Committee stands ready to assist, in whatever way may be deemed necessary, and within its competence, in collaboration with the organs, agencies and entities of the Organisation to further its objectives and, in particular, the implementation of the mandates from this Thirty-Second regular session of the General Assembly.

Thank you, Madam Chair.

B. Course on International Law

At its LIX regular session (Rio de Janeiro, August 2001), the Inter-American Juridical Committee adopted resolution CJI/RES.34 (LIX-O/01), *Course on International Law.* There it resolved that the central theme of the XXIX Course on International Law would be "Natural resources, energy, environment and international law."

Working from that resolution, the Inter-American Juridical Committee and the Department of International Law of the Secretariat for Legal Affairs organized the XXIX Course on International Law, for August 5 through 30, 2002. It was attended by 21 professors from various countries of the Americas and Europe, 28 OAS fellowship recipients selected from more than 50 candidates, and 7 students who paid their own tuition expenses.

On August 5, 2002, during the LXI regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2002), the opening ceremony for the XXIX Course on International Law was held at the Centro Empresarial Rio, attended by members of the Committee, guest officials, representatives of the General Secretariat and fellowship recipients and participants in the Course. At the inaugural session, a special tribute was paid to the memory of Dr. Francisco V. García Amador.

The program for the Course was as follows:

First Week

Monday, August 5

10:00 am	Opening ceremony Remarks by Dr. Sergio González Gálvez Member of the Inter-American Juridical Committee*Tribute to Dr. Francisco V. García Amador*

Tuesday, August 6

9:00-11:00 am	Carlos Delpiazzo Director, Institute of Informatics Law, School of Law, Universidad Mayor de la República, Uruguay *Information technology and telecommunications law I: the recent past: the law vis-à-vis telecommuinications and information technology*

11:00 am -1:00 pm Elizabeth Spehar,
Executive Coordinator, Unit for the Promotion of Democracy, OAS *The hemispheric agenda and role of the Inter-American Democratic Charter* I

Wednesday, August 7

9:00-11:00 am Carlos Delpiazzo

Information technology and telecommunications law, II: the turn-of-the century challenge: technological convergence

11:00 am - 1:00 pm Orlando Rebagliati
Member of the Inter-American Juridical
Committee*Information technology and telecommunications law, II: the turn-of-the century challenge: technological convergence*

2:30-4:30 pm Elizabeth Spehar
The hemispheric agenda and the role of the Inter-American Democratic Charter, II

Thursday, August 8

9:00-11:00 am Fabian Novak

Director, Institute of International Studies, Pontificia Universidad Católica del Perú
The liability of States for ultradangerous or ultrahazardous activities not prohibited under international law, I

11:00 am -1:00 pm Orlando R. Rebagliati
International legal regime of Antarctic natural resources, II

2:30-4:30 pm Carlos Delpiazzo
Information technology and telecommunications law, III: the present electronic commerce

Friday, August 9

9:00-11:00 am Fabian Novak
The liability of States for ultradangerous or ultrahazardous activities not prohibited under international law II

<u>Second Week</u>

Monday, August 12

9:00-11:00 am Nigel Bankes, Professor,
Faculty of Law, The University of Calgary
The Columbia River Treaty: from power and flood control to fish and the Columbia ecosystem I

11:00 am -1:00 pm Julio Herrera
Executive Secretary,OLADE
Law and energy

Tuesday, August 13

9:00-11:00 am Nigel Bankes
The Columbia River Treaty from power and flood control to fish and the Columbia ecosystem II

11:00 am -1:00 pm Julio Herrera
Law and energy

2:30 - 4:30 pm Sergio González Gálvez
Member of the Inter-American Juridical Committee
The function of law in international relations, I

Wednesday, August 14

9:00-11:00 am Nigel Bankes
The Columbia River Treaty: from power and flood control to fish and the Columbia ecosystem III

11:00 am -1:00 pm Daniel Vignes
Member of the Institut de Droit International
L'amenuisement de la souveraineté des Etats membres au cours de cinquante années de progrés de la construction de l´Europe I

2:30-4:30 pm Sergio González Gálvez
The function of law in international relations, II

Thursday, August, 15

9:00-11:00 am Daniel Vignes
The attenuation of the sovereignty of the member States over the fifty-year construction of Europe, II

11:00 am -1:00 pm Antônio Augusto Cançado Trindade
Chairman, Inter-American Court of Human Rights
The formation of contemporary international law: a reassessment of the classic theory of its sources, I

Friday, August 16

9:00 am -11:00 pm Daniel Vignes*The attenuation of the sovereignty of the member States over the fifty-year construction of Europe, III*

11:00 am -1:00 pm Antônio Augusto Cançado Trindade*The formation of contemporary international law: a reassessment of the classic theory of its sources, I*

Third Week

Monday, August 19

9:00-11:00 am J. Roberto Nolasco
Deputy Legal Advisor, Inter-American Development Bank
Protection of the environment in IDB-financed projects, I

11:00 am - 1:00 pm Jean-Michel Arrighi
Director, Department of International Law of the OAS
The inter-American juridical system, I

Tuesday, August 20

9:00 -11:00 am Jaime Aparicio
Executive Secretary Summit Process Secretariat of the OAS
The agenda of sustainable development in the Summits of the Americas process, I

11:00 am -1:00 pm Jaime Aparicio
The agenda of sustainable development in the Summits of the Americas process, I

2:30-4:30 pm — Ana Elizabeth Villalta Vizcarra
Member of the Inter-American Juridical Committee
The environment and sustainable development in the Central American Integration System (SICA)

Wednesday, August 21

9:00-11:00 am — José Félix Fernández Estigarribia
Former Minister of Foreign Affairs of Paraguay and Ambassador in Mexico
The right of asylum in the Americas, I

11:00 am -1:00 pm — Miguel Ruiz-Cabañas
Permanent Representative of Mexito to the OAS
The Inter-American Convention against Terrorism, I

Thursday, August 22

9:00 -11:00 am — Geraldo Facó Vidigal
Professor at the Universidade de São Paulo (USP)
Amer-Iberia and its sociopolitical macro interests: a picture of international economic law

11:00 am -1:00 pm — José Félix Fernández Estigarribia
The right of asylum in the Americas, II

2:30-4:30 pm — Miguel Ruiz Cabañas
The Inter-American Convention against Terrorism, II

