



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/II/doc.68/94 corr.1
7 December 1994
Original: Spanish

ANNUAL REPORT TO THE GENERAL ASSEMBLY

(Approved at the August 26, 1994 regular session)

TABLE OF CONTENTS

	Page
INTRODUCTION	1
PART I - ACTIVITIES	
1. Membership of the Committee	7
2. Chairman and Vice-Chairman of the Committee	7
3. Secretariat of the Committee	7
4. Activities of the Chairman and Vice-Chairman between the sessions periods	7
5. Election of Members of the Committee	8
6. Course on International Law	8
7. Ordinary sessions period, August 1994	8
7.1 Agenda	8
7.2 Relations with other institutions in the field of International Law	10
7.3 II Joint Meeting with Juridical Advisors of the Chancelleries of the Member-States of the Organization of American States	11
7.4 Work Program - 1996-1997	11
7.5 Participation by Specialists	11
7.6 Participation by Lecturers from the Course on International Law in the Sessions of the Inter-American Juridical Committee	11
7.7 Acknowledgment of Dr. Seymour J. Rubin	12
7.8 In memoriam: Dr. Eduardo Jiménez de Aréchaga and Dr. José María Ruda	12

7.9	Acknowledgment of the Secretariat for Legal Affairs of the Organization of American States	12
7.10	Acknowledgment of the Secretariat of the Inter-American Juridical Committee	12
7.11	Administrative Matters	12
a)	Decision on the Inter-American Juridical Committee Library	13
b)	Moving the Committee offices to the Itamaraty Palace	13
c)	March 1995 regular period of sessions	13

PARTE II - TOPICS COVERED

1.	Juridical dimensions of integration and international trade	17
1.1	Method for settlement of disputes in regional and subregional integration and free trade systems	17
1.2	Facilitation of International Activities by Individuals and Corporate Legal Entities	18
1.3	Securities Market. Normative System of Principles considered basic in the Regulation thereof in the Hemisphere	19
1.4	International Juridical Effects of Insolvency	19
2.	Democracy in the Inter-American System	19
3.	Improvement of the Administration of Justice in the Americas: appointment of magistrates and court functionaries. Protection and guarantees for judges and lawyers in the exercise of their functions	20
3.1	Facilitation of Justice. Simplification of Judicial Procedures	20
3.2	Human Rights and Delays in Justice	20
4.	Right to Information	21

5.	Environmental Law	21
6.	Peaceful Settlement of Disputes	21
7.	Human Rights and the Principle of Non-Intervention	22
8.	International Cooperation to Repress Corruption	22
9.	Juridical Aspects of Foreign Debt	22
10.	Inter-American Cooperation for Coping with International Terrorism	23
11.	Application of International Law in the Internal Areas of Activity of the Member States of the Inter-American System	23

PART III - DOCUMENT

A.	Annotated List of Topics - Inter-American Juridical Committee, document prepared by the Department of Development and Codification of International Law of the General Secretariat (OEA/Sec.Gral-CJI/doc.2/94)	29
B.	Resolutions approved	57
C.	Reports presented by the Rapporteurs	93
D.	Report submitted by the Chairman on the work carried out (CJI/SO/II/doc.20/94)	386
E.	Final Report on the XXI Course on International Law (CJI/SO/II/doc.67/94)	407

INTRODUCTION

This Annual Report covering 1994 has been prepared in compliance with the provisions of Art. 53, Item f) of the Charter of the Organization, covering the period between 30 January and 26 August this year. It therefore does not include a presentation of the results of the sessions period held during the last half of January this year, which was covered in the previous Annual Report presented by the Committee.

