ORGANIZATION OF AMERICAN STATES

INTER-AMERICAN JURIDICAL COMMITTEE

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ANNUAL REPORT

OF THE INTER-AMERICAN JURIDICAL COMMITTEE

TO THE GENERAL ASSEMBLY

2003

EXPLANATORY NOTE

Up until 1990, the OAS General Secretariat had published the *Minutes of meetings* and *Annual Reports* of the Inter-American Juridical Committee under the series classified as *Reports and Recommendations.* Starting in 1997, the Department of International Law of 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 2003, 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), AG/RES.1883 (XXXII-O/02), and AG/RES.1952 (XXXIII-O/03), 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 applicable law and competency of international jurisdiction with respect to extracontractual civil liability; the cartels in the framework of competition law in the Americas; the Seventh Specialized Inter-American Conference of Private International Law - CIDIP-VII; improving the systems of administration of justice in the Americas: access to justice; the preparations for the commemoration of the centennial of the Inter-American Juridical Committee; the Fifth Joint Meeting with Legal Advisers of the Ministries of Foreign Affairs of OAS Member States and the International Criminal Court; the juridical aspects of inter-American security; the implementation of the Inter-American Democratic Charter; the preparation of a draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance; the right to information: access and protection of information and personal data; and the juridical aspects of the enforcement in the domestic jurisdiction of States of the sentences of international tribunals or other international organs with jurisdictional functions.

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 2003 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, and 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. Sixty-second regular session

The LXII regular session of the Inter-American Juridical Committee took place on March 10 to 21, 2003, at its seat in the city of Rio de Janeiro, Brazil.

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

Luis Marchand Stens
Felipe Paolillo
Carlos Manuel Vázquez (Vice-Chairman)
Brynmor Thornton Pollard (Chairman)
Luis Herrera Marcano
João Grandino Rodas
Ana Elizabeth Villalta Vizcarra
Eduardo Vío Grossi

Dr. Jonathan T. Fried, Dr. Alonso Gómez-Robledo Verduzco, and Dr. Kenneth O. Rattray were unable to attend this period of sessions.

On behalf of the General Secretariat, technical and administrative support was provided by Dr. Enrique Lagos, Assistant Secretary for Legal Affairs; Dr. Jean-Michel Arrighi, Director of the Department of International Law; and Dr. Manoel Tolomei Moletta and Dr. Dante M. Negro, principal legal officers with the Department of International Law.

The Chairman of the Inter-American Juridical Committee, in compliance with Article 12 of the *Rules of Procedure of the Inter-American Juridical Committee*, gave his report on the activities of the Committee since its last meeting. In particular, he spoke of his March 6, 2003 presentation of the *Annual Report of the Inter-American Juridical Committee* to the Permanent Council's Committee on Juridical and Political Affairs, describing its activities during the year 2002. On this occasion, he was accompanied by the Committee's Vice-Chairman, Dr. Carlos Manuel Vázquez. He said that the Juridical Committee was congratulated for its work and that the report was well received. He informed the other members that it had been recommended that the Juridical Committee basically concentrate its efforts in two areas: competition law and the CIDIP, with respect to extracontractual civil liability, without prejudice to any other issues that could arise in the immediate future.

The Chairman of the Inter-American Juridical Committee informed the other members of the recent death of Dr. Seymour Rubin, a former member of the Committee. It was decided to send condolences to his family and to the government of the United States by means of a resolution, and a minute's silence was kept in homage to him. Some members shared their memories of Dr. Rubin. The Juridical Committee finally decided that homage would be paid to Dr. Rubin during the 2004 Course on International Law. The text of the adopted resolution reads as follows:

CJI/RES.51 (LXII-O/03)

HOMAGE IN MEMORY OF DR. SEYMOUR J. RUBIN

THE INTER-AMERICAN JURIDICAL COMMITTEE,IN

VIEW OF the sad passing away on 11 March of this year of Dr. Seymour J. Rubin, prominent jurist and former member of the Inter-American Juridical Committee;

IN RECOGNITION OF the important contribution made by Dr. Seymour J. Rubin towards the development and codification of international law;

COGNIZANT OF Dr. Rubin's extremely fruitful participation in the work of the Inter-American Juridical Committee from 1974 to 1994;

RESOLVES:

1. To render its heartfelt and sincere homage in admiration and recognition of the memory of Dr. Seymour J. Rubin, whose passing away represents a painful loss not only for his country, the United States of America, but also for the Inter-American Juridical Committee and all the countries of the continent.

To honor the memory of Dr. Seymour J. Rubin at the inaugural session of the 31st Course on International Law to be held in Rio de Janeiro in August 2004.

To transmit a copy of this resolution as an expression of its condolences to Dr. Seymour J. Rubin's family and to the Government of the United States of America.

This resolution was unanimously adopted at the session held on 19 March 2003, in the presence of the following members: Drs. Luis Marchand Stens, Carlos Manuel Vázquez, Brynmor T. Pollard, Luis Herrera Marcano, João Grandino Rodas, Ana Elizabeth Villalta Vizcarra y Eduardo Vío Grossi.

In addition, the Inter-American Juridical Committee adopted resolution CJI/RES.52 (LXII-O/03), *Expression of gratitude to the Brazilian Government,* in which it thanked the Brazilian authorities for handing over a part of the facilities of the Itamaraty Palace in Rio de Janeiro to be used by the Committee for its regular activities. This transfer took place under the *Termo de Cessão de uso de parte de imóvel situado no Palácio Itamaraty no Rio de Janeiro, que entre si celebram o Governo da República Federativa do Brasil e a Secretaria-Geral da Organização dos Estados Americanos com a finalidade de reinstalação da Comissão Jurídica Interamericana,* signed on October 21, 2002. In that same resolution, it also thanked the Government of Brazil for its donation of USD $15,000, made in order to furnish the 2003 Course on International Law with simultaneous interpreting services. This resolution was conveyed to the appropriate authorities of the Government of Brazil.

CJI/RES.52 (LXII-O/03)

EXPRESSION OF GRATITUDE TO THE BRAZILIAN GOVERNMENT

THE INTER-AMERICAN JURIDICAL COMMITTEE,

RECOGNIZING the special support that the Government of the Federal Republic of Brazil has always given to the Inter-American Juridical Committee and to the development of its work;

BEARING IN MIND the *Term of Cession of use of part of the premises located in the Itamaraty Palace in Rio de Janeiro, agreed upon by the Government of the Federative Republic of Brazil and the General Secretariat of the Organization of American States for the purpose of re siting of the Inter-American Juridical Committee* and signed on 21 October 2002;

COGNIZANT of the donation made by the Government of the Federative Republic of Brazil to the Juridical Committee of fifteen thousand US dollars on 31 December 2002, to be

used to provide simultaneous interpretation services during the Course in International Law to be held in August 2003;

CONSIDERING that this donation will make possible the awarding of more scholarships from the English-speaking Caribbean countries to attend the Course in International Law;

RESOLVES:

1. To express its deep gratitude to the Government of the Federative Republic of Brazil for ceding part of the premises of the Itamaraty Palace in Rio de Janeiro to be used by the Inter-American Juridical Committee in conducting its regular activities.

2. To thank as well the Government of the Federative Republic of Brazil for the donation of fifteen thousand US dollars to provide simultaneous interpretation services during the Course in International Law to be held in 2003.

3. To transmit this resolution to the Government of Brazil with sincere gratitude for the support that it has always given the Inter-American Juridical Committee in carrying out its activities.

This resolution was unanimously adopted at the session held on 19 March 2003, in the presence of the following members: Drs. Luis Marchand Stens, Carlos Manuel Vázquez, Brynmor T. Pollard, Luis Herrera Marcano, João Grandino Rodas, Ana Elizabeth Villalta Vizcarra and Eduardo Vío Grossi.

During this regular session, the Inter-American Juridical Committee had before it the following agenda, adopted in resolution CJI/RES.49 (LXI-O/02), *Agenda for the 62nd regular session of Inter-American Juridical Committee:*

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: Drs. 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.

Based on that document, the Juridical Committee's members began a debate on the issues to be included on the order of business. This discussion was conducted with due reference to document CJI/doc.117/03, *Working program of the Inter-American Juridical Committee: examination of topics to be included in the future working program of the IAJC,* submitted by Dr. Felipe Paolillo. The following paragraphs set forth the text of this document:

CJI/doc.117/03

WORKING PROGRAMME OF THE INTER-AMERICAN JURIDICAL COMMITTEE: examination of topics to be included in the future working programme of the IAJC
(presented by Dr. Felipe Paolillo)

At a meeting requested by the Juridical Committee between IAJC Chairman Dr. Pollard and myself on August 21, 2002, to exchange ideas for its future working programme, we agreed that the topics to be selected for consideration on the IAJC agenda should adopt two criteria, at least on our first attempt to identify them, as follows:

First, they should refer or be related to problems or issues of common interest for the States of the hemisphere; secondly, they should, if possible, be the basis for actions or adoption of measures or recommendations from the principal bodies of the Organisation.

As foreseen, the adoption of these criteria greatly restricted our research. Of course, there is a wide variety of interesting topics of international law that deserves investigation, and each of us surely has a list of them in mind. We did, however, wish to prevent - I repeat: at least in the beginning - our future work from being targeted to questions of no special interest to the Organisation, matters that have continued for years on the Committee's agenda and which are eventually included in reports that are known only to its members.

In order to adapt ourselves to the aforementioned criteria, we resolved, in addition to identifying certain specific topics to be addressed by the Committee, that it would be more convenient to mention general fields of international law, from which the Committee could choose sectors for analysis and make recommendations therein.

After reviewing the topics on the Committee agenda in recent years and consulting other precedents, such as the suggestions made in 1999 during the Fourth Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS, we concluded the following:

General Area of Hemispheric Security. we understand that the Committee should consider the possibility of resuming the study of some aspects of this matter. On doing so, the Committee should bear in mind that some members of the OAS recently disagreed with the idea of the Committee spending time studying matters to do with hemispheric security. However, and recalling that this topic - of priority on the OAS agenda – is priority on the hemispheric conference agenda this forthcoming May, we consider it acceptable that the Committee takes time for a general study of this matter, examining, for example, the question of the adaptation to current circumstances of the regional juridical framework on which is based the hemispheric security system. After all, the fundamentals of the system were established more than 50 years ago, and in which time the question of security has undergone radical change. Our work in this field could focus on examining the extent to

which regional instruments on hemispheric security, particularly the Inter-American Treaty of Reciprocal Assistance, meet today's requirements. Is TIAR in fact obsolete? Have its provisions been exceeded by the recent practice of the States in terms of the use of force, self-defence, protection of human rights, etc.? Is it necessary to amend or replace it? Without detriment to considering a possible discussion of specific aspects of this theme, such as examining contemporary threats to hemispheric security (terrorism, drug and firearm trafficking, international delinquency, etc.) and the way in which the States in the region have coped with such threats, either individually or collectively.

In any case, before the IAJC adopts a decision on this topic, it is perhaps advisable to await the results of the next aforementioned Conference on Hemispheric Security.

Humanitarian intervention. In a way, as part of the preceding topic, it has recently been discussed at length in political and academic circles. For the purpose of our study, "humanitarian intervention" should mean the intervention of one State or group of States, using armed force in the territory of another State, without the latter's permission, in order to stop or restrain serious international crimes, such as genocide or mass violation of human rights. The UN Secretary General defined it, some years ago in one of his reports, as "the dilemma of intervention". It would probably be interesting to have the Committee's opinion on this major topic, which could be a valuable contribution for the countries in the region to adopt a common position.

Human security - the new human world order. Human security could be another area to be studied by the IAJC. At the Fourth Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs, Canada suggested the topic "The scope of the human security concept". At the United Nations, the General Assembly, in response to an initiative by Guyana, asked for opinions on the promotion of a "new human world order" and the Secretary General drafted a brief report on this matter (A/57/215, 16 July 2002). The notion of a "new human world order" has not been defined and we cannot therefore say that it should be legally examined. However, the idea has been presented and the topic continues on the agenda of General Assembly of the United Nations.

Regional integration. Due to numerous projects throughout the hemisphere for setting up new regional or sub-regional integration systems, and to strengthen, consolidate or expand those already in existence, perhaps it would be appropriate to investigate which juridical questions could be studied by the IAJC.

Other thematic areas. Other topics that, in our opinion, offer the Committee good prospects for investigation are on "foreign investments" (incentives, legal system, protection and guaranties, etc.) and "extraterritorial jurisdiction" (extraterritorial application of national legislation; jurisdiction for crimes committed in another State, etc.). At our meeting, another topic was mentioned on "Control of the legality of acts by international organisations". On this matter, it should be recalled that the International Law Commission resolved, last May, to include in its working programme the topic of the "Responsibility of international organisations".

At the 1999 meeting of IAJC members with the Legal Advisors of the Ministries of Foreign Affairs, the topics most frequently raised were: International Criminal Court, Human Rights, Administration of Justice and Legal Co-operation, and Hemispheric Security.

Finally, the Inter-American Juridical Committee decided to adopt resolution CJI/RES.56 (LXII-O/03), *Date and place of the 63rd regular session of Inter-American Juridical Committee,* in which it resolved to hold its LXIII regular session at its seat, the city of Rio de Janeiro, from August 4 to 29, 2003. The text of the resolution is transcribed below:

CJI/RES.56 (LXII-O/03)

DATE AND PLACE OF THE 63RD REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

TAKING INTO ACCOUNT that article 15 of its Statutes establishes that two regular sessions be held annually,

RESOLVES to hold its 63rd regular session at the headquarters of the Inter-American Juridical Committee in Rio de Janeiro, Brazil, from August 4 to 29, 2003.

This resolution was unanimously adopted at the session held on 20 March 2003, in the presence of the following members: Drs. Luis Marchand Stens, Carlos Manuel Vázquez, Brynmor T. Pollard, Luis Herrera Marcano, João Grandino Rodas, Ana Elizabeth Villalta Vizcarra and Eduardo Vío Grossi.

B. Sixty-third regular session

The LXIII regular session of the Inter-American Juridical Committee took place on August 4 to 29, 2003, at its seat in the city of Rio de Janeiro, Brazil. On that occasion, the Inter-American Juridical Committee held its first meeting in the new premises at the Itamaraty Palace that had been handed over to it by the Government of Brazil. The Chairman of the Inter-American Juridical Committee thanked the Secretariat for its efforts in getting the premises ready in time for the Committee's meetings.

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

João Grandino Rodas
Brynmor T. Pollard (Chairman)
Luis Marchand Stens
Eduardo Vío Grossi
Alonso Gómez-Robledo Verduzco
Ana Elizabeth Villalta Vizcarra
Jonathan T. Fried
Carlos Manuel Vázquez (Vice-Chairman)
Luis Herrera Marcano
Felipe Paolillo

Dr. Kenneth O. Rattray was unable to attend.

On behalf of the General Secretariat, technical and administrative support was provided by 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, principal legal officers with the Department of International Law.

The Chairman of the Inter-American Juridical Committee, in compliance with Article 12 of the Committee's Rules of Procedure, gave his report on its activities since the last meeting.

The Chairman of the Inter-American Juridical Committee also reported that at the 33rd regular session of the OAS General Assembly (Santiago, Chile, June 2003), Dr. Mauricio Herdocia, of Nicaragua, had been elected to serve as member of the Juridical Committee and that Dr. Eduardo Vío Grossi, of Chile, had been reelected. These members will begin their new mandates on January 1, 2004, for a period of four years.

The Chairman also reported the death of Sir William Douglas, former chairman of the Inter-American Juridical Committee. The members of the Committee observed a minute's silence in his memory.

The Inter-American Juridical Committee also adopted resolution CJI/RES.57 (LXIII-O/03), *Absence of Dr. Kenneth O. Rattray from the regular periods of session 2003 regular sessions of the Inter-American Juridical Committee of March and August 2003*. In that resolution the Juridical Committee ruled that Dr. Rattray's absence was fully justified in light of the provision of Article 9 of the Committee's *Statute* whereby a vacancy shall arise on the Committee following the absence of a member from two consecutive periods of sessions. In addition, the resolution conveys the Committee's wishes for the member's prompt recovery. The following paragraphs set forth the text of the resolution:

CJI/RES. 57 (LXIII-O/03)

ABSENCE OF DOCTOR KENNETH O. RATTRAY FROM THE REGULAR PERIODS OF SESSIONS OF THE INTER-AMERICAN JURIDICAL COMMITTEE OF MARCH AND AUGUST 2003

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARING IN MIND that Dr. Kenneth O. Rattray, member of the Juridical Committee was unable to attend the regular sessions held in Rio de Janeiro in March and August 2003, due to temporary ill-health;

WHEREAS article 9 of the Statutes of the Inter-American Juridical Committee makes provision for a vacancy in the membership of the Juridical Committee to occur in the event of the absence of a member for two consecutive periods of sessions, unless the Juridical Committee considers the absence fully justified;

AWARE that the reasons for Dr. Kenneth O. Rattray's absence are of a temporary nature,

RESOLVES:

1. That, for the purposes of article 9 of the Statutes, Dr. Rattray's absence from the aforementioned regular sessions of the Inter-American Juridical Committee is fully justified.

2. To reiterate to Dr. Rattray our best wishes for a speedy recovery, with the assurance that he will be able the resume his activities as member of the Juridical Committee at the next regular session.

This resolution was unanimously adopted at the session held on 7 August 2003, in the presence of the following members: Drs. João Grandino Rodas, Brynmor T. Pollard, Alonso Gómez-Robledo, Ana Elizabeth Villalta Vizcarra, Jonathan T. Fried, Carlos Manuel Vázquez, Luis Herrera Marcano and Felipe Paolillo.

The Inter-American Juridical Committee also adopted resolution CJI/RES.60 (LXIII-O/03), Homage to Dr. Carlos Manuel Vázquez, whose work with the Inter-American Juridical Committee is to conclude on December 31, 2003.

CJI/RES.60 (LXIII-O/03)

HOMAGE TO DR. CARLOS MANUEL VÁZQUEZ

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that on December 31, 2003, the term of office of Dr. Carlos Manuel Vázquez as a member of the Inter-American Juridical Committee expires;

AWARE of the valuable contribution of Dr. Carlos Manuel Vázquez to the work of the Juridical Committee and towards maintaining its noble traditions;

REAFFIRMING the acknowledgement by the members of the Inter-American Juridical Committee of the special attributes of Dr. Carlos Manuel Vázquez throughout the period of his membership of this juridical organ of the Organization of the American States, and also in his role as the Vice-Chairman of the Committee,

RESOLVES:

1. To express its deep appreciation for the contributions made by Dr. Carlos Manuel Vázquez, during the period of his membership and in his role as the Vice-Chairman of the Inter-American Juridical Committee, towards advancing the work of the Committee and preserving its importance in the Inter-American System.

2. To record the gratitude of the Inter-American Juridical Committee to Dr. Carlos Manuel Vázquez for his tireless support of the work of the Juridical Committee particularly with respect to the subject of applicable law and competence of international jurisdiction concerning noncontractual civil liability, and preparations for the Seventh Inter-American Specialized Conference on Private International Law – CIDIP-VII, of which he was rapporteur throughout his term of office, and during which he produced reports of significant importance.

3. To transmit this resolution to Dr. Carlos Manuel Vázquez and to the organs of the Organization.

This resolution was unanimously adopted at the session held on 20 August 2003, in the presence of the following members: Drs. João Grandino Rodas, Brynmor T. Pollard, Luis Marchand Stens, Eduardo Vío Grossi, Ana Elizabeth Villalta Vizcarra, Luis Herrera Marcano and Felipe Paolillo

At its LXIII regular session, the Inter-American Juridical Committee had before it the following agenda, which was adopted by means of resolution CJI/RES.54 (LXII-O/03), *Agenda for the 63rd regular session of the Inter-American Juridical Committee:*

CJI/RES.54 (LXII-O/03)

AGENDA FOR THE
63rd REGULAR SESSION OF THE
INTER-AMERICAN JURIDICAL COMMITTEE
(Rio de Janeiro, Brazil, 4–29 August 2003)

A. Current topics

1. Seventh Inter-American Specialized Conference on Private International Law – CIDIP-VII [AG/RES.1844 (XXXII-O/02) and 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) and 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, João Grandino Rodas, Brynmor T. Pollard and Eduardo Vío Grossi

4. Improving the systems of 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 - [AG/RES.1844 (XXXII-O/02) and AG/RES.1900 (XXXII-O/02)]
   Rapporteurs: Dr. Eduardo Vío Grossi and Kenneth O. Rattray

B. Follow-up topics

1. Hemispheric security
   Rapporteurs: Drs. Eduardo Vío Grossi, Luis Marchand Stens and Ana Elizabeth Villalta Vizcarra

2. Application of the Inter-American Democratic Charter
   Rapporteur: Dr. Eduardo Vío Grossi

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

4. Creation of a draft inter-American convention against racism and all forms of discrimination and intolerance
   Rappoorteur: Dr. Felipe Paolillo

This resolution was unanimously adopted at the session held on 21 March 2003, in the presence of the following members: Drs. Luis Marchand Stens, Carlos Manuel Vázquez, Brynmor T. Pollard, Luis Herrera Marcano, João Grandino Rodas, Ana Elizabeth Villalta Vizcarra and Eduardo Vío Grossi.

At this regular session, the Inter-American Juridical Committee also approved its agenda for its LXIV regular session, set forth in resolution CJI/RES.66 (LXIII-O/03), *Agenda for the 64th regular session of the Inter-American Juridical Committee*. It also decided, in resolution CJI/RES.63 (LXIII-O/03), *Date and venue of the 64th regular session of the Inter-American Juridical Committee*, to hold that meeting at the Juridical Committee's seat, in the city of Rio de Janeiro, on March 8-19, 2004, without prejudice to the Chairman of the Committee's authority to decide to change the venue should any OAS member State make a timely offer of a different location for holding the meeting.

CJI/RES.66 (LXIII-O/03)

AGENDA FOR THE 64TH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE
(Rio de Janeiro, Brazil, 8 to 19 March 2004)

A. Topics under consideration

1. Seventh Inter-American Specialized Conference on Private International Law – CIDIP-VII [AG/RES.1844 (XXXII-O/02) and AG/RES.1846 (XXXII-O/02)]
   Rapporteurs: Dr. Ana Elizabeth Villalta Vizcarra and João Grandino Rodas

2. Legal aspects of compliance with international sentences and awards within the States
   Coordinator: Dr. Luis Herrera Marcano

3. Legal aspects of Inter-American security
   Rapporteurs: Drs. Eduardo Vio Grossi, Luis Marchand Stens and Ana Elizabeth Villalta Vizcarra

B. Topics for follow-up

1. Improving the system of 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

2. Application of the Inter-American Democratic Charter
   Rapporteur: Dr. Eduardo Vío Grossi

3. Preparations for the commemoration of the centennial of the Inter-American Juridical Committee [AG/RES.1844 (XXXII-O/02)]
   Coordinators: Drs. Eduardo Vio Grossi, Luis Herrera Marcano and João Grandino Rodas

4. Elaboration of a draft Inter-American convention against racism and all forms of discrimination and intolerance
   Rapporteur: Dr. Felipe Paolillo

5. The right to information: access to protection of information and personal data
   Rapporteur: Dr. Antonio Gómez Robledo

This resolution was adopted unanimously at the session held on 28 August 2003 in the presence of the following members: Drs. João Grandino Rodas, Luis Marchand Stens, Eduardo Vío Grossi, Ana Elizabeth Villalta Vizcarra, Carlos Manuel Vázquez and Luis Herrera Marcano.

CJI/RES.63 (LXIII-O/03)

DATE AND VENUE OF THE 64TH REGULAR SESSION OF THE INTER-AMERICAN JURIDICAL COMMITTEE

THE INTER-AMERICAN JURIDICAL COMMITTEE;

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

BEARING IN MIND that article 14 of its *Statutes* states that the Inter-American Juridical Committee has its head office in the city of Rio de Janeiro but that, in special cases, meetings may be held in any other place designated in a timely manner;

FURTHER CONSIDERING that article 11, I) of its *Rules of Procedure* states that the attributions of the Chairman are those assigned by the Committee,

RESOLVES to hold its 64th Regular Session in the office of the Inter-American Juridical Committee in the city of Rio de Janeiro on 8 to 19 March 2004, without this having any effect on delegating to the Chairman of the Inter-American Juridical Committee the decision to change this venue should some Member State of the OAS propose another location to hold this regular session, in a timely manner.

This resolution was unanimously adopted at the session held on 21 August 2003 in the presence of the following members: Drs. João Grandino Rodas, Brynmor T. Pollard, Luis Marchand Stens, Eduardo Vío Grossi, Ana Elizabeth Villalta Vizcarra, Carlos Manuel Vázquez, Luis Herrera Marcano and Felipe Paolillo.

On August 8, 2003, during the LXIII regular session of the Inter-American Juridical Committee, the inauguration ceremony of the Inter-American Juridical Committee's new premises at the Itamaraty Place was held. The event was attended by Brazil's Minister of Foreign Affairs, Ambassador Celso Amorim, the Foreign Minister's Chief of Staff, Ambassador Mauro Vieira, and, representing the OAS General Secretariat, the Assistant Secretary General, Ambassador Luigi Einaudi. Also in attendance were other authorities, the members of the Inter-American Juridical Committee, a number of General Secretariat officers, and students from the Course on International Law.

CHAPTER II

TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE AT THE REGULAR SESSIONS HELD IN 2003

The Inter-American Juridical Committee held two regular sessions in 2003, both at its seat in Rio de Janeiro. The first was in March, and the second in August. At both meetings, the following topics figured on the Committee's agenda: the applicable law and competency of international jurisdiction with respect to extracontractual civil liability; the cartels in the framework of competition law in the Americas; the Seventh Specialized Inter-American Conference of Private International Law - CIDIP-VII; improving of the systems of administration of justice in the Americas: access to justice; the preparation for the commemoration of the centennial of the Inter-American Juridical Committee; the Fifth Joint Meeting with Legal Advisers of the Ministries of Foreign Affairs of OAS Member States and the International Criminal Court; the juridical aspects of inter-American security; the implementation of the Inter-American Democratic Charter; the preparation of a draft Inter-American Convention against Racism and All Forms of Discrimination and Intolerance; the right to information: access and protection of information and personal data; and the juridical aspects of the enforcement in the domestic jurisdiction of States of the sentences of international tribunals or other international organs with jurisdictional functions.

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. Applicable law and competency of international jurisdiction with respect to extracontractual civil liability

Resolutions

CJI/RES.55 (LXII-O/03) –	Applicable law and competence of international jurisdiction on non-contractual liability
CJI/RES.59 (LXIII-O/03) –	The applicable law and competency of international jurisdiciton with respect to extracontractual civil liability

Annexes:

CJI/doc.97/02	Recommendations and possible solutions proposed to the topic related to the law applicable to international jurisdicional competence with regard to extracontractual civil liability (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 for analysis and agenda for research (presented by Dr. Carlos Manuel Vázquez)
CJI/doc.119/03	The applicable law and competency of international jurisdiction in regard to extracontractual civil liability (presented by Dr. Ana Elizabeth Villalta Vizcarra)
CJI/doc.122/03 corr.1	Jurisdiction and choice of law for non-contractual obligations – Part I: hemispheric approaches to jurisdiction and applicable law for non-contractual civil liability (presented by Dr. Carlos Manuel Vázquez)
CJI/doc.130/03	Applicable law and competence of international jurisdiction concerning non-contractual civil liability (presented by Dr. Ana Elizabeth Villalta Vizcarra)
CJI/doc.133/03	Jurisdiction and choice of law for non-contractual obligations – Part II: specific types of non-contractual liability potentially suitable for treatment in an inter-American private international law instrument (presented by Dr. Carlos Manuel Vázquez)

At the 62nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2003), Dr. Ana Elizabeth Villalta introduced document CJI/doc.119/03, entitled *The applicable law and competency of international jurisdiction in regard to extracontractual civil liability*. After briefly summarizing her earlier report, she indicated that this report was divided into various sections. The first summarizes resolution CJI/RES.50 (LXI-O/02) of the Inter-American Juridical Committee, which established the guidelines for future work on the topic.

The second section dealt with the regulation of extracontractual civil liability as a specific category in the global, regional and subregional context, and covered such topics as traffic accidents, product liability, electronic commerce, and environmental pollution, which were the areas in which this branch of law had seen most development.

In the area of traffic accidents, an Agreement on Civil Liability Arising from Traffic Accidents had been concluded between Uruguay and Argentina that relied on lex loci delicti commissi, in other words, a traditional standard, which was then attenuated by recourse to the lex domicilii. The same technique was used in the Protocol of San Luis on Civil Liability Arising from Traffic Accidents among the States Parties of MercosuR. Article 7 of the Convention establishesd multiple inter-related criteria for determining the competent jurisdiction. She also referred to the two agreements concluded within the framework of the Hague Conference on

Private International Law, which did not apply the traditional criteria but provided for multiple inter-related criteria where conflict of laws existed.

In the area of product liability, the rapporteur drew attention to the 1973 Agreement on the Law Applicable to Product Liability, which had been in effect since 1977 and which covered cases involving different jurisdictions for manufacturers and potential victim. The Agreement provided for the grouping of related criteria and for less rigid criteria. In the European system, the 1977 Strasbourg Convention on Extracontractual Liability for Defective Products in Regard to Personal Injury and Death and the 1985 European Product Liability Directive lay down a set of basic rules. She also referred to the pioneering approach of the American system, which was based on the theory of risk or objective liability. The American system was initially based on lex loci delicti and later adopted a more flexible connection that took into account the particular situation of the victim in the context of a principle of multiple inter-related criteria.

In the area of electronic commerce, the rapporteur explained that she had found little legislation. The opposite was true of environmental pollution, an area in which the law was steadily being developed, as detailed in the report in question, and in which the main actors had been the Hague Conference on Private International Law and the Institute of Private International Law, which in 1977 had put forward a series of proposals to the effect that international liability was applicable to States and civil liability to private operators. She noted that a number of jurists in Latin America had made that distinction based on the legally protected interest, a distinction that in her judgment was one of the most critical points for guiding any study by the Inter-American Juridical Committee.

The rapporteur concluded that if a general convention could not be concluded, the Juridical Committee should work on those areas separately.

The third and fourth sections established the regulation of extracontractual civil liability as a general category in the global and regional context and in the internal legislation of States. In this connection, she referred to the 1889 and 1940 Montevideo Treaties on International Civil Law and the 1928 Bustamente Code, both of which were part of the Inter-American system. In the European Community, she referred to its Constituent Treaty, the Rome Convention, and to the draft known as Rome II, which established as a general principal the application of the law most closely related to the obligation arising from the harmful act. With regard to internal law, she had looked at the laws of Venezuela and Italia, which were more developed in that area.

The fifth section dealt with the possibility of elaborating an inter-American international instrument in the field. She concluded that the conditions existed for the adoption within the inter-American system of an instrument to govern extracontractual obligations, whether through a general convention or through specific conventions on the various categories in the field. Both methods should find solutions common to both common law and civil law legal systems as well as balance between the parties with regard to the determination of the applicable law together with flexibility and confidence in the law. Such an instrument should cover extracontractual civil liability only and exclude the international liability of States, regulating the objective civil liability of the party that caused the damage, independently of fault.

Dr. João Grandino Rodas said that a general convention on the subject would not be feasible. For his part, Dr. Luis Herrera Marcano stressed the complexity of the topic and indicated that the issue of extracontractual liability was central to the system of the United States and included concepts that did not exist in any other Latin American country, such as the concept of “punitive damages,” which was an amount separate from the amounts payable for physical and moral damage. That had had a great impact on insurance premiums and the cost had been passed on to the consumer. It was an interesting subject for the Committee to consider, since a case might arise in which a Latin American judge would have to apply United States law. He also drew attention to the so-called class action suits that allowed an individual or

group of individuals to sue in the name of all injured parties and claims against States for injury to individual citizens. Lastly, he did not think it feasible to take up the study of a general convention on the topic, since in terms of methodology it seemed advisable to work on a convention of this type and to take up specific areas in an established order without excluding a priori any of them. All the work that was being done area by area would represent a significant contribution to a future general convention. Dr. Villalta supported the latter suggestion.

Dr. Eduardo Vío Grossi noted that the documents submitted were already enough to allow the Juridical Committee to submit a final report on the subject, as the mandate from the Permanent Council requested a study with general guidelines and recommendations that would lead to an international instrument, although not necessarily to a convention. He recalled the work done by the International Law Commission on the topic of the international liability of States for wrongful acts and, in light of that work, felt it was not advisable to work on conventions with specific topics, since there were many topics, which were also very technical and required a high level of specialization. The general principles of law governing the subject should also be indicated, in addition to the internal legislation of States, although there were possible exceptions to those principles. Those were essential elements based on which the Permanent Council could then make a decision. He cited as an example the general nature of the criterion of lex loci delicti and the exceptions listed as part of the criteria for determining the most significant relationship. Political organs should not necessarily take a decision to adopt a convention or model law; they could also decide to adopt a declaration. After including the background to the topic in the Committee's report, mention should then be made of the advantages and disadvantages of opting for a general or more specific convention and finally opting for one of the alternatives.

At the regular session, Dr. Carlos Manuel Vázquez, co-rapporteur on the topic, introduced document CJI/doc.122/03 corr.1, entitled *Jurisdiction and choice of law for non-contractual obligations - Part I: hemispheric approaches to jurisdiction and applicable law for non-contractual civil liability*. He indicated that the first part of the report listed various types of liability that fell within the broader category of extracontractual liability contained in a table annexed to the document. One of its conclusions, specifically in light of the various types of liability, was that it was not advisable to adopt a general convention on the subject. At the previous session, it had been decided that he would work on the internal legislation of States governing applicable law and competent jurisdiction in the field of extracontractual liability. He noted that in the United States alone there were as many as 50 jurisdictions and that the report examined their various views and those of the other countries of the hemisphere. Most Latin American countries, Canada and the countries of the Caribbean, together with 10 American states applied some version of lex loci delicti, which had the virtue of lending a degree of certainty and predictability, although, in his judgment, that could lead to unjust or arbitrary results. It would therefore be advisable to seek a middle ground, a standard that would provide a sufficient degree of certainty and predictability, while avoiding the arbitrary and unjust results of lex loci delicti. That standard would require a change in the conflict of law rules in most countries in the hemisphere and would thus be difficult to accept, unless the instrument containing it was limited to a particular sub-category of extracontractual liability. He recalled that the aim of the CIDIP had been to progress by stages and in specific areas, contrary to the idea of a general convention. With respect to the United States, while there was no constitutional obstacle that would prevent the United States from adopting a general convention, it would be politically difficult to reach agreement on a general instrument because it would federalize a broad area that had traditionally been reserved to the states.

The report of the rapporteur examined the general and specific views held in the hemisphere for determining applicable law in cases of extracontractual civil liability. The rapporteur emphasized that the modern approaches used in some states of the United States, such as "consideration of the interests of states" and the "most significant relationship," could be

highly indeterminate and thus sacrifice the certainty and predictability that were so important for international trade.

The document introduced by the rapporteur also contained a section dealing with the bases for personal jurisdiction over “out-of-state parties” in cases of extracontractual civil liability. Unlike on the previous point, the United States had a more or less common position on the question of exercising jurisdiction over individuals outside of the state in question. It also distinguished between two types of jurisdiction: general (in which the state could exercise jurisdiction with respect to any dispute) and specific (based on specific points of contact between the state and the litigant). The most controversial bases for jurisdiction seemed to be jurisdiction with respect to “doing business” in a state and the “tag jurisdiction.”

Lastly, he recommended that the Inter-American Juridical Committee should adopt at its current session a resolution concluding that a general convention on the subject was not advisable for now, and that it would be better to work in specific areas. On that basis, the Committee could report to the next General Assembly on the progress made.

The Inter-American Juridical Committee decided to continue discussion of the topic at its next regular session and adopted resolution CJI/RES.55 (LXII-O/03), entitled Applicable Law and competence of international jurisdiction on non-contractual liability, in which it thanked the co-rapporteurs for the reports submitted and requested them to prepare the draft of a final report on the subject, taking into account the preliminary reports submitted to date and the views expressed during the regular session, to the effect that, given the complexity of the subject and the broad variety of types of liability included under the category of "extracontractual civil liability," it would be better initially to recommend the adoption of inter-American instruments governing jurisdiction and applicable law with respect to specific sub-categories of extracontractual civil liability and, only later and in the appropriate circumstances, to pursue the adoption of an inter-American instrument governing jurisdiction and applicable law with respect to the entire field of extracontractual civil liability.

At its thirty-third regular session (Santiago, Chile, June 2003), the General Assembly requested the Inter-American Juridical Committee, in resolution AG/RES.1916 (XXXIII-O/03), to pursue its study of the topic of applicable law and competency of the international jurisdiction with respect to extracontractual civil liability, which had been assigned to it by the Permanent Council in resolution CP/RES.815 (1318/02).

At its 63rd regular session (Rio de Janeiro, August 2003), the Inter-American Juridical Committee had before it document CJI/doc.133/03, entitled *Jurisdiction and choice of law for non-contractualobligations – Part II: specific types of non-contractual liability potentially suitable for treatment in an inter-American private international law instrument*, submitted by Dr. Carlos Manuel Vázquez. The rapporteur drew attention to the conclusions reached in the report, particularly that extracontractual civil liability for the damage caused by traffic accidents could be considered in an inter-American instrument, in the sense that the topic did not have to address the problem of “forum non conveniens” and because the subject was not overly complicated. While there was already a Convention of The Hague on the subject, no country in the Western Hemisphere had ratified it as yet. The question still pending was whether countries had the political will to deal with the matter at the regional level or whether they considered that it would be better to deal with it at the subregional level.

According to the rapporteur, another of the topics that could be the subject of an inter-American instrument was product liability, in respect of which there was a wide variety of legislation at the domestic level. In that case, the problem of the election of the applicable law frequently arose owing to the spread of globalization. Like in the previous case, while a Hague Convention existed in the field, no country in the Western Hemisphere had as yet ratified it.

The third topic, transboundary environmental harm, did not meet the same criteria for treatment in an inter-American instrument. In the first place, there were already a number of international instruments in that field. Secondly, there was a very complex relationship in that area between public and private law, at both the domestic and international levels. Moreover, the topic was already being discussed in other forum. Even though the topic had been taken up at CIDIP-VI, its examination should be continued only if the political organs were prepared to allocate significant resources to the task.

Lastly, he noted that the topic of liability arising from use of the Internet or electronic commerce should also not be dealt with in an inter-American instrument, since the phenomenon was too new and there was no consensus on the guidelines that should be laid down.

Three of those areas of study had been drawn to the attention of the participants in CIDIP-VI by the delegation of Uruguay. The topic of electronic commerce or liability for use of the Internet was included on account of the great interest shown in it by the academics who had replied to the questionnaire prepared by the Inter-American Juridical Committee.

At its 63rd session, the Inter-American Juridical Committee also had before it document CJI/doc.130/03, entitled Applicable law and competence of international jurisdiction concerning non-contractual civil liability, submitted by Dr. Ana Elizabeth Villalta.

In that document, the rapporteur referred to the contents of Inter-American Juridical Committee resolution CJI/RES.55 (LXII-O/03), which established the guidelines for the study by the rapporteurs and highlighted the relevant elements of her first and second reports, submitted at previous regular sessions of the Juridical Committee.

She concluded that a number of areas of extracontractual civil liability had already been identified in which there had been progressive development of rules and that the appropriate conditions therefore existed for the initial adoption of inter-American instruments to be recommended in the inter-American system to regulate jurisdiction and the applicable law in areas such as highway traffic accidents, product liability and environmental pollution. Such international instruments should seek solutions that were common to the legal systems of the common law and civil law and be strictly limited to private relations, excluding the international liability of States and establishing the objective civil liability of the party that caused the damage, independently of fault.

In that effort, account must be taken of the welcome trend towards making more flexible the connecting factors determined by the applicable law through “closer ties”.

She concluded that the conditions were in place for the adoption of legal instruments in those three areas and later for the pursuit and adoption of an inter-American instrument to regulate the jurisdiction and applicable law with respect to the full scope of extracontractual civil liability. In her view, the conditions were not yet ripe for pursuing that effort in the field of electronic commerce.

Dr. João Grandino Rodas was of the view that the question of the General Assembly’s mandate had been resolved in the two reports that had been submitted. He expressed doubts that the two documents could be immediately combined in order to submit a single report to the General Assembly. He therefore suggested that a resolution should be drafted that would include common elements and the main thrust of the respective reports.

Dr. Felipe Paolillo was of the opinion that the field of transboundary pollution should be regulated in an international convention. The argument that the topic was not yet ripe at the international level might be merely an excuse for ignoring a problem in respect of which a common political will did not exist for addressing it, but which did not mean that efforts could not be made to propose alternatives.

Dr. Jonathan Fried said that there was currently no basis for formulating a final conclusion on the topic, given the absence of agreement at CIDIP-VI. One element that had not been sufficiently explored was the balance between predictability and reasonable expectations with respect to the causing of damage. That was of key importance to the issue of transboundary harm. While there was a certain urgency about presenting the results to the political organs of the Organization, the Juridical Committee should adopt a resolution indicating that the results of the Committee's studies were merely a contribution to the decision which member States might take on the matter.

Dr. Luis Herrera also suggested that in the resolution to be adopted, the Juridical Committee should remain at the disposal of the political organs for undertaking any subsequent work in that field that they might consider useful.

The Inter-American Juridical Committee finally adopted resolution CJI/RES.59 (LXIII-O/03), entitled The applicable law and competency of international jurisdiction with respect to extracontractual civil liability, which was transmitted to the Permanent Council together with the reports submitted to the Inter-American Juridical Committee on the topic at its 61st, 62nd and 63rd regular sessions, with a recommendation that all of those instruments should be available for any expert meetings that might be convened to consider the items for possible inclusion in the agenda of CIDIP-VII. The resolution concluded that the conditions were now ripe for the elaboration of an inter-American instrument dealing with jurisdiction and applicable law with respect to extracontractual obligations arising from traffic accidents and with respect to the extracontractual obligations of manufacturers and other agents in the case of defective products (product liability), notwithstanding the fact that the elaboration of such an instrument posed a greater challenge than in the previous case. It also concluded that the challenge would be considerably greater in the case of extracontractual obligations arising from transboundary environmental harm and that the conditions were not now ripe for the elaboration of an inter-American instrument dealing with jurisdiction and applicable law with respect to extracontractual obligations arising from acts committed in cyberspace.

Having concluded its work on the subject, the Inter-American Juridical Committee decided to remove the item from its agenda.

The following paragraphs set forth the text of resolution CJI/RES.55 (LXII-O/03) adopted by the Juridical Committee at its regular session in March 2003, and resolution CJI/RES.59 (LXIII-O/03), The applicable law and competency of international jurisdiction with respect to extracontractual civil liability, to which are attached the six reports drawn up by the rapporteurs for that topic, Dr. Ana Elizabeth Villalta and Dr. Carlos Manuel Vázquez, over 2002 and 2003.

CJI/RES.55 (LXII-O/03)

APPLICABLE LAW AND COMPETENCE OF INTERNATIONAL JURISDICTION ON NON-CONTRACTUAL LIABILITY

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that resolution CJI/RES.50 (LXI-O/02) requested the rapporteurs to complete a draft report in time for consideration by the Committee at its 62nd regular session, adhering to the parameters set forth in said resolution, and also to "welcome the preliminary studies presented by co-rapporteurs, Drs. 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 Carlos Manuel Vázquez *(The desirability of pursuing the negotiation towards an inter-American instrument on choice of law and competency of international jurisdiction on non-contractual civil liability: a framework for analysis and an agenda for research, CJI/doc.104/02 rev.2)."*

TAKING INTO ACCOUNT the important and thorough discussion on this topic that took place at the present regular session,

RESOLVES:

1. To welcome the draft reports presented by co-rapporteurs Drs. Ana Elizabeth Villalta Vizcarra (*Applicable Law and Competence of International Jurisdiction on Non-contractual Civil Liability,* CJI/doc.119/03) and Carlos Manuel Vázquez (*Hemispheric Approaches to the Jurisdiction and Law Applicable to Non-contractual Civil Liability*, CJI/doc.122/03), which represent extensive research on the subject and a substantial advance towards satisfactorily fulfilling what was requested by the Permanent Council in its resolution CP/RES.815 (1318/02).

2. To request the rapporteurs to submit a final draft report on the topic, taking account of the preliminary reports submitted by both rapporteurs at the 61st and 62nd regular sessions of this Committee, as well as the views expressed by the members of the Committee during this regular session, namely that, because of the complexity of the subject and the wide variety of diverging forms of responsibility encompassed within the category of "non-contractual civil liability", it would be more appropriate to recommend initially the adoption of inter-American instruments to regulate jurisdiction and choice of law with respect to specific sub-categories of non-contractual civil liability, and only afterwards, should the proper conditions exist, pursue the adoption of a general inter-American instrument to address jurisdiction and choice of law for the entire field of non-contractual liability.

3. To request the rapporteurs to distribute this report with ample time to the members of the Juridical Committee for its consideration at the 63rd regular session, for its consideration during such period, and in order for the Committee to formulate its recommendations and possible solutions to the Permanent Council.

This resolution was unanimously adopted at the session held on 20 March 2003, in the presence of the following members: Drs. Luis Marchand Stens, Carlos Manuel Vázquez, Brynmor T. Pollard, Luis Herrera Marcano, João Grandino Rodas, Ana Elizabeth Villalta Vizcarra and Eduardo Vío Grossi.

CJI/RES.59 (LXIII-O/03)

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 instructed 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, and 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 CIDIP-VI/RES.7/02, which the Permanent Council instructed the Inter-American Juridical Committee to treat as a guideline, contemplated a "preliminary study, to be submitted to a Meeting of Experts, identifying 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;"

RECALLING that at its 62nd regular session, the Inter-American Juridical Committee concluded, on the basis of studies by rapporteurs Drs. Ana Elizabeth Villalta Vizcarra and Carlos Manuel Vázquez, that "because of the complexity of the subject and the wide variety of diverging forms of responsibility encompassed within the category of 'non-contractual civil liability,' it would be more appropriate to recommend initially the adoption of inter-American instruments to regulate jurisdiction and choice of law with respect to specific sub-categories of non-contractual civil liability, and only afterwards, should the proper conditions exist,

pursue the adoption of a general inter-American instrument to address jurisdiction and choice of law for the entire field of non-contractual liability" [CJI/RES.55 (LXII-O/03)];

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

RESOLVES:

1, To welcome the additional studies presented by the co-rapporteurs, Dr. Ana Elizabeth Villalta Vizcarra (*Applicable Law and Competency of International Jurisdiction with Respect to Extracontractual Civil Liability*, CJI/doc.130/03) and Dr. Carlos Manuel Vázquez (*Jurisdiction And Choice Of Law For Non-Contractual Obligations – Part II: Specific Types Of Non-Contractual Liability Potentially Suitable For Treatment In An Inter-American Private International Law Instrument*, CJI/doc.133/03).

2. To reaffirm its conclusion that, because of the complexity of the subject and the wide variety of diverging forms of responsibility encompassed within the category of "non-contractual civil liability," it would be more appropriate to recommend initially the adoption of inter-American instruments to regulate jurisdiction and choice of law with respect to specific sub-categories of non-contractual civil liability, and only afterwards, should the proper conditions exist, pursue the adoption of a general inter-American instrument to address jurisdiction and choice of law for the entire field of non-contractual liability.

3. To conclude that:

a) favorable conditions currently exist for the elaboration of an Inter-American instrument addressing jurisdiction and applicable law with respect to non-contractual obligations arising out of traffic accidents;

b) favorable conditions currently exist for the elaboration of an Inter-American instrument addressing jurisdiction and applicable law with respect to non-contractual liability of manufacturers and others for defective products (product liability), although the elaboration of such an instrument would be more challenging than the elaboration of an instrument addressing jurisdiction and choice of law for non-contractual obligations arising out of traffic accidents;

c) the elaboration of an inter-American instrument addressing jurisdiction and choice of law with respect to non-contractual liability arising out of transboundary environmental damage would be considerably more challenging than the elaboration of an instrument addressing jurisdiction and applicable law for non-contractual obligations arising out of traffic accidents and for non-contractual liability of manufacturers and others for defective products (product liability);

d) favorable conditions do not currently exist for the elaboration of an inter-American instrument addressing jurisdiction and applicable law with respect to non-contractual liability resulting from acts occurring in cyberspace.

4. To transmit to the Permanent Council, along with this resolution, the reports presented to the Committee by the rapporteurs on this topic at the 61st, 62nd and 63rd regular sessions, and to recommend that this resolution and the accompanying reports be made available, as contemplated by CIDIP-VI/RES.7/02, to the Meetings of Experts that may be convened to study possible topics to be included in the agenda of CIDIP-VII.

5. To convey to the Permanent Council its continuing desire to support the work of the Organization relating to the harmonization and development of private international law in the Hemisphere as the Permanent Council may request.

This resolution was unanimously adopted at the session held on 12 August 2003, in the presence of the following members: Drs. João Grandino Rodas, Brynmor Thornton Pollard, Antonio Gómez-Robledo, Ana Elizabeth Villalta Vizcarra, Jonathan T. Fried, Carlos Manuel Vázquez, Luis Herrera Marcano and Felipe Paolillo.

Annexes:

1. 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 Liability, presented by Dr. Ana Elizabeth Villalta Vizcarra.

2. 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

3. CJI/doc.119/03 - The Applicable Law and Competency of International Jurisdiction in Relation to Extracontractual Civil Liability, presented by Dr. Ana Elizabeth Villalta Vizcarra.

4. CJI/doc.122/03 corr.1 - Jurisdiction and Choice of Law for Non-Contractual Obligations – Part I: Hemispheric Approaches to Jurisdiction and Aplicable Law for Non-Contractual Civil Liability, presented by Dr. Carlos Manuel Vázquez.

5. CJI/doc.130/03 - Applicable Law and Competence of International Jurisdiction Concerning Non-Contractual Civil Liability, presented by Dr. Ana Elizabeth Villalta Vizcarra.

6. CJI/doc.133/03 – Jurisdiction and Choice of Law for Non-Contractual Obligations – Part II: Specific Types of Non-Contractual Liability Potentially Suitable for Treatment in an Inter-American Private International Law Instrument, presented by Dr. Carlos Manuel Vázquez.

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 legislation 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 legislation 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 is 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.

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

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.

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

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 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]

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[3] FELDSTEIN DE CÁRDENAS, Sara Lidia. *Derecho International Privado. Parte Especia*l. Buenos Aires: Universidad Buenos Aires, 2000.

[4] Statement of Reasons, afore mentioned.

[5] Statement of Reasons, afore mentioned.

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 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.

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

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 member States 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 member State 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 member States of the convention, "the internal law of the member State 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

Without jeopardizing the provisions of article 5, the following exceptions are made to article 3:

When an accident involves only one vehicle, registered in a State other than that in whose territory the accident has occurred, the internal law of the State where the vehicle is registered will be applicable to determine the responsibility;

Concerning the driver, possessor, owner or any other person with a right to the vehicle regardless of their place of habitual abode;

With regard to an injured party who was traveling as a passenger, if his or her usual residence is a State other than that in whose territory the accident occurred;

In respect to an injured party who was at the place of the accident outside the vehicle, if his or her usual residence is the State where this vehicle is registered;

In the case of there being several victims, the law applicable will be determined with regard to each one of them separately;

When several vehicles are involved in the accident, what is set forth in a) will only be applicable if all the vehicles are registered in the same State;

When one or more persons are involved in the accident when they were outside the vehicle or vehicles at the place of the accident, what is set forth in a) and b) will only be applicable if all these persons habitually resided in the State in which the vehicle or vehicles was or were registered. The same will hold even when 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:

Nevertheless, as provided for in article 4, the legislation applicable will be the internal law of the State of usual residence of the person directly harmed if that State is also:

the State in which is located the principal establishment of the person to whom responsibility is imputed, or

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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.

the State in whose territory the product was bought by the person directly harmed. [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 legislation 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 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.

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

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 1º 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 Member State and the damaging effects resulting from it are produced or not in that same State or may cause effects on other Party States 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 Party States which has been mentioned earlier.

Accordingly, both the Hague Conference on Private International Law and the Delegation of Uruguay on the occasion of the Specialized Inter-American 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 terDr. 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 Party State:

- where the act producing the responsibility was performed, or
- where the damage was perpetrated against the injured party as a result of this act, or
- 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 Party State where the act that caused the damage was performed,

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

c) the Party State 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 extracontractual 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]

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

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 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 claiDr. 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

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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.

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 claiDr. 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 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 claiDr. 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

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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.

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 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

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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).

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 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*

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191 N.E. 2d. 179 (N.Y. 1963).

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]

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

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GOTTESMAN, Michael. *Draining the Dismal Swam: The Case for Federal Choice of Law Statutes,* 80 GEO. L.J. 1, 11 (1991).
PROSSER, William. *Interstate Publication,* 51 MICH L. REV. 959, 971 (1953).
GOTTESMAN, Michael. *Op.cit*; BAXTER, William F. *Choice of law and the federal system.* 16 STAN. L. REV (1963).
E.g., KRAMER, Larry. *On the need for a uniform choice of law code*. 89 MICH.L.REV 2134 (1991).
E.g., SYMEONIDES, Symeon C. *The need for a third conflicts restatement (and a proposal for torts conflicts).* 75 IND. L. J. 437 (2000).

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 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 were 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

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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).

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 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 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

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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).

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.

CJI/doc.119/03

THE APPLICABLE LAW AND COMPETENCY OF INTERNATIONAL JURISDICTION IN RELATION TO EXTRACONTRACTUAL CIVIL LIABILITY
(presented by Dr. Ana Elizabeth Villalta Vizcarra)

I. RESOLUTION OF THE INTER-AMERICAN JURIDICAL COMMITTEE CJI/RES.50 (LXI-O/02)

The Inter-American Juridical Committee, at its 62nd Regular Session (August 5-30, 2002), issued the resolution CJI/RES.50 (LXI-O/02) entitled *The applicable law and competency of international jurisdiction in relation to extracontractual civil liability*, in which some other questions were settled as follows:

> 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." ...
>
> 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." ...
>
> d) The report should, as far as possible, address the approaches employed by Members States to decide the applicable law and competency of international jurisdiction 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." ...
>
> e) The report should also consider past and present efforts of the global, regional, and subregional organizations that have sought, and in some cases continue to seek, conflict of laws solutions in this field. ...
>
> 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 instrument. ...

Bearing in mind the aforementioned parameters in the resolution under discussion by the Inter-American Juridical Committee, this rapporteur complements her preliminary study presented at the 61st Regular Session of the Juridical Committee under the title of R*ecommendations and possible solutions proposed to the topic related to the law applicable to international jurisdictional competence with regard to extracontractual civil responsability* (CJI/doc.97/02).

Accordingly, endeavors to identify specific areas are made where progressive development is visible on this matter by conflict of law solutions, considering the efforts by global, regional and sub-regional organizations and discussion of internal state regulations of different member States.

In the preliminary reports, Extracontractual Civil Liability refers to non-conventional obligations, arising from the degree of people's free will, such as those from manufacturing goods, road accidents, those caused by environmental pollution (offshore pollution caused by hydrocarbons, damage caused by a nuclear accident, transborder pollution, among others), and electronic commerce.

It is precisely in those areas that there has been the most progressive development of the matter, for which reason they have been used as basis for writing the report herein.

The analysis herein will refer to each specific area where this progressive development of the matter has occurred, at the level of internal state regulations as well as regulations of global, regional and sub-regional organizations. Similarly the topic will be addressed on a general basis concerning the progressive development of Extracontractual Civil Liability.

II. REGULATION OF EXTRACONTRACTUAL CIVIL LIABILITY AS A SPECIFIC CATEGORY IN THE GLOBAL, REGIONAL AND SUB-REGIONAL SPHERE

1. Road accidents

Progressive development in this specific area has been made both in the inter-American sphere and in the Conferences of the Hague on Private International Law, since it is necessary to bring the laws of the States closer, harmonize and unify them by adopting common rules, in order to provide a safety framework to guarantee solutions and harmonize decisions, with clear reasonable rules, offering the desirable predictability to whoever operates the system.

In America, in this area at a bilateral level there is the Convention of Emerging Civil Liability for Road Accidents between Uruguay and Argentina, article 2 of which states: "Civil liability for road accidents will be regulated by the internal law of the State Party in whose territory the accident occurs. Should people domiciled in the other State Party be solely involved in or be affected by the accident, it will be ruled by the internal law of the latter". [1]

In the sub-regional sphere of MERCOSUR the 1996 **San Luis Protocol on Civil Liability Resulting from Traffic Accidents between the MERCOSUR Member States** was approved, which has advanced significantly in legislation harmonization of this area, thereby permitting a more in-depth integration process.

This Protocol provides the utility of adopting common rules in terms of the applicable law and competent jurisdiction in cases of civil liability for accidents occurring in one State Party and affecting people domiciled in another State Party.

Article 3 of this Protocol rules the Applicable Law and expresses: "Civil liability for road accidents will be ruled by the internal law of the Member State in whose territory the accident occurs."

Should the accident solely involve or affect people domiciled in another State Party, it will be regulated by the internal law of the latter". [2]

This provision is practically the same as that in article 2 of the aforementioned Convention of Emerging Civil Liability for Road Accidents between Uruguay and Argentina.

The first part of both articles in said instruments refer to the guideline of *lex loci delicti commissi* when it states that, "civil liability for road accidents will be ruled by the internal law of the State Party in whose territory the accident occurs, thereby stating as a general rule, the traditional or classic connection or the local law where the offense has been committed, but at the same time mentions as an applicable law the "Law of domicile" in the event of affecting solely people domiciled in another State Party, when in the second part of both provisions such instruments state: "should the accident involve or affect only people domiciled in another State Party, it will be regulated by the internal law of the latter", includes thereby a flexible criterion.

Convention of Emerging Civil Liability for Road Accidents between Uruguay and Argentina.
San Luis Protocol on Civil Liability resulting from Traffic Accidents among the MERCOSUR States Parties.

Article 6 of the San Luis Protocol states that the law applicable to Extracontractual Civil Liability will especially determine, among other aspects:

a) conditions and extent of liability;

b) causes of exoneration, and all demarcation of liability;

c) existence and nature of damages that may have redress;

d) kinds and extent of redress;

e) the vehicle owner's liability for acts or deeds of his or her dependents, subordinates or any other legal user;

f) statutes of limitation and forfeiture.

The San Luis Protocol also introduces "flexible criteria" to establish competent jurisdiction, although its article 7 provides that:

To undertake actions contained in this Protocol the courts of the State Party will be competent, at the plaintiff's choice:

a) site of accident;

b) of domicile of the defendant, and

c) of the domicile of the plaintiff.

Two conventions have been approved in the sphere of **The Hague Conference on Private International Law** that regulate the problem of the law applicable to the Extracontractual Civil Liability, by adopting solutions for specific cases and not one general regulation or solution that might include all possible premises of the law applicable to the Contractual Civil Liability, since the primary purpose of The Hague Conference regarding those two Conventions was precisely to provide solutions that were accepted without any further problem for its Member States and international community.

The reason for the former was the 1967 DUTOIT Memorandum, drafted by the then Secretary of the Permanent Office of The Hague Conference, which provided that, given the diversity in this matter (Extracontractual Civil Liability) it was convenient that specific themes and not a general regulation be discussed.

Given this background, in **1971 the Convention on the Law Applicable to Traffic Accidents** was signed at The Hague Conference. This Convention generally rules on the application of the internal law of the State in whose territory the accident has occurred (article 3 of the Convention) and mentions as an exception the application of the law of the State in which the vehicle is registered, although the accident involved only one vehicle registered in a different State to the one in whose territory the accident occurred (article 4 of the Convention). This provision will be applicable to determining the liability of the driver, holder, owner, or anyone else who is entitled to the vehicle, regardless of his or her normal home address. Similarly, it will apply to a victim who is traveling as a passenger, if his or her home address is in a State other than that in whose territory the accident had occurred, and with regard to a victim who is at the accident site outside the vehicle, if his home address is in the State where the vehicle is registered.

If several victims are involved, the applicable law will be decided separately with regard to each of them (Article 4 of the Convention).

When several vehicles are involved in the accident, the internal Law of the State in which the vehicle is registered will apply if all vehicles are registered in the same State (Article 4 therein).

The applicable law pursuant to articles 3 and 4 also stipulates liability with regard to the victims referring to the goods carried in the vehicle, whether they belong to the passenger or not or are merely entrusted to the latter (Article 5 of the Convention).

Liability for damages to goods outside the vehicle and the liability in relation to the vehicle as such is regulated by the law of the State where the accident occurred (Article 5 of the Convention).

In the case of unregistered vehicles or those registered in several States, the internal law of the State where they are usually parked will substitute that of the State of registration (Article 6 of the Convention).

The Convention applies to all areas that can potentially be related to road accidents.

Pursuant to article 8 of the Convention, the law that is eventually applicable will rule to determine:

1) the basis and extend of liability;

2) the grounds for exemption from liability, any limitation of liability, and any division liability;

3) the existence and kinds of injury or damage which may have to be compensated;

4) the kinds and extent of damages;

5) the question whether a right to damages may be assigned or inherited;

6) the persons who have suffered damage and who may claim damages in their own right;

7) the liability of a principal for the acts of his agent or of a master for the acts of his servant;

8) rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

Concerning insurance, it regulates the victim's right to claim directly from the insurance company of the author of the damage, whenever the applicable law permits such an action and the law regulating the insurance contract also permits it (Article 9 of the Convention).

The solutions of this Convention are conceived within the Classic Conflicting Method of Private International Law but, in turn, makes serious attempts to make the *lex loci delicti commissi* more flexible, by using other "multiple connecting points".

The Conventions listed above have permitted progressive development in this specific area of "Road Accidents" and have a practical use which indicates that an Inter-American Convention can be drafted on this subject.

2. Liability for products

Progressive development in this area has occurred mainly in the sphere of The Hague Conference on Private International Law, where the 1973 **Convention on the Law Applicable to Products Liability** was signed on 2 October 1973.

In this Convention it is usual that manufacturers of goods are in different countries from their consumers, that is, that the agents and victims are in different State territories.

The Agreement is conceived to regulate both the applicable law and need for this law to respond to real links with the concrete case.

This Agreement regulates the fact that a product, due to the sharp rise in international trade, can be manufactured, sold, consumed and cause damage or loss in different States.

For this reason, and in view that there are no standard rules for regulating the civil liability of manufacturers when their goods cause damages, The Hague Conference on Private International Law harmoniously and uniformly regulates the solutions of the law applicable to some of these situations, taking into account their international scope and

especially the few precedents of regulation, judicial, jurisprudence and doctrine existing on the theme.

This Convention was enforced on 1 October 1977 and applies to all cases that are outside the contractual scope.

Article 3 of the Convention expressly states who can be defendants, as follows:

1) manufacturers of a finished product or of a component part;

2) producers of natural product;

3) suppliers of a product;

4) other persons, including repairers and warehousemen, in the commercial chain of preparation or distribution of a product.

Articles 4, 5 and 6 of the Convention establish the applicable law. It is worth mentioning that it does not only follow the solution of *lex delicti commissi*; on the contrary, the application of this rule depends on other "connecting factors", since, when following the rule of the *Proper Law*, the Convention requires at least two material contacts in the same State, to consider which law is appropriate and which has the most significant connection, thereby considering the wishes of the victim or plaintiff, permitting them to choose between the internal law of the State wherein the potentially liable damaging agent is based and, the internal law of the State where the damages or losses occurred. [3]

The prime importance of this Convention is that it provides progressive approximation between the Anglo-Saxon system (common law) and Continental requirement (civil law), from a coded standard formulation, since it resorts to the technique of "multiple connecting points" or "connection group". This is, furthering flexibility of the traditional rule of conflict through multiple connecting points, applying the order closest to each situation, such as, for example, the law of common domicile of those involved and the law chosen by the Parties, among others.

Article 4 of the Agreement states that the applicable law will be the internal law of the State in whose territory the damage occurred, whenever this State is also:

a) the place of the habitual residence of the person directly suffering damage, or

b) the principal place of business of the person claimed to be liable, or

c) the place where the product was acquired by the person directly suffering damage.

Pursuant to article 5 of the Agreement, the internal law of the State of the home address of the directly injured party will also be an applicable law, whenever the State in question 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.

Should the internal law mentioned in those articles 4 and 5 not be applicable, then the internal law of the State will be applicable, site of the main establishment of the person to whom the liability is attributed, unless the plaintiff bases his or her claim on the internal right of the State in whose territory the damage occurred (Article 6 of the Agreement).

Neither the internal law of the State in whose territory the damage occurred nor the internal law of the State where the directly injured party is resident will be applicable, if the person who is attributed liability demonstrates that he could not reasonably foresee that the product or his own products of the same kind were sold in the State in question (Article 7 of the Agreement)

GUERRA,Víctor Hugo. *La responsabilidad civil extracontractual por productos en el derecho internacional privado,* 2002.

Article 8 of the Convention states that the applicable law will determine:

1) the basis and extent of liability;

2) the grounds for exemption from liability, any limitation of liability and any division of liability;

3) the kinds of damage for which compensation may be due;

4) the form of compensation and its extent;

5) the question whether a right to damages may be assigned or inherited;

6) the persons who may claim damages in their own right;

7) the liability of a principal for the acts of his agent or of an employer for the acts of his employee;

8) the burden of proof insofar as the rules of the applicable law in respect thereof pertain to the law of liability;

9) rules of prescription and limitation, including rules relating to the commencement of a period of prescription or limitation, and the interruption and suspension of this period.

As mentioned above the Agreement considers various points of contract or connection on an accumulated basis, in support of the method of grouping connections, due to looking for the most effective location of liability (Articles 4 and 5 of the Agreement).

Article 6 establishes an election in favor of the victim or injured party, whom it practically tends to benefit.

Article 7 addresses balancing the interests at stake by protecting the person of the defendant against application of a law of unreasonable predictability, when it proves that it cannot reasonably foresee that the product would be put on sale in the State in question.

REGIONAL SOLUTIONS, EUROPEAN SYSTEM

The European experience on this subject is interesting, since the same legal system rules the different legal codes of its members. So there is the **Convention relating to the extracontractual liability for defective goods with regard to personal injury and death**, known as the 1977 “Strasbourg Convention”, which was the result of the work done by the Committee of Juridical Cooperation of the Council of Europe.

The Convention excludes from its field of application the problems arising from contractual liability and, consequently, establishes solutions for the extracontractual aspects, such as for example, basing liability of the manufacturers and goods in the theory of Objective Liability, framed in certain special considerations, such as restricting the time to start proceedings, foresee compensation solely in cases of personal injury and death, among others.

This specific area is also ruled by the 1985 **European Guideline relating to Goods Liability**. The European guidelines from their Community Agencies are an integral part of their regulations and addresses community solutions that leave enough room for internal regulation, under the particular circumstances of each State.

The purpose of this 1985 Guideline is to establish special juridical protection for the consumers and users in circumstances that the current scale economies can eventually produce.

This 1985 guideline on the subject of Extracontractual Civil Goods Liability states the following basic rules:

- the term producer includes: the manufacturer of the end or finished product; the producer of any material in a natural, untreated or crude state and anyone else who puts his name, trademark or another distinctive sign on the product;

- liability is based on the theory of objective liability;
- damages and losses that can be compensated include death, personal injury and destruction of the property or any other damage that the defective product has caused;
- injunctions (exceptions) that the defendant can oppose,
- rules relating to the statute of limitation of the actions.

The Guideline also states that: “the defect of the product should not be determined by the reference of its aptitude for use, but for lack of safety that the product ceases to provide the general public”.

This Guideline was modified in 1995 and 1999, reaffirming in both cases that the Theory of Objective Liability is the foundation for cases of Extracontractual Civil Liability.

NORTH AMERICAN LEGAL SYSTEM

Extracontractual Liability for defective goods is referred to liability of compensation that the manufacturers and salespersons have, generally, with regard to the buyers, users and even spectators, for damages and losses that their defective goods may cause them.

In 1963 in this System the theory of Objective Liability was adopted in this System, as well as the “Institution of *dépéçage* that permits that a certain aspect of the case can be ruled by other rules of conflict.

Solutions of Private International Law in terms of *torts* (Extracontractual Civil Liability), in order to determine the applicable law may focus on two stages:

The first, based on the traditional scheme of solutions, consisting of the application of the rule *lex loci delicti*, by which the North American legal operator determined the applicable law by using the classic conflicting method, without taking into account whether the result achieved was just or unjust.

The second is the current stage and is based on the criticism against the inflexible solutions of the *lex loci delicti*, which encourages the judges to determine the law applicable to the concrete case in a more flexible manner, bearing in mind the criterion of the more significant connection to the situation in question, causing the application of the law of domicile and not only the law of the place where the deed occurred, in other words, putting to use criteria of connection that are more directly related and which also take political tendencies into account. [4]

So much so that the modern North American concepts on determining the applicable law include solutions based on “the more significant relation”, “the analysis of government interests”, “the best law”, “the legislative policy that is more affected”, or a solution that combines two or more of these criteria, for which the legal operator studies each concrete case and applies to each problem the law of the State that he considers has “the most significant relation” in order to set a balance of the parties regarding the determination of the applicable law, due to which the application of the traditional criteria can lead to an unjust and abnormal outcome.

The North American Doctrine most authorized combines three different methodologies:

a) the principle of proximity;

b) the unilateral intention to determine the scope of material rules based on state interests; and

c) the teleological attempt to reach desirable results in solving problems caused by outside traffic.

FELDSTEIN DE CÁRDENAS, Sara Lídia. *Derecho internacional privado. Parte Especial*. Buenos Aires: Universidad Buenos Aires, 2000.

Present-day doctrine and jurisprudence has expressed that the “traditional or classic” rules or regulations of conflict that have unbending mechanical application of the conflicting regulations do not adapt to the current concept of extracontractual civil liability, while the judges must analyze the circumstances of each case, as well as the content of the material regulations of competency, attenuating the inflexibility in applying the chosen criterion of connection.

There are, in this area, conditions to draft an Inter-American Convention on Liability for Goods.

3. Electronic commerce

The determination of Applicable Law and Competent Jurisdiction in terms of electronic commerce has been a complete regulation of the contractual obligations and on everything in the extracontractual obligations.

The difficulty in locating a concrete offense in the virtual world of the Internet provides that in the sphere of extracontractual obligations we find a major flaw in a uniform legal regime of compared legislation and, furthermore, the possibility that the damage is produced in different countries, which means that it is difficult to apply the classic or traditional criterion of *lex loci delicti commissi*.

Failing to find a global solution for this theme, the current trend is to continue looking for specific solutions in certain sectors.

In this sense, the judges should analyze the content of the material regulations of competency and bear in mind the most significant connection, the most directly and strongly interested party with the situation under discussion.

4. Environmental pollution

This area of Extracontractual Civil Liability has also been a theme for study and analysis by the **Conference of The Hague on Private International Law**, where it still remains prevailing on the Conference Agenda, so that in June 1992 the Permanent Office sent a note to the Commission of General Affairs and Policy of the Conference wherein there is a reference to the “Law Applicable to the Contractual Civil Liability for Damages Caused to the Environment”.

In 1995, this Commission recommended the Conference of The Hague at its 18th Session to take into account the inclusion of this theme as third priority for the Agenda of the 19th Regular Session of October 2000, whenever its overrules the objections of the countries that maintain that it is a complete scenario relating to highly sensitive political questions, in which there are numerous International Agreements.

The Conference was preceded by the **Colloquy of Osnabrück** in April 1994, organized by the Institute of Comparative International Law of the University of Osnabrück and concentrated on the title “Towards a Convention on the Aspects of Private International Law for Environmental Degradation”.

Discussions revolved around all fundamental aspects of that Conference and particularly on the “European Convention on Civil Liability for Damages Resulting from Activities Hazardous to the Environment”, in which its relationship with Public International Law and Private International Law was analyzed in terms of Extracontractual Civil Liability, contained in the ten points of Osnabrück.

In those discussions complaints were also discussed arising from civil liability for damages caused by polluting actions when they are in territories of more than on State and wherever it is necessary to determine applicable law and jurisdiction.

The Colloquy of Osnabrück, concerning the determination of the Applicable Law, expressed special consideration for the situation of the victim who should have the option of choosing between the law of the place of damage and the law of the place of the activity that caused it, or the law of the place of the act that caused the damage.

Moreover, it has been a theme of a study by the **Institute of International Law**, which in 1969 adopted in a general framework a resolution relating to the determinati9on of the law applicable to extracontractual obligations, referring specially to the rule of *lex loci delicti*.

The resolution did not give a unified solution in terms of Private International Law; the Institute, on the contrary, stated "that given the unequal legislative development of the different countries in the world, no circumstances were given to formulate a draft or final solution on the matter, adopting the basic principle of application of the place where the offense occurred (*lex loci delicti*)".

The resolution also provided to apply a system of exceptions to the general rule of *lex loci delicti*, such as in the application of the usual home address of the individual and the main business establishment of the company, whichever the case.

In 1997 the Institute prepared a series of proposals for "International Liability and Civil Liability for environmental damages ruled by International Law", pointing out that International Liability corresponds to the States and Civil Liability to the private operators.

Concerning the former, we can maintain that environmental pollution, particularly transborder, has a relationship with Private International Law in a specific sector and is limited in the determination of the Applicable Law and Competent Jurisdiction in relation to claims from private individuals.

Private individuals do not present disputes for environmental damage, a question that occupies the States and international organizations, unless for damages to their persons or belongings or property, since they are in the sphere of Extracontractual Civil Liability and not in that of International Liability that is the duty of the States.

In relation to transborder pollution, the regulation of Extracontractual Civil Liability corresponds to Private International Law, with regard to the conflict of laws and jurisdiction.

In this vein, the Conference of the United Nations on the Environment and Development, signed in Rio de Janeiro, Brazil, in 1992 and known as the "The Rio Summit Conference", establishes in principle 3 of its Declaration the duty of the States to develop their internal legislation in the are of Liability and Compensation for victims of pollution, as well as the obligation to cooperate in an expeditious way to draft new international laws in both sectors. [5]

Thus being differentiated, International Liability and Extracontractual Civil Liability when identifying the safeguarded legal asset, so that the environmental protection and preservation corresponds to Public International Law (International Liability of the States), while compensation for the victims corresponds to Private International Law, when damage is caused by private operators (Extracontractual Civil Liability).

Transborder environmental pollution concerns Private International Law, in the sphere of Extracontractual Civil Liability linked to the claims of private individuals, since the obligation to pay for damages is to protect the private individuals against the hazards that the modern industrial society based on a globalized economy entails, which, in conjunction with the good that it has, introduces in turn highly dangerous industrial goods and procedures, able to cause major accidents. Hence, the legal systems must not be isolated nor lag behind this modern technology, which gives rise to unlawful acts, using 21st century techniques which cannot be solved using 19th century legal solutions.

The effects of environmental damages are different from traffic accidents and goods liability, due to the losses that they cause, transcending the damages to people and their property, since they project major consequences in the world economy, even if this kind of liability in general is accidental.

Conflict of Laws in terms of Extracontractual Liability, with emphasis on the theme of competent jurisdiction and Applicable Laws regarding International Civil Liability for Transborder Pollution. Presented by the Delegation of the Eastern Republic of Uruguay, February 2000.

The Conference of The Hague on Private International Law showed that, in fact, there is no precedent that some country has determined the Law Applicable to the Extracontractual Civil Liability for Environmental Damages, as a Specific Category.[6]

This concern was included in the Agenda of both the Conference of The Hague and the Inter-American Specialized Conference on Private International Law (CIDIP). In the Conference of The Hague, as mentioned above, the theme on the "Applicable Law in terms of Liability for Environmental Damage" was raised and, in the sphere of CIDIP, at the Fifth Inter-American Specialized Conference on Private International Law (CIDIP V), March 1994, the instance of the Uruguayan Delegation was included in the theme 4 (relating to other subjects) "the International Civil Liability for Transborder Pollution", and, accordingly, in resolution no. 8/94 of said Conference, it was recommended to the General Assembly of the Organization of American States (O.E.A.), include in the CIDIP VI Agenda the theme "International Civil Liability for Transborder Pollution, Aspects of Private International Law".

In this sense, the Delegation of Uruguay presented the document for the Meeting of Government Experts, **Bases for an Inter-American Convention on Applicable Law and Competent International Jurisdiction in case of Civil Liability for Transborder Pollution**, which regulates the Private International Law's own questions such as the Applicable Law and Competent Jurisdiction, being strictly restricted to relations of a private nature, excluding therefore liability of the States. [7]

Concerning jurisdiction, if the plaintiff is able to choose between the forum of the State in which the deed giving origin to the pollution occurred, that of the State in which occurred the damages that are subject of the complaint or that of the State where the plaintiff or defendant is domiciled, has normal home address or business establishment (article 4 of the preliminary draft Bases)

With regard to Applicable Law, a multiple connection criterion is adopted since the plaintiff (injured party or victim) is entitled to choose between the law of the State where the event causing the pollution occurred, the law of the State where the claimed damages were caused or the law of the State where the plaintiff is domiciled or has his usual home address or business establishment (Article 5 of the preliminary draft Bases)

This document was presented by the Delegation of Uruguay to the Meeting of Government Experts in preparation for the Sixth Inter-American Specialized Conference on Private International Law, held in Washington, D.C. from 14 to 18 February 2000.

In this area there already are Draft Bases for preparing an Inter-American Convention in this way, which could include the comments from the States.

III. REGULATION OF EXTRACONTRACTUAL CIVIL LIABILITY AS A GENERAL CATEGORY IN THE GLOBAL, REGIONAL AND SUB-REGIONAL FRAMEWORK

The 1889 and 1940 Treaties of Montevideo of International Civil Law, in the sub-regional framework, stated in articles 38 and 43, respectively: "that the obligations arising without a Convention are ruled by the law of the place where the lawful or unlawful act is performed from which it derives" (article 38, 1889 Treaty), adding from article 43 of the 1940 Treaty the following: "and, in its case, under the law ruling the legal relations to which it responds", thereby adopting the criterion of *lex loci delicti* or the law of the place where the unlawful act occurred, or the law of the place where the loss generating act arose.