Friday, August 23

9:00-11:00 am — Geraldo Facó Vidigal
Amer-Iberia and its sociopolitical macro interests: a picture of international economic law

Fourth Week

Monday, August 26

9:00-11:00 am — Frida Armas Pfirter
Member of the Legal and Technical Commission of the International Seabed Authority and Coordinator General of the Argentine Commission of the Continental Shelf's Outer Edge
The exploitation of the natural resources of the continental shelf and the seabed and protection of the environment, I

11:00 am -1:00 pm — Jean-Michel Arrighi *The inter-American juridical system, II*

Tuesday, August 27

9:00 - 11:00 am — Frida Armas Pfirter
The exploitation of the natural resources of the continental shelf and the seabed and protection of the environment, II

11:00 am -1:00 pm — Luis Diaz Muller
Consultant, Instituto de Investigaciones Jurídicas, UNAM, México
Sovereignty and globalization

2:30-4:30 pm — Embajador João Clemente Baena Soares
Former Secretary General of the OAS
Experiences in the OAS General Secretariat

Wednesday, August 28

9:00 -11:00 am	Frida Armas Pfirter *The exploitation of natural resources from the continental shelf and the seabed and environmental protecction, III*
11:00 am -1:00 pm	Diego Fernández Arroyo, Professor of International Law, Universidad Complutense de Madrid *CIDIP-VI. A paradigm shift in the inter-American codification of private international law?*
2:30-4:30 am	Luis Díaz Muller *Globalization and human rights*

Thursday, August 29

9:00-11:00 am	Diego Fernández Arroyo *The inter-American model law on secured transactions*
11:00 am -1:00 pm	Didier Opertti, Minister of Foreign Affairs of Uruguay *MERCOSUR: current legal issues*

Friday, August 30

10:00 am	Closing and presentation of certificates Brynmord Pollard, Chairman of the Inter-American Juridical Committee

During its LXI regular session (Rio de Janeiro, August 2002), the Inter-American Juridical Committee adopted resolution CJI/RES.46 (LXI-O/02), *XXX Course on International Law*, wherein it decided that the XXX Course would be from August 4 to 29 2003, and that the main theme would be "International law and the maintenance of international peace and security." The Committee also decided that at the opening ceremony, tribute would be paid to Dr. Jorge Casteñeda. The following is the text of that resolution:

CJI/RES.46 (LXI-O/02)

30th COURSE ON INTERNATIONAL LAW

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that in 2003 the thirtieth Course on International Law, which it organizes annually in conjunction with the General Secretariat of the Organization of the American States, will be held in the city of Rio de Janeiro;

CONSIDERING the need for the Course on International Law to concentrate on a central topic that focuses attention on a matter of current international importance and is also flexible enough to attract teachers and students with different interests in public and private international law,

RESOLVES that the 30th Course on International Law shall be held from August 4 to 29, 2003, with the central topic *International Law and the Maintenance of International Peace and Security.*

This resolution was unanimously adopted at the session held on August 16, 2002, in the presence of the following members: Drs. Brynmor T. Pollard, Jonathan T. Fried, Orlando R. Rebagliati, João Grandino Rodas, Felipe Paolillo, Ana Elizabeth Villalta Vizcarra, Carlos Manuel Vázquez and Sergio González Gálvez.

Concerning the publications from the Course on International Law, the Director of the Department of International Law announced that the volume for the 2001 course had already been published. He also reported that it was his intention to continue to publish the new International Law Course Series, which summarizes the classes by area. The next will be the volume on the inter-American system; the volume after that will deal with public international law in general. At the LX regular session, he presented the series pertaining to private international law.

C. Relations and forms of cooperation with other inter-American organs and entities and with like regional or world organizations

- The Inter-American Juridical Committee's participation as an observer to various organizations and conferences

The following members of the Inter-American Juridical Committee were observers at various meetings and international organizations in 2002:

- Dr. João Grandino, at the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI), held February 4 through 8, 2002.
- Dr. Orlando Rebagliati, at the 54th Session of the United Nations International Law Commission (Geneva, June 5-6, 2002). Dr. Rebagliati presented the document CJI/doc.96/02, titled *Report by the observer of the Inter-American Juridical Committee to the 54th session of the International Law Commission (Geneva, June 5 and 6, 2002).*
- Dr. Brynmor Pollard, at the IV Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas (IV REMJA), held in Trinidad and Tobago, March 11 through 13, 2002. Dr. Pollard presented document CJI/doc.99/02, *Report by the observer of the Inter-American Juridical Committee on the Fourth Meeting of Ministers of Justice or of Ministers or Attorneys-General of the Organization of Amrican States (IV REMJA) (Port of Spain, Trinidad, March 10-13, 2002)*.
- Dr. João Grandino Rodas, at the XIX Seminar Rome-Brasília, which took place in Brasília from August 21 to 24, 2002. He spoke on the subject of justice, international courts and globalization.

The following are the texts of the reports written by Dr. Rebagliati and Dr. Pollard:

CJI/doc.96/02

REPORT BY THE OBSERVER OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE 54th SESSION OF THE INTERNATIONAL LAW COMMISSION (Geneva, June 5-6, 2002)

(presented by Dr. Orlando R. Rebagliati)

1. In compliance with the mandate received from the Juridical Committee, I participated as an observer on its behalf during the 54th session of the International Law Commission that was first held throughout April 29 to June 7, 2002 at the United Nations head offices in Geneva. The second part of this session will take place in the same headquarters from July

22 to August 16 of the current year. I was present during the plenary sessions held on June 5 and 6, when I was welcomed by President Robert Rosenstock (United States of America) and Vice-President Enrique J.A.Candioti (Argentina). The prior coordination was efficiently carried out by Messrs. Manoel Tolomei Moletta and Vaclav Mikulka, secretaries of the respective organs, who also granted their specific cooperation to ensure the good performance of this mission.

2. The following agenda was adopted by the Commission for this session:

   a) Election to fill the vacancy (created by the decease of member Adegoke Ajibola Ige – Nigeria);

   b) Organization of the Work to the carried out by the Session;

   c) Reservations to Treaties;

   d) Diplomatic Protection;

   e) Unilateral State Acts;

   f) Program, working procedures and methods for the Commission and its documentation;

   g) Cooperation with other organs;

   h) Date and venue of the 55th session; and

   i) Other issues.