During the period covered by this Report, in addition to all the topics included on its Agenda, the Committee devoted special attention to consideration of the following points:

1. Juridical aspects of Integration and International Trade
2. Democracy in the Inter-American System
3. Improvement of the Administration of Justice in the Americas, and
4. Peaceful Settlement of Disputes

On the first topic, the activities of the Committee were concentrated on an examination of the systems for methods of settlement of disputes in economic integration schemes, and free trade agreements in the region, on the basis of special Reports prepared by its members. To this end it examined the systems developed under the North American Free Trade Agreement (NAFTA), the Latin American Free Trade Association (LAFTA) including those adopted through economic supplementation or free trade agreements of a bilateral nature, signed under the juridical auspices of this Organization, the Central American Integration System, the Group of 3, the Caribbean Community, and the Mercosur Southern Cone Common Market.

The examination of these systems revealed that, despite their individual characteristics shaped by the nature of the corresponding economic integration or free trade agreements, they nevertheless had various elements in common, such as the use of arbitration procedures between States. At the same time, this analysis showed that, on this topic, there are nevertheless various aspects that could give rise to a more detailed study, such as the access of private individuals to the use of methods for settlement of disputes.

Also under the topics regarding the juridical dimension of integration and international trade, the Committee devoted special efforts to the following topics: Facilitation of international activities by individuals and corporate legal entities and the securities market - normative benchmark of principles considered basic to the regulation thereof in the Hemisphere.

Regarding the first of these topics, the Committee considered that both the North American Free Trade Association - NAFTA as well as the more recent Free Trade Agreement signed by the Group of 3, highlight an important experiment in the regulation of transborder movements of individuals and corporate legal entities, especially with regard to business activities; the placement of investments and rendering of services. It thus also took into consideration that GATT will establish an

international system for handling this matter. It also felt that the limited number of ratifications of the Inter-American Convention on Personality and the Capacity of Corporate Legal Entities under International Private Law may be taken as a sign that, for the moment, the national legislations of the Member-States of the Organization contain sufficient norms to cope with this issue. Taking into account these and other considerations, the Committee decided that, apparently, the facilitation of transborder movement of individuals could be handled with greater efficiency under the economic integration scheme or free trade agreements in which the Member-States of the Organization participate.

With regard to the development of basic common norms for the regulation of securities markets, the Committee found it convenient to check the viewpoints of various specialists on this matter, including senior management of the Securities Commissions of various countries in the region, as well as obtaining more information on activities under way on this matter in specialized organizations such as the Council of Securities Regulators of the Americas - COSRA. In function of the information obtained, the Committee reached the conclusion that its efforts in this field could bear fruit insofar as, in cooperation with the above-mentioned specialized organizations, it could foster the organization of Seminars or Colloquia slanted towards a broader analysis and dissemination of this project among the competent authorities of specialists in the Member-States of the Organization, as well as other interested parties.

With regard to the topic of Democracy in the Inter-American System, the Committee proved, through an examination of the practice of the States, that this topic is of much interest to the Member-States of the Organization. Having examined the progress achieved to date in the development of juridical norms, forwarded to foster the preservation and guarantee of democratic regimes, it found that, for these reasons, it should reaffirm that these matters hold a relevant position with regard to international law enforcement, within the sphere of action of the Member-States of the Organization, which distinguishes it. Similarly, the Committee reached the conclusion that, despite these important achievements, there is still room for the development of revisions and regulations designed to strengthen measures for achieving the above-mentioned objectives.

Under the topic of Improvement of the Administration of Justice in the Americas, the Committee held a broad-ranging discussion on the appropriateness of fostering the adoption of effective measures both within the Member-States of the Organization as well as under the auspices of inter-American cooperation in order to assure the independence and personal security of the members of the Judiciary and in order to provide better guarantees for the professional activities of lawyers. As the outcome of this discussion, the Committee agreed to recommend to the Permanent Council of the Organization that it should consider the possibility of keeping under constant examination, through regular Reports and the publication of information, the problem which could threaten the independence of the Judiciary in the Member-States, hampering adequate protection for judges and lawyers in the exercise of their function, as well as measures that could be implemented to cope with these problems, while suggesting to the General Assembly the convenience of exhorting the Government of the Member-States to pay special attention to the recommendations issued by the United Nations on this matter, and that it should also undertake broad-ranging dissemination of these documents among the pertinent judicial authorities as well as others of equal competence (See CJI/RES.II-19/94).