The Code of Private International Law or 1928 Bustamante Code in the regional sphere regulates the obligations arising without Convention (extracontractual obligations) as one general category and in the sub-regional framework, in its articles 167 and 168, that in their order provide that: "Obligations arising from crimes or offenses are under the same law as the crime or offense from which they derive" (article 167) and "Obligations deriving from acts or omissions that intervene blame or negligence not punishable by the law of the place

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Minutes and documents of Conference of The Hague.
Afore mentioned work of the Delegation of the Eastern Republic of Uruguay.

where the negligence or blame causing them occurred" (article 168), by adopting from this framework the criterion of the classic or traditional connection of *lex loci delicti commissi*.

In the **European Union, the Extracontractual Civil Liability for lack of global solutions has also been regulated generally in this regional framework in article 215 line 2 of the Constitutional Treaty of the European Economic Community**, which states: "In terms of extracontractual liability, the Community should pay for damages caused by its institutions or agents, when exercising its functions, pursuant to the general principles common to the rights of the member States".

In 1972 in the sphere of the European Economic Community was presented the **Draft Convention of the European Economic Community relating to the Law Applicable to the Contractual and Extracontractual Obligations**, to be known later as the **Convention of Rome**.

This draft was prepared by a Working Group appointed by the European Community Commission, directed to unifying the rules relating to the determination of the applicable law in terms of contractual and extracontractual obligations.

This draft did not, at that time, satisfy the extracontractual solutions and was only approved for contractual solutions (1980), otherwise it was argued that to regulate extracontractual solutions it meant invading the very functions of the Conference of The Hague.

In 1998 amidst the European Union Council, the European Group of Private International Law presented a new Draft Convention on the Law Applicable to Extracontractual Obligations, known as "Rome II".

The general solution in this new draft is to discard the application of *lex loci delicti commissi* as a general rule, taking as a factor of connection that of the "closest bonds" or "significant connection", thus being based on factors such as home address and the place where the damages and losses occur or originate.

Accordingly, that "Rome II" foresees as a general principle "the application of the law that presents the closest bonds with the obligation deriving from the offensive act".

The following assumptions are adopted in said Convention:

a) General of maximum binding, determining as a point of connection the country of normal residence of the author of the damage and victim; or the country where the causal fact and damage occur;

b) Special, determining as a point of connection the normal residence of the victim as a place of expressing the damage.

In this sense, the crisis and problem raising the rule of *lex loci delicti commissi* must be considered in Private International Law, which is why it is convenient to elect the law that safeguards **the most significant relationship** with the situation under discussion.

IV. REGULATION OF EXTRACONTRACTUAL CIVIL LIABILITY AS A GENERAL CATEGORY IN THE INTERNAL LEGISLATION OF THE STATES

Venezuela has an internal law on Private International Law which is the **1998 Act of Venezuelan Private International Law**, which rules non-conventional obligations in two articles, one relating to unlawful acts (article 32) and the other to business administration, undue payment and unlawful enrichment (article 33), whose texts read as follows:

Article 32: Unlawful acts are ruled by the law of the place where their effects were produced. Nevertheless, the victim may demand the application of the right of the State where the generating cause of the damage was produced.

Article 33: Business administration, undue payment and unlawful enrichment is ruled by the law of the place in which the original act of the obligation begins.

In this sense, the regulation of the unlawful act includes those situations implying obligations determined by acts or omissions that, without affecting a pre-existing relationship, cause subsequent damages.

The Venezuelan law sets the unlawful act in the "place where the effects of the act were produced", although the victim is entitled to choose to apply the law of the "place where the generating cause of the damage was produced", pursuant to the current trend of Private International Law in favor of reimbursement for damages.

The determination of the Applicable Law in terms of Extracontractual Civil Liability, in Venezuela is regulated by the Bustamante Code and the 1998 Act of Private International Law.

Italy also has a special law on this matter and article 62 of this **1995 Italian Act on Private International Law** states:

Liability for an unlawful act is ruled by the law of the State in which the event occurs.

However, the victim can ask to apply the law of the State in which the damage occurred.

Chapter X of this Act regulates "Non-contractual Obligations" among which are the liability for the unlawful act and extracontractual liability for damages of products.

In the Italian Act, the "Liability for an Unlawful Act" is ruled by the law of the State in which the event occurs, while the victim may ask to apply the law of the State where the act that causes the damage occurs, and if the unlawful act involves solely nationals of a State domiciled or resident in it, the law of that State applies; and, the "Liability for damages of products", is regulated at the choice of the injured party or victim of the damage.

The **European Commission** in terms of Civil Legal Cooperation, has drawn up a "Preliminary draft of the Council's proposal to rule on the Law Applicable to the Extracontractual Obligations", which was open for consultation by the interested Parties in 2002.

The application scope of this Preliminary Draft Regulation will be in situations that imply a conflict of laws for the Extracontractual Obligations (Article 1)

Article 2 regulates the universal character of the law.

With regard to the Extracontractual Obligations deriving from a crime, it regulates goods liability, unfair trade competition and practices, slander and environmental degradation.

In terms of Liability, the Preliminary Draft Regulation states that it should contain:

- The basis, conditions and scope of the liability;
- Causes of exoneration, as well as all restriction and sharing of liability;
- Existence and nature of damages for compensation;
- Within the restrictions of the powers attributed to the court by its procedural law, measures that the judge may adopt to guarantee prevention, cessation and compensation for damage;
- Assessment of the damage to the extent that it is regulated by legal regulations;
- Transferability of the right to compensation;
- People entitled to compensation for personal injury;
- Liability for third party acts,
- Statute of limitation and forfeiture based on the expiry of a deadline, including the beginning, interruption and suspension of deadlines. (Article 9 of preliminary draft).

The preliminary draft also regulates “unlawful enrichment”, which will be ruled by the law of the country in which the enrichment has been made, and the “business administration”, which will be ruled by the law of the country where administration has been performed.

Should this Regulation be approved, it will be mandatory in all its elements and directly applicable in each Member State pursuant to the Constitution Treaty of the European Community.

V. POSSIBILITY OF DRAFTING AN INTER-AMERICAN INTERNATIONAL INSTRUMENT ON THE MATTER

The report herein has identified some of the specific areas within the broad category of “Extracontractual Obligations”, in which there has been progressive development of the regulations on this matter through conflict of law solutions, considering past and present efforts of the global, regional and sub-regional organizations that have endeavored or continue to endeavor to find conflict of law solutions in this field, some already having solutions by signing international conventions on certain specific areas, as those mentioned herein.

In this sense, there are conditions for an Instrument to be adopted in the Inter-American System that regulates the extracontractual obligations, whether through a General Convention (as suggested by this rapporteur in her report CJI/doc.97/02, *Proposed recommendations and possible solutions for the theme relating to the Applicable Law and competency of international jurisdiction with respect to the Extracontractual Civil Liability,* in which its point 5 included the consideration of an “International Instrument on Applicable Law and Internationally Competent Jurisdiction in terms of Extracontractual Civil Liability”), or by means of Specific Conventions regulating the specific categories on the matter.

This inter-American Instrument regulating the extracontractual obligations must find solutions common to the common law and civil law systems, by which the coding is by no means incomplete, and should contain the general institutions of Private International Law, find a balance of the Parties regarding the determination of the applicable law, and look for flexibility and security therein.

The instrument must be closely restricted to private relations that cause Extracontractual Civil Liability, excluding International Liability of the State and, since conflict of laws is a theme inherent to Private International Law, the instrument must solve by determining the Applicable Law and Competent Jurisdiction, concerning the claims of private individuals.

It is convenient for the instrument to regulate Objective Civil Liability, which imposes on the damaging factor regardless of its blame, being enough to place others at risk for there to be liability.

Consequently, the Instrument to be drafted requires inter-American solutions of Private International Law, that is, international solutions coded especially for this Continent. In this sense, there is a positive trend towards more flexible connecting factors in both common and civil law, which determine the Applicable Law through “closer bonds”, because of the classic or traditional criterion of a solution based on *lex loci delicti commissi*. If facing a series of drawbacks caused by their practical application, such as, for example, when the place where the damaging act occurs far from forming a “significant bond” particularly, is a circumstantial element or, when the act or omission that causes civil liability is spread over the territory of several States, it is appropriate to choose the law that maintains “the most significant relationship” with the problem, as well as adopt multiple connections offering alternatives for the victim or injured party to choose the Applicable Law.

Consequently, the rapporteur herein considers that it is feasible to regulate Extracontractual Civil Liability by adopting a general convention or specific conventions, but there has been a certain tendency to regulate such liability more specifically, as mentioned herein. Nevertheless, serious efforts have been made to regulate a general convention at the

Conference of The Hague on Private International Law, in the proposed "European Agreement on the 1998 law applicable to the extracontractual obligations or Rome Convention II", and at the Inter-American Specialized Conference on Private International Law (CIDIP), at which the Delegation of Uruguay presented to the VI Conference in February 2002 the Draft Inter-American Convention on Applicable Law and Internationally Competent Jurisdiction in terms of Extracontractual Liability.

However, the absence of these global solutions has caused the current trend to continue seeking specific solutions in certain sectors or categories, with precedents such as the Conference of The Hague on Private International Law involving two Conventions concerning: 1971 Convention on the Law to Traffic Accidents and 1973 Convention on the Law Applicable to Products Liability; and, within the MERCOSUR there is the San Luis Protocol in terms of emerging civil liability for road accidents between the States Parties of MERCOSUR.

Consequently, the tendency to continue regulating Extracontractual Civil Liability on a specific basis or by certain areas is evident in the scope of Private International Law. Its proof lies in the agendas of the International Conferences on Private International Law, such as in the Conferences of The Hague and CIDIP, which in turn implies jurisprudence development.

The solutions for all these problems caused by modern media cannot be solved using archaic procedures, that is, that the solutions cannot be those developed in the 19th century of the major codes, nor solutions given in the 1930s of the 20th century by representatives of the North American methodological revolution. The solution should rather seek an outcome based on both processes, in which the juridical operator must work closely with the parties, without casting aside their cultural, economic, political and social context, in which there must be a balance between the interests and wishes of the parties in choosing the Applicable Law.

As a result of the above, we consider that the best way to approach the theme of Extracontractual Civil Liability would be through an international convention that would rule it, either in a general way or in specific areas, where progressive development of the matter is evident. In this sense, endeavors could be made to find inter-American solutions especially in the fields of road accidents, goods liability or transborder pollution, taking into account the efforts made in the global, regional and sub-regional framework, a Convention that should be maintained in the form and content referred to herein.

Drawing up a Convention whether general or specific on this matter would be a challenge to the Inter-American System, which is necessary to be able to approximate, harmonize and unify the laws of the States by adopting common rules that permit a secure framework to guarantee their solutions and to provide the desired predictability to whoever operates in the System.

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JURISDICTION AND CHOICE OF LAW FOR NON-CONTRACTUAL OBLIGATIONS – PART I: HEMISPHERIC APPROACHES TO JURISDICTION AND APPLICABLE LAW FOR NON-CONTRACTUAL CIVIL LIABILITY

(presented by Carlos Manuel Vázquez)

On May 1, 2002, the Permanent Council "instructed 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 "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."[1] The Juridical Committee designated as rapporteurs of this topic Committee members Ana Elizabeth Villalta Vizcarra and Carlos Manuel Vázquez. Both rapporteurs presented preliminary studies on the topic at the 61st Regular Session of the Committee in August 2002. These studies discussed some of the choice of law and jurisdictional approaches taken by OAS member states in cases of non-contractual liability, identified preliminary considerations regarding the desirability of pursuing negotiation of an Inter-American instrument addressing this subject, and outlined an agenda for further research necessary to enable Committee to develop recommendations for the Permanent Council.[2]

On the basis of the rapporteurs' reports, the Committee at its 61st Regular Session adopted a resolution [CJI/RES.50 (LXI-O/02)] providing guidelines for the completion of this mandate. The Committee's resolution provided, inter alia, that the rapporteur's report should include "an enumeration of the specific categories of obligations that are encompassed within the broad category of 'non-contractual obligations,'" as well as a "survey [of] the approaches to jurisdiction and choice of law currently being employed in the hemisphere in the field on non-contractual liability." The Resolution stated that the report "should consider as well the past and ongoing efforts of global, regional, and subregional organizations that have sought, and in some cases continue to seek, conflict of laws solutions in this field." In pursuance of this mandate, the rapporteurs divided the work between them. Dr. Villalta's report examines the past and ongoing efforts of global, regional, and subregional organizations on this topic. This report enumerates the forms of non-contractual liability currently recognized in this Hemisphere and surveys the approaches currently being followed by the nations of the Hemisphere in determining jurisdiction and applicable law in suits seeking to impose non-contractual liability. Part I enumerates the major theories of non-contractual liability and compares them across the common and civil law system. Part II surveys the major approaches taken in the Hemisphere to issues of choice of law in cases of non-contractual liability. Part III surveys the major approaches taken in the Hemisphere in determining the existence of jurisdiction in cases of non-contractual liability.

I. THE RECOGNIZED FORMS OF NON-CONTRACTUAL CIVIL LIABILITY IN THE HEMIPSHERE

In its Resolution No. 50 (LXI-O/02) of Aug. 23, 2002, the Juridical Committee resolved that the report prepared by the rapporteurs of this topic for presentation at the Committee's 62d session "include an enumeration of the specific categories of obligations that are encompassed within the broad category of 'non-contractual obligations.' Such an analysis

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Permanent Council Resolution, Assignment to the Inter-American Juridical Committee of the CIDIP Topic Regarding the Applicable Law and Competency of International Jurisdiction with Respect to Non-contractual Civil Liability, May 1, 2002, OEA/Ser.G CP/RES.815 (1318/02), available at http://www.oas.org/consejo/resolutions/res815.htm.

See Carlos M. Vázquez, The Desirability of Pursuing the Negotiation of an Inter-American Instrument on Choice of Law and Competency of Interstateal Jurisdiction With Respect to Non-Contractual Liability: A Framework for Analysis and Agenda for Research, OEA/Ser.Q CJI/doc.104/02 rev.2, Aug. 23, 2002; A.E. Villalta, Propuesta de Recomendaciones y de Posibles Soluciones al Tema Relativo a la Ley Aplicable y Competencia de la Jurisdicción Internacional Con Respecto a la Responsabilidad Civil Extra-Contractual. Study Prepared for August 2002 Meeting of Inter-American Juridical Committee.

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." [3]

This section of this report provides such an enumeration. The enumeration demonstrates that the field of non-contractual liability is very broad indeed, including a wide variety of disparate types of liability. The term "non-contractual liability covers literally all forms of liability that are not based on a contract, including but not limited to all forms of torts, quasi-contracts, delicts, quasi-delicts, and all liability arising under statutes that create private rights of action. (Although the term literally also includes liability of private individuals to the state, I have excluded that form of liability from the scope of this report on the assumption that the mandate to the Committee was not intended to reach that far.) Chart I at the end of this section confirms the wide range of theories of non-contractual liability that can be found in the national and subnational laws in both common and civil law jurisdictions of the Hemisphere.[4] These theories are set forth in domestic legal codes and statutes, case-law, and treaties.[5]

At a general level, the nature of tort and illicit act liability in the civil and common law jurisdictions of the Hemisphere is similar. Both systems premise liability of this kind upon an act or omission that constitutes the breach of a legal duty.[6] In common law jurisdictions tort liability typically arises from a tortious act that is either intentional or negligent, or from an act subject to strict liability.[7] Similarly, in civil law jurisdictions such liability typically arises from an illegal act (*hecho ilícito* in Spanish or *ato ilícito* in Portuguese) which is either a delict (*delito*) – defined as an act committed with intent to harm – or as a quasi-delict (*quasi-delito*) – defined as an act committed without harmful intent,[8] or from an act subject to *responsabilidad objetiva* – defined as liability that does not require proof of fault, but rather only proof of damage and causation.[9] The term "non-contractual liability" also embraces numerous forms of liability not generally regarded as traditional torts – such as liability for infringement of copyright and patents as well as for discrimination based on race, gender and other impermissible classifications. Moreover, new technologies (such as the internet and genetic testing) and new scourges (such as AIDS) have required the extension of traditional torts into new contexts or the fashioning of wholly new bases of liability.

Many of the same kinds of acts are grounds for non-contractual liability in both common law and civil law jurisdictions. Chart I shows that both systems provide for liability

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Applicable Law and Competency of International Jurisdiction with Respect to Non-contractual Civil Liability, OEA/Ser.Q CJI/RES.50 (LXI-O/02), Aug. 23, 2002.

The common law jurisdictions covered are Antigua & Barbuda, Bahamas, Barbados, Belize*, Canada (excl. Quebec), Dominica, Grenada, Guyana, Jamaica, St. Vincent & Grenadines, St. Kitts & Nevis, St. Lucia, Trinidad & Tobago, and the United States (excl. Louisiana and Puerto Rico). The civil law jurisdictions covered are Louisiana (U.S.)*, Puerto Rico (U.S.)*, Quebec (Canada), Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Peru, Paraguay, Suriname, Venezuela, and Uruguay. However, jurisdictions noted with a * have been classified as both common and civil law.

Among the major treaties providing substantive liability rules are the Chicago Convention on Civil Aviation, the Convention on the Liability of Operators of Nuclear Ships 1962, Brussels, May 25, 1962, reprinted in 57 Am. J. Int'l L. 268 (as of 1997 not yet entered into force); the Convention on International Liability for Damage Caused by Space Objects; the Convention on Third Party Liability in the Field of Nuclear Energy 1960, Paris, July 29, 1960, U.K.T.S. 1968 & Supplementary Convention 1963, 2 I.L.M. 685; the Geneva Convention on Indemnification for Workplace Accidents; the Geneva Convention on Indemnification for Workplace Accidents in the Agricultural Sector; the International Convention on Civil Liability for Oil Pollution Damage 1969, Brussels, Nov. 29, 1969, 9 I.L.M. 45 & Protocols; the International Convention for the Establishment of An International Fund for Compensation for Oil Pollution Damage 1971, Brussels, Dec. 18, 1971; the Paris Convention on Third Party Liability in the Field of Nuclear Energy, July 29, 1960, 956 U.N.T.S. 251 (as amended by 1964 Protocol), (entered into force Apr. 1, 1968), reprinted in 55 AM.J.INT'L L. 1082 (1961), amended by the Brussels Supplementary Convention, Jan. 31, 1963, 1041 U.N.T.S. 358 (as amended by 1964 Protocol) (entered into force Dec. 4, 1974); the Vienna Convention on Civil Liability for Nuclear Damage, May 21, 1963, 1063 U.N.T.S. 265 (entered into force Nov. 12, 1977), reprinted in 2 I.L.M. 727 (1963); and the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage By Air, 137 L.N.T.S. 11.

In some cases liability is premised on harm or prejudice rather than breach of a duty. See ARTURO VALENCIA ZEA, DERECHO CIVIL, VOL. III, DE LAS OBLIGACIONES 201 (1974) (citing definition of illicit act in Colombian law); *see also* C.C. of Guatemala , art. 1648 (shifting burden of proof upon showing of injury to defendant to prove no fault).

See generally WILLIAM PROSSER, JOHN W. WADE & VICTOR E. SCHWARTZ, TORTS: CASES AND MATERIALS (10th ed. 2000); RESTATEMENT (SECOND) OF THE LAW OF TORTS (1965).

See, e.g., Villalta, *supra* at 6, citing C.C. of El Salvador, art. 2035 (defining delicts and quasi-delicts).

See JORGE A. VARGAS, THE MEXICAN LEGAL SYSTEM 217 (1998) (defining objective liability as arising from the carrying out of ultrahazardous activities and treating objective liability as a class of liability distinct from non-contractual liability).

for transportation accidents, workplace accidents, injuries caused by animals, wrongful death, battery, assault, manufacture and distribution of defective products (products liability), ultrahazardous activity, injurious acts by dangerous animals, false and misleading advertising, fraud and misrepresentation, defamation, breach of confidence, malicious falsehood, professional malpractice, loss of consortium and spousal companionship, paternity, statutory rape, discrimination, abuse of civil and criminal process, false arrest, trespass, conversion, destruction of property, expropriation, violation of intellectual property rights, conspiracy, restraint of trade and unfair competition, embezzlement, environmental damage, nuisance, unjust enrichment, and violation of securities laws. Common law quasi-contractual obligations arising from unjust enrichment and restitution[10] are also similar to the civil law quasi-delictual liability for collection of debts not owed. Further, civil law quasi-delictual liability for unauthorized agency and for injuries arising from property owned in common are also found in common law jurisdictions, though under slightly different guises of agency law and liability of property owners.

While the civil and common law regulation of non-contractual liability share certain general characteristics and many common theories of liability, the two systems also exhibit a number of significant differences. As a general matter, common law systems appear to have developed a greater variety of common bases for non-contractual liability. For example, in common law systems theories of non-contractual liability for such acts against individuals as invasions of privacy,[11] discrimination, false imprisonment,[12] sexual harassment,[13] alienation of the affections of family members,[14] and infliction of emotional distress[15] appear to be used and developed to a greater extent than in civil law countries. Some might argue that protection in common law jurisdictions may also be generally greater for such commercial acts as violations of intellectual property rights and expropriation.[16] Moreover, common law torts typically brought by individuals as breach of implied covenant of fair dealing, borrower harassment, interference with the doctor-patient relationship, contract, gifts, inheritance, or water rights, as well as for wrongful pregnancy, wrongful birth, and wrongful life[17] appear to have no functional equivalents in the civil law.

These and other differences in the Hemisphere's substantive laws concerning non-contractual liability demonstrate that, in disputes having connections with more than one nation, there will often be a need to select among possibly conflicting laws. The law of one state may recognize a particular right of action while the law of another may not, or the elements of the right of action may be different under the laws of the relevant states, or the laws of the relevant states might provide for differing levels of compensation.

The great variety of types of claims encompassed within the category of "non-contractual" liability strongly supports the conclusion that an attempt to unify the

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See Chart 1, *infra.* for list of three most common quasi-contracts in civil law systeDr.

Although the body of law on privacy in civil law jurisdictions has not developed as robustly as in some common law jurisdictions such as the U.S., Latin American jurisdictions have been enacting laws governing data privacy in recent years. *See* Pablo A. Palzzi, Data Protection Materials in Latin American Countries Worldwide, available at http://www.ulpiano.com/DataProtection-LA-links.htm.

There does not appear to be a correlate basis for non-contractual liability in the civil law. Instead, the offense of *Delito Contra la Libertad Individual* is typically a basis for criminal liability. In addition, strictly speaking, this scope of this term is more broad than false imprisonment and includes such acts as kidnapping (*secuestreo*).

Yet theories of liability for sexual harassment are reportedly developing in Latin American countries. *See* Sandra Orihuela & Abigail Montjoy*, The Evolution of Latin America's Sexual Harassment Law: A Look at Mini-Skirts and Multinationals in Peru*, 30 CAL. W. INT'L L.J. 326 (2000).

The recovery in civil law jurisdictions is more centered around loss to the victim rather than loss of affections toward the victim.

In many civil law jurisdictions, the concept of "moral damages" (non-material damages) reportedly allows for the possibility of recovery for loss to the "right of personality," including affronts to honor, reputation, feelings, or peace of mind. *See, e.g.,* Margarita Trevino Balli & David S. Coale, *Torts and Divorce: A Comparison of Texas and the Mexican Federal District*, 11 CONN. J. INT'L L. 29, 44 (1995) (discussing role of moral damages in Mexico). It is not clear, however, that provisions for moral damages under the civil law provides nearly the same level of recovery for emotional distress in the common law.

There are laws protecting against expropriation in Latin American jurisdictions. *See* George Chifor, *Caveat Emptor: Developing International Disciplines for Deterring Third Party Investment in Unlawfully Expropriated Property*, 33 LAW & POL'Y INT'L BUS. 179 n.268 (2002) (citing over 1,600 expropriation cases pending in three Latin American countries alone).

There are no known reports that these three actions which sound in tort under U.S. law and are respectively referred to in translation as actions for *embarazo injusto, nascimiento injusto,* and *vida injusta* have been recognized as a basis for non-contractual liability in civil law countries.

Hemisphere's approaches to jurisdiction and choice of law through a general convention applicable to all forms of non-contractual liability would be an extremely difficult and complex undertaking. It is very unlikely that a single approach to choice of law would be appropriate for such diverse forms of liability as those arising from traffic accidents, defamation, theft of trade secrets, paternity, antitrust, and sexual harassment, to name just a few. Such a concern led the Hague Conference on Private International Law to decide to harmonize choice of law for particular narrow categories of non-contractual liability, such as products liability and traffic accidents.[18] Where the attempt has been made to address the entire field, such as in the ongoing efforts by the European Commission to adopt a regulation on this subject (known as "Rome II"), many forms of non-contractual liability were expressly excluded from the scope of the regulation,[19] and numerous specific provisions addressing particular categories of non-contractual liability have been included.[20] Unlike the E.U., there is no entity in the America with authority to legislate a choice of law rule for the nations of the Hemisphere. Thus, it will be necessary to negotiate an instrument that will have to be ratified or otherwise implemented by the various nations of the Hemisphere. The need for negotiation suggests that we in the Americas should be more hesitant to seek to harmonize choice of law in the entire field of non-contractual liability. The great variety of different types of obligations encompassed in the field of non-contractual liability means that a broad range of interested parties, with divergent interests and points of view, will seek input into the process of negotiation and, later, implementation of such a Convention. The voluminous comments received by the European Commission on its proposed Rome II regulation – most of which questioned the need for any such regulation – included numerous comments by parties primarily interested in how the regulation treated a single issue, such as defamation or products liability. It will be difficult enough to attain agreement on a single approach to choice of law in a particular narrow category of non-contractual liability. Obtaining agreement on a single approach – or even a variety of approaches – for the entire field of non-contractual liability would be an overly ambitious undertaking.

Bernard M. Dutoit, *Mémorandum relatif aux actes illicites en droit interstateal privé (Secrétaire du Bureau Permanent).* In: ACTES ET DOCUMENTS DE LA ONZIEME SESSION, 7 AU 26 OCTOBRE 1968, t.3. La Haye: Bureau Permanent de la Conférence, 1970.

Consultation on a preliminary draft proposal for a council regulationon the law aplicable to non-contractual obligations, May 3, 2002, art. 1 (excluding from scope non-contractual obligations relating to family relationship, succession, commercial instruments, persons charged with corporate accounting functions, exercise of government authority, and trusts) (on file with author).

See id., arts. 5-8 (providing special rules for product liability, unfair competition and other unfair practices, defamation, and violation of the environment).

CHART 1 – THEORIES OF NON-CONTRACTUAL LIABILITY IN COMMON AND CIVIL LAW SYSTEM

Acts Against the Person

Common Law	Civil Law
Negligence[1]	Los Cuasi-delitos
- Accidents at Sea, Rail, Air, or Road	- Las Accidentes de Tránsito o Ferrocarril, y Abordaje de Avión o Navio
- Workplace Accidents	- Las Accidentes de Trabajo
- Injury Caused by Domesticated Animal	- El Daño Causado Por Animal Doméstico
- Land Occupier's for Injury to Guests	- La Responsabilidad del Ocupante por el Daño a un Huesped[2]
- Wrongful Pregnancy or Conception	
- Wrongful Birth	
- Wrongful Life[3]	
- Wrongful Death	- La Muerte Injusta
- Infliction of Emotional Distress	- El Daño Moral
Intentional Torts	Delitos
- Battery and Assault	- La Agresión y el Asalto
- False Imprisonment	- La Violación de la Libertad Individual
- Rape	- El Estupro, Rapto o La Violación
- Infliction of Emotional Distress	- El Daño Moral
Strict liability	Responsabilidad Objetiva[4]
- Defective products (products liability)	- Los Productos Defectuosos / Produtos com Defeitos (Br.)
- Ultrahazardous activity	- La Actividad Riesgosa o Ultrapeligrosa
- Injuries Caused by Dangerous Animals	- El Daño Causado por Animal Doméstico Feroz
Acts Against the Consumer[5]	Formas de Daño al Consumidor
- Products Liability	- Los Productos Defectuosos [6]
- False and Misleading Advertising	- La Publicidad Falsa y Engañosa
- Fraud and Misrepresentation	- El Fraude Contra el Consumidor
- Borrower Harassment	
- Interference with Dr.-Patient Relationship	
- Breach of Implied Covenant of Fair Dealing	
- Professional Malpractice[7]	- La Impericia Profesional
Defamation & Injury to Personality	El Daño Moral[8]
- Libel (perm.) & Slander (temporal) (US)	- El Libelo, La Injuria & La Difamación
- Breach of Confidence	- El Abuso de la Confianza
- Malicious Falsehood	- La Acusación Calumniosa

These are just a few examples of forms of negligence that can be caused by act or omission in violation of a duty imposed by law. Because negligence actions under U.S. law depend on the breach of a duty, and duties are context-specific, many more examples of negligence could be listed here. In addition, in some cases the theories listed here may also apply to intentional acts.

See, e.g., C.C.D.F. de Mexico, art. 1931.

This cause of action is only recognized in three U.S. states.

These theories of liability are listed here merely as the civil law correlate of the common law strict liability theories and do not necessarily fall under the heading strict liability (*responsabilidad objetiva*) for all civil law jurisdictions. In some countries these theories are classified as *delitos* or *quasi-delitos*.

The theories of liability here, such as fraud and misrepresentation as well as professional malpractice, may also apply to acts against legal entities. However, they are listed here as liability for acts against the consumer because they appear to be most applicable to the consumer context.

In civil law systems it is reportedly often difficult to distinguish between contractual and non-contractual liability for injuries caused by products. For a discussion of this distinction under Argentine law, see ATILIO ANIBAL ALTERINI, TEMAS DE RESPONSABILIDAD CIVIL 231 et seq. (1995) (contractual liability being generally attributed to the merchant and non-contractual liability being generally attributed to the producer).

See also actions for wrongful birth, life, pregnancy, and conception in negligence section of this chart.

Because this form of liability involves non-physical and defamatory damages, such as injury to an individual's feelings, affections, beliefs, honor, decorum, reputation, privacy, image, and physical appearance, the term is also listed as a correlate to the common law theory of liability for infliction of emotional distress. *See* Vargas, *supra.* at 238.

Interference with Family Relations	Los Daños en el Derecho de la Familia
- Alienation of Spousal Affection	
- Criminal Conversation with a Spouse	- La Seducción
- Causing Spouse to Leave and Not Return	- La Perdida de acompañante y sociedad
- Loss of Consortium	- La Perdida de Consorcio
- Paternity Suits	- Los Reclamos de Paternidad
- Alienation of Affections of Child or Parent	
- Causing Child to Leave and Not Return	
Invasion of Privacy	El Derecho de / a la Intimidad
- Violation of Data Privacy Statutes	- La Protección de Datos Personales
- Appropriation of Likeness	
- Unreasonable Intrusion	
- Publication of False Facts	
Discrimination, on basis of	La Discriminación
- race, gender, religion, stateality, disability	
- In employment or public accommodations	
Wrongful Use of Civil Legal Proceedings	El Abuso Malicioso del Proceso Legal o Derecho
Malicious Criminal Prosecution	El Abuso Malicioso del Proceso Legal o Derecho
False Arrest	La Detención Ilegal
Sexual Harassment	El Acaso Sexual/Assédio Sexual (Br.)/Hostigamiento Sexual (P.R.)

Acts Against Property

	El Daño Patrimonial o Material
Trespass	El Traspaso
- to Land	- a La Propiedad Inmueble
- to Chattel	- a La Propiedad Mueble
Conversion	El Hurto
Destruction of Property of Another	La Destrucción de Cosa Ajena
Expropriation	La Expropiación
Interference with Inheritance or Gift	
Interference with Use of Water (Riparian)	

Acts Against Business

Passing off or infringement of	La Violación de
- Copyright	- los Derechos del Autor
- Trademark or Trade Name	- la Marca
- Patent	- el Patente
- Trade Dress	
Theft of Trade Secrets	La Violación de Secretos Industriales
Interference with Existing/Future Contract	
Intimidation	
Conspiracy / RICO	La Conspiración
Restraint of Trade	La Represión del Comercio
Unfair Competition / Anti-trust	La Competencia Desleal
Injurious Falsehood/Product Disparagement	Desacreditar a un Producto
Embezzlement	La Apropiación Indebida

Acts Against Environment

Por lo General	La Responsabilidad por Daño al Medioambiente
- Polluter Liability	- Responsabilidad por Contaminación
- Violation of Environmental Regulations	- Violación de Reglamentación o Protección Ambiental
Nuisance (Public/Private)	Molestia

Quasi-contracts/delicts[9]	Los Cuasicontratos
- Unjust Enrichment	- El Enriquecimiento Sin Causa/[10]
	- El Cobro indebido[11]
	- La Gestión de Negocios/Agencia Oficiosa (Agency Liability)[12]
	- La Comunidad (Título en Común)[13]

Other Forms[14]

Violation of	La Violación de
- Health and Safety Regulation	- La Reglamentación de la Salud y Seguridad Pública
- Securities Laws (Derivative Suits)	- La Reglamentación de Mercado de Valores
- TRADE EMBARGO/EXPORT CONTROL LAWS	- EL EMBARGO MERCANTIL/REGLAMENTACIÓN DE IMPORTACIONES/EXPORTACIONES

The most common civil law quasi-delictual obligations are included here. The laws of some jurisdictions provide for other forms of quasi-delictual obligations not included here.

Unjust enrichment is not typically referred to as a quasi-contractual obligation in the civil codes of Latin America. Nonetheless, it is listed here because it corresponds to the common law cause of action for unjust enrichment, which is typically classified as a quasi-contractual obligation.

See, e.g., 31. L.P.R.A. §§ 5091-5127 (Puerto Rican law governing quasi-delictual obligations).

See, e.g., id.

See, e.g., id.

While some of the sources of non-contractual liability listed in other categories may also be codified in a statute, this category is limited to liability which is based upon a violation of a statute that was not enacted for the primary purpose of establishing an independent source of *tort* liability.

II. GENERAL AND SPECIFIC APPROACHES TAKEN IN THE HEMISPHERE TO DETERMINING APPLICABLE LAW IN CASES OF NON-CONTRACTUAL LIABILITY

The resolutions of the Sixth Specialized Conference on Private International Law (CIDIP-VI), which the Permanent Council instructed this Committee to treat as a guideline,[15] called for "a comparative analysis of national norms currently in effect" concerning jurisdiction and choice of law in the field of non-contractual liability.[16] The Juridicial Committee called upon the rapporteurs to "survey the approaches to jurisdiction and choice of law currently being employed in the hemisphere in the field on non-contractual liability." This section of the report provides a survey of the approaches currently being employed by the nations of the Hemisphere with respect to the selection of the applicable law in cases seeking to impose non-contractual liability.

Most jurisdictions of the Hemisphere have adopted a general approach for determining the law applicable to most forms of non-contractual liability, with exceptions providing for specific approaches for certain forms of non-contractual liability. While many different general approaches are used, three are most common. The place-of-the-wrong (*lex loci delicti*) rule has long been in force in many civil law jurisdictions and remains in force in some common law jurisdictions.[17] In the later half of the 20th Century, however, many common law jurisdictions moved away from *lex loci delicti*[18] in favor of the increasingly popular most-significant-relationship approach. Finally, the double-actionability approach, received from English common law into the law of most Commonwealth Caribbean jurisdictions, is still followed by many of these jurisdictions, although its use has been decreasing.

Most jurisdictions also use specific approaches to determine the applicable law for certain categories of non-contractual liability. The use of specific approaches for certain kinds of liability varies across jurisdictions. The forms of liability subject to specific approaches include, depending upon the jurisdiction, liability arising from anti-trust violations, defective products, injury to consumers, misrepresentation, defamation, environmental damage, workplace accidents, transportation accidents, intellectual property violations, and quasi-contractual/delictual obligations.

One of the reasons for Hemispheric divergence in general and specific approaches to choice of law on non-contractual liability is that in a number of jurisdictions with federal systems, such as Argentina, Brazil, Canada, Mexico, and the U.S., choice of law rules are often found at the state or provincial level. In fact, divergence within federal jurisdictions was one reason why Inter-American harmonization of private international law in the Americas has historically been difficult.[19]

Some commentators claim that behind the formal diversity of approaches taken by states to choice of law there is a de facto convergence of results[20] These scholars have observed that courts in common and civil law systems alike tend to apply the law of the forum, regardless of the particular choice of law approach used,[21] whether for ease, comfort, or bias in favor of protecting a forum's own nationals.[22] However, far from offering a possible basis for agreement on a choice of law instrument, the tendency to apply forum law threatens to undermine the choice of law project. Among the important aims of choice of law rules is to produce certainty and predictability and to reduce forum shopping by providing for

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CIDIP-VI/RES.7/02

See, e.g., RESTATEMENT (FIRST) CONFLICT OF LAWS §§ 377-79 (1934) (codifying *lex loci delicti* approach).

Any attempt to harmonize common and civil law approaches will therefore have to take into account the likely reluctance of common law jurisdictions to retreat to an earlier approach which they have already rejected.

The United States rejected the Bustamante Code because it claimed that choice of law was a matter for the states. *See* Tatiana Maekelt, *Private International Law in the Americas*, in RECUEIL DES COURS 227, VOL. 177 (1982).

A distinguished scholar of conflicts jurisprudence in the United States explains that "seemingly disparate approaches produce results that are 'statistically indistinguishable'." RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 348 (4th ed. 2001), *citing* Borchers, *The Choice of Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 358, 367 (1992).

See P. Carter, *Rejection of Foreign Law: Some Private International Law Inhibitions*, 55 B.Y.I.L. 111 (1984); *see also* Ralph U. Whitten, *U.S. Conflict-of-Laws Doctrine and Forum Shopping, International and Domestic (Revisited)*, 37 TEX. INT'L L.J. 559, 569 n.56 (2002).

See, e.g., O. Kahn-Freund, *Delictual Liability and the Conflict of Laws*, in RECUEIL DES COURS 5, VOL. 124 (1968).

the applicability of a particular state's law to a dispute, regardless of the state in which the dispute is adjudicated. If the inter-American system were to countenance the application of forum law in all circumstances, it could still seek to limit forum-shopping and achieve a certain degree of certainty and predictability by limiting the forums in which disputes could potentially be brought, but the resulting instrument would not be a choice of law instrument. This possibility is discussed in Part III.

A. Choice of Laws Approaches in Common Law Jurisdictions

The different common law jurisdictions in the Hemisphere each apply different general and specific approaches. With respect to general approaches, the most-significant-relationship approach is the most common in the United States. The double-actionability approach is the most common in the Caribbean Commonwealth. The *lex loci delicti* approach currently prevails in Canada. The specific approaches are more varied.

1. *The United States: A Variety of Approaches.*

In the United States, non-contractual liability is primarily governed by the laws of the fifty states and other sub-national jurisdictions (only two of which will be considered here, the District of Columbia and Puerto Rico). When a dispute presents a conflict between the laws of the states, or between the states and foreign jurisdictions, applicable law is determined by the choice of law rules of the states. In certain areas, however, the federal government has enacted substantive statutes establishing non-contractual obligations. Where federal law applies, it applies uniformly throughout the nation. However, conflicts can arise between federal law and the laws of foreign states. Such conflicts are resolved by federal choice of law rules, which determine the extraterritorial applicability of these statutes. In the United States, therefore, choice of law rules emanate from the federal government, the fifty states, and numerous other sub-national jurisdictions.

a. General Approaches

Because federal choice of law rules apply only with respect to specific statutes, the general approaches to choice of law in the United States come from the sub-national jurisdictions only. The numerous different approaches that compete for application in the United States have led to what some commentators describe as a "rhubarb"[23] and others less forgivingly describe as a "dismal swamp."[24]

Until the middle of the Twentieth Century, almost all jurisdictions in the United States followed the place-of-the-wrong approach (*lex loci delicti*) reflected in the First Restatement of Conflict of Laws and associated with Professor Beale. This approach promised certainty, predictability, ease of application, and the avoidance of forum-shopping, as in theory the same law would govern the dispute regardless of where suit was brought. However, the approach often produced arbitrary and unjust results. Moreover, in practice, the certainty and predictability promised by the *lex loci delicti* rule was undermined by the tendency of judges to escape the rule's arbitrary and unjust results through escape devices such as renvoi, characterization, and the public policy exception. Moreover, determining the place of the wrong was often not a simple matter, particularly with respect to conduct causing intangible injuries. Today, only ten states follow the *lex loci delicti* approach.[25]

The first States to depart from this approach adopted in its place governmental interest analysis,[26] an approach originally advanced by Prof. Brainerd Currie.[27] The central idea behind interest analysis is that the choice-of-law issue involves, as a threshold matter, a

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Alan Reed, *American Revolution in Tort Choice of Law Principles: Paradigm Shift or Pandora's Box*, 18 ARIZ. J. INT'L & COMP. L. 867 (2001).

William Prosser, *Interstate Publication*, 51 MICH. L. REV. 959, 971 (1953) ("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."), *quoted in* Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L. J. 1 (1991).

See Symeon C. Symeonides, *Choice of Law in the American Courts in 2002: Sixteenth Annual Survey* at 61 (on file with author), *citing Choice of Law in the American Courts in 2000: Fourteenth Annual Survey*, available at http://www.willamette.edu/wucl/wlo/conflicts/00survey/00survey.htm (chart of U.S. conflict of laws rules for torts).

See id. (citing New Jersey, California, and Washington, D.C.).

See generally BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 189 (1963).

determination of which of the various states whose laws are contending for application have an interest in having their law apply 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 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. Prof. Currie originally proposed that, in the event of a true conflict, the forum should always apply its own law.[28] He later modified this view, urging courts faced with a true conflict to take a second look to see if, through a more restrained view of the forum's interest, the true conflict might be revealed to be a false conflict. But if the conflict persisted, then even under Currie's more restrained approach, the forum would apply its own law. Among the problems with interest analysis is its difficulty of application. It is not always clear what the policy behind a particular state's law is or whether the interest would be advanced by applying the law in a particular situation. Courts tended to impute purposes to particular laws, often imputing parochial purposes (such as protection of domiciliaries). As proposed by Currie, interest analysis erroneously assumed that the only relevant state interest was its interest in advancing the policy of the substantive law vying for application. This, however, ignores the possibility that a state may have a broader systemic interest in promoting certainty and predictability, as well as international harmony. Another problem with Currie's approach to interest analysis is that, because the applicable law depends on where the suit is brought, the approach encourages forum shopping and exacerbates conflicts. Today, only three states follow Currie's approach to interest analysis.[29]

Other scholars accepted Currie's approach to identifying true conflicts, but rejected his recommendation that courts faced with true conflicts always apply forum law. Professor William Baxter proposed that, in the event of a true conflict, the court should apply the law of the state whose policy would be impaired to a greater extent if its law were not applied to the case.[30] This approach – known as the "comparative impairment" approach – should, in theory, avoid forum shopping because the analysis should lead to the same applicable law regardless of the forum. In practice, however, it proved quite difficult to determine the extent to which the various contending laws would be impaired if not applied. Only two states currently follow the comparative impairment approach.[31] Under still another approach, associated with Prof. Robert Leflar, a court confronted with a true conflict would apply the law that it regarded as the better law on the merits.[32] The problem with this approach is that people frequently disagree about which law is better on the merits. Indeed, that is the most likely explanation for the divergent laws. Five states currently follow this approach.[33]

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 "[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties."[34] Contacts to be taken into account in determining which state has the most significant relationship include (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, and place of incorporation, and place of business of the parties, and (d) the place where the relationship,

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See id. at 183-184.

See Symeonides, *supra.*

See generally William Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963).

Symeonides, *supra* (California and Louisiana). For further discussion of Louisiana's approach, see infra at [page number to be inserted].

See generally Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Robert Leflar, *Conflicts Law: More on Choice Influencing Considerations*, 54 CAL. L. REV. 1584 (1966).

Symeonides, *supra*.

RESTATEMENT (SECOND) CONFLICT OF LAWS § 145 (1971) [hereinafter RESTATEMENT (SECOND)].

if any, between the parties is centered.[35] 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: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied.[36] These contacts are to be evaluated according to their relative importance with respect to the particular issue.[37] The great number of "factors" and "contacts" to consider effectively give the courts wide discretion to apply the law that they regard as most appropriate in any given case. The obvious problem with this approach is that it produces very little certainty and predictability in the law. In the words of Professor Gottesman (criticizing interest analysis and the Second Restatement 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.[38]

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 nation-wide acceptance. Although this is the most popular approach in the United States today, fewer than half of the states (22) have adopted the Second Restatement approach.

Among the remaining states, two base their choice of law determination on which jurisdiction has the most significant contacts to the case.[39] This approach functions similarly to the Second Restatement most significant relationship approach, but is the result of a more nebulous conglomeration of precedent which has not produced the kind of specification of factors or contacts found in the Second Restatement.[40] Three states take a straight *lex fori* approach.[41] Finally, four states follow what is called the "combined modern" approach, a catch-all phrase used to describe approaches which fit no standard category.[42] These approaches are varied. For example, Hawaii follows a "combination of interest analysis, the Restatement, and Leflar's choice-influencing considerations"; Massachusetts follows a combination of interest analysis and the Restatement; and Pennsylvania did likewise "but in addition draws from Cavers' principles of preference."[43]

In sum, within the United States there is far from a consensus on any single general approach for selecting the applicable law in interstate and international cases concerning non-contractual liability. The states use a variety of different approaches, none of which has been adopted in a majority of the states.

Id. § 145(2).
Id. § 6.
Id.
Gottesman, *supra*.
See Symeonides, *supra.* (citing Indiana and North Dakota). The Puerto Rican approach is not included here because its approach will be discussed in the civil law section.
See Scott M. Murphy, Note, *North Dakota Choice of Law in Tort and Contract Actions: A Summary of Cases and a Critique*, 71 N.D. L. Rev. 721 (1995).
See Symeonides, *supra.* (citing Kentucky, Michigan, Nevada).
See id. (citing Hawaii, New York, Massachusetts, Oregon, Pennsylvania). The Louisiana approach is not included here because its approach will be discussed in the civil law section.
Symeon C. Symeonides, *Choice of Law in the American Courts in 1993 (And in the Six Previous Years)*, 42 AM. J. COMP. L. 599, 611 (1993).

b. Specific Approaches

Even where the states have adopted a general approach for selecting the applicable law in cases of non-contractual liability, they have often adopted more specific rules to govern the choice of law issue with respect to specific torts. In addition, where a conflict arises between federal law and foreign law, the applicable law is determined by reference to federal choice of law rules, which vary depending on the federal statute involved.

Where the conflict is between federal law and foreign law, the courts view the question of applicable law to be identical to the question whether the federal law applies extraterritorially. If the intent of the legislature concerning the extraterritorial scope of the law is clear, the courts will follow that intent even if it produces a severe conflict with the laws and policies of other nations.[44] Usually, however, the legislature will not have addressed the issue of extraterritoriality. If the legislature has been silent on the issue, the courts apply a variety of approaches. The Supreme Court has said that in such situations, the strong presumption is that the law does not apply extraterritorially.[45] This approach is based on the assumption that, when Congress legislates, it typically has only domestic circumstances in mind.[46] In justifying this approach, the Supreme Court has explained as well that it minimizes conflicts with foreign laws and policies.[47]

The U.S. courts do not apply this presumption for all statutes, however. In the case of the antitrust laws, the Supreme Court originally applied the presumption against territoriality,[48] but the approach was subsequently abandoned in favor of the "effects" test, under which the antitrust laws apply as long as the challenged conduct was intended to, and did, produce a direct and substantial effect on U.S. commerce.[49] The "effects" test resulted in broad extraterritorial application of U.S. antitrust laws and produced significant international controversy. In response to this reaction, the U.S. Court of Appeals for the Ninth Circuit articulated a "jurisdictional rule of reason," under which the courts declined to apply the U.S. antitrust laws if they concluded that the dispute had a stronger connection with another nation.[50] Although this approach was widely adopted among the lower courts, the Supreme Court rejected it in favor of the "effects" test in *Hartford Fire Insurance Co. v. California*.[51] The U.S. courts also apply *sui generis* approaches to determining the extraterritorial applicability of such federal laws as those involving securities regulation,[52] torts occurring on ships,[53] and violations of intellectual property rights.[54]

The states, too, often have particular choice of law rules for specific kinds of liability. While the specific rules used throughout the fifty states are as varied as the general rules and thus not amenable to brief summary here, the specific rules applied by states following the Second Restatement[55] are among the most common and can be briefly addressed.

For example, in 1991 Congress made clear its intent that Title VII apply extraterritorially. *See* Protection of Extraterritorial Employment Amendments, Civil Rights Act of 1991, Pub. L. No. 102-166 (1991), amending definition of employee under Title VII to include employment of U.S. citizens abroad by covered employers. 42 U.S.C. § 2000e(f) ("[w]ith respect to employment in a foreign country, [the] term [employee] includes an individual who is a citizen of the United States.").

EEOC v. Arabian American Oil Co. (Aramco), 499 U.S. 244, 248 (1991); Sale v. Haitian Ctrs. Council, 509 U.S. 155, 158 (1993).

Aramco, 499 U.S. at 248.

Id.

American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

United States v. Aluminum Co. of America (Alcoa), 148 F.2d 416 (2d Cir. 1945). This decision was decided by the U.S. Court of Appeals for the Second Circuit as the court of last resort in the absence of a quorum in the Supreme Court. The *Alcoa* decision has since been adopted by the Supreme Court. *See* Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

Timberlane Lumber Co. v. Bank of America, 594 F.2d 597 (9th Cir. 1976).

Hartford Fire, 509 U.S. 764.

See, e.g., Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London, 147 F.3d 118, 125 (2d Cir. 1998); (applying a conduct and effects test to anti-fraud provisions of securities laws); *see also* Peter J. Meyer and Patrick J. Kelleher, *Use of the Internet to Solicit the Purchase or Sale of Securities Across National Borders: Do the Anti-Fraud Provisions of the U.S. Securities Laws Apply?*, at 3 (Mar. 1999) (on file with author) (observing that "[a]lthough the federal circuit courts of appeals agree that the anti-fraud provisions apply to some foreign securities transactions and conduct, they disagree over the test that should be used to determine when the anti-fraud provisions apply").

See, e.g., Lauritzen v. Larsen, 345 U.S. 571 (1953) (deciding extraterritorial reach of Jones Act); *see also* 68 A.L.R. Fed. 360 (1984) (summarizing case law on extraterritorial applicability of Jones Act).

See, e.g., Steele v. Bulova Watch Co., 344 U.S. 280 (1952) (deciding extraterritorial reach of Lanham Act regulating trademarks); *see also* RESTATEMENT (SECOND) § 222 (provisions on copyright).

RESTATEMENT (SECOND) § 146.

These specific rules operate as presumptions. In each case, the rule sets forth a particular contact that presumptively determines the applicable law, subject to the caveat that another state's law applies if that state has a more significant relationship to the particular issue. Thus, disputes relating to defamation and injurious falsehood are presumptively governed by the law of the state where publication occurred.[56] Invasions of privacy claims are presumptively governed by the law of the state where the invasion occurred.[57] Liability for interference with marital relations is presumptively governed by the law of the state where the conduct complained of principally occurred.[58] Malicious prosecution and abuse of process claims are presumptively governed by the law of the state where the relevant proceeding occurred.[59]

2. *The Double-Actionability Approach and More Significant Relationship Exception Received by Commonwealth Caribbean Nations*

The Caribbean Commonwealth is comprised of twelve OAS member states: Antigua & Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana[60], Jamaica, St. Kitts & Nevis, St. Lucia[61], St. Vincent & the Grenadines, and Trinidad & Tobago.[62] The general approach followed in most of the Caribbean Commonwealth is the double-actionability approach received from the English common law announced in *Phillips v. Eyre* and its progeny.[63] In *Phillips*, the English Court explained that "[a]s a general rule, in order to found a suit in [this country] for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in [this country] . . . Secondly, the act must not have been justifiable by the law of the place where it was done."[64] Because a claim is only cognizable if actionable under both forum law and the law of the jurisdiction where committed, this approach has come to be referred to as the "double-actionability" rule.[65] Forum law (*lex fori*) is applied to a claim whenever the claim is justifiable under the law of the jurisdiction where committed (*lex loci delicti commissi*).[66]

However, almost a century after *Phillips*, English courts recognized an exception to the double-actionability rule in the 1971 case *Boys v. Chaplin*. In *Boys*, the court decided that in certain unspecified exceptional cases "a particular issue between the parties may be governed by the law of the country which, with respect to that issue, has the most significant relationship with the occurrence and the parties."[67] *Boys* was later made binding in all of the Commonwealth Caribbean countries except for Guyana through the 1994 Privy Council decision in *Red Sea Insurance Co. v. Bouygues SA*.[68] One reason why the scope of the *Boys* exception has not been clarified in the English common law is that the U.K. Private International Law (Miscellaneous Provisions) Act of 1995 expressly abrogated the double-actionability approach[69] and its progeny from the common law of England and Wales, Scotland and Northern Ireland altogether. However, the Act did not expressly abrogate the approach from the common law of the Commonwealth Caribbean jurisdictions.[70] Therefore

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Id. § 149-51.
Id. § 152.
Id. § 154.
Id. § 155.
The Guyanan system was also influenced by the Roman-Dutch tradition.
The St. Lucian system was also influenced by the French civil law tradition.
See The Commonwealth, Who We Are, available at http://www.thecommonwealth.org/dynamic/Country.asp. The legal systems of some of these countries have also been influenced by the Hindu, Muslim, and Indian legal traditions.
A.E.J. JAFFEY, TOPICS IN CHOICE OF LAW 94 (1996).
Phillips v. Eyre (1870) LR 6 QB 1 (Ex. Ch.), pp. 28-29 (Willes J).
This characterization is premised upon the common interpretation of the criteria "not justifiable" as meaning not actionable, rather than merely not defensible though actionable. Another interpretation of the "not justifiable" standard is that the act must be "innocent" or not contrary to the law under the law of the foreign jurisdiction. See Machado v. Fontes [1897] 2 Q.B. 231 (CA). *See* WILLIAM TETLEY, INTERNATIONAL CONFLICT OF LAWS: COMMON, CIVIL AND MARITIME 438 (1994) (discussing the broad Canadian interpretation of the "not justifiable" requirement).
Boys v. Chaplin [1971] A.C. 356.
[1995] 1 A.C. 190.
U.K. Private International Law (Miscellaneous Provisions) Act of 1995, Nov.8, 1995, Part III(10), available at http://www.legislation.hmso.gov.uk/acts/acts1995/Ukpga_19950042_en_1.htm.
See id., Part IV(18)(3) (defining applicability of Part III of statute relating to choice of law in tort).

in Commonwealth jurisdictions it remains unclear when the *Boys* exception applies.[71] To the extent the exception does apply then the approach taken by the Caribbean Commonwealth begins to resemble more closely the Restatement approach in the United States.

In Dominica, the double-actionability rule was modified when in 1998 Dominica adopted the Transnational Causes of Action (Product Liability) Act, which adopts the most-significant-relationship approach found in the Second Restatement.[72]

3. *Canadian Revival of the Lex Loci Delicti Commissi Rule*

In the same year that the British Privy Council began to restrict the scope of the double-actionability rule in the Caribbean Commonwealth, the Supreme Court of Canada abandoned the double-actionability rule which Canada had received from English common law.[73] In *Tolofson v. Jensen* the Court declared that the *lex loci delicti comissi* was the new tort conflicts rule in Canadian common law jurisdictions.[74] The Court reasoned that "'[t]he nature of our constitutional arrangements--a single country with different provinces exercising territorial legislative jurisdiction--would seem to me to support a rule that is certain and that ensures that an act committed in one part of this country will be given the same legal effect throughout the country. This militates strongly in favor of the *lex loci delicti* rule."[75] Although these 1994 cases involved traffic accidents, the general language of the Court's holding left little room to doubt that the new rule was applicable to other forms of non-contractual liability.[76]

The leading commentator on Canadian conflict of laws reports that specific approaches are taken in some provinces in selecting the applicable law for claims relating to products liability and traffic accidents.[77] The Yukon province has adopted the Uniform Conflict of Laws (Traffic Accidents) Act, [78] legislation based upon the Hague Convention on the Law Applicable to Traffic Accidents.[79] Further, New Brunswick has a statute which effectively adopts the *lex fori* for products liability, subject to certain Constitutional limitations on extraterritorial application.[80]

B. Private International Law Approaches in Civil Law Jurisdictions

With very few exceptions, the Hemisphere's civil law jurisdictions have continued to adhere to the traditional lex loci delicti rule. The exceptions are Venezuela, Perú, and Mexico, both of which have recently adopted private international law statutes, and the civil law subnational jurisdictions of Quebec, Louisiana, and Puerto Rico, which apply choice of

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See Yeo Tiong Min, *Tort Choice of Law Beyond the Red Sea: Whither the Lex Fori?*, 1 SING. J. INT'L & COMP. L. 91, 115 (1997) (suggesting that the exception will be applied expansively).

Transnational Causes of Action (Product Liability) Act, entered into force Jan 15, 1998 (section 7 providing that "(2) Where an action is founded in tort or delict, the right and liabilities of the parties with respect to a particular issue or the whole cause of action shall be determined by the local law of the country which, as to the issue or cause of action, has the most significant relationship to the cause of action and the parties."). This act was originally introduced in St. Lucia but not adopted there. *See* Winston Anderson, *Forum Non Conveniens Checkmated? – The Emergence of Retaliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183, 187 (2001).

Phillips LR 6 QB 1 (Ex. Ch.), *adopted in* McLean v. Pettigrew (1945) S.C.R. 62 (holding that act at issue must be actionable under *lex fori* and not justifiable under law of place where committed).

See Tolofson v. Jensen; Lucas (Litigation Guardian Of) v. Gagnon [1994] 3 S.C.R. 1022; *see also* William Tetley, *New Development in Private International law: Tolofson v. Jensen and Gagnon v. Lucas*, 44 AM. J. COMP. L. 647 (1996). Prior to the Canadian Supreme Court decision in Tolofson, private law reform groups in Canada had urged modernization of the Canadian approach through enactment of a uniform Canadian Foreign Torts Act adopted by the Conference of Commissioners on Uniformity of Legislation in Canada at its August 1966 meeting. The Act, which takes a "most substantial connection" approach similar to the Second Restatement approach, was never enacted by any Canadian common law province or territory, however. *See* Tetley *supra*. at 438-9.

3 S.C.R. at 1058.

See David McClean, *A Common Inheritance? An Examination of the Private International Law Tradition of the Commonwealth*, in RECEUIL DES COURS, VOL. 260 13 et seq. (1996) (confirming that following Tolofson the new Canadian general approach is *lex loci delicti*).

See J.G. CASTEL, CANADIAN CONFLICT OF LAWS 509 *et seq.* (3d ed. 1994) (discussing how the general approach applies in certain specialized torts, except for the law of traffic accidents).

1970 Proc. Of Unif. L. Conf. 263.

See Castel, *supra*.

Id.

law rules that significantly differ from the lex loci delicti approach. Civil law jurisdictions have also adopted specific choice of law rules for certain forms of liability, such as accidents at sea[81] or on the road.[82]

1. *The Dominant Latin American Approach: Lex Loci Delicti*.

Most Latin American civil law jurisdictions apply the *lex loci delicti* rule for non-contractual liability. This approach is found in the Bustamante Code (1928), the Treaties of Montevideo (1889 and 1940), many of the national and sub-national civil codes,[83] and in certain bilateral treaties between Latin nations.[84] In particular, under the Bustamante Code the law of the place of the act or omission (*lex loci delicti comissi*) governs both intentional acts (*delitos o faltas*)[85] and negligent acts (*quasi-delitos*).[86] The Bustamante Code assumes primary importance because it has been more widely-ratified than either of the Treaties of Montevideo. The Code only applies between parties and not between parties and non-parties.[87] While fourteen OAS Member States have ratified the Code,[88] many have not, including Argentina, Colombia, Mexico, Paraguay, and Uruguay. Even among the states that have ratified, many took reservations which potentially render the provisions of the Code unenforceable domestically. Bolivia, Chile, Costa Rica, Ecuador, and El Salvador took broad reservations subordinating the Code to provisions of domestic law in the event of a conflict between the Code and domestic law.[89] In these countries, the Code comprises only part of

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See Argentine treaties cited *infra*.

See Protocolo de San Luis sobre Responsabilidad Civil Emergente de Accidentes de Tránsito, MERCOSUR/CMC, Dec. 1, 1996 [hereinafter MERCOSUR Protocol of San Luis], arts. 3-6 (art. 3: "La responsabilidad civil por accidentes de tránsito se regulará por el derecho interno del Estado Parte en cuyo territorio se produjo el accidente. Si en el accidente participaren o resultaren afectadas únicamente personas domiciliadas en otro Estado Parte, el mismo se regulará por el derecho interno de éste último"; art. 4: "La responsabilidad civil por daños sufridos en las cosas ajenas a los vehículos accidentados como consecuencia del accidente de tránsito, será regida por el derecho interno del Estado Parte en el cual se produjo el hecho"; art. 5: "Cualquiera fuere el derecho aplicable a la responsabilidad, serán tenidas en cuenta las reglas de circulación y seguridad en vigor en el lugar y en el momento del accidente"; art. 6: "El derecho aplicable a la responsabilidad civil conforme a los artículos 3 y 4 determinará especialmente entre otros aspectos: a) Las condiciones y la extensión de la responsabilidad; b) Las causas de exoneración así como toda delimitación de responsabilidad; c) La existencia y la naturaleza de los daños susceptibles de reparación; d) Las modalidades y extensión de la reparación; e) La responsabilidad del propietario del vehículo por los actos o hechos de sus dependientes, subordinados, o cualquier otro usuario a título legítimo; f) La prescripción y la caducidad.").

See Maekelt *supra*. (noting influence of Joseph Story in Argentina and Paraguay, influence of Andrés Bello in Chile, Colombia, Ecuador, El Salvador, Honduras, Nicaragua, Panama, and Uruguay, and influence of Napoleonic tradition in Bolivia, Costa Rica, Haiti, and Peru)

See, e.g., Tratado Bilateral de Derecho Internacional Entre Colombia y Ecuador (1906) (art 37: "La responsabilidad civil proveniente de delitos o cuasi-delitos se regirá por la ley del lugar en que se hayan verificado los hechos que los constituyen."); Convenio Entre la Republica Argentina y la Republica Oriental del Uruguay en Materia de Responsabilidad Civil Emergente de Accidentes de Transito, Ley 24-106, 7 de julio de 1992, available at http://www.argentinajuridica.com/RF/ley_24_106.htm, arts. 2 & 4 (art. 2: "La responsabilidad civil por accidentes de tránsito se regulará por el Derecho interno del Estado Parte en cuyo territorio se produjo el accidente. Si en el accidente participaren o resultaren afectadas únicamente personas domiciliadas en el otro Estado Parte, el mismo se regulará por el Derecho interno de este último"; art. 3: "La responsabilidad civil por daños sufridos en las cosas ajenas a los vehículos accidentados como consecuencia del accidente de tránsito, será regida por el Derecho interno del Estado Parte en el cual se produjo el hecho."); Convenio entre Argentina y Austria del 22 de Marzo de 1926 Sobre Ley Aplicable a Accidentes de Trabajo, arts. 1-4 (adopting *lex loci delicti commissi* approach); Convención entre Argentina y Bulgaria de 7 de Octubre de 1937 Sobre Indemnizaciones de Accidentes del Trabajo, art. 4 (adopting *lex loci delicti commissi* approach).

See Bustamante Code (Inter-American Convention on Private International Law), Havana, Feb. 20, 1928, 86 L.N.T.S. 111/246 No. 1950 (1929) [hereinafter Bustamante Code], art. 167 ("Las [obligaciones] originadas por delitos o faltas se sujetan al mismo derecho que el delito o falta de que procedan" estas obligaciones). Private international law scholars conclude that under this rule acts specifically prohibited by law are subject to the laws of the place where committed. *See* José Luis Siqueiros, *La Ley Aplicable y la Jurisdicción Competente en Casos de Responsabilidad Civil Por Contaminación Transfronteriza*, InfoJus Derecho Int'l Vol. II. *Cf.* Villalta, *supra.* at 8 (similarly interpreting similar language in Treaties of Montevideo).

See Bustamante Code, art. 168: ("Las [obligaciones] que se deriven de actos u omisiones en que intervenga culpa o negligencia no penadas por la ley, se regirán por el derecho del lugar en que se hubiere incurrido en la negligencia o la culpa que las origine."). Scholars similarly conclude that under this rule negligence is governed by the laws where the negligence occurred. *See* Siqueiros, *supra. Cf.* Villalta, *supra.* at 8 (similarly interpreting similar language in Treaties of Montevideo).

See Tetley, *supra.* at 888 ("The Bustamante Code applies between those Latin American States which have ratified it.").

These countries are Bolivia (Mar. 9, 1932), Brasil (Aug. 3, 1929), Costa Rica (Feb. 27, 1930), Chile (Decreto del Ministerio de RR.EE. No. 374, Apr. 10, 1934), Dominican Republic (1929), Ecuador, El Salvador, Guatemala (1929), Haiti (Feb. 6, 1930), Honduras (1930), Nicaragua (1930), Panama (1928), Peru, and Venezuela. TRATADOS Y CONVENCIONES INTERAMERICANOS. FIRMAS, RATIFICACIONES Y DEPOSITOS 33 (2d ed. 1969), published by OAS General Secretariat.

See Inter-American Juridical Committee, Comparative Study of the Bustamante Code, the Montevideo Treaties, and the Restatement of the Law of Conflict of Laws, CJI-21, Sept. 1954, at 34-36 (summarizing general reservations taken to the Bustamante Code); *see also* GONZALO PARRA-ARRANGÜREN, CODIFICACIÓN DEL DERECHO INTERNACIONAL PRIVADO EN AMÉRICA

the approach taken to conflict of laws on non-contractual liability.[90] On the other hand, even in states such as Mexico where the Bustamante Code has not been ratified, or Brazil where the code has not been fully implemented, the choice of law approach taken in the Code has nevertheless taken hold to some extent.[91]

While less influential, the Treaties of Montevideo remain another important exemplar of the use of the *lex loci delicti* rule in civil law jurisdictions of Latin America. Five countries[92] ratified the 1889 Treaty of Montevideo and of those, three[93] ratified the 1940 Treaty of Montevideo.[94] Under the first treaty, non-contractual obligations are governed by the law of the place from which the obligations are derived,[95] which scholars have interpreted to mean the law where the act giving rise to the obligations is committed.[96] While the second treaty adds language to the end of this rule,[97] scholars still interpret the rule as a codification of the standard place-of-the-wrong approach.[98]

The *lex loci delicti* is not applicable in all cases of non-contractual liability, however. Both the Bustamante Code and the Montevideo Treaties contain specific choice of law rules for quasi-contracts and maritime collisions. Under the Bustamante Code, quasi-contracts are governed by the law of the "juridical institution from which they derive,"[99] except for illicit management of the affairs of another (*gestión de negocios*), which is governed by the law of the place where the unauthorized agent acts,[100] and restitution of a sum wrongfully collected (*pago indebido*), which is governed by the personal law of the parties.[101] In the Montevideo Treaties, quasi-contracts are governed by special rules as well.

Special choice of law rules in the Bustamante Code and Montevideo Treaties also apply to collisions in territorial waters or territorial airspace. Under the Bustamante Code, collisions on national territory are governed by common flag, or if there is no common flag, then the law of the place of the collision,[102] whereas collisions on or above the high seas are

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122, 176 (1982) (reporting that Bolivia, Cuba, Haiti, Honduras, Mexico, Peru, and Venezuela did not make and reservations to the Code).

A number of other countries laws leave unresolved the question of whether the provisions of the Code apply only with respect to conflicts between the laws of two countries that have adopted the Code, only with respect to conflicts between a country that has adopted the Code and one that has not, or both. *See* JÜRGEN SAMTLEBEN, DERECHO INTERNACIONAL PRIVADO EN AMERICA LATINA: TEORÍA Y PRACTICA DEL CÓDIGO BUSTAMANTE, VOL. I: PARTE GENERAL (1983) (discussing application of Bustamante Code by Latin American nations against other countries that have adopted the Code and against "third party" countries that have not adopted the Code).

See, e.g., BEAT WALTER RECHSTEINER, DIREITO INTERNACIONAL PRIVADO: TEORÍA E PRÁTICA 102 (2000) (observing that while Brazilian statutory law does not formally adopt the *lex loci delicti* approach, this approach has been followed in a number of court decisions); HEE MOON JO, MODERNO DIREITO INTERNACIONAL PRIVADO 469 (2001) (noting strong preference in Brazilian doutrina for lex loci delicti commissi approach); Vargas, *supra.* at 219 (observing that in most all jurisdictions in Mexico non-contractual liability "is governed by the principles contained in the civil code of the state where the tortious act took place.").

According to available ratification instruments, parties of the Tratado de Derecho Civil Internacional de Montevideo de 1889 [hereinafter Montevideo Treaty I] are Argentina (Ley 3192), Bolivia, Paraguay, Peru, and Uruguay.

According to available ratification instruments, parties of the Tratado de Derecho Civil Internacional de Montevideo de 1940 [hereinafter Montevideo Treaty II] are Argentina (Decreto Ley 7771/56, Apr. 27, 1956), Paraguay (Ley del 14 de julio de 1950), and Uruguay (Decreto Ley No. 10272, Nov. 12, 1942).

See WERNER GOLDSCHMIDT, DERECHO INTERNACIONAL PRIVADO 35 (1970) (concluding that conflicts between the laws of Argentina, Bolivia, Peru, and Columbia are governed by the 1889 treaty and conflicts between the laws of Argentina, Uruguay, and Paraguay are governed by the 1940 treaty).

Montevideo Treaty I, art. 38 ("Las obligaciones que nacen sin convención se rigen por la ley del lugar donde se produjo el hecho licito o ilícito de que proceden" las obligaciones).

See Villalta, *supra.* at 8.

Tratado de Derecho Civil Internacional de Montevideo de 1940, art. 43 (". . ., y en su caso, por la ley que regula las relaciones jurídicas a que responden.").

See Statement of Reasons, Draft Inter-American Convention on Applicable Law and International Competency of Jurisdiction with Respect to Non-contractual Liability, OEA/Ser.K/XXI.6 CIDIP-VI/doc.17/02, Feb. 4, 2002 at 13 (explaining that the additional language added at the end of art. 43 is "redundant, since the solution it offers inevitably derives from a correct evaluation); *see also* Villalta, at 8 (explaining that the additional phrase included at the end of art. 43 of the 1940 Treaty of Montevideo "determines a question of qualification that the interpreter should resolve in the manner they see fit").

Bustamante Code art. 222 ("Los . . . cuasicontratos se sujetan a la ley que regule la institución jurídica que los origen.").

Id. art. 220 ("la gestión de negocios ajenos se regula por la ley del lugar en que se efectúa.").

Id. art. 221 ("el cobro indebido se somete a la ley personal común de las partes, en su defecto, a la del lugar en que se hizo el pago.").

Id. arts. 289-91 (art. 289: "El abordaje fortuito en aguas territoriales o en el aire nacional se somete a la ley del pabellón si fuere común"; art. 290: "En el propio caso, si los pabellones difieren, se aplica la ley del lugar"; art. 291: "La propia ley local as aplica

governed by common flag, or if there is no common flag, then by the law of the flag of the vessel struck by an at-fault vessel. If the collision is fortuitous, each is responsible for half the damages.[103] Under the second Montevideo Treaty, watercraft collisions are governed by the law of the territory of the collision,[104] or if the collision occurs outside territorial waters, by the law of the common flag, or if there is no common flag, then each ship is governed by the law of its flag.[105]

2. *Recent Amendments to the Codes of Venezuela, Perú, and México.*

While a number of Latin American jurisdictions have considered introducing revisions to their choice of law codes in recent decades,[106] to date only Venezuela, Perú, and Mexico have enacted a significant amendments to their codes of private international law. Under the Venezuelan 1998 Private International Law Statute, illicit acts are presumed to be governed by the law of the place of the injury (*lex loci damni*), though the victim is free to elect the law of the jurisdiction where the illicit act took place (*lex loci delicti commissi*).[107] For quasi-contracts, the traditional *lex loci delicti* applies.[108] Similarly, the Civil Code of Perú provides, in article 2097, that the law applicable to extracontractual liability shall be the law of the place where the principal acts giving rise to the dispute were performed. However, if the law of the place in which the injury was suffered would hold the defendant liable, but the law of the place of where the acts were performed would not, then the applicable law shall be the former law, provided that the defendant should have foreseen that his acts might produce injury there.[109] Until 1988, México adhered to a strictly territorialist approach, under which foreign law was never applied. In 1988, Mexico enacted amendments that altered its choice of law rules. The lex fori is still presumptively applicable, but the Code allows for the application of foreign law if a statute or treaty specifically requires it.[110]

3. *Aproaches Taken by Sub-national Civil Law Jurisdictions*

The three sub-national civil law jurisdictions in the United States and Canada – Puerto Rico, Quebec, and Louisiana – each take unique approaches to choice of law in cases of non-contractual liability.

a. Puerto Rican Adoption of the Functional Equivalent of the Second Restatement

In 1966, the Supreme Court of Puerto Rico abandoned the strict *lex loci delicti* approach inherited from the Spanish civil law in favor of a more fluid approach which the court referred to as dominant contacts (*contactos dominantes*).[111] The U.S. courts have

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en todo caso al abordaje culpable en aguas territoriales o aire nacional").

Id. arts. 292-94 (art. 292: "Al abordaje fortuito o culpable en alta mar o aire libre, se le aplica la ley del pabellón si todos los buques o aeronaves tuvieron el mismo"; art. 293: "En su defecto, se regulara por el pabellón del buque o aeronave abordados si el abordaje fuere culpable"; art. 294: "En los casos de abordaje fortuito en alta mar o aire libre, entre naves o aeronaves de diferente pabellón, cada uno soportara la mitad de la suma total del dano, repartida según la ley de una de ellas, y la mitad restante repartida según la ley de la otra").

1940 Treaty of Montevideo art. 5.

Id. art. 7.

Following attempts by the Inter-American Juridical Committee in the 1960s to harmonize the Montevideo Treaties and Bustamante Code, legislators in Argentina, Brazil, Peru, and Venezuela considered enactment of draft private international law codes. *See, e.g.,* Enrique Dahl, *Argentina: Draft Code of Private International Law*, 24 I.L.M. 269, 272 (1985).

Venezuelan Private International Law Statute (1998), art. 32, published in the Gaceta Oficial No. 36,511, Aug. 6, 1998, available at http://www.csj.gov.ve/legislacion/ldip.html, with English translation available at http://www.analitica.com/biblioteca/congreso_venezuela/private.asp 1998 (art. 32: "los hechos ilícitos se rigen por el Derecho del lugar donde se han producido sus efectos. Sin embargo, la victima puede demandar la aplicación del Derecho del Estado donde se produjo la causa generadora del hecho ilícito"; art. 33: "La gestión de negocios, el pago de lo indebido y el enriquecimiento sin causa se rigen por el Derecho del lugar en el cual se realiza el hecho originario de la obligación.").

Id. art. 33.

Código Civil de 24.7.1984, art. 2097.

C.C.D.F. art. 12 (1988), Diario Oficial, Jan. 7, 1988, available at http://www.solon.org/Statutes/Mexico/Spanish/ccm.html ("Las leyes mexicanas rigen a todas las personas que se encuentren en la Republica, así como los actos y hechos ocurridos en su territorio o jurisdicción y aquellos que se sometan a dichas leyes, salvo cuando estas prevean la aplicación de un derecho extranjero y salvo, además, lo previsto en los tratados y convenciones de que México sea parte."). *See generally* Jorge Vargas, *Conflict of Laws in Mexico: The New Rules Introduced by the 1988 Amendments*, 28 INT'L L 659-94 n.3 (1994) (discussing C.C.D.F. arts. 12-15).

See Fernández Vda. De Fornaris v. American Surety Co. of New York., 93 P.R. Dec. 29, 48 (1966); *see also* Russell J.

deemed the new approach taken under Puerto Rican common law to be equivalent to the Second Restatement most-significant-relationship test.[112] The new Puerto Rican approach has never been codified. As scholars point out, neither the Civil Code of Puerto Rico "nor any of Puerto Rico's other statutes, contain any choice-of-law rules for torts . . ."[113] A 1991 attempt to adopt a new choice of law statute in Puerto Rico was unsuccessful.[114]

b. Comparative Impairment in Louisiana

Louisiana adopts the comparative impairment approach to choice of law for non-contractual liability. For delicts, the Louisiana rule applies "the law of the state whose policies would be most seriously impaired if its law were not applied."[115] This rule is subject to a number of exceptions, however. Conduct-regulating standards are governed by the law of the place of the conduct (*lex loci delicti commissi*).[116] Specific rules are used for issues such as products liability.[117]

c. The Quebec Hybrid Approach

Quebec also adopts a unique approach. Under its 1991 revisions of the Civil Code of Quebec, the *lex loci delicti commissi* generally applies, though the law of the place of the injury (*lex loci damni*) can apply where the injury in the jurisdiction where the injury occurred would have been foreseeable to the party accused of causing the injury.[118] In addition, if the injured and injuring parties share a common domicile, the law of the common domicile applies regardless of where the act or injury occurred.[119]

Specific rules are provided for liability of product manufacturers and for producers of raw materials. The victim can elect to apply either the law of the location of the manufacturer or the law of the place where the product was purchased.[120] Finally, *lex fori* applies to cases

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Weintraub, *At Least, To Do No Harm: Does the Second Restatement of Conflicts Meet the Hippocratic Standard?*, 56 MD. L. REV. 1284, n.8 (1997) (characterizing *Fornaris* as abandonment of *lex loci delicti commissi* in favor of dominant contacts).

See Servicios Comerciales Andinos, S.A. v. General Elec. Del Caribe, Inc., 145 F.3d 463, 478-79 (1st Cir. 1998) (observing that "[t]he courts of the Commonwealth of Puerto Rico have consistently followed the choice of law rules laid out in the Restatement (Second) of Conflict of Laws.").

Symeon C. Symeonides, *Revising Puerto Rico's Conflicts Law: A Preview*, 28 COL. J. TRANSNAT'L L 413, 417-18 (1990).