3. The tasks undertaken may be summarized as follows:

   a) Mr. Peter C.R. Kaatsi (Uganda) was elected to fill the above mentioned vacancy

   b) The Commission took due note of the decision taken by the Planning Group to re-establish the Long Term Work Program Working Group, which shall be presided by Mr. Alain Pellet (France);

   c) The Commission adopted the recommendation made by the Planning Group to include the following topics in its working program:

      - International Responsibility for Damages Caused by Acts Not Prohibited by International Law. For this purpose, it established a Working Group that shall be presided by Mr. P.S.Rao (India), stating that he could also be chosen as the rapporteur of this special subject at a later date.

      - International Responsibility of International Organizations. A Working Group was also established to deal with this issue and will be presided by Mr. Giorgio Gaja (Italy), who was also nominated as special rapporteur on this topic.

      - Shared Natural Resources. Mr. Chusei Yamada (Japan) was designated as the special rapporteur on this subject.

   d) Furthermore, the Commission also decided to establish a Study Group to cover the topic Fragmentation of International Law, and commissioned Mr. Bruno Simma (German Federal Republic) to chair it.

   e) The Commission discussed extensively the third report of the special rapporteur on the topic of Diplomatic Protection, Mr. Christopher J.R. Dugard (South Africa), related to the rule of depletion of internal resources, even the Calvo Clause, and approved several draft articles referring to the norm of nationality.

   f) The Commission also discussed the fifth report presented by the special rapporteur on the subject of Unilateral Acts, Mr. Victor Rodriguez Cedeño (Venezuela), and resolved to carry out a systematic study on the practice used in the States.

4. During the second part of this session the Commission will continue discussing the matters under reference, and shall also consider the seventh report issued by the special rapporteur, Mr. Alain Pellet, on practical guidelines applicable to matters related to treaties' reservations.

5. At the invitation of the President, during the 2730th meeting of the Commission held on June 5, I expressed the declaration attached herewith. Its text recalls the relevant background of the Juridical Committee since 1906, makes reference to the task carried out throughout the last two periods of sessions, including those made in cooperation with other organs trying to transmit its participation in said tasks, particularly regarding the main decisions recently taken by the Permanent Council and its subsidiary organs, the General Assembly and the Specialized Inter-American Conferences on Private International Law. Furthermore, special mention is also made on other related and important activities, such as the Course on International Law and the Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the OAS Member State. Finally, some remarks are also made regarding the cooperation relationship the Juridical Committee has established with other organs and organizations, particularly the International Law Commission. As mentioned in the declaration, the relevant OAS documents were distributed prior to these tasks. At the end of this intervention there was an interchange of ideas and information on some items that I will proceed to summarize below: The President, the Vice-President and several members expressed their sincere thanks for the participation of the Inter-American Juridical Committee as an observer during a part of the Commission work pointing out that it would be convenient to continue with such a good practice. They also recalled the regular cooperation relationship maintained by the Commission with the Inter-American Juridical Committee, the Legal Asian-African Consultation Committee, the European Committee on Legal Cooperation and the Arab Commission on International Law. Notwithstanding the above, they further expressed their thanks for the general overview given during the presentation as well as for all the documents that had been distributed that clearly illustrated some important tasks carried out by the Inter-American Juridical Committee and the Inter-American System in general. Several members expressed their views on the discussions held by the Commission on the topic covering the Fragmentation of International Law, and praised the approach maintained in the hemisphere, especially as regard the *Inter-American Convention on Terrorism* and the measures covering the Prevention of Racism and all other forms of Discrimination and Intolerance and the possibility of preparing a Draft Inter-American Convention on the subject. Additionally, several laudatory concepts were expressed on the *Inter-American Democratic Charter* and the process that resulted in its adoption during the XXVIII Special Session of the General Assembly held in Lima, Peru, in September 2001.The importance of the special session of the International Law Course organized on an annual basis by the Juridical Committee was also worthy of notice, and mention was made of its analogy to the International Law Seminar held by the Commission every year.

6. During the following meeting I expressed my acknowledgement for the opportunity granted to the Inter-American Juridical Committee to participate as observer in the Commission, highlighting that although that participation was relatively brief it was still very suitable for enhancing the knowledge on the tasks performed by both organs. Finally, I renewed the interest of the Juridical Committee and it General Secretariat to maintain and strengthen, if it were possible to do so, this cooperation between both organs.

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ANNEX

DECLARATION MADE BY
THE INTER-AMERICAN JURIDICAL COMMITTEE OBSERVER TO THE
UNITED NATIONS INTERNATIONAL LAW COMMISSION
(Geneva, June 5 and 6, 2002)

(presented by doctor Orlando R. Rebagliati)

Mr. President:

First of all, allow me to express my appreciation for the opportunity the International Law Commission has granted me to participate as observer on behalf of the Inter-American Juridical Committee during your 54th session. I feel pleased by the honor and consider it very suitable to be able to participate, no matter how briefly, at a session held by this prestigious United Nations organ and to renew a practice that has shown to be mutually fruitful in the past. This is the ideal environment to interchange information and the best way to appreciate the work being done in the core of the international legal plans upheld and performed by both organs.