Finally, the Committee devoted special efforts to an examination of the topic of Peaceful

Settlement of Disputes in the Inter-American System. It noted that the norms on this matters contained both in the Charter of the Organization as well as in the Pact of Bogota and other instruments, in general terms offered a good range of options to the Member-States. At the same time, it warned that possibly reasons of a political nature have hampered more frequent recourse to such measures to date. Due to the importance of this topic, and taking into consideration the fact that there is still room to contribute to the progressive normative development for such improvement, in accordance with the objectives and functions of the Organization, of the systems of measures for the Peaceful Settlement of Disputes, the Committee resolved to keep this topic on its Agenda.

This Annual Report sets out in greater detail the treatment of the topics mentioned. Similarly, it includes the presentation of the activities carried out with regard to the other topics on its Agenda.

In order to facilitate consultation, it also includes the Resolutions adopted during this period, as well as the Reports of the Rapporteurs and other background matters presented by its members regarding the treatment of various topics submitted for its consideration.

PART I

ACTIVITIES

PART I

ACTIVITIES

1. Membership of the Committee

During the period covered by this Report, the Inter-American Juridical Committee consisted of the following Members: Drs. Ramiro Saraiva Guerreiro, Jonathan T. Fried, Luis Herrera Marcano, Alberto Zelada Castedo, Miguel Angel Espeche Gil, Galo Leoro Franco, Mauricio Gutiérrez Castro, Seymour J. Rubin, Eduardo Vio Grossi, José Luis Siqueiros and Philip Telford Georges.

2. Chairman and Vice-Chairman of the Committee

The Chairmanship of the Inter-American Juridical Committee was exercised by Dr. José Luis Siqueiros, with Dr. Ramiro Saraiva Guerreiro as Vice-Chairman, until the end of the corresponding period.

As from 11 August, the Committee elected Dr. Ramiro Saraiva Guerreiro as Chairman for the next two-year period, with Dr. Jonathan Fried as Vice-Chairman.

On this occasion, the Committee adopted a Resolution of thanks and congratulations for the previous Chairman, Dr. José Luis Siqueiros (See Par III. Documents. CJI/RES. II-11/94).

3. Secretariat of the Committee

On 31 March, the Secretary-General appointed Dr. Manoel Tolomei Pereira Gomes Moletta as Secretary of the Committee, replacing Dr. Renato Ribeiro, who retired.

4. Activities of the Chairman and Vice-Chairman between the sessions periods

In February, the Chairman, Dr. José Luis Siqueiros attended the XX Extraordinary Meeting of the Organization of American States on Inter-American Cooperation for Development, held in Mexico, as the Observer from the Inter-American Juridical Committee.

In March, the Chairman, Dr. José Luis Siqueiros, represented the Committee at the Fifth Specialized Inter-American Conference on International Private Law (CIDIP-V), in Mexico, which he chaired.

In April, the Chairman attended the sessions of the Permanent Council during which it heard the Annual Report of the Inter-American Juridical Committee covering the previous period.

In June, the Chairman attended the sessions of the International Law Commission of the United Nations as the Observer from the Committee.

In June, the Vice-Chairman, Dr. Ramiro Saraiva Guerreiro, represented the Committee at the XXIV General Assembly of the Organization of American States in Belem do Pará, Brazil.

5. Election of Members of the Committee

In June, the General Assembly of the Organization of American States re-elected Dr. Ramiro Saraiva Guerreiro (Brazil) and Dr. José Luis Siqueiros (Mexico) as members of the Inter-American Juridical Committee, and also elected Dr. Roberto R. Alemán (Panama) for a period of four years, starting on 1 January 1995.