See generally id. (discussing proposal drafted in the early 1990s by the Puerto Rican Academy of Jurisprudence and Legislation).

C.C. of Louisiana, arts. 3542, as amended by Act 923, approved July 24, 1991, in force as of Jan. 1, 1992, arts. 42-49 (West 1991) ("Except as otherwise provided in this Section, an issue of delictual or quasi-delictual obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue"). *See generally* Symeon C. Symeonides, *Louisiana's Conflicts Law: Two 'Surprises'*, 54 LA. L. REV. 494 (1994).

C.C. of Louisiana,. art. 3453 ("Issues pertaining to standards of conduct and safety are governed by the law of the state in which the conduct that caused the injury occurred, if the injury occurred in that state or in another state whose law did not provide for a higher standard of conduct.
In all other cases, those issues are governed by the law of the state in which the injury occurred, provided that the person whose conduct caused the injury should have foreseen its occurrence in that state.
The preceding paragraph does not apply to cases in which the conduct that caused the injury occurred in this state and was caused by a person who was domiciled in, or had another significant connection with, this state. These cases are governed by the law of this state.").

Id. art. 3545 ("Delictual and quasi-delictual liability for injury caused by a product, as well as damages, whether compensatory, special, or punitive, are governed by the law of this state: (1) when the injury was sustained in this state by a person domiciled or residing in this state; or (2) when the product was manufactured, produced, or acquired in this state and caused the injury either in this state or in another state to a person domiciled in this state. ...The preceding paragraph does not apply if neither the product that caused the injury nor any of the defendant's products of the same type were made available in this state through ordinary commercial channels.").

Québec Civil Code of 1991, art. 3126, Dec. 18, 1991, in force Jan. 1, 1994, available at http://www.droit.umontreal.ca/doc/ccq/fr/index.html & http://www.canlii.org/qc/sta/ccq/whole.html/ (English translation) (art. 3126: "The obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred. However, if the injury appeared in another country, the law of the later country is applicable if the person who committed the injurious act should have forseeen that the damange would occur. In any case where the person who committed the injurious act and the victim have their domiciles or residences in the same country, the law of that country applies").

Id.

Id. art. 3128 ("The liability of the manufacturer of a movable, whatever the source thereof, is governed, at the choice of the victime, (1) by the law of the country where the manufacturer has his establishment or, failing that, his residence, or (2) by the law of the country where the movable was acquired").

seeking civil damages for injuries resulting from exposure to raw materials originating in Quebec.[121]

C. Conclusion: The Difficulty of Pursuing a General Choice of Law Instrument for the Entire Field of Non-Contractual Liability

The foregoing examination of the approaches employed by the nations of the Hemisphere to select the applicable law in cases of non-contractual liability support the conclusion that pursuing a general inter-American instrument harmonizing choice of law for the entire category of non-contractual liability would be an overly ambitious undertaking. There are several reasons for this conclusion.

First, although the foregoing survey does reveal a significant degree of consensus in the Hemisphere concerning choice of law for non-contractual liability, the approach that is widely in force in the hemisphere is one that is highly problematic and unlikely to be appealing to the negotiators of an inter-American instrument. The most widely-followed general approach in the Hemisphere is the traditional *lex loci delicti* approach. Virtually all of the nations of Latin America adhere to this approach. Canada has recently reaffirmed its adherence to this approach. The Caribbean nations, except for Dominica, apply the *lex loci delicti* approach, with the caveat that the claim must also be actionable under forum law. In addition, ten states of the United States follow this traditional approach.

The current wide acceptance of the *lex loci delicti* approach is not a strong basis for pursuing an Inter-American conflict of laws instrument. Among scholars, *lex loci delicti* is widely – although not universally – regarded as an unsatisfactory approach to choice of law because it often produces arbitrtary and unjust results. None of the global, regional, or subregional efforts to regulate choice of law in the area of non-contractual liability have adopted the traditional *lex loci delicti* approach in its unvarnished form. An Inter-American instrument seeking to harmonize choice of law in this field would be unlikely to adopt this approach. If so, an inter-American instrument would call for the alteration of the choice of law approaches currently in force in the great majority of nations on the hemisphere.

The most significant departure in the Hemisphere from the traditional *lex loci delicti* approach has occurred in the United States, where all but ten of the states have departed from that approach. The U.S. experience, however, does not provide a model for a general inter-American choice of law instrument. First, no agreement has been reached in the United States on an alternative approach. Second, the most widely adopted of the approaches employed in the United States – the "most significant relationship" approach of the Second Restatement, which has been adopted by 22 (less than half) of the states – also has significant probleDr. As discussed above, the broad discretion this approach leaves to judges results in a system that provides little certainty or predictability in the law. The point of an international instrument harmonizing choice of law would be, in large part, to provide the increased certainty and predictability in the law which is so important to advancing international transactions. It would be ironic and counterproductive to replace the current approaches followed by most countries of the hemisphere – an approach that, despite its flaws, has the virtue of producing certainty and predictability – with as indeterminate an approach as that of the Second Restatement.

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.

Id. art. 3129 ("The application of the rules of this Code is imperative in matters of civil liability for damage suffered in or outside Quebec as a result of exposure to or the use of raw materials, whether processed or not, originating in Quebec.").

The challenge will be to find a middle ground: an approach that produces a significant degree of certainty and predictability, while averting the arbitrary and unjust results often produced by the *lex loci delicti* approach. This has, indeed, been the aim of the global and regional organizations that have undertaken to harmonize choice of law rules with respect to various aspects of non-contractual liability. Most of the texts proposed by these entities have taken a hybrid approach – selecting the law of the place of injury as the principal rule, but establishing exceptions where, for example, the parties are both domiciliaries of a different state. If the best approach to the question of non-contractual liability is a hybrid approach, an instrument that adopts such an approach will require changes in the choice of law approaches of *all* Member states. This will place a heavy burden of persuasion on those seeking the adoption and ratification of the eventual CIDIP instrument. Agreement on an approach that would require such broad changes in the approaches currently taken would be more feasible only if the instrument were limited to a particular subcategory of non-contractual liability.

The difficulty of adopting a general convention stems in addition from the sheer number and variety of sorts of liability that fall within the rubric of "non-contractual" liability. It is unlikely that any generally-phrased test would be adequate for all such subcategories of liability. At a minimum, the instrument would have to exclude from its scope – or include special provisions addressing – those categories of non-contractual liability that are sufficiently different from the "typical" tort that they require special rules. For example, injuries caused by the internet are likely to require special treatment. The same is true for numerous other sorts of liability encompassed by the term "non-contractual liability." The European Commission's draft regulation regulating choice of law for non-contractual liability (Rome II) included specific provisions for various specific categories of non-contractual liability, and numerous of those provisions produced significant controversy among affected parties. The Inter-American process lacks a "commission" with the power to impose a choice of law rule from above; any instrument must accordingly obtain the agreement of the individual Member states. Strong opposition from interested parties is likely to derail the effort to adopt an inter-American instrument in this field. The more limited the agreement's scope, the narrower the field of affected parties whose concerns would have to be taken into account, and accordingly the better the chances of reaching agreement on a common approach.

Finally, the federal system of government in the United States makes it highly unlikely that it would be able to support or implement a convention harmonizing choice of law for the entire area of non-contractual liability. In the United States, the federal government negotiates treaties, and, once negotiated, the treaty is binding on the states. However, as noted above, choice of law is currently regarded as primarily a matter of state law. An inter-American convention harmonizing choice of law for all cases of non-contractual liability would accordingly supersede state choice of law rules in a broad range of cases. Given the traditional division of authority between the state and federal governments, I think there would be very strong – probably insurmountable – political resistance to an instrument that would displace state law so broadly in an area traditionally governed by state law. On the other hand, if the convention were to seek to harmonize choice of law for only a narrow subcategory of non-contractual liability, adherence by the United States would not be out of the question. (The alternative would be a model law harmonizing choice of law in cases of non-contractual liability, but, even if agreement could be reached on such an instrument, it would have to be adopted by 50-plus individual states of the United States, thus making harmonization even within the United States a quite significant undertaking.)

The experience of other global and regional organizations also cautions against undertaking the project of seeking to harmonize choice of law in the entire field of non-contractual liability. The Hague Conference considered undertaking such a project in the late 1960's and decided that the sheer number and diversity of forms of liability encompassed in the category made such a project inadvisable. It accordingly decided to pursue a series of narrower choice of law instruments addressing particular subcategories of non-contractual liability. The Hague Conference's experience with respect to the Convention on Jurisdiction and Judgments currently being negotiated also cautions against pursuing an instrument

seeking to harmonize jurisdiction in all cases of non-contractual liability. The negotiations are currently stalled and it appears that the most likely outcome will be a narrower instrument addressing the validity of choice of law agreements in contracts. As this outcome suggests, the major disagreements that led to the failure of the proposed broader instrument related to jurisdiction in cases of non-contractual liability.

At the regional level, the experience of the European Union is not encouraging. In the 1970's the EC sought to harmonize choice of law with respect to both contractual and non-contractual liability. This proved too difficult insofar as non-contractual liability was concerned, so the project was trimmed to include only choice of law for contractual disputes. The result was the Rome Convention. Very recently, the idea of harmonizing choice of law with respect to non-contractual liability was revived, this time through a proposed regulation of the European Commission. A draft regulation was made available for comments in 2001, and the comments received are available in the European Commission's web site. A large majority of those submitting comments questioned the need for such a regulation. Many denied that there was a problem, and many believed that the EC's proposed solution to the non-problem would make matters worse. As noted above, many businesses and trade associations expressed grave concerns about the effects that the proposed choice of law rules would have on their particular industry. The European Commission may well eventually adopt a regulation attempting to harmonize choice of law in the entire field of non-contractual liability, but the comments suggest that they are likely to narrow the scope of the regulation significantly. In any event, as noted above, there is no similar legislative body in the Americas, so a solution that is not widely approved by Member states is unlikely to be adopted. Such approval is far more likely with a narrower instrument.

Finally, the decision to undertake the broad project of harmonizing choice of law for all non-contractual liability is inconsistent with CIDIP's raison d'etre. It is well to recall that CIDIP emerged in the 1970's after the failure of the attempt of the Inter-American Juridical Committee's attempt in the 1960's to achieve a revision of the entire Bustamante Code. This failure led the OAS to pursue instead an approach whereby the harmonization of private international law in the Hemisphere would be pursued in smaller, more manageable phases. The CIDIP conferences are the manifestation of the decision to take this incremental approach.[122] Harmonization of jurisdiction and choice of law in the field of non-contractual liability would not be quite as ambitious as revising the Bustamante Code in its entirety.[123] However, because the bases of non-contractual liability, and the contexts in which such liability is incurred, have expanded exponentially since the project of revising the Bustamante Code was abandoned in the 1960's, it is likely that, today, the effort to harmonize jurisdiction and choice of law for non-contractual liability would be a more far ambitious undertaking than the failed effort to revise the Bustamante Code was when it was abandoned in the 1960's. We would be more faithful to the incremental approach embodied in the CIDIP project if we were to recommend that the harmonization of jurisdiction and/or choice of law be, if at all, only with respect to a specific narrow subcategory of non-contractual liability.

See The History of the CIDIP Process, OEA/Ser.K/XXI.6 CIDIP-VI/doc.11/02, Jan. 25, 2002, at 7; Maekelt, *supra*.

Portions of the Bustamante Code have already been addressed in instruments adopted at CIDIP concerning choice of law for contractual obligations and general principles of private international law. But an instrument seeking to address jurisdiction and choice of law for the field of non-contractual liability would far exceed those other conventions in scope.

CHART 2 – CHOICE OF LAW RULES IN THE HEMISPHERE

Jurisdiction	*Type of Rule**	*Source of Choice of Law Rule*
COMMON LAW		
Antigua & Barbuda	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of	Phillips v. Eyre and related cases
Bahamas	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
Barbados	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
Belize	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
Canada (excl. Quebec)	LLD, with exception for specific kinds of liability, including transportation accidents (maritime, air, auto)	Tolofson v. Jensen & Gagnon v. Lucas
Dominica	Most significant relationship	Transnational Causes of Action (Products Liability) Act
Grenada	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
Guyana	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
Jamaica	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
St. Vincent & Grenadines	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases

St. Kitts & Nevis	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
St. Lucia	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
Trinidad & Tobago	LF & LLD (Double-Actionability), with most significant relationship exception for specific kinds of liability	Phillips v. Eyre and related cases
U.S. (excl. LA & PR)	2nd R (22)	Restatement (Second) Conflict of Laws Sects. 145-46 & 6
	LLD-I (10)	Restatement (First) Conflict of Laws Sects. 377-78
	BL (5)	Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267 (1966); Robert Leflar, *Conflicts Law: More on Choice Influencing Considerations*, 54 CAL. L. REV. 1584 (1966)
	IA (3)	BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 189 (1963)
	LF (3)	
	SC (2)	
	Combined Modern (5)	
<u>*CIVIL LAW*</u>		
Argentina	LLD	Montevideo Treaty (1889), art. 38 & Montevideo Treaty (1940), art. 43
Bolivia	LLD	Código de DIPr (Bustamante Code) (1932) arts. 167-8 (with reservation that rules of the Code are superseded by any conflicting provisions of the Montevideo Treaty) & Montevideo Treaty (1889), art. 38
Brazil	LLD	Bustamante Code (1929) C.C. art. 9, adopted by Lei de Introdução ao Código Civil, Law 4.657, Sept. 4, 1942

Canada (Quebec)	CD, or if none, then LLD, or LLD-I if foreseeable; except for products liability (law of manufacturers location or point of sale); damage by raw materials originating from Quebec (lex fori)	Quebec Civil Code of 1991, arts. 3126; 3128-29
Chile	LLD	Bustamante Code (1933) arts. 167-8 (general reservation subordinating Code to conflicting domestic law) C.C. art. 14
Colombia	LLD	C.C. art. 18
Costa Rica	LLD	Bustamante Code (1930) arts. 167-8 (general reservation subordinating Code to conflicting domestic law)
Dominican Republic	LLD	Bustamante Code (1930) arts. 167-8
Ecuador	LLD	Bustamante Code (1933) arts. 167-8 (general reservation subordinating Code to conflicting domestic law)
El Salvador	LLD	C.C. arts. 2035-36 & Bustamante Code (1931) arts. 167-8 (general reservation subordinating Code to conflicting domestic law)
Guatemala	LLD	Bustamante Code (1929) arts. 167-8
Haiti	LLD	Bustamante Code (1929) arts. 167-8
Honduras	LLD	Bustamante Code (1930) arts. 167-8
Mexico	Lex fori, unless statute or treaty creates exception	C.C.D.F. art. 12 (1988)
Nicaragua	LLD	Bustamante Code (1930) arts. 167-8
Panama	LLD	Bustamante Code (1928) arts. 167-8 [cite to relevant civil code provisions and/or treaties]
Paraguay	LLD	Montevideo Treaty (1889), art. 38 & Montevideo Treaty (1940), art. 43

Peru	Lex loci actus or lex damni, whichever is more favorable to the victim	C.C. arts. 2097-98.
Suriname		
Uruguay	LLD	Montevideo Treaty (1889), art. 38 & Montevideo Treaty (1940), art. 43
U.S. (Louisiana)	CI, except for products liability, where either LLD or LLD-I applies	C.C. arts. 14, 3542-45, as amended by 1991 La. Sess. Law. Serv. Act 923
U.S. (Puerto Rico)	Law of place with most dominant contacts]	Widow of Fornaris v. American Surety Co. (1966)
Venezuela	LLD-I, or, at option of plaintiff, LLD	Private International Law Statute (1998), Gaceta Oficial No. 36,511, art. 32; see also Bustamante Code (Mar. 12, 1932), arts. 167-8 (referring only to LLD)

III. GROUNDS FOR PERSONAL JURISDICTION IN CASES OF NON-CONTRACTUAL LIABILITY

Similar to their approaches to conflict of laws, countries and states within the Hemisphere also tend to take a general approach to jurisdiction over most forms of non-contractual liability with specific rules for certain kinds of liability. The specific rules are often incorporated into treaties.[124] This Section will discuss the most common general and specific approaches, and will briefly mention doctrines relating to the mandatory and discretionary exercise of personal jurisdiction, such as the doctrines of *forum non conveniens* and *lis pendens*.

In the United States, long-arm statutes generally provide grounds for exercising personal jurisdiction over parties outside the jurisdiction who commit torts within the jurisdiction or commit foreign torts that cause injury within the jurisdiction. In Canadian common law jurisdictions, long arm jurisdiction is generally premised upon commission of a tort or suffering an injury within the jurisdiction. Meanwhile, in the civil law jurisdictions of Latin America, courts can generally exercise personal jurisdiction where the illicit act occurred and also where the defendant is domiciled. Each of the civil law sub-national jurisdictions within common law countries has also enacted a long-arm statute codifying its particular approach.

A. Jurisdictional Principles Applied in Common Law Jurisdictions.

1. *U.S. Principles Influencing the Exercise of Personal Jurisdiction*.

The law in the United States concerning jurisdiction over foreign defendants is far more unified than the law concerning choice of law. That is because the federal Constitution imposes significant limits on a state's power to exercise jurisdiction over out-of-state defendants. In general states may exercise jurisdiction over such defendants only where "he have certain minimum contacts with [the forum jurisdiction] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice."[125] The constitutional limits apply equally to defendants from other states of the Union and defendants from foreign countries, except that the Supreme Court has cautioned that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field."[126] The states need not exercise jurisdiction to the full extent permitted by the Constitution, but many states have authorized their courts to do so.[127] For this reason, the constitutional limits are the relevant ones for present purposes. This section will therefore focus on those limits.[128]

U.S. law distinguishes between two types of jurisdiction: general and specific. General jurisdiction refers to situations in which the state may exercise jurisdiction over the defendant with respect to any dispute. When a state possesses general jurisdiction, there is no need to show that the particular dispute has any connection with the forum state. Under current doctrine, the courts of a state may exercise general jurisdiction over any domiciliary of the state, or against any corporation that is incorporated within the state or has its principal place of business there. In addition, current doctrine permits a state to exercise general jurisdiction over any individual or corporation that has "continuous and systematic" presence within the

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See, e.g., Warsaw Convention (allowing suit against air carriers for injuries caused by accidents in the place of ordinary residence, the principal place of business, or the destination of the flight).

International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945).

Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. 102, 115 (1987).

The Constitution also imposes outer limits on a state's discretion to apply its law to out of state events, but the limits imposed in this area are relatively minor. *See generally* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981). Most states do not exercise their power in this regard to the full extent permitted by the Constitution.

The constitutional limits on the jurisdiction of the federal courts are the same in theory but different in application. Because the relevant sovereign in a suit brought in federal court is the United States as a whole, the Constitution permits federal courts to exercise jurisdiction as long as there are "minimum contacts" with the entire United States. By statute and rule, however, the jurisdiction of the federal courts is (with a minor exception) linked to the jurisdiction of the courts of the state in which the court sits. Thus, although Congress may broaden the federal court's jurisdiction, under current law the federal courts may exercise jurisdiction only if the defendant has minimum contacts with the state in which the court sits. The one exception concerns cases in which the defendant lacks minimum contacts with any single state but has minimum contacts with the United States as a whole. In such circumstances, any federal court can exercise jurisdiction over the defendant. Fed. R. Civ. P. 4(k)(2).

jurisdiction, such as maintaining a branch office there. This category of jurisdiction is referred to as "doing business" jurisdiction, and has proved to be a controversial basis of jurisdiction at the ongoing negotiations over a possible Hague Convention on Jurisdiction and Enforcement of Judgments. Even more controversial is the United States' recognition that a state may exercise general jurisdiction over any person who is served with process while physically present within the state, even if his presence in the state was transitory. Under this doctrine, sometimes referred to as "tag" jurisdiction, a person who is served with process in New York while attending a conference in that state, or perhaps even while his plane made a stop there en route to another destination, may be subjected to the jurisdiction of that state on any cause of action, however unrelated to New York or indeed to the United States as a whole.

The second category of jurisdiction – specific jurisdiction – is jurisdiction based on contacts between the defendant and the forum state that are related to the dispute sought to be litigated there. For example, an out-of-state defendant may be sued in a state if the dispute concerns a product marketed by the defendant in the forum state which foreseeably causes an injury in the forum state. On the other hand, the defendant may generally not be sued in a state in which a product causes an injury if the product was unilaterally transported to the forum state by the plaintiff or a third party and the defendant did not market the product in that state.[129]

As noted, the states are not required to exercise jurisdiction to the full extent of permitted by the Constitution. The actual scope of a state's jurisdiction over out-of-state defendants is determined by the state's statutes on the subject, known as "long-arm" statutes. The states cannot exercise jurisdiction over cases not specified in their long-arm statutes. These statutes typically allow for personal jurisdiction parties who have caused injuries in the state even if caused by an act or omission outside the state, as well as over parties causing injuries elsewhere by an act or omission inside the state.[130] Even when the jurisdiction is authorized by a state statute, the state courts must comply with the outer limits imposed by the Constitution. Some states have simplified matters by enacting statutes authorizing their courts to exercise jurisdiction to the full extent permitted by the federal Constitution.[131] Even statutes that do not say so expressly have been interpreted by the courts to authorize jurisdiction to the full extent permitted by the Constitution. For this reason, it seems reasonable to conclude that, for purposes of negotiation of an Inter-American instrument regulating jurisdiction in non-contractual disputes, the relevant U.S. rules of jurisdiction will be those emanating from the federal Constitution.

Under U.S. law, the exercise of jurisdiction over the parties is not mandatory. In most states, the courts have the discretion to dismiss a case under the doctrine of *forum non conveniens,* even if they have jurisdiction over the case under the Constitution and statute. The doctrine of *forum non conveniens* permits a court to decline to exercise jurisdiction where there is another more convenient forum in which the case can be heard and certain factors weigh in favor of hearing the case in that forum. This doctrine has been extremely controversial in the nations of Latin America and the Caribbean, some of which have enacted retaliatory legislation.[132]

2. *Canadian Jurisdictional Principles.*

Canadian provinces have also enacted long-arm statutes. These laws typically provide for personal jurisdiction over a party who has committed a tort within the jurisdiction and over a party who allegedly caused damage incurred in the jurisdiction,[133] as well as over parties owning property located within the jurisdiction and parties domiciled or resident in the

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See World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) & Asahi, 480 U.S. at 112.

Other common grounds for long-arm jurisdiction are doing business in the forum state, owning property in the forum state, or contracting to insure a risk located in the state. *See* Uniform Procedure Act; *see also* RICHARD L. MARCUS, MARTIN H. REDISH, EDWARD F. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 697 (3d ed. 2000).

Cal. Civ. Proc. Code § 410.10. If a state court has personal jurisdiction over the parties, then it will typically have subject matter jurisdiction over the dispute because state courts are courts of general subject matter jurisdiction.

For further discussion of forum non conveniens, *see* Part II

Castel, *supra.* at 197-98, 205.

jurisdiction.[134] Similar to U.S. courts, courts in Canadian common law provinces require that jurisdiction be founded upon a "real and substantial connection" between the defendant and the forum showing that the defendant voluntarily submitted to the risk of litigation in the forum.[135] Also similar to the U.S. courts, courts in Canadian common law provinces require that personal jurisdiction over foreign defendants be exercised consistent with principles of "order and fairness."[136]

B. Personal Jurisdiction Principles Applied in Civil Law Jurisdictions.

1. *Jurisdiction Over Wrongs Committed or Defendants Domiciled Within the Jurisdiction*

In civil law countries of Latin America, national law typically provides for jurisdiction wherever the defendant is domiciled or the wrongful act (*acto/hecho ilíicito*) occurred.[137] This approach is found in the Treaties of Montevideo[138] as well national civil codes, including the Brazilian Code of Civil Procedure.[139] The Bustamante Code also allows for jurisdiction in the additional case where the plaintiff but not the defendant is domiciled in the forum state, provided both parties have consented in fact or law to jurisdiction.[140] This rule is subject to the general reservations under which the provisions of the Code only apply to the extent consistent with domestic law. Although the Bustamante Code includes provisions relating to jurisdiction over criminal delicts or quasi-delicts,[141] there are no similar provisions for non-criminal delicts or quasi-delicts.

2. *Sub-regional Jurisdictional Norms for Specific Types of Liability*

Some of the civil law jurisdictions in Latin America have joined other jurisdictions in adopting special sub-regional jurisdictional rules for certain categories of liability. For example, the MERCOSUR countries of Brazil, Argentina, Paraguay, and Uruguay have enacted two jurisdictional protocols, one in the area of traffic accidents and the other in the area of consumer relations. The San Luis Protocol provides special rules for jurisdiction over traffic accidents in the place of the accident, domicile of the defendant, or the domicile of the plaintiff.[142] The Santa Maria Protocol provides special rules for jurisdiction in the jurisdiction of the consumer's domicile, with exceptions for other jurisdictions upon consent of the consumer, which could include the place where goods or services are delivered and the domicile of the defendant.[143]

Id. at 198-201

Id. at 8-11 (observing that minimum contact with the forum could satisfy this test), *citing* Dupont v. Taronga Holdings Ltd. (1987), 49 D.L.R. (4th) 335 & Morguard Investments Ltd. v. De Savoye, 12 Adv. Q. 489.

Castel, *supra.* at 9. This standard is analogous to the U.S. standard of fair play and substantial justice.

Anderson *supra*., at 198 (citing Guatemala C.C. art. 16: "In complaints for the compensation of damages, the judge of the place where they were caused has jurisdiction"; Costa Rica C.C. art. 28; Panama C.C. art. 267).

See Treaty of Montevideo (1889), art. 56 ("Las acciones personales deben entablarse ante los jueces del lugar a cuya ley esta sujeto el acto jurídico materia del juicio. Podrán entablarse igualmente ante los jueces del domicilio del demandado.") & Treaty of Montevideo (1940), art. 56: (adding the following phrase to end of 1889 art. 56: "[s]e permite la prorroga territorial de la jurisdicción si, después de promovida la acción, el demandado la admite voluntariamente, siempre que se trate de acciones referentes a derechos personales patrimoniales."); *see also* Additional Protocol to Treaty of Montevideo (1940) art. 5 (prohibiting contractual abrogation of Treaty of Montevideo rules on choice of law and jurisdiction).

C.P.C. of Brazil, art. 88 (English translation) (Brazilian courts are competent when "the defendant, of watever nationality, is domiciled in Brazil . . . [or] the cause of action arises from an event or act that took place in Brazil."), *cited in* DOING BUSINESS IN BRAZIL § 21.133.

Bustamante Code., art. 318 ("Será en primer término juez competente para conocer de los pleitos a que dé origen el ejercicio de las acciones civiles y mercantiles de toda clase, aquel a quien los litigantes se sometan expresa o tácitamente, siempre que uno de ellos por lo menos sea nacional del Estado contratante a que el juez pertenezca o tenga en él su domicilio y salvo el derecho local contrario.").

Bustamante Code, art 340 (providing that "para conocer de los delitos y faltas y juzgarlos son competentes los jueces y tribunales del Estado Contratante en que se hayan cometido").

MERCOSUR Protocol of San Luis, art. 7 ("Que para ejercer acciones serán competentes, a elección del actor, los tribunales del Estado Parte: 1) donde se produjo el accidente; 2) del domicilio del demandado; y 3) del domicilio del demandante."). *See* Rechsteiner, *supra.* at 295 (noting that as of 2000 there was doubt as to whether Brazil had taken the necessary steps to make this protocol enter into force as domestic law).

MERCOSUR Protocol on International Jurisdiction in Matters Regarding Consumer Relations, 6th Meeting of Ministers, Santa Maria, Brazil, Dec. 1996, CMC, arts. 4-5.

3. Sub-national Civil Law Jurisdictions of Common Law Nations

a. Puerto Rican Long-Arm Statute

Puerto Rican law provides for long-arm jurisdiction over claims against foreign defendants arising from their participation in tortuous acts within Puerto Rico, including while driving a vehicle in Puerto Rico or operating a passenger or cargo transportation operation.[144] Jurisdiction can also be grounded upon doing business in Puerto Rico or owning real property situated in Puerto Rico.[145]

b. Quebec Long-Arm Statute

The Quebec Civil Code provides for long-arm jurisdiction if a delict is committed in Québec, damage is suffered in Québec, or an injurious act occurred within Québec.[146] In addition, under the Code Quebec courts have exclusive jurisdiction over all actions for damage suffered in or outside Québec as a result of exposure to or the use of raw materials, whether processed or not, originating in Québec.[147] Other bases of long-arm jurisdiction are the defendant having domicile or residence in Québec, the defendant being a legal person not domiciled in Québec but having an establishment in Québec, provided that the dispute relates to the defendant's activities in Québec, and the defendant submitting to jurisdiction.[148] Courts of Quebec can also take jurisdiction over foreign defendants if the dispute has "sufficient connection to Quebec" and cannot be reasonably expected to be litigated outside of Quebec[149] or if person or property present in Quebec is threatened by emergency or serious inconvenience.[150]

c. Louisiana Long-Arm Statute

Similar to common law U.S. states, Louisiana has adopted a long-arm statute specifying which allows Louisiana courts to assert personal jurisdiction over foreign defendants who either (1) cause injury or damage as the result of a delictual or quasi-delictual act or omission inside Louisiana, (2) cause injury or damage in Louisiana as a result of a delictual or quasi-delictual act or omission outside of Louisiana, provided that the defendant regularly does or solicits business, engages in some persistent course of conduct, or earns revenue from goods or services sold in Louisiana, or (3) manufacture a product or component part which causes foreseeable damage in Louisiana.[151] Transacting business in Louisiana is another basis for personal jurisdiction.[152] The Louisiana long-arm statute also provides for jurisdiction in other cases so long as jurisdiction is not inconsistent with the Louisiana and U.S. Constitutions.[153]

See Rule 4.7 of the Puerto Rican Code of Civil Procedure, 32 L.P.R.A. Ap. III R. 4.7 ("(a) Cuando la persona a ser emplazada no tuviere su domicilio en Puerto Rico, el Tribunal General de Justicia de Puerto Rico tendrá jurisdicción personal sobre dicha persona, como si se tratare de un domiciliado del Estado Libre Asociado de Puerto Rico, si el pleito o reclamación surgiere como resultado de dicha persona: (1) Haber efectuado por si o por su agente, transacciones de negocio dentro de Puerto Rico; o (2) haber participado, por si o por su agente, en actos torticeros dentro de Puerto Rico; o (3) haberse envuelto en un accidente mientras, por si o por su agente, manejare un vehículo de motor en Puerto Rico; o (4) haberse envuelto en un accidente en Puerto Rico en la operación, por si o por su agente, de un negocio de transportación de pasajeros o carga en Puerto Rico o entre Puerto Rico y Estados Unidos o entre Puerto Rico y un país extranjero o el accidente ocurriere fuera de Puerto Rico en la operación de dicho negocio cuando el contrato se hubiere otorgado en Puerto Rico, o (5) ser dueño o usar o poseer, por si, o por su agente, bienes inmuebles sitos en Puerto Rico.").

Id.

Quebec C.C. art. 3148(3).

Id. art. 3151.

Id. art. 3148.

Id. art. 3136 (in Spanish translation) ("que aunque una autoridad de Quebec no sea competente para conocer en un litigio, en el caso de que resulte imposible entablar una acción en el extranjero o si no puede exigirse que ella sea introducida en el extranjero, podrá asumir competencia si la cuestión presenta un vinculo suficiente con Québec."). *See, e.g.,* Recherches Internationales Québec v. Cambior, Inc., unreported judgment of Aug. 14, 1998, Canada Superior Court, Quebec, no. 500-06-000034-971, cited by Anderson, *supra.* at 194 n.61.

Id. art. 3140. As with common law jurisdictions applying the *forum non conveniens* doctrine, Quebec courts can always decline jurisdiction if authorities in another jurisdiction are in a better position to decide. *Id.* art. 3135.

13 La. R.S. art 3201.

Id. art. 3135.

Id.

C. Conclusions

Whether the conditions exist for the harmonization of jurisdictional principles for cases of non-contractual liability must be informed by the Hague Conference's recent experience with its proposed Convention on Jurisdiction and Enforcement of Judgments in Civil or Commercial Matters. After many years of work on the topic, the Hague Conference appears to have narrowed significantly the scope of the project. The once ambitious project has been narrowed considerably and now seeks to address just the validity of choice of forum clauses in contracts.

An Inter-American instrument harmonizing jurisdiction for cases of non-contractual liability would be narrower than the Hague Conference's original project in two respects. First, there would be fewer parties to the negotiation, as this would be a regional instrument rather than a global one. Second, the possible Inter-American instrument under discussion would cover only non-contractual obligations, rather than all civil or commercial matters. The question is whether these differences justify greater optimism for the Inter-American instrument under consideration.

The regional nature of the Inter-American instrument may make it easier to reach agreement on relevant principles. However, the principal disagreements that led to the abandonment of the broader Hague project were disagreements between the civil law nations of Europe and the common law system of the United States. Because this dichotomy is replicated in the Americas, the disagreements may well prove equally intractable in this Hemisphere.

The fact that the possible Inter-American instrument would cover only non-contractual liability also offers little basis for optimism. As discussed above, the category of non-contractual obligations is quite broad. In both Europe and the Americas, choice of law conventions were much easier to conclude with respect to contractual than non-contractual obligations. It is likely that the same would be true for an instrument seeking to harmonize the bases for jurisdiction. The fact that the Hague Conference has narrowed its project to encompass only choice of law clauses in contracts suggests that the principal problem concerned non-contractual obligations. The most intractable problems that arose during the negotiations of the Hague Conference concerned certain categories of non-contractual liability – namely those involving intangible business injury. As with choice of law, the best strategy for an Inter-American instrument addressing jurisdiction for cases of non-contractual liability is to begin with a specific subcategory of this broad field, preferably not involving intangible business injury, and to expand gradually to other categories.[*]

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I. SUBSTANTIVE LAW ON EXTRACONTRACTUAL LIABILITY

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incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it.").

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b. *United States*

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2. Caribbean

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3. Central America

a. Panama

WILLIAM TETLEY, INT'L CONFLICT OF LAWS; COMMON, CIVIL AND MARITIME (1994) (at 956 citing LLD as general rule, with special rules in areas such as maritime tort: law of ship's flag governs).

4. South America

a. *General*

Montevideo Treaty I.

Montevideo Treaty II.

Protocolo de San Luis sobre Responsabilidad Civil Emergente de Accidentes de Tránsito, MERCOSUR/CMC, Dec. 1, 1996, arts. 3-6 (art. 3: "La responsabilidad civil por accidentes de tránsito se regulará por el derecho interno del Estado Parte en cuyo territorio se produjo el accidente. Si en el accidente participaren o resultaren afectadas únicamente personas domiciliadas en otro Estado Parte, el mismo se regulará por el derecho interno de éste último"; art. 4: "La responsabilidad civil por daños sufridos en las cosas ajenas a los vehículos accidentados como consecuencia del accidente de tránsito, será regida por el derecho interno del Estado Parte en el cual se produjo el hecho"; art. 5: "Cualquiera fuere el derecho aplicable a la responsabilidad, serán tenidas en cuenta las reglas de circulación y seguridad en vigor en el lugar y en el momento del accidente"; art. 6: "El derecho aplicable a la responsabilidad civil conforme a los artículos 3 y 4 determinará especialmente entre otros aspectos: a) Las condiciones y la extensión de la responsabilidad; b) Las causas de exoneración así como toda delimitación de responsabilidad; c) La existencia y la naturaleza de los daños susceptibles de reparación; d) Las modalidades y extensión de la reparación; e) La responsabilidad del propietario

del vehículo por los actos o hechos de sus dependientes, subordinados, o cualquier otro usuario a título legítimo; f) La prescripción y la caducidad.").

b. *Jurisdiction Specific*

i. *Argentina*

- *Primary Sources*

C.C. art. 8 ("Los actos, los contratos hechos y los derechos adquiridos fuera del lugar del domicilio de la persona, son regidos por las leyes del lugar en que se han verificado.").

Convenio con Austria del 22 de Marzo de 1926 Sobre Ley Aplicable a Accidentes de Trabajo, arts. 1-4 (adopting *lex loci delicti commissi* approach).

Convención con Bulgaria de 7 de Octubre de 1937 Sobre Indemnizaciones de Accidentes del Trabajo, art. 4 (adopting *lex loci delicti commissi* approach).

Convenio entre la Republica Argentina y la Republica Oriental del Uruguay en Materia de Responsabilidad Civil Emergente de Accidentes de Transito, Ley 24-106, 7 de julio de 1992, available at http://www.argentinajuridica.com/RF/ley_24_106.htm, arts. 2 & 4 (art. 2: "La responsabilidad civil por accidentes de tránsito se regulará por el Derecho interno del Estado Parte en cuyo territorio se produjo el accidente. Si en el accidente participaren o resultaren afectadas únicamente personas domiciliadas en el otro Estado Parte, el mismo se regulará por el Derecho interno de este último"; art. 3: "La responsabilidad civil por daños sufridos en las cosas ajenas a los vehículos accidentados como consecuencia del accidente de tránsito, será regida por el Derecho interno del Estado Parte en el cual se produjo el hecho."); Convenio entre Argentina y Austria del 22 de Marzo de 1926 Sobre Ley Aplicable a Accidentes de Trabajo, arts. 1-4 (adopting *lex loci delicti commissi* approach).

Decreto Ley 7771/56, Apr. 27, 1956) (ratifying Montevideo treaty).

Ley 20.094, arts. 605 et seq. (concerning collisions between watercrafts).

- *Secondary Sources*

ENRIQUE DAHL, *Argentina: Draft Code of Private International Law*, 24 I.L.M. 269, 272 (1985) (citing criticism of the U.S. governmental interest analysis because it leads to "unexpected" results).

JACOB DOLINGER, *Evolution of Principles for Resolving Conflicts in the Field of Contracts and Torts*, in 283 RECUEIL DES COURS (2000) (citing art. 2622 of new draft Civil Code which takes the approach taken in the 1991 amendments to the Civil Code of Quebec).

WILLIAM TETLEY, INT'L CONFLICT OF LAWS; COMMON, CIVIL AND MARITIME (1994) (at 871 citing LLD as standard rule, as applied in 1926 Wolthusen case).

ii. *Bolivia*

JAIME PRUDENCIO C., CURSO DE DERECHO INTERNACIONAL PRIVADO (5th ed. 1997).

iii. *Brazil*

- *Primary Sources*

Introductory Law to Civil Code, Law 4.657, Sept. 4, 1942, art. 9 ("Para qualificar e reger as obrigações, aplicar-se-á a lei do pais em que se constituirem. Sec. 1. Destinando-se a obrigação a ser executada no Brasil e dependendo de forma esencial, será esta observada, admitidas as peculiaridades da lei estrangeira quanto aos requisitos extrinsicos do ato . . .").

- *Secondary Sources*

JACOB DOLINGER, *Evolution of Principles for Resolving Conflicts in the Field of Contracts and Torts*, in 283 RECUEIL DES COURS (2000) (citing art. 9 of Introductory Law and explaining that its reference to "obligations" generally has been construed to include torts).

PAUL GRIFFITH GARLAND, AMERICAN-BRAZILIAN PRIVATE INTERNATIONAL LAW 50 (1959) (citing *lex loci delicti* as Brazilian choice of law rule).

iv. *Chile*

ALFREDO ETCHEBERRY O., AMERICAN-CHILEAN PRIVATE INTERNATIONAL LAW 61 (1960) (stating that no special choice of law rules for torts exist under Chilean law and that *lex loci delicti* is the most common approach).

v. *Colombia*

- *Primary Sources*

Tratado Bilateral de Derecho Internacional Entre Colombia y Ecuador (1906) (art 37: "La responsabilidad civil proveniente de delitos o cuasi-delitos se regirá por la ley del lugar en que se hayan verificado los hechos que los constituyen.").

- *Secondary Sources*

MARCO GERARDO CALVA, TRATADO DE DERECHO INTERNACIONAL PRIVADO 46 (2d ed. 1973) (confirming that Colombia had signed the 1889 Treaty of Montevideo but that the treaty is not in effect in Colombia).

PHANOR J. EDER, AMERICAN-COLOMBIAN PRIVATE INTERNATIONAL LAW 77 (1956) (stating that Colombian law does not provide specific choice of law rules for tort and that the general rules of private international law therefore apply to torts).

WILLIAM TETLEY, INT'L CONFLICT OF LAWS; COMMON, CIVIL AND MARITIME (1994) (at 894 citing LLD and place of injury rules).

vi. *Ecuador*

Tratado Bilateral de Derecho Internacional Entre Colombia y Ecuador (1906).

vii. *Paraguay*

C.C. art. 21 ("Los buques y aeronaves están sometidos a la ley del pabellón en todo que respecta a su adquisición, enajenación y tripulación. A los efectos de los derechos y obligaciones emergentes de sus operaciones en aguas o espacios aéreos no nacionales, se rigen por la ley del Estado en cuya jurisdicción se encontraren").

Ley del 14 de julio de 1950) (ratifying Montevideo treaty).

viii. *Peru*

C.C. arts. 2097-98, adopted by Decreto Legislativo 295, 1984 (Title III on choice of law, art. 2097: "Extra-contractual liability is governed by the law of the country where the principal activity which gave rise to the damage took place. In case of liability arising from an omission, the law of the place where the offender should have acted shall be applied. If the agent is liable under the law of the place where the damage arose but not under the law of the place where the act or omission occurred, the former law shall be applied if the agent should have foreseen that the damage would have occurred in that place as a result of his act or omission"; art. 2098: "Obligations arising by operation of law, the management of another's affairs without authorization (gestión de negocios), unjust enrichment, and payment of a thing not due (pago indebido) are governed by the law of the place where the fact giving rise to the obligation happened or should have happened.") *reprinted at* 24 I.L.M. 997 (1985) (English translation).

ix. *Uruguay*

C.C. art. 2399 (“Los actos juridicos se rigen, en cuanto a su existencia, naturaleza, validez y efectos, por la ley del lugar de su cumplimiento.”).

Decreto Ley No. 10272, Nov. 12, 1942) (ratifying Montevideo treaty).

x. *Venezuela*

Venezuelan Private International Law Statute (1998), published in the Gaceta Oficial No. 36,511, Aug. 6, 1998, available at http://www.csj.gov.ve/legislacion/ldip.html, with English translation available at
http://www.analitica.com/biblioteca/congreso_venezuela/private.asp 1998.

III. JURISDICTION

A. GENERAL

Bustamante Code., art. 318 & 340.

B. JURISDICTION SPECIFIC

1. North America.

a. *Canada*

Quebec C.C. art. 3135-36 & 3148(3)-51.

Recherches Internationales Québec v. Cambior, Inc., unreported judgment of Aug. 14, 1998, Canada Superior Court, Quebec, no. 500-06-000034-971.

b. *United States*

- Primary Sources

13 La. R.S. art 3201.

Asahi Metal Industry Co., Ltd. v. Superior Court, 480 U.S. 102, 115 (1987).

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).

Cal. Civ. Proc. Code § 410.10.

Fed. R. Civ. P. 4(k)(2).

International Shoe Co. v. State of Washington, 326 U.S. 310, 316 (1945).

Rule 4.7 of the Puerto Rican Code of Civil Procedure, 32 L.P.R.A. Ap. III R. 4.7.

Uniform Procedure Act.

World Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

- Secondary Sources

RICHARD L. MARCUS, MARTIN H. REDISH, EDWARD F. SHERMAN, CIVIL PROCEDURE: A MODERN APPROACH 697 (3d ed. 2000).

c. *Mexico*

2. Caribbean.

Dupont v. Taronga Holdings Ltd. (1987), 49 D.L.R. (4th) 335.

Morguard Investments Ltd. v. De Savoye, 12 Adv. Q. 489.

Rules of the Supreme Court.

Societé Nationale Industrielle Aerospatiale v. Lee Kui Jak [1987] 1 App. Cas. 871 (Eng. P.C.), [1987] 3 All E.R. 510.

Transnational Causes of Action (Product Liability) Act.

3. Latin America.

a. *General Sources*

MERCOSUR Protocol of San Luis, art. 7.

MERCOSUR Protocol on International Jurisdiction in Matters Regarding Consumer Relations, 6th Meeting of Ministers, Santa Maria, Brazil, Dec. 1996, CMC, arts. 4-5.

SANDRO SCHIPANI & ROMANO VACCARELLA, UN 'CODICE TIPO' DI PROCEDURA CIVILE PER L'AMERICA LATINA (1988).

Treaty of Montevideo (1889), art. 56 ("Las acciones personales deben entablarse ante los jueces del lugar a cuya ley esta sujeto el acto jurídico materia del juicio. Podrán entablarse igualmente ante los jueces del domicilio del demandado.") & Treaty of Montevideo (1940), art. 56: (adding the following phrase to end of 1889 art. 56: "[s]e permite la prorroga territorial de la jurisdicción si, después de promovida la acción, el demandado la admite voluntariamente, siempre que se trate de acciones referentes a derechos personales patrimoniales."); *see also* Additional Protocol to Treaty of Montevideo (1940) art. 5 (prohibiting contractual abrogation of Treaty of Montevideo rules on choice of law and jurisdiction).

b. *Jurisdiction Specific Sources*

i. *Argentina*

C.C. arts. 612-21 (relating to maritime disputes).

ii. *Bolivia*

C.P.C. art. 10(1).

iii. *Brazil*

C.P.C. of Brazil, art. 88 (English translation) (Brazilian courts are competent when "the defendant, of watever nationality, is domiciled in Brazil . . . [or] the cause of action arises from an event or act that took place in Brazil."), *cited in* DOING BUSINESS IN BRAZIL § 21.133.

Decree-Law 4.657.

Law 5.869 of Jan. 11, 1973.

iv. *Costa Rica*

C.C. art. 28.

v. *Colombia*

- *Primary Sources*

Const. Title XV.

Code of Judicial Org/CP Law 105 of 1931.

vi. *Guatemala*

C.C. art. 16 ("In complaints for the compensation of damages, the judge of the place where they were caused has jurisdiction")

vii. *Panama*

C.C. art. 267.

CJI/doc.130/03

APPLICABLE LAW AND COMPETENCE OF INTERNATIONAL JURISDICTION CONCERNING NON-CONTRACTUAL CIVIL LIABILITY

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

1. RESOLUTION OF THE INTER-AMERICAN JURIDICAL COMITTEE, CJI/RES.55 (LXII-0/03)

At its 62nd Regular Session (March 1-21, 2003), the Inter-American Juridical Committee approved Resolution CJI/RES.55 (LXII-0/03), called the "Applicable Law and Competence of International Jurisdiction concerning Non-contractual Civil Liability". Some of the topics decided therein were as follows: To ask the rapporteurs to submit a draft final report on the matter, bearing in mind the preliminary reports presented by both co-rapporteurs at the 61st and 62nd Regular Sessions of this Committee. Also to submit the points of view expressed by the Committee Members during the 62nd Regular Session, so that, due to the complexity of the matter and wide range of different forms of liability under the category of "non-contractual civil liability", it would be more convenient first to recommend the adoption of inter-American instruments that regulate jurisdiction and applicable law with regard to specific subcategories of non-contractual civil liability, and then, only later, when appropriate, to seek to adopt an inter-American instrument that regulates jurisdiction and applicable law concerning the full range of "non-contractual civil liability".

Similarly, The General Assembly of the Organization of American States (OAS), in its Thirty-third Regular Session, Santiago, Chile, in June 2003, under Resolution Agreement/res.1916 (XXXIII-0/03), requested the Inter-American Juridical Committee to proceed with the study on the theme on the "Applicable Law and Competence of International Jurisdiction concerning the Non-contractual Civil Liability", which was assigned to the Committee by the Permanent Council under its resolution CP/RES. 815 (1318/02).

Taking into account the aforementioned mandates, the rapporteur hereby presents the draft Final Report at this 63rd Regular Session of the Inter-American Juridical Committee, in order to merge with the draft final report of Dr. Carlos Manuel Vázquez, also joint rapporteur of this theme, so that the Committee can provide the Permanent Council with recommendations and possible solutions.

Consequently, the rapporteur hereby submits the following report:

2. RELEVANT ASPECTS OF THE FIRST REPORT FROM THIS RAPPORTEUR, IN ACCORDANCE WITH THE NEW MANDATE

The first report by the rapporteur hereof was presented at the 61st Regular Session of the Inter-American Juridical Committee, August 5-30, 2002, called "Proposed Recommendations and Possible Solutions to the theme on Applicable Law and Competence of International Jurisdiction concerning Non-contractual Civil Liability" (CJI/doc.97/02).

This first report described the doctrinal aspects of the theme, and a distinction was made between contractual civil (consisting of the obligation to repair damage caused by failing to comply with an obligation under contract) and non-contractual liability (those obligations not under contract, but, on the contrary, outside an individual's freewill. In other words, it arises from obligations beyond the scope of an agreement, and may originate from various sources: Quasi-contractual, criminal, quasi-criminal and legal source). This indicates that the latter (non-contractual) should be considered in the scope of Private International Law, since the victims are private individuals. The report also stated that the subject was fairly complex, due to the multiple connecting points that it presents.

This report, when discussing the topic of "Applicable Law" in the obligations arising without an agreement or non-contractual, resorted to the traditional or classic criteria (*lex fori, lex loci delicti commissi, lex domicilii)* and current settlements (most significant connection, multiple connection, or group of connections, more flexible methodologies, North American jurisprudence). It set out the pros and cons of each in their application, as well as corresponding criticisms of the authors of Private International Law, in both their individual and collective works.

Furthermore, an allusion was made to the fact that, in the framework of the "Conference of The Hague on Private International Law" to determine the Applicable Law in Non-contractual Civil Liability, it had resorted to the points technique of "multiple connection" or "group of connections", in both the 1971 Agreement on the Applicable Law concerning Road Transportation, and the 1973 Agreement on the Law Applicable to Liability for Goods.

Similarly, it was established that, in view of the traditional criteria with rigid connection points, "North American Jurisprudence" has been one of the most innovative in pointing out the conflicting regulations in cases of Non-contractual Civil Liability, on everything concerning road accidents, where the application of the criterion of "*lex loci delicti commissi*" has been substituted by the criterion of "most significant connection" to the situation in question.

The most authorized North American doctrine contains three different methodologies:

a) the principle of proximity;

b) the unilateralist aim to determine the scope of material regulations based on state interests, and

c) the teleological aim to achieve desirable results in solving the problems caused by foreign traffic.

The "Center of gravity" doctrine is thus adopted, tending to adopt the law of the place that has a more significant relationship with the subject under litigation, since adopting traditional criteria may lead to unfair or abnormal results. The Anglo-Americans have called this solution The Proper Law of the Tort.

Moreover, it was mentioned that currently authors on this topic of Non-contractual Civil Liability generally establish more flexible or moderate criteria of connection, adopting the connection group technique.

Thus establishing that, in terms of applicable laws, the "classic criteria", as strictly applied and sole connections, are very often insufficient and inappropriate. It is therefore necessary to use classic regulations in a more moderate manner, that is, adopting a more flexible methodology, and incorporating alternatives for settlement, from which the court should elect, not in an absolutely discretional form but based on alternative criteria clearly established by the legislator previously. This permits the court to act reasonably and adapt the general rule to the requirements of fundamental justice of the particular case, thereby making a more significant connection with the situation in question.

Reference is made in the report in question to authors Pierre Bourel, Juenger, Alfonsín, Uzal, Boggiano, Herbert, for example; to different laws, such as the 1978 Austrian Federal Law, 1966 Portuguese Civil Code, 1995 Law of Italian Private International Law, 1998 Law of Venezuelan Private International Law, Swiss Federal Law and Law of Quebec; at a level of international forums on the matter, reference was made to the Conference of The Hague on Private International Law, to the Inter-American Specialized Conference on Private International Law (CIDIP), and Institute of International Law; in relation to the integrated areas or integration systems, referring to the treaties of the European Union and San Luis Protocol in the MERCOSUR framework (MERCOSUR/CMC.doc.1/96).

Mention was made concerning competent jurisdiction that the most appropriate is to establish criteria, so that the actor can choose the most beneficial route, permitting a choice of the most suitable jurisdiction, facilitating its access to justice, considering that the victim has suffered injury from a deed or act of the defendant.

This first report established the convenience that Non-contractual Civil Liability in the Inter-American System was regulated, being strictly restricted to relations of a private nature (civil liability). International liability of the States is excluded and, since it involves conflict of laws, a subject inherent to Private International Law, it must be settled by determination of the Applicable Law and Competent Jurisdiction, concerning claims of private individuals.

Consequently, current settlements proposed by the doctrine, jurisprudence and comparative jurisprudence should be considered, involving more flexible or moderate classic or traditional criteria, and adopting multiple connections, which will be adopted as an alternative. The most significant connection to the case in question should also be considered, permitting the judge to adapt the general rule to the requirements of justice supporting the particular case, acting reasonably and not arbitrarily. Thus, a more significant connection will be made to the situation in question, also considering the socioeconomic context, to which the involved parties belong.

In this first report, the rapporteur stated that it would be convenient in the Inter-American System to adopt an agreement that will regulate the subject of Non-contractual Civil Liability, in broad and general terms, taking as the foundation the Draft presented by the Delegation of Uruguay at the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI), signed on February 2-8, 2002, in Washington, D.C., United States of America, and that it should bear in mind the current criteria permitting further flexibilization of the connecting points, as well as ruling on the damage, which must be compensated pursuant to the modern criteria for damages.

3. SPECIFIC ASPECTS OF THE SECOND REPORT BY THE RAPPORTEUR, CONCERNING THE NEW MANDATE

The rapporteur's second report was presented at the 62nd regular session of the Inter-American Juridical Committee, March 10-21, 2003, called "Applicable Law and Competence of the International Jurisdiction in relation to Non-contractual Civil Liability" (CJI/doc.119/03).

The first part of the report summarizes the resolution of the Inter-American Juridical Committee CJI/RES.50 (LXI-0/02), which establishes the guidelines and parameters for future work on the subject, and in which other questions were also settled.

To request that the rapporteurs complete a draft report in due time, to be considered by the Committee at its 62nd regular session, adapting it to the following parameters:

a) The report must include numbering of the specific categories of obligations included under the general category of "Contractual Obligations".

b) The main focus of the report should be to identify specific areas under the general category of non-contractual liability, which would be themes adapted to an inter-American instrument on Applicable Law and Competence of International Jurisdiction. This focus is compatible with the CIDIP Resolution of "identifying specific areas that demonstrate progressive development of establishing rules and regulations in this field by means of solutions on the topic of Conflict of Laws".

d) The report must address, as far as possible, the treatment of the regulations adopted by the Member States in relation to the Applicable Law and Competence of International Jurisdiction, referring to particular subcategories of non-contractual obligations, in order to fulfill the mandate of "identifying specific areas in which a progressive development of establishing regulations on this subject can be confirmed by solutions of conflict of laws".

e) The report must also consider past and present efforts of the global, regional, and sub-regional organizations, which have found or are finding solutions for the conflict of laws in this area.

f) Concerning the particular subcategories of non-contractual obligations that the rapporteurs consider potentially appropriate for discussion in an inter-American instrument on conflict of laws, the report should facilitate alternatives regarding the form and content of such an instrument.

Taking into account such guidelines and parameters, the rapporteur's second report identified subcategories or specific areas, in which a further progressive development of this subject can be confirmed, by means of settling a conflict of laws, considering the efforts made by global, regional, and sub-regional organizations, plus the treatment of government

regulations of different States, and the progressive development of the generally regulated Non-contractual Civil Liability.

These areas or specific subcategories are as follows:

- Road accidents, liability for goods, electronic commerce and environmental pollution

In the area or subcategory relating to "**road accidents**", it was mentioned that it had progressed steadily in both the inter-American sphere and in the Conferences of The Hague on Private International Law. It is necessary to approximate, harmonize and unify the laws of the States by adopting common standards that provide a framework of security guaranteeing the solutions and harmonizes the decisions, with clear logical rules, providing the desirable foresight for those operating in the system.

This second report indicated that in this area there are the following: Agreement of Emerging Civil Liability for Road Accidents between Uruguay and Argentina, which resorts in a principle to the traditional or classic connection of the "lex loci delicti commissi" to later attenuate said criterion with the use of the *lex domicilii*. Similarly, the 1996 "San Luis Protocol in terms of Emerging Civil Liability of Road Accidents between the MERCOSUR Member States", attenuates the criterion of *lex loci delicti commissi* "with the use of the criterion of "lex domicilii", and introduce "criteria of flexibility" to establish the competent jurisdiction.

Mention was made that also in the scope of the "Conference of The Hague on Private International Law", there had been progressive development of this specific area and that the predecessor was the 1967 Dutoit Memorandum, in which it was mentioned that given the diversity of this subject (Non-contractual Civil Liability), it was convenient to discuss it by specific themes rather than by general regulation.

Thus, in 1971, during the Conference of The Hague, the "Agreement on Applicable Law in terms of Road Accidents", in which the traditional or classic criterion of the *lex loci delicti commissi* is flexibilized by using multiple connection points.

That second report mentioned that the aforementioned Agreements had permitted a progressive development in that specific area of "road accidents, which had caused its practical use, indicating that there are suitable conditions for this specific subcategory of Non-contractual Civil Liability to adopt an inter-American instrument on this subject, which in turn regulates the Applicable Law and Jurisdiction.

With regard to the area or specific subcategory of **"Liability for Goods**", the second report mentioned that there had been progressive development in that area mainly in the scope of the Conference of The Hague on Private International Law, during which the "Agreement on the Law Applicable to Liability for Goods" was signed on October 2, 1973, and which prevails since October 1, 1977. In this Agreement, it so happens that normally goods manufacturers are found to be in different countries from their consumers, that is, that the agents and victims are found in territories of different States, regulating the fact that a product, due to the sharp increase in foreign trade, can be manufactured, sold, consumed, and also cause damage or loss in different States.

Concerning the connection criteria, the second report mentioned that in that Agreement, the attenuation of strict or traditional criteria (*lex loci delicti commissi*) applies, conditioned to other "connection factors" (group of connections), because following the rule of the proper law, the Agreement requires at least two material contacts located in the same State, to consider which is the appropriate law and which has the more significant connection, thereby taking into consideration the wishes of the victim or defendant, permitting a choice between the internal law of the State in which the agent of the damage or whoever us potentially liable has its main business and the internal law of the State where the damages or losses occur.

It was also pointed out that the vital importance of this Agreement is that it offers the progressive approximation between the Anglo-Saxon system (common law) with the

continental requirements (civil law) of coded regulations, since the “multiple connection points” or “group of connections” technique is used.

It was mentioned that in the European System, the experience in this area has been interesting, and is based on the “Agreement on Non-contractual Liability for faulty goods with regard to personal injury and death”, known as the 1977 “Strasbourg Convention”. The latter establishes solutions for non-contractual aspects, such as, for example, basing the liability of the manufacturers and produces on the theory of Objective Liability.

Also in this area or specific subcategory of “Liability for Goods”, mentioned was also made that it is governed by the “European Guideline relating to the 1985 Liability of Goods”, which establishes a series of fundamental rules to establish a special legal protection towards the consumers and users, also consisting of the “theory of objective liability”, the basis of liability. Moreover the Guideline also states that: “The defect of the product should not be determined by the reference of its aptitude for use but rather for lack of the safety that the product fails to offer the general public”, the Guideline was modified in 1995 and 1999.

The North American System was mentioned in that report, which in this specific area of Liability for Goods, in 1963 adopted the “theory of Objective Liability”, and also instated the “*dépeçage*” to permit that a certain aspect of the case can be ruled by other conflicting regulations.

The two following stages may be established in terms of Non-contractual Civil Liability (torts):

The **First** stage, based on the traditional settlement scheme, consisting of the application of “*lex loci delicti*”, by which the North American legal operator would determine the applicable law by means of the conflicting method, without taking into account whether the achieved result was fair or unfair.

The **Second**, which is practically the current stage, is based on the criticism against the rigidity of the “*lex loci delicti*” solutions, which guides the judges on how to determine the law applicable to the particular case in a more flexible manner, considering the criterion of the most significant connection to the situation in question, that is, using more directly related connection criteria.

Accordingly, the modern North American concepts on determining the applicable law consist of solutions based on: “The most significant relation”, “analysis of government interests”, “the best law”, “the legislative policy that seems to be most affected”. Or else a settlement combines two or more of those criteria, for which the legal operator studies each particular case and applies to each problem the law of the State, which considers that it has “the most significant relation”, in order to establish a balance between the parties when determining the applicable law, due to which the application of the traditional criteria can lead to unfair and abnormal results. We thus have, initially, the North American system employing the “*lex loci delicti commissi*”, to later adopt a more flexible connection relating to the victim’s own situation in the framework of a multiple connection criterion.

Given the aforementioned, we consider that in this specific subcategory of Non-contractual Civil Liability relating to the “Liability for Goods”, appropriate conditions do exist for adopting an inter-American instrument on this subject, regulating jurisdiction and the applicable law with regard to the full range of “Non-contractual Civil Liability”.

In relation to the specific area on “**Electronic commerce**”, the determination of the Applicable Law and competent Jurisdiction has been a complex regulation on contractual and, especially, non-contractual obligations, where we find there is a major failure of a standard legal system of comparative jurisprudence and, which should also be considered, the possibility that the damage is caused in other countries.

In the failure to find a global solution for this subject, the current trend is to continue looking for specific solutions in certain sectors, because the rapporteur considers that, in this specific subcategory of Non-contractual Civil Liability relating to “Electronic commerce”, suitable conditions for adopting an inter-American instrument to regulate it do not exist.

In the area or specific subcategory of "**environmental pollution**", the rapporteur informed that this has been a theme involving main players, namely the Conference of The Hague on Private International Law, which has a study on "Law Applicable to Civil Liability for damages to the Environment", and the Institute of International Law, which in 1997 drafted a series of proposals for "International Liability and Liability for environmental damages regulated by International Law", pointing out that International Liability corresponds to the States, and Civil Liability to private operators. Another contribution to this theme is the 1994 "Osnabrück Colloquy", which concerns the decision of the Applicable Law, and expressed special consideration for the status of the victim, who should be given the option of choosing between the law of the place where the damage occurred, and the law of the activity that caused it, or the law of the place which originated the damage.

For this reason, environmental pollution is restricted to determining the Applicable Law and Competent Jurisdiction concerning claims of private individuals. Private individuals do not file disputes for damages to the environment, which is an issue that concerns States and international organizations, unless for damages to their person, or property or assets, since it is in the sphere of Non-contractual Civil Liability, and not in that of International Liability, which is the liability of the States.

The International Liability and Non-contractual Liability are different from each other in this way, when identifying the protected asset, so that Public International Law corresponds to the protection and preservation of the environment (International Liability of the States), while compensation to the injured parties correspond to Private International Law, when damage has been caused by private operators (Non-contractual Civil Liability).

The regulation of environmental pollution as a specific subcategory, Non-contractual Civil Liability, not only has been a concern of the Agenda of the Conference of The Hague on Private International Law, but also of the Inter-American Specialized Conference on Private International Law (CIDIP), since, in its Fifth Inter-American Specialized Conference in March 1994, when the Delegation of Uruguay included the theme 4 (any other business) "International Civil Liability for Transboundary Pollution", because in resolution no. 8/94 of the aforementioned Conference, the General Assembly of the Organization of American States (OAS), was recommended to include in the CIDIP VI Agenda, the theme: "International Civil Liability for Transboundary Pollution, Aspects of Private International Law".

Accordingly, the rapporteur informed that the Delegation of Uruguay presented to the preparatory Meeting of Government Experts for the Sixth CIDIP Conference (February 14-18,2000) a document "Grounds for an Inter-American Agreement on Applicable Law and competent International Jurisdiction in cases of Civil Liability for Transboundary Pollution". This regulates the very questions of Private International Law, such as Applicable Law and Competent Jurisdiction, and being closely confined to private relations, thus excluding the liability of the States, and establishing a multiple connection criterion for determining the Applicable Law, and in relation to competent jurisdiction, the (injured) party is given the possibility of option.

Accordingly, in this specific subcategory of Non-contractual Civil Liability, not only do proper conditions exist, but there is also a document of rules presented in the Inter-American System, regulating the Applicable Law and Competent Jurisdiction in cases of Civil Liability for transboundary pollution, which could include the comments from the States, and thereby adopt an inter-American instrument.

With regard to the **General Regulation of Non-contractual Civil Liability in the Global, Regional, Sub-regional Framework and in Internal Legislation of the States**, the second report from the rapporteur referred to the 1889 and 1940 Montevideo Treaties of International Law, and the 1928 Bustamante Code, in the Inter-American System.

In the framework of the European Union, reference is made to its Constitutional Treaty, Draft Treaty of the European Economic Community concerning the Law Applicable to contractual and non-contractual obligations, or Treaty of Rome, as well as the new Draft Agreement on the Law Applicable to Non-contractual Obligations, known as "Treaty of Rome

II", which establishes as a connecting factor that of the "closest ties" or "significant connection, foreseeing as a general principle, "the application of the law with the closest links with the obligation deriving from the harmful event".

Concerning internal legislation of the States, the rapporteur referred to the 1998 Law of the Venezuelan Private International Law, and to the 1995 Italian Law, since both demonstrate further development on this matter.

4. CONCLUSION

Considering the Resolution of the Inter-American Juridical Committee CJI/RES.55 (LXII-0/03), the preliminary reports submitted herewith, and the points of view expressed by the Members of the Inter-American Juridical Committee at their 61st and 62nd Regular Sessions, it is estimated that some of the areas or specific subcategories of Civil Liability have been identified. Progressive development of the regulations on this subject has been noted therein, considering the past and present efforts of the global, regional and sub-regional organizations to find solutions for conflict of laws in those areas. Some of them have already arrived at solutions by signing international agreements in certain specific subcategories, as mentioned herein.

In this sense, the rapporteur considers that suitable conditions do exist for the recommendation in the Inter-American System to first of all adopt inter-American instruments that govern Jurisdiction and Applicable Law with regard to specific subcategories of Non-contractual Civil Liability, for example, Road Accidents, Liability for Goods, Environmental Pollution, since there is major progressive development in those areas.

These international instruments, which may be adopted to regulate those specific subcategories of non-contractual obligations, must find common solutions to the legal systems of Common and Civil Law, because its codification task will continue to be complex, since a balance must be found for the parties in order to determine an applicable law, and to find flexibility and security therein.

The inter-American instruments to be adopted must be closely confined to private relations, giving rise to Non-contractual Civil Liability, excluding International Liability of the States and, since conflict of laws is a theme inherent to Private International Law, the instruments must settle it by deciding the Applicable Law and Competent Jurisdiction, concerning the claims of private individuals.

It is also convenient to regulate, in those instruments, that on the matter of objective Civil Liability, which is imposed on who causes the damage, regardless of blame, and the mere fact that others are endangered implies liability.

The inter-American instruments adopted in this field should have solutions of Inter-American Private International Law, for which it should be borne in mind the agreed trend towards more flexible connection factors, both in the common law and civil law systems, determining the Applicable Law through the "closest ties", due to which the classic or traditional settlement criterion based on "*lex loci delicti commissi*", has been compared to a series of setbacks arising from its practical application. An example is when the place, where the damaging deed occurs, far from creating a "significant link" with the private case, is a circumstantial element, or else, when the action or omission causing the Non-contractual Civil Liability is distributed in the territory of a number of States, which makes it convenient to choose the law that holds "the most significant relationship" with the problem, as well as adopting multiple connections so that the victim or injured party has alternative choices of the applicable law.

The solutions made in the corresponding adopted inter-American instruments in relation to this problem caused principally by the modern media, cannot be resolved using archaic procedures. In other words, solutions cannot be the same as those adopted during the 19th century, when the major codes were created, nor the solutions offered during the 1930s. So the solution must be resolved based on both processes, where the legal operator should act closely with the parties, without discarding its cultural, economic, political and

social context, in which a balance should exist between the interests and wishes of the parties in the choice of the applicable law.

Accordingly, we repeat that suitable conditions do exist for recommending the adoption of inter-American instruments in those aforementioned specific subcategories of Non-contractual Civil Liability, which regulate the competent jurisdiction and applicable law. Their drafting would not only be a threat but also a challenge to the Inter-American System, which makes it necessary to approximate, harmonize and unify the laws of the States, by adopting common regulations to provide a safe framework that guarantees their solutions, as well as the desirable foresight for those operating in the System.

Consequently, the rapporteur is of the opinion that the Inter-American Specialized Conference on Private International Law (CIDIP) could address the negotiation, and later adopt inter-American instruments in those areas or specific subcategories under reference. Later, if the proper conditions exist, it could endeavor to adopt an inter-American instrument to regulate the Jurisdiction and Applicable Law concerning the full range of "Non-contractual Civil Liability".

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CJI/doc.133/03

JURISDICTION AND CHOICE OF LAW FOR NON-CONTRACTUAL OBLIGATIONS – PART II: SPECIFIC TYPES OF NON-CONTRACTUAL LIABILITY POTENTIALLY SUITABLE FOR TREATMENT IN AN INTER-AMERICAN PRIVATE INTERNATIONAL LAW INSTRUMENT

(presented by Dr. Carlos Manuel Vázquez)

In resolution 815 of May 1, 2002, the Permanent Council instructed the Inter-American Juridical Committee "to examine the documentation on the topic regarding the applicable law and competency of international jurisdiction with respect to extra-contractual civil liability, bearing in mind the guidelines set out in CIDIP-VI/RES.7/02," and "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." The CIDIP resolution referenced by the Permanent Council indicated that the Conference was "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."

On the basis of reports prepared by rapporteurs Dra. Ana Elizabeth Villalta Vizcarra and Dr. Carlos Manuel Vázquez, the Committee determined in its 62nd regular session that, because of the breadth of the general topic of "non-contractual liability" and the diversity of obligations encompassed in that category, the conditions for developing an Inter-American instrument harmonizing jurisdiction and choice of law for the entire category did not exist at this time.

In accordance with the CIDIP resolution which the Permanent Council instructed the Committee to bear in mind, this Report seeks to "identify specific areas" within the broad topic of non-contractual obligations "revealing progressive development of regulation in this field through conflict of law solutions." The Report examines the three areas suggested by the delegation of Uruguay in its final report to the CIDIP-VI conference as potentially meriting separate treatment in an Inter-American private international law instrument: transboundary pollution, product liability, and traffic accidents.[1] In addition, because of the great interest in e-commerce expressed by the scholars who responded to the Inter-American Juridical Committee's questionnaire concerning the future of CIDIP, we have also considered whether the area of Internet torts would be a suitable topic for such an instrument.

The Report concludes that the conditions currently exist for the elaboration of an Inter-American private international law instrument in the areas of product liability and traffic accidents. The conditions may also exist with respect to transboundary environmental damage, although that question is significantly more complex, and the answer less certain. Finally, the conditions do not exist at this time for the elaboration of a private international law instrument regarding Internet torts.

A. TRANSBOUNDARY ENVIRONMENTAL DAMAGE

At CIDIP-VI, Member States agreed on the need for further study of the possibility of pursuing a private international law instrument in the area of "Conflict of Laws on Extra-contractual Liability, with an Emphasis on Competency of Jurisdiction and Applicable Law with Respect to Civil International Liability for Transboundary Pollution."[2] This section will address the latter issue: civil international liability for transboundary pollution. Discussion of this issue will be limited to the liability of private actors because the Member States generally agreed at the February 20002 plenary session of CIDIP-VI Committee III that the topic should exclude state responsibility from its scope.[3] Nevertheless, as Member States taking leadership roles in the CIDIP-VI negotiations on this topic have recognized, there is "significant interplay between the [public] international liability and civil liability system."[4]

Even when limited to private actors, the scope of the topic remains quite broad, encompassing all forms of pollution as well as all scenarios which are transboundary in nature. First, there are many pollutants and many ways pollutants can cause harm to the environment. Generally, pollutants are classified as either nonhazardous, such as industrial waste, sewage and trash, or even in some circumstances genetically modified organisms, or as hazardous materials, such as nuclear waste and biological toxins. These pollutants can cause harm to any number of components of the environment, including air, water, soil, space, ecosystem, and the food supply.

Second, there are many forms of activity which can cause pollution which is transboundary in nature. For example, a party in one country might accidentally cause pollution in that country which spills over into another country or countries. An oil rig might spill oil in the territorial sea of country which washes over into the territorial sea of a neighboring country. In addition, a party located in one country can intentionally cause pollution in another. Such an example might involve acid rain which falls in one country as a

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See Statement of Reasons: Draft Inter-American Convention on Applicable Law and International Competency of Juridiction with respect to Extracontractual Liability, at 17, OEA/Ser.K/XXI.6 CIDIP VI/doc.17/02, Feb. 4, 2002 [hereinafter Statement of Reasons].

CIDIP-VI/Res. 7/02, Feb. 8, 2002.

See Report of Rafael Veintimilla, Committee III Rapporteur, Feb. 11, 2002, OAS Doc. No. CIDIP-VI/Com.III/doc.2/02 rev.2 [hereinafter Veintimilla Report]. This limitation may reflect a growing interest in addressing the issue of transboundary pollution through private liability solutions. *Compare* Stockholm Declaration of June 1972 (principles 21 and 22 concerning state responsibility) *with* 1992 Rio Summit Declaration (calling upon states to develop national laws regarding compensation of victims) & Ten Points of Osnabruk of April 1994.

Study Prepared by the Uruguayan Delegation to the OAS, Doc. No. CIDIP-VI/doc.5/00, Feb. 7, 2000. In the Committee III negotiations at CIDIP-VI, some Member States called for greater attention to this issue. *See* Veintimilla Report.

result of pollution emitted during the purposeful manufacturing process in another country. Also, a party principally located in one country can transport materials in another country which results in harm to the environment in the latter country. Less common, though still possible, a party from one country could be injured while passing through another country. A tourist could be exposed to sewage on a beach, for example. Finally, pollution that takes place in international territory, such as the high seas or outer space, might also be regarded as "transboundary" pollution, at least if preventive measures could have been taken in national territory to prevent a pollution-causing event which occurs in international territory.

The question whether the conditions currently exist for the negotiation of an Inter-American private international law instrument concerning the liability of private parties for transboundary environmental damage is complex for a number of reasons. First, and most obviously, this topic has already been on the CIDIP agenda, and no agreement was reached on the topic in that forum. The advisability of pursuing the topic again in CIDIP-VII obviously depends on the reasons for this topic's lack of success in CIDIP-VI. If the lack of agreement on this topic was the result of an insuperable disagreement among the Member States on the appropriate approach to this topic, then it would appear to be advisable to begin the project of harmonizing jurisdiction and choice of law for non-contractual liability in this Hemisphere with another topic.

The second complexity results from the fact that other international organizations have aspects of this topic on their agenda – most notably the International Law Commission and the Hague Conference. It may be desirable for the OAS to defer its treatment of this topic until after the other organizations have completed their work, because (a) the relevant organizations are global in their scope, and (b) they have been working on this topic for considerably longer than the OAS has. The ILC currently has on its agenda the topic of "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law." This topic has been on its agenda, in one form or another, since 1978. Although it originally was considering only the liability of states, it has recently decided to expand the scope of the project to consider the liability of private operators as well. The Hague Conference has been considering the elaboration of a private international law instrument for transfrontier environmental damage since 1992. It produced a comprehensive Note on the topic in 2000, but the topic is apparently now in an inactive status on its agenda.

The third complication results from the existence of numerous international instruments addressing liability for transboundary environmental damage in various discrete sectors. Not all states of the Hemisphere are parties to these instruments, but many are. Some of these instruments address questions of jurisdiction and choice of law, but most address the question of substantive liability. This may reflect the international community's preference to approach this topic through harmonization of substantive law rather than through harmonization of jurisdiction and choice of law. Indeed, a preference for the former approach appears to be reflected in the Stockholm Declaration of 16 June 1972[5] and the Rio Declaration on Environment and Development.[6] According to principle 22 of the Stockholm Declaration, "[s]tates shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction of control of such States to areas beyond their jurisdiction." Principle 13 of the Rio Declaration similarly provides that "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction."

On the other hand, differences in substantive law are likely to persist despite attempts at substantive harmonization, and the need to allocate jurisdiction will necessarily remain. Indeed, the ILC's work explicitly contemplates that it will be complemented by regional and bilateral arrangements.[7] In any event, the key questions for the OAS are whether it should

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Report of the United Nations Conference on the Human Environment, Declaration of Principles, Session of June 5-16, 1972, Principle 21, U.N. Doc. A/CONF.48/14, reprinted in 11 I.L.M. 1416, 1420 (1972).

Rio Declaration on Environment and Development, UN Doc. A/CONF.151/5/Rev.1, June 14, 1992, *reprinted in* 31 ILM 874 (1992).

See Commentaries on the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, adopted by

pursue an instrument on this topic before the work of the other organizations has been completed or abandoned, and whether it should focus on harmonization of substantive law, harmonization of private international law, or a combination of the two.

This section shall describe, in general terms, the existing international and domestic laws in force in this Hemisphere governing non-contractual liability for environmental damage. It shall then briefly describe the Hemispheric approaches to choice of law and jurisdiction in cases of transboundary environmental damage, as well as the approaches to these questions taken elsewhere in the world. It shall then discuss the work currently being done on this topic by international organizations, including the prior work done on this topic in CIDIP-VI. Conclusions will follow.