As you may recall, the Inter-American Juridical Committee acknowledges the background of its foundation in the resolution adopted on August 23, 1906 in Rio de Janeiro, Brazil, by the Third International American Conference that established the Permanent Commission of Jurists. The Commission prepared several draft conventions on the issue of international public and private law. The highly renowned “Codigo Bustamante” is included in this latter field. A second milestone particularly relevant for the institution of which I am a member, was the Inter-American Committee on Neutrality established during the First Consultation Meeting of Ministers of Foreign Affairs of the American States, held between September 26 and October 3, 1939. The evolution of international relationships as of that date, resulted in the fact that the Third Consultation Meeting of Ministers of Foreign Affairs held in Rio de Janeiro in 1942, transformed this Committee into the Inter-American Juridical Committee. This was later included in the Organization of American States Charter adopted in Bogota in 1948, that after undergoing several amendments continues to rule to date. It is specifically mentioned in Article 53 of the Charter, jointly with other important institutions belonging to the Organization, such as the General Assembly, the Consultation Meeting of Ministers of Foreign Affairs, the Councils, the Inter-American Committee on Human Rights, the General Secretariat, and the Specialized Conferences and Organisms. The purpose of the Juridical Committee is to serve the consultative body of the Organization on legal matters, promote the progressive development and codification of international law, study the legal problems related to the integration of the developing countries in the Continent and the possibility of achieving uniformity of their legislations, whenever it may seem convenient to do so. In compliance thereof, the Inter-American Juridical Committee undertakes studies and preparatory works commissioned by the General Assembly, The Consultation Meeting of Ministers of Foreign Affairs and the Organization Councils. Additionally, it may also carry out others it may deem necessary under its own initiative, and suggests the celebration of specialized juridical conferences. The Juridical Committee, constituted by eleven nationals of the member States of the Organization who must have the required qualifications and perform their tasks on a personal basis, represents these States and has the most wide-ranging technical autonomy. It is headquartered in Rio de Janeiro and is empowered to meet in other cities in Brazil as well as any other member States. As a matter of fact, it has practiced this prerogative quite often, holding meetings in Washington D.C as other cities of the Continent. Three distinct issues may be pointed out that differentiate the Committee from the International Law Commission, which could go a step further from the prevailing analogy that exists between both organs, one at the regional and the other at the world level scope. The Juridical Committee is duly established by the *Charter* and may, and *de facto* it does, deal with subjects under its own initiative and its field of action covers public international law and private international law. The distinguished members of the Commission have at their disposal the publication *Profile of the Inter-American Juridical Committee*, prepared by its Secretariat.

I will now try to give you a brief background of the works done by the Inter-American Juridical Committee during its 59th and 60th sessions held in July/August 2001 and February-March 2002. The respective agendas, documents CJI/RES.27 (LVIII-O/01) and CJI/RES.36 (LIX-O/01), are available to all members of the Commission.

Notwithstanding the wide-ranging agenda foreseen for the 59th session, highly important institutional reasons supported the Juridical Committee's decision to concentrate almost exclusively on one issue: Democracy in the Inter-American System. This was the result of the fact that the 28th Special Session of the General Assembly had already been summoned and was going to be held the following month of September in Lima, Peru, with the objective of adopting the *Inter-American Democratic Charter*.

The Inter-American Juridical Committee has been working on the topic of Democracy in the Inter-American System since 1995, and has made a large number of contributions that have been adopted in a greater or lesser degree by other organs, especially the General Assembly and the Permanent Council. At the beginning of the 59th session to which I refer to, the Chairman of the Juridical Committee received a letter from the Chairman of the Permanent Council inviting the Juridical Committee to support the Council's Working Group that had been entrusted with some tasks in order to complete the preparation of the Inter-American of American States. It was also understood that the aim of this resolution was to strengthen the OAS instruments for the active defense of representative democracy, as had been clearly expressed in the previously mentioned resolution 1838 of the General Assembly.

In the light of this draft, the Inter-American Juridical Committee considered it timely to point out that resolutions of this nature usually have the objective of interpreting conventional provisions, proving the existence of customary law rules, taking due notice of the general principles of law Democratic Charter, that had to be presented at the Special Session of the General Assembly the following month.

The Inter-American Juridical Committee undertook full responsibility to prepare it, bearing in mind the scarce time available, the contribution expected from it in view of the importance assigned to this topic by the member States. The result of this decision was the adoption of resolution CJI/RES.32 (LIX-O/01) that contains as Annexes the Observations and Remarks made on the *Draft Inter-American Democratic Charter* that had been adopted by the General Assembly during its 31st regular session, held in March 2001 in San José, Costa Rica [AG/RES.1838 (XXXI-O/01)]. It was this draft that had been used as basis by the Permanent Council Working Group to which I referred to previously.

The observations and remarks made by the Juridical Committee were formulated under the assumption that it did not seem timely to propose alternative texts in view of the drafting stage of the *Charter* and the haste with which, they had consequently been requested to remit them. Furthermore, they were formulated under the assumption that the *Inter-American Democratic Charter* would be adopted as a resolution of the General Assembly of the Organization, proclaiming common aspirations and contributing to the progressive development of international law. Furthermore, it also recalled that some of the resolutions issued by an organ of an international organization may have a binding nature within the Organization when duly stipulated by its incorporation instrument. Lastly, it advised that the context of this type of resolutions must also identify precepts of a programmatic order.

Following these remarks of a general nature, the Juridical Committee focused its analysis on the draft of the *Charter* adjusting its task to a technical juridical approach. Observations tending to achieve an enhanced systematization of the text were drafted together with the coherent grouping of the different topics covered, especially its compatibility with previous resolutions adopted by the General Assembly, among which AG/RES.1080 (XXI-O/91), on Representative Democracy and, obviously, the *OAS Charter*. As it may be recalled, article 9 of this resolution foresees the possibility of a member State whose democratically constituted government has been overthrown by force may be suspended from exercising its right to participate in the sessions of the General Assembly,

the Consultation Meeting of Ministers of Foreign Affairs, the Organization Councils and the Specialized Conferences as well as from the committees, working groups and any other bodies that may have been constituted. The same provision stipulates other pertinent and related mechanisms, including the lifting of this suspension. Resolution 1080 dated l991 is compatible with this provision despite the fact that it covers a broader hypothesis. In addition to the armed coup, it also covers the interruption of the institutional democratic process, the illegitimate exercise of government by powers that have not been legitimally elected. This resolution does not refer to the suspension of the member States but empowers the Permanent Council and General Assembly to adopt certain measures on this regard. The Third Summit of the Americas held in the city of Quebec, Canada, on April 20–22, 2001 established, among other things, the so called democratic clause that foresees that any unconstitutional change or interruption of democratic order in a State in the Hemisphere constitutes an insurmountable obstacle for the participation of its government at the General Assembly sessions, the Consultation Meeting of Ministers of Foreign Affairs, the Organization Councils and Specialized Conferences, as well as in committees, working groups and remaining organs of the Organization. This provision, which was briefly included in the *Inter-American Democratic Charter*, triggered a lengthy discussion at the Juridical Committee that issued several recommendations regarding the need to make it compatible with the *OAS Charter*, as well as other related texts. The result was politically acceptable, at least for the time being, but perhaps when looking at it from a strictly legal viewpoint it may be less acceptable. One provision remains which is quite probably necessary, but that may legally cause some conflict with the *Charter*. All will depend on its interpretation and application. This may perhaps entail a broader framework than the one desired by the Juridical Committee. Be it as it may, it represents the collective wish to prevent and sanction alterations made to the constitutional and democratic order by non-violent means that are, nevertheless, just as illegal, and which have been occurring to a certain degree in the American Continent.