6. Course on International Law

The Inter-American Juridical Committee once again sponsored the Course on International Law in Rio de Janeiro held in August 1994 at the Getulio Vargas Foundation.

Lectures were given on various international juridical topics of current importance by distinguished experts from the Americas and all over the world, attended by students from over thirty countries. The Committee adopted various recommendations approving the scheduling, curriculum and participation for the 1995 Course (See Part III. Documents. CJI/RES.II-20/94).

7. Ordinary Sessions Period, August 1994

On 1 August 1994 the ordinary sessions period of the Committee began, (the second session this year, see Introduction) chaired by Dr. José Luis Siqueiros, with Dr. Ramiro Saraiva Guerreiro as Vice-Chairman.

7.1 Agenda

The Committee adopted the following Agenda for this sessions period:

1. Juridical Dimensions of Integration and International Trade:
 - a) Methods for settling disputes in sub-regional integration and free trade schemes: (AG/doc.3131/94-item 4):
 - i. Cartagena Pact
Rapporteur: Dr. Alberto Zelada Castedo
 - ii. Caricom Pact
Rapporteur: Dr. Philip T. Georges
 - iii. The Mercosur
Rapporteurs: Dr. Ramiro Saraiva Guerreiro and Dr. Miguel Angel Espeche Gil
 - iv. North American Free Trade Agreement (NAFTA)

- Rapporteur: Dr. José Luis Siqueiros and
Dr. Jonathan T. Fried
 - v. Juridical regulations for settling disputes in Bilateral Free Trade and Complementary Economic Treaties
Rapporteur: Dr. Alberto Zelada Castedo
 - vi. The Central American Integration System
Rapporteur: Dr. Mauricio Gutiérrez Castro
 - vii. G-3 (Mexico, Venezuela and Colombia)
Rapporteur: Dr. Luis Herrera Marcano
 - viii. Latin American Integration Association - LAIA
Rapporteur: Dr. José Luis Siqueiros
 - b) Facilitation of international activities by individuals and corporate entities (AG/doc.3131/94-item 2).
Rapporteur: Dr. Luis Herrera Marcano
 - c) The securities market. Benchmark principles considered basic to its regulation in the Hemisphere (AG/doc.3131/94-item 4)
Rapporteurs: Dr. Seymour J. Rubin, Dr. José Luis Siqueiros, and Dr. Jonathan T. Fried
 - d) The International Juridical Effects of Insolvency
Rapporteurs: Dr. Seymour J. Rubin, Dr. José Luis Siqueiros, and Dr. Jonathan T. Fried
2. Democracy in the Inter-American System (AG/doc.3131/94-item 7)
Rapporteur: Dr. Eduardo Vío Grossi
3. Improving the Administration of Justice in the Americas (AG/doc.3131/94-item 5)
- a) Streamlining Access to the Courts. Simplification of judicial procedures
Rapporteur: Dr. Seymour J. Rubin
 - b) Human Rights and Delays in Justice
Rapporteur: Dr. Luis Herrera Marcano
 - c) Appointment of Magistrates and Court Employees. Protection and guarantees for judges and lawyers in the exercise of their functions. Rapporteur: Dr. Jonathan T. Fried.
4. The Right to Information (AG/doc.3131/94-item 6)
Rapporteur: Dr. Mauricio Gutiérrez Castro
5. Environmental Law (AG/doc.3131/94-item 8)
Rapporteur: Dr. Galo Leoro F.

6. Peaceful Settlement of Disputes (AG/doc.2683/91)
(AG/doc.2771/91 rev.1)
Rapporteur: Dr. Galo Leoro F.
7. Human Rights and the Principle of Non-Intervention
Rapporteur: Dr. Luis Herrera Marcano
8. International Cooperation to Repress Corruption
Rapporteur: Dr. Miguel Angel Espeche Gil
9. Juridical Aspects of Foreign Debt
Rapporteur: Dr. Miguel Angel Espeche Gil.
10. Update of the juridical response to international terrorism
Rapporteur: Dr. Miguel Angel Espeche Gil.