1. Substantive Laws Governing Liability for Environmental Damage

To the extent the substantive rules governing civil liability for environmental damage are in harmony – either because the national or subnational laws in the hemisphere coincide or because international conventions have succeeded in harmonizing the law – attempts to harmonize the choice of law rules would be superfluous. This section provides a brief overview of the national and subnational laws governing civil liability for environmental damage in this Hemisphere and the existing international instruments seeking to harmonize such laws. The national laws on this subject diverge in several significant respects. The existing international instruments cover only certain discrete sectors, leaving many types of environmental damage unaddressed; and a significant portion of the states from this Hemisphere are not parties to many of these instruments.

a. National Laws

Common Law. The common law provides for a number of theories of recovery that could apply to environmental damage: public and private nuisance, trespass, negligence, strict liability, the public trust doctrine, and riparian rights. Public and private nuisance doctrine prohibits intentional non-trespassory interference with the use and enjoyment of land.[8] Trespass addresses the intentional *physical* invasion of property, and is often coupled with nuisance in an action for damages or injunctive relief.[9] An action based on negligence can be brought where the harm-doer has a duty of diligence and, in failing to fulfill his duty, departs from the standard of care to which a reasonable person would adhere.[10] Strict liability is based on the famous case of *Rylands v. Fletcher*. The rule developed imposes strict liability for non-natural, large-scale "ultrahazardous" activities that cause injury to neighboring persons or property. Under the public trust doctrine, the State is the trustee of natural resources in service to the public.[11] Land held in public trust can be transferred to individuals, but burdens of the public trust obligations run with the land.[12] Enforcement of the trust generally must be by the State against the harm-doing individual; it is not clear whether an individual can initiate enforcement proceedings.[13] Riparian rights are held by persons whose land borders waterways; the holders of the rights may bring actions to maintain the waterways in their natural state.[14]

In the United States, the federal government has also enacted a large number of statutes to govern liability for environmental harm. Most of these laws do not address the liability of one private party to another for harm caused to person or property. Two that do address such liability, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) [15] and the Oil Pollution Act (OPA),[16] address the civil liability of persons responsible for disposal of toxic or dangerous substances, or due to an accidental oil spill. CERCLA is concerned with remedying damage caused to public health and the environment as a result of inadequate storage of toxic waste.[17] To this end, it addresses

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International Law Commission at its Fifty-third Session (2001), at 381.
See Civil liability resulting from transfrontier environmental damage: a case for the Hague Conference?, Preliminary Document No. 8, Note drawn up by Christophe Bernasconi (April 2000) [herinafter 2000 Hague Note], at 16-17.
Id. at 17.
Id. at 18.
This theory is not accepted in Canada, but is widely used in the United States.
2000 Hague Note at 19.
Id.
Id. at 20.
42 U.S.C. § 9601 *et seq.* (2003).
33 U.S.C. § 2701 *et seq.* (2003).
2000 Hague Note at 21-22. The person liable is also responsible for damages inflicted on or harm caused to natural resources

clean-up of toxic waste sites. It provides for citizen suits, confers on the administrative agency the duty to identify contaminated sites and confers on the President of the United States the authority to "take the necessary safety measures in case of a threat to public health or the environment."[18] The Act is financed by the Superfund, which is fed by taxes levied on petroleum products and dangerous waste.[19] CERCLA imposes a strict liability regime and also provides for joint and several liability; in addition, the defendant can seek third-party indemnification or contribution.[20]

In the wake of the Exxon Valdez incident, the United States decided not to join international efforts to establish a unified system of civil liability for oil pollution. Instead, it enacted the Oil Pollution Act, which sets forth 42 regulations governing oil transport and imposes strict liability on whoever has control of the ship.

Civil Law. Civil law also provides for a number of general bases for recovery applicable to environmental harm: servitudes, fault or delict, strict liability, and neighborhood law. In addition, there are special rules applicable to the environment. The law of servitudes is similar to the theory of riparian rights: owners of land bordering water sources "cannot impede the natural flow of the water or substantially change the quality of the water."[21] Liability based on fault or delict results from the breach of a general duty to act so as not to cause harm to another.[22] Mexican civil law sets out a regime of strict liability, which similar to that of the common law.[23] The only exculpatory provision in the Mexican law is the fault or "inexcusable" negligence of the victim.[24] Neighborhood law is a no-fault regime in which one must conduct one's affairs in such a way that no injury is done to a neighbor's property.[25]

Special rules on environmental liability in civil law systems include many laws based on strict liability.[26] Some laws make even normal use actionable, if it results in damage.[27] Greece characterizes environmental harm as "infringement on the rights of the personality,"[28] and Italy assesses damages against one who "nonchalantly" violates environmental law.[29] In short, there is a wide range of special rules for environmental liability in civil law regimes.

In both common law and civil law countries, ultrahazardous activities and activities that are likely to cause environmental damage are highly regulated by administrative agencies. Such regulation adds another potential layer of law that might give rise to choice of law issues. For example, in some countries, prior approval of an activity by an administrative agency may produce a degree of immunity from civil liability for injuries suffered.[30] In case of transboundary damage, there may arise the need to determine whether the administratively-conferred immunity should be given effect with respect to injuries suffered elsewhere. As a general matter, the fact that the area of environmental protection is highly regulated in many states, with administrative agencies taking an active role, adds a layer of complexity to the topic of transboundary environmental protection. This topic requires that attention be paid to the relation between public and private domestic law as well as the relation between public and private international law.

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or their destruction or loss.

Id. at 22.

Id. It is worth noting that the Act has not actually worked that well – the costs are high and the clean up has taken much longer than anticipated.

Id.

Access to Courts and Administrative Agencies in Transboundary Pollution Matters, Commission for Environmental Cooperation Background Paper in N. AMER. ENV. L. AND POL'Y, Vol. 4, Spring 2000 [hereinafter CEC Background Paper], at 224.

Id.

Id. at 226.

Id.

2000 Hague Note at 23. The Swiss Civil Code is an example. The basis for liability is "objectively" exceeding one's property rights, although the plaintiff does have to show a causal connection between the damage and the property owner's action. Swiss Civ. Code, arts. 679-684.

Most states have strict liability regimes. Russia is an exception, but in Russia, fault is presumed, with the defendant bearing the burden of rebuttal. 2000 Hague Note at 24 n.102. Generally, again, strict liability is accompanied by a limit on the amount of damages a plaintiff can recover. *Id.* at 24.

See, *e.g., id.* at 24 (discussing Germany).

Id.

Id.

2000 Hague Note at 41 n.211 (citing Christian Von Bar, Environmental Damage in Private International Law, *Collected Courses of the Hague Academy of International Law*, Vol. 268, at 324).

b. Treaties Addressing Civil Liability for Environmental Damage

In addition to treaties and other instruments that address the liability of states for transboundary environmental damage in certain sectors,[31] there are a number of treaties that address civil liability for environmental damage in certain sectors. The most prominent treaties regulate civil liability relating to three major pollutants – nuclear waste, spilled oil, and hazardous materials. The 1960 Paris Convention and the 1963 Vienna Convention, which were linked through a Joint Protocol in 1992, regulate nuclear waste.[32] The 1969 Brussels Convention regulate oil spills.[33] The transportation of hazardous materials is governed by a number of treaties, including the Basel Protocol.[34] The principal features of the principal treaties relating to transboundary pollution are described briefly below. Though the substantive legal standards used in these and other treaties vary widely, there are at least four major issues which treaties on transboundary pollution usually address.

(1) *Parties eligible to recover*

Because pollution is often a diffuse phenomenon, affecting many people, one of the most important aspects of pollution liability rules is who is able to directly enforce them. Transboundary pollution can cause injury to the persons or property of many kinds of legal actors, whether natural persons, legal entities, or even the state. Different conventions in this area provide means of recovery to some or all of these legal actors in certain situations. Some treaties also condition the ability of an actor to recover upon the actor having a relationship with a Contracting Party, in which case nationals of non-contracting parties are not covered by the treaty even when injured within the territory of a Contracting Party. By contrast, other treaties bind Contracting Parties to apply the treaty rules without respect to the nationality of the injured party. Still others exclude application of the treaty rules altogether where a foreign party is injured in the same state as the pollution-causing event, in which case national laws generally apply.

(2) *Parties Held Liable and Standard of Liability*

Rules determining who is held liable for transboundary pollution are often based upon one or more of the following basic principles: the "polluter pays principle" under which the costs of environmental harm are internalized by those who cause the harm, and the "precautionary principle" under which cost-effective precautions should be taken to prevent the risk of environmental harm even where there is a lack of scientific certainty as to whether these precautions will be effective or are necessary.[35] Examples of the polluter pays principle are found in oil spill and nuclear damage treaties which assign liability to the "operator" (e.g., company operating a ship which leaks oil or a nuclear plant which emits radioactive waste), while hazardous waste disposal treaties may employ the precautionary principle by assigning liability to the "disposer: (e.g., company which placed waste into transportation containers).

(3) *Recoverable damage*.

Different treaties allow, prohibit, or cap recovery for different kinds of damages. Listed in order from most common to least common, these kinds of damages include loss of life and personal injury, loss or damage to personal property, loss of income or profits, costs of cleanup, costs of subsequent preventive measures, and punitive damages.

(4) Principal Treaties

(i) *The Paris Convention on Third Party Liability in the Field of Nuclear Energy* (*Paris Convention*).[36]

The instruments addressing state liability for environmental injury will not be discussed in this Report.

Joint Protocol to the Application of the Vienna Convention and the Paris Convention, Sept. 21, 1988, *reprinted in* 42 NUC. LAW. BULL. 56 (Dec. 1988).

Brussels Convention on Civil Liability for Oil Pollution, Nov. 29, 1969, 9 I.L.M. 45. This Convention has been amended by two protocols.

Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, UN Doc. EP/IG.80/3, 28 I.L.M. 649 (1999).

Rio Declaration on Environment and Development, U.N. Doc. A/CONF 151/26 (Vol. 1), Aug. 12, 1992 (promoting national implementation of the precautionary principle).

The Convention is in force in most of the countries of Western Europe (Germany, Belgium, Denmark, Spain, Finland, France, Greece, Italy, Norway, Netherlands, Portugal, Sweden, Turkey and the United Kingdom). *See* 2000 Hague Note at 5 n.15. No

This convention is a regime of strict (or objective) civil liability that applies when a nuclear incident has occurred in the territory of a Contracting State with damages suffered in another Contracting State.[37] It has been supplemented by the *Brussels Convention*, which institutes a "complementary system of indemnifications drawn from public funds in the event of particularly costly damages."[38]

(ii) *The Vienna Convention on Civil Liability for Nuclear Damage* (*Vienna Convention*).[39]

This convention was joined to the *Paris Convention* by a Joint Protocol in 1988; Parties to the Joint Protocol are treated as parties to both treaties.[40] Like the *Paris Convention*, the *Vienna Convention* is a regime of strict liability. Both Conventions channel liability to the operators of the nuclear installation that causes the alleged damage, and both Conventions provide for limitations on recovery.[41]

(iii) *The International Convention on Civil Liability for Oil Pollution Damage*.[42]

This treaty responded to the then-growing concern over oil tanker accidents.[43] It was modified by additional Protocols in 1976, 1984 and 1992, although the 1984 Protocol has not entered into force.[44] Like most other Treaties setting out substantive law, the *Oil Pollution Damage Convention* is a regime of strict civil liability, with a limitation on liability.[45] This Convention also establishes a fund out of which damages can be paid.[46] In addition, ship owners and oil companies entered into voluntary agreements intended to indemnify victims of pollution.[47]

(iv) *The Geneva Convention on Civil Liability for Damages Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels* (*CTRD*).[48]

The CTRD Convention is another regime of strict civil liability, also limiting liability.[49] However, the transporter is obliged to carry insurance and is also entitled to third-party indemnification.[50] States may avail themselves of a reservation for the purpose of applying higher limits, or no limit, on liability.[51] The Convention applies to both national and

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Western Hemisphere countries are party.

Id. at 5.

Id.

Ten Western Hemisphere countries are party to this convention: Argentina, Bolivia, Brazil, Chile, Cuba, Mexico, Peru, St. Vincent & Grenadines, Trinidad & Tobago, and Uruguay. Colombia has signed but not become party.

Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention, Sept. 21, 1988 [hereinafter Joint Protocol], *reprinted in* W.E. Burhemme (ed.), DROIT INTERNATIONAL DE L'ENVIRONNEMENT, TRAITÉS INTERNATIONAUX. Although the Joint Protocol has 20 parties, in the Western Hemisphere only Chile and St. Vincent & Grenadines are party. Argentina has signed but has not become party.

2000 Hague Note at 6. In addition to channeling liability to private operators, the Conventions authorize actions against insurers or other persons who have "granted a financial guarantee to the operator." *Id.* The Protocol to Amend the 1968 Vienna Convention on Civil Liability for Nuclear Damage extends the geographical scope of the application of the Vienna Convention to nuclear damage "wherever suffered." 2000 Hague Note at 5 n.17.

International Convention on Civil Liability for Oil Pollution Damage (CLC) 1969, *entered into force* June 19, 1975 [hereinafter 1969 CLC Convention]. Twelve countries in the Western Hemisphere are party: Brasil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Nicaragua, Peru, and St. Kitts & Nevis.

2000 Hague Note at 7.

Id. The 1984 Protocol did not enter into force because it was not ratified by at least six states, but was instead superseded by the 1992 Protocol which required ratification by only four states, and is now in force. The following 17 Western Hemisphere countries as parties to the 1992 Protocol, which requires automatic denunciation of the 1969 CLC Convention: Antigua & Barbuda, Argentina, Bahamas, Barbados, Belize, Canada, Chile, Colombia, Dominica, Domnican Republic, El Salvador, Grenada, Jamaica, Mexico, St. Vincent & Grenadines, Trinidad & Tobago, and Uruguay. The 1976 Protocol also entered into force with the following 11 Western Hemisphere countries as parties: Antigua & Barbuda, Bahamas, Barbados, Belize, Canada, Colombia, Costa Rica, El Salvador, Nicaragua, and Peru. *See* Status of IMO Conventions, available at http://www.imo.org; *see also* 2000 Hague Note at 7 n.28.

Id. at 7. The liability limits were increased by the 1992 Protocol. *Id.*; *see also* 1969 CLC Convention, art. V.

In addition, the 1969 CLC Convention is ensured by obligatory insurance and provides for the possibility of a direct action against the insurer. The additional Protocols allow for supplementary indemnification for victims who might not be able to identify the polluter or in cases where the polluter is insolvent. 1969 CLC Convention, arts. VII & VIII.

Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) and Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL), *cited in* 2000 Hague Note at 8 nn.31 & 32.

CRTD Convention, Oct. 10, 1985. No Western Hemisphere states are party.

See Uniform Law Review 1989-1, p. 280/281, *et seq.*, cited in 2000 Hague Note at 9 n. 40. In this case, however, the strict liability is attenuated by an exculpatory clause, which provides that the transporter is exonerated if he proves that "the consignor or any other person failed to meet his obligation to inform him of the dangerous nature of the goods, and that neither he nor his servants or agents knew or ought to have known of their nature." *Id.* at 9 n.41 (internal quotation marks omitted).

Id. at 9.

Id.

international carriage, but only if the acts causing the injury and the injury itself occurred in a Contracting State.[52]

(v) *The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*.[53]

This treaty addresses liability for injury caused to importing (receiving) States in the transport of hazardous waste. As supplemented by a 1999 Protocol, it establishes a very complex regime of strict liability. It permits States-Parties to impose limits on liability as long as the limits are not below the minimum requirements set out in the Annex to the Convention.[54]

(vi) *The Council of Europe's Convention of 21 June 1993 on Civil Liability for Damage Resulting from Activities Dangerous to the Environment* (*Lugano Convention*).[55]

The Lugano Convention aims primarily to ensure adequate compensation for damages. Because the terms are defined broadly, the substantive scope is considerable.[56] The geographic scope is also rather broad: the Convention applies to incidents "occurring in the territory of a State Party, 'regardless of where the damage is suffered.'"[57] Again, this Convention provides for a regime of strict liability[58] – but also requires every State to ensure that its operators have funds to cover potential liability under the Convention.[59]

c. Conclusions

The national laws in force shows that the laws regulating civil liability from environmental damage differ in many respects. In transboundary cases, therefore, there will frequently be a need to select among the conflicting laws of the affected states. The brief survey of international instruments addressing liability for environmental damage shows that there has been substantial effort to unify the substantive law in various sectors. These efforts have not obviated choice of law problems, however, because the international instruments address the problem only in some sectors, leaving other sectors to national law, and because not all of these instruments have been widely ratified by American states. The conclusion reached by the European Commission about the persistence of conflicts of law in this area applies even more strongly to the Americas:

> In spite of this gradual approximation of the substantive law . . . major differences subsist – for example in determining the damage giving rise to compensation, limitation periods, indemnity and insurance rules, the right of associations to bring actions and the amounts of compensation. The question of the applicable law has thus lost none of its importance.60

Id. at 9-10.

The Basel Convention is nearly universal, with 133 state parties, 30 of which are in the Western Hemisphere: Antingua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, Uruguay, and Venezuela. For a list of all parties, see http://www.basel.int/ratif/ratif.html#basel.

2000 Hague Note at 10.

Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Jun. 21, 1993 [hereinafter Lugano Convention]. The Lugano Convention is not yet in force. It has been signed by Cyprus, Finland, Greece, Iceland, Italy, Liechtenstein, Luxembourg, the Netherlands and Portugal, but only Portugal has ratified it. See http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm.

2000 Hague Note at 12.

Id. at 14. The Lugano Convention provides for the possibility of a reservation, by which states can elect to participate in the Convention only on the basis of reciprocity. No states have applied on this basis. *Id.*

Lugano Convention, art. 6. The Convention does not require that the plaintiff establish that the defendant caused the harmful occurrence, although she must demonstrate a "causative link" between her injury and the occurrence. However, there is no presumption of causation. 2000 Hague Note at 13. In addition, the operator may escape liability if he can show that the damage resulted from a "natural phenomenon of an exceptional, inevitable, and irresistible character," or from "pollution at tolerable levels under local relevant circumstances," or from "a dangerous activity taken lawfully in the interests of the person who suffered the damage, whereby it was reasonable toward this person to expose him to the risks of the dangerous activity." Lugano Convention, art. 8, sub-paras. a, d, e.

Lugano Convention, art. 12.

Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (2003/0168 (COD), July 22, 2003, at 20.

2. Choice of Law

a. Approaches in the Western Hemisphere

Among the nations of the Hemisphere, there are no legal provisions specifically addressing choice of law in the context of transboundary pollution. Accordingly, the courts select the applicable law by applying the choice of law rules that apply generally to torts. Most of the nations of Latin America, as well as Canada and ten states of the United States follow the traditional *lex loci delicti* (place of the wrong) approach. In the context of transboundary pollution, however, there is a difference among these states in how the *lex loci delicti* rule is applied. The typical transboundary pollution cases will involve an act performed in state A which causes harm to persons or property in state B. It is debatable, in such cases, whether the *lex loci delicti* is the place where the act was performed (*lex loci actus*) or the place where the injury was suffered (*lex damni*). In the United States, the states that follow the traditional *lex loci delicti* rule, as articulated in the First Restatement, apply the law of the state in which the injury occurred (*lex damni*).[61] According to the Bustamante Code and the Montevideo Treaties, the applicable law in such cases is the law of the place where the act causing the injury occurred (*lex loci actus*).[62]

Additional disuniformity results from the fact that some states apply rules other than *lex loci delicti*. In the United States, only ten of the sister states currently follow the *lex loci delicti* approach. The most widespread of the other approaches used in the United States is the "most significant relationship" approach of the Second Restatement, which is characterized by its indeterminacy. The Caribbean nations follow the double actionability rule, under which the suit is maintainable only if actionable under the law of the forum and the law of the place where the conduct occurred, although in exceptional cases the courts will apply instead the law of the state with the most significant relationship to the dispute.[63] Mexico applies the *lex fori* unless a treaty or state specifically call for the application of foreign law. [64]

Three other states have adopted versions of what is known as the principle of ubiquity, under which the applicable law is either the law where the acts were performed or the law where the injury was suffered, whichever is more favorable to the victim. The Civil Code of Peru provides, in article 2097, that the law applicable to extracontractual liability shall be the law of the place where the principal acts giving rise to the dispute were performed. However, if the law of the place in which the injury was suffered would hold the defendant liable, but the law of the place of where the acts were performed would not, then the applicable law shall be the former law, provided that the defendant should have foreseen that his acts might produce injury there.[65]

The 1999 Venezuelan codification of private international law adopts an approach similar to Peru's. Under article 32, the *lex damni* applies, but the victim may request the application of the law of the state in which the event causing the damage took place.[66] The Civil Code of Québec provides that "[t]he obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred. However, if the injury appeared in another country, the law of the later country is applicable if the person who committed the injurious act should have forseeen that the damange would occur."[67] If the plaintiff and defendant have a common domicile, however, the law of the common domcile applies.[68]

See RESTATEMENT OF THE LAW OF CONFLICT OF LAWS § 377, illustration 4 (A, in state X, throws out noxious fumes from a chimney which destroy the grass of B in state Y. The place of the wrong is in Y.)

Bustamante Code, arts. 167-168. *See* Jose Luis Siqueiros, La Ley Aplicable y Jurisdicción Competente en Casos de Responsabilidad Civil por Contaminación Transfronteriza; Conflict of Laws on Tort Liability, with Emphasis on Jurisdiction and the Law Applicable to International Civil Liability for Transboundary Pollution, OAS/REG/CIDIP-VI/doc.5/00, at 13.

See Winston Anderson, *Forum Non Conveniens Checkmated? – The Energence of Reatliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183, 207 (2001) (noting the "lack of clarity as to when the exception [to the doule actionability rule] applies").

Jorge A. Vargas, *Conflict of Laws in Mexico: The New Rules Introduced by the 1988 Amendments*, 28 INT. LAW. 659, 674-75 (1994).

Código Civil del Peru del 24 de julio de 1984, art. 2097.

See Gonzalo Parra-Aranguren, *The Venezuelan 1998 Act on Private International Law*, XLVI NETHERLANDS INT'L L. REV. 383, 391 (1999).

Civil Code of Québec, art. 3126, para. 1.=

Id.

b. Approaches Prevailing Elsewhere

(1) lex loci actus

The law applied in most of this Hemisphere – the *lex loci actus* – is also applied by Austria, the Netherlands, Denmark, Finland and Sweden, although some of these states may permit the displacement of that law if another state has a closer connection to the dispute.[69] The international trend, however, has been away from this rule, and for good reason. A rule under which an operator can be held liable only to the extent of the law of the state in which he carries out the activity permits the operator (and the states in which they operate) to externalize the costs of their hazardous activity, to the detriment of neighboring states.

(2) lex damni

Applying the law of the place of the injury seems much more sensible, as it entitles the injured party to precisely the degree of protection afforded him by the state in which he resides. Where the law of the state where the harmful conduct occurred is less protective of the victim, applying the law of that state is problematic for the reason just discussed; applying the *lex damni* is accordingly preferable. Whether the *lex damni* is preferable to the *lex loci actus* when the former is less protective of the victim will be discussed below.

The *lex damni* is the choice of law rule followed by the United Kingdom, Spain, Romania and Turkey,[70] although Turkey permits the displacement of that law if another state has a closer connection to the dispute.[71] Under Japanese law, *lex damni* applies even if the person liable could not have foreseen the damage occurring in that place.[72] France selects the *lex damni* as well. In a recent case, the Court of Cassation in France indicated that, where the injury was suffered in a state other than where the acts causing the injury occurred, it was necessary to apply the law that has the closest connection with the situation in question." The court went on to hold, however, that, in the absence of "exceptional circumstances," the law having the closest connection to the situation will be the law of the state in which the injury occurred.[73]

(3) principle of ubiquity

Under the so-called principle of ubiquity, the applicable law is that which is more favorable to the victim as between the law of the place of the harmful event and the law of the place of injury. Outside the Americas, versions of this principle have been adopted by Switzerland, Germany, Greece, Hungary, Slovakia, the Czech Republic, the former Yugoslavia, Estonia, Tunisia, and Italy.

Switzerland is the only state to have enacted a specific choice of law provision for cases of transboundary pollution. The Swiss law provides that "claims resulting from harmful emissions coming from an immovable property are governed, at the choice of the injured party, by the law of the State in which the real property is located or by the law of the State in which the result was produced."[74] This law thus differs from the laws of Peru and Venezuela, which do not call on the plaintiff to select the law, but instead instruct the court to apply the law more favorable to the plaintiff. Like Switzerland, Germany calls for the plaintiff to choose the applicable law, giving him the same options.

Calling on the plaintiff to choose the applicable law poses certain potential probleDr. One is what to do if the victim fails to make a choice. This problem is avoided by states, such as Italy and Venezuela, which set forth the applicable law but give the victim the power to request the application of another law.[75] For both states, in the absence of selection by the victim, the law of the place of injury applies. Another potential problem, pointed out by Professor Morse, is that,"[i]f the plaintiff is to make an informed choice, he will have to ascertain all of the details of the potentially relevant laws, a process that is bound to be expensive and difficult. Moreover, the plaintiff's supposition as to the content of the foreign

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Id. at 36.
Id.
Id. at 36 n.181.
Id.
Court of Cassation of France, Decision of 11 May 1999, *discussed in* 2000 Hague Note at 34-35.
Switzerland Federal Law on Private International Law, art. 138.
2000 Hague Note at 33.

law may not be accepted as accurate by the court."[76] This problem is avoided by states such as Peru, which call upon the judge, rather than the victim, to select the law that favors the victim. However, as pointed out by Professor Morse, even the court may have difficulty in certain cases determining which law is more favorable to the victim: "[W]here both jurisdictions provide for a cause of action, but the respective provisions differ, it may become difficult, if not impossible, to say which is more favorable to the injured party. And what if some of the rules were more favorable and others less so?"[77]

One answer to this last question is that one would apply the more favorable law on each discrete issue – i.e., combine the principle of ubiquity with the principle of depeçage. However, even the defenders of the principle of ubiquity consider it unacceptable to combine it with depeçage:

It seems obvious however that the injured party must subject his or her claim . . . to a single law. Indeed, it would scarcely be in line with the purpose of this provision to permit the injured party to very his or her choice as a function of the claim invoked or according to the legal issue in question. That would obviously bring on very complex and unforeseeable legal situations for the defendant.[78]

In any event, the difficulty of choosing the more favorable law when some provisions are more and others are less favorable will be more of a problem for some variations of the principle of ubiquity than for others. In jurisdictions such as Québec and Peru, the court need select as between two (or more) laws only when the law of the place of injury would hold the defendant liable but the law of the place of the act would not. There would appear to be no occasion for the court to choose between the two laws if both laws would hold the defendant liable, but the laws differ in other respects. For example, if the law of the place of the act would place a lower limit on the extent of recoverable damages than the law of the place of injury, it appears that, under the choice of law rules of Québec and Perú, the law of the place of the act would apply even though it is less favorable to the plaintiff. By contrast, Germany and Switzerland would permit the plaintiff to choose the law of the place of injury in such a case.[79]

c. Conclusions

The trend of the cases and the scholarly commentary is to disfavor the application of the *lex loci actus*, which is the rule currently applicable in a large part of this Hemisphere. An Inter-American instrument replacing the *lex loci actus* approach with the *lex damni* approach would be a significant advance. Whether the principle of ubiquity is preferable to the rule of *lex damni* is a more complex question. The negotiations for an Inter-American instrument on choice of law for cross-border environmental damage could provide a valuable forum for debating that question. Whether the principle of ubiquity is politically acceptable to the Member States is also an open question – one that would be answered by such a negotiation (or perhaps already has been).

3. Jurisdiction

An Inter-American instrument addressing jurisdiction could have important consequences whether or not the instrument also standardizes choice of law in the Hemisphere. If the instrument does also include choice of law rules, or if it incorporates indeterminate choice of law rules – such as the "most significant relationship approach of the Second Restatement – then the instrument's jurisdictional provisions will indirectly determine the applicable law. If the instrument included relatively determinate choice of law rules, then the plaintiff's choice of forum would not be an indirect way to choose the applicable law, but it would have other important consequences. Since the forum will apply its own procedural

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C.G.J. Morse, *Choice of Law in Tort: A Comparative Perspective*, 32 AM J. COMP. L. 51, 60 (1984).

Morse, op cit., at 59-60.

2000 Hague Note at 30.

The Nordic Convention on the Protection of the Environment, in force between Sweden, Denmark, Norway, and Finland, provides that requests for damages "shall not be judged by rules which are less favorable to the injured party than the rules of … the State in which the activities are being carried out." Thus, if the state's choice of law rule would otherwise require the application of the *lex damni*, the convention would entitle the victim to the application of the *lex loci actus*, if it is more favorable. *Cf.* internal text *supra*. (Denmark, Finland and Sweden generally apply the *lex loci actus*). There are a few additional treaties that provide limited choice of law rules for dicrete types of environmental damage, but they are of limited interest because the rules they adopt are closely linked to the particular goals of the regime set up by the treaties. For a description, see 2000 Hague Note at 49.

rules even if another state's law applies to the substance, the choice of forum will determine the availability of procedural mechanisms such as class actions pretrial discovery or a jury trial or contingency fee arrangements. Additionally, the traditional refusal of states to enforce another state's penal laws or laws that violate its strong public policy usually means that punitive damages will be available only in the courts of a state that provides for such damages.[80] Since punitive damages and the procedural mechanisms noted above are typically available only under the law of the United States, the jurisdictional question will be most consequential when the choice is between a U.S. forum and that of another state.

a. Treaties

A few conventions designate the available fora for the adjudication of disputes concerning certain specific types of crossborder environmental damage. With respect to nuclear incidents, the Paris Convention provides for actions to be brought only in the Contracting State on whose territory the accident occurred.[81] With respect to oil pollution, the *Brussels Convention* limits actions to the territory of the Contracting State(s) in which the damage occurred. The parties excluded the state of the habitual residence of the owner of the vessel as a forum in order to avoid having a suit brought in a jurisdiction that is the territory of a flag of convenience.[82]

The Convention on Civil Liability for Damage caused during the Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CTRD) provides that a claim for compensation may be brought in the courts of the place where "a) the damage was sustained; b) the incident occurred, c) preventive measures were taken …, or d) the carrier has his habitual residence."[83] The plaintiff's choice of forum will depend in part on where the carrier has established a limitation fund, as required by Article 11 of the Convention; the courts of the State in which the fund is established are *exclusively* competent to determine "all matters relating to apportionment and distribution of the fund."[84]

The Nordic Convention, which applies to all categories of emissions, provides that actions can be brought before a court in the State where the harmful activity occurred – although this limitation is ultimately not that burdensome because the Parties' laws are relatively harmonized.[85] The Lugano Convention, which also applies generally to damage resulting from activities dangerous to the environment, allows an action to be brought where the damage was suffered, where the dangerous activity was conducted, or where the defendant has her habitual residence.[86] It allows claims by organizations as well as individuals,[87] and includes detailed rules concerning access to information, which, inter alia, allow persons who suffered damage to request information "at any time, in so far as … is necessary to establish the existence of a claim for responsibility."[88]

Finally, although not yet adopted and apparently curtailed, it is worth recalling that the latest draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Hague Convention) included a provision would have allowed a tort action to be brought either in the state of the defendant's habitual residence, in the state in which the act or omission causing the injury occurred, or in the state in which the injury

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In theory, an Inter-American instrument could require the forum state to enforce another state's laws authorizing punitive damages whenever the substantive law of that state applies under the instrument's choice of law provisions. On the other hand, instrument could also expressly exclude the application of another state's choice of law rules. The European Commission's proposed Rome II regulation takes the latter approach by providing in article 24 that "[t]he application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy." Finally, the Inter-American instrument could be silent with respect to punitive damages, thus leaving it to the forum to determine whether to enforce another state's law providing for punitive damages. This last option is likely to lead to the same result as the second.

Paris Convention on Third Party Liability in the Field of Nuclear Energy, art. 13. Obviously, this could be either the State where the injury or the harmful act occurred.

2000 Hague Note at 48.

Uniform Law Review, *supra* note 51; 2000 Hague Note at 48. This Convention has not yet entered into force. *Id.* at 48 n.236.

Id.

Id. at 49.

Lugano Convention, art. 19, para. 1. This Convention has not yet entered into force.

2000 Hague Note at 50.

Lugano Convention, art. 16, para. 2. The Convention also stipulates the type of information that can be requested and provides for some limitations on access. 2000 Hague Note at 66.

arose, unless the defendant could not have reasonably foreseen that the act or omission could result in an injury of the same nature in that state.[89]

b. National Laws

There are no national jurisdictional provisions in this Hemisphere specifically addressing cases of environmental damage. The applicable rules are therefore those addressing non-contractual liability in general. Among Latin American countries, the general rule is that the suit may be brought in the place of habitual residence of the defendant and, in addition, in the place where the act causing the injury occurred.

The rule prevailing in the United States would permit the suit to be brought in either place and, in addition, in the place where the injury occurred, provided that the defendant could reasonably foresee that his conduct would cause an injury there. Similarly, under Canadian law, a tort suit can typically be brought in the place of the defendant's habitual residence or where the tort was committed or caused an injury, provided that there is a "real and substantial" connection between the defendant and the forum showing that the defendant voluntarily submitted to the risk of litigation in the forum.[90]

The Canadian provinces and some states of the United States, however, recognize an important limitation to jurisdiction in cases involving injury to real property. Under the so-called "local action" rule, actions relating to ownership of real (immovable) property have to be brought in the jurisdiction in which the property is located. In *British South Africa Co. v. Copanhia de Moçambique*,[91] the House of Lords extended the principle to actions *in personam* relating to damages for trespass.[92] As a result of this extension, English courts also declined to enforce foreign judgments relating to *in personam* damage done to property, in which the property is not located in the same jurisdiction as the court.[93] The rule has been severely criticized.[94] In the United Kingdom, it was abolished by the *Civil Jurisdiction and Judgments Act of 1982*, which allows English courts to rule on *in personam* actions relating to land situated outside England.[95] Nonetheless, it continues to be followed by some states of the United States and some provinces of Canada, leading to the dismissal of suits seeking to impose liability for acts performed within the state that causes injury to real property abroad. The Uniform Transboundary Pollution Reciprocal Access Act of 1982 was drafted by the U.S. and Canadian bar associations in order to address this problem. The Act is in force in Ontario, Manitoba, Nova Scotia and Prince Edward Island in Canada, and by Michigan, Montana, Wisconsin, Colorado, Connecticut, New Jersey and Oregon in the United States.[96] States and provinces that have adopted the Act grant access to their courts to persons whose property abroad was damages by acts occurring in the state or province, provided that the state or province in which the injury was suffered grants reciprocal access to the citizens of the forum. [97]

The Commission for Environmental Cooperation is currently endeavoring to implement Article 10(9) of the North American Agreement on Environmental Cooperation, the environmental side agreement of the NAFTA, under which Mexico, Canada and the United States agreed to consider and develop recommendations for reciprocal access to the courts and administrative agencies of their territories in cases relating to injuries suffered or likely to be suffered due to transboundary pollution. To date, however, they have taken no action on this issue beyond authorizing the secretariat's "Background Paper."[98]

Another quasi-jurisdictional doctrine that has had a significant impact in transnational litigation involving environmental damage has been the doctrine of forum non conveniens.

Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, arts. 3, 10, available at http://www.hcch.net/e/conventions/draft36e.html.

See March 2003 report of author (discussing Canadian "real and substantial connection" choice of law approach).

[1893] A.C. 602 (H.L.).

2000 Hague Note at 50.

Id. at 50. English courts from the outset (of the rule) refused to enforce judgments *in rem* where the property was not located in the jurisdiction of the court.

See, e.g., Welling/Heakes, *Torts and Foreign Immovables Jurisdiction in Conflict of Laws*, (1979-80), 18 UNIV. W. ONT. L.REV. 295.

2000 Hague Note at 52.

Id. at 53 n.261.

Uniform Transboundary Pollution Reciprocal Access Act, *cited in* 2000 Hague Note at 53 n.261.

John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT'L L. 291, 313 n.148 (2002).

This doctrine, which is recognized in the United States, Canada, and most Caribbean states, permits a court that otherwise possesses jurisdiction to decline to exercise such jurisdiction if it determines that another state has a closer connection with the underlying dispute and would be a significantly more convenient forum. This doctrine has been applied in numerous environmental cases of a transnational nature (to use Ballarino's term[99]) – that is, cases in which both the activity that immediately caused the injury and the injury itself occurred in the same state, but the defendant is a national of, and operated primarily in, another state. In the typical environmental case in which a forum non conveniens dismissal has been sought, the defendant has been a U.S. corporation that conducts operations, either through a branch or a subsidiary, in another state, allegedly causing environmental injury to nationals of that state. The plaintiffs bring suit in the United States, and the U.S. defendant seeks to have the action dismissed on the ground that the state in which the acts and injury occurred are the more appropriate forum. The most famous case of this description dismissed on forum non conveniens grounds was the suit brought against Union Carbide involving the gas leak in Bhopal that killed or injured thousands on people.[100] Numerous similar cases brought by plaintiffs from the Americas have been the subject of forum non conveniens motions, most of which have been successful.[101]

The doctrine of forum non conveniens is unknown in civil law countries, where the courts generally lack the discretion to decline to exercise jurisdiction. The dismissal of suits by U.S. courts in transnational environmental cases have been a source of considerable controversy in Latin America.[102] The doctrine has been widely criticized on the ground that it discriminates against foreign litigants and that it constitutes a denial of justice. Indeed, even some judges in the United States have described the doctrine as permitting "connivance to avoid corporate accountability."[103] On the other hand, proponents of such dismissals claim that the plaintiffs seek a US forum in these cases to take advantage of U.S. procedures such as class actions, jury trials, and contingency fee arrangements – mechanisms that, in their view, are properly limited to claimant challenging conduct that causes injury in the forum state.

The doctrine is also beginning to have the effect of distorting other nations' jurisdictional rules. Under U.S. law, a case may be dismissed on forum non conveniens grounds only if the court finds that a more appropriate forum is available elsewhere. To help their citizens avoid dismissal of their U.S. cases on forum non conveniens grounds, some states in the Americas are beginning to revise their jurisdictional laws to deny their courts jurisdiction in cases brought by their citizens in U.S. courts against U.S. nationals and dismissed by U.S. courts on forum non conveniens grounds. Such legislation has been

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Tito Ballarino, Questions de droit internationale privé et Dommages Catastrophiques, *Recueil des Cours* , v. 220 (1990-I) (distinguishing "transnational" cases from "international" cases; the latter consists of cases in which acts in one state cause injuries in another state).

In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986).

Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001) (Latin American banana workers brought class action against multinational fruit and chemical companies alleging exposure to toxic substances); Jota v. Texaco, 157 F.3d 153 (2d Cir. 1998) (Ecuador residents brought class action against United States oil company alleging environmental and personal injuries); Ciba-Geigy Ltd. v. Fish Peddler, Inc., 691 So. 2d 1111 (Fla. 4th Dist. Ct. App. 1997) (Ecuadorian shrimp cultivators brought action against United States companies alleging environmental and economic injury) (dismissed on grounds of *forum non conveniens*); Aquinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996) (Ecuador residents brought action against oil company for damages due to oil exploration and extraction activities); Delgado v. Shell Oil, 890 F.Supp. 1324 (S.D. Tex. 1995) (Latin American citizens brought action alleging personal injury against United States chemical manufactures) (dismissed on grounds of *forum non conveniens*); Sequihua v. Texaco, 847 F. Supp. 61 (1994) (Ecuador residents brought action against U.S. corporation alleging air, water and ground contamination) (dismissed on grounds of *forum non conveniens*); Dow Chemical Co. v. Castro Alfaro, 786 S.W.2d 674 (Tex. 1990), cert. denied 498 U.S. 1024 (1991) (Costa Rican employees of fruit company brought personal injury action for damages against United States companies manufacturing pesticides); Cabalceta v. Standard Fruit Co., 667 F. Supp. 833 (S.D. Fla. 1987), aff'd in part and rev'd in part, 883 F.2d 1553 (11th Cir. 1989) (Costa Rican workers brought personal injury action for damages against several chemical companies, including one in the U.S.) (dismissed on grounds of *forum non conveniens*); In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986), aff'd in part and rev'd in part, 809 F.2d 195 (2d Cir. 1987) (attorneys in United States filed suits on behalf of Indian residents injured by industrial accident in India) (dismissed on grounds of *forum non conveniens*); Sibaja v. Dow Chemical Co., 757 F.2d 1215 (11th Cir. 1985), cert. denied, 474 U.S. 948 (1985) (Costa Rican farm workers brought action against United States chemical manufacturers alleging personal injury) (dismissed on grounds of *forum non conveniens*). *See generally* Brooke Clagett, *Forum Non Conveniens In International Environmental Tort Suits: Closing The Doors Of U.S. Courts To Foreign Plaintiffs*, 9 TUL. ENVTL. L.J. 513 (1996).

See Proposal for an Inter-American Convention of the Effects and Treatment of the Forum Non Conveniens Theory, presented by Gerardo Trejos Salas, OAS CJI/doc.2/00, March 3, 2000.

Dow Chemical Co. v. Alfaro, 786 S.W.2d 674, 680 (Tex. 1990) (Doggett, J., concurring).

enacted in Costa Rica, Ecuador, Guatemala, Honduras, and Nicaragua.[104] The Environmental Committee of the Latin American Parliament, PARLATINO, introduced a resolution to the Parliament recommending that all Latin American and Caribbean countries adopt this type of legislation.[105] Dominica has enacted a different form of retaliatory law. Because denial of jurisdiction to its nationals would violate its Constitution, its law instead makes the procedural advantages of U.S. litigation available in suits brought in Dominica after having been dismissed from U.S. courts on forum non conveniens grounds – advantages such as the availability of class actions. In addition, it provides that, in transnational cases, the courts of Dominica may ward punitive damages, and it specifies that the level of damage awarded shall be comparable to the damages awarded in analogous cases in the country from which the suit was dismissed.[106] In addition, the laws requires as a condition of maintaining the suit in the courts of Dominica that the defendant post a bond in an amount equivalent to 140% of the amount awarded in analogous cases by the courts from which the suit was dismissed.[107] The law also alters the choice of law rule for suits dismissed from another state's courts on forum non conveniens grounds: it provides that, in such suits, the rule of double actionability shall be replaced by the "most significant relationship" test. Finally, the law modifies the substantive standard of liability in such suits; where the law of Dominica applies, the law "imposes strict liability upon any person who manufactures, produces, distributes, or otherwise places any product or substance into the stream of commerce which results in harm or loss."[108]

These laws have so far not had effect of preventing the dismissal of suits from the U.S. courts on forum non conveniens grounds. The U.S. courts have instead dismissed the cases without prejudice to their resumption in U.S. courts if the foreign fora ultimately dismiss the cases for lack of jurisdiction.[109] It remains to be seen whether the U.S. courts will permit the suit to be maintained in the U.S. courts if the foreign forum dismisses the suit pursuant to one of the retaliatory laws.

c. Conclusions

With respect to jurisdiction, an Inter-American instrument in this field could make a valuable contribution by abolishing the Mozambique rule. It would also make a valuable contribution if it resolved the questions surrounding the availability of the forum non conveniens doctrine. On the other hand, finding a mutually acceptable solution to this latter problem may prove difficult. During the negotiations on the Hague Convention on Jurisdiction and Judgments, an early draft of the document would have eliminated the possibility of dismissing cases on forum non conveniens grounds, but this proved unacceptable to the United States, and later drafts permitted such dismissals in "exceptional" circumstances.[110]

4. Related Work of Other International Organizations

(a) International Law Commission

The topic of "International liability for injurious consequences arising out of acts not prohibited by international law" was placed on the ILC's agenda in 1978. The subject was an offshoot of the ILC's work on state responsibility. The decision to treat the subject separately was based on the recognition that environmental damage emanating from a state's territory might give rise to an obligation to repair the damage or pay compensation even if the

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See Ley No. 364 – Ley Especial Para la Tramitación de Juicios Promovidos Por Las Personas Afectadas Por El Uso de Pesticidas Fabricados A Base de DBCP, La Gaceta Diario Oficial, Jan. 17, 2001, amending C.P.C. de Nicaragua, art. 621 et seq. (changing laws applicable to certain cases filed in Nicaragua due to barrier posed by U.S. *forum non conveniens* doctrine); Ley No. 55 - Ley Interpretativa de los Artículos 27, 28, 29, y 30 del Código de Procedimiento Civil, para los casos de Competencia Concurrente Internacional, Registro Oficial, Organo del Gobierno del Ecuador, Jan. 30, 1998 (art. 1 providing that Ecuadorian courts lack jurisdiction over a suit "presented" abroad); C.P.C. de Costa Rica, art. 31 ("[i]f there were two or more courts with jurisdiction for one case, it will be tried by the one who heard it first at plaintiff's request"), *cited in* Canales Martinez v. Dow Chemical Co., 219 F.Supp. 2d 719, 728 (E.D. La. 2002); Ley de Defensa de Derechos Procesales de Nacionales y Residentes, Diario de Centro América (Guatemala), June 12, 1997 (art. 2 depriving Guatemalan courts of jurisdiction over cases validly lodged abroad in a court with jursidiction). For further description of these laws, see Lawrence W. Newman, *Latin America and Forum Non Conveniens Dismissals*, NEW YORK LAW JOURNAL, Feb. 4, 1999, at 3.

See Anderson, *supra.* at 186.

Id. at 210-211.

Id. at 203. Some of the Latin American laws include a similar provision for the posting of a bond. For a defense of such provisions, see Trejos, supra.

Anderson, op cit., at 208.

See Newman, *supra.*

See Draft Convention, art. 22 (available at http://www.hcch.net/e/conventions/draft36e.html)

damage was not the result of a breach by the state of any primary obligation under international law. In the absence of such a breach, state responsibility would not attach, but a "liability" of the state – understood as a primary obligation of the state to remedy the injury – might arise. Much of the ILC's early work on this topic focused on the conceptual difference between state responsibility and state liability.[111]

The ILC's work on this topic proceeded at a deliberate pace from 1978 until 1996, a period in which seventeen Reports were produced by two Special Rapporteurs.[112] In 1997, the ILC established a Working Group to review its work on the topic since 1978. The Working Group concluded that "the scope and content of the study remained unclear" because of "conceptual and theoretical difficulties" and "the relation of the subject to 'State responsibility.'"[113] The ILC decided, in agreement with the Working Group's recommendation, to treat separately the issues of prevention and liability, and it appointed Dr. Pemmaraju Sreenivasa Rao Special Rapporteur of the topic of "prevention of transboundary damage from extrahazardous activities."[114] The ILC completed its work on this topic at its fifty-third session in 2001, when it adopted a draft preamble and 19 draft articles on prevention of transboundary harm from hazardous activities. The draft articles are conceived as the basis for an international convention, and the ILC accordingly recommended to the General Assembly the elaboration of such a convention.[115] Under the articles, states would be obligated, inter alia, to require operators to obtain prior authorization for activities that pose a risk of causing significant transboundary harm, and to notify and consult with other states that would be affected by such activity.[116]

The ILC resumed its work on the second part of the topic – "international liability for failure to prevent loss from transboundary harm arising out of hazardous activities" – at its 54th session in 2002, with Dr. Rao again serving as Special Rapporteur.[117] The ILC's work so far shows that the remaining part of the project will address the liability of not just states, but also private parties. Early in the process, the Working Group reached agreement of several important points: "First, the innocent victim should not, in principle, be left to bear the loss. Secondly, any regime on allocation of loss must ensure that there are effective incentives for all involved in a hazardous activity to follow best practice in prevention and response. Thirdly, such a regime should cover widely the various relevant actors, in addition to States. These actors include private entities such as operators, insurance companies and pools of industry funds."[118] The Working Group also decided that "[t]he operator, having direct control over the operations, should bear the primary liability in any regime of allocation of loss. The operators share of loss would involve costs that it needs to bear to contain the loss upon its occurrence, as well as the cost of restoration and compensation."[119] The Working Group's report reaching these and other conclusions about the allocation of loss as among various private and public actors was considered and adopted by the ILC.[120]

The ILC's work on the topic of international liability for transboundary harm will thus apparently seek to impose certain requirements for national laws regulating the liability of private and public actors for transboundary environmental injuries. The ILC is unlikely to seek to harmonize all aspects of this subject. If its work on prevention is a guide, it is more likely that it will set forth some minimum standards, leaving states free to choose the details of implementation. Thus, even if the ILC succeeds in reaching agreement on draft articles concerning international liability for transboundary environmental damage, and even if the draft articles are later incorporated into a convention that is widely ratified, its work is not likely to eliminate choice of law issues. Nevertheless, its work will affect the extent and nature of the conflicts of law that will exist in the future.

On this distinction, see generally Daniel Barstow Magraw, *Transboundary Harm: The International Law Commission's Study Of "International Liability,"* 80 AM. J.INT'L.L. 305 (1986).

Five reports were produced by Mr. Robert Q. Quentin-Baxter. See Report of the International Law Commission on the Work of its Fifty-fourth Session at 220 (Oct. 2002). After Quentin-Baxter's death in 1985, Mr. Julio Barboza was appointed Special Rapporteur. Barboza produced twelve reports. *See id.* at 221 n.406.

Id.

Id.

Id. at 223.

Draft articles on prevention of transboundary harm from hazardous activities, arts. 6-10.

See Report of the International Law Commission on the Work of its Fifty-fourth Session at 223.

Id. at 225.

Id.

Id. at 223.

It is also likely that the ILC will itself address certain private international law issues. Among the "additional issues" the Working Group listed for future consideration were "inter-State and intra-State mechanisms for consolidation of claims, . . . the processes for assessment, quantification and settlement of claims, access to the relevant forums and the nature of available remedies."[121] The ILC's past work on this topic suggests what its approach to these issues might look like. The 1996 Report of the Working Group On International Liability For Injurious Consequences Arising Out Of Acts Not Prohibited By International Law includes draft articles prepared by a Working Group operating under the chairmanship of Dr. Barboza. One of the draft articles is of particular relevance. Article 20 provided in relevant part that "[a] State on the territory of which an activity referred to in article 1 is carried out shall not discriminate on the basis of nationality, residence or place of injury in granting to persons who have suffered significant transboundary harm, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief."[122] This provision would appear to invalidate the Mozambique rule discussed above. According to the commentary on this article, "if significant harm is caused in State A as a result of an activity . . . in State B, State B may not bar an action on the grounds that the harm occurred outside its jurisdiction."[123]

Although this article does not directly address choice of law, the commentary suggests that it may do so indirectly: "The rule set forth obliges States to ensure that any person, whatever his nationality or place of residence, who has suffered significant transboundary harm as a result of [hazardous] activities should, regardless of where the harm occurred or might occur, receive the same treatment as that afforded by the State of origin to its nationals in case of domestic harm."[124] This may suggest that the applicable law should be the same as would apply if the harm had occurred entirely within the state's territory. Elsewhere, the commentary states that "[w]hen relief is sought through the courts of the State of origin, it is in accordance with the applicable law of that State."[125] If the reference here is to the substantive law of the state, then it appears that the draft articles contemplate the application of the *lex loci actus*. If the reference is to the whole law of the state, including its choice of law rules, then the draft articles would leave choice of law unaddressed. In any event, the draft articles make it clear that the above rule "is residual" and that "[a]ccordingly, States concerned may agree on the best means of providing relief to persons who have suffered significant harm, for example through a bilateral agreement."[126] Although presumably a regional agreement would similarly be permitted, the OAS may wish to defer its work on such an agreement until the default rules set forth by the ILC have been completed. Under Dr. Rao's leadership, the ILC's work on this topic is likely to proceed more quickly than it did in its first twenty years.

(b) The Hague Conference

The Hague Conference has focused more directly on the private international law aspects of transboundary environmental harm. In 1992, the Permanent Bureau distributed to its Member States a Note providing background and seeking their views as to whether "the law applicable to civil liability for damage to the environment might be a viable topic to be dealt with in a future international convention."[127] The Permanent Bureau's belief that this might be an appropriate topic was based in part on its observation that "most of the international negotiations being carried on with a view to protecting the environment are directed towards problems of a worldwide nature and focus upon the liability of the States from which pollution originates."[128] The need for such a convention, the Bureau noted, "is aggravated by the relative lack of success in dealing with liability for transfrontier pollution at

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Id. at 227.

1996 Report at 43.

Id. As a precedent for this article, the Working Group cited the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden of 19 February 1974 and the OECD Recommendation on Implementation of a regime of equal right of access and non-discrimination in relation to transfrontier pollution, both discussed supra. *See* 1996 Report at 44.

Id.

Id. at 42.

Id. at 43.

Note on the Law Applicable to Civil Liability for Environmental Damage, Preliminary Document No. 9 of May 1992, in Proceedings of the Seventeenth Session, 10 to 29 May 1993, First Part, at 187 [hereinafter 1992 Note].

Id.

the public international law level.[129] As just discussed, the ILC's more recent work has not focused exclusively on the liability of states, and its work has begun to proceed at a faster pace.

After surveying the existing international law instruments on this topic and the relevant national laws, the Permanent Bureau concluded that "[t]his is essentially an untreated area in the international treaties, preempted only to a limited extent in specific classes of cases by substantive law treaties."[130] Furthermore, "[t]he pattern of cases involving claims of civil liability for environmental damage . . . seem to be identifiable enough to allow clear ideas of appropriate conflicts rules to be developed while there is the advantage that the lack of fixed conflicts rules in treaties and in national law at present leaves a fairly open field for adoption and implementation of unified conflicts rules."[131] On the basis of the Bureau's 1992 Note, the Hague Conference decided to include this item on the agenda for the work programme of the Conference.[132] Although all the delegates believed that this was an important matter that ought to be studied by the Conference, some "considered that the question should not be given priority, both because it is an extremely complex one and touches on political problems of a sensitive nature and in view of the fact that there are already a large number of international texts on the subject."[133]

In April of 1994, the Hague Conference sponsored a colloquium held at Osnabrück with the title "Towards a Convention on the Private International Law of Environmental Damage," the conclusions of which were described in a 1995 Note by the Permanent Bureau.[134] These conclusions are known as the Ten Points of Osnabrück. The participants were on the whole quite favorably disposed towards the drafting of a private international law convention concerning transboundary environmental harm. In addition, they believed that the convention should address the question of jurisdiction. Indeed, they concluded that "[t]he negotiators of a possible Hague Convention will have to take a broad view and incorporate in their attempt at unification not only the conflicts of laws and jurisdiction, but also certain aspects of procedure as well as the relations with other conventions providing for compensation through compensation funds and – first and foremost – the important problem of insurance."[135] Among the procedural issues that they suggested be addressed in the convention was that of class actions and citizen suits.[136]

At the colloquium, there was quick agreement on the appropriate approach for selecting the applicable law. The participants endorsed the principle of ubiquity, under which the victim would be able to choose between the law of the place where the activity causing the injury occurred or the law of the place where the injury was suffered. [137] In the view of the Permanent Bureau, however, "this rule was perhaps too rapidly accepted" at the colloquium "and was not sufficiently discussed nor its implications assessed in relation to all the conceivable hypotheses of transboundary pollution."[138] The Bureau accordingly recommended that the Conference consider as well the possibility of selecting the *lex loci actus* and the *lex damni*, among other possibilities.[139] In particular, the Bureau seemed to favor the *lex damni* because it "might seem to afford the best protection for the claimant's interests, satisfying his legitimate expectations, and which will frequently be identical with the victim's residence and the place in which his property is located," and because it "seems to correspond to the present-day trend in the substantive law of liability for transboundary pollution."[140] With respect to jurisdiction, the colloquium endorsed a rule giving the victim the choice of bringing suit in the defendant's habitual residence, the place of the dangerous activity, or the place where the damage was suffered.[141]

Id. at 193.
Id. at 207.
Id.
Final Act of the Seventeenth Session, B, ¶ 3.
Note on the Law Applicable and on Questions Arising from Conflicts of Jurisdiction in Respect of Civil Liability for Environmental Damage, Preliminary Document No. 3 of April 1995, Proceedings of the Eighteenth Session 30 Sept. to 19 Oct. 1996, Volume I, at 73 [hereinafter 1995 Note].
1995 Note.
Id. at 83.
Id. at 79.
Id. at 75.
Id.
Id. at 75-77.
Id. at 77.
Id.

At the Conference's Eighteenth Session, the Special Commission decided to retain the topic on the Conference's agenda, despite some concerns about "the risk of overlap which might exist between the various conventions in the field" and the "political sensitivity of the topic."[142] However, the topic was given third priority among the items on the Conference's agenda, behind the proposed Hague Convention on Jurisdiction and Judgments and the extension of the convention on minors to incapacitated adults.[143] The Special Commission decided that the topic should be the subject of further studies by the Permanent Bureau.

In 2000, the Permanent Bureau released an exhaustive Note titled "Civil Liability resulting from transfrontier environmental damage: a case for the Hague Conference?"[144] This lengthy note included the most thorough discussion yet of the existing instruments and national laws on the subject, as well as an extensive discussion of the possible options. With respect to choice of law, the Note reflects a distinct preference for the principle of ubiquity. It notes that the rule has been adopted by Germany and Italy and a number of other states, including Venezuela and Perú,[145] and that "even authors who are generally hostile to this principle as a general rule . . . favor its application in transfrontier pollution matters."[146] The alternative of *lex loci actus* has the disadvantage of permitting the polluting state to externalize the costs of the harm caused. On the other hand, if the *lex loci actus* is more favorable to the victim than the *lex damni*, the Note asks, "why should the victims in another State not benefit from these same advantageous provisions?"[147] The Note also noted that the principle favoring the injured party also has the advantage of favoring the protection of the environment.[148]

The Permanent Bureau's Note was considered by the Conference's Special Commission in May 2000. While the Commission recognized the importance of the topic, it decided to retain the topic on its agenda "without priority." Several reasons were expressed for this decision. "A number of experts pointed to the problems raised by issues of public international law and indicated that the time was not ripe for a Hague Convention on this topic."[149] Additionally, there was concern abut the risk of overlap which might occur with various existing instruments.[150] Finally, "[a]ttention was drawn to the work previously done by the Council of Europe and the European Union in this domain, and work that might be undertaken by the Organization of American States."[151] It thus appears that the decision of the Hague Conference not to give priority to this topic was based in part on the expectation that the topic would be pursued in the Inter-American context through CIDIP.

(c) Rome II

The European Commission has proposed a regulation that would regulate choice of law for non-contractual liability. In May 2002, it released a draft regulation and sought comments on the draft from interested parties. The draft included a provision specifically addressing liability for transboundary environmental harm. This provision would have designated the lex damni as the applicable law. Extensive comments on the draft were received in September 2002. With respect to the provision on transboundary environmental harm, the Hague Conference submitted comments that, consistent with its 2000 Note on the subject, defended the principle of ubiquity, without ultimately taking a position on whether it should be adopted.[152] After taking all of the comments into account, the European

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Conclusions of the Special Commission of June 1995 on General Affairs and Policy of the Conference, Preliminary Document No. 9 of December 1995, Proceedings of the Eighteenth Session, Vol. I, at 109.

Id. at 119.

2000 Hague Note.

Id. at 33-34.

Id. at 33.

Id. at 34.

Id.

Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference. Preliminary document No. 10 of June 2000 for the attention of the Nineteenth Session, at 13.

Id.

Id.

Hague Conference on Private International Law, Comments on Proposed Regulation of Choice of Law for Non-Contractual Liability. In describing the Hague Conference's position, the European Commission noted that "the Hague Conference has . . . put an international convention on cross-border environmental damage on its work programme, and preparatory work seems to be moving towards a major role for the place where the damage is sustained, though the merits of the principle of favouring the victim are acknowledged." Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations, 2003/0168 (COD), July 22, 2003, at 20.

Commission revised its draft. The revised version was submitted to the European Parliament on July 22, 2003.

The revise version rejects the principle of ubiquity as the general rule for non-contractual liability, adopting instead as the basic rule (article 3) "the law of the place where the direct damage arises or is likely to arise" (*lex damni*).[153] This was "a compromise between the two extreme solutions of applying the law of the place where the event giving rise to the damage occurs and giving the victim the option."[154] The Commission concluded that "giv[ing] the victim the option of choosing the law most favourable to him . . . would go beyond the victim' s legitimate expectations and would reintroduce uncertainty in the law, contrary to the general objective of the proposed Regulation."[155] Nevertheless, in the provision specifically addressing choice of law for transboundary environmental damage (article 7), the Commission opted for the principle of ubiquity. "The uniform rule proposed in Article 7 takes as its primary solution the application of the general rule in Article 3(1), applying the law of the place where the damage is sustained but giving the victim the option of selecting the law of the place where the event giving rise to the damage occurred."

The Commission's principal reason for adopting the principle of ubiquity in this context appears to be based not on the protection of the legitimate expectations of either of the parties, but instead on the European Union's substantive policies regarding the protection of the environment:

> [T]he exclusive connection [in Article 3] to the place where the damage is sustained would . . . mean that a victim in a low-protection country would not enjoy the higher level of protection available in neighbouring countries. Considering the Union' s more general objectives in environmental matters, the point is not only to respect the victim's legitimate interests but also to establish a legislative policy that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other torts or delicts, generally derives an economic benefit from his harmful activity. Applying exclusively the law of the place where the damage is sustained could give an operator an incentive to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighbouring country' s laxer rules. This solution would be contrary to the underlying philosophy of the European substantive law of the environment and the "polluter pays" principle. [156]

According to the proposal, "[i]t will . . . be for the victim rather than the court to determine the law that is most favourable to him."[157] The Commission elided the potential problems with this procedure discussed above by stating that it is up to each Member State to establish the procedures for making the choice given to the plaintiff.[158]

The Commission also briefly addressed the problem posed by the fact that environmental regulation is highly regulated by public law:

> A further difficulty regarding civil liability for violations of the environment lies in the close link with the public-law rules governing the operator's conduct and the safety rules with which he is required to comply. One of the most frequently asked questions concerns the consequences of an activity that is authorised and legitimate in State A (where, for example, a certain level of toxic emissions is tolerated) but causes damage to be sustained in State B, where it is not authorised (and where the emissions exceed the tolerated level). Under Article 13, the court must then be able to have regard to the fact that the perpetrator has complied with the rules in force in the country in which he is in business.[159]

Id. at 12.
Id.
Id. at 12-13.
Id. at 19-20.
Id. at 20.
Id.
Id.

Proposed article 13 provides that, "whatever the applicable law, in determining liability account shall be taken of the rules of safety and conduct which were in force at the place and time of the event giving rise to the damage." According to the commentary, "[t]aking account of foreign law is not the same thing as applying it: the court will apply only the law that is applicable under the conflict rule, but it must take account of another law as a point of fact, for example when assessing the seriousness of the fault or the author' s good or bad faith for the purposes of the measure of damages."[160]

The European Commission's proposed Rome II regulation must now be considered by the European Economic and Social Commission, and thereafter by the European Parliament.

5. CIDIP-VI

Topic III on the agenda of CIDIP-VI was "Conflict of laws concerning extracontractual liability, with an emphasis on the issue of proper jurisdiction and applicable law with respect to international civil liability for cross-border pollution." Its genesis was the proposal by the delegation of Uruguay to CIDIP-V that the issue "International Civil Liability for Transboundary Pollution: Private International Law Aspects" be included on the agenda of CIDIPVI. In preparation for a Meeting of Experts to discuss the agenda of CIDIP-VI, the Secretariat of Legal Affairs prepared a background document in 1996 examining the possibility of addressing more generally the topic of "Conflict of Laws on Extracontractual Liability," but the document concluded that the "broad topic . . . does not lend itself to ready study in the absence of specific issues."[161] The document went on to consider the narrower topic of "Civil International Liability for Crossboundary Pollution." It noted that the issue is complex, in part because it is interrelated with state responsibility, and that "[m]any other international organizations have, or are in the process of working to resolve some of the issues."[162] It concluded that "[t]his may be seen as an indication that the area is still emerging and not ripe for codification," or, per contra, "it may be viewed as an opportunity for participation in the development of international law."[163]

During the Meeting of Experts held in Washington, D.C., in December of 1998, it was agreed that the topic of "Conflicts of laws on tort liability, with emphasis on jurisdiction and the law applicable to international civil liability for Transboundary Pollution" would be included in the agenda of CIDIP-VI, and that Uruguay would be the rapporteur of this topic. On February 7, 2000, a document prepared by Uruguay was distributed in anticipation of the first Meeting of Experts to prepare for CIDIP-VI, which was held in Washington, D.C., one week later (February 14-18).[164] After a brief overview of the work then being done on the topic by other organizations and a brief review of the national laws on the topic, the document proposed a particular approach to both choice of law and jurisdiction.

For choice of law, proposed the adoption of the following approach:

a. To maintain the traditional solution of lex loci actus (the law of the State in which the conduct causing the harm has occurred).

b. To give the plaintiff (the victim) the option of choosing between the lex loci and the law of the State affected by the harm, if the harm is manifested in a State other than that in which the polluting activity occurred.

c. If the polluter and the victim have their domicile, usual place of residence, or commercial establishment in a single State, to designate the law of such State as the applicable law.

d. To incorporate a provision on the ambit and scope of the applicable law, which would implicitly contain the international elements of the case.[165]

Although the language quote above indicates that the victim is to choose the applicable, a footnote explains that in fact the judge would be "in charge of weighing the

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Id. at 25.
OEA/Ser. K/XXI RE/CIDIP-VI/doc.7/98, at 9.
Id. at 22.
Id.
Conflict Of Laws On Tort Liability, With Emphasis On Jurisdiction And The Law Applicable To International Civil Liability For Transboundary Pollution, OEA/Ser.K/XXI REG/CIDIP-VI/doc.5/00, Feb. 7, 2000.
Id. at 20.

option[s], [and] would choose the law most favorable to the victim."[166] Another footnote explains why the rapporteur rejected the requirement found in the law of Québec and Switzerland, under which the *lex damni* can be applied only if the perpetrator could have foreseen that his conduct would produce harm there. According to the footnote, "[t]his condition appears to limit the rights of the victim to have his law applied . . . . Furthermore, this 'possibility of foreseeing' would not be consistent with the negligence with which the polluter presumably acted."[167] The proposal would thus have given to the plaintiff a wider and less constrained choice than the existing national laws discussed in the document.

With respect to jurisdiction, the document noted that national laws have approved the institution of proceedings in the state of the respondent's domicile, the state where the act causing the injury were performed, and the state where the injury was suffered. The document then goes on to propose the following rule:

Actions for civil liability shall be subject, at the plaintiff's option, to the jurisdiction of the State:

a. in which the polluting activity was performed;

b. in which the harm was suffered;

c. in which the plaintiff or respondent has his domicile, usual place of residence, or commercial establishment."[168]

Here, too, the proposed solution was more favorable to the victim than the existing national laws discussed in the document. In this case, the proposal went beyond existing solutions by providing for jurisdiction in the state of the plaintiff's domicile or usual place of business. If the plaintiff was injured in that state, then the provision produces the same result as a provision calling for jurisdiction in the state where the harm was suffered. But the document makes it clear in a footnote that the state of the plaintiff's domicile would have jurisdiction even if the harm was suffered elsewhere.[169] The footnote defended this solution on the ground that it "makes it easier for the victim to sue."[170] As a precedent, the document cites the Uruguayan-Argentine Convention on Liability for Traffic Accidents and the Mercosur San Luis Protocol.[171] The footnote also cited an article by Didier Opertti Badan stating that, "in the face of a denial of justice for the victims in the responsible State, it [sh]ould be possible to recur to the jurisdiction of the victim's domicile or place of residence."[172] This suggests that the jurisdiction of the state of the plaintiff's domicile was intended to be a fall-back that would become available only if the courts of the other states declined jurisdiction. However, the proposal was not stated in such terDr.

Finally, it appears that the proposed convention was intended to prohibit states-parties to decline jurisdiction if they possessed it under the terms of the convention. Specifically, a footnote indicated that dismissal of actions on forum non conveniens grounds would not be permitted.[173] Additionally although the Mozambique is not specifically mentioned, the proposal would appear to eliminate that rule for the states that current follow it.

The Meeting of Experts took place from February 14-18, 2000, and most of it focused on the other two Topics on the agenda of CIDIP-VI.[174] On the penultimate day of the meeting, Uruguay presented a document titled Bases for an Inter-American Convention on Applicable Law and Competency of International Jurisdiction with respect to Civil Liability for Transboundary Pollution,[175] setting forth a draft convention on the topic. It consisted of six articles, with one article addressing "competent jurisdiction" and one addressing "applicable

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Id. at 20 n.34. As a precedent for this approach, the document cites the Inter-American Convention on Support Obligations (Montevideo 1889). *See id.*

Id. at 20 n.35.

Id. at 21.

Id. at 21 n.41.

Id.

Id. It is worth noting, however, that these instruments involve neighboring states; the same solution may not be appropriate where the state of the plaintiff's domicile may be far away from where the activity and the injury occurred.

Id. (citing Didier Opertti Badan, Derecho Internacional Privado y Medio Ambiente (La contaminación transfronteriza y el derecho internacional privado), *in* MEDIO AMBIENTE Y DESARROLLO 150 (Montevideo 1992).

Id. at 44.

See Diego P. Fernández Arroyo, La CIDIP VI: ¿Cambio de Paradigma en la Codificación Interamericana de Derecho Internacional Privado?, at 469.

law." Article 4 on competent jurisdiction set forth the rule described above, giving the plaintiff the option of bringing suit in the state where the harmful events took place, where the injury was suffered, or where the plaintiff or the defendant were domiciled or had their habitual place of residence or their business.[176] Article 5 on applicable law would give the plaintiff the option of choosing the applicable law, but the plaintiff's options were now expanded to include not just the law of the State in which the pollution originated or in which the injury was suffered, but also the state in which he is domiciled or has his habitual place of residence or business.[177] No explanation was given for allowing the plaintiff to sue in states that may have little or no connection to either the injury or the events giving rise to the claim. A footnote indicates that "[c]onsideration could be given" to assigning to the judge the task of choosing the law most favorable to the victim.[178]

The Draft Convention was discussed at the Meeting of Experts on February 17, but the records of that meeting do not reveal the substance of the discussion.[179] It was decided that a drafting committee would be formed and that Uruguay would chair it.[180] Member States were asked to advise the members of the drafting group of any judicial rulings or verdicts concerning "verified instances of transboundary pollution."[181] Member States were also invited to send their comments on the documents presented to the General Secretariat for forwarding to the other Members. Finally, it was decided that a meeting of the working group would be held "toward the end of 2000 . . . to prepare the final version of the convention," if the necessary resources were available.[182] (It appears that the contemplated working group meeting never took place.)

On October 4, 2000, the Permanent Council distributed to the Member States for their comments a document prepared by Uruguay consisting of a cover letter and an accompanying "Preliminary Draft Inter-American Convention on Applicable Law and Proper International Jurisdiction in Matters of Civil Liability for Cross-Border Pollution."[183] The draft convention again consisted of six articles, with one article addressing "proper jurisdiction" and one article addressing "applicable law." Article 4 on jurisdiction was the same in substance as the draft presented in February. Article 5 on applicable law modifies the February draft by omitting the language that would have allowed the plaintiff to choose the law of his own domicile. The cover letter notes that allowing the plaintiff to choose between the law of the place of the harmful act and the law of the place of injury "is established in many sources of law," including "*inter alia*, German private international law, the laws of Switzerland, Slovakia, Greece, Hungary, the Czech Republic, and former Yugoslavia, and the recent codifications of private international law of Estonia, Tunisia, Venezuela, and Italy."[184]

The only comments received were from Colombia, which stated that, under Colombian law, most procedural rules were matters of public order that could not be determined by the parties. [185] However, it noted that there were exceptions to this principle. The memorandum proposed the drafting of a set of articles allowing the plaintiff to select the forum, but proposed deleting article 5 concerning applicable law. It expressed the view that, if the plaintiff were permitted to choose the forum, then a separate article purporting to allow him to select the applicable law would be unnecessary, as his choice of forum "will be accompanied by the law to be applied in the event of a claim for damages suffered as a result of transboundary pollution." It is unclear whether the memorandum was assuming that the forum would be applying its own substantive law, or its own choice of law rules. In any event, Colombia appears to have had a strong objection to a provision under which the applicable law would be determined by one of the parties.

Id. at 2.
Id.
Id. at 2 n.2.
Report of the Meeting of Governmental Experts to Prepare for the Sixth Inter-American Specializd Conference on Private International Law (CIDIP-VI), OAS/REG/CIDIP-VI/doc.6/00 corr. 2, Mar. 14, 2000.
Id. at 11.
Id.
Id. at 12.
OEA/Ser. G CP/CAJP-1688/00.
Id. The letter does not mention that some of these laws permit the choice of the law of the place of injury only if the perpetrator could have foreseen that his conduct would cause injury there, a provision purposely omitted from the draft.
Position of the Legal Office of the Ministry of Foreign Affairs on the Preliminary Draft Inter-American Convention on Applicable Law and Competency of International Jurisdiction in Cases of Civil Liability for Transboundary Pollution (presented by the delegation of Colombia, CP/CAJP-1836/01, Oct. 22, 2001.

On February 4, 2002, the day the CIDIP conference began, Uruguay suddenly shifted its focus. It presented a document proposing a convention that would address jurisdiction and choice of law for the broad topic of non-contractual liability, rather than just for disputes concerning transboundary pollution. In explaining its shift, the Uruguayan delegation stated that, "although it is perfectly understandable that because of their specific natures, some matters require special, independent regulations (e.g., manufacturers' liability for their products, crossborder pollution, road accidents, etc.), it would seem important to regulate extracontractual liability in general, as a broad category, which would allow legal practitioners to evaluate, within it, the infinite range of legal relations that arise in the real world every day and that it would be impossible for lawmakers to address individually."[186] This broader project, the delegation stated, "has a higher priority" than the regulation of specific narrower categories.[187]

In the light of Uruguay's last-minute shift, it is no surprise that no agreement was reached on this topic at CIDIP VI. Given that the proposal was not made until after the start of the Conference and had not been the subject of any prior discussions among the Member States, the proposal for a convention to regulate jurisdiction and choice of law in the broad area of extracontractual liability did not stand a chance of success.

More important for present purposes is whether the proposal of a narrower convention concerning jurisdiction and choice of law for transboundary pollution would have succeeded. Professor Fernandez Arroyo has suggested that Uruguay's late shift of course was attributable to "the manifest opposition of certain states, from the outset, to the development of the topic of transboundary pollution at the Inter-American level."[188] The Canadian delegation, in particular, expressed the view at CIDIP-VI that this topic should be addressed at the global rather than the regional level.[189] If there were significant objections to this project of this nature, then there would appear to be little hope for success if the project were resurrected now.

On the other hand, Professor Fernández Arroyo has also expressed the view that the lack of success of this topic may have been a result of the failure of Uruguay to flesh out the topic sufficiently prior to the Conference. In the view of Fernández Arroyo, the lack of adequate preparatory work sealed the fate of the proposal. He notes that the proposal for an Inter-American instrument on transboundary pollution excited the greatest interest among the participants at the initial Meeting of Experts in 1998. Uruguay failed to transform this rhetorical interest in protection of the environment into a willingness by Member States to develop the technical-juridical aspects of the topic.[190] The comments of the delegations of the United States and Canada in the Third Committee suggest that their opposition to the proposal was attributable in large part to the lack of adequate preparatory work.[191] If this was the reason for the failure of this topic at CIDIP-VI, the topic would not necessarily meet the same fate at CIDIP-VII.

Finally, it is possible that the opposition to the Uruguayan proposal was attributable in part to the content of the draft convention proposed by Uruguay. The proposal adopted an approach that was more favorable to the plaintiff than virtually all of the existing national laws. The idea of selecting the law that is more favorable to the victim is an unorthodox one, particularly in this Hemisphere.[192] The documents presented by Uruguay noted that the approach had been adopted in a number of countries, largely in Europe, but they did not explain why this approach was preferable to the *lex damni* approach. While it seems reasonable to afford the victim the protection provided by his own law, some Member States may have questioned why the victim should be entitled to claim the protection of a law other than the one of the state in which he is domiciled and his injured property is located. From the victim's perspective, it might be regarded as fortuitous that the event causing his injury had its origins in a different state; to give him the benefit of the law of the defendant's

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Statement of Reasons at 16-17.

Id. at 17.

Fernández Arroyo, *supra*, at 477. If so, then, as Fernández Arroyo observes, its strategy was sure to fail. If the delegations were opposed to the development of the narrow topic of transboundary pollution at the regional level, then they would be unlikely to be more amenable to the development of a broader topic that includes transboundary pollution. *Id.*

Report of the Rapporteur of Committee III, CIDIP-VI/Comm.III/doc.2/02 rev.3 at 2.

Fernández Arroyo, *supra*, at 479.

Report of the Rapporteur of Committee III, at 1-2.

See quotations from Professors Symeonides and Riemann, *infra*.

domicile, if that happens to be more beneficial, might thus be regarded as a windfall. Additionally, some states may have perceived the proposed rule as giving one side of the litigation an unfair advantage. And at least one state (Colombia) had concerns that the proposal contravened traditional principles under which procedural matters are for the court, not the parties to decide. There may well be convincing answers to these questions, but there was little opportunity to air these concerns, much less to debate them. Moreover, to the extent the argument for giving the victim the benefit of that law is based the desire to select the law most beneficial to the environment, the solution seems based on substantive policy relating to environmental law rather than concerns having strictly to do with private international law. If it were thought desirable to choose a choice of law rule by reference to substantive environmental law policies, perhaps a greater participation by specialists in environmental law would appear to be appropriate.

A second aspect of Uruguay's proposal that was likely perceived as controversial was its prohibition of forum non conveniens dismissals. This topic is highly contested in this Hemisphere. The solution proposed by Uruguay would have been welcomed in much of the Hemisphere, but it was undoubtedly regarded as highly problematic in other parts of the Hemisphere. At the Hague Conference a compromise was reached on this issue. The CIDIP proposal would have completely eliminated the doctrine, with the only discussion of the issue appearing in a footnote.

6. Conclusions

It is most likely that the failure of the topic at CIDIP-VI was the result of a combination of concerns about the substance of the proposal, concerns about treating the topic at the regional rather than the global level and about the complexity of the topic, and the lack of adequate preparatory work. There may well have been convincing responses to the Member States' substantive concerns, but the Member States were not provided a forum in which to air these concerns, much less to debate them. It is possible that, with sufficient preparatory work, agreement could be reached on an Inter-American private international law instrument in the area of transboundary environmental damage having a content somewhat different from the one proposed in CIDIP-VI. It may even be possible, although less likely, that, with a great deal more preparatory work, agreement could be reached on the instrument that was proposed at CIDIP-VI.