The *Democratic Inter-American Charter* was adopted by consensus during the 37th Special Meeting of the General Assembly on September 11, 2001. The date itself is a proof of the wish to approve it, while it also explains the absence of a final round of negotiations of its text. This *Charter* has been made available to the distinguished members of the Commission.

During its 60th regular session, the Inter-American Juridical Committee was advised about the adoption of the *Inter-American Democratic Charter* and, as a result, adopted resolution CJI/RES.41 (LX-O/02), which states that the former has included a large amount of criteria and suggestions formulated by the Committee and among many other matters, leaves on record the deep appreciation expressed by the Secretary General and other high dignitaries present at the Assembly for the participation of the Inter-American Juridical Committee in the process that culminated with the adoption of *the Inter-American Democratic Charter*. Jointly with all the other resolutions of the 60th session, this text is also available to all members of the Commission.

Allow me to give you now a brief summary on the work carried out during this 60th regular session, held in February-March, 2002. As previously mentioned, the agenda is available to all the distinguished members of the Commission. In addition to the topic of the *Charter* I shall highlight the treatment given to three main issues. One of them had not been included in the formal agenda.

In its resolution AG/RES.1774 (XXXI-O/01) entitled the *Preparation of an inter-American draft convention against racism and all forms of discrimination and intolerance*, the General Assembly requested the Inter-American Juridical Committee to prepare an analytical document aiming to offer a contribution and advance the works carried out on the same topic by the Permanent Council. As a result, the Committee dealt with this topic very broadly and approved resolution CJI/RES.39 (LX-O/02) that expresses concern regarding the growing acts of racism and intolerance perpetrated throughout the world and confirms the need to joint forces in a common cause against these manifestations, by strengthening the cooperation among the States to eradicate these practices. Furthermore, it adopted as

its own the conclusions given in document CJI/doc.80/02 rev. 2. Both texts were transmitted to the Permanent Council and are available to the members of the Commission. On this regard, it is worthy to mention that the Juridical Committee made an in-depth revision, duly proceeded by the compilation of treaties and legislation as well as answers received from the member States to the questionnaire, regarding the general legal framework that exists on this subject. Going a step further from the considerations mentioned in the replies, quite a large number indeed, the Committee was able to arrive to some conclusions which are included in the document under reference. They mirror some caution in favoring the negotiation of a new convention on the matter, while at the same time making it clear that, should this become necessary, it must represent a supplementary instrument to the existing universal and regional conventions, in other words, it should cover general aspects that have not been covered in these conventions, or typify forms of racism, racial discrimination or intolerance that have not been subject to a specific international regulation. The Juridical Committee clearly advised against entering into a negotiation which would end up drafting a convention to prevent, sanction and eradicate racism and all other types of discrimination and intolerance, inasmuch as it could be redundant, produce overlapping and would consequently raise serious problems regarding its interpretation and application. The Juridical Committee nevertheless identified certain subjects that could be significant to work with such a problematic issue that requires constant action from the Governments. These topics are: strengthening the supervisory mechanisms and compliance with the obligations arising from the conventions on human rights; taking into account specific groups such as the indigenous populations, ethnic minorities, etc., and the contemporary forms of racism and racial discrimination. Notwithstanding the above, the Committee deemed that if an Inter-American convention were concluded with a specific objective on this issue, it should be elaborated within the framework of the *International Convention on the Eradication of all Forms of Racial Discrimination* and other universal and regional conventions. The Committee further agreed that there are other means available to regulate matters related to racism and racial discrimination, particularly if they refer to the adoption of supplementary provisions contained in other instruments in force, or regulate specific aspects of a restricted scope. In this respect it mentioned, among others, the adoption of amendments, approval of interpretation declarations and the conclusion of additional protocols. Additionally, it recalled the possibility of using procedures of a political nature, such as those recommended by the First and Second Summits of the Americas (Miami, 1994 and Santiago de Chile 1998, respectively), and by the World Conference on Racism, Racial Discrimination and Xenophobia and related forms of intolerance (Durban, 2001). Finally, the Juridical Committee also indicated that the organs of the OAS could consider the possibility of urging the members who had not yet done so to ratify or adhere to the existing conventions, and could recommend to those States that are Parties to the conventions against racism and racial discrimination to adopt the measures necessary to effectively comply with the obligations arising thereof, including the adoption of laws and regulations in their domestic legislation.

This topic was recently under consideration during the 32nd regular period of session of the General Assembly held in Bridgetown, Barbados, and will continue under consideration in the future fora of the Organization. The Assembly adopted resolution AG/RES.1905 (XXXII-O/02) on this topic that recalls the conclusions of the Inter-American Juridical Committee and gives some guidelines for the future tasks to be performed by the Permanent Council regarding issues that do not necessarily imply the preparation of a Convention. As a matter of fact, I believe this is the right moment to mention that the agenda of the Assembly (AG/CP/SUB.TP-42/02 rev.2) is available to the distinguished members of this Commission. Furthermore, I also think it worthy to mention that the Assembly took under consideration a Agenda of special current importance. I refer to the adoption of an *Inter-American Convention against Terrorism*. The Draft was prepared by the Working Group of the Commission on Juridical and Political Affairs of the Permanent Council, and its text (CP/CAJP-1891/02) is available to all members of the Commission. The Chairman of the Group visited the Juridical Committee during the development of these tasks. Several consultations were held on the topic, which greatly facilitated an enhanced, the comprehension of the economy of the project and resulted in suggestions and remarks that

were taken into account before the Group finished its work. The Assembly that has just come to its end, adopted the draft convention through resolution AG/RES.1840 (XXXII-O/02), and even decided to open it for signature. Thirty Member States proceeded to subscribe it at that session.