7.2. Relations with other institutions in the field of International Law

The Inter-American Juridical Committee approved a Cooperation Program with various institutions involved with the study or teaching of International Law (See Part III. Documents. CJI/RES.II-10/94).

During its August sessions period, the Committee reaffirmed its commitment with regard with cooperative relations with other organizations, continuing its annual interchange of observers with the International Law Commission of the United Nations, actively exploring the possibility of joint meetings, reciprocal interchange of observers, library agreements and research with other international juridical agencies, law associations, international law societies and higher education institutions.

During the course of the year, the Committee continued to work with the Secretary-General to keep the publication of its works up to date, as well as the lectures given during the International Law Course, while improving its administrative procedures in order to carry out its mandate in the most efficient manner possible, with regard to costs.

7.3 II Joint Meeting with Juridical Advisors of the Chancelleries of the Member-States of the Organization of American States

In function of the experience of the I Joint Meeting with Juridical Advisors of the Chancelleries of the Member-States of the Organization of American States, held in Rio de Janeiro in August 1993, and the instructions of the General Assembly to advise the Committee to continue with this type of meeting (AG/doc.3131/94), as well as at the request of the participating Juridical Advisors, the Committee resolved to organize the II Joint Meeting of Juridical Advisors or Consultants of the Chancelleries of the American Nations, setting the lists of topics to be covered therein (See Part III. Documents. CJI/RES.II-14/94).

7.4 Work Program - 1996-1997

The Committee approved the Work Program for 1996-1997 to be forwarded to the Secretary-General for preparation of the corresponding draft budget (See Part III. Documents. CJI/RES.II-18/94).

7.5 Participation by Specialists

Messrs. Thomas Tosta de Sá, Chairman of Brazil's Securities Commission, and Suly Fontain, Director of the International Relations Department of this Commission, took part as specialists in a session of the Committee dedicated to the topic of Security Markets.

7.6 Participation by Lecturers from the Course on International Law in the Sessions of the Inter-American Juridical Committee

Following established practice, the lecturers listed below from the XXI International Law Course took part in the sessions of the Committee for an interchange of ideas and opinions on the Course, in their respective areas of specialization:

- Dr. Heather Forton, Director, Environmental Law Department, Ministry of Foreign Affairs and Trade, Canada;
- Dr. Artur Fajardo Maldonado, Director, Central American Bank;
- Dr. Hector Faundez Ledesma, Director, Graduate Studies Center, Central University, Caracas, Venezuela;
- Dr. Jaime Ruiz de Santiago, representative of ACNUR;
- Dr. Keith Highet, Consultant in International Law;
- Dr. Manuel Rama Montaldo, representative, Legal Affairs Department, United Nations.

7.7 Acknowledgment of Dr. Seymour J. Rubin

As the term of office of Dr. Seymour J. Rubin ends this year, a Resolution was approved acknowledging his valuable input to the Committee over the past twenty years (See Part III. Documents. CJI/RES.II-9/94).

7.8 In memoriam: Dr. Eduardo Jimenez de Aréchaga and Dr. José Maria Ruda

The Committee offered a one-minute silence to the memory of these illustrious jurists, former

judges of the International Court of Justice, who passed away during the year: Dr. Eduardo Jimenez de Arechaga (Uruguay) and Dr. José María Ruda (Argentina), and approved a Resolution honoring them (See Part III. Documents. CJI/RES.II-21/94).

7.9 Acknowledgment of the Secretariat for Legal Affairs
of the Organization of American States

The Inter-American Juridical Committee expressed its acknowledgment to Ambassador Hugo Caminos, departing Secretary for Legal Affairs, for his efforts, wishing him the greatest success in his new activities.