In the end, the Member States are in a better position to judge the reasons for the failure of the topic at CIDIP VI. Leaving that question aside, it would appear that the topic of transboundary environmental damage is a complex and problematic topic with which to begin an Inter-American attempt to harmonize jurisdiction and choice of law in the field of non-contractual liability. The complications derive from the fact that there are numerous instruments addressing substantive aspects of the topic, and the complex relation between the public and private international law aspects and the public and private domestic law aspects of the topic. aspects of the topic. The fact that the ILC is considering aspects of this topic may suggest as well that the topic is unripe. On the other hand, the Hague Conference has deferred its consideration of the topic in part because the OAS may be taking it up. The complex set of international instruments that address various aspects of the substantive law in this field will inevitably leave differences among the substantive laws of the Members States on a number of issues, differences that will continue to give rise to problems of private international law. If the political sensitivity of the topic were not deemed too great, another attempt to address this topic would not be out of the question, provided sufficient resources are available to conduct the necessary preparatory work.

B. PRODUCT LIABILITY

Uruguay's final proposal to CIDIP-VI listed "manufacturers' liability for their products" among the categories of non-contractual liability that merited separate treatment.[193] When the Juridical Committee distributed its 2001 Questionnaire seeking proposals for possible topics for CIDIP VII, two prominent scholars of private international law – Professors Tatiana B. de Maekelt of Venezuela and Arturo Díaz Bravo of Mexico – likewise proposed the topic of liability for defective and injurious products.[194] Several other prominent professors have also deemed the topic of products liability an appropriate topic for private international law

Statement of Reasons, supra, at 16.

See Responses to CIDIP-VII Questionnaire by Tatiana B. de Maekelt & Arturo Díaz Bravo.

development, proposing special choice of law rules for the topic. Dean Symeonides has written that "[p]roducts liability conflicts are usually so much more complex than generic tort conflicts that they raise the question of whether a special set of choice-of-law rules might be necessary."[195] By offering his own set of special choice of law rules for this topic, he – and many others – have answered that question in the affirmative.

The Hague Conference has also answered that question in the affirmative. The Hague Conference embarked on the project of harmonizing choice of law for products liability cases at the global level in the early 1970s. The result was the Hague Convention on the Law Applicable to Products Liability (Hague Convention). [196] Although this convention has been in force for more than 25 years, it has been ratified by only one in five members of the Hague Conference, and has not been signed by any Member State in more than a decade.[197] More importantly, it has never been signed by any state in the Western Hemisphere.[198] The decision by the Hague Conference to tackle the topic of choice of law for products liability at the global level supports the conclusion that the topic is important enough to warrant the effort to negotiate an international instrument, and also indicates that the topic is reasonably manageable. The failure of the Hague Convention to attract ratifications in this Hemisphere, however, may suggest that a fresh look at this subject at the regional level may be appropriate.[199]

Despite the complexity of the subject matter, the topic of product liability appears to be an appropriate one with which to begin the process of harmonizing jurisdiction and choice of law in the Hemisphere in the area of non-contractual liability. First, numerous scholars have reached the conclusion that this field requires special choice of law rules. Second, the substantive laws in this area are fairly well-developed, and there are important differences in the laws on this subject among the nations of the Hemisphere, thus making it necessary in transnational cases for the court to select among potentially divergent laws. Third, special choice of law rules for product liability cases have already been adopted in a number of jurisdictions, and numerous additional proposals have been advanced by scholars. These may serve as models for an Inter-American instrument. Moreover, attempts to harmonize choice of law in this area have already been attempted by global and regional organizations. These attempts can serve as models, or as lessons in what to avoid.

Finally, Europe's experience with the Rome II proposal suggests that an effort to harmonize jurisdiction and choice of law in product liability cases is likely to attract the interest of numerous sectors of society,[200] including manufacturers and trial lawyers, who may well be willing to defray the cost of meetings of experts and the other studies that are so important to reaching a successful outcome.[201] For all of these reasons, the time appears to be ripe to pursue an Inter-American instrument concerning products liability through the CIDIP process.

1. Substantive Law

Transnational products liability consists of the legal responsibility of a party based in one country for injuries caused to a party in another country by a product whose relevant components were at some time in the first party's control. Although parties other than consumers may recover, the typical products liability action is brought by or on behalf of an injured consumer.

Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677, 749 (1992).

Hague Convention No. 22 on the Law Applicable to Products Liability, opened for signature Oct. 2, 1973, 11 I.L.M. 1283 (1972).

See The Hague Conventions: Signatures, Ratifications, and Accessions in the Member States of the Organization of American States as of December 19, 2002 [hereinafter Hemispheric Status of Hague Conventions], available at http://hcch.net/e/status/stat22e.html.

See id.

On the other hand, it may indicate that the Member States do not perceive a problem with the existing state of private international law on this subject.

When the European Commission sought comments on its draft Rome II regulation in May 2002, a large number of the comments received concerned the provision relating to product liability, most of them from affected businesses and bar groups.

See Fernández Arroyo, op.cit., at 482-484 (commenting on the "privatization" of CIDIP). Of course, the capture of the CIDIP process by interest groups favoring one side or another of a controversy should be avoided. However, the funding of groups of experts by sources representing a broad range of interests is less problematic, and may be necessary in the light of budgetary constraints.

The national laws in the Hemisphere governing product liability differ in important respects. The differences relate primarily to three major areas of product liability law – the legal standards governing liability, who can be subject to liability, and the measure of damages.[202]

(a) *Noncontractual theories of recovery*.

Common theories of liability available in the Hemisphere include strict liability, negligence, and failure to warn. Depending on the jurisdiction, one or more of these theories is available:

(i) *Strict liability vs. Negligence*

Under the strict liability standard, liability does not depend upon fault. Regardless of negligence or due care, liability arises "to one with whom [a party] is not in privity of contract, who suffers physical harm caused by the chattel."[203] Jurisdictions in the Hemisphere split on whether the strict liability standard applies to products liability actions brought by the consumer. U.S. jurisdictions provide for use of the strict liability standard. The standard has also recently been adopted in such Latin American jurisdictions as Brazil,[204] Argentina,[205] and Uruguay.[206] Yet a number of civil law jurisdictions, such as Chile, Venezuela, and Mexico, continue to use the negligence-like standard of *hecho ilícito* in products liability actions.[207] Nor does Canada generally impose strict liability on product manufacturers.[208] Therefore, unlike with other issues such as punitive damages discussed below, the split on this issue is not primarily between common law and civil law countries. (Even in the United States, however, a negligence standard applies if the action is brought by an injured bystander, as opposed to a consumer.)

(ii) *Failure to warn*

U.S. law also imposes liability for failure to warn users of pertinent product features and risks. Some civil law jurisdictions, such as Uruguay and Brazil, also require labels which provide relevant warnings. [209] Other nations of the Hemisphere do not recognize this theory of recovery.

(iii) *Other theories under U.S. law*

In addition to the above theories, U.S. law provides for liability for defective products using theories of implied warranty of merchantability, implied warranty of fitness for a particular purpose, express warranty, misrepresentation, and intentional torts.

(b) *Parties Subject to Noncontractual Liability*

As a general rule, in most all jurisdictions in the Hemisphere any private party can be liable for negligence or commission of an *hecho ilícito.* The law is rather uniform in this respect. The law diverges, however, as to who can be held strictly liable. Under U.S. law, any "commercial seller or distributor" of a product are subject to strict liability for injuries caused by the product.[210] Accordingly, U.S. law provides that the ultimate seller and any one or more

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National laws concerning product liability differ in other respects as well, such as the rules concerning the availability of class actions, discovery, juries, and defenses such as the state of the art, compliance with law, and unfit use.

WILLIAM PROSSER, TORTS 712 (10th ed.). For an overview of U.S. law of products liability, see Joachim Zekoll, *Liability for Defective Products and Services*, 50 AM. J. COMP. L. 121 (2002).

Brazilian Law 8.078/90.

Argentine Law 24.240/93.

Law 17.250/00.

See The Globalization of Products Liability Actions, Printed Materials and Audio Presentation by the Lex Mundi Toxic Tort & Products Liability Committee, Feb. 2001 Symposium (citing decline of the concept of *hecho ilicito* in Latin American products liability laws).

Robert F. Hungerford & Rupert M. Shore, *1997 Damages: A Catalyst for Jurisdictional Disputes in Aviation Accidents*, 62 J. AIR L. & COM. 1037, 1038 (1997). *But see* Eric C. Rose, *International Contractual Developments in Products Liability*, 371 PLI/Lit 175, 181 (1989) (observing that elements of strict liability are found in a number of Canadian court decisions).

Uruguay Law No. 17.250/00; 1990 Brazilian Consumer Defense Code, arts. 12-17 (including requirements relating to sufficiency and adequacy of information on risks and proper uses), *cited in* Pinheiro Neto Advogados, DOING BUSINESS IN BRAZIL, Vol. I, § 25.129 (2003).

RESTATEMENT (THIRD) OF THE LAW OF TORTS – PRODUCTS LIABILITY § 1 (1998) ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property

of the parties in the chain of distribution, including the original manufacturer, can be held strictly liable for injuries caused by a product. By contrast, in Canada and in many Latin American jurisdictions no parties in the supply chain are subject to strict liability. Only recently have some Latin American jurisdictions, such as Brazil[211] and Uruguay,[212] adopted an approach similar to that in the United States under which a party can be held liable even when the party has no direct contact or contract with the injured person.

(c) *Recoverable Damages*

Another area in which the laws of the Hemisphere diverge is damages. Laws relating to punitive and compensatory damages are quite varied.

(i) *Punitive damages*

Common law jurisdictions tend to allow punitive damages, with some limitations. For example, U.S. law allows punitive damages where a defendant has acted maliciously and with reckless disregard for the injured party. Punitive damage awards in the United States are subject to some limitations, whether under the laws of a majority of states or the federal Constitution, which places Due Process limitations on grossly excessive punitive damage awards.[213] Like the United States, Canada allows punitive damages and has not adopted any federal legislation capping these damages. However, punitive damages are reportedly rare in Canada, in part because of judicial restraint.[214] By comparison, most civil law jurisdictions do not allow punitive damages.[215]

(ii) *Compensatory damages*

There are a number of ways in which jurisdictions in the Hemisphere conceive of recoverable compensatory damages. These include injury to the person, injury to property, and purely economic loss. First, there does not appear to be any jurisdiction in the Hemisphere that does not provide for recovery for personal injury caused by a defective product. This category of injury often includes pain and suffering (*daño moral*). In addition, most jurisdictions in the Hemisphere provide for recovery of damage to property caused by a product. U.S. law also provides that, in actions based upon breach of warranty, the injured party can seek damages for purely economic loss (e.g., lost earnings or profits). A claim for lost profits (*lucro cesante*) is also available in most Latin American countries. While all three of these categories of compensatory damages are therefore available in some form in many common and civil law jurisdictions in the Hemisphere, the typical amount of recovery in each of these categories for a given injury can vary widely among jurisdictions.

2. Choice of Law

Despite the complex and unique issues which often arise in products liability actions, very few jurisdictions in the Hemisphere use a specific approach to choice of law in this area. Though courts in these jurisdictions doubtless tailor their general approaches when faced with product liability cases, Québec and Louisiana are the only jurisdictions to have enacted legislation abrogating the general approach to choice of law for issues of noncontractual liability in favor of a specific approach for certain products liability actions.

Most common law jurisdictions in the Hemisphere, including those in the United States and Canada, apply standard choice of law approaches in products liability actions. U.S. courts tend to apply the general choice of law approach used in tort cases in the state where the court sits, whether the Restatement approach, *lex loci delicti*, or other approaches

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caused by the defect.")

1990 Brazilian Consumer Defense Code.

Uruguay Law No. 17.250/00 (holding supplier, manufacturer, and importer primarily liable; exculpating retailer and distributor except where the supplier, manufacturer, or importer cannot be found or the injury was caused by mishandling by the distributor or merchant).

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1998).

Trebilcock, *The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis*, 24 SAN DIEGO L. REV. 929 (1987), cited by Ralph A. Winter, *The Liability Crisis and the Dynamics of Competitive Insurance Markets*, 5 YALE J. REG. 455 (1988).

Cf. Model Inter-American Law on Secured Transactions and Commentaries, 18 ARIZ. J. INT'L & COMP. L. 605, 653 (2001) (noting that in Latin America plaintiff debtors "generally will not be entitled to punitive damages").

described earlier.[216] This is even true for Louisiana.[217] *Depeçage* is also used by some U.S. courts to account for the unique nature of products liability actions. For example, courts may select U.S. law to govern the issue of liability and foreign law to govern the issue of damages. As in the United States, choice of law for products liability actions in Canadian common law provinces are largely subject to the standard choice of law approach used in each jurisdiction.

Similarly, most civil law countries in the Hemisphere determine the law applicable to transnational products liability actions according to the choice of law approach used for noncontractual liability generally. Most civil law states follow lex loci delicti, although Mexico follows lex fori, and Venezuela and Perú have adopted the principle of ubiquity. The only civil law jurisdictions to have adopted a specific rule for product liability cases are civil-law jurisdictions in predominantly common-law countries: Québec and Louisiana. The Québec rule only displaces the general rule when determining the law applicable to manufacturers. The Québec Civil Code provides that the law applicable to the liability of the manufacturer of a movable good can be chosen by the victim, between the law of place of the manufacturer's domicile or the place where the product was acquired.[218]

The relevant provision of Louisiana's choice-of-law statute provides that "[d]elictual and quasi-delictual liability for injury caused by a product, as well as damages, whether compensatory, special, or punitive, are governed by the law of this state: (1) when the injury was sustained in this state by a person domiciled or residing in this state; or (2) when the product was manufactured, produced, or acquired in this state and caused the injury either in this state or in another state to a person domiciled in this state," except where "neither the product that caused the injury nor any of the defendant's products of the same type were made available in this state through ordinary commercial channels."[219] Where the conditions specified in the section are not satisfied, the applicable law is to be determined by Louisiana's general choice of law rules for non-contractual liability.

3. Jurisdiction

In transnational products liability actions, most states in the Hemisphere appear to apply the approaches taken to jurisdiction for non-contractual liability generally. For example, the United States determines jurisdiction in products liability actions by applying the general jurisdictional norms, as interpreted in this specific area of the law. While the foreseeability element typical in U.S. long-arm statutes can be applied without great difficulty, the second requirement – the Constitutional Due Process requirement – usually gives rise to more complex analysis. In the 1987 *Asahi Metals* case, a plurality of the Court announced that, under the Due Process clause, courts only have jurisdiction over nonresident defendants in products liability actions if the defendant took certain actions purposefully to avail themselves of the forum state's laws.[220] This approach requires more than just placement of a product into the stream of commerce which eventually flows into the forum state. Under this view, more positive action is required, such as designing the product for use in the forum, advertising in the forum, or selling the product to a distributor whose distribution network is known to include the forum.[221] Because the view was not announced by a majority of the Court, however, lower courts since *Asahi* have not uniformly applied this approach.[222]

Canadian common law jurisdictions also use their general approach to jurisdiction in products liability actions. For a little more than a decade, common law provinces in Canada

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See, e.g., Sanchez v. Brownsville Sports Center, Inc., 51 S.W. 3d 643, 668 (Tex. Ct. App. 2001) (applying Restatement approach under Sections 6 and 145 to products liability action, resulting in application of forum law to accident in Mexico caused by ATV originally sold in Texas forum); Land v. Yamaha Motor Corp., U.S.A., 272 F.3d 514 (7th Cir. 2001) (applying *lex loci delicti* to products liability action, resulting in application of Indiana SOL to accident in Indiana caused by watercraft introduced into stream of commerce in Japan).

Marchesani v. Pellerin-Minor Corp., 269 F.3d 481 (5th Cir. 2001) (applying Louisiana Civil Code comparative impairment approach for torts to products liability action).

Civil Code of Québec, art. 3128.

La. Civ. Code Ann. art. 3545 (West 1992).

Asahi Metal Indus. Co. v. Sup. Ct. of Cal., 480 U.S. 102 (1987).

Id.

Another question the Supreme Court has yet to resolve is whether a defendant's targeting of the U.S. market as a whole is sufficient to give rise to personal jurisdiction in all states. A number of lower court decisions have found foreign defendants' national contacts to give rise to such nationwide jurisdiction. *See* Alan J. Lazarus, *Jurisdiction, Venue, and Service of Process Issues in Litigation Involving a Foreign Party*, 31 TORT & INS. L.J. 29, 45 (1995) (reviewing cases comprising circuit split on this issue).

have been using a "real and substantial connection" test under which courts take jurisdiction only over foreign defendants who show a real and substantial connection to the forum state, as guided by notions of "order and fairness."[223] The Supreme Court of Canada subsequently applied this standard in *Hunt v. T&N PLC*, a domestic products liability action.[224] In cases involving defendants located in foreign countries, Canadian courts also apply the doctrine of comity in the personal jurisdiction analysis.[225]

As with the United States and Canada, most Latin American jurisdictions also apply their general approaches to jurisdiction over transnational noncontractual liability. Neither the Bustamante Code nor the Treaties of Montevideo provide special jurisdictional rules for products liability. The general rule is that the suit may be brought in the place of habitual residence of the defendant and, in addition, in the place where the act causing the injury occurred. The lack of a specific approach in these instruments can be at least partially explained by looking to the time period when the instruments were enacted. When these treaties were concluded, widespread industrialization had not yet occurred throughout the Hemisphere and liability for injuries caused by products was not the common issue it is today. Given the advent of regional trade integration since the negotiation of these instruments, the time may have come to revisit the issue at the regional level.

The Rule of Mozambique would not be applicable in product liability cases. The forum non conveniens doctrine, however, is sometimes applied to dismiss transnational product liability cases brought in the U.S. courts,[226] although the issue arises less frequently in such cases than in cases involving transboundary environmental damage. An attempt to harmonize jurisdiction in the area of product liability could thus provide an opportunity to address this issue in a context in which it would have less of an impact. Alternatively, if the issue turned out to be intractable, it could be left unaddressed in an instrument focusing on product liability.

4. Prior Attempts to Harmonize Choice of Law and Jurisdiction in This Field

a. Choice of Law

(i) *Hague Convention on the Law Applicable to Product Liability*

The Hague Conference has produced the only multilateral treaty relating to choice of law in a transnational products liability action. The Hague Convention on the Law Applicable to Products Liability (Hague Convention) has been in force for more than 25 years. However, the Hague Convention has been ratified by only one in five members of the Hague Conference, has never been signed by any Member State in the Western Hemisphere,[227] and has not been signed by any Member State in more than a decade.[228]

The Hague Convention governs all persons in the chain of preparation or distribution but does not govern the party who sold or leased the injurious product to the consumer.[229] The choice-of-law principles contained in the Hague Convention are set forth in a series of complex interlocking rules. Under these rules, the law of the habitual residence of the victim applies whenever the victim was injured in that jurisdiction, or when that jurisdiction is also home to the defendant's principal place of business or was the jurisdiction place where the product was acquired.[230] Otherwise, the law of the place of the injury applies, provided this was also the place where the product was purchased or the defendant has its principal place of business.[231] Neither of these choice of law rules applies, however, if the defendant "could not reasonably have foreseen that the product or [its] own products of the same type would be made available in that [s]tate through commercial channels."[232] Finally, where these two

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Morguard Invs. Ltd., [1990] 3 S.C.R. at 1091 (announcing real and substantial connection test).
Hunt v. T&N PLC, [1993] 4 S.C.R. 289, 313 (Can.).
See id. (La Forest, J., discussing how the 'real and substantial connection' standard should be applied in international context).
See, e.g., Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804 (1986).
See Hemispheric Status of Hague Conventions.
See id.
Hague Convention, arts. 1 and 3(4),
Id. arts .4 and 5.
Id. art. 4.
Id. art. 7.

rules do not apply, the victim is permitted to choose the applicable law from among the law of the place of the injury or the defendant's principal place of business.[233]

The approach of the Hague Convention does not mirror any particular national approach, but rather combines a number of approaches. The application of the *lex loci deliciti commissi* is made subject to other "connecting factors." In accordance with the British "proper law" approach, the Convention requires at least two relevant contacts in the same state to regard that state as the one having the most significant relation with dispute such that its law must be applied. The approach bears a close resemblance to the approach of the Second Restatement of the Conflict of Laws in the United States, which should not be surprising, as the Chief Reporter of that Restatement, Professor Willis L.M. Reese, was also the Rapporteur of the Hague Convention.

Among commentators, the critical appraisal of the Hague Convention has been mixed. Some scholars regard the Hague Convention as a valuable contribution to international law. Others deem the Hague Convention a failure and argue for its revision.[234] Its provisions "have been criticized as kaleidoscopic and as deviating too much from the usual tort conflicts rules."[235] If the topic of product liability is selected as a topic for a possible private international law instrument in the Americas, it will be necessary to study in greater depth the reasons for the failure of the Convention to attract parties, especially in the Americas. The reason may have to do with the particular provisions in contains. In particular, the provision permitting the plaintiff to choose the law most favorable to his case may have struck many states as heterodox. As Professor Symeonides has written:

> The notion of letting the plaintiff choose the applicable law under certain circumstances was first advanced by the 1972 Hague Products Liability Convention. . . . As appealing as it might be to the conflicts expert, this idea sounds quite heretical to the uninitiated. This is why it has little or no chance of being accepted by the majority of state legislatures.[236]

Although Professor Reimann notes that Germany and Italy, as well as Estonia and Hungary, allow the plaintiff to select the most favorable law in certain circumstances,[237] he describes this as a "peculiar pro-recovery twist."[238] His use of an exclamation point when describing the provision of German law containing this plaintiff-favoring aspect[239] indicates that he believes his readers would find it surprising. Thus, even though the Hague Convention permits the plaintiff to choose the applicable law only in very limited circumstances, it is possible that many potential adherents to the convention could not bring themselves to adopt such an approach. If this is indeed the reason the Convention has not attracted more adherents, it is a problem that can be easily avoided.

In any event, the Hague Convention should still be carefully studied before commencing any work in this area. Although it represents a rare instance where common and civil law countries were able to conclude a treaty containing uniform standards governing choice of law for products liability,[240] it has also for some reason not been accepted in this Hemisphere. Any work on the topic at the regional level would have to be done with an awareness of why no OAS Member States have become party to the Hague Convention.

(ii) European Initiatives

One reason for the failure of the Hague Convention to attract many European adherents since it was adopted in 1973 may be fact that the Europeans have been pursuing

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Id. art. 6.

See, e.g., Russel J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 ILL. L. REV. 129, 156 (1989) (describing the Convention as a "good example" of how treaties can be used to unify choice of law relating to mass torts); Willis L.M. Reese, *Further Comments on the Hague Convention on the Law Applicable to Products Liability*, 8 GA. J. INT'L & COMPL. L. 311 (1978).

Matthias Reimann, *Codifying Torts Conflicts: The 1999 German Legislation in Comparative Perspective*, 60 LA. L. REV. 1297, 1311 (2000) (citing GERHARD KEGEL, INTERNATIONALES PRIVATRECHT 558 (7th ed. 1995) and opining that the criticisms "are well-taken").

Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677, 755 n.324 (1992).

See Riemann, *supra*., at 1307 n.52. *See also supra* text accompanying note 202 (describing Québec law); *infra* text accompanying note 234 (desribing Swiss statute).

Id. at 1300.

Id.

See Report by Ana Elizabeth Villalta, Aug. 2002, *supra*.

the harmonization of the substantive law of product liability since the mid-1970's. "At least within Europe, the need for unification of conflicts rules in this area has diminished because of the harmonization of substantive product liability law."[241]

In 1977, the Member States of the Council of Europe signed the European Convention on Products Liability in Regard to Personal Injury or Death, known as the Strasbourg Convention.[242] In article 3, the contracting parties agree to recognize strict liability of manufacturers for defective products causing death or personal injuries, although, according to article 4, the compensation may be reduced if the injured party was contributorily negligent. Article 12 provides that the Convention "shall not affect any rights which a person suffering damage may have according to the ordinary rules of contractual or extracontractual liability." Thus, the states-parties may continue to apply their laws of product liability, so long as they recognize the minimum level of liability provided for in the Convention. This convention has never entered into force, but its principal provisions were incorporated into a Directive of the European Council of 1985, which likewise provides for the strict liability of manufacturers for defective products and allows Member States to impose more stringent rules of liability on manufacturers.[243]

Because the Directive permits Member States to deviate from the Directive's provisions by imposing more stringent rules of liability, choice of law issues are not entirely irrelevant on that Hemisphere. The proposed Rome II regulation would, if adopted, include a specific provision for product liability.[244] In the Commission's view, the choice of law rule for product liability must "respect the parties' legitimate expectations, [but also] reflect also the wide scatter of possible connecting factors (producer's headquarters, place of manufacture, place of first marketing, place of acquisition by the victim, victim' s habitual residence), accentuated by the development of international trade, tourism and the mobility of persons and goods in the Union."[245] The Commission considered the basic rule of *lex damni* to be inappropriate in the product liability context because the place of the injury could in many cases be fortuitous and "unrelated to the real situation."[246] In its view, 'the large-scale mobility of consumer goods means that the connection to the place where the damage is sustained no longer meets the need for certainty in the law or for protection of the victim."[247] The Commission also rejected the approach of the Hague Convention as unnecessarily complex. Because insurers are very often involved in product liability cases, and consequently the rate of out-of-court settlements is very high, a simple and predictable rule is necessary.[248] The Commission selected the following rule:

Without prejudice to Article 3(2) and (3), the law applicable to a non-contractual obligation arising out of damage or a risk of damage caused by a defective product shall be that of the country in which the person sustaining the damage is habitually resident, unless the person claimed to be liable can show that the product was marketed in that country without his consent, in which case the applicable law shall be that of the country in which the person claimed to be liable is habitually resident.[249]

One question that should be considered before initiating an effort at harmonization in the commercial sphere is whether to harmonize the substantive law or instead the rules concerning jurisdiction and choice of law. The European experience shows that this issue does not necessarily present just a binary choice. We in the Americas could elect to pursue both. Although efforts to harmonize substantive law do not necessarily obviate the choice of law problem, they may well reduce the occasions to choose among discrepant laws. Although, in Europe, the attempts to harmonize substantive law in the field of product liability and the attempts to harmonize choice of law have been pursued in different fora at different

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Riemann, *supra*., at 1311.

European Treaty Series No. 91, Jan. 27, 1977.

Council Directive of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Prodicts (85/374/EEC).

Proposed Rome II regulation, supra, at 14.

Id.

Id. at 13-14. It gave the example of "a German tourist buying French-made goods in the Rome airport to take to an African country, where they explode and cause him to sustain damage." *Id.* at 14 n.25.

Id. at

Id.

Proposed Rome II regulation, art. 4. Rule 3(2) provides that, if the plaintiff and defendant have a common domicile, the law of that state applies. Rule 3(3) provides that, in exceptional cases, the law of another state shall apply "where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with" that state.

times, there is nothing to prevent us in the Americas from pursuing both at the same time. Indeed, the CIDIP process has been an innovator in this respect, having produced a hybrid instrument concerning the choice of law for contractual liability.[250] Similarly, the OAS may wish to pursue a hybrid instrument concerning product liability – one that seeks to harmonize substantive law to some extent and goes on to address the questions of jurisdiction and choice of law, which will remain important because residual differences in the substantive law will inevitably remain.

(b) *Jurisdiction*

The issue of jurisdiction in products liability actions has not been addressed either at the regional or the global level. Negotiations at the Hague Conference's Jurisdiction and Judgments Project did not produce any provisions specifically addressing jurisdiction in transnational products liability actions. We are informed, however, that the points of contention that ultimately led to the failure to reach agreement on a convention generally regulating jurisdiction in civil and commercial matters did not have to do with cases concerning product liability.

At the subregional level, MERCOSUR has adopted an instrument relating to jurisdictional norms applicable in transnational products liability actions.[251] The MERCOSUR Santa Maria Protocol on International Jurisdiction over Matters of Consumer Relations grants jurisdiction to the courts in the consumer's domicile for actions brought by the consumer against the supplier. In addition, if the consumer consents or other exceptional circumstances apply, jurisdiction will also lie in the place where the defendant delivers the goods or in the defendant's domicile.[252]

5. Other Possible Models

In addition to the statutes and international instruments described above, an Inter-American attempt to harmonize choice of law and jurisdiction in this field should consider as possible models the Swiss statute establishing special choice of law rules of product liability, as well as the proposals that have advanced by scholars in this area.

Article 135(1) of the Swiss Statute on Private International Law of 1987 provides that "[c]laims based on a defect in, or a defective description of, a product are governed, at the choice of the injured party, (a) by the law of the state in which the tortfeasor has his place of business or, in the absence thereof, his habitual residence, or (b) by the law of the state in which the product was acquired, unless the tortfeasor proves that the product has been marketed in that state without its consent."[253]

Professor Cavers has offered a solution to the choice of law issue in product liability cases, according to which

(a) the claimant should be entitled to the protection of the liability laws of the State where the defective product was produced (or where its defective design was approved.

(b) If, however, the claimant considers the liability laws of that State (i) less protective than the laws of the claimant's habitual residence where either he had acquired the product or it had caused harm or (ii) less protective than the laws of the State where the claimant had acquired the product and it had caused harm, then the claimant should be entitled to base his claim on whichever of those two States' liability laws would be applicable to his case.[254]

See Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 AM. J. COMP. L. 195, 206 (1997).

Cf. Jason Farber, *NAFTA and Personal Jurisdiction: A Look at the Requirements for Obtaining Personal Jurisdiction in the Three Signatory Nations*, 19 LOY. L.A. INT'L & COMP. L.J. 449, 465-66 (1997) (noting that NAFTA only touches indirectly on the issue of personal jurisdiction).

Protocolo de Santa Maria Sobre Jurisdicão Internacional em Materia de Relacões de Consumo, Mercosul/CMC/Dec. No. 10/96, arts. 4-5, available at http://www.mrecic.gov.ar/comercio/mercosur/normativa/decision/1996/dec1096.htm.

1988 BB I 5, 1988 FF I 5, art. 135(1) (Switz.).

David F. Cavers, *The Proper Law of Producer's Liability*, 26 INT'L L. Q. 703, 728 (1977).

Professor Kozyris has proposed a choice of law rule for product liability cases under which the applicable law would be "the state of intended use of the product at the time of delivery to the original acquirer."[255]

In 1990, Professor Russell Weintraub published a proposed choice of law framework for international products liability actions.[256] This proposal, which Professor Weintraub continued to advocate as recently as four years ago, calls for a bright-line rule intended to discourage forum shopping by reducing the importance of party autonomy in the choice of law consideration:

> To determine liability and the measure of compensatory and punitive damages for injuries caused by a product, apply the law of the injured person's habitual residence, whether this law is more or less favorable to the injured person than the law of other countries that have contacts with the defendant and the product, except:
>
> 1. The injured person is not entitled to the favorable law of her habitual residence if the defendant could not reasonably have foreseen that the product or the defendant's products of the same type would be available there through commercial channels.
>
> 2. Law of a country that is not the injured person's habitual residence, but is where the defendant has acted and is favorable to the injured person, should be applied when this is desirable to punish and deter the defendant's outrageous conduct.[257]

A decade later, Dean Symeon Symeonides offered an approach according great weight to the choice of the plaintiff:

> § 5. Products Liability
>
> 1. Victim's choice. Liability and damages for injury caused by a product are governed by the law of the state chosen by the injured party, provided that that state has any two of the following contacts: (a) place of injury; (b) domicile of the injured party; (c) domicile of the defendant; (d) place of manufacture of the product; or (e) place of acquisition of the product. [For the purposes of this choice, contacts situated in different states whose law on the particular issue is substantially identical shall be treated as if situated in the same state.]

Although all of these proposals revolve around the same sorts of contacts, they provide for different choices of law in particular circumstances. To illustrate the differences, it is useful to consider how they would apply to a particularly problematic, if unusual, set of facts: A person domiciled in state *A* is injured in state *B* by a product he purchased in state *C,* which was manufactured in state *D* by a manufacturer having its principal place of business in state *E.* The Hague Convention on the Law Applicable to Products Liability would allow the plaintiff to choose between the laws of either state *B* or *E.*[258] The Swiss conflicts statute would let the plaintiff choose between states *C* and *E.*[259] Under Professor Cavers' proposal, the law of state *D* would apply.[260] Professor Kozyris would apply the law of state *C* as the state of the "original delivery" and presumed "intended use" of the product.[261] Professor Weintraub would apply the law of state *A,* unless the product was not available there through ordinary commercial channels.[262] Finally, Dean Symeonides would allow the plaintiff to choose the law of any of the above states, as long as at least one of the other states has the same law.[263] In summary, the results would be as follows: Hague, *B* or *E;* Swiss, *C* or *E;*

P. John Kozyris, *Choice of Law for Product Liability: Whither Ohio?*, 48 OHIO ST. L.J. 377, 383 (1987).
Russell J. Weintraub, *A Proposed Choice-of-Law Standard for International Products Liability Disputes*, 16 BROOK. J. INT'L L. 225 (1990).
Weintraub, *Choice of Law for Products Liability: Demagnetizing the United States Forum*, 52 Ark. L. Rev. 157, 164 (1999), citing Weintraub, Proposal, *id.*.
Hague Convention, art. 6.
See supra (discussion of Swiss statute).
See supra (discussion of Professor Cavers' proposal).
See supra (discussion of Professor Kozyris' proposal).
See supra (discussion of Professor Weintraub's proposal).
See supra (discussion of Dean Symeonides' proposal).

Cavers, *D;* Kozyris, *C;* and Weintraub, *A*; Symeonides, *A, B, C, D,* or *E*, if one other states' laws is the same.

6. Conclusions

Although the commentators are not in agreement about the best approach to employ in complex cases, the question has been the subject of intense study for decades and it is unlikely that further study would produce a scholarly consensus. Thus, the time may well be ripe for discussion of the issue in an Inter-American forum and the selection of one approach or another solution from among the rich array found in the national laws, international instruments (or drafts thereof), and scholarly proposals.

C. TRAFFIC ACCIDENTS

A third subcategory of non-contractual liability that is often mentioned as a candidate for separate treatment in a private international law instrument consists of disputes stemming from traffic accidents.[264] As with product liability, a choice of law convention on this topic elaborated by the Hague Conference – the Hague Convention on the Law Applicable to Traffic Accidents – is already in force. However, as with the product liability convention, no states from the Western Hemisphere are parties to this convention. The time may thus be ripe for an Inter-American attempt to harmonize jurisdiction and choice of law on this subject. On the other hand, the apparent lack of interest in this convention in the Western Hemisphere may indicate that the Member States do not perceive a problem with the existing state of the law. Bilateral and subregional instruments addressing this topic already exist in this Hemisphere. Since disputes involving traffic accidents are most likely to arise among neighboring states, it may be that this topic is most appropriately handled at the subregional level.

1. Substantive Law

The areas of substantive law that tend to produce conflicts in litigation involving traffic accidents include the laws concerning loss of consortium and wrongful death, the application of guest statutes, limitations on damages and the availability of punitive damages.[265] Perhaps in the future the failure to adhere to provisions mandating the use of seatbelts will prove to be an important choice-of-law issue, at least insofar as it relates to mitigation of damages and/or liability for accident injuries.[266] In addition, recovery based on joint and several liability (probably applicable only in multi-vehicle accidents) may implicate conflicts of law.[267]

Unlike transboundary pollution disputes, in traffic accident cases, the place of the acts causing the injury is likely to be the same as the place where the injury was suffered. Thus, the *lex loci actus* and the *lex damni* will usually be the same. The "international" elements of the dispute will usually result from the fact that either the plaintiff or the defendant, or both, will be nationals of states other than the where the accident occurred.

2. Choice of Law

a. National Approaches in the Americas

(i) Lex loci delicti

Lex loci delicti is the most widely followed approach to choice-of-law in the Western Hemisphere. It is followed by all countries in Latin America except Venezuela, Peru, Mexico, and the states of Mercosur. It is also followed by ten states in the United States, and all provinces in Canada except Québec and the Yukon Province. In states that follow the *lex loci delicti* approach, the applicable law will be that of the state where the accident occurred.

Venezuela, Perú, and Québec have adopted the principle of ubiquity, which in the case of traffic accidents is likely to produce the same result as *lex loci delicti*. Québec, however, supplements the principle with a provision specifying that, if the tortfeasor and the victims are from the same state, the law of that state applies. The Yukon Province adopted the *Uniform*

See Statement of Reasons, at 17.
Fanselow v. Rice, 213 F.Supp.2d 1077 (D.Neb. 2002).
See Noble v. Moore, 2002 WL 17665 (Con. Super. 2002).
See Erny v. Estate of Merola, 792 A.2d 1208 (N.J. 2002).

Conflict of Laws (Traffic Accidents) Act,[268] based on the *Hague Convention on the Law Applicable to Traffic Accidents*, discussed below.

(ii). The "Most Significant Relationship" Approach and Interest Analysis

Twenty-one states in the United States and Puerto Rico follow the "most significant relationship approach of the Restatement (Second) of Conflict of Laws. Puerto Rico's law, although a civil code, is the functional equivalent of this approach.[269] In addition, three states apply the closely related "significant contacts" test, five apply Leflar's "better law" approach, three apply interest analysis, and six states apply various combinations of the above.[270] Although all of these approaches tend to be highly indeterminate, they do consistently yield one specific result: when the plaintiff and the defendant share a common domicile, the law of the state of the common domicile applies. This was the result in the case that initiated the choice of law revolution in the United States, Babcock v. Jackson, which was itself a traffic accident case.[271] While the choice of law revolution in the Untied States has received mixed reviews, the Babcock v. Jackson solution for common domicile cases has been universally praised[272] and is now entrenched in the United States.[273] This solution has also been expressly incorporated into Québec's private international law statute,[274] and has been adopted by the international instruments described below.

(iii) Double-Actionability

Most of the states in the Caribbean Commonwealth follow the double actionability approach, while permitting the application of the law with the "most significant relationship" to the dispute in exceptional cases.[275]

(iv) *Lex Fori*

The *lex fori* approach is followed by three states of the United States. Mexico applies *lex fori* as well, unless a statute or treaty specifically calls for the application of foreign law.

b. International Instruments Choice of Law for Traffic Accidents in the Americas

The *Convention on Emerging Civil Liability for Traffic Accidents* (between Uruguay and Argentina) provides that traffic accidents will be regulated by "the internal law of the Member State in whose territory the accident occurs."[276] However, where the persons affected are all domiciled in another Member State, the law of that Member State applies.[277]

The MERCOSUR *San Luis Protocol on Emerging Civil Liability for Road Accidents* (in force between MERCOSUR Member States) provides for both choice of law and jurisdictional rules governing traffic accidents. Like the Convention between Uruguay and Argentina, the *San Luis Protocol* starts with the law of the state in whose territory the accident occurs, but selects the law of another state only if all affected persons share a common domicile in that state.[278]

c. Approaches Outside the Western Hemisphere

Outside the Western Hemisphere, there is a discernable trend toward adopting the common-domicile exception to the *lex loci delicti* rule that originated in this Hemisphere. The Swiss Federal Act of Private International Law of 1987 provides that "[w]hen a tortfeasor and the injured party have their habitual residence [at the time the tort was committed] in the same state, claims in tort are governed by the law of such state."[279] German law similarly

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1970 Proc. of Unif. L. Conf. 263.

See 2000 Hague Note, at 36-37.

See generally Symeon C. Symeonides, *Choice of Law in the American Courts in 2002: Sixteenth Annual Survey*, 51 AM. J. COMP. L. 1 (2003) [hereinafter Symeonides, 2002 Survey].

191 N.E.2d 279 (N.Y. 1963).

See Harold L. Korn, *The Choice of Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 788-89 (1983) (common domicile solution is the "only unqualified success" and "most enduring contribution" of choice of law revolution in the United States).

See Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (and a Proposal for Tort Conflicts)*, 75 IND. L. J. 438, 459 (2000).

See supra (discussion of Quebec Civil Code provisions).

Chaplin v. Boys, [1971] App. Cas. 356.

Convention of Emerging Civil Liability for Road Accidents between Uruguay and Argentina, art. 2,

Id.

Protocolo De San Luis En Materia De Responsabilidad Civil Emergente De Accidentes De Transito Entre Los Estados Partes Del MERCOSUR, Mercosur/CMC/Dec.No. 1/96, art. 3.

Art. 133(1) (reproduced in 37 AM. J. COMP. L. 193 (1989)).

provides that, "[I]f the tortfeasor and the victim, at the time the tort was committed, had their habitual residence in the same state, the law of this state applies."[280] Numerous other states recognize an exception to the lex loci delicti in cases in which their citizens commit torts abroad against co-citizens.[281]

The draft convention proposed by the groupe europeen de droit internationale provides generally that a non-contractual obligation shall be governed by the law of the country with which it is most closely connected. It goes on to provide that "[w]hen the author of the damage or injury and the person who suffers damage or injury are habitually resident in the same country at the time of the harmful event, it shall be presumed that the obligation is most closely connected with that country."[282] The proposed Rome II regulation proposed by the European Commission provides that the applicable law is generally the *lex loci delicti*, but it specifies that, "[w]here the person claimed to be liable and the person sustaining damage have their habitual residence in the same country when the damage occurs, the non-contractual obligation shall be governed by the law of that country."[283] None of the extensive comments received by the Commission concerning this proposal objected to this provision.

The *Hague Convention on the Law Applicable to Traffic Accidents*, which has been adopted in the Western Hemisphere only in the Yukon Province,[284] also begins with the law of the place where the accident occurred.[285] Article 4 then sets out exceptions to this general rule, which call for the application of the law of the state of registration of the vehicle in the following circumstances:

(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.[286]

This set of exceptions will produce the same result as the common domicile exception to *lex loci delicti* embodied in the San Luis Protocol and the Québec statute when all affected parties are domiciled in the state of registration of the vehicle, which will usually be the case. In other respects, the exception to *lex loci delicti* embodied in the Hague Convention is broader than that of the San Luis Protocol and the Québec statute, as it would call for the application of the law of the state of registration even when that state is not the state of domicile or habitual resident of the victim or the person having control over the vehicle.

Introductory Act to the BGB (Civil Code), art. 40(2).
See generally Kurt Siehr, *Conflict of Laws, Comparative Law and Civil Law: Revolution and Evolution in Conflicts Law*, 60 LA. L. REV. 1353, 1354 (2000).
See 7 EUR. REV. OF PRIV. L. 45, 47 (1999).
Proposal for Rome II, art. 3, cl. 2.
See *supra* –(discussion of Yukon statute in March 2003 report of rapporteur).
Hague Convention on the Law Applicable to Traffic Accidents, art. 3.
Id., art. 4

3. Jurisdiction

The San Luis Protocol establishes that a suit may be maintained in the courts of the site of the accident, the domicile of the defendant, and the domicile of the plaintiff.[287] Otherwise, there is no law in the Americas specifically addressing jurisdiction in international traffic accident cases. The analysis would therefore be the same as that set forth in Section A, above, except that the Rule of Mozambique would not be applicable, and *forum non conveniens* would typically not be relevant to traffic accident cases.

4. Conclusions

The circumstances appear to be propitious to pursue an Inter-American instrument addressing choice of law in traffic accident cases. There appears to be substantial acceptance among states and scholars of the common domicile exception to the *lex loci delicti rule*. An Inter-American instrument adopting that exception would produce a welcome change in the laws of the many states in the Hemisphere that still do not recognize this exception, including some that have recently codified their private international law rules (such as Perú and Venezuela), as well as those that adhere to *lex fori* (including Mexico and some states of the United States). The absence of ratifications of the Hague Convention in this Hemisphere may be a result of the fact that its exception to the *lex loci delicti* rule is significantly broader than a common-domicile exception.

An agreement to unify rules of jurisdiction would likely be easier to achieve for traffic accidents than for transboundary pollution or product liability, primarily because forum non conveniens is not implicated in traffic accident cases. Moreover, the principle points of controversy that ultimately led to the failure of the Hague Convention on Jurisdiction and Judgments involved business torts. These controversies should not hamper the negotiations on an Inter-American instrument relating to traffic accidents.

For the foregoing reasons, the negotiation of an Inter-American instrument on jurisdiction and choice of law for cases involving traffic accidents would be manageable exercise that could produce significant advances in private international law in this Hemisphere. Because there are fewer complications for this topic than for the topics considered above, it may be preferable to begin the project of unifying the Hemisphere's private international law rules for non-contractual liability with traffic accidents. On the other hand, this may be a subject that is better handled at the subregional level, as has already been done in the Southern Cone. The Member States' interest in this topic will have to be verified by the political organs of the OAS.

D. INTERNET TORTS

The responses received by the Inter-American Juridical Committee to the questionnaire we distributed seeking proposals for topics for CIDIP-VII disclosed a significant interest in pursuing an Inter-American instrument concerning some aspect of electronic commerce.[288] In the light of this interest, we have considered the possibility of pursuing an Inter-American instrument concerning jurisdiction and choice of law with respect to Internet torts. The term "Internet tort" (or cybertort) will be used in this section to refer to noncontractual liability for acts committed in cyberspace. The term thus does not refer to a distinct category of non-contractual liability. Rather, the category consists of a variety of traditional torts that are perpetrated in a new context: the Internet. States have not generally recognized new causes of action for wrongs committed over the Internet. They have merely adapted the existing causes of action to take account of this new medium through which wrongful conduct may be channeled.

Noncontractual disputes generally arise three forms of activity which take place over the Internet (i.e., in cyberspace): operation of web pages, transmission of e-mails and other electronic files, and posting of messages on electronic bulletin boards or newsgroups.[289] The breadth of conduct carried out by these three means which can give rise to noncontractual

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MERCOSUR San Luis Protocol, art. 7.

CIDIP-VII and Beyond, Report of the IJC, CIDIP-VI/doc.10/02.

See Herbert Kronke, *Applicable Law in Torts and Contracts in Cyberspace*, in Katharina Boele-Woelki & Catherine Kessedjian eds., INTERNET – WHICH COURT DECIDES? WHICH LAW APPLIES? 65-87 (1998) (identifying the following groups of actors on the Internet: publishers, broadcasters, re-broadcasters, librarians/bookstores/news-stands, re-transmitters, space owners, and common carriers).

liability under U.S. law is quite broad. Among the most common noncontractual causes of action available to recover for injuries caused by Internet conduct are the following:

a) Deceptive trade practices (consumer protection) such as false advertising (e.g., through Internet yellow pages as well as certain methods of inducing airline/hotel/car rental reservations);

b) Violation of licensing regulations (e.g., selling prescription drugs without a license in violation of state pharmacist licensing laws);

c) Defamation (e.g., publishing defamatory statements by e-mail, Internet bulletin boards, in downloaded files, or in print or television media broadcast online);

d) Invasion of privacy (e.g., collecting personal information using cookies, etc.);

e) Fraud and conversion (e.g., using another's credit card online or withdrawing money from a bank account without authorization);

f) Trespass to chattels (e.g., cyber piracy – commandeering or hacking into web site of another);

g) Negligence or nuisance (e.g., spreading of a computer virus which destroys intellectual property or damages personal property; providing links to web pages which cause injuries[290])

h) Intentional infliction of emotional distress (e.g., certain defamatory remarks).

i) Anti-competitive practices including anti-trust violations (e.g., cross-border mergers and acquisitions)

j) Infringement of intellectual property rights, such as

- trademark infringement and dilution (e.g., cybersquatting – registering domain name using trademark of another)
- copyright violation (e.g., online sales of copyrighted material by someone other than the copyrightholder without consent – see, e.g., Napster)
- patent infringement (e.g., wrongfully facilitating downloads of a patented product such as software); breaches of corporate duties (e.g., insider trading using online brokerage accounts)

k) Violation of securities laws (e.g., selling securities over the Internet without a license or in violation of federal disclosure and anti-fraud laws, promoting Internet gambling as a violation of federal securities laws or possibly anti-gambling laws).

This enumeration of the legal obligations encompassed in the term "cybertorts" illustrates the first difficulty of tackling this subject in an Inter-American instrument. The topics are nearly as diverse as those encompassed by in the entire category of "non-contractual obligations," rendering it nearly as difficult to tackle as the general category.

This problem is exacerbated by the fact that the torts in the list include some that raise particularly sensitive issues for some Member States. For example, actions for defamation raise important issues regarding freedom of speech, which in the United States is protected by the federal Constitution. The United States might thus have difficulty agreeing to recognize the jurisdiction of other states to impose liability for defamation over the Internet in circumstances where the conduct would be protected by the federal Constitution.

A third difficulty stems from the novelty of the medium. The Internet is a comparatively recent phenomenon, and states are just beginning to experiment with regulations of cyberspace. There are as yet pronounced differences of view concerning the types and extent of regulation that is appropriate in cyberspace. Some constituencies favor leaving the

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"Link liability" also arises from the law of agency and principles of vicarious liability. In addition, although transferring of software products online is a form of Internet activity, this activity will be discussed further in the section on products liability because the approaches to jurisdiction in products liability cases is more likely to be applied to injuries caused by software defects, even though the liability arises from Internet activity.

Internet relatively unregulated, relying on technical innovations to address potential problems, while others advocate a more active role for state regulation.

A fourth difficulty is one that affects in particular the effort to regulate jurisdiction and choice of law. Cyberspace poses particularly severe challenges for private international law, because the norms in this field have traditionally been closely tied to notions of territoriality. Cyberspace is a completely new dimension, difficult to situate within traditional conceptions of territory. Rules that turn on where conduct causing the injury occurred or where the injury was suffered are difficult to apply when the simple click on a computer located in a state that may be entirely unknown produces injury to potentially numerous people situated in diverse parts of the globe. Scholars are in the midst of an intense debate about whether traditional private international law approaches are well-suited to the Internet, and, if not, what alternative approaches are appropriate.[291]

The courts are no closer to reaching a consensus on the appropriate way to address private international law issues with respect to claims arising from conduct on the Internet. With respect to jurisdiction, for example, some courts in the United States have considered "the use of electronic mail ... by a party in another state" to be sufficient basis on which to uphold personal jurisdiction in that forum.[292] The courts in the United States have also found jurisdiction to exist in a distant forum where the defendant had published defamatory statements on an Internet bulletin board and the statements were received in that forum.[293] Australia's courts have similarly upheld jurisdiction in Australia based on the receipt in Australia of communications posted on the Internet in New Jersey.[294] But the courts in Canada have refused to recognize judgments rendered under such circumstances, noting that "[I]t would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to Internet could be achieved, a person who posts fair comment on a bulletin board could be haled before the courts of each of those countries where access to this bulletin board could be obtained."[295] Similarly, the Court of Appeal for Ontario has held that a business owner could not maintain an action against the owner of passive website with a similar name that mistakenly directed users to the first owner's site.[296]

The novelty of the Internet might have been viewed by some as an opportunity to establish uniform rules of substance or of jurisdiction and choice of law before the states become too attached to divergent solutions. Indeed, the borderless nature of the Internet demands harmonized solutions to legal probleDr. It is thus understandable that there are a great number of projects in course seeking to establish uniform laws to govern various aspects of e-commerce.[297] CIDIP-VII is very likely to include one or more topics relating to e-commerce. But these topics will likely involve the harmonization of substantive law.

The efforts that have been undertaken so far seeking to address private international law aspects of e-commerce make it clear that the nations of the world are not yet ready to agree on a uniform solution to these probleDr. Indeed, it appears that the challenges posed by the Internet are almost single-handedly responsible for defeating the decade-long efforts of the Hague Conference to elaborate a Convention on Jurisdiction and Enforcement of

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See, e.g., Matthew R. Burnstein, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75 (1996); Christopher P. Beall, *The Scientological Defenestration of Choice-of-Law Doctrines for Publication Torts on the Internet*, 15 J. MARSHALL J. COMP. & INFO. L. 361, 362 (1997); William Patry, Choice of Law and International Copyright, 48 AM. J. COMP. L. 383; Jennifer M. Driscoll, *It's a Small World After All: Conflict of Laws and Copyright Infringement on the Information Superhighway*, 20 U. PA. J. INT'L ECON. L. 939; Daniel P. Schafer, *Canada's Approach to Jurisdiction Over Cybertorts: Braintech v. Kostiuk*, 23 FORDHAM INT'L L.J. 1186 (2000); Charles H. Fleischer, *Will the Internet Abrogate Territorial Limits on Personal Jurisdiction?*, 33 TORT & INS. L.J. 107 (1997); Tapio Puurunen, *The Judicial Jurisdiction of States Over International Business-to-Consumer Electronic Commerce from the Perspective of Legal Certainty*, 8 U.C. DAVIS J. INT'L L. & POL'Y 133, 212 (2002); Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L. J. 1345 (2001).

See, *e.g.*, Hall v. LaRonde, 66 Cal.Rptr.2d 399, 400 (Cal. Ct. App. 1997), in which the court held that e-mail and telephone communications satisfied the "minimum contacts" requirement for personal jurisdiction.

See Blake v. Continental Airlines, Inc., 751 A.2d 538 (N.J. 2000).

See Dow Jones & Co., Inc. v. Gutnick, [2002] H.C.A. 56.

Briantech v. Kostiuk, 1999 B.C.D. Civ. J. LEXIS 2020, *32 (quoted in Schafer, supra, at 1186).

See Pro-C Ltd. v. Computer City, Inc., 55 O.R. (3d) 577. The basis for plaintiff's suit was that the misdirection created an influx of hits that overwhelmed its system, ultimately causing its business to fail.

Most concern substantive law, although a few concern private international law. See WIPO Group of Consultants on the Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted through Global Digital Networks, Geneva, Dec. 1998, available at http:// www.wipo.org/eng/meetings/1998/gcpic/index.htm.; see also WIPO Forum on Private International Law and Intellectual Property, Geneva, Jan. 2001, available at http://www.wipo.org/pil-forum/en/documents/index.htm.

Judgments.[298] As a result of these difficulties, the Hague Conference has abandoned its ambitious attempt to set forth uniform principles for jurisdiction and enforcement of judgments in civil or commercial matters and replaced it with a far more limited attempt to establish uniform rules for recognizing choice of forum clauses.[299]

For the foregoing reasons, we conclude that it is premature to undertake an effort to harmonize private international law concerning Internet torts in this Americas.

E. CONCLUSIONS

The foregoing analysis supports the following conclusions regarding the suitability of the topics discussed for treatment at this time in an Inter-American instrument regulating jurisdiction and choice of law:

The topic of non-contractual civil liability for harm resulting from traffic accidents is ripe for treatment in an Inter-American instrument. Such an instrument would make a valuable contribution by adopting the common domicile exception to the rule of lex loci delicti. Although there is already a Hague Convention on choice of law on this topic, the convention has not been ratified by any nation of the Western Hemisphere. Because the topic does not implicate the controversial doctrine of forum non conveniens, and because the subject matter is not very complex, this topic would probably produce the smoothest negotiation of the possible categories of non-contractual liability. The principal question is whether the nations of the Hemisphere regard the problems in this area as worthy of attention at the regional level, or instead regard the topic as more suitable for treatment at the subregional level.

The topic of product liability is somewhat more complex, but also ripe for treatment in an Inter-American instrument. There are significant differences in the laws of the Hemisphere regarding the substantive laws of product liability, and choice of law frequently arise because of the increasingly globalized market for such products. Here, too, there is a Hague Convention addressing choice of law, but, again, no nations in the Western Hemisphere are parties. Numerous distinct solutions to the choice of law problem in product liability cases, but, broadly speaking, most of them share the "grouping of contacts" approach. The particular solutions that have been adopted or proposed in this Hemisphere and elsewhere would produce somewhat different results in highly complex cases, but it is unlikely that further academic work would disclose that one of these solutions is necessarily superior to the others. The time is thus ripe for an Inter-American negotiation to select one or another of the approaches. With respect to jurisdiction, a negotiation in the context of product liability claims could provide an opportunity to address the controversial topic of forum non conveniens. But, because forum non conveniens dismissals are less frequent in product liability cases than in environmental damage cases, the topic could be left out of the negotiations if agreement proves elusive.

The suitability of the topic of transboundary environmental damage presents a more difficult question. Significant challenges are posed by the existence of numerous international instruments governing substantive liability in various sectors, some of which also address jurisdiction and choice of law. Additional challenges are presented by the complex interrelationship between private and public law in this area, both domestic law and international law. Other international bodies are currently addressing the topic, most notably the International Law Commission and the Hague Conference, although the latter' work on the topic is currently without priority. With respect to choice of law, the negotiations are likely to require a possibly intense debate between proponents of the *lex damni* and proponent of the rule of ubiquity. With respect to jurisdiction, the issue of forum non conveniens is likely to prove difficult to resolve. Whether agreement on solutions to the private international law issues raised by this topic is likely to be achieved is a question on which the political bodies may have well-grounded views in the light of the fact that this topic was considered during CIDIP-VI. In any event, success on this topic will require extensive preparatory work, which should ideally include expert in environmental law as well as experts in private international

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See generally Avril D. Haines, *Why Is It So Difficult to Construct an International Legal Framework for E-Commerce? The Draft Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters: A Case Study*, 3 EUR. BUS. ORG. L. REV. 139 (2002).

See Report On The Work Of The Informal Working Group On The Judgments Project, In Particular On The Preliminary Text Achieved At Its Third Meeting – 25-28 March 2003, prepared by Andrea Schulz, First Secretary, Preliminary Document No 22 of June 2003.

law. The topic should therefore be selected only if the political bodies are ready to commit the necessary resources for the carrying out of the needed work.

The topic of Internet torts is not suitable for treatment in an Inter-American private international law instrument at this time because the phenomenon is too new and insufficient consensus exists on the proper approach to the private international law questions that arise. The topic proved to be the undoing of the Hague Convention on Jurisdiction and Judgments and it would is likely to reach a similar end if considered in the Inter-American context.[300]

The author gratefully acknowledges the valuable assistance of Mr. Owen Bonheimer in the preparation of this Report.

2. Cartels in the framework of competition law in the Americas

Resolution

CJI/RES.58 (LXIII-O/03) – Cartels n the scope of the competition law in the Americas

Documents

CJI/doc.118/03 rev.2 -	Competition and cartels in the Americas (presented by Drs. João Grandino Rodas and Jonathan T. Fried)
CJI/doc.123/03 -	Competition and cartels in the americas: suggested conclusions to document CJI/doc.118/03 (presented by Dr. Eduardo Vío Grossi)

At the 62nd regular session of the Inter-American Juridical Committee (Rio de Janeiro, March 2003), Dr. João Grandino Rodas introduced document CJI/doc.118/03, entitled *Competition and cartels in the Americas*, prepared by the rapporteurs Jonathan Fried and João Grandino Rodas.

He noted that the subject was a complex one and that its complexity was reflected in the structure of the report. The objective was to complete an updated work that described the status of the topic from a critical perspective. The report began with an up to date bibliographical list of books, articles and web pages on the subject. It then addressed the subject of cartels and the various types of cartels and offered a value judgment on the harmful nature of "hard core" cartels as the most pernicious type of competitive practice. The document then discussed the international organizations that had studied the subject in recent years and described the most important regional agreements on the subject. The report was based on more than 20 replies sent to the Committee in response to the questionnaire prepared during its previous regular session, which showed the importance of the topic to the countries of the hemisphere. The replies were not included verbatim in the report but had served as the basis for its preparation. The report ended with a discussion of the direction that competition policy in the hemisphere should take and emphasized the importance of examining the possibility of publishing the final result in the four official languages of the OAS. He asked the other members to add their personal contributions to the report from the perspective of the various regions of the continent.

Dr. Eduardo Vío Grossi noted the absence of any reference to the subject in the Charter of the OAS or in other inter-American instruments, although there were references to it in the Charters of the Andean Community and CARICOM. It could therefore be concluded for now that the subject was one for the internal jurisdiction of States. He, however, mentioned the FTAA and noted that there was an opportunity within that process for the Committee to offer an opinion. Since the negotiation process was under way, the Juridical Committee should try to give its opinion on the subject and a good way to do so was to prepare a reference work like the one prepared by the Rapporteurs so that the negotiators could have a broader range of views. That aim was nevertheless not sufficient. In its capacity as the consultative body of the OAS on legal matters, the Committee should provide guidance to the political authorities. On the basis of the report that had been submitted, the Committee should therefore propose the broad outlines of a possible Free Trade Treaty of the Americas, which could be drawn from two sources: the internal laws of States (from which some general principles of law could be inferred, such as those related to acts that hindered free competition), and other international treaties, such as those concluded within the framework of CARICOM and the Andean Community.

Dr. Luis Herrera Marcano stated that it had never been suggested that the market economy should function without any intervention by the State. The United States, for example, despite its free market structure had anti-monopoly laws that were very complicated and highly punitive. Until recently, there was a system of internal markets within countries and an international market, and in the latter market there were no rules limiting monopolistic practices. Since World War II, however, common markets and free trade areas had been created that were neither internal markets nor international markets and therefore required special rules. He stressed the importance of making a distinction between monopolistic practices and unfair

competition practices in any document elaborated by the Juridical Committee. Lastly, the Committee's contribution could be very useful for countries faced with that problem, particularly in the context of the FTAA negotiations. It was important to deduce the general principles that could govern that field.

Dr. Ana Elizabeth Villalta stressed the importance of the work, since serious sanctions still unknown to some countries of the hemisphere might be imposed under the WTO.

Dr. Carlos Manuel Vázquez said that the Charter of the OAS did not advocate any particular economic system. He had some doubts about the usefulness of deducing general principles of law with respect to competition based on the internal laws of States, at a time when those same States were negotiating a new instrument, to the extent that they encountered deficiencies in the existing laws.

Dr. Brynmor Pollard said that one of the conclusions that seemed to emerge from the report was that all cartels should be regulated. He asked whether that included export cartels, because, if so, the initial direction of the work must have changed. He also noted that the report was aimed at enhancing the effectiveness of sanctions, which could pose a grave challenge to Caribbean countries. He therefore asked what results had been achieved in other countries when more severe sanctions were imposed on violators. On that point, Dr. Grandino Rodas said that a prior problem was the difficulty of proving the occurrence and impact of an economic infraction. Dr. Brynmor Pollard noted further that a subject that was absent from the rapporteurs's report was that of the telecommunications monopoly. Some CARICOM countries had reserved certain services for their nationals by prohibiting their exploitation by foreign operators. He asked whether, given the size of the population in a specific country, particularly where the population was small, the right to free competition could be restricted or regulated. Dr.Grandino Rodas said that a paragraph on that subject would be inserted in the report.

Dr. Luis Marchand recalled that there were legal monopolies in some countries and wondered whether a future convention on the subject might encounter difficulties in implementation. It should be borne in mind that FTAA has no social dimension, as it considered only the commercial aspect, and that for many countries, the concept of free competition was more nuanced. One country's view of free competition might be different from that of other countries and thus the establishment of bodies might not be the most practical solution.

> At that regular session, Dr. Eduardo Vío Grossi introduced document CJI/doc.123/03, entitled *Competition and cartels in the Americas: suggested conclusions to document CJI/doc.118/03*, which contained the observations made on some aspects of the rapporteur's report. Dr. Vío Grossi noted, in particular, that the subject was being discussed at the inter-American level by the Negotiating Group on Competition Policy (one of the nine groups working within the framework of FTAA), which meant that that was the body to which the Committee's suggestions should be directed. For the time being, everything related to the law on competition and cartels was regulated under the internal jurisdiction of States, since inter-American international law contained no provision for making free competition obligatory or for giving the OAS the power to impose sanctions for actions in violation of such competition. Any future convention or agreement on the subject would be more likely to succeed if it were consistent with the current national legislation of the respective States, so long as that consistency reflected general principles of law. Consistency could be ensured through the establishment and operation of a State agency endowed with sufficient autonomy to ensure due impartiality and mandated to ensure free competition and to punish actions in violation thereof. Other principles to take into account might relate to the obligation of cooperation among such State agencies, the application of the principle of double jeopardy, compliance with the decisions of such agencies abroad, and the settlement of disputes that might arise from the exercise of the respective jurisdictions or the application of the laws of the different States. The Juridical Committee should determine what the problem was in that area and provide a solution to it.

Dr. Jonathan Fried, who was unable to attend the session, participated through a teleconference to contribute his observations on the subject. He said that the initial motivation for discussion of the subject was the increasing integration of the economies of the Americas in

recent years. The objective was to prepare a document containing best practices to provide guidance for countries that needed it. Thus, he felt that the contribution that other members of the Committee might make with respect to their own countries was important. On the question of the challenges facing the small countries in the region, the report sought to highlight in general the problems that any national authority might face. It was clear that small States were at a disadvantage because of their specific characteristics. The report should therefore incorporate ideas on both bilateral and regional cooperation to assist those States, with specific emphasis on the exchange of information, and present the various options for building capacity in the implementation of the norms in question. That could be a significant contribution from the Committee, since the bibliography on the subject was probably limited. He added that the strengthening of institutions and national legislation could represent another major contribution from the Committee on the subject and that the report in question was not interfering with the mandates of other bodies. They were in the early phases of a natural evolution in the field and the area in which there were fewest disagreements was that of hard-core cartels. If the aim was to explore other areas, the respective norms began to vary significantly from one country to the other. Thus, a broad inter-American overview of the subject was therefore difficult to achieve and it could take a long time to reach any firm conclusions. He therefore suggested moving ahead in the area of cooperation at the level of procedures and in terms of vertical and horizontal cooperation.

Lastly, Dr. Brynmor Pollard and Dr. Eduardo Vío Grossi were appointed co-rapporteurs on the topic. It was decided that the rapporteurs would work on the report submitted and that, with contributions from the other members of the Juridical Committee, the report would be taken up again at the Committee's regular session in August 2003 for final adoption.

At its thirty-third regular session (Santiago, Chile, June 2003), in resolution AG/RES.1916 (XXXIII-O/03), the General Assembly renewed its request to the Inter-American Juridical Committee to continue its study of the subject of competition law in the context of the promotion of trade and integration in the Americas with a view to including the results of those studies in its next annual report, bearing in mind the efforts already under way in the Organization and in other international fora.

At the 63rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2003), Dr. Jonathan Fried orally introduced document CJI/doc.118/03 rev.1, entitled *Competition and cartels in the Americas*, submitted by him and his co-rapporteur, Dr. João Grandino Rodas. He first traced the history of the topic in the Inter-American Juridical Committee. The final document contained the replies of States members to the questionnaire prepared earlier by the Juridical Committee. In his view, the topic did not now require further study by the Committee. He then outlined the structure of the report and said that it should be borne in mind that the concept of "competition policy" was much broader than that of "competition law", which covered three categories in the report, namely, hard core cartels, export cartels and import cartels.

Dr. Jonathan Fried said that of the more than 90 countries that dealt with the topic in their internal legislation, most of them did so basically with respect to hard-core cartels. Even in developing countries, activities carried on outside their own territory but which had effects inside the territory were considered as falling within their competence. However, that posed the challenge of how to deal with the problem. Developing countries had not insisted on greater international regulation and instead had sought other means to attenuate the impact of cartels either through domestic legislation or through greater cooperation with other countries in the form of technical assistance or increased exchange of information. One example of that was the policy of many countries considered to be permissive in that area, such as Canada, which allowed other countries to regulate the field as they thought fit under their own national legislation. The best approach was to try to ensure that the principles underlying such legislation were as similar as possible in order to facilitate the harmonization of the policies and actions adopted, even though the particular rules might be different. Countries tended to deal with the problem at the subregional rather than the global level on account of the particular

circumstances of each of them and the different impact that the activities of various cartels could have.

The Inter-American Juridical Committee finally adopted resolution CJI/RES.58 (LXIII-O/03), entitled *Cartels in the scope of the competition law in the Americas*, in which the General Secretariat was requested to arrange for the report on competition and cartels in the Americas to be circulated to the competent authorities in the member States in the official languages of the Organization and member States were urged to give the highest priority to the adoption and implementation of competition laws and to conclude agreements to strengthen consultation, cooperation and the exchange of information on competition-related matters. The resolution also urged Member States to pay particular attention to the challenges faced by less developed or territorially smaller member States to help them develop the necessary capacity to maintain effective administration, implementation and international cooperation in that field. Lastly, the Inter-American Juridical Committee decided to respond favourably to any future request from the political organs of the Organization to undertake additional activities in the field.

Having concluded its work on the subject, the Inter-American Juridical Committee decided to remove the item from its agenda.

The texts of the documents and resolutions approved by the Juridical Committee on this topic during 2003 are transcribed below:

CJI/RES.58 (LXIII-O/03)

CARTELS IN THE SCOPE OF THE COMPETITION LAW IN THE AMERICAS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONVINCED that the adoption and effective application of laws and policies on competition can contribute significantly to the economic growth of the member States;

ACKNOWLEDGING that the increasing integration of the economic activity in the Americas requires further cooperation between the member States with regard to administration and application of the competition laws;

PLEASED with the immediate and detailed answers from the vast majority of member States to its Questionnaire on the subject;

RECALLING that the General Assembly, in its resolution AG/RES.1916 (XXXIII-O/03), asked the Committee to extend its studies on the competition law in trade and integration in the Americas;

HAVING BENEFITED from its discussions on the insight given in the *Report on Competition and Cartels in the Americas* (CJI/doc.118/03 rev.2),

RESOLVES:

1. To thank the co-rapporteurs, Drs. João Grandino Rodas and Jonathan T. Fried, for having completed their work on the study of competition and cartels in the Americas.

2. To request the General Secretariat to distribute the *Report on Competition and Cartels in the Americas*, in the official languages, to the competent authorities in the member States as soon as possible.

3. To encourage member States to give top priority to the adoption and application of the competition laws, and reach agreements on extending the inquiries, cooperation and exchange of information on matters relating to competition.

4. To encourage member States, when pursuing the objectives established in paragraph 3, to pay special attention to the challenges faced by smaller, and less developed, member States, so that they can develop the capacity required to maintain effective administration, application, and international cooperation in this area.

5. To agree to any future request from political organs of the Organization to undertake complementary tasks in this field.

This resolution was unanimously adopted at the session held on 7 August 2003, in the presence of the following members: Drs. João Grandino Rodas, Brynmor T. Pollard, Alonso Gómez-Robledo, Ana Elizabeth Villalta Vizcarra, Jonathan T. Fried, Carlos Manuel Vázquez, Luis Herrera Marcano and Felipe Paolillo.

CJI/doc.118/03 rev. 2

COMPETITION AND CARTELS IN THE AMERICAS

(presented by Drs. João Grandino Rodas and Jonathan T. Fried)

I. Introduction

Initially, this study was requested by the IAJC in response to the General Assembly's urging that the Inter-American Juridical Committee ("IAJC") study various dimensions of the legal aspects of integration and free trade in the Americas. The IAJC, in Resolution CJI/RES. 14 (LVII-O/00)[1], referred to the preliminary proposal presented by Dr. João Grandino Rodas entitled *Considerations relevant to a proposal to include the 'Competition Law' as a topic to be studied by the Inter-American Juridical Committee*[2], as the basis for its request that the IAJC undertake a preliminary analysis of existing laws and regulations on competition in Member States. A subsequent submission by Dr. Rodas entitled *International Regulations on Competition*[3] emphasized the need for more in depth consideration of national competition laws within the hemisphere in light of increasing international rules and agreements which heighten the potential for possible conflicts caused by the extraterritorial application of competition laws for the region.

As part of the study requested by the OAS, during the IAJC's 60th Regular Session in March 2002, it was decided that the theme of competition policies in the hemisphere should include specific reference to the subject of cartels. Thus the 61st Regular Session of the IAJC welcomed the presentation of preliminary studies submitted by the co-rapporteurs, Dr. João Grandino Rodas and Dr. Jonathan T. Fried.[4] The IAJC resolved to request the national competition authorities of the Member States of the OAS to provide the co-rapporteurs with information on their domestic competition legislation, recent cases and practices, and invited the co-rapporteurs to prepare a revised, consolidated report, incorporating information received from the national authorities.[5]

In response to the IAJC's recognized goals of the "desirability of promoting more effective control over anti-competitive practices in the Americas" and "contributing to better understanding of the laws and policies relevant to the regulation of cartels in this regard", the co-rapporteurs sent a questionnaire to Member States through the Office of the Secretariat of the IAJC. The results have been incorporated in this report. In preparing this report, a brief review of competition and cartel law and policy considerations is included for context. A section describing existing *fora* for international cooperation on competition has also been incorporated. In the hope that this paper may also serve as a basic reference guide, an extensive bibliography of further readings has been appended, in addition to a list of useful websites.

The results of the questionnaire sent to the OAS Member States build upon and update the work undertaken by the FTAA Negotiating Group on Competition Policy in its *Inventory of Domestic Laws and Regulations relating to Competition Policy in the Western Hemisphere*[6]. A companion guide prepared by the OAS Trade Unit, which should serve as a

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ORGANIZATION OF AMERICAN STATES. Inter-American Judicial Committee. *Competition law and policy in the Americas*. [CJI/RES. 14 (LVII-0/00), 18 August 2000].

RODAS, João Grandino. *Considerations relevant to a proposal to include the 'Competition Law' as a topic to be studied by the Inter-American Juridical Committee.* [(OEA/Ser.Q CJI/doc.23/00), 2 August 2000].

RODAS, João Grandino. *International Regulations on Competition.* [(CJI/doc.78/01), 20 August 2001].

RODAS, João Grandino. *Cartels in the sphere of competition law in the Americas.* [(CJI/doc.106/02), 13 August 2002; FRIED, Jonathan T. *Cartels and competition law in the Americas: 'hard-core' and export cartels* [(CJI/doc.102/02), 9 August 2002].

ORGANIZATION OF AMERICAN STATES. Inter-American Judicial Committee. *Cartels in the sphere of competition law in the Americas.* [CJI/RES.45 (LXI-O/02), 16 August 2002].

FTAA. Negotiating Group on Competition Policy. *Inventory of Domestic Laws and Regulations relating to Competition Policy in the Western Hemisphere* (FTAA.ngcp/inf/03Ner.1), 22 January 2001.

valuable complement to this study, is *The Inventory of the Competition Policy Agreements, Treaties, and other Arrangements existing in the Western Hemisphere*[7].

II. Competition Law and Policy

The importance of competition law and policy has grown significantly, particularly in the last two decades, as countries have begun to acknowledge that sound competition policies facilitate the optimal allocation of domestic economic resources. This is reflected in the growing number of countries that have adopted a competition policy, or that are contemplating adopting such a policy. Twenty years ago, approximately 20 jurisdictions had competition laws; however, in 2000, approximately 90 jurisdictions had adopted competition laws.[8] This suggests that countries have accepted that today, medium and long-term economic development hinges on the existence of competitive markets and that competition laws and policies underpin the establishment and maintenance of sound market mechanisDr.[9]

Nonetheless, despite recognition of competition as fostering effective use or efficient allocation of a society's resources, Shyam R. Khemani *et al*. reminds us that the importance of this objective has not been uniformly accepted as government authorities try to assess the relative importance and balance between market efficiency and various other economic, social and political objectives.[10] A consensus does seem to exist that the main objective of competition policy is to protect competition itself by regulating business practices that adversely interfere with the competitive process.

A note by the Organisation for Economic Co-operation and Development ("OECD") Secretariat entitled *Goals, Instruments and Institution of Competition Law* defines the objective of competition law as promoting economic efficiency, and states that objectives such as pluralism, protection of small business, employment and regional development objectives of competition law are "unlikely to succeed and likely to have important negative economic effects. These issues are better dealt with elsewhere through government policy".[11] Furthermore, the OECD suggests that shielding a government owned business from competitive pressure, or protecting an industry from misguided notions of "destructive" competition in various sectors could have serious consequences in social areas such as health and safety concerns. The OECD also comments that the extent to which individual companies have been able to restrict competition could be insignificant in comparison to the extent to which governments may use their powers to restrict competition.[12]

It appears that most countries have attempted to balance economic and non-economic public interest considerations in crafting their domestic competition policies. Khemani *et al*. explain that if maximum efficiency were sought, there would be no room for consideration of sociopolitical criteria such as fairness and equity in the administration of competition policy; on the other hand, if the public interest were seen as being paramount, criteria such as a society's culture, history and institutions likely could not be reduced to a single economic objective. As a result, the evolution of competition laws and their applications in various countries may well manifest a variety of objectives.[13]

Competition law – which is referred to in some jurisdictions as antitrust law or restrictive trade practices law – deals with the market behaviour of business entities. Although competition laws may be influenced by different economic and political considerations, competition laws are generally based on the premise that, while free market behaviour is desirable, some interference in the market may be necessary to maintain competitive pressures and to promote competition among business entities to obtain an efficient allocation of resources. By placing limits on private market activities, competition law

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OAS Trade Unit. *The Inventory of the Competition Policy Agreements, Treaties, and other Arrangements existing in the Western Hemisphere* (FTAA.ngcp/inf/03Ner), March 2002.

GAL, Michal S. *Market Conditions Under the Magnifying Glass: The Effects of Market Size on Optimal Competition Policy.* American Journal of Comparative Law, v. 50 (Spring 2002) p. 303-303.

See WTO. *Communication from the United States - Impact of Anti-Competitive Practices of Enterprises and Associations of International Trade,* Working Group on the Interaction Between Trade and Competition Policy (WT/WGTCP/W/66), 26 March 1998.

KHEMANI, Shyam R. *et al. A Framework for the Design and Implementation of Competition Law and Policy*, (World Bank: Washington; Paris: OECD; 1998), p. 4.

OECD. *Goals, instruments and institutions of competition law*, (Paris, 1994), mimeo, p. 3.

Ibid.