Another important aspect of the last session held by the Juridical Committee related to the treatment given to the results of the Sixth Specialized Inter-American Conference on Private International Law, held in Washington D.C. on February 4 – 8 of this year. The Conference adopted two model laws: a *Standard Bill of Lading for the Transportation of Merchandise by Highways* and a *Non-Negotiable Standard Bill of Lading for the Transportation of Merchandise by Highways*. Furthermore, the Conference also adopted the *Inter-American Model Law on Transaction Guarantees*, which is expected to "reduce the cost of loans and facilitate international trade and investments throughout the region, as well as support small and medium sized enterprises in the hemisphere". A third subject was also discussed by the Conference, namely the one related to liability arising from transborder pollution. No agreement could be reached on this matter. The Juridical Committee received a very explicit commendation from the Conference for its contribution to their tasks done as well as two commissions. One requested its cooperation to study the issue of "the law applicable and international jurisdiction competent on matters related to civil extra contractual responsibility", and the other aiming to assist in the preparation of an agenda for the future Seventh Specialized Inter-American Conference on Private International Law. The Committee welcomed the commendation and assignments received. The Agenda for the next Juridical Committee session [CJI/RES.42 (LX-O/02)], is available to the members and shows the inclusion of the topic referred to above.

There is a last item that may result of interest to the Commission and it refers to the Preparations for the Commemoration of the Inter-American Juridical Committee Centennial. As recalled previously, its background goes back to 1906. This is the reason why the Committee has started working with some anticipation last year, and shall continue discussing the topic during each session. This is the sort of event that tends to attract a broad participation from Inter-American organs and organizations as well as from other regions, and certainly hopes to include the International Law Commission and other United National organs and specialized organisms. It undoubtedly also aspires to obtain the participation of academic and professional institutions with a high level of competence in the sphere of international public and private law. Among other models, special attention has been given to the preparatory works for the commemoration of the Centennial of The Hague Conference that took place in 1999. The program will also include meetings and specific events, publications and other academic activities, generally oriented towards current quick retrospective visions of the hemisphere, in the international-juridical framework.

The Juridical Committee is carrying forward two related activities as part of its task. One on a yearly schedule – the Course on International Law - and the other every two or three years - the Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States. It goes without saying that for both endeavors as well as for all the works it carries out, it has always counted with the valuable support of the General Secretariat.

The International Law Course has been lectured since 1974. It has a four-week duration that usually coincides with the meeting the Juridical Committee holds in Rio de Janeiro in August. Approximately thirty scholarship students from all members States participate in this Course, and seven additional participants, also from the members States, who receive no scholarship. The participants are young graduates, some work in the universities other in the public sector, and other even in the foreign services of their countries. They are carefully chosen using a pre-established procedure and devote themselves full time to the activities of the Course during the four weeks, and are subject to evaluation. The lectures are given by Committee members, international officers, or members of international organs and, obviously, professors from American universities as well as from other regions, particularly Europe, whose main activities are academic. The staff of professors usually reaches some thirty participants each year. Several member of the

International Law Commission both from their present roster as previous ones had dictated lectures to the Course and greatly contributed to its prestige. The Course is developed around a main topic. The Professors choose a specific topic or topics they will lecture on during their classes with broad discretion, and in coordination with the General Secretariat. The core topic during 2001 was "The Human Person in Contemporary International Law". This year's topic will deal on "Natural Resources, Energy, the Environment and International Law".

The last Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States were held during the Juridical Committee's 56th session, held in Washington D.C., in March 2000. The next one will take place in 2002 and the topic, handed down as a mandate from the General Assembly will include "International Criminal Court" that stopped being part of the Juridical Committee agenda. Notwithstanding the above, the remainder of the agenda is under preparation and demands consultations with the future participants. In general, it is a matter of exchanging information and agreeing on criteria applicable to some juridical issues that are current in the member States, especially in the Inter-American sphere. It is unnecessary to explain that it is extremely important for the Juridical Committee to know the viewpoints Legal Advisors have on some issues included in the Committee's Agenda, the importance assigned to it, and to receive suggestions on issues that could be included in its agenda.

Article 103 of the *Organization of American States Charter* expresses that: "The Inter-American Committee shall establish cooperation relations with universities, institutes and other teaching centers, as well as with national and international committees and entities devoted to study, research, teaching, or dissemination of information on juridical matters of international interest". I hope I have been able to make some contribution to fulfill this mandate.

Thank you very much.

CJI/doc.99/02

REPORT BY THE OBSERVER OF THE INTER-AMERICAN JURIDICAL COMMITTEE ON THE FOURTH MEETING OF MINISTERS OF JUSTICE OR OF MINISTERS OR ATTORNEYS-GENERAL OF THE ORGANIZATION OF AMERICAN STATES (IV REMJA)

(Port-of-Spain, Trinidad, March 10-13, 2002)

(presented by Dr. Brynmor T. Pollard)

I attended the Fourth Meeting of Ministers of Justice or of Ministers or Attorneys-General of the OAS (IV REMJA), held in Port-of-Spain, Trinidad, March 10-13, 2002, on behalf of the Inter-American Juridical Committee with observer status. The main themes of the Meeting were legal and judicial cooperation in the Americas in fighting transnational organized crime and terrorism, particularly in the light of the tragic events which occurred in the USA in September 11, 2001 and also improving the administration of justice in member States of the OAS, with particular emphasis on access to justice and prison policy. A number of delegations informed the Meeting of the introduction of Alternative Dispute Resolution procedures in their respective jurisdictions intended to reduce delays being experienced in the traditional justice systems. The meeting resolved that the topic would be restyled *Improvement in Systems of the Administration of Justice*.

I was afforded the privilege of addressing the Meeting on behalf of the Inter-American Juridical Committee and took the opportunity to convey to the meeting greetings from the Chairman and members of the Committee and best wishes for fruitful deliberations at the Meeting, leading to conclusions of vital importance to the Organization in the pursuit of its

objectives and to member States, particularly in their implementation. I also referred to the fact that the topic – *Improvement in the Administration of Justice* (now restyled) – had, for sometime, been under examination by the IAJC, culminating in the preparation of a comprehensive report in the late 1990's, which was submitted to the political organs of the Organization.

The meeting was also informed that the IAJC noted with satisfaction that REMJA considered access to justice, especially by disadvantaged groups in our societies, to be an important item on its agenda. The meeting was informed that the 31st regular session of the General Assembly in Costa Rica, in June, 2001, had requested the Inter-American Juridical Committee to continue its research into matters relating to the administration of justice in member States and the Committee had resolved to keep the topic on its agenda, particularly to take account of decisions which might be taken at REMJA-IV and to benefit also from any consultations with the Executive Director of the Justice Studies Center of the Americas.