KHEMANI *et al. A Framework for the Design and Implementation of Competition Law and Policy,* p. 2.

aims to protect consumer interests from the anti-competitive behaviour of business entities seeking to raise prices for their products above the prices that would otherwise prevail in a competitive marketplace. Thus, competition laws may include measures designed to protect trade and commerce from restraints, cartels, monopolies, price-fixing and price discrimination.[14]

UNCTAD describes the key components of competition law as:

(i) the prohibition of cartels, or agreements among rival firms to stop competing by fixing prices, allocating (or sharing) markets and taking action against non-Members of the cartel;

(ii) the control of vertical anticompetitive practices or restraints and the prohibition of abuses of dominant market power by large firms or monopolies, which are able to impose such anticompetitive restraints on their suppliers or distributors; and

(iii) the control and review of mergers and acquisitions which might lead to the creation of a dominant firm or ultimately to the establishment of a monopoly.[15]

Although the terms competition *policy* and *law* are often used interchangeably in various countries, Bernard Hoekman and Petros C. Mavroidis suggest that it might be useful to understand competition *policy,* as the set of measures used by government to enhance the contestability of markets by constraining both private and governmental actions. For example, the application of competition policy objectives can range from the privatization of state owned enterprises, reduction of firm-specific subsidies, reduction of licensing requirements for new investments and adoption of trade liberalization measures. On the other hand competition *laws* "are the set of rules and disciplines maintained by governments aiming to counteract attempts to monopolize the market" and generally pertain to the behaviour of private entities or firDr.[16]

Khemani *et al*. provide a useful analysis of the various types of agreements among competing enterprises: horizontal agreements which cover prices and other important aspects of competitive interaction, and vertical agreements which occur between firms at different levels of the manufacturing or distribution process.[17] Some domestic competition laws distinguish between *per se* offences (that is, that the prosecutor need not establish that the offence has any impact on competition) and rule of reason offences (in which the prosecutor must establish that the offence has had an effect on competition). The majority of antitrust cases are generally found to involve rule of reason offences which may be prohibited.[18]

In seeking to apply competition law and policy, it is important to note that a certain tension exists between law and economics, given the need for a clear set of legal rules to foster certainty in the application of competition policy while maintaining the flexibility to consider and evaluate specific facts. Thus Khemani *et al*. remind us that while competition policy aims at correcting market failure arising from imperfect competition, precise legal rules would be difficult to formulate across all types of actual or potential anticompetitive situations. "For example, an outright prohibition or a *per se* approach may well be adopted against price-fixing agreements, while a rule of reason approach that evaluates facts on a case by case basis is likely to be more appropriate in certain types of business practices such as exclusive dealing contracts."[19] Economic tools can be very useful in analyzing economic concerns considering the fairness or equity implications of enforcement decisions, or in a systematic

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MITCHELL, Andrew D. *Broadening the Vision of Trade Liberalisation: International Competition Law and the WTO*", World Competition Law, v. 24, n. 3 (2001) p. 343; p. 365-345.

UNCTAD. *Closer multilateral cooperation on competition policy: the development dimension* (Geneva: UNCTAD, 2002), p. 4 (Consolidated report on issues discussed during the Panama, Tunis, Hong Kong and Odessa Regional Post-Doha Seminars on Competition Policy) ["UNCTAD, Consolidated Report"]. *See* p. 7-9 of above report for more background on vertical restraints and abuse of dominance and mergers and acquisitions as well as an explanation of the differences in distinguishing competition law from unfair competition and from antidumping practices.

HOEKMAN, Bernard and MAVROIDIS, Petros C. *Economic development, competition policy and the WTO*, World Bank (Working Paper n. 2917), 17 October 2002, p. 4. Available online: <http://econ.worldbank.org/view.php?tupe=5&id=20844 >.

KHEMANI *et al*. *A Framework for the Design and Implementation of Competition Law and Policy,* p. 19-38.

U.S. Federal Trade Commission and the U.S. Department of Justice. *Antitrust Guidelines for Collaborations Among Competitors*, (April 2000). Available online: <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

KHEMANI *et al*. *A Framework for the Design and Implementation of Competition Law and Policy,* p. 2.

assessment of the effects of different business practices and market structures. Clearly legal and economic disciplines must play mutually supporting roles in the application of competition law and policy.

Both developed and developing countries face similar challenges with respect to the implementation and enforcement of competition policies. The increased internationalization of business activities has increased the likelihood that anticompetitive behaviour in one country, or the behaviour of companies located in different countries, could adversely affect the interests of other countries. As well, the unilateral application by one country of its domestic competition law in cases in which business operations in other countries are involved raises questions of sovereignty and extraterritoriality. To address these issues, many countries have entered in bilateral and plurilateral arrangements to provide a mechanism for consultation and to enhance inter-agency communication and co-operation in investigation and enforcement proceedings. For a detailed discussion on these arrangements, see Section IV (Evolution of Co-operation Agreements).

However, many academics have suggested that developing countries may face particular challenges in implementing and enforcing competition policies. Frederic Jenny suggests that, in today's globalized and interdependent system, the different levels of economic development among various countries around the world often affects the extent to which countries will be able to benefit from the opportunities offered by international competition.[20] This implies that competition laws should be sufficiently flexible to be adapted to the legal and economic contexts of each country. Indeed, Michael Gal recommends that competition laws of small economies should contain the same elements as those of large economies – such as a ban on anticompetitive mergers and acquisitions – but should not adopt all of presumptions (such as *per se* rules) used by large economies. Rather, he suggests that small economies take a case-by-case approach and not adopt rules that do not give sufficient weight to efficiency considerations.[21]

One of the key issues for developing countries is that they be allowed some flexibility in developing industrial policy in order to make up for domestic market failures. However, the above mentioned UNCTAD report notes that it is thought that if the industrialization process progressed at higher levels of development, "it is clear that such policies would gradually become less effective than competition policy".[22]

The argument has been made that for many lesser-developed countries their domestic markets may be too small to accommodate a sufficient number of enterprises to achieve vigorous internal competition while ensuring that economies of large-scale operation are attained. F.M. Sherer warns that:

> except after careful research showing that scale economies will not be jeopardized, trust busting and stringent anti-trust merger enforcement would not be appropriate. However, when fully workable internal competition is not attainable, it is all the more important to ensure that dominant domestic enterprises are exposed to effective import competition and, when exchange rates and/or international transportation costs leave potentially attainable domestic costs lower than world price levels, that feasible competition is not subverted by price fixing agreements. Decades of experience have shown that strong, efficient homegrown enterprises are not likely to emerge under the protracted protection afforded by import substitution policies and indigenous cauterization.[23]

Nonetheless, it has been observed that in a globalized world, national competition authorities might find it tempting to make it easier for strategic alliances and mergers

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JENNY, Frederic. *Globalization, competition and trade policy: convergence, divergence and cooperation,* in: *International and Comparative Competition Laws and Policies*, ed. Chao Yang-Ching (The Hague: Kluwer Law International, 2001), p. 68.

GAL, Michal S. *Size Matters for Competition Policy: Prepared Remarks for the OECD Session on Small Economies. OECD Global Forum on Competition* (CCNF/GF/COMP/WD(2003)42 (dated 7 February 2003); GAL, Michal S. *Market Conditions Under the Magnifying Glass: The Effects of Market Size on Optimal Competition Policy*, American Journal of Comparative Law, v. 50 (Spring 2002), p. 303-338.

UNCTAD, "Consolidated Report," p. 7.

SCHERER, F.M. *A century of competition policy enforcement*, in: *International and comparative competition laws and policies*, ed. Chao Yang-Ching, p. 14.

between firms to take place by relaxing restrictions on them as rapidly as possible. Hans-Werner Sinn reports that "[d]omestic competition is now taking second place to international competition and this is forcing the cartel authorities to behave like competitors themselves". He goes on to say that it is increasingly common to hear that domestic industries are protected in potential merger situations by the argument that they must compete in a fiercely competitive international environment.[24]

Jenny, in a recent seminar on Hemispheric Cooperation, has suggested that there is increasing evidence that international anti-competitive practices are on the rise and such practices are undoubtedly most harmful in countries which do not have strong anti-trust laws. These anti-competitive behaviours are often aimed at preventing the emergence of local industries and clearly hurt developing countries which are dependent on imports (for access to basic industrial products not produced locally) or on exports (for their growth), and which have weak industrial structures. He cited a World Bank study showing that in 1997, developing countries imported US$81 billion of goods from industries which had been affected by price fixing conspiracies during the 1990s. These imports represented 6.7% of imports and 1.2% of the GDP of the developing countries.[25]

In an earlier work, Jenny states that "...even if one believes that competition law and policy is not an appropriate tool to foster domestic economic development in developing countries, it is clear that private international anticompetitive practices or monopolization by global firms of domestic markets can prevent economic development or limit its scope, and that failure by developing countries to have adequate means to fight such practices exposes them to significant cost and setbacks on the road to economic development".[26]

There is little doubt that competition policy has been crucial for accompanying the market oriented economic reforms undertaken in most countries during the last 10 to 20 years. Policies of price liberalization, deregulation, privatization, trade liberalization and reforms in the foreign direct investment legislation of many developing countries are the ultimate goals of trade policy and regulatory reforms which are generally being promoted globally and which need competition policies consistent with these goals. While the aim of trade policy and domestic regulatory policy reforms are to allow for the possibility of increased competition, Jenny concludes that competition policies must be in place to ensure that practices and strategies of firms do not distort the competitive process.[27]

A recent World Bank Development Report urges the promotion of competition as one of the four principles to guide policymaker to build more effective institutions by fostering competition among jurisdictions, firm and individuals in the belief that competition creates demand for new institutions, changes behavior, brings flexibility in markets and leads to new solutions.[28] Nonetheless, Jenny reminds us that countries must remain alert to the growing transnational anti-competitive forces which seek to defeat trade liberalization (i.e. import cartels, domestic abuses of dominant position, vertical restraints, international hard core cartels) as well as activities that could deprive trading countries of the benefits of trade (export cartels, domestic abuses of dominant positions, and anti-competitive transnational mergers).[29]

This argues for the increasing urgency of examining the crafting and application of competition policies and appropriate legislation, which takes into account trends that might affect the competitive positions, particularly of developing countries. Thus, while it may be argued by some that maximum competition in societies is not necessarily optimal in terms of dynamic efficiency, i.e., the maximization of a country's long-term productivity growth, Ajit Singh concludes that there can be no doubt that even if not required in the past, countries

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SINN, Hans-Werner. *The Competition Between Competition Rules*, (National Bureau of Economic Research, Working Paper n. 7273; July 1999), 1. Available online: < http://www.nber.org/papers/w7273>.

JENNY. *International cooperation on competition policy* (presentation to the Seminar on Hemispheric Cooperation on Competition Policy, Santiago: Economic Commission for Latin America and the Caribbean; Organization of American States. Online, 2002).
Available online: < http://www.sice.oas.org/tunit/Seminar/santiago/Jenny4.ppt >.

JENNY. *Globalization, competition and trade policy*, p. 52.

Ibid, p. 37.

WORLD BANK. *Development report 2002: building institutions for markets*, (Washington D.C.: The World Bank, 2002). Available online: < http://econ.worldbank.org/wdr/WDR2002 >.

JENNY. *International cooperation on competition policy*. Available online: < http://www.sice.oas.org/tunit/seminar/santiago/jenny4.ppt.

must be guided today by appropriate and informed competition laws to protect both their efficiency and their public interest goals.[30]

III. Cartels

Despite the differing views which may exist regarding the various objectives of competition policy, there appears to be a consensus that hard core cartels have a negative impact worldwide. Khemani *et al*. note that "such agreements are widely acknowledged as blatant attempts to replicate the monopolistic behaviour of raising prices above competition levels by reducing output. This conduct results in the misallocation of resources and a reduction in economic welfare." [31] The World Trade Organization ("WTO") Working Group on the Interaction between Trade and Competition Policy ("WGTPC") states that "...cartels are the most pernicious type of anti-competitive practice from the point of view of trade and development as well as of competition law enforcement and impose heavy costs on consumers and the economies of Members, including both developed and developing countries."[32] Sinn writes that restriction of cartels is clearly necessary because both the consumer and society overall are losers as cartels reduce the quantity of sales and raise prices, although despite falling costs and rising profits, on balance, the cartels' gains are usually less than the consumer losses. [33]

a) What Are Cartels?

A cartel is a form of co-ordinated behaviour between firms that would otherwise be in competition.[34] It is important to distinguish between the various types of cartels, as much of the characterizations above and the current discussion in international *fora* and recent academic studies have focused on "hard core" cartels.

The OECD[35] distinguishes between "hard core" cartels engaging in price-fixing, output restraints, market division, customer allocation and bid rigging which may be expected to reduce or eliminate competition, and cartels which may not harm competition significantly, may be pro-competitive, or have beneficial effects outweighing any anti-competitive effects. This latter category of cartels could include research and development, and specialization or rationalization agreements. Hard core cartels are clearly distinguished from joint ventures or other inter-firm arrangements that involve active collaboration among firms and potentially enhance social welfare, and do not include "agreements, concerted practices, or arrangements that: (i) are reasonably related to the lawful realization of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorized in accordance with those laws".[36]

Hard core cartels may 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.[37] Export cartels vary in scope and composition. 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.

SINGH, Ajit. *Competition and competition policy in emerging markets: international and developmental dimensions.* Centre for Business Research Working Paper N. 246 (Cambridge: Centre for Business Research, 2002). Available online: < http://www.cbr.cam.ac.uk/pdf/WP246.pdf >.

KHEMANI *et al. A Framework for the Design and Implementation of Competition Law and Policy*, p.5.

WTO. *Provisions on Hardcore Cartels*, Working Group on the Interaction between Trade and Competition Policy (WT/WGTCP/W/191), 20 June 2002, p. 3. Available online: <http://www.wto.org>.

SINN. *The Competition Between Competition Rules*, p. 3.

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* (WT/WGTCP/W/191, dated 20 June 2002) at § 3.

OECD. *Recommendation of the Council concerning effective action against hard core cartels*, (C(98)35/FINAL), 13 May 1998. Available online: < http://www.oecd.org/pdf/M00018000/M00018135.pdf >. [*Recommendation on Hard Core Cartels*]

WTO. *Provisions on Hard Core Cartels*, p. 2.

An export cartel may not necessarily allocate market shares or fix prices, but may limit its actions to promotion and marketing. *See*: EVENETT, Simon J., LEVENSTEIN, Margaret C., SUSLOW, Valerie Y. *International cartel enforcement: lessons from the 1990s*, The World Economy, v. 24, n. 9 (September 2001), p. 1221-1245, fn.3. Available online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=265741 >.

National export cartels consist of suppliers from one country, while international export cartels are comprised of suppliers from several countries. Finally, an export cartel may be private (the firms comprising the cartel are independent from government) or public (the cartel is established and operated by government).[38]

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.[39]

b) Domestic Competition Law and Cartels

As discussed in Section II (Competition Law and Policy), 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.[40] 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, however, 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.[41] 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* ("Guidelines"), 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.

Certain 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.[42] However, it does not appear that any country expressly prohibits export cartels under its domestic competition law.

c) 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 firDr. 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.[43]

Some academics and international organizations have suggested that export cartels could potentially have a trade-distorting effect.[44] For example, the WGTCP has suggested

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For further background see Department of Foreign Affairs and International Trade (Canada), *Competition Policy Convergence: The Case of Export Cartels* ("Competition Policy Convergence"), Policy Staff Paper n. 94/03, April 1994. Available online" <http://www.dfait-maeci.ge.ca/english/foreignp/dfait/policypapers/1994/94_03_e.html#s3>.

Background Note, at § 5.

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.

EVENETT. *International Cartel Enforcement*, Table 3.

EVENETT *et al*. *International Cartel Enforcement*, Table 3.

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 p. 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.

See, for example, NAGAOKA, Sadao. *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*

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.[45] 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."[46]

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.[47] 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.[48]

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 Free Trade Area of the Americas ("FTAA").

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.[49] Further, the WTO Working Group on the Interaction between Trade and Competition Policy ("WGTCP"), 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.[50]

Recently, the WGTCP 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 WGTCP 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 leveled 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.[51]

In a Background Note prepared 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

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Enforcement.

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

Background Note, at § 14.

Competition Policy Convergence: *The Case of Export Cartels*. EHRLICH, William, SHARMA, Prakash. I. *Report of the Canadian Department of Foreign Affairs and International Trade, Policy*. Staff Paper 94/03;.

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

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.

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 hard core 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 <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>.

2001 Report, at § 101.

WTO Members have suggested that such exemptions "should be kept to a minimum and, ideally, phased out over time."[52]

As well, the Negotiating Group on Competition Policy of the FTAA 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 limited exemptions and exceptions from national competition laws.[53]

d) Anticompetitive Conduct of Cartels

The OECD *Report on the Nature and Impact of Hardcore Cartels and Sanctions Against Cartels Under National Competition Laws* ("Cartel Report")states that, in addition to the obvious negative effects of such anticompetitive conduct, hard core cartels also seem to offer no legitimate economic or social benefits which would justify the losses that they generate.[54] The OECD concludes that "[t]he harm from cartels is even larger than has been previously thought and conservatively exceeds the equivalent of billions of U.S. dollars per year."[55] The OECD also warns that "[c]artel operators can go to great lengths to keep their agreements secret, showing that they fully realize that their conduct is harmful and unlawful."[56]

In 1998, the OECD Council adopted a set of *Recommendations Concerning Effective Action Against Hard Core Cartels* ("OECD Recommendations"), which "called upon Member nations to enact anti-cartel laws that can effectively deter cartelization, and to lay out common principles to guide cooperation between anti-trust authorities."[57] It condemned hard core cartels as the most egregious violations of competition law, noting that they raise prices and restrict supply, distort world trade, create inefficiencies and waste resources while reducing consumer welfare, in addition to inflicting enormous damage on victiDr. The OECD Recommendations did not encompass export cartels. Subsequently, in 2002, the Cartel Report pointed to a continuing "knowledge gap" and lack of awareness concerning the nature and extent of harm done by hard core cartels by the public and policymakers outside of the competition field. The Cartel Report estimates that hard core cartels produce, on average, overcharges amounting to 10 percent of the affected commerce, and can cause overall harm amounting to 20 percent of affected commerce. However, the Cartel Report also notes that it is difficult to measure the precise dimensions of the harmful effects of cartels. This is not simply due to lack of evidence of harmful effects, which is required in most competition laws for prosecuting hard core cartels, but the inherent difficulties in calculating harm which may impede implementation of appropriate sanctions.[58] Thus, Phase II of the Cartel Report will provide a more detailed study on harmful effects, including the effectiveness of various investigative tools, optimal sanctions and methods of international cooperation. Terry Winslow, in his September 2002 presentation to the International Cartels Workshop in Rio de Janeiro, suggested that Phase II was to include more work with non-OECD Member countries, both because of evidence that suggests that cartels are particularly harmful to developing countries and because anti-cartel cooperation must extend beyond OECD Members in order to be effective.[59]

An OECD survey report issued following the October 2001 OECD Global Forum on Competition, outlined cartel characteristics based on information provided by twelve countries. Although unable to create a single "profile" of markets that would be subject to cartelization, certain factors appeared repeatedly. These factors include high concentration of

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Background Note, at § 15.

The second draft FTAA Agreement, dated 1 November 2002, can be found at: <http://www.ftaa-alca.org/ftaadraft02/eng/draft_e.asp>.

OECD. *Report on the nature and impact of* hard core *cartels and sanctions against cartels under national competition laws* (DAFFE/COMP(2002)7), 9 April 2002, p.5. Available online: < http://www.oecd.org/pdf/M00028000/M00028445.pdf>. [*Report on the nature and impact of hard core cartels*]

OECD. *Report on the nature and impact of hard core cartels*, p. 5.

OECD. *Report on the nature and impact of hard core cartels*, p. 2.

OECD. *Recommendation on Hard Core Cartels.*

See OECD. *Report on the nature and impact of hard core cartels*, for a brief background summary of the OECD developments relating to action on hard core cartels.

WINSLOW, Terry. *International co-operation in cartel investigations*, (paper presented to the IV International Workshop on Cartels, Rio de Janeiro: Brazilian Government: CADE; SDE and SEAE, 2002).

markets, homogenous products, and the existence of an industry trade association that often provided the opportunity for conspirators to meet and agree. The report also explains that "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"[60]

Evenett *et al.* suggest that increasing concern has arisen over the phenomenon of international cartels due to the fact that national competition policies are often oriented towards addressing the harmful effects of cartels in domestic markets; in some cases, these policies merely prohibit cartels without taking strong enforcement measures. They further stated that "[t]he 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 probleDr." They also caution that from the only 20 cartels with available sales data used in their sample, the annual worldwide turnover in the affected products exceeded U.S. 30 billion.[61] F.M. Shearer suggests that "for a long time the prevailing wisdom was that international cartels, or at least, cartels among private rather than governments enterprises, had receded to relative unimportance in world trade. That view no longer appears tenable in view of the many transnational cartels that have recently come to light - e.g. in paper pulp, Portland cement, coated facsimile paper, lysine, a broad range of vitamin products and graphite electrodes." [62]

The effects of cartels on developing countries are even more worrisome. Available information on the developing country imports of 16 products affected by international cartels "suggests that the price impact of cartels supplying these products was in the range of U.S. $16-32 billion for these products alone".[63] Another study covering data from 14 of the 39 known international cartels estimates that losses to developing countries caused by this small sampling amounts conservatively to about 1.7 percent of the GDP of these countries.[64]

As discussed in the above-mentioned report of the WGTCP, by their nature, "international cartels are unlikely to respect the neatly defined territories covered by existing bilateral agreements, which may exist between countries. They tend to act strategically and to seek out the cracks that might exist between relevant regional and bilateral agreements".[65] These cartels are often characterized by multi-jurisdictional price fixing, market and customer allocation schemes and usually have significant foreign targets located in multiple jurisdictions. The cartels sometimes have no domestic presence and so may not hold meetings in the home market of the firms comprising the cartels (and so may not violate domestic competition laws). Furthermore, cartels are often involved in multiple products, are usually engaged in a large volume of commerce,[66] and they can have clear effects on market access if the cartels allocate national markets between the participating firDr. However, even where they do not affect market access, most international cartels may distort the efficient function of international markets and thus undermine the benefits that should flow from trade liberalization.[67]

Despite increasing concerns about cartels and general agreement by most academics and specialists in various international organizations dealing with competition issues about the harm they can cause, many private sector interests are hesitant to rush into applying universal measures against hard core cartels. The Business and Industry Advisory Committee (BIAC), which represents business interests at the OECD, noted in the *Roundtable on Information Sharing in Cartel Cases* that "...the business community has

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OECD. *Report on the Nature and Impact of Hard-Core Cartels,* p.7

EVENETT *et al. International cartel enforcement*, p. 1.

SCHERER. *A century of competition policy enforcement*, p.16.

WTO. *Provisions on Hardcore Cartels*, citing "Hard core Cartels and Developing Economies" (presentation by Simon Evenett to the Symposium on Trade and Competition Policy: Looking Ahead After Doha, held at the WTO, 22 April 2002

UNCTAD. *Closer multilateral cooperation on competition policy: the development dimension* (Geneva: UNCTAD, 2002), p. 16 (Consolidated report on issues discussed during the Panama, Tunis, Hong Kong and Odessa Regional Post-Doha Seminars on Competition Policy) ["UNCTAD, Consolidated Report"].

WTO. *Provisions on Hardcore Cartels*, p. 4.

MILLER, William J. *International cooperation in cartel investigations*, (paper presented to the IV International Workshop on Cartels. Rio de Janeiro: Brazilian Government: CADE; SDE and SEAE, 2002).

OECD. *Report on the nature and impact of hard core cartels.*Available on line: Available online: < http://www.oecd.org/pdf/M00028000/M28445.pdf.

differing views on the definition of a hard core cartel based on the fact that different jurisdictions have different laws which govern activities that may be considered hard core cartel behaviour in one jurisdiction and not another."[68] The Guiding Principles set out by the International Chamber of Commerce offers its own definition of hard core cartels and states that "[h]ardcore cartel treatment should not be extended to agreements that are reasonably related to efficiency enhancing activity. Where a jurisdiction adopts a *per se* category of hard core cartels, there should always be some opportunity to demonstrate efficiency enhancing aspects of an agreement, even in a case that involves elements of price fixing..."[69]

However, the growing importance of creating appropriate policies that clearly prohibit cartel activity is underlined by the recent WTO analysis of factors which contribute to the harmful effects associated with hard core cartels: "i) the non-existence of a well-constituted competition law and policy; ii) statutory exemptions on protective regulatory regimes covering the conduct in question; iii) failure to adequately enforce existing laws and policies relating to anti-competitive practices; iv) the existence of other government policies that implicitly or explicitly sanction or encourage anti-competitive conduct; v) the lack of effective rules governing access to essential facilities, in the context of deregulation."[70] Clearly, countries need to focus on appropriate policies and enforcement strategies, backed up by substantial penalties, including fines and or imprisonment and encompassing the relevant powers necessary for the investigation and prosecution of cartels.

One of the major challenges facing domestic regulators is obtaining sufficient evidence to prosecute. Given that cartel Members may meet throughout the world, documents and witnesses could be located in many jurisdictions, sufficient evidence to prosecute may not be located in any one jurisdiction or critical evidence may be outside the jurisdiction of any of the competing authorities.[71] While economic evidence is crucial in most cartel cases, cartels are becoming increasingly more sophisticated with the result that documentary evidence is increasingly more difficult to find. According to the Italian experience, often collusion is sought and obtained by alternate means, usually through concerted or facilitated practices, and challenging either form is an infringement of competition law that requires substantial economic analysis and careful evaluation of economic evidence.[72]

Often major economic evidence for analysis comes from the exclusion of any other alternative economic explanation of the firm's behaviour except that of coordination among firms as well as from the presence in the market of many elements that facilitated the existence of a cartel.[73] However, "...even when indirect evidence of violating conducts is collected, the judge will still have to fulfill the arduous task of examining such evidence and convincing himself that they are sufficient and appropriate to convict the cartel ... nevertheless since it could be extremely difficult to collect direct evidence, the investigation of indirect evidence is important as an attempt to include the behaviour of potential cartel-oriented companies into a framework that typifies their behaviour as anticompetitive practices".[74]

As the potential rewards to cartel activity are very high and the risk of detection relatively low, effective sanctions are required. James Griffin noted to the International Cartels Workshop that the United States has criminal penalties, corporate fines and jail times of three years for individuals found guilty of cartel activity. The 2002 OECD *Report on the Nature and Impact of Hard Cartels* agrees that the principle purpose of sanctions in cartel cases is deterrence and ideally sanctions should take away the prospects of gain from cartel

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An International Chamber of Commerce Discussion Paper on "Hard core Cartels", prepared by the ICC Task Force on Competition and Trade states, p. 2, that "[i]n Draft BIAC Talking Points dated 07/02/01 to the OECD CLP WP3 Roundtable on Information Sharing in Cartel Cases, BIAC noted that the business community has differing views on the definition of a hard core cartel based on the fact that different jurisdictions have different laws which govern activities that may be considered hard core cartel behaviour in one jurisdiction and not another."

International Chamber of Commerce. "Hard core cartels" (paper presented to the IV International Workshop on Cartels. Rio de Janeiro: Brazilian Government: CADE; SDE and SEAE, 2002).

WTO. *Provisions on Hard Core Cartels*, p. 4.

See Griffin's presentation to IV International Workshop on Cartels (Rio de Janeiro, 2002).

GRILLO, Michele. *Economic evidence in cartel cases: the experience of Italy* (paper presented to the IV International Workshop on Cartels. Rio de Janeiro, 2002).

CONSIDERA, Claudio, DUARTE, Gustavo Seixas. *The importance of economic evidence for cartel investigation: the Brazilian experience* (paper presented to the IV International Workshop on Cartels. Rio de Janeiro, 2002).

ANDRADE, Thompson. *Trial of cartels and the use of indirect evidence* (paper presented to the IV International Workshop on Cartels. Rio de Janeiro, 2002).

activity. Particularly since not all cartels can be uncovered and punished, many experts contend that effective deterrence requires imposing a fine against organizations participating in a cartel that is a multiple of the estimated gain on those cartels that are uncovered. Some countries are now imposing very large fines on enterprises for cartel conduct, but more countries are still not doing so. Available data indicate that sanctions have not reached the optimal level for deterrence. [75] The European Commission in the past two years has imposed fines on nearly 20 cartels involving nearly 100 companies. But still, despite large American successes, a recent article in *The Economist* quoted Joel Klein, a former U.S. Assistant Attorney General with the Antitrust Division, Department of Justice, as saying that this is only the tip of an iceberg of anti-competitive activity.[76] A recent international seminar of competition authorities listed more than 30 industries as worthy of investigation, ranging from shipping to diamonds.[77]

One of the most invaluable tools used in investigations is an effective corporate leniency policy, which has been successfully employed in recent years by the United States, and has played a major role cracking various international cartels in addition to generating over U.S. $1.5 billion in fines.[78] While at the beginning of the 1990s only the United States was taking aggressive action against international hard core cartels (due to a revision of its corporate leniency program in 1993, which led to dramatic increases in international cartel prosecutions), "by decade's end, several high profile enforcement actions had convinced policymakers in other industrial countries that stronger measures against international cartels ought to be taken. Consequently, corporate leniency programs have been revised or introduced in several countries, new international norms and reforms of cartel enforcement have been proposed at the OECD, and bilateral cooperation developed between a few jurisdictions."[79] In the recently adopted EC leniency notice, there is also the possibility raised of offering firms full immunity even if they come in after an investigation has been started.[80]

However, there still seems to be some debate as to whether the current system and existing laws are sufficient to safeguard the interests of countries and consumers worldwide. According to Debra Valentine "[a]ntitrust law as we know it is largely capable of protecting against cartels in the global marketplace. The United States, Canada and the European Union treat this anticompetitive activity similarly and cooperate closely in this area ... While countries need improved procedural mechanisms for sharing confidential information about cartels, most countries' substantive laws are fully adequate to address this cross-border problem."[81] The key question is whether cartel agreements that span international borders should be singled out for treatment under international covenants, or whether they are adequately covered through the exercise of extraterritorial jurisdiction by national competition authorities and/or through cooperation among multiple national authorities. F.M. Scherer writes that "…the fact that many such cartels have been uncovered and subject to fines shows that extraterritorial enforcement and cooperation agreements do work - at least in some cases. However, in other cases they have not succeeded. The international diamond cartel is a prominent example."[82]

Consequently, the recent and much cited work by Evenett *et al.* has proposed a gradual reform process which notes that States must begin this process by strengthening national anti-cartel laws and commitments to enforcement. They suggest that enhanced international cooperation would foster trust between antitrust agencies, which is critical to successfully conducting international cartel investigations and which would build up the experience of mutual cooperation and assistance for the eventual possibility of creating a supra-national anti-cartel agency.[83] The authors are somewhat encouraged that bilateral

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Sanctions on cartels can be imposed either as fines or forfeitures upon the offending enterprises, as fines or imprisonment imposed on natural persons who participate in the cartel, or as compensatory and possibly punitive damages awarded to the victims of the cartel. *See* OECD. *Report on the Nature and Impact of Hardcore Cartels,* which includes thumbnail descriptions of the available sanctions for hard core cartels in the laws of Member Countries.

"Britain: Setting the Trap, Competition Policy," The Economist, v. 365, n. 8.297 (November 2002).

Ibid.

See Griffin's presentation to IV International Workshop on Cartels (Rio de Janeiro, 2002).

EVENETT *et al. International cartel enforcement*, p.18.

See George de Bronett's presentation to the IV International Workshop on Cartels (Rio de Janeiro, 2002).

VALENTINE, Debra A. *US competition policy and law: learning from a century of antitrust enforcement*, in: *International and comparative competition law and policies*, ed. Chao Yang-Ching (The Hague: Kluwer Law International, 2001), p. 78.

SCHERER. *A century of competition policy enforcement*, p. 16.

EVENETT *et al.*. *International cartel enforcement*, p. 24-25.

cooperation in investigating international hard core cartels seems to raise the probability of an international cartel being punished, either by a country invoking mutual legal assistance treaties (MLATs) that have been signed with other countries, or through explicit bilateral agreements on antitrust matters. However, the authors caution that the exchange of confidential business information and various inconsistencies in applying agreements still raise serious probleDr.

Evenett *et al*. summarize their recommendations by citing three specific aspects of cartel enforcement in need of 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. Secondly, penalties based on national assessments of the pecuniary gains to cartelization are unlikely to deter cartels that operate in many countries markets. Third, vigilance should not end with a cartels 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 competitive policy enforcement, the benefits created by keen international cartel enforcement will be eroded by lax enforcement in other areas."[84]

As it is clearly difficult for any one country to effectively regulate the behaviour of international cartels that often originate outside of its markets, cooperation in exchanging and disseminating basic information on legislation and enforcement guidelines must be a basic prerequisite. And, as Terry Winslow has stated, cooperation through gathering and /or sharing "confidential" information “...does not have to threaten national or legitimate business interests so long as it simply authorizes competition agencies to gather and/or share confidential information 1) when doing so is consistent with national interests and 2) subject to safeguards adequate to protect business secrets and other competitively sensitive information”.[85]

Margaret Bloom sums up the most effective methods to uncover cartels as including the implementation of effective investigative authorities, utilizing essential international cooperation, implementing an effective leniency policy, and of course procuring solid economic evidence. To deter cartels from forming, there is a clear necessity for severe and effective penalties, including criminal sanctions with severe sentences, compliance programs and educational efforts to inform the public as well as training enforcement authorities on the nature and harmful effect of cartels.[86] However, Evenett *et al*. warn that there can be no doubt that "aggressive prosecution of cartels must be complemented by vigilance in other areas of competition policy. If not, firms will respond to the enhanced deterrents to cartelization by merging or by taking other measures that lessen competitive pressures."[87]

Finally, while developing countries require a competition policy in order to deal with the issues of market dominance and abuse of dominant position, Singh states that it is unclear whether these countries would have the power to restrain cartel activity, due to inadequate development of their legal and institutional frameworks, lack of information and lack of evidence regarding the harmful effects of international cartels. He also cautions that it is important to remember that:

> the anti-cartel legislation in advanced countries does not normally extend to developing countries. Indeed, on the contrary, exports or foreign markets are often explicitly exempted from such laws. In these circumstances, in addition to domestic competition policies, developing countries clearly require considerable co-operation from advanced countries to be able to cope at all effectively with anti-competitive behaviour of advanced country cartels between the large multinationals. From the perspective of poor countries, it is therefore necessary not only to have the right kind of domestic competition policies, but also an appropriate framework for international co-operation on competition issues.[88]

As emphasized in the seminal research done by Evenett *et al.,* the need for tough and proactive policies against cartels is clear "...even when cheating eventually undermines a

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See EVENETT *et al. International cartel enforcement*, for a comprehensive treatment of the need for reform, p. 27.
WINSLOW. *International co-operation in cartel investigations*.
Margaret Bloom’s presentation to the IV International Workshop on Cartels (Rio de Janeiro, 2002), p.2.
EVENETT *et al. International cartel enforcement*, p. 2
SINGH. *Competition and competition policy in emerging markets*, p.19.

cartel, consumers may have been burdened by years of increased prices and enduring barriers to entry have often been created by strategic cartel behaviour."[89]

IV. Evolution of Co-operation Agreements

In the post-war period, the primary focus of international competition/antitrust debate was whether U.S. courts should be able to apply U.S. antitrust laws to conduct occurring outside of the United States or to foreign nationals, whether natural or legal persons.[90] This debate arose out of a series of cases in which U.S. courts held that a state could exercise jurisdiction over conduct that occurs outside of the state's territory if that conduct has, or is intended to have, a substantial effect in its territory.[91]

The extraterritorial enforcement by the United States of its antitrust laws created significant tension with other States.[92] For example, in 1947, in the course of investigating the U.S. paper industry, a U.S. grand jury issued subpoenas to Canadian International Paper Company and International Paper Sales Company, Inc., which were Canadian companies owned by a U.S. company, International Paper Company, which was the target of the antitrust investigation. The Canadian companies were ordered to produce documents located in Canada. The controversy surrounding this extraterritorial assertion of jurisdiction by the U.S. grand jury ultimately concluded in two Canadian provinces passing legislation prohibiting the Canadian companies from producing documents in compliance with a government authority from outside that province.[93]

States recognized that the extraterritorial application of domestic competition laws could create commercial and legal uncertainty, distort investment and trading decisions and impose conflicting legal requirements on companies.[94] Indeed, the extraterritorial application of competition law by a state is particularly problematic when that state's laws prohibit conduct expressly permitted by the state in which the conduct has occurred. Further, some States had concerns about U.S. discovery proceedings, in which information that was confidential or important to national commercial interests, could flow into the United States.[95]

States protested the assertion of U.S. antitrust law through both diplomatic and legal channels and through the passage of legislation intended to block the application of U.S. antitrust law to their nationals.[96] For example, between 1951 and 1960, a U.S. grand jury investigated alleged worldwide production and market allocation arrangements among U.S., U.K. and Dutch petroleum companies. The U.S. grand jury issued broad subpoenas to a number of foreign companies seeking documents located outside of the United States. The U.K. and Dutch governments instructed domestic firms not to produce the requested documents, and the U.K., Dutch and French Governments delivered a series of diplomatic protests to the U.S. Government.[97]

EVENETT *et al*. *International cartel enforcement*, p. 2.

There are a variety of justifications for the extraterritorial application of competition laws, including: (i) the principle of territoriality, which gives a state the right to apply its laws to conduct occurring fully or partially within its territory; (ii) the principle of nationality, which allows a state to apply its laws to its citizens, regardless of whether the activity takes place; and (iii) the effects doctrine, which provides that a state may apply its domestic laws to conduct that, while not occurring within that state's territory, in intended to have substantial effects within its territory. *See* WALKER, William K. *Extraterritorial Application of U.S. Antitrust Laws: The Effect of the European Community – United States Antitrust Agreement*, 33 Harvard International Law Journal 583 (Spring, 1992), p. 583–584 and NEREP, Erik. *Extraterritorial Control of Competition under International Law* (P A Norstedt & Söners Förlag, Stockholm, 1983), p. 573–577.

WALKER. *Extraterritorial Application*, p. 584-585. *See also* WALLER, Spencer Weber and KESSLER, Jeffry. *International Trade and Antitrust Law* (West Group: 2002), §5.03.

FOX, Eleanor M. *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade*, 4 Pacific Rim Law & Policy Journal 1 (March 1995), p. 18-20.

HUNTER, Lawson A.W., Q.C. and HUTTON, Susan M. *Where There is a Will, There is a Way: Cooperation in Canada – U.S. Antitrust Relations*, 20 Canada – United States Law Journal 101 (1994), p. 102.

LANGE, Dieter and BORN, Gary (ed.) *The Extraterritorial Application of National Laws* (ICC Publishing S.A.: Paris, 1987), p. 4–12.

WALKER. *Extraterritorial Application*, p. 584-586.

WALLER and KESSLER. *International Trade*, §5.03; WALKER. *Extraterritorial Application*, at p. 586. Blocking legislation may take a variety of forms such as (i) fining companies that submit to foreign requests for documents; (ii) preventing the enforcement of treble damages (U.S. antitrust law permits private plaintiffs to commence suits seeking treble damages) by permitting defendants to recover from the plaintiff any amounts that exceed actual damages.

INTERNATIONAL CHAMBER OF COMMERCE. *The Extraterritorial Application of National Laws* (Kluwer Law and Taxation Pub., Deventer, The Netherlands, 1987) p. 5. The United States eventually dropped its criminal investigation and pursued a civil antitrust case against only the U.S. corporations

In order to minimize conflict and tension, a number of States entered into informal arrangements between their domestic competition authorities to provide a mechanism for consultation and to enhance inter-agency communication and co-operation.[98] For example, in 1959, Canada and the United States entered into a *Bilateral Understanding regarding Antitrust Notification and Consultation Procedure* (the "Fulton-Rogers Understanding") that established a communications channel to manage disagreements on such matters as the extraterritorial application of competition laws. The Fulton-Rogers Understanding provided for intergovernmental discussions "whenever it becomes apparent that the interests of one of our countries are likely to be affected by the enforcement of the antitrust laws of the other" and prior to the initiation of any lawsuit involving the interests of the other state. The Fulton-Rogers Understanding, however, did not include any provisions related to co-operation in antitrust enforcement.[99]

However, U.S. courts continued to enforce U.S. antitrust laws in a manner that had an impact on the sovereignty or national interests of various countries, including Canada. As a result, in 1969, Canada and the United States signed a *Joint Statement Concerning Cooperation in Antitrust Matters* ("Basford-Mitchell Understanding") that supplemented the notification and consultation procedures in the Fulton-Rogers Understanding with information sharing and co-ordination of enforcement activities, to the extent possible under each country's domestic laws.[100] However, the Fulton-Rogers Understanding and the Basford-Mitchell Understanding were unable to resolve serious antitrust disputes between Canada and the United States.[101]

In response to the closure of the U.S. market to uranium imports, the governments of several uranium exporting countries – including Canada, the U.K., Australia and France – created a uranium producers cartel. In 1976, a U.S. grand jury investigation was launched into possible criminal activities arising out of the cartel. The decision by U.S. courts to take jurisdiction to inquire into activities of a cartel whose Members and activities were located entirely outside of the United States and whose actions were sanctioned by foreign governments and whose intended effects expressly excluded the domestic U.S. market offended the governments of several countries, including Canada.[102] In response to the litigation, Australia, Canada and the United Kingdom adopted blocking statutes.[103]

Since the 1970s, a number of approaches have been suggested to resolve jurisdictional conflicts in the application of competition laws. Some States adopted a "rule of reason", which would require States to consider foreign interests in applying competition laws extraterritorially.[104] As well, there has been some limited support for the development of a comprehensive international competition law system and a world competition code,[105] or the development of a relatively narrow multilateral competition agreement that addresses specific problems and tensions.[106]

OECD. *Working Party N. 3 on International Cooperation: Developing Cooperation Relationships – Canada* (DAFFE/COMP/WP#/WD(2003)15, dated 7 May 2003), parag. 22. For a discussion of co-operation between Brazilian, U.S. and Canadian competition authorities in three notable cartel investigations, *see* ARAÚJO, Mariana Tavares de. *The Brazilian Experience on International Cooperation in Cartel Investigation* (November 2002) Available online: <http://www.fazenda.gov.br/seae/english/index_english.html>.

HUNTER & HUTTON. *Cooperation in Canada- U.S. Antitrust Relations*, p. 103.

HUNTER & HUTTON. *Cooperation in Canada- U.S. Antitrust Relations*, p. 104.

BLAIR, D. Gordon. *The Canadian Experience* in: GRIFFIN, Joseph P. (ed.) *Perspectives On the Extraterritorial Application of U.S. Antitrust and Other Laws* (American Bar Association, 1979), p. 71–75.

HUNTER & HUTTON. *Cooperation in Canada- U.S. Antitrust Relations*, p. 106.

LANGE & BORN. *Extraterritorial Application*, p. 6–7.

The rule of reason would require States to refrain from applying their competition laws to conduct that occurs principally abroad when doing so would unreasonably interfere with the interests of other States and of private parties. *See* WALLER & KESSLER. *International Trade*, §5.05 - §5.06. The rule of reason was essentially adopted in the *1987 Restatement (Third) of Foreign Relations Law of the United States*. *See* GRIFFIN, Joseph P. *EC and U.S. Extraterritoriality: Activism and Cooperation*, 17 Fordham International Law Journal 353, p. 362–364.

In 1993, the "Munich Group" issued "Draft International Antitrust Code" ("DIAC") which was intended to serve as a plurilateral agreement under the Agreement Establishing the World Trade Organization. Some of the more controversial features of DIAC was the creation of an independent antitrust authority to supervise enforcement of domestic competition laws and the use of international antitrust panels to settle intergovernmental disputes under the WTO state-to-state dispute settlement procedures. *See* JONES, Clifford A. *Toward Global Competition Policy? The Expanding Dialogue on Multilateralism,* Journal of World Competition, 23(2) 95–99 (2000), p. 96.

The development of multilateral disciplines on competition law and policy by the World Trade Organization ("WTO") and the on-going Free Trade Agreement of the Americas ("FTAA") negotiations are discussed in Section V of this paper.

Most countries were not prepared to accept multilateral disciplines on competition law, but recognized that the increasing internationalization of markets required the creation of a predictable framework to address international competition/antitrust issues. To that end, many States focused on developing bilateral and plurilateral co-operation in the area of competition,[107] which were based on a series of recommendations from the Organization for Economic Co-operation and Development ("OECD") and the United Nations Conference on Trade and Development ("UNCTAD") providing for consultation and co-operation in significant competition law enforcement actions.[108]

In 1976, the OECD adopted Guidelines for Multinational Enterprises ("Guidelines"),[109] which were based, at least in part, on earlier recommendations from the OECD Committee on Experts on Restrictive Practices.[110] In 1979, the OECD adopted a *Recommendation Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade* providing for consultation and co-operation in various areas including significant enforcement actions.[111]

In 1979, UNCTAD held a conference to formulate international rules and principles for the control of restrictive business practices. In 1980, UNCTAD developed a Restrictive Business Practices Code ("RBP Code"),[112] which recommended certain principles and rules addressed to States as well as to private and public enterprises. The RBP Code encourages Member States to improve and enforce their national competition laws and provides that States should cooperate with authorities in other States that are adversely affected by restrictive business practices.[113]

In order to minimize jurisdictional conflicts in competition investigations and proceedings, a number of countries entered into informal arrangements or bilateral agreements to increase co-operation between competition authorities. These arrangements usually involved mutual recognition of essentially equivalent competition laws, notification provisions, and a traditional comity provision (that is, one country will attempt to minimize conflict by agreeing not to take action that will unnecessarily interfere with the interests of the other country).[114] For example, the United States entered into bilateral memoranda of understanding with Germany (1976) and Australia (1982) and mutual legal assistance treaties with certain other countries.[115]

In 1984, Canada and the United States signed a *Memorandum of Understanding as to Notification, Consultation and Co-operation* ("MOU") which included provisions relating to conflict avoidance and management. The MOU contained much more detailed provisions designed to avoid antitrust conflicts between Canada and the United States, while expressly recognizing that each country was free to apply its domestic laws. The MOU sets out in detail

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See, for example, COCUZZA, Claudio. *International Antitrust Cooperation in a Global Economy*, p. 3 (the paper is available on-line at http://www.aija.org/pdf/anti_text2.pdf); Commission of the European Communities, *Report from the Commission to the Council and the European Parliament on the Application of the agreements between the European Communities and the Government of the United States of America and the Government of Canada regarding the application of their competition laws, 1 January 2001 to 31 December 2001* (COM(2002) 505 final, dated 17 September 2002).

In 1967, the OECD adopted a set of recommendations concerning co-operation between Member States with respect to restrictive business practices. These recommendations contained co-operation provisions in addition to notification and consultation provisions.

OECD. *Annex to the OECD Declaration on International Investment and Multinational Enterprises*, 21(76) 04/01 (1976). This Recommendation replaced the Recommendation of the OECD Governing Council.

In 1967, the OECD Governing Council adopted a recommendation (C967) 53 (Final), dated 5 October 1967), based on a recommendation from the OECD Committee of Experts on Restrictive Business Practices ('the "Committee of Experts") calling for co-operation among Member States regarding notification and consultation on competition matters where feasible and co-ordination of competition enforcement where possible. In 1973, the Council adopted a recommendation [C973)99 (Final), dated 3 July 1973) based on a Committee of Experts recommendation that States adopt a voluntary procedure for notification, consultation and conciliation.

C(79)154 (Final) dated 5 September 1986. This Recommendation superceded a similar recommendation made in 1973.

U.N. Doc T.D.-RBP-CONF-10 (1980), reprinted in 19 I.L.M. 813 (1980).

UNCTAD is also involved in providing technical assistance to countries seeking to adopt and enforce competition and consumer protection laws. To date, more than 50 developing countries and countries with economies in transition have received technical assistance from UNCTAD. UNCTAD also publishes a Model Law on Competition (TD/RBP/CONF.5/7). The Model Law is available on-line at: http://www.unctad.org/en/docs//tdrbpconf5d7.en.pdf.

The traditional comity clause is often referred to as a "negative comity clause" to distinguish it from the positive comity clause. *See* EHLERMANN, Claus-Dieter. *The International Dimension of Competition*, Policy, 17 Fordham International Law Journal 833, p. 836.

MITCHELL, Andres D. *Broadening the Vision of Trade Liberalization: International Competition Law and the WTO*, Journal of World Competition 24(3) 343(2001), p. 354.

the circumstances requiring notification.[116] The countries further enhanced co-operation in antitrust enforcement actions by subsequently entering into a *Mutual Legal Assistance in Criminal Matters Treaty* ("MLAT").[117]

More recently, some countries have entered into more advanced bilateral co-operation agreements. A notable example is the Competition Co-operation Agreement executed in 1991 by the European Commission ("EC") and the United States ("1991 Agreement").[118] In addition to the provisions typically contained in earlier bilateral co-operation agreements, the 1991 Agreement includes a "positive comity" principle– that is, one Party can invite the other Party to take, on the basis of the latter's legislation, appropriate measures regarding anti-competitive behaviour in its territory that affects the important interests of the other Party.[119] For example, if the United States was concerned that proposed merger of two European companies would have an adverse impact on American trade in Europe, it could request that the EC review the proposed merger under its competition laws.

In 1998, the EC and the United States entered into another agreement which strengthened the positive comity provisions of the 1991 Agreement ("1998 Agreement").[120] The 1998 Agreement clarified the positive comity co-operation provisions and the circumstances in which it may apply. In particular, the 1998 Agreement describes the conditions in which a Party should normally suspend its own enforcement procedures and refer the matter to the other Party.

In 1995, the OECD adopted *Revised Recommendations Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade* ("the Recommendation").[121] The OECD recognized that the increased internationalization of business activities increases the likelihood that anticompetitive behaviour in one country, or the behaviour of companies located in different countries, could adversely affect the interests of Member countries. The OECD acknowledged that anticompetitive practices investigations and proceedings by one Member country might, in certain cases, affect important interests of other countries, and that the unilateral application by one Member country of its domestic competition law in cases in which business operations in other countries are involved would raise questions of sovereignty and extraterritoriality.

The Recommendation addressed such issues as notification, exchange of information and co-ordination of action, consultation and conciliation.[122] For example, the Recommendation proposed that a Member country undertaking an investigation or proceeding under its domestic laws which might affect important interests of another Member country should notify that country to facilitate consultations; such notification would permit the investigating Member to take account of the views of the other Member and any remedial action that the other Member might take under its own laws. The Recommendation also suggested that Member countries should cooperate in developing or applying mutually satisfactory measures for dealing with anticompetitive behaviour in international trade, such as supplying each other with relevant information on anticompetitive behaviour.

Currently, most co-operation agreements typically contained notification provisions (that is, a Party will notify the other Party of cases being handled by its competition authority to the extent that these cases concern the important interests of the other Party), co-operation provisions (that is, the Parties' competition authorities will co-operate and co-ordinate), and provisions regarding the exchange of information. Some agreements also

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For example, each country is to seek to obtain information necessary to its antitrust enforcement action from within its borders. If necessary, a country may seek information located in the other country after first notifying the other country and providing an opportunity to seek consultations prior to requesting the information.

The MLAT, which was signed in 1985, entered into force in 1990.

Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, dated 23 September 1991.

2001 EC Report, p. 2–3.

Agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of their competition laws, dated 4 June 1998.

C(95)130/FINAL, dated 21 September 1995.

The Recommendation also appended *Guiding Principles for Notifications, Exchanges of Information, Co-operation in Investigations and Proceedings, Consultations and Conciliation of Anticompetitive Practices Affecting International Trade* ("Principles"). The Principles clarify the procedures set out in the Recommendation and are intended to strengthen cooperation and to minimize conflicts in the enforcement of competition laws. The Principles contain detailed recommendations on such matters as the circumstances in which a Member country should notify another Member of an investigation or proceeding, sets out a procedure for notification, and addresses confidentiality of information exchanged by Members.

contained a "traditional comity" principle – that is, each Party undertakes to take into the account the important interests of the other Party when it takes measures to enforce its competition rules.[123] However, more countries are entering into co-operation agreements containing positive comity provisions. For example, the United States has entered into co-operation agreements containing positive comity provisions with Canada (1995), Brazil (1999), Mexico (2000); Canada has entered into co-operation agreements containing positive comity provisions with the EC (1999) and Mexico (2003)[124]; and Brazil, in addition to entering into a co-operation agreement with the United States, has recently entered into a co-operation agreement containing a positive comity provision with Russia.[125]

Since 1991, there has been considerable discussion of "positive comity" as a form of co-operation that might improve the effectiveness and efficiency of competition law enforcement in international cases.[126] In a recent study, the OECD has suggested that the more successful the positive comity clause in a co-operation agreement, the less a state is likely to apply its competition laws extraterritorially. However, the OECD has also suggested that there are limits to the usefulness of positive comity. For example, since the concept relates to possible enforcement action by the requesting State, it applies only to conduct that is illegal in that State. Restrictions on the sharing of confidential investigatory information by the States' competition authorities and the need for the requested state to agree to commence an investigation may also limit the potential scope of positive comity. Indeed, the OECD suggests that positive comity may have little potential in hard core cartel cases and may not be particularly beneficial in merger cases given the mandatory and differing time frames.[127]

As markets become more global, there is increasing pressure to create larger cross-border enterprises. This has lead to a recent merger wave, which has substantially increased the number of notifications in the United States, Canada and other jurisdictions.[128] Many countries are now recognizing the heavy regulatory burden which can result in multi-jurisdiction reviews of mergers, and the very significant transaction costs incurred by companies. For example, the current system of merger review in the case of substantial multinational companies will commonly involve obtaining consents from 60 or 70 different national competition authorities.[129]

In 2000, the U.S. International Competition Policy Advisory Committee Report urged competition authorities to establish a new and independent forum that would be more inclusive of both developed and developing countries than existing fora.[130] The new forum would promote consultation, dialogue and consensus-building. In 2001, senior competition officials representing 14 jurisdictions agreed to launch the International Competition Network ("ICN").[131] In its first year, the ICN established working groups to consider multijurisdictional merger review and competition advocacy issues.[132] In its second year, the ICN created a third working group to examine capacity building issues and competition policy implementation. As of June 2003, the ICN consists of 81 competition authorities from 70 jurisdictions.

WALKER. *Extraterritorial Application*, p. 586–589.

See The text of co-operation agreements to which the United States is a party can be found at: http://www.usdoj.gov/atr/public/international/int_arrangements.htm. The text of co-operation agreements to which Canada is a party can be found at: http://strategis.ic.gc.ca/SSG/ct02142e.html. The text of co-operation agreements to which the EC is a party can be found at: http://europa.eu.int/comm/competition/international/bilateral/

CONSIDERA, Claudio Monteiro and TEIXEIRA, Cleveland Prates. *Brazil's Recent Experience in International Cooperation*, at pp. 2 – 3. Available online: <http://www.fazenda.gov.br/seae/english/index_english.html>

See, for example, GRIFFIN, Joseph P. *EC and U.S. Extraterritoriality: Activism and Cooperation*, 17 Fordham International Law Journal 353 (1994).

CLP Report on Positive Comity, p. 12–16.

ROWLEY, J. William, WAKIL, Oman K. and CAMPBELL, A. Neil. *Streamlining International Merger Control*, presented at the EC Merger Control 19th Anniversary Conference (September 2000). This paper is available on-line at http://www.mcbinch.com/Inprint/template/Publication/Welcome.php3?id=313 .

MITCHELL. *Broadening the Vision of Trade Liberalization*, p. 351.

International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust - Final Report, 2000. This paper is available on-line at: http://www.usdoj.gov/atr/icpac/finalreport.htm.

The IPCAC Report referred to "Global Competition Initiative".

The International Competition Network. Comments by VON FINCKENSTEIN, KONRAD. Commissioner of Competition and Chair, Interim Steering Group, ICN, to the Insight Conference *International Dimensions of Competition Law* (Toronto, 22 March 2002). This paper is available on-line at:
http://strategis.ic.gc.ca/SSG/1/ct02353e.html.

Any proposals for an international approach to merger review arising out of the ICN may complement existing bilateral and plurilateral co-operation agreements. In the absence of harmonization of substantive disciplines on competition law, which appears unlikely at least in the near future, countries may be able to mitigate potential problems related to international merger review by relying on the advance notification principles, consultation provisions and positive comity provisions found in many co-operation agreements.

V. Regional and Multilateral Arrangements

Andean Community

The Cartagena Agreement (also known as the Andean Pact) was signed in 1969 for the purpose of establishing a customs union within a period of 10 years.[133] The key objectives of the Cartagena Agreement include liberalization of trade in goods in the sub region, the adoption of a common external tariff, and the harmonization of foreign trade instruments and policies of economic policy for the Sub-region. Institutional and policy reforms in the Cartagena Agreement were accomplished through the Protocols of Trujillo and Sucre, respectively.[134] The institutional reforms created the Andean Community and the Andean Integration System (AIS) while the policy reforms extended the scope of integration beyond purely trade and economic areas. The Andean Community started operating on August 1, 1997, with headquarters for the General Secretariat established in Lima, Peru.

The Andean Community is comprised of the Member countries of Bolivia, Colombia, Ecuador, Peru and Venezuela and also the bodies and institutions comprising the AIS. The Community has a series of provisions for preventing or counteracting distortions in competition in the Sub-region produced by dumping and subsidies and other practices which restrict free competition. The representative of any national industry that is affected can make a complaint or submit one on behalf of that industry or Member country through the national integration bodies. Decision 285, enacted by the Commission in 1991 was the first effort to address competition issues at the sub-regional level in Latin America and established common rules to: "prevent or correct distortions in competition resulting from practices aimed at restricting free competition."[135] The Decision, which was enacted before the current national competition laws, is based on supranational principles and prevails over domestic law in cases of sub-regional dimension.

CARICOM

The Treaty of Chaguaramas, signed in Trinidad on July 4, 1973, established the Caribbean Community (CARICOM), which came into force on August 1 of 1973.[136] CARICOM Member States are: Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, Saint Lucia, St. Kitts and Nevis, St. Vincent and the Grenadines, Suriname, and Trinidad and Tobago. The Caribbean Community has three objectives: a) economic cooperation and international competitiveness in the production of goods and provision of services throughout the Caribbean Single Market and Economy; b) coordination of foreign policy among the independent Member States; and c) provision of common services and cooperation in functional matters such as health, education and culture, communications and industrial relations.

The Treaty has been comprehensively revised with the goal of establishing the CARICOM Single Market and Economy where the factors of production would be free to migrate to any part of this economic space where they can be efficiently employed. In order to provide a level playing field for economic actors and to facilitate internationally competitive production of goods and services, chapter 8 of the Revised Treaty addresses the Rules of competition. Central to the institutional arrangements established in this context, are a regional Competition Commission and a Caribbean Court of Justice (CCJ) with original

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Cartagena Agreement ("Andean Pact"), 26 May 1969 (came into effect 1970). Available online: < http://www.comunidadandina.org/ingles/treaties/trea/ande_trie1.htm >.

ANDEAN COMMUNITY. *Codification of the Cartagena Agreement* ("Protocol of Turjillo"), Decision 406, approved 25 June 1997; *Sucre Protocol*, 25 June 1997 (not ratified, except for Chapter on Associate Members and first Transitory Provision). Available online: < http://www.comunidadandina.org/ingles/treaties.htm >.

ANDEAN COMMUNITY. *Rules and regulations for preventing or correcting distortions in competition caused by practices that restrict free competition* (Decision 285), 21 March 1991. Available online: < http://www.comunidadandina.org/ingles/treaties/dec/d285e.htm >.

CARICOM. *Treaty Establishing the Caribbean Community and Common Market*, Chaguaramas, 4 July 1973 (came into force 1 August 1973). Available online: <http://www.caricom.org/archives/revisedtreaty.pdf >.

jurisdiction to settle disputes concerning interpretation and application of the Treaty. Pending ratification and its definitive entry into force, the Revised Treaty is being provisionally applied by the Member States of the Caribbean Community.

FTAA

The Summit of the Americas, held in December 1994 in Miami, Florida, began an effort to unite the economies of the Western Hemisphere into a single free trade agreement of the Americas. The intent of the Free Trade Agreement of the Americas ("FTAA") is to progressively eliminate barriers to trade and investment. The goal is to complete negotiations by 2005 among the 34 democracies within the region. At the fourth preparatory Ministerial Meeting of the FTAA process held in San Jose, Costa Rica in March 1998, the structure, general principles and objectives were laid out to guide the negotiations. On the basis of the San Jose Declaration, the FTAA negotiations were formally launched in April 1998 at the Second Summit of the Americas held in Santiago, Chile. At the Third Summit of the Americas held in Quebec City in April 2001, the draft text of the FTAA Agreement was presented to the Ministers by the Negotiating Groups and was subsequently made available to the public. The FTAA process is consistent with WTO rules and disciplines and can coexist with bilateral and sub-regional agreements; countries may negotiate and accept the obligations of the FTAA individually or as Members of a sub-regional integration group.

Nine FTAA Negotiating Groups have been established, each with a specific mandate from the Ministers and the TNC (Trade Negotiations Committee formed by the Vice Ministers responsible for Trade) to negotiate text in their subject areas. The objectives of the Negotiating Group on Competition Policy (as stated in the San Jose Ministerial Declaration) are: "to guarantee that the benefits of the FTAA liberalization process not be undermined by anticompetitive business practices to advance towards the establishment of juridical and institutional coverage at the national, sub-regional or regional level, that proscribes the carrying out of anti-competitive business practices; to develop mechanisms that facilitate and promote the development of competition policy and guarantee the enforcement of regulation on free competition among and within countries of the Hemisphere."[137]

The current draft Chapter on Competition Policy, published following the seventh FTAA Ministerial meeting in Quito, Ecuador in November 2002, includes provisions on: the scope and coverage of domestic competition laws (including a requirement that such laws cover cartels); the establishment of a competition committee; competition policy review mechanisms; consultation and dispute settlement; the provision of technical assistance; and transitional provisions.[138]

The European Union

The European Union was set up after the Second World War. The process of European integration was launched on May 9, 1950 when France officially proposed to create 'the first concrete foundation of a European federation'. Today, after four waves of accessions, the EU has 15 Member States and is preparing for the accession of 13 additional countries from Eastern and Southern Europe. Its Member States delegate authority to common institutions who represent the interest of the Union as a whole on questions of joint interest. All decisions and procedures are derived from the basic treaties ratified by the Member States.

The European Commission is the executive body of the European Union and is responsible for implementing European legislation, the budget and programmes adopted by Parliament and the Council. It represents the Union in negotiating international agreements, chiefly in the field of trade and cooperation, and has been entrusted by Member States to deal with competition matters at the Community level. While both national and EU competition laws may apply to cartels, there is generally cooperation between the different authorities as to whether cases are pursued at the national or EU level. European competition policy is based on a Community legislative framework essentially provided by

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See <http://www.alca-ftaa.org >.

See FTAA, *Second Draft Agreement, Chapter on Competition Policy*, online: <http://www.ftaa-alca.org/ftaadraft02/eng/ngcpe_1.asp#CP >.

the EC Treaty (Articles 81 to 90).[139] All Commission decisions are subject to judicial review by the Community's legal system.

The mission of the Competition Directorate General (DG) is to enforce the competition rules of the Community's Treaties. Its work includes a special cartels unit to investigate suspected cartels. The Competition DG also deals with the international dimension of competition policy as a partner of the industrially developed countries, or as a counselor to countries with transforming economies (i.e. countries of Eastern and Central Europe). Its main areas of activities are in anti-trust, merger control, liberalization and state intervention, as well as also state aid. Currently the DG is involved in a process of substantial reform of enforcement mechanisms and some substantive rules in order to modernize competition policy in the EU and make it more effective within an enlarged European Union. The European Commission was the first to suggest including competition policy in the new phase of the WTO negotiations.

South and Central America are currently a great focus of attention for the European Community as regards competition policy. The European Union has set up a series of framework cooperation agreements within Latin American countries. The main one is the *Interregional Framework Cooperation Agreement* with MERCOSUR, of December 15, 1995, which includes a provision for the future establishment of a free trade area.[140]

MERCOSUR

MERCOSUR represents a process of economic integration between Brazil, Argentina, Uruguay and Paraguay. It was constituted on March 26, 1991, with the signing of the Treaty of Asunción.[141] The processes of integration are classified into diverse types including Preferential Tariff Zones, Free Trade Zone, Customs Union and Common Market. Since 1995, MERCOSUR has acted as a Customs Union within the process of becoming a Common Market. The two major pillars upon which MERCOSUR was founded are economic-commercial liberalization and the policy of democratization. Its main objectives are: "the elimination of tariffs and non-tariff barriers within the commercial relations of Member countries; the adoption of a Common External Tariff; the coordination of macroeconomic policies; and the free trade in services, labor and capital within the Common Market".[142]

Negotiations on the theme of Competition Defense are held within the scope of Technical Committee no. 5 (CT-5). The *Regulations for the Defense of Competition Protocol* - PDC (also known as the Forteleza Protocol) was signed on June 18, 1997, and comprises the legal framework between the Member States of MERCOSUR regarding anticompetitive conduct within the MERCOSUR region. At the present time, the PDC is in force only in Brazil and in Paraguay. The Regulation of the PDC, following approval by the Common Market Group (GMC) and by the Common Market Council (CIVIC) must still be internalized by the Member States before it can be enforced.[143]

NAFTA

The North American Free Trade Agreement ("NAFTA") was launched by Canada, Mexico and the United States in January 1994, comprising the world's largest free trade area to date. Designed to foster increased trade and investment among the partners, the NAFTA contains an ambitious schedule for tariff elimination and reduction of non-tariff barriers, as well as comprehensive provisions on the conduct of business in the free trade area. These provisions include disciplines on the regulation of investment, services, intellectual property, competition and the temporary entry of businesspersons. The NAFTA Secretariat, through its national sections in Ottawa, Mexico City and Washington, is responsible for the

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See Consolidated version of the Treaty Establishing the European Community. Available online: <http://europa.eu.int/eur-lex/en/treaties/dat/EC_consol.pdf>.

European Community/MERCOSUR, *Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part* (OJ L 069, 19/03/1996), 15 December 1995. Available online: <http://europa.eu.int/comm/external_relations/MERCOSUR/bacground_doc/fca96.htm >. *Also see* generally http://europa.eu.int/.

See MERCOSUR. *Treaty of Asunción*. Available online: <http://www.sice.oas.org/trade/mrcsr/mrcsrtoc.asp>.

Ibid.

See < http://www.mercosur.org.uy/.

administration of the dispute settlement provisions of the Agreement and provides assistance to the Commission, its various committees and workgroups.

Article 1501 provides that "each Party shall adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto, recognizing that such measures will enhance the fulfillment of the objectives of this Agreement". Furthermore, Article 1504 provides for the establishment of a Working Group on Trade and Competition to report and make recommendations on issues concerning competition law and policies in the free trade area. The Working Group has met several times and has considered several studies prepared by delegates addressing issues related to trade and competition, comparing competition laws within the three NAFTA Parties and evaluating any implications of these laws on trade.[144]

SICA

The Central American Integration System (SICA) was created by the Protocol of Tegucigalpa in December 1991. It came into force in February 1993 and has been ratified by all Member States. The countries of El Salvador, Honduras, Nicaragua, Guatemala, Costa Rica, Panama and Belize seek to create a Central American Customs Union by January 1, 2004. Integration efforts date back to 1960 when the Central American Common Market (MCCA) was launched and sought to create a common market based on a free trade zone, the union of customs houses and common foreign tariffs.

An accelerated timetable for Central American integration was recently launched with the San Salvador Plan of Action of March 2002. Today, with the increasing integration of the region, plans are underway to negotiate free trade agreements as a unified block with the United States and also with the European Union.[145]

WTO

The *Agreement Establishing the World Trade Organization* ("WTO Agreement") was signed in 1994.[146] It deals with the global rules of trade among nations, and supercedes the *General Agreement on Tariffs and Trade ("GATT").* The WTO today has 142 Members, accounting for over 90 percent of world trade, and has over 30 other countries negotiating membership. The primary functions of the WTO are to act as a forum for trade negotiations, settle trade disputes, review national trade policies, assist developing countries in trade policy issues through technical assistance and training programmes and cooperate with other international organizations.

The WTO Agreement is central to multilateral trading applied to trade in goods in the GATT. In addition, the WTO Agreement also applies to trade in services, trade in intellectual property and trade in investment.

The WTO Working Group on the Interaction between Trade and Competition Policy (WGTCP) was established at the Singapore Ministerial Conference in December 1996 to consider issues raised by Members relating to the interaction of these two policy fields. Since 1999, pursuant to a decision by the General Council of the WTO, the WGTCP has been focusing on: "the relevance of the fundamental WTO principles of national treatment, transparency and most-favored-nation treatment to competition policy and vice versa; approaches to promoting cooperation and communication among Members, including in the field of technical cooperation and the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trades[147] Most recently, discussions have focused more specifically on the desirability of developing a multilateral framework on competition policy, which was taken up at the Doha Ministerial Conference in September 2002 and will again be discussed at the fifth Ministerial Conference in Mexico in 2003. The Doha Ministerial Declaration specifically instructs the Working Group to, among other things, focus on clarifying provisions on hard core cartels that could be included in a multilateral framework on competition policy.

See < http://www.nafta-sec-alena.org >.
See < http://www.sgsica.org/sica >.
Agreement Establishing the World Trade Organization ("WTO Agreement"), 15 April 1994, Marrakesh. Available online: http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.
See < http://www.wto.org > in reference to the Working Group set up by Singapore ministerial.

VI. International Fora for Co-operation in Competition Policy
International Competition Network (ICN)

The idea for a new global competition initiative was first put forward in February 2000 in the Report of the US International Competition Policy Advisory Committee (ICPAC) and was endorsed by key public and private competition leaders at the Ditchley Park Meeting in February 2001. The ensuing result was the creation of the ICN, which is primarily a virtual network of competition practitioners from around the world, operating mainly through its Web site. Its agenda is driven by ICN Members in addressing practical antitrust enforcement and policy issues of common concern. Membership is open to any national or multinational competition agency responsible for the enforcement of competition laws from both developed and developing countries. Currently ICN counts among its Members 77 agencies from 67 jurisdictions around the world. The ICN is a project-oriented and consensus based organization. Representatives from the private sector, academia and other international organizations work with ICN Members to produce best practice proposals, which, while non-binding upon ICN jurisdictions, are hoped to be persuasive in urging for the incorporation of such proposals into domestic legal frameworks and practices. In its first year, the ICN focused on two mains areas, multi-jurisdictional merger control and the role of competition advocacy. A working group, which will examine capacity building and competition policy implementation, was launched at the ICN's first annual conference. While the ICN calls itself the only international body devoted exclusively to competition law enforcement issues, it seeks to complement the work of other international fora and hopes to play a leading role in contributing to international competition policy discussions in working towards greater convergence of competition law and analysis.[148]

OECD

The Organization for Economic Cooperation and Development (OECD), based in Paris, brings together 29 Member countries in a forum where governments of mostly high-income countries seek to consult and cooperate in the development of appropriate economic policies. The OECD is an important venue for discussing issues and developing potential accords, which then must be adopted by a consensus of the Member countries. It offers advice and recommendations to help its Members define their economic policies and facilitates the negotiation of multilateral agreements, legal codes and voluntary guidelines in key areas of policy.

For decades, the Competition Committee of the OECD has been a leading forum for regular and focused policy dialogue among the world's competition officials. Members of the Competition Committee include senior representatives from competition authorities in OECD countries, plus observers from a number of non-OECD countries. NGOs, business and consumer representatives also participate actively in discussions. The Competition Division within the OECD supports the Committee's work through preparation of analytical papers, sector studies and policy recommendations, and offers hands-on support to governments seeking to strengthen their national competition frameworks.

Working Party No. 3 on International Cooperation developed two key recommendations which were ultimately adopted by the OECD's governing Council: the *Recommendation Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade,* adopted in 1995, and the *Recommendation Concerning Effective Action Against Hard Core Cartels,* ("Recommendation on Hard core Cartels"), adopted in 1998.[149] The Recommendation on Hard core Cartels calls upon Member countries to ensure that their domestic competition laws adequately prohibit hard core cartels and provide for effective sanctions, enforcement procedures and investigative tools to combat such cartels. This Recommendation also invited non-member countries to adopt and implement the Recommendation.

In 2000, the Competition Committee submitted a Report to the OECD Council on the implementation of the Recommendation.[150] The Report explored topics of international co-operation in cartel investigations and the obstacles to more effective co-operation, and

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See < http://www.InternationalCompetitionNetwork.org >.

OECD. *Revised Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade* (C(95)130/FINAL), 27-28 July 1995; OECD, *Recommendation on Hard Core Cartels.*

See OECD Competition Committee Report, (Paris: OECD, 2000), ("Hard core Cartels"). Available online: <http://www.oecd.org/pdf/M000013000/M00013729.pdf>.

recommended an intensified phase II anti-cartel program with further study being conducted on the harm caused by cartels, effective investigative tools, optimal sanctions and international co-operation. Since the 2000 Report, Working Party No. 3 has studied several further topics relating to cartels with a view to increasing knowledge and understanding of cartels and enhancing Member countries' efforts to combat them. The report from phase II of the cartel work program will be issued in the spring of 2003 and will set out a phase III cartel work program.

The OECD also publishes the Journal of Competition Law and Policy and regularly sponsors a "Global Forum on Competition", created to deepen relations with a larger number of non-OECD economies in the field of competition.[151]

UNCTAD

Established in 1964, the United Nations Conference on Trade and Development (UNCTAD) is the focal point within the UN system for the integrated treatment of trade and development, and the interrelated issues in the areas of finance, technology, investment and sustainable development. The Fourth UN Review Conference in September 2000 requested UNCTAD to study in depth the development impact of possible international agreements on competition law and policy, including the possibility of "preferential or differential treatment" for developing countries and dispute mediation mechanisms and alternative arrangements, including "voluntary peer reviews" at bilateral, regional, plurilateral and multilateral levels.

> UNCTAD's role in the field of competition law and policy dates back to the early seventies, when developing countries in particular, called for work on restrictive business practices (RBPs). This was followed, in 1979-1980, by negotiations on a multilateral code of conduct on RBPs, and the adoption in 1980 by the UN General Assembly (resolution 35/63 of December 5, 1980) of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, (known as the RBP Set), in the form of a Recommendation to States. To date, the UN RBP Set is still the only fully multilateral instrument on competition law and policy. [152]

There are two institutional bodies that monitor and review the implementation of UNCTAD's work in competition law and policy: 1) The UN Review Conferences and; 2) The Intergovernmental Group of Experts on Competition Law and Policy. In 2005 a fifth UN Review Conference will fully review all aspects of the RBP Set. As for the Intergovernmental Group of Experts, they provide an annual forum for multilateral consultations; discussions and exchange of views between States on matters related to the Set and undertake studies and research on competition policy issues. "The Group continues to work on updating a model law on competition and also a handbook on competition legislation."[153]

VII. IAJC Questionaire On Competition Policy And Cartels

As mentioned in the introduction to this paper, OAS Member States were invited to respond to a questionnaire, sent through the offices of the Secretariat for Legal Affairs, regarding their laws and policies concerning competition and cartels. Additionally, it was decided to also send out a brief version of the questionnaire to five regional trading blocks in this area. Responses were received from twenty-four Member States and four of the trading blocks. Copies of the questionnaire and the original detailed Member States´ responses may be obtained from the IAJC Secretariat for further elaboration upon the summary grouping of responses which follow.

As also noted previously, this questionnaire sought to update and expand upon information contained in the *Inventory of Domestic Laws and Regulations Relating to Competition Policy in the Western Hemisphere* ("FTAA Inventory").[154] Since many countries took advantage of the opportunity to refer to their existing answers given in that document, an in-depth analysis of responses to this IAJC questionnaire must examine the answers given for this study in conjunction with the responses set out in the FTAA Inventory. Having

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See < http://www.oecd.org >.

See < http://r0.unctad.org/en/subsites/cpolicy/english/aboutus.htm >. *See also* United Nations Conference on Restrictive Business Practices. *The Set of Multilaterally Agreed Equitable Principles and Rules* (U.N.Doc. TD/RBP/109), 2002. The document can be found at: http://www.un.org/search.

See < http://www.unctad.org/en/subsites/cpolicy/english/aboutus.htm >.

FTAA.ngcp/inf/o3/Rev.2.

obtained a respectable rate of response (24 of the 35 Member States replied to the questionnaire), the results of this survey may provide slightly more comprehensive and updated information relating to competition and cartels policies in the Americas than the FTAA Inventory. For easy reference and an overall view of the status and evolution of competition law, with particular emphasis on cartel provisions and experience in Member States, several charts have been developed for this study and are appended as Annexes I·through IV.

An initial question dealing with the existence of national competition legislation or regulations elicited responses from fifteen countries reporting on existing domestic competition laws (Argentina, Barbados, Brazil, Canada, Colombia, Costa Rica, Chile, Jamaica, Mexico, Panama, Peru, St. Vincent & Grenadines, United States, Uruguay and Venezuela). Seven counties reported that they are in the process of drafting legislation (Belize, Bolivia, El Salvador, Guatemala, Honduras, Paraguay and Trinidad and Tobago). Although there was no response received from the Dominican Republic, Ecuador and Nicaragua about the status of such potential legislation, these countries had reported in the FTAA Inventory that they were actively designing and debating respective draft legislation on the issue, and it would be useful to investigate further what happened to the potential legislation. However, it is also worth noting that since the FTAA Inventory was published, two more countries (Belize and Paraguay) have reported that they are designing competition laws, and Barbados and St. Vincent and Grenadines have reported the passage of new competition laws. Responses from the Andean Pact, CARICOM and NAFTA indicate that they have all adopted obligations with respect to competition policy, although CARICOM´s protocol on this subject is not yet in place. Although no specific responses to the questionnaire were received from Mercosur, relevant information may be found in the *FTAA Inventory of the Competition Policy Agreements, Treaties and Other Arrangements Existing in the Western Hemisphere*[155]. The Mercosur Protocol on the Defense of Competition has at present only been implemented by Brazil and Paraguay and is not yet regulated by any of the four Member countries.

It is important to highlight that while fifteen countries in the Americas reported having existing competition laws, most of the seven countries currently designing competition laws nevertheless cited having various constitutional and/or other provisions in commercial or penal codes which seek to promote competition policies and/or prohibit various anti-competitive practices. Several countries without competition laws also have various existing entities empowered with enforcement responsibilities over diverse aspects of competition policy.

In response to the question about the characteristics of the entity responsible for administering and enforcing their domestic competition regime, most referred to the FTAA Inventory where these commissions or superintendencies are independent technical bodies charged with investigation and enforcement review. Nineteen countries identified their national agencies (or potential agencies) as administrative in nature (Argentina, Barbados, Belize, Bolivia, Brazil, Canada, El Salvador, Costa Rica, Chile, Guatemala, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, the United States, Uruguay, and Venezuela), while Colombia and St. Vincent & Grenadines characterized their agencies as having both administrative and judicial functions. Nineteen countries described possibilities for decisions of the competition agency to be reviewed by a tribunal or court (Argentina, Barbados, Belize, Brazil, Canada, Colombia, Chile, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Panama, Peru, Paraguay, St. Vincent and Grenadines, United States, Uruguay and Venezuela).

Although CARICOM´s protocol on competition policy is not yet in place, it provides for creation of a Community Competition Commission. The Andean Pact cited the General Secretariat as the executive organ responsible for implementing, administering and enforcing obligations dealing with competition policy. And, in the case of NAFTA, while there are provisions for each Party (Canada, Mexico and the United States) to adopt or maintain measures to proscribe anti-competitive business conduct, there is no regional body to implement or enforce these provisions. Enforcement of all competition offences is carried out by each Party according to its national legislation.

FTAA.ngcp/inf/03/Rev.2.

In the series of questions dealing with cartels, responses indicated that nineteen countries have legislation or regulatory provisions addressing cartel activity (Argentina, Barbados, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Panama, Peru, St. Vincent & Grenadines, the United States, Uruguay and Venezuela). And while Belize and Paraguay have no existing provisions, both countries intend to cover cartels in their pending competition legislation. The Andean Pact and CARICOM have both included provisions on cartels within their regional competition policies, while NAFTA, as mentioned above, relies on each Party to adopt or maintain anti-competitive measures, including cartels.

It is important to point out that although several countries responded that they do not have specific legislation regarding cartels, they in fact often have either general provisions which could cover cartel activity and/or prohibition of several of the specific practices cited in the *OECD Recommendation on Hard Core Cartels* (i.e. fixing prices; making rigged bids – collusive tenders; establishing output restrictions or quotas; and sharing or dividing markets). As can be seen in Annex III, most countries which responded to the questionnaire do in fact have at least two, (and the majority have all four) of these practices which are characterized as anti-competitive agreements, practices or arrangements and can be defined as constituting "hard core cartels".

Responses concerning recent significant decisions taken regarding cartel activities ranged across a variety of sectors and commodities, from communications, insurance, agriculture, shipping and transport to vitamins, chemicals and gasoline. Although nine Member States in the region (Argentina, Brazil, Canada, Colombia, Costa Rica, Mexico, Peru, United States, Venezuela) responded that they had had recent decisions on cases, the time period described as "recent" varied (the U.S. Department of Justice website cited 4 cases in January 2003 alone) while the other responses of between two and four cases not only varied over several years but some listed specific cases while others talked of sectors in general. (Also Panama mentioned several cases which were initiated but the time period and resolutions taken were not specified). There were no specific cases cited regarding this question from the trading blocks.

Only three countries (Canada, Costa Rica and Mexico) responded affirmatively to the question regarding whether certain cartels (e.g., export or import cartels) are exempt from their domestic competition regime (Canada and Mexico's competition regimes do not prohibit export cartels, Costa Rica's regime applies to both import and export cartels). In addition, the United States reported that there are provisions in its *Antitrust Enforcement Guidelines for International Operations* for joint conduct among export firms in order to provide legal certainty regarding domestic antitrust consequences of such conduct.[156] However, despite eight countries (Argentina, Barbados, Brazil, Colombia, Chile, Panama, the United States, and Venezuela) stating that they have no exemptions for certain types of cartels from their domestic competition legislation, most gave various reasons and possibilities under which exceptions and exemptions could in fact be made. (Belize, upon passing its competition law also plans to exempt cartels which could be shown to benefit the welfare of domestic consumers).

In the question regarding provisions which would provide for firms organizing an export or import association or cartel to register for exemptions, only Chile answered in the affirmative, describing a process of seeking approval which necessitated an independently confirmed market study, while also noting that no one has applied for such in the last five years. Canada and Mexico, which exempt export cartels, clearly stated that they do not require registration (nor will Belize upon implementation of its law). As set out in its *International Guidelines*, the United States requires registration of export associations and Export Trading Companies.

A final question on cartels dealt with provisions in the competition regimes which would permit enforcement action to be taken with respect to cartels having an effect in other jurisdictions. The responses from two countries (Belize and Chile) indicated that their legislation would allow such actions, although four countries (Canada, Costa Rica, Mexico and Brazil) provided responses stating that as signatories to various conventions and

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U.S. Department of Justice and U.S. Federal Trade Commission. *Antitrust Enforcement Guidelines for International Operations* (April, 1995). Available on-line: <http://www.usdoj.gov/atr/public/guidelines/internat.htm>

treaties, including MLATs, opportunities for cooperation in this area were possible. Five countries (Argentina, Colombia, United States, Panama and Venezuela) indicated that their legislation did not permit such action.

The response to a question seeking information on the areas of greatest difficulty and concern in the application of cartel policies produced a range of issues from eight countries (Brazil, Canada, Colombia, Costa Rica, Mexico, Panama, Peru, and the United States). Responses included problems with restrictions on confidential information; difficulties in obtaining material proof of existence of accords or practices; ensuring that penalties imposed upon participants in hard core cartel cases are sufficient to discourage the practice in question; and concerns about the requirement of determining whether a conspiracy unduly lessens competition, rather that treating conspiracies as a *per se* offence, as well as lack of understanding and familiarity with cartel policy. Also cited were particular difficulties with cartels in the sectors of agriculture/livestock, hydrocarbons and telecommunications as well as problems related to the exceptions allowed to various sectors under national laws.

A concluding question which asked about training and public outreach activities was answered to by thirteen countries (Argentina, Barbados, Brazil, Canada, Colombia, Costa Rica, Chile, Mexico, Panama, Peru, St. Vincent & Grenadines, United States, and Venezuela). Activities reported included discussion *fora*; speeches; publications in journals; official publication of resolutions and opinions; collective interviews; pamphlets and guides; public seminars; websites maintained; compliance programs for divulging information to the public; training programs for personnel working in the area; special training for school teachers; maintenance of international contacts with other competition agencies; and elaboration of technical studies and comments on potential legislation being considered by the U.S. Congress.

VIII. Future Directions For Competition Policy

As one considers the future directions for competition policy, there seem to be varying options and approaches, despite general agreement on the underlying issues and probleDr. As was described by Graham and Richardson, the difficulties arise beginning with the initial divergence among countries about the main goals of competition policy resulting in different substantive standards for competition policy in those countries having competition laws. This lack of clarity on goals makes it difficult for nations to either harmonize their competition policies (i.e., to implement common substantive and enforcement standards) or to negotiate common rules at a supranational level. While there is generally a high degree of consensus on what should be covered by competition policy (e.g., cartels, monopoly, vertical arrangements, predatory practices, merger and acquisition regulation, etc), there is no consensus on what specific rules should govern these issues. [157]

Nevertheless, there seems to be a growing perception that domestic economic regulations need to be made as consistent as possible, with the increasing desire to allow as much market competition as is politically and socially possible. And, as is evidenced by results of this survey and others, despite the relative newness of competition laws and of many enforcement agencies, there appears to be an evolution of successful institutions often staffed by highly trained economists and lawyers, who seek to apply competition laws with increasing vigor and purpose. In Latin America and the Caribbean, UNCTAD has noted "[t]he region's competition agencies have played a preventive and proactive role in the promotion of regulatory reforms as a way to improve markets behaviors"[158].

José Tavares de Araújo Jr. has noted that the principal challenges for competition agencies in Latin America are "to introduce a clear-cut division of functions between the competition police authority and the sectoral regulatory agencies, and second, to curb rent seeking opportunities within a domestic scenario of unfinished economic reforms".[159] There is

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GRAHAM, Edward M., RICHARDSON David J. *Global Competition Policy* (Washington, DC: Institute for International Economics, 1997). GRAHAM and RICHARDSON provide a thorough examination of both ideological as well as structural barriers to fully competitive markets and propose various initiatives linking trade and competition policy.

ÁLVAREZ, Ana María. *Towards a multilateral competition agreement*, *WTO and FTAA: priorities on the LAC trade agenda*, n. 63 (September – December 2001). Available online:

< http://lanic.utexas.edu/~sela/AA2K1/ENG/cap/N63/rcap63-6.htm >. ALVAREZ notes that the question is now what is the appropriate balance between sectorial regulations and the defense of competition within a regulatory reforms framework. Even though both coincide in some aspects and contribute to a competition environment, the application and the instruments they use are different.

ARAÚJO JÚNIOR, José Tavares de. *Schumpeterian competition and its policy implications: the Latin American case*

growing evidence of increased integration and interdependence among Latin American economies, as well as with the U.S. and the world economy, which Jose M. Salazar-Xirinachs describes as a "new generation" of agreements including, new sectors such as services and agriculture and new areas of disciplines such as investment, competition policy, intellectual property rights and dispute settlement mechanisms, in addition to the liberalization of trade in goods.[160]

However, at the same time that countries are strengthening national competition laws, there is a clear growth in transnational anticompetitive practices and there is an increasing gap between the geographical contours of relevant economic markets and the territorially limited areas of jurisdiction of national competition authorities. Most often, national authorities cannot use their powers of investigation to investigate practices implemented in other countries that are having an effect on their domestic markets. Undoubtedly economic globalization has led to a loss of operational sovereignty for national competition authorities.[161] Thus, even if a country injured by international anti-competitive practices has domestic competition laws in place, the lack of a cooperative framework operating with the competition authorities in the country of the company inflicting the damage makes it extremely difficult to take effective action against the practice in question.

Over the years, a variety of international instruments dealing with competition law and policy have been developed, including: bilateral or tripartite agreements; mutual legal assistance treaties; friendship, commerce and navigation treaties; agreements for technical cooperation in economic regulation; free trade, customs union or economic market agreements; and multilateral instruments.[162] However, while it seems that there are numerous and growing options available for international cooperation in competition policy, there is also an increasing call for creating a multilateral framework agreement on competition policy, despite many nations questioning the desirability of pursuing such a course and preferring the continuation of bilateral or regional approaches. José Tavares de Araújo Jr. noted that "nearly all Latin American and Caribbean countries belong to sub-regional projects of economic integration which contain explicit commitments on the harmonization of the competition conditions. If these commitments were transformed into operational mechanisms, they could provide a timely alternative for those countries that do not have antitrust laws."[163] A recent paper by Thomas Andrew O'Keefe discusses the resurgent prospects for MERCOSUR as a strengthened integrating force both economically and politically and notes that its future direction and continued health will clearly have an impact on the FTAA negotiations and the ultimate content of that agreement.[164] For its part, the FTAA continues to call for all countries to promote competition and seeks to harmonize, reconcile and strengthen existing national legislation in countries of the region by 2005. However, Ana Maria Alvarez observes "[o]ne of the noteworthy aspects of FTAA negotiations on the issue of competition is that the norms that may be agreed upon must be in agreement with national norms and procedures must be developed for those countries lacking such national legislation. In general terms, the question arises how will the FTAA coexist with existing regional integration agreements."[165]

Jenny points out that "...transnational anticompetitive practices which do not create a trade problem but rob trading nations of the benefits of trade liberalization can be fought through bilateral or regional cooperation mechanisms between competition authorities (such as agreements on exchange of information or positive or negative comity arrangements). Thus, irrespective of what may happen on the multilateral front, developing voluntary bilateral or regional cooperation among competition authorities is not only useful but also

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(Washington, D.C.: Organization of American States, 1999), p. 3. Available online: <http://www.sice.oas.org/compol/articles/schumcop.asp >.

SALAZAR-XIRINACHS, José M. *Latin America trade policies in 2002 and beyond: diagnosis and prognosis*, OAS Trade Unit. Available online: <http://www.sice.oas.org/tunit/staff%5Farticle/jmsx%5Fdiagnosis%5Fe.asp >.

JENNY. *International cooperation on competition policy*.

For a more detailed description see UNCTAD, *Experiences gained so far on international cooperation on competition policy issues and the mechanism used*, Intergovernmental Group of Experts on Competition Law and Policy (TB/B/COM.2/CLP/21/Rev.1), July 2002. [Hereinafter *Experiences gained so far*].

ARAÚJO JÚNIOR, José Tavares de. *Schumpeterian competition and its policy implications*, p.6.

O'KEEFE, Thomas Andrew. *A resurgent Mercosur: confronting economic crises and negotiating trade agreements*, The North – South Agenda (University of Miami, 2003).

ÁLVAREZ. *Towards a multilateral competition agreement*, p. 10.

necessary."[166] In addition, as noted above, Tavares de Jr. argues that as long as a multilateral system was not in place, regional trade arrangements could provide an interim solution, since the harmonization of the competition conditions inside the integration project is a natural priority for the Member countries. He points to NAFTA as the most advanced agreement in this direction, since all of the Members already have antitrust agencies in place.[167]

The case for seeking convergence of competition laws is made by Mitsuo Matsushita as he argues that no matter how closely States cooperate in the enforcement of competition laws, there is clearly a limit to the effectiveness of such cooperation if there is a great divergence in the substance of competition laws among States. He warns that "[c]ooperation may be hampered if there is inconsistency between provisions of competition laws of different States. In light of this convergence or harmonization of competition laws is, to a degree, indispensable in order to effectuate cooperative relationship among States in the enforcement of competition laws."[168] However, Voutier warns that "harmonization of competition laws could not only risk inflexibility in responding to diverse economic and other circumstances over time; it could leave exemptions (e.g. export cartels) untouched even though these undermined any competition and efficiency objective of the 'harmonized' law; and it would not address disparities between countries in either their level of enforcement commitment or willingness to cooperate on cross-border frictions."[169]

In examining the prospect of having enforceable multilateral rules regarding competition, it is important to remember that while the UN RBP Set was in the form of a recommendation to States, it has often served as the foundation for the development of competition law and policy at the national, regional and international levels and as the basis for international cooperation on this issue.[170] As noted above, the Set is the only universally applicable, although non-binding, multilateral instrument for competition policy today. The OECD instruments, as well as the Set, are also concerned with the adverse impact of restrictive business practices on international trade, but they apply only to a restricted group of countries while the Set applies more broadly and is also concerned with developmental impacts on countries.[171]

It is suggested that the voluntary nature of compliance and the instruments for cooperation which exist today, including agreements that set forth guidelines and recommendations to parties, belong to what Matsushita calls a "soft law" approach. Agreements in which the participants are obligated to modify their domestic laws according to the mandates of the agreement fall into the category of a "hard law" approach. "Given the state of affairs in international competition matters - that there is little agreement among nations as to the objectives, forms and enforcement process of competition laws - it is extremely hard to enact a bilateral, plurilateral or multilateral agreement which would legally compel the parties to subject their domestic norms to international discipline".[172]

Nonetheless, discussion has increasingly centered around the possibility of incorporating an agreement on international competition policy within the framework of the WTO, which would be compulsory in nature as far as the signatories are concerned. While current WTO agreements do incorporate references to competition in various agreements, taken together, these do not provide the overall coherence that a general framework might provide. UNCTAD has stated that the "present piecemeal approach is not satisfactory as the risk exists that the various provisions relating to competition in different trade agreements

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JENNY, Frederic. *Globalization, competition and trade policy: convergence, divergence and cooperation*, in: *International and comparative competition laws and policies*, ed. Chao Yang-Ching, p.69.

ARAÚJO JÚNIOR, José Tavares de. *Schumpeterian competition and its policy implications*, p.6.

MATSUSHITA, Mitsuo. *Globalizing the world economy and competition law and policy: the need for international cooperation*, in: *International and comparative competition laws and policies*, ed. Chao Yang-Ching, p.257.

VOUTIER, Kerrin M. *International approaches to competition laws: government cooperation for business competition*, in: *International and comparative competition law and policies*, ed. Chao Yang-Ching, p.189.

UN RBP Set (U.N.Doc. TD/RBP/109), 2002.

Although UNCTAD notes that the OECD "recommendation concerning effective action against hard core cartels states that it is open to non-OECD Member countries to associate themselves with this recommendation and to implant it (and several such countries have indicated interest in associating themselves) (UNCTAD, *Experiences gained so far.*); and the Guidelines for Multinational Enterprises have been adopted not only by the Member States of the OECD but also by some Latin American countries and the Slovak Republic.

See MATSUSHITA. *Globalizing the world economy*, p.252-254, for further discussion of the advantages and disadvantages of these two approaches.

may be inconsistent with each other. Moreover, there is a danger that developing countries - especially those that are not acquainted with competition law and policy - might be unable to take advantage of those provisions. Hence the need for more systematic across-the-board coverage of competition law and policy."[173]

Unlike the U.N. RBP Set and the above-mentioned OECD Recommendations, "the Uruguay Round agreements are legally binding and are backed by strong dispute settlement mechanisDr. Different provisions with a bearing on competition law and policy are included in, among other things, the articles or agreements dealing with: state enterprises and enterprises with exclusive rights; anti-dumping; subsidies; safeguards; trade-related aspects of intellectual property rights (TRIPS); trade-related aspects of investment measures (TRIMS); and trade in services, particularly telecommunications and financial services."[174] However, in addition to giving a more coherent approach and to helping developing countries to resolve cases of anticompetitive practices operated from abroad (such as international cartels), UNCTAD notes that it is felt by some experts that a multilateral competition framework "would induce many countries to give the competition issue higher domestic priority, which might accelerate the adoption of domestic legislation and effectively control anticompetitive practices".[175]

The key concerns to be examined in the adoption of a multilateral framework on competition, as suggested by Jenny, includes progressivity and flexibility; extent of substantive commitments (relating to transparency, nondiscrimination, due process, hard core cartels, as well as market access commitment); the extent of cooperation (consultations, exchange of non-confidential information and peer reviews); in addition to discussion of the dispute settlement mechanism.[176] Philippe Brusick includes the core international trade principles, basic competitive principles, voluntary cooperation rules and limited dispute-settlement mechanism as the main elements of an ideal framework and suggests that "[t]o remedy the asymmetries between developed and developing partners, especially for those from LDCs, it might be necessary to consider special and differential treatment as a sort of 'affirmative action' to favor certain equilibrium".[177] This approach might make it possible to exclude or except some strategic sectors from the full application of a national competition law for developmental reasons.

The current Director General of the WTO recently characterized the last WTO Ministerial meeting in Doha as a pivotal turning point in launching an ambitious new round of global trade negotiations, building on the work of the past eight trade rounds to continue to liberalize multilateral trade. As the Doha discussions paved the way for possible future negotiations for global rules on competition policy, a serious commitment was made to provide significantly more, and better, technical assistance for developing countries to be able to pursue more effective negotiations in order to benefit from WTO agreements.[178] Essentially, negotiations on competition policy were deferred until the next WTO Ministerial in Cancun in the fall of 2003. In noting that the Doha Declaration agreed "that negotiations take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations," Singh recounts that there may be considerable divergence in the interpretation on when exactly to

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UNCTAD. *Consolidated Report*, p.18.

Referred to in UNCTAD. *Experiences gained so far*. For the scope, coverage and enforcement of competition laws and policies and analysis of the provisions of the Uruguay Round agreements relevant to competition policy, including their implications for developing and other countries, *see* UNCTAD. *Consultations on competition law and policy, including the model law and studies related to the provisions of the set of principles and rules* (TD/RBP/COM.2/EM/2), 13 November 1996; *see also* the *1997 WTO Annual Report*.

See UNCTAD. *Consolidated Report*, for a good discussion of issues relating to the development of a multilateral framework for competition policy.

JENNY. *International cooperation on competition policy*.

BRUSICK, Philippe. *Competition, development and a possible multilateral framework*, (paper presented at the regional seminar on competition policy and multilateral negotiations, Hong Kong: United Nations Conference on Trade and Development, April 2002). Available online: <http://www.consumer.org,hk/20020416/unctad >.

WTO. *The World Trade Organization: To Cancun and Beyond* (speech made by the Director General, Supachai Panitcpakdi, 24 January 2003); available online: <http://www.wto.org/english/news_e/news03_e/news_cancun_beyond_24jan03_e.htm >. For specific decisions made by the WTO Ministerial Conference regarding the interaction between trade and competition policy, *see* paragraph 24 of the Doha Ministerial Declaration (WT/MIN(01)/DEC/1), 20 November 2001; available online: <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>.

launch the negotiations as many countries may choose to interpret "modalities" in different ways.[179]

Singh notes that in the past it was developing countries which were in favor of multilateral action to restrict business practices of the large multinational companies and it was at their insistence that the Set was adopted in 1980, although they were against making it legally binding; however, today, it is the advanced countries seeking a binding multilateral agreement through the WTO and the developing countries opposing it. Singh suggests that the real reason for developing countries' opposition is that they do not wish any new disciplines to be included in the WTO agreements because of the provision of cross-sanctions - a violation in one area may be penalized in another by the complaining country, if the complaint is held to be justified.[180]

Bernard Hoekman and Petros Mavroids argue that a WTO agreement limited to 'core principles' - nondiscrimination, transparency, and provisions banning 'hard core' cartels - would create compliance costs for developing countries while not addressing the anticompetitive behavior of firms located in foreign jurisdictions. "To be unambiguously beneficial to low-income countries, any WTO antitrust disciplines should recognize the capacity constraints that prevail in these economies, make illegal collusive business practices by firms with international operations that raise prices in developing country markets, and require competition authorities in high-income countries to take action against firms located in their jurisdictions in defense of the interests of affected developing country consumers."[181]

In considering options for reform of the global competition system and cartel enforcement, Evenett *et al*. suggest that "[a]s 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 cartelization 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."[182] They also express doubts about a WTO agreement remedying the deficiencies of national anti-cartel enforcement in pointing out that it is unclear how a WTO dispute panel could assess whether a government used its investigative and prosecutorial 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 cartelization are based on the worldwide pecuniary gains."[183]

Brusick notes that while agreement on hard core cartels and voluntary cooperation could be reached sooner rather than later, he sees greater problems with agreement on vertical restraints and abuse of dominance and mergers, which might take more time to build convergence, as would support for a dispute settlement mechanism.[184] The Permanent Mission of Canada to the WTO WGTCP suggests using the OECD *Recommendation on Hard Cartels* as a starting point for WTO provisions in this area since: "First, not all WTO Member nations have competition regimes in place and, hence, in many nations there are no legal prohibitions on private cartels. Second, a WTO agreement would affirm a multilateral

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SINGH. *Competition and competition policy in emerging markets*.

Ibid. SINGH himself basically argues that the WTO concepts and language are inadequate to reflect the development concerns of emerging countries and suggests that the "ultimate aim of the WTO should be not to promote free trade for its own sake but to achieve economic development". He stresses the need to be mindful of the competitive opportunities of small and medium sized firms, to facilitate transfer of technology to developing countries and to ensure fair prices and fair distribution of wealth. Thus he proposes a "development friendly International Competition Authority in order to control anti-competitive conduct of the world's large multinational corporations (above a certain threshold of size) as well as to control their propensity to grow by take-overs and mergers. In order to maintain contestability and efficiency on international markets it is proposed that the large multinationals should be allowed to take over another company only if they sell off a subsidiary of similar value".

HOEKMAN and MAVROIDIS. *Economic development, competition policy and the WTO*. The authors make a case that traditional liberalization commitments using existing WTO *fora* will be the most effective means of lowering prices and increasing access to an expanded variety of goods and services.

EVENETT *et al. International cartel enforcement*, p.22.

Ibid.

BRUSWICK. *Competition, development and a possible multilateral framework*.

consensus regarding the harmful effects of hard core cartels and the interests of Member countries in combating these cartels. Third, a WTO agreement would give notice to global cartels that there are fewer safe havens for their activities."[185]

Summing up, Jenny suggests that the possible benefits of a WTO agreement on competition include: sending a signal that the multilateral community is not exclusively interested in the promotion of the welfare of large multinational firms; contributing to the achievement of the goals of the multilateral trading system by providing a way to fight anticompetitive practices which are defeating or confiscating the benefits of trade liberalization; and that the application of WTO principles of national treatment, non discrimination and transparency to national competition laws would help governments resist protectionist and corporatist pressures by domestic lobbies and, allow them to establish a more investment friendly legal environment.[186] UNCTAD also concludes that "[i]n order to be a development-friendly instrument, a possible MCF would also need to be flexible, enabling developing and least-developed countries to take full part in the negotiations and possibly reach agreement. In particular, it was felt that developing countries would need to have the necessary policy space to be able to blend competition policy with industrial policy, if that was needed for developmental reasons, to ensure optimal chances for development in cases where market failures hampered competition."[187] They suggest that such concerns could be taken into account under the principle of special and differential treatment for developing and least-developed countries; provisions in the areas of technical cooperation, transition periods, exceptions and exemptions for developing countries and specific undertakings for developed countries to eliminate their own exceptions and exemptions on a non-reciprocal basis could explicitly recognize this principle.[188]

Thus the real debate and negotiations at the WTO about the potential and effectiveness of a multilateral agreement on competition rules is yet to begin, and the possible outcome may vary from doing nothing to fully harmonized international law - a consensus view has still not emerged. Even while such a multilateral framework agreement on competition policy is sought by the WTO, many still question its desirability and continue to favor bilateral and/or regional approaches to competition. However, as countries pursue trade negotiations, one approach recently suggested by Salazar Xirinach, Director of the OAS Trade Unit, is that "countries will be better served by a multiple-path strategy of trade negotiations, that is they can maximize benefits by moving simultaneously on several negotiating fronts. What precise mix or balance between these different paths is something that each country would have to decide". [189]

It is also useful to keep in mind the need to ensure that these regional and bilateral trade agreements complement the efforts at the WTO. As Supachai Panitchpakdi recently said, "There are already some 250 regional trade agreements in force around the world. Since Doha, we've seen a proliferation of new bilateral and regional trade negotiations launched in every region of the world. Twenty different sets of talks have been set in motion since last summer alone. Granted, regional trade agreements deepen, strengthen and promote the values of trade liberalization. But WTO Members must be careful not to stretch their negotiating resources and political energies too thinly. We cannot let regional prospects, as positive as they may be, distract us from much greater global gains."[190] Nonetheless, timing and strategies are still open questions. Bergsten recently suggested that "the outlook is for a series of preferential pacts over the next few years that will generate 'competitive liberalization' and produce a sweeping Doha agreement by the middle of 2007".[191]

While countries prepare their negotiating strategies and balance the risks and benefits of the options outlined above, it seems reasonable to agree that three concepts and approaches to furthering competition policy are critical: cooperation and consultation; action and advocacy, and building a culture of competition in all countries. An excellent source of information and analysis on experiences in cooperation is to be found in the above cited

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See OECD. *Recommendation on Hard Core Cartels.*
JENNY. *International cooperation on competition policy*.
UNCTAD. *Consolidated Report*, p.14.
Ibid.
SALAZAR-XIRINACHS. *Latin America trade policies in 2002 and beyond.*
WTO. *The World Trade Organization: To Cancun and Beyond.*
BERGSTEN, Fred. *A competitive approach to free trade*, op. ed., The Financial Times, 4 December 2002 (London).

UNCTAD report on *Experiences gained so far on a International Cooperation on Competition Policy Issues and the Mechanisms used.*

As for action and advocacy, a good starting point in the struggle for battling hard core cartels would be to accept the OECD invitation for non-member countries to associate themselves with the 1998 *Recommendation on Hard Core Cartels* as this could create a more cooperative relationship among competition agencies around the world to halt the hard core cartels multibillion dollar drain on the world economy. In addition, as Winslow reminds us, the challenge now is to encourage other jurisdictions harmed by cartels to bring actions "after they were halted and punished by other, larger jurisdictions."[192]

Finally, regarding perhaps the most important ingredient - creating a culture of competition - an interesting article in the 2003 *Antitrust Review of the Americas* reminds us that in a "post-ADM, post-Enron world", revisiting the tenets and practices of fair competition is also imperative for developed countries with long traditions of competition culture. "Compliance - conducted uniformly around the world - is the best protection against cartel prosecution anywhere in the world."[193] Ignacio de Leon warns that "[t]he ultimate success of competition policy in Latin America will depend on the degree to which it succeeds in internalizing the values and principles, which makes market functioning sustainable".[194] He cautions that "policy makers must pay due attention to the cultural environment where competition policy operates. Not surprisingly, the pervasiveness of these cultural institutions which have promoted anti-market values in the past, now undermines the efficacy of competition policy to attain its goals, by delaying its full implementation."[195]

It might be appropriate to conclude by concurring with Jenny; he suggests that " building a culture of competition where it is lacking is a necessary condition for facilitating the adoption of instruments allowing a better complementarity between trade liberalization, regulatory reform and competition policy. International cooperation and technical assistance are important instruments for building a competition culture or developing appropriate institutions."[196]

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Ibid. LEON delineates the conditions necessary for competition policy enforcement in Latin American countries to achieve both efficiency and innovation development goals
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Annex 1

Status of Competition Law in OAS Member Countries

I. Country	II. According to the FTAA Inventory of March 2002	**According to the answers of the OAS Questionnaire - March 2003**
III. Antigua & Barbuda	NA	does not have
Argentina	Has	Has
Bahamas	NA	NA
Barbados	NA	Has
Belize	NA	does not have (is designing)
Bolivia	does not have (is designing)	does not have (is designing)
Brazil	Has	Has
Canada	Has	Has
Chile	Has	Has
Colombia	Has	Has
Costa Rica	Hás	Has
Cuba	NA	NA
Dominica	NA	NA
Domican Republic	does not have (is designing)	NA
Ecuador	does not have (is designing)	does not have
El Salvador	does not have (is designing)	does not have (is designing)
Grenada	NA	NA
Guatemala	does not have (is designing)	does not have (is designing)
Guyana	NA	NA
Haiti	NA	NA
Honduras	does not have (is designing)	does not have (is designing)
Jamaica	Has	Has
Mexico	Has	Has
Nicaragua	does not have (is designing)	NA
Panama	Hás	Has
Paraguay	NA	does not have (is designing)
Peru	Has	Has
Trindad & Tobago	does not have (is designing)	does not have (is designing)
St. Kitts & Nevis	NA	NA
St. Lucia	NA	NA
St. Vincent & the Grenadines	NA	Has
Suriname	NA	NA
United States	Has	Has
Uruguay	Has	Has
Venezuela	Has	Has

NA: No Answer / Not Available (the country's agency did not respond to the questionnaire or the information is not available in the FTAA Inventory).

Annex 2

Competition law and cartel provisions of the OAS Members[1]

Country	Competition law	Cartel provisions
IV. Antigua and Barbuda	Does not have. **(1)**	Does not have. **(1)**
V. Barbados	2002: current law: Fair Competition Act. **(1)**	Part III of the Fair Competition Act and section 16 (3), and Part VI section 33 (1) (a) and (b) refer to cartel practices. Part III states that: "addresses anti-competitive agreements, including price fixing, restraint of supply, market division, bid rigging, price discrimination". **(1)**
Argentina	1919: original law. 1946 and 1980: amendments. Under review in March 22, 2002. 1999: current law. **(2)** 1999: current law: Law n. 26.156. **(1)**	Article 1 and 2 of the Law n. 26.156, of 1999, which specifically prohibits price fixing, rigged bids, establishing output restrictions or quotas and market share or division. Article 2 rules that "The following conducts […] are restrictive practices to competition: a) fix […] the selling or purchase of goods or services […]; b) establish the obligation of product, distribution, purchase a restrict quantity of goods […] or limitated of services; c) share […] markets, consumers or sources of supplies, d) coordinate acts on bids, […]; g) fix, impose or practice, direct or indirectly, on agreements with competitors or individually, […] prices […]; […]. **(1)**

(1): Source: responses to the OAS questionnaire.
(2): FTAA Inventory of Domestic Laws and Regulations relating to Competition Policy in the Western Hemisphere (March 22, 2002), p. 1.
NA: No Answer.

Belize	There is a pending bill. **(1)**	Clauses 4º and 5º of the pending bill, which prohibit the following restrictive practices, generally: i) restrictive agreements, arrangements or concerted practices between rival or potentially rival enterprises and ii) restrictive practices by parties in a vertical relationship respectively. **(1)**
Bolivia	There is a pending bill. **(1)**	Contained within the pending bill. It mentions the Commercial Code which, in its Chapter V, rules that "acts that constitute disloyal competition: […] the utilization of any intentional way to distort the market" **(1)**
Brazil	1962: original law. 1990: amendment. 1994: review. **(2)** 1994: current law: Law. n. 8.884. **(1)**	Articles 20 and 21 of the Law n. 8.884, of 1994, which specifically prohibits price fixing, rigged bids, establishing output restrictions or quotas and market share or division. Article 21: prohibits "i) fixing […] prices […]; […] iii) share the market […]; vii) combine prices previously […] in bids […]; regulate […] the production of goods or the services". **(1)**
Canada	1889: original law. There are later legislation and amendments. **(2)**	Cites the FTAA Inventory, which states that the criminal offences include generally: i) conspirancies, combinations, agreements or arrangements to lessen competition unduly in relation to the supply, manufacture or production of a product (Section 45)"; and specifically: "ii) Bid-rigging […] (Section 47)". **(2)**
Chile	1959: original law. 1973: amendment. 1979: review and incorporation. 1999: modification of the Decree-Law. **(2)** Decree n. 511 1973: Decree Law n. 211. 1999: Law n. 19.610. **(1)**	Article 2 of the Decree-Law n. 211 prohibits acts against free competition, including price fixing, sharing or dividing market and arranged practices. Item "f" rules that "generally, any other act that has the objective of affecting free competition". **(1)**
Colombia	1959: original law. 1992: suplementation. **(2)** 1996: current applicable law: Law 256. **(1)**	Article 47 of Decree n. 2.153, of 1992 specifically prohibits acts that: i) have the effect of direct or indirect price fixing; […] ii) that have as effect the market dividing […], iii) that have the effect of establishing output restrictions or quotas; iv) that have as effect the bid rigging […]". **(1)**
Costa Rica	1994: original law. **(2)** 1994: Law n. 7.472. **(1)**	Article 11 of the law n. 7.472, of 1994 rules that are prohibited: a) fix […] the selling or purchasing prices […]; b) establish the obligation to product, […] distribute or sale a restrict amount of goods […] or services; c) divide, […] market […]; d) establish, […] or coordinate the supplies […] on bids" .**(1)**
Dominican Republic	According to the FTAA Inventory, of March 2002, the implementation of legislation about competition was in discussion. **(2)**	NA
Ecuador	Doesn't have, although there were previously reported efforts to create legislation about competition. **(2)**	NA
El Salvador	There is a pending bill under discussion. **(1)**	There is a bill under discussion to specifically prohibit price fixing, establishing output

		restrictions or quotas and market share or division. Article 232 of the Criminal Code rules that "will be sanctioned […] who abuse from the dominant position […] by agreements with other persons or companies, impeding, making difficult or falsifying the competition rules, through one of the following practices: 1) fixing […] the selling or purchase prices; […] 4) the imposition of output restrictions; 5) market share or division of supplies". Article 110 of the Federal Constitution states that "with the objective of protecting free competition and the consumer, monopolistic practices are prohibited".**(1)**
Guatemala	There is a pending bill. **(1)**	There is a pending bill which would generally prohibit behaviours related to cartels. Article 130 of the Federal Constitution rules that will: "[…] protect the market economy and will hinder the associations that have the effect of restrict the market freedom or the consumers interests". There are also cartel provisions on the Criminal and Commercial Codes, and in Sectoral Laws. **(1)**
Honduras	There is a pending bill. **(1)**	There is a pending bill which would cover cartels. There are also some *sectoral* agreements and Laws (those about author rights, industrial property, telecommunications, electrical sector, banks and assurance and representatives and deliverer and agents of national and foreign companies). Article 339 of the Federal Constitution rules that "Monopolies, oligopolies, allocations and similar practices are prohibited". **(1)**
Jamaica	1993: original law. **(2)** 1993: Fair Competition Act. **(1)**	Section 2 of the Fair Competition Act, 1993: "Without prejudice to the generality of subsection (1), agreements referred to in that subsection include agreements which contain provisions that: a) […] fix purchase or selling prices […]; b) limit or control production, markets, technical development or investment; c) share markets or sources or supply; d) affect tenders to be submitted in response to a request for bids; […]". **(2)**
Mexico	1934: original law. 1992: substitution of the previous law. **(2)** 1993: Federal Economic Competition Law – LFCE. **(1)** 1998: Regulation of the Federal Economic Competition Law. **(2)**	Response states that there are no specific provisions about cartels. However, article 9 of the "Federal Law of Economic Competition – LFCE" of 1993 states that: "Absolute monopolistic practices are contracts, agreements, arrangements, or combinations between competition economic agents having any of the following objectives or effects: i) fix […] price of goods or services […]; ii) establish the obligation to produce, process, distribute , or market only a restrict or limited quantity of goods or provide a restrict or limited number, volume or frequency of services; iii) divide, distribute, assign or

		impose shares or segments of a current or potential market for goods and services through consumers, suppliers, determined or determinate times or spaces; or iv) establish, agree on, or coordinate positions or abstain from tendering, competitive bidding, auctions, or public auctions". **(2)**
Nicaragua	According to the FTAA Inventory, the implementation of legislation was in discussion. **(2)**	NA
Panama	1996: original law. **(2)** 1996: Law n. 29. **(1)**	Law n.29, 1996, article 11 states that 1. Absolute monopolistic practices: are any combinations, arrangements, agreements or contracts between competition or potentially competition economic agents, the purposes or effects or which are any of the following: a. To fix […] price […]; b. To agree not produce, process, distribute or market other than a small quantity of goods, or to provide a limited number, volume or frequency of services; c. To divide […] an existing or potencial market for goods or services […]; or d. To establish, agree upon or coordinate bids or nonparticipations or public auctions". **(2)**

Paraguay	There is a pending bill. **(1)**	There is a pending bill in which article 7 states that "are prohibited generally agreements among companies, decisions of associations of companies, and the collusive practices that may produce, have the purpose or have the effect of hindering, restricting, or falsifying competition in the national market, and specifically refers to: "a) fix […] the selling or purchase prices […]; b) limit or control the market […]; c) share or divide the market or the supplies sources […]". **(1)**
Peru	1991: original law. 1994 and 1996: modifications. **(2)** 1993: Federal Constitution. Art. 58, 60 and 61. Decision 285 of the Cartagena Agreement. Legislative Decree n. 688. Legislative Decree n. 757. Decree-Law n. 25.868 1991: Legislative Decree n. 701. Legislative Decree n. 788, modifying the Legislative Decree 701. Legislative Decree n. 807, modifying the Legislative Decree n. 701. 1997: Law n. 26.876. 1998: Supreme Decree n. 017-98-ITINCI. Supreme Decree n. 087-2002-EF. **(1)**	Legislative Decree n. 701, of November 7, 1991, prohibits: a) the fixing […] price […]; b) the market sharing or division of the market or of the supplies sources; c) the sharing or division of production quotas; […] d) the establishment or coordination of bids or abstention to propose bids on biddings […]. **(1)**
Saint Vincent and the Grenadines	1999: current law: Fair Competition Act. **(1)**	Sections 34 (about price fixing) and 36 (about bid rigging) from the Fair Competition Act. Section 34: (1) a person who is engaged in the business of providing or supplying shall not, directly or indirectly: […] (a) by agreement, threat, promise or any like means, attempt to influence upward or discourage the reduction of the price at which any other person supplies or offers to supply or advertise goods; […]. Section 36: (1) Subject to subsection (2) it is unlawful for two or more persons to enter into an agreement whereby: (a) one or more of them agree or undertake not to submit a bid in response to a call or request for bids or tenders; or (b) as bidders or tenders they submit, in response to a call or request, bids or tenders that are arrived at by agreement between or among themselves". **(1)**
Trinidad and Tobago	1999: there is a pending bill. **(1)**	There is a pending bill which states, in chapter 9, subitem 9.1: "[…] Examples of the sort of agreements that would be caught by such a prohibition are 1. agreements to fix selling prices or buying prices; bid-rigging, i. e. secret agreements between bidders in a

		tender or auction; agreements to limit production or investment; agreements sharing out markets, e.g. by territory; […]" **(1)**
United States	1890: original law. There are later modifications on the legislation. **(2)**	The Sherman Act § 1º [15 U.S.C. § 1º]: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal" and Federal Trade Commission Act § 5º [15 U.S.C. § 45]: "Unfair methods of competition in or affecting commerce […] are declared unlawful". **(1)**
Uruguay	Current laws: 2000: Law n. 17.243 (articles 13, 14 and 15) and 2001: Law n. 17.296 (articles 157 and 158). **(1)**	Law n. 17.243, of June 29, 2000 (article 14) prohibits the practices that "a) impose permanently, direct or indirectly, the sale and purchase prices or other conditions that affects the consumers' interests" or "b) restrict, without justification, the production, distribution and the technological development, affecting the consumers and companies interests". Article 14 determines, generally, prohibited conducts, including agreements, collusive practices and decisions of enterprise associations and the abuse of dominant position of one or more "economic agents" that have the objective to restrict the free competition and the free access to the market of goods and services. **(1)**
Venezuela	1991: original law. **(2)** 1992: Law for Promotion and Protection of the Exercise of Free Competition, Federal Register n. 34.880. **(1)**	Law for Promotion and Protection of the Exercise of Free Competition, Federal Register n. 34.880 of 1992 states in Article 5 that "conduct, practices, agreements, conventions, contracts, or decisions that impede, restrict, falsify, or limit free competition are prohibited". Article 10 states that "Agreements, decisions, collective recommendations or concerted activities are prohibited if they: 1) Fix, […] prices […]; 2) Limit production […]; 3) Divide markets […] supply sectors". **(2)**

Annex 3

Overview of cartel provisions containing practices characterizing "hard core cartels" (based on the elements within the OECD Recommendation)[1]

Country	VI. Fixing prices	**Making rigged bids (collusive tenders)**	**Establishing output restrictions or quotas**	**Sharing or dividing markets**
VII. Antigua & Barbuda	have no competition law	have no competition law	have no competition law	have no competition law
Argentina	yes	yes	yes	yes
Barbados	yes	yes	yes	yes
Belize[2]	generally (in the pending competition bill)	generally (in the pending competition bill)	generally (in the pending competition bill)	generally (in the pending competition bill)
Bolivia[3]	generally	generally	generally	generally
Brazil	yes	yes	yes	yes
Canada[4]	generally	yes	generally	generally
Chile[5]	yes	yes	generally	yes
Colombia	yes	yes	yes	yes
Costa Rica	yes	yes	yes	yes
El Salvador[6]	yes	generally	yes	yes
Ecuador	have no competition law	have no competition law	have no competition law	have no competition law
Guatemala[7]	generally	generally	generally	generally
Honduras[8]	generally	generally	generally	generally
Jamaica	yes	yes	yes	yes
Mexico	yes	yes	yes	yes
Panama	yes	yes	yes	yes
Paraguay[9]	yes (in the pending competition bill)	generally (in the pending competition bill)	yes (in the pending competition bill)	yes (in the pending competition bill)
Peru	yes	yes	yes	yes
Saint Vincent and Grenadines	yes	yes	no	no
Trinidad and Tobago[10]	yes (in the pending	yes (in the pending	yes (in the pending	yes (in the pending

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For more specific information about cartel provisions on the legislation, *see* Annex 2 - Competition law and cartel provisions of the OAS Member States.

Belize's response is based on the pending Competition Act Bill which, in its clauses 4 and 5, prohibits, generally, "(i) restrictive agreements, arrangements or collusive practices between rival or potentially rival companies and; (ii) restrictive practices by parties in a vertical relationship respectively".

The Commercial Code, in its Chapter V, rules that "acts that constitute disloyal competition: […] the utilization of any intentional way to distort the market".

Canada, cites the FTAA "Inventory of Domestic Laws and Regulations relating to Competition Policy in the Western Hemisphere" (FTAA.ngcp/inf/03/Rev.2/p.30, 31, 34 and 35) referring to Section 45 of the Canadian competition law which prohibits, as offences of criminal nature, "[...] conspiracies, combinations, agreements or arrangements to lessen competition unduly in relation to the supply, manufacture or production of a product".

The Decree-Law n. 211 of 1973, in its article 2, letter "f", prohibits "in general, any other act that has the purpose to restrict the free competition".

The article 110 of the Federal Constitution states that "with the objective of protecting free competition and the consumer, monopolistic practices are prohibited".

Guatemala doesn't yet have a competition law. However, article 130 of the Federal Constitution rules that the law will "[...] protect the market economy and will hinder that the associations tend to restrict the market economy or to injure the consumers interests". There are almost cartel provisions on the Criminal and Commercial Codes, and in Sectoral Laws.

Article 339 of the Federal Constitution rules that "Monopolies, oligopolies, allocations and similar practices are prohibited". There are also some sectorial agreements and laws (those about author rights, industrial property, telecommunications, electrical sector, banks and assurance and representatives and deliverer and agents of national and foreign companies).

The response given by Paraguay was based on the country's pending competition bill. The article 7 of the competition act bill rules, generally, that "are prohibited generally the agreements among companies, decisions of associations of companies, and the collusive practices that may have the purpose or have the effect of hindering, restricting, or falsifying competition in the national market […]".

	competition bill)	competition bill)	competition bill)	competition bill)
United States[11]	yes	generally	generally	yes
Uruguay[12]	yes	generally	yes	generally
Venezuela[13]	yes	generally	yes	yes[14]

There is a pending bill which states, in chapter 9, subitem 9.1: "[…] Examples of the sort of agreements that would be caught by such a prohibition are 1. agreements to fix selling prices or buying prices; bid-rigging, i. e. secret agreements between bidders in a tender or auction; agreements to limit production or investment; agreements sharing out markets, e.g. by territory; […]"

Although information regarding fixing prices and sharing or dividing market were not provided in the answer to the OAS questionnaire, responses provided in the FTAA Inventory suggest that those are specifically covered in US legislation (FTAA.ngcp/inf/03/Rev.2/p. 114-116). The IAJC questionnaire, cites the "Sherman Act", § 1, which rules, generally, the following: "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." [15 U.S.C., § 1]. Additionally, it cites the "Federal Trade Commission Act", § 5; which rules that "unfair methods of competition in or affecting commerce are declared unlawful." [15 U.S.C., § 45].

Article 14 of the Law n. 17.243 determines, generally, prohibited conducts, including agreements, collusive practices and decisions of enterprise associations and the abuse of dominant position of one or more "economic agents" that have the objective to restrict the free competition and the free access to the market of goods and services.

Article 5 of the competition law states, generally, that "conduct, practices, agreements, conventions, contracts, or decisions that impede, restrict, falsify, or limit free competition are prohibited". (FTAA.ngcp/inf/03/Rev.2/p. 113).

Annex 4

Country	**Significant recent decisions regarding cartels**[1]
VIII. Antigua and Barbuda	NA[1]
Argentina	Over the last several years, the National Commission for Competition Defense – CNDC didn't condemn on cartel practices. During that period, there were 4 denunciations (not condemned) of cartel practices in the following sectors: 1. one in the sector of airlines industry (the date and the fine amount are not informed); 2. two in the sector of cable television industry (the date is not informed); 3. one in the fuel sector (the date and the amount of the fine are not informed). Currently there are several denunciations on procedural steps.
Barbados	There have been no decisions about cartels.
Belize	There have been no decisions about cartels.
Bolivia	Not applicable.
Brazil	1. Steel market: convictions of the companies CSN, Usiminas and Cosipa, for cartel practices, in 1999 (the fines amount aren't informed). 2. Market of fuel sales: conviction of gas stations in Florianópolis and also the labor union in the state of Goiânia, due to cartel practices, in 2002 (the fines amount aren't informed).
Canada	1. Vitamin market: conviction, in 2002, due to the practice of conspiracy for price fixing and allocation of wholesale market. Fees: $ 3.875 million to the companies and $ 150 thousand to an executive director. 2. Sorbates market: conviction, in 2001, due to the practice of price fixing and volume allocation. Fees: $ 1.250 million to the company and $ 150 thousand to the former senior executives. 3. Lysine and Citric Acid market: conviction, in 1998, due to the practice of conspiracy related to price fixing and market allocation. Fee: $ 16 million to the company. 4. Sodium Erythorbate market: conviction due to the practice of conspiracy to price fixing, in 2001. Fee: $ 15 million to the company.
Chile	There aren't any recent decisions refering to cartels combat.
Colombia	1. Fuel distribution market: conviction due to the practice of price fixing, in 2002 (the fee amount wasn't informed). 2. Maritime transportation market: conviction due to the practice of fixing the conversion taxes applicable to the payment of maritime freight, in 2002 (the fee amount wasn't informed).
Costa Rica	1. Terrestrial conteiner transportation market: conviction due to the practice of spreading of price table (the date wasn't informed). Fees: varied from 16 to 140 minimum salaries. 2. Rice and other markets: conviction due to monopolistic practices, in 2001 (the fee amount wasn't informed). 3. Beans and similars products improvement market: conviction due to the practice of price fixing (the date wasn't informed). Fee: varied from 12 to 44 minimum salaries.
Ecuador	NA
El Salvador	There have been no decisions about cartels.
Guatemala	There have been no decisions about cartels.
Honduras	There have been no decisions about cartels.
Jamaica	There have been no decisions about cartels.
Mexico	1. Production, commercialization, and sale of citric acid market: conviction due to combination and price fixing, in 2002 (the fee amount wasn't informed). 2. Vitamins market: **agreement** (and not strict conviction) due to investigations about price fixing, in 2002. The fee wasn't informed.. 3. Lysine market: conviction due to price fixing (the date and the fee amount weren't informed).

Panama	It mentions the following **started judicial proceedings** (not convictions): 1. Flour for bread manufacture market: market sharing through geographic and production basis and price fixing (the date and the fee amount weren't informed). 2. Tickets of airlines companies market: agreement to reduce of percentage paid to the salesmen of tickets (the date and the fees amount weren't informed). 3. Fuel transportation market: agreement for price fixing the value paid for the transportation (the date and the fees amount weren't informed). 4. Social Security's Licitation to buy medical oxygen: rigged bids (the date and the fees amount weren't informed). 5. Meat cuts market: agreement to price fixing. Besides this, there were emitted judgments about horizontal mergers related to the markets of: 1. milk derivatives products; 2. new vehicles; and 3. one case of merger in the liquor market. On the other hand, it **denied the allowance** of a horizontal merger related to the beer market.
Paraguay	Not applicable.
Peru	1. Obligatory assurance of traffic accidents market: conviction due to price fixing (the date and the fees amount weren't informed); 2. Sale of tickets of airlines companies: conviction due to agreement to reduce the commission given by the agencies to the sellers (the date and the fees amount weren't informed).
St. Vincent and the Grenadines	There have been no decisions about cartels.
Trinidad and Tobago	NA
Uruguay	NA
United States	The Department of Justice web site is the only response mentioned. However, it's impossible to know, through this source, the exact and total number of recent and more relevant decisions, as there are hundreds of cases, listed in alphabetical order, dating back to 1994.
Venezuela	1. Bottling of gaseous drinks: conviction due to practice of collusive practices to fix sales conditions (the date, and the fee amount weren't informed). 2. Insurance market: conviction for the practice of price fixing (the date wasn't informed). Fee: little more than 1 billion, 150 million bolívares. 3. Law Activities (Bar Association): conviction due to the practice of price fixing by the maintenance of minimun prices table, in 1999 (the fee amount wasn't informed).

ANNEX 5

CJI/doc.113/02 rev.3

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.

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SELECTED INTERNET WEBSITES AND RESOURCES RE COMPETITION

IX. INTERNATIONAL FORA

APEC. (Competition Policy & Law Database).

Available at: http://www.apeccp.org.tw

CARICOM.

Available at: http://www.caricom.org

COMUNIDAD ANDINA.

Available at: http://www.comunidadandina.org

FTAA.

Available at: http://www.alca-ftaa.org

International Competition Network (ICN).

Available at: http://www.InternationalCompetitionNetwork.org

MERCOSUL.

Available at: http://www.mercosur.org/uy

NAFTA (The North American Free Trade Agreement).

Available at: http://www.nafta-sec-alena.org

OAS – SICE. (Foreign Trade information System).

Available at: http://www.sice.oas.org/compol/studies.asp

OECD. (The Organization of Economic Cooperation and Development).

Available at: http://www.oecd.org

SICA (The Central American Integration System).

Available at: http://www.sgsica.org/sica

The European Union.

Available at: http://www.europa.eu.int

UNCTAD (The United Nations Conference on Trade and Development).

Available at: http://www.unctad.org

WTO (The World Trade Organization).

Available at: http://www.wto.org

JOURNALS AND ACADEMIC RESOURCES

Antitrust Policy. Available at: http://www.antitrust.org

Boletim Latinoamericano de Competência. Available at: http://www.europa.eu.int/comm/competition/international/others

CEI (Competitive Enterprise Institute). Available at: http://www.cei.org

COMPETITION. Available at:
http://www.clubi.ie/competition/compframesite/WorldsBiggestAntiTrustSitiesList.html

Competition Policy Center.

Available at: http://groups.haas.berkeley.edu/iber/cpc/Events/Events.html

EC Competition Policy Newsletter.

Available at: http://www.europa.eu.int/comm/competition/publications/cpn

OECD Journal of Competition Law and Policy.

Available at: http://www.oecd.org

Ripon College: Antitrust Sources on the Web

Available at: http://www.ripon.edu/Faculty/bowenj/antitrust/Sources,htm

South Centre. Available at: http://www.southcentre.rog/publications/pubindex.htm

MISCELLANEAS RESOURCES

AAI (American Antitrust Institute).

Available at: http://www.antitrustinstitute.org

CataLaw.

Available at: http://www.catalaw.com/topics/Anti-trust.shtml

E.U. Annual Reports on Competition Policy.

Available at: http://europa.eu.int/comm/competition/annual_reports

Global Competition Forum.

Available at: http://www.globalcompetitionforum.org

Global Competition Review.

Available at: http://www.globalcompetitionreview.com

HierosGamos (Legal Research Center)

Available at: http://www.hg.org/antitrust.html

Internet Resources for Latin America.

Available at: http://lib.nmsu.edu/subject/bord/laguia

MegaLaw Legal Site.

Available at: http://www.megalaw.com/top/unfaircomp.php

Pritchard Law Webs.

Available at: http://www.priweb.com/internetlawlib/315.htm

Promoting Competition.

Available at: http://www.ftc.gov/bc/compguide/index.htm

The Lectric Law Library.

Avaiable at: http://www.lectlaw.com/tant.htm

TRADE AND DEVELOPMENT CENTRE

Available at: http://www.itd.org/index1.htm

U.S. Department of Justice – Antitrust Division.

Available at: http://econpapers.hhs.se/paper/fthusjuat

USICN (U.S. International Competition Network).

Available at: http://www.usicn.gov

CJI/doc.123/03

COMPETITION AND CARTELS IN THE AMERICAS:
SUGGESTED CONCLUSIONS TO DOCUMENT CJI/doc.118/03

(presented by Dr. Eduardo Vío Grossi)

1. As expressed in the document CJI/doc.118/03, of February 28, 2003, under the title of *Competition and Cartels in the Americas*, presented by Drs. Rodas and Fried, the following comments are made in order to obtain probable conclusions presented herein, although on the grounds of certain general observations and as a hypothesis, to be demonstrated.

2. The first general comment to be considered refers to the contents of the document under study, since today there are several institutions or international fora occupied with or discussing the question, such as UNCTAD, World Bank, WTO, OECD, European Union, Andean Community of Nations, CARICOM and in FTAA negotiations.

3. Consequently, the second comment to be considered is that any participation of the Inter-American Juridical Committee in the aforementioned process must necessarily be clearly specified, so that it in fact portrays an original contribution on the subject and that, accordingly, is not a mere repetition of what has been discussed at the aforementioned international fora.

4. Of course, such specific aspects would be determined by the nature of both the Inter-American Juridical Committee itself and the matter under study.

5. Concerning the Committee, it is worth mentioning that it is the consulting body of the OAS on juridical matters, to promote progressive development and coding of International Law and study of the juridical problems referring to the integration of the developing countries on the Continent and the possibility of achieving uniformity in their legislation wherever convenient (Art. 99, *Charter of the OAS*).

6. The above implies, then, that the Inter-American Juridical Committee, in general, must keep its work basically within the parameters, namely, one, what is of interest should be fundamentally referred to the overall Inter-American System, that is, to those matters involving all member States of the OAS, and two, that consequently addressing what is in the sphere of International Law applicable to this group.

7. Concerning the question under study, it should be mentioned that it is already being discussed, within the inter-American sphere, by the Negotiating Group on Competition Policy, consisting of representatives of the member States of the OAS, to back the negotiations for establishing the FTAA, which evidently determines the body to which they should ultimately send the proposals or suggestions that may be formulated by the Inter-American Juridical Committee on this matter.

8. As aforementioned, it could be said that the issue in question is to be internationally regulated by convention and with an inter-American territorial coverage, discarding for the time being, therefore, the possibility of achieving uniformity in national laws on this matter.

9. However, from such a viewpoint, a first conclusion that seems to arise from the aforementioned document CJI/doc.118/03, would be that everything pertaining to the Law of Competition and Cartels is so far, in the inter-American scope, in the sphere of internal, domestic or sole jurisdiction of the States, since there is nothing in the *Charter of the OAS* nor in any other inter-American convention that establishes that free competition is mandatory nor the capacity of the Organization to impose sanctions for acts against it.

10. Certainly, the *Charter of the OAS* alludes to economic matters but has been using concepts such as cooperation for development, eradication of abject poverty, integral development and other similar topics (Arts. 2, 3, 17,19, 20 and Chapter VII), and does not impose, nor does any other similar Treaty or inter-American custom, the mandatory nature of some economic system, as the said *Charter* does, however, regarding the political system, which must be democratic.

11. The second conclusion from the aforementioned document would, therefore, be that the States of the Inter-American System are politically willing, at least in part, to include matters relating to free competition and cartels in the sphere of applicable International Law in the Americas by means of a convention, which would be FTAA. This political willingness, according to the principle of International Law implicit in the *Convention of Vienna on the Law of Treaties*, obliges them to negotiate in good faith, that is, with the intention of effectively reaching an agreement on the matter.

12. However, and this would be the third conclusion, the aforementioned negotiation would very likely be successful if the agreement substantially complies with the national legislation of the relevant States, provided that this correspondence expresses General Principles of Law, which is a third source of International Law under consideration, after the Treaties and Custom, in article 38 of the *Statutes* of the International Court of Justice. These principles therefore would have their origin in the former.

13. From this viewpoint, the fourth conclusion to be considered is the common point that, on the matter, included in the different laws of the States of the Inter-American System, is the *establishment and operation of a state body belonging in some cases to the Executive and in others to the Judiciary, but always endowed with sufficient autonomy to guarantee its impartiality, responsible for striving for free competition and sanctioning acts against it and whose resolutions can be appealed in Higher Courts.*

14. Similarly, it could then be said that the national laws will not be agaisnt the possible international juridical instatement, by means of a convention, of the mandatory establishment in each State of a body with the aforementioned characteristics.

15. On the other hand, it is apparent and always in accordance with document CJI/doc. 118/03, that it cannot be said that the different national laws relating to free competition and cartels share a definition or concept on the former nor even a detailed description of the acts against the free market, among them, pernicious cartels and the cases where they can be legal in their country of origin and illegal in the country where the damage occurs.

16. But on the other hand, it can be pointed out as the fifth and last conclusion that the national laws of the member States of the OAS, rather than defining and specifying what is understood to be *free competition, monopoly, cartels and other practices that could be considered contrary thereto, grant the aforementioned autonomous state body the right to determine and apply such concepts, in each particular known case and based on merely case studies given by Law, and proceed at their discretion, but not arbitrarily, to apply the corresponding sanctions*.

17. Undoubtedly, establishing a Treaty such as the FTAA indicated in items 13 and 16 above, could be major progress or innovation on the matter and would hugely help to establish and improve the system of free competition in the Americas, which would not be established in an instrument of general or political scope, such as the *Charter of the OAS*, but rather specialized or restricted, as in the case of FTAA and, therefore, established solely as an instrument to achieve the purposes proposed by the Treaty that establishes it.

18. Lastly, it should be added that the text in items 13 and 16, could or should also include regulations taken from general principles of law originating from other sources of International Law and, hence, likely to be accepted by the States, affecting the obligation to cooperate between those aforementioned state bodies, the application in the cases known from the principle of double incrimination, fulfilling its resolutions abroad and settlement of disputes arising from actions of the relevant jurisdictions or application of laws of different States, inasmuch as such matters have peculiarities that so deserve.

3. Seventh Specialized Inter-American Conference on Private International Law - CIDIP-VII

At its 62nd regular session (Rio de Janeiro, March 2003), the Inter-American Juridical Committee did not address this subject.

At its thirty-third regular session (Santiago, Chile, June 2003), the General Assembly requested the Inter-American Juridical Committee, in resolution AG/RES.1916 (XXXIII-O/03), to continue to assist with the preparatory work for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) and to continue to support consultations with governmental and nongovernmental experts. In resolution AG/RES.1923 (XXXIII-O/03), it also requested the Committee to continue to submit its comments and observations on the draft agenda for CIDIP-VII.

At its 63rd regular session (Rio de Janeiro, August 2003), the Inter-American Juridical Committee elected Dr. João Grandino Rodas to serve as joint rapporteur for this topic. It was decided that the issue would remain on the agenda, while the Committee was to continue presenting its comments and remarks regarding the proposed agenda for CIDIP-VII.

4. Improving the systems of administration of justice in the Americas: access to justice

Document

CJI/doc.136/03 rev.1 - The Caribbean Court of Justice
(presented by Dr. Brynmor T. Pollard)

The Inter-American Juridical Committee did not take the subject up at its 62nd regular session (Rio de Janeiro, March 2003). However, it had agreed to change the title of the item from *Improving the administration of justice in the Americas: access to justice* to *Improving the systems of administration of justice in the Americas*, in light of the decisions taken at REMJA IV.

At its thirty-third regular session (Santiago, Chile, June 2003), the General Assembly requested the Inter-American Juridical Committee, in resolution AG/RES.1916 (XXXIII-O/03), to add to its work agenda, in accordance with its mandates, the pertinent recommendations of the Meetings of Ministers of Justice or of Ministers or Attorneys General of the Americas (REMJA) in order to closely monitor the progress of their implementation.

At its 63rd regular session (Rio de Janeiro, August 2003), the Inter-American Juridical Committee had before it document CJI/doc.136/03 rev.1, entitled *The Caribbean Court of Justice*, submitted by Dr. Brynmor Pollard.

The members of the Juridical Committee made a number of observations on the document. Dr. Felipe Paolillo asked several questions about the nationality of the judges, to which Dr. Pollard replied that there was no reference to nationality for members of the Court. Dr. Paolillo also expressed concern about the number of judges of which the Court would be comprised, which had been given as a number not higher than nine but remained ill-defined. Dr. Pollard said that there were no references to the minimum number to constitute a quorum, but he assumed that it was five. Lastly, Dr. Paolillo said that he understood that the contracting parties were each of the countries of the Caribbean Community, but had doubts in that regard.

Dr. Luis Herrera recalled that the Juridical Committee had elaborated and published a document on dispute-settlement systems in the various regional blocks several years ago, which had been published by a university in Argentina. The presentation by Dr. Pollard provided a good opportunity to take up the subject again in the Committee. The item was part of the broader subject of the enforcement in national systems of sentences handed down by international courts, which could eventually be included in the agenda of the Juridical Committee and had effectively been included as an item in the current regular session.

Dr. Carlos Manuel Vázquez found it interesting that the Court should have final jurisdiction over matters falling within national legislation, even though it did not violate the norms of the Community, in other words, supranational laws. That was a notable difference from other international courts that had been established at the global level. Dr. Ana Elizabeth agreed with that observation and cited as an example the Central American Court, whose decisions and advisory opinions were of a supranational character for the countries that had accepted its jurisdiction.

With those comments, it was decided to retain the item in the agenda as a follow-up item. The text of document CJI/doc.136/03 rev.1 is transcribed below:

CJI/doc.136/03 rev.1

THE CARIBBEAN COURT OF JUSTICE
(presented by Dr. Brynmor T. Pollard)

1. The Caribbean Court of Justice (CCJ) is the latest significant judicial body established by Members States of the Caribbean Community.

2. With the dissolution of the West Indies Federation in 1962 and with it the Federal Supreme Court which served as a Court of Appeal from decisions of the Superior Courts of those countries forming the Federation, repeated calls were made for the replacement of the Federal Supreme Court, but by a final appellate court for the countries forming the Federation thereby abolishing the jurisdiction of the Judicial Committee of the Privy Council in England as the final appellate court for those English-Speaking Caribbean Countries wishing to do so. The English-Speaking Caribbean Countries, except Guyana, are among the remaining minority of. Commonwealth Countries with the Judicial Committee of the Privy Council as the final. Appellate court for the particular country.

3. The Organization of Commonwealth Caribbean Bar Association (OCCBA)

Began active consideration of proposals for the establishment of the proposed final appellate court for Commonwealth Caribbean Countries and published its recommendations in its Report in 1972. Further consideration of the matter was later undertaken by the Attorneys-General of the English-Speaking Caribbean Countries in a series of meetings utilizing the recommendations of OCCBA as the basis for their deliberations. There was a suspension of consideration of the proposal in the 1970's, occasioned presumably by other priorities of the Governments, but the matter was revived in 1987 on the initiative of the late former Attorney-General and Minister .of Legal Affairs of Trinidad and Tobago, Sewn Richardson. Since then, the proposal has engaged the attention of the Attorneys-General of CARICOM States and the Conference of CARICOM Heads of Government with the result that the Agreement to establish the Court was signed by representatives of Member States of the Caribbean Community and has been ratified by the requisite number of States with the deposit of instruments of ratification with the CARICOM Secretary-General, resulting in the entry into force of the Agreement. However, a number of procedures, including constitutional amendments at the national level, the formation of the Regional Judicial and Legal Services Commission to appoint the Judges and staff of the Court, the conclusion of the agreement establishing the CCJ Trust Fund and signing of as appropriate vesting fund must be completed before the Court can become operational.

4. The Conference of CARICOM Heads of Government has agreed that the seat of the Headquarters of the Court will be in Port of Spain, Trinidad. The Court may, however, sit in the territory of any other Contracting .Party as circumstances.warrant. The predecessor courts – the Federal Supreme Court and the British Caribbean Court of Appeal functioned essentially as itinerant courts of appeal sitting, from time to time, for varying periods in certain territories of the English-Speaking Caribbean Region. Members of the private Bar are not supportive of the CCJ functioning in a similar manner despite the reason advanced concerning convenience to lawyers and litigants. It is the view of the private Bar that a final appellate court functioning as an itinerant court will experience a number of disadvantages which will affect the work of the Court.

5. Certain interesting characteristics of the CCJ merit being highlighted. Firstly, the appointment of the judges of the Court. Article IV of the Agreement establishing the Court provides for the President and not more than nine other judges of whom at least three shall possess expertise in international law, including international trade law. This is a significant provision because of the jurisdiction conferred on the Court by Article XII of the Agreement. The article confers an exclusive and compulsory jurisdiction on the CCJ to hear and deliver judgement on disputes concerning the interpretation and application of the Revised Treaty of Chaguaranas including:

a. disputes between Contracting Parties to the Agreement;
b. disputes between any Contracting Parties to the Agreement and the Community;
c. referrals from National Courts or Tribunals of Contracting Parties;
d. applications by nationals with the leave of the Court.

Concerning the interpretation and application of the Treaty establishing the Caribbean Community with respect to a claim to a right conferred by or under the Treaty on a Contracting Party and enuring to the benefit of persons directly.

In the exercise of its original jurisdiction, the Court shall be duly constituted if it consists of not less than three judges being an uneven number of judges.

The Governments of CARICOM States consider the establishment and functioning of the CCJ as vital for the efficient functioning of the CARICOM. Single Market and Economy envisaged by the Revised Treaty establishing the Caribbean Community. The expectation is that the conferring of the original and exclusive jurisdiction on the Court on matters relating to the Treaty will result in uniformity in the interpretation and application of provisions of the Treaty within the Community.

6. Article XIII confers exclusive jurisdiction on the CCJ to deliver advisory opinions concerning the interpretation and application of the Treaty.

Article XIV provides that a national court or tribunal of a Contracting Party that is seised of an issue the resolution of which involves a question concerning the interpretation or application of the Treaty shall, if it considers that a decision on the question is necessary to enable it to deliver judgment, refer question to the CCJ for determination before delivering judgment.

Article XVI provides that the Contracting Parties agree to recognize as compulsory, *ipso facto* and without special agreement, the original jurisdiction of the Court and, in the event of a dispute as to whether the Court has jurisdiction, the matter shall be determined by the Court. The Caribbean Court of Justice (CCJ) is, therefore, a court which will function as a final appellate court applying municipal law and also as an international tribunal applying international law.

Note: Also article XXIII enjoins Contracting Parties to the maximum effort possible to encourage and facilitate the use of arbitration and other means of alternative dispute resolution for the settlement of international commercial disputes. Contracting Parties must provide appropriate procedures to ensure the relevance of agreements to arbitrate and for the recognition and enforcement of arbitral awards in such disputes.

7. With the impending abolition of the jurisdiction of the Judicial Committee of the Privy Council concerns have been frequently expressed about the qualifications of the judges of the Court and the procedure for appointing them having regard to the desirability of attracting suitably qualified and experienced persons for appointment to the Court., and also to minimize political influence in the appointment process.

Article IV, paragraph 10, provides as follows:

> "10". A person shall not be qualified to be appointed to hold or to act in the office of Judge of the Court, unless that person satisfies the criteria mentioned in paragraph 11 and
>
> a. is or has been for a period or periods amounting in the aggregate to not less than five years, a Judge of a court of unlimited jurisdiction in civil and criminal matters in the territory of a Contracting Party or in some part in the Commonwealth, or in a State exercising civil law jurisprudence common to the Contracting Parties, or a Court having jurisdiction in appeals from any such court and who, in the opinion of the Commission, has distinguished himself or herself in that office; or

b. is or has been engaged in the practice or teaching of law for a period or periods amounting in the aggregate to not less than fifteen years in a Member State of the Caribbean Community or in a Contracting Party or in some part of the Commonwealth, or in a State exercising civil law jurisprudence common to Contracting Parties, and has distinguished himself or herself in the legal profession.

The above mentioned provision must be read in conjunction with Article IV, paragraph 11, which is an interesting provision intended to ensure the selection of an experienced and well qualified panel of judges and which states as follows:

> "11. In making appointments to the office of judge, regard shall be had to the following criteria: high moral character, intellectual and analytical ability, sound judgment, integrity, and understanding of people and society".

Article IV, Paragraph 12 of authorizes the Regional Judicial and Legal Services Commission established by the Agreement prior to appointing a judge of the Court, to "consult with associations representative of the legal profession and with other bodies and individuals that it considers appropriate in selecting a judge of the Court".

8. In the early stages of developing the articles of the Agreement establishing the CCJ provision was made for the President and other judges of the Court to be appointed by the Conference of Heads of Government of the Caribbean Community after the Heads of Government had engaged in appropriate consultations with competent professional and other bodies and persons. It was eventually decided by the Conference of Heads of Government that the Agreement should provide for the establishment of a Regional Judicial and Legal Services Commission with the responsibility for making the judicial appointments (other than the President of the Court) and the officials and employees of the Court.

9. Article V of the Agreement provides for the establishment of the Commission as follows:

a. the President of the Court who shall be the Chairman of the Commission;

b. two persons nominated jointly by the Organization of the Commonwealth Caribbean Bar Associations (OCCBA) and the Organization of Eastern Caribbean States (OECS) Bar Associations;

c. one .chairman of the Judicial Services Commissions of a Contracting Party selected in rotation in the English alphabetical order for a period of three years;

d. the Chairman of a Public Service Commission of a Contracting Party selected in rotation in reverse English alphabetical order for a period of three years;

e. two persons from civil society nominated jointly by the Secretary-General of the Community and the Director General of the OECS for a period of three years following consultations with the regional non-governmental organizations;

f. distinguished jurists nominated jointly by the .Dean of the Faculty of Law of the University of the West Indies, the Deans of the Faculties of Law of any of the Contracting Parties and the Chairman of the Council of Legal Education, and

g. two persons nominated jointly by the Bar or Law Associations of the Contracting Parties.

10. Article IV, paragraph 6 of the provides for the President of the Court to .e appointed or removed from office by the qualified majority vote of three-quarters of the Contracting Parties on the recommendation of the Commission. The appointment shall be signified by letter under the hand of the Chairman of the Conference of Heads of Government.

Article IV, Paragraph 7 requires that the Judges of the Court, other than the President, shall be appointed or removed by a majority vote of all the members of the Commission. The

appointment of Judges of the Court, other than the President, shall be signified by letter under the hand of the Chairman of the Commission, that is to say, the President of the Court.

11. Article IX of the Agreement provides that the removal from office of Judges of the Court, including the President, is dependant on the advice tendered by a tribunal to which the matter is referred and after due inquiry. In the case of the President of the Court the reference to a tribunal is at the instance of the Heads of the Government and in the case of any other Judge of the Court on a reference by the Judicial and Legal Services Commission.

12. Sustaining the financing of the Court has been a major concern expressed by members of the legal profession and other members of the public primarily because of financial constraints being experienced by CARICOM *States* and embracing past experience in the financing of Caribbean regional institutions. It is contended that this must not be the experience of the Court and, consequently, the CARICOM Heads of Government authorized the creation of a trust fund to be established with monies to be raised and on rent by the Caribbean Development Bank and to be repaid to the Bank by participating CARICOM States on the basis of an agreed formula governing their contributions to the financing of the Court. The monies raised by the Caribbean Development Bank and forming the Trust Fund are expected to guarantee the financing of the capital and operations expenses of the Court (including the emoluments and other remuneration payable to the Judges) in perpetuity.

13. Article XXVIII (paragraph 2 (1) provides for the terms and conditions and other benefits of the Judges of the Court to be determined by the Regional Judicial and Legal Services Commissions with the approval of the Conference of Heads of Government. As provided for the Judiciary in national Constitutions, Article XXVIII (paragraph 3) provides that the salaries and allowances payable to the Judges of the Court and their other terms and conditions of service shall not be altered to their disadvantages during their tenure of office.

14. On the basis of the arrangements contemplated for the CCJ in terms of its jurisdictional composition, procedures for appointment and financing the CCJ, it does appear that this institution constitutes of interesting and unique development in international institutional arrangements. In this context, the establishment of the CCJ is to provide an interesting precedent for similar judicial institutions.

5. Preparation for the commemoration of the centennial of the Inter-American Juridical Committee

At its thirty-third regular session (Santiago, Chile, June 2003), the General Assembly requested the Inter-American Juridical Committee, in resolution AG/RES.1916 (XXXIII-O/03), to continue the preparations for the celebrations to mark its centennial, in 2006.

At the 63rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2003), Dr. Eduardo Vío presented a brief oral report on the topic touching on the draft declaration, the establishment of the inter-American network, the posters and the publication of the book.

The Director of the Department of International Law reported that to date no replies had been received from the members or ex-members of the Inter-American Juridical Committee on the articles to be submitted for the publication of the book to mark the centennial. Regarding the Inter-American network, he reported that it had already been established, was operating and was permanently fed.

The Secretary of the Juridical Committee presented three design proposals for the centennial poster. After considering them, the ideas that the members of the Committee agreed to reflect in the poster were the attainment of 100 years and the future projection of the Juridical Committee and international law in the Americas. The Committee requested the General Secretariat to arrange for the design to be finalized. The Secretary of the Juridical Committee undertook to send by electronic mail the design proposals so that members of the Committee could make their suggestions in a timely manner.

Dr. Eduardo Vío suggested, with reference to the centennial book, that each member of the Juridical Committee should take responsibility for one of the areas in the Committee's agenda over the years. He requested the Secretariat to prepare a document suggesting the areas. He also requested that a new communication should be sent to members and ex-members requesting their contributions to the book. He stressed the difference between the publication of the centennial book and the publication of the book on this year's Course on International Law, whose main theme would also be the centennial of the Juridical Committee.

Lastly, Dr. Vío proposed that the Inter-American Juridical Committee should have a logo to commemorate its centennial and requested the Secretariat to provide the financial resources to prepare three proposals for the next regular session and to review the norms of the Organization in this field. He offered to work with the Secretariat on this task.

The Inter-American Juridical Committee decided to leave this item in its agenda as a follow-up item.

6. Fifth Joint Meeting with Legal Advisers of the Foreign Ministries of OAS Member States

Resolutions

CJI/RES.53 (LXII-O/03) - Fifth Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS

CJI/RES.62 (LXIII-O/03) - Expression of thanks to the Andean Corporation for Development for lending support to the V Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS held on 25-26 August 2003 in the city of Rio de Janeiro

Document

CJI/doc.116/03 - Proposal of topics for the agenda of the Fifth Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS
(presented by Dr. Eduardo Vío Grossi) [1]

During the Committee's intersessional period, Dr. Eduardo Vío Grossi sent the other members of the Juridical Committee a memorandum with suggestions for organizing the Joint Meeting. Based on those suggestions and on the exchange of opinions that had taken place at the 62nd regular session (Rio de Janeiro, March 2003), the Juridical Committee had adopted resolution CJI/RES.53 (LXII-O/03), entitled *Fifth Joint Meeting with Legal Advisors of the Foreign Ministries of OAS Member States*. That resolution set the dates of August 25-26, 2003 for the meeting, approved the agenda, and requested the General Secretariat to inform the legal advisors in a timely manner. It also requested the General Secretariat to explore the possibility of approaching the Inter-American Development Bank (IDB) and the Andean Development Corporation (CAF) for financing for the participation of the legal advisors to be invited and to make all necessary arrangements to ensure the success of the Meeting, including the designation of presenters and commentators on the subjects to be discussed.

On April 20, 2003, in follow-up to the request made at the session, Dr. Luis Marchand wrote to Dr. Enrique García, President of the Andean Development Corporation (CAF), asking him to consider the possibility of contributing to the financing of the Joint Meeting to be held in August 2003. On May 8, 2003, invitations to attend the Joint Meeting were sent to the legal advisors of each of the Ministries of Foreign Affairs.

At its thirty-third regular session (Santiago, Chile, June 2003), the General Assembly encouraged the Inter-American Juridical Committee, in resolution AG/RES.1916 (XXXIII-O/03), to continue to promote regular joint meetings with the legal advisers of the respective Ministries of Foreign Affairs of OAS member States and noted with satisfaction the decision to hold the fifth such Joint Meeting during the Juridical Committee's regular session in August 2003.