On behalf of the IAJC, I cautioned that in implementing alternative dispute resolution mechanisms in their justice systems, member States must ensure that the quality of justice is not prejudiced. Finally, pledges of cooperation were given on behalf of the IAJC in assisting in implementing the decisions of REMJA.

The Vice-President of the Board of Directors of the Justice Studies Center of the Americas, Dr. Federico Callizo, Dr. Karl Hudson-Phillips of Trinidad and Tobago, a member of the Board, Director Juan Enrique Vargas and Staff Attorney Luciana Sánchez hosted a meeting with representatives of the CARICOM delegations with a view to exploring ways in which the Center could effectively carry out its mission in the Caribbean Region. There was a fruitful exchange of views and many helpful suggestions were made which were appreciated by the representatives of the Center.

Copies of the text of my intervention at REMJA-IV and the letter from the President, Board of Directors of the Justice Studies Center of the Americas are attached.

ANNEX I

PRESENTATION OF THE VICE CHAIRMAN OF THE INTER-AMERICAN JURIDICAL COMMITTEE AT THE FOURTH MEETING OF MINISTERS OF JUSTICE OR OF MINISTERS OR ATTORNEYS GENERAL OF THE AMERICAS (REMJA-IV)

(presented by Dr. Brynmor T. Pollard)

Madam Chair,

I wish to associate myself with the congratulations extended to you by the representatives of delegations on your election to chair this important Fourth Meeting of Ministers of Justice or of Ministers or Attorneys General of the Americas (REMJA) and to the Vice-Presidents.

I wish also to express appreciation for the hosting of this Meeting by the Government of the Republic of Trinidad and Tobago and for the invitation extended to the Inter-American Juridical Committee. It is always a pleasure to be here in Trinidad and Tobago.

Madam Chair, I bring to this meeting of Ministers and Attorneys-General greetings from the Chairman and other members of the Inter-American Juridical Committee of the Organisation with expressions of their wish that the deliberations at this Meeting will lead to conclusions of vital importance to the Organisation in the pursuit of its objectives and to the Member States particularly in their implementation.

Madam Chair, the Inter-American Juridical Committee is particularly pleased that the topic – "Improvement In the Administration of Justice (restyled at this meeting "Improvement in Systems of Administration of Justice") continues to be an important item on the agenda of REMJA. Members of delegations will recall that the Inter-American Juridical Committee had in the late 1990's prepared a comprehensive report on improvements in the administration of

justice in member States which was submitted to the political organs of the Organisation with the recommendation that particular issues be drawn to the attention of member States, for example, recommendations of measures for implementation intended to assist in safeguarding the independence of the judiciary.

The Inter-American Juridical Committee notes with satisfaction that, in particular, access to justice especially by disadvantaged groups in our societies is considered by REMJA to be an important item on its agenda. At the 31st Regular Session of the General Assembly in Costa Rica, in June 2001, the Assembly requested the Inter-American Juridical Committee to continue its research into matters relating to the administration of justice. At its 60th Regular Session in Rio de Janeiro which ended on March 8th, the Inter-American Juridical Committee resolved to retain the topic "access to justice" on its agenda in keeping with the General Assembly's mandate and particularly to take account of decisions which may be taken at this meeting of REMJA and also to benefit from any consultations to be engaged in with the Executive Director of the Justice Studies Centre of the Americas with the expectation that proposals for further work on the topic could be submitted for the consideration of the Juridical Committee at its next regular session in August 2002.

Madam Chair, I was pleased to hear the reports of the representatives of member States at this meeting providing information on measures which have been taken to implement alternative dispute resolution mechanisms in their justice systems in order to facilitate access to justice. The Inter-American Juridical Committee wishes to caution that in introducing those mechanisms into their justice systems, Member States must ensure that the quality of justice is not prejudiced.

Madam Chair, the Inter-American Juridical Committee, within its competence, pledges its co-operation in assisting in implementing decisions of REMJA and in the furtherance of its work if it is considered that the Committee can make a contribution.

Thank you Madam Chair.

* * * *

ANNEX II

March 2002
Mr. Brynmor Thornton Pollard
Vice President
Inter-American Juridical Committee
P.O. Box 10290
18 Brick Dam, Stabrock
George Town, Guyana
Oasgy@guyana.net.gy

Honorable Mr. Thornton Pollard,

Thank you very much for participating in the informal dialogue with representatives of the Justice Studies Center of the Americas, at the recent meeting of the Attorneys General and Ministers of Justice of the Americas in Trinidad. Together with our Vice President Dr. Federico Callizo of Paraguay, our Board member Dr. Karl Hudson-Phillips of Trinidad and Tobago, our Director Juan Enrique Vargas and Staff Attorney Luciana Sanchez, I found your remarks most helpful as the Center begins to explore ways in which we can carry out our mission in the Caribbean region.

Based on the many helpful suggestions received, we shall now begin to evaluate the next steps in this fruitful dialogue, and will be in further touch with you in the coming weeks. In the meantime, we welcome any further suggestions you might have and, in particular, the names and contact information of any jurists from your country or the region whom you would recommend be included in our ongoing communications.

On behalf of myself and our team, please accept my very best wishes for success in your work to improve the administration of justice. It was a pleasure to meet you, and I look forward to seeing you again.

Sincerely,
Douglass Cassel
President, Board of Directors
Justice Studies Center of the Americas

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ANNEX III

REPORT ON THE MEETING OF THE JSCA WITH CARIBBEAN JURISTS AND REPRESENTATIVES OF MISSIONS FROM CARIBBEAN COUNTRIES AT REMJA IV

This is a summary of the informal meeting at REMJA IV between members of the Board and Staff of the justice Studies Center of the Americas (JSCA) and Caribbean Jurists and representatives of Missions from Caribbean countries. A wealth of opinions was exchanged on matters relating to the functioning of justice systems in the Caribbean. This Report mentions only those topics discussed which have some link to the JSCA, or to which the activities of the JSCA can usefully contribute.

For convenience in this report, the comments of participants are grouped informally by topic.

ATTENDEES:

Without exception and to our great satisfaction, those who attended the Meeting expressed a great interest in collaborating with the Center and its regional activities.

Attendees on behalf of the JSCA:

Douglass Cassel, President.
Federico Callizo, Vice President.
Karl Hudson-Philips, Director.
Juan Enrique Vargas, Executive Director**.**
Luciana Sánchez, Programs Director.
Francisco Cruz, Secretary of the Board of Directors.
Silvina Ramírez, Associate Member.