At its 63rd regular session (Rio de Janeiro, August 2003), the Inter-American Juridical Committee had before it resolution CJI/RES.53 (LXII-O/03) containing the agenda of the V Joint Meeting with Legal Advisors of the Foreign Ministries of OAS Member States, to be held during that session. The agenda was as follows:

Monday, August 25

a. Review of mechanisms to address and prevent serious and recurrent violations of international humanitarian law and international human rights law, and the role played by the International Criminal Court in this process

b. Panel on NAFTA with the participation of students from the Course on International Law

[1] This document was reproduced from e-mails sent by Dr. Eduardo Vío Grossi to the IAJC members on November 15, 2002.

Tuesday, August 26

a. The inter-American juridical agenda

b. Panel on hemispheric security with the participation of students from the Course on International Law

Throughout the various meetings, the members of the Inter-American Juridical Committee made adjustments to the program, which were communicated in a timely manner to the various legal advisors who had confirmed their participation. The final program was as follows:

Monday, Augut 25

10am – 1pm	Welcome and introduction
	Hemispheric security
1pm – 3pm	Break
3pm – 5:30pm	Review of mechanisms to address and prevent serious and recurrent violations of international humanitarian law and international human rights law, and the role played by the International Criminal Court in this process. Panel with the participation of students from the Course on International Law
5:30pm	Welcome cocktail

Tuesday, August 26

10am – 1pm	The inter-American juridical agenda
1pm – 3pm	Break
3pm – 5:30pm	Juridical aspects of the enforcement in the domestic jurisdiction of decisions of international tribunals or other international organs with jurisdictional functions. Panel with the participation of students from the Course on International Law
5:30pm	Closing session

On Monday, August 25 and Tuesday, August 26, and in accordance with the above program, the V Joint Meeting was held with the legal advisors of the Foreign Ministries of OAS member States at the headquarters of the Inter-American Juridical Committee and with the participation of the following invitees:

Minister Eugenio María Curia, Director General of the Legal Advisory Service (Argentina)

Dr. Freddy Abastoflor Córdova, Director General of Legal Affairs (Bolivia)

Dr. Antônio Paulo Cachapuz de Medeiros, Legal Advisor (Brazil)

Mrs. Colleen Swords, Legal Advisor (Canada)

Ambassador Claudio Troncoso Repetto, Director of Legal Affairs (Chile)

Dr. Clarencio Bolaños Barth, Director of Legal Affairs (Costa Rica)

Ambassador Rodrigo Yépez Enrique, Legal Technical Advisor (Ecuador)

Dr. Ana Elizabeth Villalta, Director of the Legal Unit (El Salvador)

Mrs. Mary Catherine Malin, Assistant Legal Advisor (United States)

Dr. Mario E. Salinas Zepeda, Legal Advisor (Honduras)

Dr. Henry L. MacDonald (Suriname)

At the conclusion of the meeting, which to date had the largest number of legal advisors participating, including the presence of students from the Course on International Law in the afternoon sessions, the members of the Inter-American Juridical Committee termed it a success.

Dr. Eduardo Vío recalled the reason for the convening of that type of meeting and said that the idea had been taken from the informal meeting of legal advisors of the States Members of the United Nations at the time of the submission of the annual report of the International Law Commission. He pointed out that such occasions did not present themselves within the framework of OAS and the Juridical Committee therefore supported the initiation of the joint meetings.

Finally, the Inter-American Juridical Committee adopted resolution CJI/RES.62 (LXIII-O/03), entitled *Expression of thanks to the Andean Corporation for Development for lending support to the V Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS held on 25-26 August 2003 in the city of Rio de Janeiro*, in which it thanked the CAF for the support provided in funding the participation of several of the legal advisors.

In light of the holding of the V Joint Meeting, the Inter-American Juridical Committee decided to remove the item from the agenda of its current regular session.

The following paragraphs contain the text of the two resolutions adopted by the Juridical Committee on this matter during 2003 and the document submitted by Dr. Eduardo Vío:

CJI/RES. 53 (LXII-O/03)

FIFTH JOINT MEETING WITH THE LEGAL ADVISORS OF THE MINISTRIES OF FOREIGN AFFAIRS OF THE MEMBER STATES OF THE OAS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARING IN MIND the resolutions of the General Assembly AG/RES.1844 (XXXII-O/02) and AG/RES.1900 (XXXII-O/02) encouraging the Juridical Committee to continue periodically holding Joint Meetings with the Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS, and that the agenda of the next Joint Meeting should include an examination of mechanisms to address and prevent recurrent serious violations of International humanitarian law and international human rights law, as well as the role played by the International Criminal Court in that process;

CONSIDERING in addition the decision by the Inter-American Juridical Committee at its 61st regular session (Rio de Janeiro, August 2002) to hold the 5th Joint Meeting with the Legal Advisors of Ministries of Foreign Affairs of the Member States of the OAS at its regular session in August 2003;

RESOLVES:

1. To set the dates 25 and 26 of August 2003 to hold the 5th Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS on the occasion of the 63rd regular session of the Inter-American Juridical Committee.

2. To approve the following agenda for the above-mentioned Joint Meeting:

Monday 25 August:

a. Examination of the mechanisms to address and prevent the recurrence of serious violations of international humanitarian law and international human rights law, as well as the role played by the International Criminal Court in that process (private morning session).

b. Panel on the FTAA attended by students of the Course on International Law.

Tuesday 26 August:

a. The inter-American juridical agenda (private morning session).

b. Panel on hemispheric security attended by students of the Course on International Law.

3. To request the General Secretariat to inform the legal advisors of the agenda of the 5th Joint Meeting with sufficient advance time for preparation.

4. To request the General Secretariat to look into the possibility of approaching the Inter-American Development Bank (IDB) and the Andean Corporation for Development (CAF) to finance the participation of the invited legal advisors.

5. To entrust to the General Secretariat the necessary measures to ensure the success of the 5th Joint Meeting, including the designation of presenters and commentators of the topics to be discussed.

This resolution was unanimously adopted at the session held on 20 March 2003, in the presence of the following members: Drs. Luis Marchand Stens, Carlos Manuel Vázquez, Brynmor T. Pollard, Luis Herrera Marcano, João Grandino Rodas, Ana Elizabeth Villalta Vizcarra y Eduardo Vío Grossi.

CJI/RES.62 (LXIII-O/03)

EXPRESSION OF THANKS TO THE ANDEAN CORPORATION FOR DEVELOPMENT FOR LENDING SUPPORT TO THE V JOINT MEETING WITH THE LEGAL ADVISORS OF THE MINISTRIES OF FOREIGN AFFAIRS OF THE MEMBER STATES OF THE OAS HELD ON 25-26 AUGUST 2003 IN THE CITY OF RIO DE JANEIRO

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARING IN MIND resolutions AG/RES.1844 (XXXII-O/02) and AG/RES.1900 (XXXII-O/02), in which the General Assembly exhorted the Inter-American Juridical Committee to continue holding periodical Joint Meetings with the Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS;

CONSIDERING that the Inter-American Juridical Committee, during its 61st Regular Session held in Rio de Janeiro in August 2002, decided to hold the V Joint Meeting in August 2003;

BEARING IN MIND that the Juridical Committee, in order to ensure the success of said meeting, decided to approach the Andean Corporation for Development to request financial assistance for those legal advisors who wished to take part;

BEARING IN MIND the positive answer obtained from the Executive Chairman of the Andean Corporation for Development, thereby allowing several legal advisors to attend and thus helping to make the V Joint Meeting a success,

RESOLVES:

1. To express its deep gratitude to the Executive Chairman of the Andean Corporation for Development, Dr. Enrique García, for the financial support granted to the Inter-American Juridical Committee to organize the V Joint Meeting of the Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS held in its head office in the city of Rio de Janeiro on 25-26 August 2003, thereby helping several legal advisors to attend and consequently contributing to the success of this important Joint Meeting.

2. To mention with emphasis that this financial support enabled the V Joint Meeting to count with the largest attendance of legal advisors to date.

3. To send a copy of this resolution to the Executive Chairman of the Andean Corporation for Development, Dr. Enrique García.

This resolution was unanimously adopted at the session held on 21st August 2003, in the presence of the following members: Drs. João Grandino Rodas, Brynmor T. Pollard, Luis Marchand Stens, Eduardo Vío Grossi, Ana Elizabeth Villalta Vizcarra, Carlos Manuel Vázquez, and Luis Herrera Marcano.

CJI/doc.116/03

PROPOSAL OF TOPICS FOR THE AGENDA OF THE FIFTH JOINT MEETING WITH LEGAL ADVISORS OF THE MINISTRIES OF FOREIGN AFFAIRS OF THE MEMBER STATES OF THE OAS

(presented by Dr. Eduardo Vío Grossi)[2]

I have been thinking that perhaps the Meeting with the Legal Advisors should be held in the last week of the August 2003 regular session, that is, the week beginning 26th. This seems to be the most suitable date because the start of the customary August regular session invariably cuts short the vacations of the legal advisors from the Northern hemisphere, which has probably been the reason for their poor attendance at the meetings. The new dates could also give the students attending the Course on International Law an opportunity to participate, since the course will practically be over by then. It would also be a better closure to both the Course and the Regular Session.

On the other hand, I believe that, on this occasion, the meeting should focus on two or three topics, as follows: **Juridical feasibility of FTAA; Terrorism and Hemispheric Security, International Criminal Court and the Inter-American System.**

Each topic should be prepared and presented by one speaker and two commentators. The speaker and commentators should be legal advisors of the member States of the OAS. Thus, for example, on the first topic, the speaker could be the Legal Advisor of the United States of America and the commentators from Brazil and Chile. On the second topic, the speaker could be the Legal Advisor of Colombia and commentators from Canada and Mexico. On the third topic, the speaker could be the Legal Advisor from Argentina and the commentators from Peru and Jamaica or Nicaragua. And in any case, the moderators should be members of the IAJC. The General Secretariat will be in charge of preparing the minutes of the sessions and corresponding draft declarations.

After the presentations and comments, there will, of course, be a general discussion involving all legal advisors, IAJC members and the General Secretariat, in order to obtain, if possible, three separate Declarations on such topics.

This document was reproduced from e-mails sent by Dr. Eduardo Vío Grossi to the IAJC members on November 15, 2002.

7. Juridical aspects of inter-American hemispheric security

Resolution

CJI/RES.65 (LXIII-O/03) – Legal aspects of inter-American security

Documents

CJI/doc.128/03 - Draft Resolution: Inter-American Security (presented by Dr. Eduardo Vío Grossi)

At its 62nd regular session (Rio de Janeiro, March 2003), the Inter-American Juridical Committee decided to again include the subject of hemispheric security in its agenda. It also decided to transmit to the Chair of the Permanent Council the reports prepared earlier on the subject by Dr. Eduardo Vío Grossi, namely, CJI/doc.38/99 corr.1, entitled *Juridical Aspects of Hemispheric Security: First Preliminary Report on "The Charter of the Organization of American States: Limitations and Opportunities"*, and CJI/doc.9/00, *Juridical Aspects of Hemispheric Security: Second Preliminary Report on "The Charter of the Organization of American States: Concepts"*. The reports were sent in late March. Eduardo Vío Grossi, Luis Marchand and Ana Elizabeth Villalta were appointed Rapporteurs for the topic.

At the 63rd session of the Inter-American Juridical Committee (Rio de Janeiro, August 2003), Dr. Eduardo Vío submitted document CJI/doc.128/03, entitled *Inter-American security*. The rapporteur for the topic stated that the TIAR was not the only instrument currently applicable to hemispheric security, particularly since not all States members were parties thereto. Mexico had denounced it and, moreover, it had not been implemented in the manner that Argentina had wished during the crisis of the Malvinas (Falkland) islands. OAS had a political vocation: peace and security in the hemisphere, although it did not have the power to impose coercive measures that were binding on all States. It was thus a traditional organization that relied on cooperation. In view of that situation, the Rapporteur wondered what the OAS could do in the field of peace and security in the Hemisphere.

In his view, the potential contribution of the Inter-American Juridical Committee to the Special Conference on Security should be juridical, indicating what was the applicable law in the field in the Americas, within the framework of the TIAR and compliance with a resolution of the United Nations, or in the case of a terrorist event. The report did not necessarily have to be finalized before the Conference but should in fact be prepared in the light of the Conference's results.

Regarding the concept of peace and security, a broad concept covered by the Draft Declaration of the Special Conference on Security to be held in Mexico in October 2003, he said that while it was not possible to define it, it was possible to identify the organ that could undertake that conceptual task. That could also be a contribution of the Juridical Committee.

Dr. Felipe Paolillo said that it would be a good idea to prepare a document of a purely juridical nature that would identify the topics to be developed and the juridical instruments that needed to be changed in order to strengthen peace and security in the hemisphere. Dr. João Grandino Rodas supported the ideas expressed by Dr. Vío and Dr. Paolillo. Dr. Ana Elizabeth Villalta proposed that the topic should be an item for consideration in the agenda of the Juridical Committee.

The Inter-American Juridical Committee accepted and endorsed the approach proposed by Dr. Eduardo Vío and proposed that the Committee should work collectively on the subject based on a preliminary document which it would prepare before the next regular session.

It was also decided to change the title of the item replacing it with "Juridical aspects of inter-American security" and resolution CJI/RES.65 (LXIII-O/03) was adopted, in which the item was referred to under its new title and a decision made to include it among the topics for

consideration. In that resolution, the Inter-American Juridical Committee decided to pursue the objective proposed in the above-mentioned document CJI/doc.128/03, namely, that the proposed study should seek to compile and systematically present current international norms in the field of international peace and security in the Americas, encompassing at least four aspects: the concept of inter-American peace and security and its connections with other inter-American juridical issues; the procedures and measures that might be adopted by the OAS in cases that affected or that could affect inter-American peace and security; and, lastly, the areas of this field in which international law in the Americas could be progressively developed and the measures of coordination between the Organization and other hemispheric organizations concerned with international peace and security.

At the regular session, Dr. Luis Marchand also introduced document CJI/doc.144/03, entitled *Memorandum: Some preliminary comments on the next Specialized Conference on Hemispheric Security, to be held in Mexico*, *and on the document presented by Dr Eduardo Vío Grossi suggesting certain legal initiatives*, which was not examined by the other members of the Juridical Committee.

The text of the resolution approved by the Juridical Committee on the topic and the documents submitted by Dr. Eduardo Vío and Dr. Luis Marchans are transcribed below:

CJI/RES.65 (LXIII-O/03)

LEGAL ASPECTS OF INTER-AMERICAN SECURITY

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING,

1. That at its 62nd Regular Session, the Committee re-introduced the topic of Hemispheric Security into its agenda as a follow-up item;

2. The reports "*Legal aspects of hemispheric security. First Preliminary Report on the Charter of the Organization of the American States: limitations and possibilities*" *(*CJI/doc.38/99 corr.1) and "*Legal aspects of hemispheric security. Second Preliminary Result on the Charter of the Organization of the American States: concepts*" (CJI/doc.9/00), presented by the rapporteur of the theme, Dr. Eduardo Vío Grossi;

3. That in October of this year the Specialized Conference on Hemispheric Security will be held in Mexico;

4. That on that occasion a Draft Declaration on Hemispheric Security will be discussed, which by its very nature will probably have a more clearly political tone,

RESOLVES:

1. To refer to this topic on its agenda as "*Legal aspects of Inter-American security*" and to include it among the items under consideration.

2. To approve the objective proposed in document *Draft Resolution. Inter-American* Security, presented by Dr. Vío Grossi (CJI/doc.128/03), namely, that the study to be undertaken should try to gather and present systemically the prevailing international norms with regard to international peace and security in the Americas.

3. Consequently, to accept the suggestion included in CJI/doc.128/03, namely, that this study should cover at least four facets of the issue: the concept of Inter-American peace and security and how this is related to other Inter-American legal topics; the procedures and measures to be followed by the Organization of the American States in cases that affect Inter-American peace and security; the areas that could foster the progressive development of the International Law of the Americas; and lastly, the coordination measures between the Organization and other hemispheric agencies connected with international peace and security.

4. To determine that the report to be presented by the rapporteur for this topic at the 64th Regular Session especially include the resolutions reached at the Specialized Conference on Hemispheric Security to be held in Mexico in October 2003.

This resolution was unanimously adopted at the session held on 27 August 2003, in the presence of the following members: Drs. João Grandino Rodas, Brynmor T. Pollard, Luis Marchand Stens, Eduardo Vío Grossi, Ana Elizabeth Villalta Vizcarra, Carlos Manuel Vázquez and Luis Herrera Marcano.

CJI/doc.128/03

DRAFT RESOLUTION:
INTER-AMERICAN SECURITY
(presented by Dr. Eduardo Vío Grossi)

1. Considering that the States of the Inter-American System are working on the draft of a Declaration on Hemispheric Security to be possibly adopted at the special Conference to be held shortly in Mexico, it is suggested that the Permanent Council of the OAS ask the Inter-American Juridical Committee to prepare a Draft Resolution on Inter-American Security at its forthcoming August session.

2. Since inter-American security is the primary and essential objective of OAS in both regional organization and general or political vocation, in other words, whose main concern is international peace and security in the region, the document in question should recognize the prevailing rules on international peace and security in the Americas, in a similar way as that of the Inter-American Democratic Charter, which was also drafted by the Inter-American Juridical Committee.

3. Accordingly, the Draft Resolution on Inter-American Security would be expressed in terms of articles based, once again, on International Law currently applicable in the Americas and which differs then from the Declaration on Hemispheric Security that may be adopted at the Special Conference in Mexico, which consequently would be of a rather more political nature.

4. Along these lines, the first part of the draft resolution could be related to the concept, at least procedural, of inter-American security and its links with other American international juridical topics, such as, for example, peace, democracy, human rights, obligation to peacefully settle disputes, abject poverty and drug trafficking.

5. A second part of the document under reference could address the procedures and measures that should be adopted in OAS, pursuant to the Organization's Charter, in the different scenarios where inter-American security would be affected, mentioning, therefore, the following cases:

a) the Security Council of the Organization of the United Nations decides to appeal to OAS to prevent, maintain or restore international peace and security;

b) armed aggression against territorial integrity or inviolability of the territory or against the sovereignty and political independence of an American State member of the Inter-American Treaty on Reciprocal Aid (TIAR) by an extra-continental State;

c) a similar situation affecting a State that is not a member of TIAR;

d) aggression not affecting territorial integrity or inviolability of the territory or against sovereignty and political independence of an American State;

e) non-armed aggression by an extra-continental State against an American State;

f) aggression of an American State against another American State;

g) armed aggression against an American State by State-independent terrorists or terrorist groups;

h) an extra-continental dispute that endangers peace in the region; and

i) any other fact or situation that may endanger the peace of America.

6. A third part of the proposed document could include topics closely related to the preservation and maintenance of international peace and security, such as, for example, the educational programs for peace, peace investigations, measures of mutual trust, transparency in weapon procurement processes, ban on certain weapons, namely nuclear and of mass destruction, peace zones, etc.

7. Lastly, the draft resolution could include some reference to areas relating to international peace and security where progressive development of the International Law of the Americas could be exploited and to coordinate measures between the OAS and other hemispheric organizations on this theme.

8. A draft text such as that proposed could eventually be approved on a non-binding basis, since it would be a mere resolution of the General Assembly of the OAS, not only as a boost to preparing a more complete or enhanced scheme on inter-American security in the future, but rather primarily to consolidate what is currently in force and it would be a great step forward.

8. Implementation of the Inter-American Democratic Charter

Resolution

CJI/RES.64 (LXIII-O/03) - Application of the Inter-American Democratic Charter

Document

CJI/doc.127/03 - Democracy in the Inter-American System: follow-up report on applying the Inter-American Democratic Charter (presented by Dr. Eduardo Vío Grossi)

At its 62nd regular session (Rio de Janeiro, March 2003), the Inter-American Juridical Committee decided to include in its agenda the item on the implementation of the Inter-American Democratic Charter. Dr. Eduardo Vío Grossi introduced document CJI/doc.127/03, entitled *Democracy in the Inter-American System: Follow-up Report on applying the Inter-American Democratic Charter* and was appointed rapporteur on the topic. The Committee decided to consider the document at its next regular session.

At its 63rd regular session (Rio de Janeiro, August 2003), the Inter-American Juridical Committee adopted resolution CJI/RES.64 (LXIII-O/03), entitled *Application of the Inter-American Democratic Charte*", in which it noted that, to date, the agenda of the competent organs of the Organization did not contain any request for the implementation of the mechanisms provided for in the Inter-American Democratic Charter and decided that the item should remain on its agenda as a follow-up item. Lastly, it requested the rapporteur, Dr. Eduardo Vío, to submit a new report on the topic at the Committee's 64th regular session.

The text of the document prepared by Dr. Eduardo Vío and the resolution approved by the Inter-American Juridical Committee are transcribed below:

CJI/RES.64 (LXIII-O/03)

APPLICATION OF THE INTER-AMERICAN DEMOCRATIC CHARTER

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING,

1. That during its 62nd Regular Session, the Committee decided to include the topic "Application of the Inter-American Democratic Charter" in its agenda and designated Dr. Eduardo Vío Grossi as rapporteur; and

The oral report delivered by the rapporteur during the present 63rd Regular Session,

RESOLVES:

1. To take note that at the present moment there are no requests on the agenda of the competent branches of the Organization to apply the mechanisms provided in the Inter-American Democratic Charter.

2. To determine that the topic should continue on its agenda among the "matters under follow-up", and to instruct the rapporteur to present a new oral or written report on the subject at the 64th Regular Session.

This resolution was unanimously adopted at the session held on 27 August 2003, in the presence of the following members: Drs. João Grandino Rodas, Brynmor T. Pollard, Luis Marchand Stens, Eduardo Vío Grossi, Ana Elizabeth Villalta Vizcarra, Carlos Manuel Vázquez and Luis Herrera Marcano.

CJI/doc.127/03

**DEMOCRACY IN THE INTER-AMERICAN SYSTEM:
FOLLOW-UP REPORT ON APPLYING THE
INTER-AMERICAN DEMOCRATIC CHARTER**
(presented by Eduardo Vío Grossi)

1. With regard to the political situation in Venezuela, last year the Permanent Council of the Organization of the American States adopted three resolutions, namely, CP/RES. 811 (1315/02), entitled *Situation in Venezuela*, dated 13 April 2002, CP/RES.821 (1329/02), entitled *Support for the Process of Dialogue in Venezuela*, dated 14 August 2002, and CP/RES.833 (1348/02), called *Supporting Democratic Institutionality in Venezuela and the Function of Facilitator on the Part of the Secretary General of the OAS*, dated 16 December 2002.

2. These resolutions refer to the *Inter-American Democratic Charter* approved by the General Assembly in its resolution AG/RES.1 (XXVIII-E/01), dated 11 September 2001.

3. This report aims to outline the following preliminary legal considerations concerning applying the *Charter* to the case of Venezuela: a) this is in keeping with what the *Charter of the Organization of the American States* declares about the following procedures: b) two of the three procedures provided for in the *Inter-American Democratic Charter* were chosen; c) the authorized functions have taken on a broader facet, and d) the *Inter-American Democratic Charter* seems to be invoked as an autonomously binding legal text.

4. As regards the first question, that is, the agreement between the *Inter-American Democratic Charter* (as far as the procedures provided therein are concerned) and the *Charter of the OAS*, seems to indicate that in the case in point the Permanent Council acts in accordance with the faculties granted by the former to support what is prescribed in the latter.

5. In fact, article 70 of the *Charter of the OAS* states that "*The Permanent Council of the Organization… has the authority assigned (to it) by the Charter and other inter-American instruments, as well as the functions assigned to it by the General Assembly...*" In turn, article 82 of the same normative document points out that "*the Permanent Council knows, within the limits of the Charter of the inter-American treaties and agreements, of any matter entrusted to it by the General Assembly ...*".

6. As for articles 17, 18 and 20 of the *Inter-American Democratic Charter*, these contemplate the faculty of the Permanent Council to act in cases they provide for, so that it can thereby be concluded that through the above-mentioned resolution AG/RES.1 (XXVIII-E/01), which approved the *Charter*, the General Assembly of the OAS "assigned" the Permanent Council to act as set out in cases such as the one we are concerned with.

7. This first consideration could be relevant since, besides confirming the legitimacy of all consequent actions, it is an evident demonstration of the merit and even the efficiency of the *Inter-American Democratic Charter* itself, at least as a procedure that the OAS should by obligation follow in situations such as that unfolding in Venezuela.

8. With regard to the second consideration, that is, that in the referred case, two of the three procedures provided for in the *Inter-American Democratic Charter* were opted for, it should first be recalled that such procedures are established in the following terms in articles 17, 18 and 20, first item of the text:

> Art.17 – When a government of a member State considers that its democratic political institutional process or its legitimate exercise of power is at risk, it may request assistance from the Secretary General or the Permanent Council for the strengthening and preservation of its democratic system;
>
> Art.18 -When situations arise in a member State that may affect the development of its democratic political institutional process or the legitimate exercise of power, the Secretary General or the Permanent Council may, with

> prior consent of the government concerned, arrange for visits or other actions in order to analyze the situation. The Secretary General will submit a report to the Permanent Council, which will undertake a collective assessment of the situation and where necessary, may adopt decisions for the preservation of the democratic system and its strengthening;
>
> Art.20 -In the event of a constitutional alteration of the constitutional regime that seriously impairs the democratic order in a member State, any Member State or the Secretary General may request the immediate convocation of the Permanent Council to undertake a collective assessment of the situation and to take such decisions as it deems appropriate.

9. So, it is unquestionable that the first resolution of the Permanent Council of the OAS regarding the situation in Venezuela, CP/RES.811 (1315/02), was adopted to support what is set forth in article 20 of the *Inter-American Democratic Charter*, since not only does the former expressly invoke the latter but also employs the same terms in its appreciation of the situation on declaring that "*considering that an alteration of the constitutional regime has occurred in Venezuela which seriously impairs the democratic order...".* It also consequently provides for the measures set forth in the second and third items of the same article 20, that is to say, undertaking diplomatic measures in order (as stated in the second item of this provision and in number 5 of the resolution referred to above) "*to promote as quickly as possible the normalization of the democratic institutional framework*" and (following the terms of item three of said article 20 and number 6 of said resolution) to convoke "*a special session of the General Assembly*".

10. It also seems evident that on the other hand the other two resolutions of the Permanent Council of the OAS with regard to the Venezuelan situation - CP/RES.821 (1329/02) and CP/RES.833 (1348/02) - were adopted as provided for in article 18 of the *Inter-American Democratic Charter*, although, oddly enough, neither of the two resolutions expressly indicates so.

11. In fact, it should first of all be pointed out that although neither of these resolutions refers expressly or directly to aforementioned article 18, both nevertheless employ similar expressions to those used by the latter. While the provision mentions "*decisions for the preservation of the democratic system and its strengthening*, the former talks of "*consolidating the democratic process*" (the Second Legal Reason ("Considering") and the First Resolve ("Resolutivo") of the first mentioned and the Sixth Legal Reason of the second) and "*to safeguard the free exercise of the essential elements of democracy*" (the First Resolve of same).

12. In addition, it would be appropriate to draw attention to how resolution CP/RES.833 (1348/02) qualifies the presentation of the Permanent Representative of Venezuela before the OAS in respect to the Venezuelan situation, since it does so pointing out that this presentation spoke "*of the incidents that could destabilize democratic constitutional order in Venezuela*", expressions very similar to those contained in article 18 of the Inter-American Democratic Charter, namely, "*When a situation arise in a member State that may affect the development of the democratic political institutional process or the legitimate exercise of power* ..."

13. This means that in accordance with the recent resolutions quoted above, the situation in Venezuela could not be qualified as an "*alteration of the constitutional regime that seriously impairs the democratic order*" in Venezuela, a hypothesis provided for in article 20 of the *Inter-American Democratic Charter*, and that would accordingly be superseded, but rather as a situation "*that may affect the development of the democratic political institutional process or legitimate exercise of power*". Consequently, that is why the measures that the OAS can and has adopted in the case through the two recent resolutions mentioned above are aimed less towards "*normalizing democratic institutionality",* as article 20 states, than towards "*safeguarding and strengthening democratic institutionality*", which was not or is not being altered but is in fact in force.

14. The above interpretation is also supported by what is expressed in the resolutions in question when they allude to the "*full exercise of democracy in Venezuela*" (First Resolve of resolution CP/RES.833 (1348/02) and the support of the "*democratic and constitutional order of the Bolivarian Republic of Venezuela, whose government is headed by Hugo Chávez Farías*" (that is, it is assumed from what has been resolved that there is democracy in Venezuela or that no alteration to the democratic order that seriously affects its democratic order and accordingly calls for adopting some of the measures provided for in article 20 that might lead to the suspension of the member State as provided for in article 21 of the *Inter-American Democratic Charter*).

15. This being so, in support of the thesis that resolutions CP/RES.821 (1329/02) and CP/RES.833 (1348/02) are sustained by what is prescribed in article 18 of the *Inter-American Democratic Charter*, one could invoke the fact that that reference is made therein to the visits of staff of the Secretariat General to Venezuela, to the invitation made by Venezuela for representatives of the OAS to facilitate dialogue and the pursuit of democratic agreements in Venezuela (the Third Legal Reason of the first resolution referred to), to the offer of support that the government of Venezuela might request (First Resolve of the same resolution) and to the report of the Secretary General on the situation in Venezuela (the Second Legal Reason of the second resolution mentioned). These are all aspects that might well be given consideration along with those that article 18 alludes to on mentioning the visits as one of the measures that could be taken by the Permanent Council of the OAS and the prior consent of the government affected as the requisite to proceed.

16. As regards the third consideration suggested, that is, that the authorized functions have taken on a broader dimension, it is worth recalling on the one hand that article 18 of the *Inter-American Democratic Charter* refers in generic terms to the "*decisions for the preservation of the democratic system and its strengthening,* without specifying these, and on the other hand that the decision adopted was the function of facilitating dialogue on the part of the Secretary General of the OAS (the Second, Seventh and Eighth Legal Reasons of resolution CP/RES.833 (1348/02) and the Second, Third and Ninth Resolves of the same), a function that obviously has to be understood as part of good offices (the Third Resolve of resolution CP/RES. 821 (1329/02).

17. This being so, this function to facilitate dialogue is certainly fulfilled not only before or in relation to the authorities of States (which in this case would be only those of Venezuela), as normally happens with diplomatic functions, but also before bodies made up of opponents to the State authorities, although such bodies have no legal or even national identity, which is what happens with the Democratic Coordinating Body mentioned in the Fifth Legal Reason of resolution CP/RES.821 (1329/02) and in the Third Resolve of resolution CP/RES.833 (1348/02), which doubtless constitutes a necessary expansion of the scope of actions that need to be taken to ensure success.

18. Finally, as regards the last consideration, that is, that the *Inter-American Democratic Charter* seems to be invoked as an autonomously binding legal text, on the one hand it should be recalled that this was approved by aforementioned resolution AG/RES.1 (XXVIII-E/01), and on the other hand that the Inter-American Juridical Committee pointed out in its *Observations and Comments on the Draft Inter-American Democratic Charter* (CJI/doc.76/01, dated 16 August 2001) that

> *5.* the provisions of resolutions of this nature generally have as their purpose the interpretation of treaty provisions, the provision of evidence of the existence of customary norms, the affirmation of general principles of law, or the proclamation of common aspirations, and they may contribute to the progressive development of international law. The provisions of some resolutions of an organ of an international organization may have an obligatory effect within the Organization when the constitutional instrument provides for such.

19. Of course, and in the light of what has been said above as a first consideration, what is prescribed in articles 17, 18 and 20 of the *Inter-American Democratic Charter* could be included among the provisions that have obligatory effect within the Organization.

20. But is can also be claimed that the *Inter-American Democratic Charter* as a whole would seem to be considered by the aforementioned resolutions of the Permanent Council as a legal text that interprets conventional norms or contributes to the progressive development of international law, that is, as an autonomous legal text or, equally, with a higher value than the mere resolutions of bodies of international organizations, that is, with binding force.

21. The above could be deduced from the invocation of the *Democratic Charter* as a whole both as grounds for the decisions taken (the Third Legal Reason of resolution CP/RES.811 (1315/02) and the Fourth Legal Reason of resolution CP/RES.833 (1348/02) and the Resolves themselves (the Fourth Resolve of resolution CP/RES.811 (1315/02) and the Second and Fourth Resolves of resolution CP/RES.833 (1348/02), which perhaps indicates the course being followed by the political will of the Organization with regard to this question.

9. Preparation of a Draft Inter-American Convention Against Racism and All Forms of Discrimination and Intolerance

At its 62nd regular session (Rio de Janeiro, March 2003), the Inter-American Juridical Committee decided to again include this subject in its agenda in view of the importance assigned to it during the meeting of the Committee on Juridical and Political Affairs of the Permanent Council of the OAS in March 2003, when the Juridical Committee's annual report for the year 2002 was submitted.

The Inter-American Juridical Committee did not consider the item at its 63rd regular session (Rio de Janeiro, August 2003).

10. Right to information: access to and protection of information and personal data

At the 63rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2003), Dr. Alonso Gómez-Robledo proposed that the topic of access to governmental public information should be included in the Committee's agenda. The members of the Juridical Committee agreed to include the item as a follow-up item with the same title under which the item on the right to information was formerly listed in the agenda, that is, "Right to information: access to and protection of personal information and data", and appointed Dr. Gómez-Robledo as rapporteur.

11. Juridical aspects of enforcement by the internal jurisdiction of States of sentences of international tribunals or other international organs with jurisdictional functions

Resolution

CJI/RES.67 (LXIII-O/03) – Legal aspects concerning States complying internally with sentences passed by international courts or other international organizations with jurisdictional functions

In the light of the exchange of opinions at the V Joint Meeting with Legal Advisors of Foreign Ministries of OAS member States, which was held on August 25 and 26, 2003 at the Headquarters of the Inter-American Juridical Committee, and during its 63rd regular session (Rio de Janeiro, August 2003), the Committee adopted resolution CJI/RES.67 (LXIII-O/03), entitled *Legal aspects concerning States complying internally with sentences passed by international courts or other international organizations with jurisdictional functions*, in which it decided to include the item in its agenda and requested each of its members to submit for consideration at the next regular session a report on the juridical situation in their respective countries with regard to the topic. It also requested Dr. Luis Herrera Marcano to coordinate these tasks and the latter undertook to submit an initial report to the members of the Juridical Committee before the next regular session for their comments on the delineation of the topic.

Several members of the Juridical Committee stressed the importance of addressing this issue. Dr. Eduardo Vío stated that there were generally clear norms on the enforcement of foreign sentences but none governing the enforcement of the decisions of international tribunals. He stated that the item was closely related to the subject of the international liability of States for the acts of not only executive branches but also of the legislative and even judicial branches, in which case such principles as *res judicata* could be involved. He cited as an example the decision of the Inter-American Court of Human Rights in the case of the censure of a film that led to a change in legislation but did not alter the situation of *res judicata*. He also mentioned that Chile had not found it possible to ratify the Statute of the International Criminal Court because of the Statute's incompatibility with its Constitution.

Dr. Luis Herrera referred to a series of situations that could be examined in the light of the item in general, such as the decisions of the Inter-American Court of Human Rights, the decisions taken by the United Nations Security Council and the liability of States, which accepted them from the moment that they became members of that Organization, the decisions of financial and integration entities, such as the Andean Community, the Central American block, the Caribbean block, etc.

Lastly, Dr.João Grandino Rodas referred to cases in which state and not federal authorieis were liable for failure to enforce international decisions. He suggested that work should be done on reference guidelines in such cases. Because of their complexity, it was not advisable to take up all possible items, except in the introductory part, restricting it thereafter to the case of judicial sentences.

CJI/RES.67 (LXIII-O/03)

LEGAL ASPECTS CONCERNING STATES COMPLYING INTERNALLY WITH SENTENCES PASSED BY INTERNATIONAL COURTS OR OTHER INTERNATIONAL ORGANIZATIONS WITH JURISDICTIONAL FUNCTIONS

THE INTER-AMERICAN JURIDICAL COMMITTEE,

TAKING INTO ACCOUNT the interest raised during the V Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS with regard to the topic "Legal aspects of States complying internally with sentences passed by international courts or other international organizations with jurisdictional functions,"

RESOLVES:

1. To include in its agenda the topic “Legal aspects of States complying with international sentences and awards or other decisions of a like nature.”

2. To entrust each of its members with presenting at the next regular session a report on the legal situation in their respective countries with regard to this matter.

3. To assign the coordination of these reports to Dr. Luis Herrera Marcano.

This resolution was adopted unanimously at the session held on 28 August 2003 in the presence of the following members: Drs. João Grandino Rodas, Luis Marchand Stens, Eduardo Vío Grossi, Ana Elizabeth Villalta Vizcarra, Carlos Manuel Vázquez and Luis Herrera Marcano.

CHAPTER III

OTHER ACTIVITIES

Activities carried out by the Inter-American Juridical Committee in 2003

A. Presentation of the Annual report of the Inter-American Juridical Committee

The Chairman of the Juridical Committee, Dr. Brynmor Pollard, at its 62nd regular session (Rio de Janeiro, March 2003), spoke of his March 6, 2003, presentation to the Permanent Council's Committee on Juridical and Political Affairs of the *Annual Report of the Inter-American Juridical Committee*, describing its activities during the year 2002. In giving this presentation he was accompanied by the Committee's Vice-Chairman, Dr. Carlos Manuel Vázquez, in response to the Committee's request, made the previous year, that the greatest possible number of Inter-American Juridical Committee members should participate in presenting its Annual Report. He said that the Committee was congratulated for its work and that the report was well received. He informed the other members that it had been recommended that the Committee basically concentrate its efforts in two areas: competition law and the CIDIP, with respect to extracontractual civil liability, without prejudice to other issues that could arise in the immediate future. In addition, the Chairman of the Inter-American Juridical Committee informed its 63rd regular session (Rio de Janeiro, August 2003) about his attendance, in the company of Dr. Eduardo Vío, at the 33rd regular session of the OAS General Assembly (Santiago, Chile, June 2003).

B. Course on International Law

At its 61st 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*, in which it decided that the central theme of the 30th Course on International Law would be *International law and the maintenance of international peace and security*.

Based on this resolution, the 30th Course on International Law was organized by the Inter-American Juridical Committee and the Department of International Law of the Secretariat for Legal Affairs and took place from August 4 to 29, 2003. It was attended by 24 professors from different American and European countries, 29 OAS fellowship recipients, chosen from among more than 70 applicants, and 25 pupils who paid their own fees.

On August 4, 2003, during the 63rd regular session of the Inter-American Juridical Committee (Rio de Janeiro, August 2003), the 30th Course on International Law was inaugurated at the Rio Business Center. The ceremony was attended by members of the Inter-American Juridical Committee, invited special guests, representatives of the General Secretariat, and the fellowship recipients and participants who would be taking the Course. At that same session, a tribute was extended to the memory of Dr. Jorge Castañeda.

The Course timetable was as follows:

30th Course on International Law

Rio de Janeiro, 4-29 August 2003

International Law and the Maintenance of International Peace and Security

First Week

Monday 4

10:00am-12:00pm **Inauguration - Alonso Gómez-Robledo**
Member, Inter-American Juridical Committee
Tribute to Dr. Jorge Castañeda

Tuesday 5

9:00 - 11:30am **Antônio Augusto Cançado Trindade**
Chairman, Inter-American Court of Human Rights
The United Nations Declaration of the Principles of International Law which rule the friendly relations among States 33 years after: peaceful settlement of disputes and the use of force-I.

11:30am - 1:30pm **Katia Fach Gómez**
Doctor in Law and Professor of Private International Law, University of Zaragoza
International judicial competence and applicable law on extracontractual liability-I

3:00 - 5:00pm **Brynmor T. Pollard**
Chairman, Inter-American Juridical Committee
The Inter-American Juridical Committee as an organ of the OAS

Wednesday 6

9:00 - 11:30am **Antônio Augusto Cançado Trindade**
The United Nations Declaration of the Principles of International Law which rule the friendly relations among States 33 years after: peaceful settlement of disputes and the use of force-II.

11:30am - 1:30pm **Katia Fach Gómez**
International judicial competence and applicable law on extracontractual liability-II.

3:00 - 5:00pm **Katia Fach Gómez**
International judicial competence and applicable law on extracontractual liability-III

Thursday 7

9:00 - 11:00am **Luiz Otávio Pimentel**
Professor of Law, Federal University of Santa Catarina.
Intellectual property-I.

11:00am - 1:00pm **Jean-Michel Arrighi**
Director, OAS Department of International Law
The Inter-American System-I.

2:30pm - 4:30pm **Dante Negro**
Principal Legal Officer, OAS Department of International Law
The Inter-American Convention against Terrorism I - Setting of international obligations

Friday 8

9:00am - 11:00am **Luiz Otávio Pimentel**
Intellectual Property-II.

11:00am - 1:00pm **FREE**

17:00pm Cocktail – Inauguration of the new offices of the Inter-American Juridical Committee

<u>Second Week</u>

Monday 11

9:00 - 11:00am **Luigi Einaudi**
Assistant Secretary-General of the OAS
The legal-political administration of the OAS without the use of force.

11:00am - 1:00pm	**Zlata Drnas de Clement** Professor of Public International Law, Law and Social Sciences College, National University of Cordoba. *Meaning and scope of the determination of threat to peace, break of peace or act of aggression from the part of the Security Council.*
2:30 - 4:30pm	**FREE**
Tuesday 12	
9:00am - 11:00am	**Edmundo Vargas Carreño** OPANAL Secretary-General *Nuclear disarmament and no-proliferation in Latin America and the Caribbean*
11:00am - 1:00pm	**Zlata Drnas de Clement** *Meaning and scope of the determination of threat to peace, break of peace or act of aggression from the part of the Security Council-II*.
2:30pm 4:30pm	**Felipe Paolillo** Member, Inter-American Juridical Committee *The evolution of the principle of the use of force-I*
Wednesday 13	
9:00 - 11:00am	**Edmundo Vargas Carreño** *Zones free from nuclear weapons and contemporary international law*
11:00am - 1:00pm	**Zlata Drnas de Clement** *Meaning and scope of the determination of threat to peace, break of peace or act of aggression from the part of the Security Council-III*.
2:30 - 4:30	**Felipe Paolillo** *The evolution of the principle of the use of force-I*
Thursday 14	
9:00 - 11:00am	**Edmundo Vargas Carreño** *The principle of non-intervention*
11:00am - 1:00pm	**Deisy Ventura** Assistant Professor of International and Communitarian Law, Department of Law, Federal University of Santa Maria, RS, Brazil *The new ways of the European Communitarian Law-I*.
2:30 - 4:30	**Ricardo Seitenfus** Principal Professor of Public International Law and International Organizations, Department of Law, Federal University of Santa Maria, RS, Brazil *The international organizations in face of power and the law-I*
Thursday 15	
9:00 - 11:00am	Deisy Ventura *The new ways of the European Communitarian Law-II*.
11:00 - 1:00	**Ricardo Seitenfus** *The international organizations in face of power and the law-II*.
2:30 - 4:30pm	**FREE**

Third Week

Monday 18

9:00 - 11:00am	**Francesc Vendrell** Special Representative of the European Union for Afghanistan *East Timor and Afghanistan cases-I*.
11:00am - 1:00pm	**Jean-Marc Thouvenin** Professor of International Law, Secretary-General of the French Society for International Law *The role of the international judge in the maintenance of international peace and security*
2:30 - 4:30	**Duke Pollard** Officer in Charge, Legal and Institutional Development Division of CARICOM Secretariat. *The role of international law in regional economic development; supranationality and the regional integration movement-I.*

Martes 19

9:00 - 11:00am	**Francesc Vendrell** *East Timor and Afghanistan cases-II.*
11:00am - 1:00pm	**Jean-Marc Thouvenin** *The role of the international judge in the maintenance of international peace and security*.
2:30 - 4:30pm	**Duke Pollard** *The role of international law in regional economic development; supranationality and the regional integration movement-II.*

Wednesday 20

9:00 - 11:00am	**Francisco Orrego Vicuña** *International constitutional law and the function of maintaining peace and security-I.*
11:00am - 1:00pm	**Jean-Marc Thouvenin** *The role of the international judge in the maintenance of international peace and security*.
2:30 - 4:30pm	**Horacio Grigera Naon** *International arbitration among States and particular cases: its relevance to Latin America-I.*

Thursday 21

9:00 - 11:00am	**Francisco Orrego Vicuña** *An international constitutional law and the function of maintaining peace and security-II.*
11:00am - 1:00pm	**Elizabeth Spehar** Executive Coordinator of the OAS Unity for the Promotion of Democracy *Hemispheric Security and the OAS*
2:30 - 4:30pm	**Horacio Grigera Naon** *International arbitration among States and particular cases: its relevance to Latin America-II.*

Friday 22

9:00 - 11:00am	**Francisco Orrego Vicuña** International constitutional law and the function of maintaining peace and security-III.
11:00am - 1:00pm	**Elizabeth Spehar** Hemispheric Security and the OAS
2:30 - 4:30pm	**FREE**

Fourth Week

Monday 25

9:00 - 11:00am	**FREE**
11:00am - 1:00pm	**Adherbal Meira Mattos** Principal Professor of International Law, Federal University of Pará and University of Amazonia, Brazil Sovereignty, globalization and the world new order
3:00 - 5:30pm	Participation at the Fifth Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS
5:30pm	Cocktail

Tuesday 26

9:00 - 11:00am	**Dante Negro** The Inter-American Convention against Terrorism II – Implementation of obligations in the domestic rights of the States Parties.
11:00am - 1:00pm	**Daniela Trejos Vargas** Professor of Private International Law, Pontificia Universidade Católica, Rio de Janeiro, Brazil The Inter-American Conferences on Private International Law (CIDIPs): Judicial cooperation and juridical integration in the Americas-I.
2:30 - 6:00pm	Participation at the Fifth Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the Member States of the OAS

Wednesday 27

9:00 - 11:00am	**Ana Elizabeth Villalta Vizcarra** Member, Inter-American Juridical Committee The Framework Treaty of Democratic Security in Central America and the Security Commission-I
11:00am - 1:00pm	**Jean-Michel Arrighi** *The Inter-American System-II*.
2:30 - 4:30pm	**FREE**

Thursday 28

9:00 - 11:00am	**Ana Elizabeth Villalta Vizcarra** *The Framework Treaty of Democratic Security in Central America and the Security Commission-II*
11:00am - 1:00pm	**Daniela Trejos Vargas** The Inter-American Conferences on Private International Law (CIDIPs): Judicial cooperation and juridical integration in the Americas-II.
2:30 - 4:30pm	**FREE**

Friday 29

10:00 - 11:00am	**João Clemente Baena Soares** Former Secretary-General of the OAS
11:00 - 12:00am	Closing session and Diplomas

At its 63rd regular session (Rio de Janeiro, August 2003), the Chairman of the Inter-American Juridical Committee reported that the government of Brazil had given the Juridical Committee a donation of USD $15,000 to be used to provide simultaneous interpreting during the Course. These interpreting services were used for the first occasion during the 30th Course on International Law in August 2003, enabling increased participation by monolingual students.

The Inter-American Juridical Committee also decided that Dr. Luis Herrera Marcano would pay homage to the memory of Dr. Seymour Rubin at the inauguration of the 2004 Course on International Law. It was also decided that the central topic of the 2004 Course would be International law, trade, finance, and development.

At the session, the Director of the Department of International Law reported on the publications his department produces in connection with the Course. The volume dealing with the 2002 Course was published in July 2003, and 2004 will see the completion of the thematic series of all the Courses to date that gathers together the lecturers' presentations into specific areas: private international law, public international law, and the inter-American system.

The Inter-American Juridical Committee wanted to offer public congratulations to the Department of International Law for its efforts in connection with the Course on International Law. In that regard, it adopted resolution CJI/RES.61 (LXIII-O/03) *Recognition of the Secretariat for Legal Affairs,* which resolved to congratulate the Secretariat's Department of International Law for the efficient support it provides the Inter-American Juridical Committee in organizing the Course, which, in recent years, has enabled a constant increase in the academic standard attained, as duly acknowledged by all the OAS member states. It also congratulated for its efforts in keeping the annual publications of Course lectures up to date, and for its other publications gathering together all the lectures given over the past 30 years into thematic series. The following paragraphs contain the text of this resolution:

CJI/RES.61 (LXIII-O/03)

RECOGNITION TO THE SECRETARIAT FOR LEGAL AFFAIRS

THE INTER-AMERICAN COMMITTEE,

BEARING IN MIND the importance of the Course on International Law, which it organizes annually, with the efficient cooperation of the Secretariat for Legal Affairs of the General Secretariat of the Organization of American States through its Department of International Law;

CALLING ATTENTION to the constant support provided throughout the year by the Secretariat for Legal Affairs through its Department of International Law to the organizers of the Course, and its valuable contribution toward the level and recognition that it enjoys today at the hemispheric level;

CONSIDERING, moreover, the importance of the annual publication of the lectures delivered during the Course in disseminating the knowledge transmitted therein, and, particularly, the publications containing the lectures delivered on particular subjects,

RESOLVES to congratulate the Secretariat for Legal Affairs of the General Secretariat of the Organization of American States and particularly its Department of International Law for its efficient support to the Inter-American Juridical Committee in organizing the Course on International Law, which has in recent years contributed to the even higher academic level achieved and recognized in all OAS member States; and also to congratulate for the work

done in producing the annual publications of the lectures delivered during the Course, and for the publications containing a compilation of the lectures delivered on particular subjects.

This resolution was unanimously adopted at the session held on 21st August 2003, in the presence of the following members: Drs. João Grandino Rodas, Brynmor T. Pollard, Luis Marchand Stens, Eduardo Vio Grossi, Ana Elizabeth Villalta Vizcarra, Carlos Manuel Vázquez, and Luis Herrera Marcano.

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 served as observers at and participated in different forums and international agencies over 2002-03:

- Dr. Brynmor Pollard, at the Annual Meeting of Legal Advisors of the United Nations, held on October 28-29, 2002, in New York City. Dr. Pollard noted that this meeting was also attended by Inter-American Juridical Committee member Dr. Ana Elizabeth Villalta, the chairman of the UN's International Law Commission, UN Under-Secretary-General for Legal Affairs Dr. Hans Corell, and Dr. Enrique Lagos and Dr. Jean-Michel Arrighi from the OAS's Secretariat for Legal Affairs. He explained that the central topic had been regional and international responses to terrorism. Document CJI/doc.120/03, Address by the Chairman of the Inter-American Juridical Committee at the Meeting of Legal Advisors of the Ministries of Foreign Affairs of United Nations Member States (United Nations headquarters, New York, 28-29 October 2002), appears at the end of this section.

- Dr. Brynmor Pollard and Dr. Eduardo Vío, at the 33rd regular session of the OAS General Assembly (Santiago, Chile, June 2003). Document CJI/doc.132/03, *Presentation of the Annual Report for 2002 of the Inter-American Juridical Committee to the General Committee of the thirty-third regular session of the OAS General Assembly* appears at the end of this section.

- El Dr. João Grandino Rodas, at the UN's International Law Commission in May. Dr. Grandino Rodas reported that his address before the International Law Commission lasted for two hours and was attended by most of the Commission's members. He said that he had provided an issue-by-issue overview of the Juridical Committee's agenda, including the Centenary celebration, regarding which keen interest was expressed. He said that the presentation was followed by a round of questions on competition law from the traditional point of view and also on the Inter-American Juridical Committee's capacity for initiative and its consultative competence. Dr. Grandino Rodas noted that there was today a much deeper understanding of the Juridical Committee's work, but that the promotion of its efforts had to continue – not only through the Internet, but also through personal exchanges with specific members of the International Law Commission. Document CJI/doc.129/03, *Presentation to the United Nations Commission on International Law by Dr. João Grandino Rodas, Member of the Inter-American Juridical Committee (May 28, 2003): Topics under construction in the Inter-American Juridical Committee* appears at the end of this section.

- Dr. Brynmor Pollard at the 20th Roma-Brasilia Seminar, which was held at the Supreme Court of Justice in Brasilia. His participation took place on August 28, 2003.

The Chairman of the Inter-American Juridical Committee, Dr. Brynmor Pollard, reported that the Committee had been unable to attend the January 1, 2003, inauguration of the President of Brazil to which it had been invited, on account of budgetary constraints.

In addition, at its 63rd regular session (Rio de Janeiro, August 2003), the Inter-American Juridical Committee selected the following members to attend a number of meetings as observers:

Dr. Brynmor Pollard, at the presentation of the Annual Report of the Inter-American Juridical Committee to the Committee on Juridical and Political Affairs of the OAS Permanent Council (March 2004).

Drs. Alonso Gómez-Robledo Verduzco and. Eduardo Vío, at the Special Conference on Security to be held in Mexico City in October 2003.

The following sections transcribe the addresses given by members of the Inter-American Juridical Committee in their capacity as observers or participants at different meetings held during 2003:

CJI/doc.120/03

ADDRESS BY THE CHAIRMAN OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE MEETING OF LEGAL ADVISORS OF MINISTRIES OF FOREIGN AFFAIRS OF UNITED NATIONS MEMBER STATES
(United Nations Headquarters, New York, 28-29 October, 2002)
(presented by Dr. Brynmor T. I. Pollard)

Dr. Chairman, distinguished representatives of member States, special invitees from other international and regional organisations:

I regard it as a signal honour and a privilege to be invited in my capacity as the Chairman of the Inter-American Juridical Committee of the OAS to participate in this important meeting of the Legal Advisors of Ministries of Foreign Affairs of UN Member States. I wish, therefore to express on behalf of the Committee deep appreciation to the organisers of this meeting for having extended the invitation. I also bring you greetings from the members of the Juridical Committee with our best wishes for fruitful deliberations and rewarding outcomes from this meeting.

As you are no doubt aware, the Inter-American Juridical Committee is the oldest juridical body of the inter-American system and will be celebrating its centennial in 2006. The Committee comprises eleven jurists, nationals of member States of the OAS, nominated by member States for election in their personal capacity by the General Assembly of the Organisation for four-year terms of office and eligible for re-election. The Chairman and Vice-Chairman of the Committee are each elected for a two-year term of office.

Article 99 of the Charter of the Organisation provides that “The purpose of the Inter-American Juridical Committee is to serve the Organisation as an advisory body on juridical matters; to promote the progressive development and codification of international law and to study juridical problems related to the integration of the developing countries of the Hemisphere and, in so far as may appear desirable, the possibility of attaining uniformity in their legislation”.

Article 100 mandates the Juridical Committee 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 Organisation. On its own initiative, the Committee may also undertake such studies and preparatory work as it considers advisable, and suggest the holding of specialised juridical conferences.

Article 102 expressly states that the Juridical Committee represents all of the member States of the OAS and has the broadest possible autonomy.

Article 103 enjoins the Juridical Committee to establish co-operative relations with universities, institutes and other teaching centres, as well as with national and international committees and entities devoted to the study, research, teaching or dissemination of information on juridical matters of international interest.

Article 5 of the Juridical Committee’s Rules of Procedure mandates the Committee “to study the juridical problems related to the integration of the developing member States in the economic, social, educational, scientific and cultural fields in accordance with the standards

set out in the Charter of the Organisation." The Inter-American Juridical Committee is also mandated to study the possibility of attaining uniformity in the legislation of the member States in the abovementioned fields.

Article 6 of the Rules of Procedure empowers the Juridical Committee to:

a) carry out, on its own initiative, the studies on preparatory work that it considers advisable;

b) b) suggest the holding of specialised meetings and Conferences of an international character.

Article 7 of the Rules of Procedure authorises the Juridical Committee to establish cooperative relations within or outside the hemisphere, with universities, institutes and other teaching centres, Bar Associations and other associations of lawyers and with national and international committees, organisations and entities devoted to the development or codification of international law or to study research, teaching or dissemination of juridical matters of international interest.

The Juridical Committee's responsibilities now extend to receiving and implementing within its competence, mandates from the Summit Process of the Americas, the Meetings of Ministers of Justice, Ministers and Attorneys-General of Member States of the Organisation (REMJA) and working, as appropriate, in collaboration with the Justice Studies Centre of the Americas in Santiago, Chile.

The Juridical Committee has established and maintains a valuable relationship with the International Law Commission and a member of the Committee is designated annually to visit with the Commission, by arrangement, and to make a presentation to the Commission on important aspects of the work of the Committee.

During the past decade, the Juridical Committee has undertaken studies on topics of vital interest to the Governments of member States and, in the process, has submitted reports containing valuable information which could facilitate effective implementation of policies adopted by the political organs. These include:

a) strengthening systems of the administration of justice in the Americas;
b) the right of access to information and the protection of personal data;
c) providing guidelines to member States in the implementation of the Inter-American Convention Against Corruption;
d) the application of the 1982 United Nations Convention on the Law of the Sea by States in the Hemisphere;
e) juridical aspects of hemisphere security;
f) democracy in the Americas; and
g) anti-terrorism.

Members of the Juridical Committee derived great satisfaction from the acknowledgment given by the political organs of the OAS to the contribution of the Committee to the development of the Inter-American Democratic Charter adopted by member States in Lima, Peru.

Hemispheric Security occupies a place of priority on the agenda of the Organisation. This is manifested by the adoption by the Thirty-Second Regular Session of the General Assembly in Barbados in June 2002 of the Bridgetown *Declaration on the Multi-Dimensional Approach to Hemispheric Security* and the decision to convene a meeting of representatives of OAS member States in Mexico City in May 2003 to advance the process. The Juridical Committee expects that it may be invited to make a contribution to the deliberations on this matter.

The Inter-American Juridical Committee has included competition law in member States as a topic on its agenda. Special attention is being given to cartels taking account of practices in other jurisdictions and the regulatory regimes, if any, governing their operations.

CONVENTION ON RACISM AND ALL FORMS OF DISCRIMINATION AND INTOLERANCE

The General Assembly of the OAS at its 31st Regular Session in San José, Costa Rica, in June 2001, requested the Inter-American Juridical Committee to draft an analysis document in order to foster and further the work of the Permanent Council, bearing in mind the international juridical instruments on the matter, the replies from the member States to the questionnaire on the issue of racism prepared by the Department of International Law of the Secretariat for Legal Affairs at the request of the Committee for Juridical and Political Affairs and the outcome of the World Conference Against Racism, Racial Discrimination, Xenophoby and Other Pertinent Forms of Intolerance held in Durban, South Africa in 2001 and the Regional Conference of the Americas in Santiago, Chile in 2000.

At its 60th Regular Session in February-March, 2002, the Juridical Committee expressed its concern at the increase in the number of acts of racism and intolerance throughout the world and confirmed the need to make a common cause in opposition to such manifestation by intensifying cooperation among States in order to eradicate such practices. The Inter-American Juridical Committee, therefore, formulated certain conclusions on the matter in a document entitled *Drawing up an Inter-American draft Convention Against Racism and All Forms of Discrimination and Intolerance. Report of the Inter-American Juridical Committee* (CJI/doc. 80/02 rev.3) which was transmitted to the President of the Permanent Council. The Juridical Committee proposed that a new Inter-American Convention on Racism, Racial Discrimination and other pertinent forms of intolerance should be a complementary instrument to the existing universal and regional conventions. Any new instrument should, therefore, cover aspects not already covered by existing conventions. Otherwise, the new document would be repetitive producing overlapping that would lead to serious and inevitable problems of interpretation and also generating doubts and confusion as to which were the rights and obligations of member States parties to the previous conventions.

The Inter-American Juridical Committee has participated in discussions relating to the convening of the Inter-American Specialised Conference on Private International Law (CIDIP-VII). The primary concern relates to revitalising the CIDIP process because of the comparatively low level of ratifications of CIDIP instruments. Because of the problem of decreasing ratifications, CIDIP-VI focussed on producing model laws on substantive topics of private international law. The debate has centred on duplication of effort in the field of private international law - Regionalism vs. Globalism.

At the global level, CIDIP competes with the work of organisations such as UNCITRAL, UNIDROIT and the Hague Conference. It is contended that the Latin American nations tend not to participate in the work of the global organisations preferring instead to devote their efforts to the CIDIP process. Also, because of limited resources, many States in the hemisphere are understandably selective in their participation in efforts at harmonisation with the likelihood of achieving a more useful or more far reaching product at the regional level. This approach has encouraged the Europeans to address regionally many of the same matters that have been addressed globally. It has also been proposed that the Inter-American Juridical Committee should play a central role in a more formalised CIDIP process. It is contended that a priority item for CIDIP-VII when it is convened should be “The Role of CIDIP in the Twenty-first Century”.

THE COURSE ON INTERNATIONAL LAW

The Course on International Law conducted annually under the auspices of the Inter-American Juridical Committee continues to be acclaimed by participants in the Course from OAS member States and from representatives of member States. The main theme for the Course in 2003 will be “International Law and the Maintenance of International Peace and Security”.

Joint Meetings of the Legal Advisors of Ministries of Foreign Affairs of Member States of the OAS have been held under the auspices of the Inter-American Juridical Committee at which topics of general interest to member States have been discussed and plans of action

formulated. The next meeting (the Fifth) is scheduled to be held in Rio de Janeiro in August 2003. These meetings provide the opportunity for the representatives of member States to exchange views on matters of concern interest (regionally and globally) to member States. It is my belief that this meeting of Legal Advisors has the same potential and will be of invaluable benefit to all of us.

Thank you again, Dr. Chairman, for affording me, on behalf of the Inter-American Juridical Committee, the opportunity to make this presentation to the meeting.

Thank You.

CJI/doc.132/03

PRESENTATION OF THE ANNUAL REPORT FOR 2002 OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE GENERAL COMMITTEE OF THE THIRTY-THIRD REGULAR SESSION OF THE OAS GENERAL ASSEMBLY

(presented by Dr. Brynmor T. Pollard)

Chairman, Distinguished Representatives of Member States,

On behalf of the members of the Inter-American Juridical Committee of this Organisation, I extend congratulations to you Dr. Chairman on your election to chair the proceedings of this General Committee of the XXXIII Regular Session of the General Assembly of the Organisation. It is our wish that the deliberations and outcomes of this Committee and of the General Assembly will result in furthering the objectives and aspirations of our Organisation. Congratulations must also be extended to the Vice Presidents. It would be remiss of me if I did not associate myself with the expressions of deep appreciation to the Government of Chile for hosting this meeting of the Assembly and for the warm hospitality extended to us and for which the people of this country are noted. To those of us who have visited here before we looked forward to this visit with great expectations. It is my pleasure to present to this Committee a summary of the main activities engaged in by the Inter-American Juridical Committee for 2002 and more extensively reported in the Committee's Annual Report for 2002.

As members of the General Committee are aware, the work of the Inter-American Juridical Committee involves responding to the priorities of the Organisation as set by the political organs and the other bodies of the Organisation as well as tasks and studies undertaken by the Committee in fulfilling to its responsibilities under the Charter of the Organisation and the Committee's Rules of Procedure.

The following topics, in particular, engaged the attention of the Committee during the reporting period:

a) The Inter-American Specialised Conference on Private International Law (CIDIP);
b) The Applicable Law and Competent International Jurisdiction with respect to Extra-contractual Civil Liability;
c) Improvement in systems of the administration of justice in the Americas;
d) The Inter-American Democratic Charter;
e) Preparations for the commemoration of the centenary of the Inter-American Juridical Committee;
f) The draft Inter-American Convention against racism and all forms of discrimination and intolerance;
g) Cartels and competition law in the Americas;
h) The International Criminal Court: Fifth Joint Meeting with Legal Advisers of the Ministries of Foreign Affairs of Members States of the OAS.

With reference to:

a) The Inter-American Specialised Conference on Private International Law (CIDIP)

The Inter-American Juridical Committee at its session in March, 2002 noted with satisfaction the expressions of appreciation for the work of the Committee in this area and, at the same time, acknowledged the work done by its members Drs. Grandino Rodas and Carlos Manuel Vázquez in this area at the Sixth Inter-American Specialised Conference on Private International Law. The Committee re-affirmed its willingness to contribute to the study of the topic "Applicable Law and competent international jurisdiction in terms of extra-contractual liability" and also to preparations for the Seventh Inter-American Specialised Conference on Private International Law to be convened at the request of the General Assembly.

b) The Applicable Law and Competent International Jurisdiction with respect to extra-contractual civil liability

The Permanent Council in its Resolution CP/RES.815 (1318/02) had instructed the Inter-American Juridical Committee to consider the topic regarding the applicable law and the competent international jurisdiction with respect to extra-contractual civil liability, taking into account the guidelines set out in CIDIP-VI/RES.7/02. The Committee was further instructed to report on the matter drawing up recommendations and possible solutions for presentation to the Council.The Committee has already engaged in discussions on preliminary studies on the topic with presentations by two members of its Committee - Dr Ana Elizabeth Villalta Vizcarra and Dr. Carlos Manuel Vázquez functioning as co-rapporteurs containing recommendations and possible solutions. The Committee at its 61st regular session in August 2002, requested the rapporteurs to complete a draft report for consideration at its 62nd regular session in March 2003. The report should include an enumeration of the specific categories of obligations that fall within the broad category of non-contractual obligations. The analysis would illustrate the enormous breath and variety of obligations that as Inter-American instrument on jurisdiction and choice of law in this field and could potentially affect. The report should focus primarily on the task of identifying specific areas within the broad categories of obligations that are encompassed within the broad category of non-contractual obligations. Such an analysis will 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. The report is expected to focus primarily on the task of identifying specific areas within the broad category of extra-contractual liability which might be suitable subjects for an Inter-American instrument regulating applicable law and competency of jurisdiction. This focus will be consistent with the CIDIP resolution referenced by the Permanent Council to be treated as a guideline which specifically requests the Committee "to identify specific areas revealing progressive development of regulation in this field through conflict of law solutions". This approach 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 the applicable law through a general convention encompassing the entire field was not feasible. The Hague Conference therefore proceeded to pursue the adoption of instruments regulating the applicable law in specific subcategories of non-contractual civil liability. The report of the rapporteurs should also describe the current approaches adopted by Member States and 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. The rapporteurs will be expected to identify specific subcategories of non-contractual obligations with sufficient harmony among the Member States to facilitate the successful adoption of an Inter-American instrument on the subject.

The rapporteurs should also consider past and present efforts of global, regional and sub-regional organisations that have sought solutions in this area. The rapporteurs have noted that 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 sub-regional level, among other public and private organisations 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. If the rapporteurs consider it desirable their report could set out provisions which a conflict of laws might include.

c) Improvement in systems of Administration of Justice

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 focussing its efforts on access of individuals to justice at the same time maintaining the necessary coordination and the highest possible degree of co-operation with other organs, agencies and entities of the Organisation involved in this area of activity, especially with the Justice Studies Centre of the Americas with its Headquarters in Santiago, Chile. At the 60th Regular Session of the Inter-American Juridical Committee held in February - March, 2002, the Inter-American Juridical Committee decided to retain the topic on its agenda particularly in the light of the Fourth Meeting of Ministers of Justice or of Ministers or Attorneys General in Trinidad in March 10 -13, 2002 (REMJA-IV) when the Meeting resolved that the topic be renamed "Improvement in Systems of Administration of Justice".

The Inter-American Juridical Committee was represented with observer status at REMJA-IV and a presentation was made to the meeting by the Vice-Chairman. He pledged the co-operation of the Inter-American Juridical Committee, within its competence, in assisting in implementing decisions of the Ministers.

d) The Inter-American Democratic Charter

The Inter-American Juridical Committee at its LX Regular Session in Rio de Janeiro in February-March 2002 adopted resolution CJI/RES.41 (LX-0/02) in which the Committee expressed deep satisfaction at the outcome of the Special Session of the General Assembly in Lima, Peru, which adopted the Inter-American Democratic Charter. The Committee noted with deep appreciation the public recognition of the Committee's participation in the process that culminated in the adoption of the Charter. The Committee also took the opportunity presented by the abovementioned resolution to pledge its resolve to fulfill its role as the advisory body on juridical matters. The Inter-American Juridical Committee proposed the advisability of undertaking a campaign to publicise the Inter-American Democratic Charter as a juridical instrument embodying the applicable principles on the subject and reiterated its readiness to support the initiative.

e) Preparations for the commemoration of the centenary of the Inter-American Juridical Committee

At its 32nd regular session in Bridgetown, Barbados, in June 2002, the General Assembly, by Resolution AG/RES.1844 (XXXII-0/02), encouraged the Inter-American Juridical Committee to continue to use its best endeavours to develop the programme of activities for the centenary of the Committee as contained in the Resolution, including some additional matters particularly the publication for the centenary containing articles by all members of the Committee, former members and members of the staff of the General Secretariat desiring to submit 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. The General Assembly also decided that the programme of activities might include the drafting of a declaration on the role of the Inter-American Juridical Committee in the development of Inter-American Law for consideration in due course by the General Assembly and that the main theme of the Committee's Course in International Law in August 2006 in Rio de Janeiro should be "The Contribution of the Inter-American Juridical Committee to the development of Inter-American Law." At the LXI regular session of the Committee in Rio de Janeiro in August, 2002, the Director of the Department of International Law reported that a survey was being done of all institutions and centres of learning in the Americas. At the same time, the Director solicited the co-operation of members of the Committee in composing the list of institutions and centres of learning.

The Committee decided that efforts would be made to explore the possibility of utilising the Committee's contacts with the American Society of International Law and the American Bar Association with respect to commemorating the centennial.

f) The draft Inter-American convention against racism and all forms of discrimination and intolerance

At the 31st regular session of the OAS General Assembly in San José, Costa Rica, in June 2001, the General Assembly in its resolution AG/RES.I774 (XXXI-O/01) entitled *Preparation of a draft inter-American convention against racism and all forms of discrimination and intolerance* requested the Inter-American Juridical Committee "to draft an analysis document in order to foster and further the work of the Permanent Council bearing in mind the international juridical instruments on the matter, the replies from the member States to the questionnaire on the issues of racism prepared by the Department of International Law of the Secretariat for Legal Affairs at the request of the Committee for Juridical and Political Affairs, as well as the outcome of the World Conference Against Racism, Racial Discrimination, Xenophoby and Other Pertinent Forms of Intolerance, held in Durban, South Africa, in 2001 and the Regional Conference of the Americas in Santiago, Chile, in 2000.

At its 60th regular period of sessions held during the period of 25 February to 8 March, 2002, the Inter-American Juridical Committee expressed its concern at the increase in the number of acts of racisms and intolerance through out the world and confirmed the need to make a common cause in opposition to such manifestations by intensifying cooperation among States in order to eradicate such practices. The Committee, therefore, formulated certain conclusions on the matter in a document entitled *Drawing up an inter-American draft convention against racism and all forms of discrimination and intolerance: report of the Inter-American Juridical Committee* (CJI/doc.80/02 rev 3 corr.1) to the President of the Permanent Council.

The Inter-American Juridical Committee proposed that a new Inter-American Convention on Racism, Racial discrimination and other pertinent forms of Intolerance should be a complementary instrument to the existing universal and regional conventions. Any new instrument should, therefore, cover aspects not clearly dealt with by existing conventions. Otherwise, the new document would be repetitive producing overlapping that would lead to serious and inevitable problems of interpretation and also generating doubts and confusion as to which were the rights and obligations of member States parties to the previous convention and the new convention.

g) Cartels in the Framework of Competition Law in the Americas

At its 57th Regular Session in Rio de Janeiro in August 2000, the Inter-American Juridical Committee decided to include in its agenda the topic "Competition Law in the Americas" as part of the wider issue of the Juridical Dimension of Integration and International Trade. Dr. João Grandino Rodas and Dr. Jonathan Fried were designated co-rapporteurs. The rapporteurs were requested to conduct a preliminary analysis of competition law and rules in force in the member states, with particular attention being paid to restrictions, state owned companies and regulated industries, and international aspects such as cartels, the definition of major markets, the capacity for co-operation in the exchange of information and in research as well as limits of jurisdiction.

At its 61st regular session in August 2002, the Committee adopted a resolution which welcomed the studies conducted by the co-rapporteurs and decided to request national authorities that have responsibility for supervising competition matters in the Member States to furnish the rapporteurs with information on their laws, recent cases decided in their respective jurisdictions and other related practices to enable the rapporteurs to prepare a revised and consolidated report for further consideration, with the intention of preparing a final report of the Committee for circulation among Members States.

As a consequence, a Questionnaire on Competition Policies and Cartels was despatched to the Permanent Missions to the OAS and to various national agencies and institutions in the expectation of receiving responses preparatory to the production of a final report during 2003.

h) Fifth Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of Member States of the OAS

At its 32nd regular session in Barbados, in June 2002, the General Assembly encouraged the Inter-American Juridical Committee to promote regular meetings of Legal Advisors. It also requested the Committee to ensure that the agenda of the next meeting would include a discussion on mechanisms to prevent the recurrence of serious violations of international humanitarian rights law, and the role of the International Criminal Court in that process. The Committee has decided to host the Fifth (V) Joint Meeting of Legal Advisors during the first week in August 2003. The topic "The International Criminal Court" will be included in the agenda of the Meeting. The General Secretariat is to circulate updated information relating to the implementation of the Rome Statute. Included among the documents for the meeting will be a document entitled "Reflections on the Future of the International Criminal Court Statute" submitted to the 60th regular session of the Committee by Dr. Sergio González Gálvez, whilst he was still a member of the Committee. Members of the Committee were appreciative of the gesture of Dr. González Gálvez in sharing information and ideas with other members of the Committee. Member States have been urged to facilitate the participation of their respective Legal Advisors in the forthcoming meeting.

THE COURSE ON INTERNATIONAL LAW

The Inter-American Juridical Committee and the Department of International Law of the Secretariat for Legal Affairs organised the XXIX Course on International Law during the period 5 - 30 August, 2002 the main topic for the course being "National Resources, energy, environment and international law". The course was attended by twenty-one (21) professors from countries of the Americas and Europe with twenty-eight (28) fellowships being awarded.

The opening ceremony for the course was held on August 5, 2002 during the 61st regular session of the Committee at the Centro Empresarial Rio and was attended by members of the Committee, guests, officials of the General secretariat, and the recipients of fellowships and other participants in the Course. A special tribute was paid to the memory of the late Dr. Francisco V. Garcia Amador.

The topic selected for the next course in August 2003 is "International Law and the Maintenance of International Peace and Security".

In December 2002, the Government of Brazil donated to the Committee 15,000 United States dollars to be used in providing translation services during the Course on International Law to be conducted in August 2003. This will facilitate meaningful participation in the course for those students from the English-speaking Member States of the Caribbean Community whose only language is English. The appreciation of the Committee was conveyed to the Government of Brazil as well as to the Government of France for the generous contribution to the Course in August 2003 to defray the expenses for a participating professor at the Course.

RELATIONS WITH OTHER ORGANISATIONS AND BODIES

The Committee values highly its relationship with other organisations and bodies. The following members of the Inter-American Juridical Committee attended meetings of other organisations and bodies in 2002:

i) Dr. João Grandino Rodas attended the Sixth Inter-American specialised Conference on Private International Law (CIDIP - VI) during the period 4 - 8 February, 2002.

ii) Dr. Orlando Rebagliati attended the 54th Session of the United Nations International Law Commission in Geneva during 5 - 6 June 2002 and presented a report on the work of the Inter-American Juridical Committee.

iii) Dr. Brynmor Pollard attended the IV Meeting of Ministers of Justice or of Ministers or Attorneys-General of the Americas (REMJA - IV) held in Trinidad and Tobago during March 11 -13. He made a presentation to the Meeting.

iv) Dr. João Grandino Rodas participated in the XIX Seminar Roma-Brasilia in Brasilia from 21 - 24 August, 2002. The theme of his presentation was justice, international courts and globalisation.

v) Dr. Brynmor Pollard was among special invitees at the Annual meeting of Legal Advisors of Ministries of Foreign Affairs of UN Member States at United Nations Headquarters on 28 - 29 October, 2002. Dr. Pollard made a presentation to the meeting.

RELOCATION OF THE OFFICES OF THE JURIDICAL COMMITTEE

On February 12, 2002, the Permanent Representative of Brazil to the OAS officially informed the Secretary General of the Organisation of the intention of the Government of Brazil to provide the Committee with offices in the Palácio Itamaraty in Rio de Janeiro. The relocation of the office of the Committee is imminent and the next regular session of the Committee in August 2003, will be held in the new premises in the renowned Palácio Itamaraty. The Government of Brazil is to be highly commended for its gesture.

Visits received by the Inter-American Juridical Committee

During 2003, the Inter-American Juridical Committee invited the following individuals to attend its meetings as guests:

Dr. Antônio Augusto Cançado Trindade, President of Inter-American Court of Human Rights, and a lecturer at the Course on International Law.

Dr. Katia Fach, professor in private international law at the University of Zaragoza, and a lecturer at the Course on International Law.

Dr. Luiz Otávio Pimentel, professor of law at the Federal University of Santa Catarina and a lecturer at the Course on International Law.

Dr. Zlata Drnas de Clement, professor in public international law at the National University of Córdoba's faculty of law and social sciences, and a lecturer at the Course on International Law.

Dr. Edmundo Vargas Carreño, Secretary General of OPANAL, and a lecturer at the Course on International Law.

Dr. Deisy Ventura, assistant professor in community and international law at the law department of Brazil's Federal University of Santa María, and a lecturer at the Course on International Law.

Dr. Ricardo Seitenfus, senior professor in public international law and international organizations at the law department of Brazil's Federal University of Santa María, and a lecturer at the Course on International Law.

Dr. Duke Pollard, officer in charge of the Legal and Institutional Development Division of the CARICOM Secretariat, and a lecturer at the Course on International Law.

Dr. Jean-Marc Thouvenin, professor of international law, Secretary General of the French Society for International Law, and a lecturer at the Course on International Law. In this instance, the Chairman of the Juridical Committee noted its gratitude toward the government of France for

having financed the participation of a French lecturer at the Course on International Law each year.

Dr. Horacio Grigera Naon, attorney at law, and a lecturer at the Course on International Law.

Dr. Francisco Orrego Vicuña, professor in international law, and a lecturer at the Course on International Law.

Dr. Elizabeth Spehar, Executive Coordinator with the OAS's Unit for the Promotion of Democracy of the OAS, and a lecturer at the Course on International Law.

Dr. Daniela Trejos Vargas, professor in private international law at the Pontifical Catholic University of Rio de Janeiro, and a lecturer at the Course on International Law.

Dr. Dante M. Negro, Chief Legal Officer with the OAS's Department of International Law, and a lecturer at the Course on International Law.

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