Representing delegations from Caribbean Countries:

Bahamas:

- Mr. Bernard S.A. Turner, Director of Public Prosecutions, Office of the Attorney General

Barbados:

- Mr. Charles Leacock, Director of Public Prosecutions

Haiti:

- Mr. Salim Succar, Ministry of Justice and Public Security.

Jamaica:

- Ms. Gladys Young, Attorney-at-Law, Attorney General's DepartmentSuriname:

- Acting Attorney General Soebhaschandre Punwasi

Trinidad and Tobago:

- Ms. Harriet (Lindi) Seenath, Legal Affairs Officer, Ministry of Foreign Affairs

- The Honourable Mr. Justice R. Nelson, Supreme Court of Judicature, Court of Appeal, Hall of Justice

- Mr. Samraj Harripaul, Attorney at Law/Senior Parliamentary Counsel, Law Reform Comission, Ministry of the Attorney General and Legal Affairs

Inter-American Juridical Committee:

- Vice President Brynmor Thornton Pollard

CARICOM:

- Ms. Gloria Richards-Johnson, Assistant General Counsel, CARICOM Secretariat.

Additionally, Mr. Douglass Cassel, President of the JSCA, Board Member Mr. Karl Hudson-Phillips and the Executive Director met with Attorneys General Gertel Thom of Anti2ua and Barbuda and Raymond Anthony of Grenada.

TOPICS DISCUSSED.

The following topics and proposals were among those discussed:

a) Bar Associations:

- It was proposed that measures be taken to upgrade the quality of the Caribbean bar to prepare lawyers to serve as judges.
- OCBA - the Organization of Caribbean Bar Associations - has recently proposed to levy a membership fee on attorneys.

b) Judicial Training

- Training of judges in the region was unanimously pointed out as among the most significant needs in which the JSCA may collaborate. Ongoing initiatives in this sense were mentioned, but their potential could be increased. Integral training was emphasized, taking into account the differences among the diverse legal systems in the region.
- Cybercrime and e-commerce matters were proposed as subjects for which judicial training is specifically required, because these topics are new to judges in the Caribbean countries.
- There is a need for training in order to enhance cooperation, not only for judges but for all the players in the justice sector.
- Conducting Seminars for training and exchange of information on the different national and regional legal systems in the Americas was proposed, so as to encourage cooperation among judges prosecutors, and other "operators" of judicial systems.
- It was also recommended to open communication channels with the Regional Judicial training Institute, headquartered are in Jamaica, so as to coordinate action.
- Court administration and court reporting pose problems for Caribbean Countries, because they do not have enough properly trained personnel. The paramount need was stressed for training to bring employees and judicial administrators up to date.
- A database was proposed of resource persons in Latin America, organized according to expertise, so that Caribbean institutions can thus have access to technical assistance and useful exchanges of high quality.

c) Regional Issues:

- The inclusion of Suriname, Haiti and Saint Lucia was discussed. These countries have a continental legal system (civil law), and for that reason assistance was requested from the JSCA to integrate them and their legal systems into the regional system in the Caribbean. This is especially important for regional economic integration treaties.
- Mechanisms should be organized to promote fluid information exchange between Caribbean Countries and Latin America on topics or common concern.
- There is a need for close relations with the Inter-American Juridical Committee.
- The possibility of a JSCA representative visiting the Office of Legal Affairs of CARICOM in Suriname was discussed.

- Topics concerning corruption and money laundering, as well as the drug-trade, are of concern in the Caribbean. It would be interesting to have information on how these topics are dealt with in the rest of the Americas, with a view toward possible joint action.
- Research might be conducted in regard to the historical relationships between Spanish Law and Common Law in Trinidad and Tobago.

d) Alternative Dispute Resolution:

- The importance of this issue was highlighted, especially in relation to the processes of economic integration in the region.
- It was noted a recent workshop in Grenada on alternative dispute resolution focused on reforming the judiciary.

e) Prison and Imprisonment:

- The need for alternatives to prison sentences, in order to reduce prison populations, was stressed.
- There is also a need to train people to run administrative institutions for community service and for rehabilitation and reintegration of offenders. There is a lack of prison rehabilitation programs and aftercare, as well as a serious lack of trained counselors.
- A study by Trinidad three years ago found that the cost of keeping a prisoner incarcerated is much higher than a judicial salary.

f) Judicial Reform:

- Grenada is involved in judicial reform projects with CEDA (Canadians) and OECS (Organization of Eastern Caribbean States). Any new initiative should be complementary to efforts already being implemented such as those of CEDA, USAID, IADB and CARICOM.
- An important topic for judicial reform is citizen participation in the administration of Justice.

g) Legislative Reform

- Many countries are planning or already carrying out constitutional reforms; there is a need for training and technical assistance on how to draft these constitutional reforms.
- The Jamaican representative proposed sending the JSCA legislation that might serve as models, such as the Public Defender Act and the ADR act.

h) Juveniles.

- An important problem is that juveniles enter prison and then mix with seasoned criminals. At present there is often no alternative. This is directly related to the concern for juvenile penal law that meets international standards. An exchange of experiences is needed with other countries in the Americas.

i) New technologies:

- Data about information technology and computerizing the courts is required.

j) Judiciary:

- The topic of judicial independence as suggested by several delegations as a burning issue in the Caribbean. They propose conducting an advance course on judicial independence.

The meeting closed with acknowledgment of the need to consider these many suggestions and to conduct analyses and to make additional contacts to identify those topics on which the JSCA may most effectively be of assistance to the needs of the Caribbean.

- Visits made to the Inter-American Juridical Committee

The Inter-American Juridical Committee was pleased to receive visits from the dignitaries in 2002:

- Ambassador Didier Opertti, Foreign Minister of Uruguay.
- Ambassador João Clemente Baena Soares, former Secretary General of the OAS.
- Dr. Antônio Augusto Cançado Trindade, Chairman of the Inter-American Court of Human Rights.
- Ambassador Miguel Ruiz-Cabañas, Permanent Representative of Mexico to the OAS
- Professors of the XXIX Course on International Law: Drs. José Félix Fernández Estigarribia, Daniel Vignes, Jaime Aparicio, Nigel Bankes and Fabian Novak.

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