Similarly, the Inter-American Juridical Committee manifested its thanks to Dr. Enrique Lagos, temporary Secretary for Legal Affairs of the General Secretariat of the Organization of American States, with a round of applause for his priceless dedication and cooperation with the efforts of the Committee during this ordinary sessions period.

7.10 Acknowledgment of the Secretariat of the
Inter-American Juridical Committee

The Inter-American Juridical Committee voted a round of applause to the new Secretary of the Committee, Dr. Manoel Tolomei Pereira Gomes Moletta, which was extended to all the staff in the Secretariat for the dedication, enthusiasm and efficiency shown in carrying out their tasks.

7.11 Administrative Matters

The Committee adopted various Resolutions and administrative decisions with regard to the following topics:

a) Decision on the Inter-American Juridical Committee Library

The Committee approved Decision CJI/SO/II/doc.52/94 in which various measures were recommended in order to re-organize and equip the library.

b) Moving the Committee offices to the Itamaraty Palace

The Committee approved Resolution CJI/RES.II-16/94, in which it requests the Secretary-General to kindly prepare a program and layout of the premises, furniture and equipment necessary for its operations in the offices at the Itamaraty Palace (See Part III. Documents)

c) March 1995 regular period of sessions

Through Resolution CJI/RES.II-17/94, the Committee decided to hold its next regular period

of sessions at the Head Offices of the OAS in Washington, D.C., from 13 -24 March 1995 (See Part III. Documents)

The Committee also approved Resolution CJI/RES.II-22/94, which established the list of topics for the ordinary sessions period (See Part III. Documents).

PART II

TOPICS COVERED

PART II

TOPICS COVERED

The background to each of these topics may be found in the document on the Allocated List of topics of Inter-American Juridical Committee, prepared by the Department of Development and Codification of International Law of the General Secretariat of the Organization of American States, given in Part III. Documents (OAS/Gen.Sec. - CJI./doc.2/94).

1. Juridical Dimensions of Integration and International Trade

1.1 Method for settlement of disputes in regional and sub-regional integration and free trade schemes

In compliance with the request issued by the General Assembly (AG/doc.3131/94, point 4) which commissioned the Inter-American Juridical Committee to assign top priority to studies currently under way of juridical aspects of integration, specifically with regard to methods for the settlement of disputes in integration schemes and free trade agreements, during this ordinary sessions period, Reports were presented by the following members: Drs. Mauricio Gutiérrez Castro, José Luis Siqueiros, Philip Telford Georges, Luis Herrera Marcano and Alberto Zelada Castedo, on methods for the settlement of disputes in: a) the Central American Integration System (SICA), (CJI/SO/II/doc.19/94); b) Latin American Integration Association - LAIA, (CJI/SO/II/doc.21/94); c) the CARICOM Pact (CJI/SO/II/doc.25/94); d) Group of 3 (Mexico, Venezuela and Colombia) (CJI/SO/II/doc.34/94 rev.1); and e) systems for the settlement of disputes under the auspices of the Latin American Integration Association -LAIA, (CJI/SO/II/doc.48/94 rev. 1); which, together with the Report presented previously by Dr. Ramiro Saraiva Guerreiro and Dr. Miguel Angel Espeche Gil on: f) Mercosur (adding an Annex on the Protocol on investment funds in the sub-regional agreement (CJI/SO/II/doc.44/94); as well as by Dr. Jonathan T. Fried and José Luis Siqueiros on : g) NAFTA (CJI/SO/II/doc.2/94), in compliance with the list of topics mentioned in the previous paragraph (See Part III. Documents).

During the review of these works, the discussions of the Committee revealed that all the various systems shared a series of aspects in common, for example, with respect to the settlement of disputes between States. Other issues require further examination, particularly private access to methods for the settlement of disputes, the existence of permanent arbitration or judicial institutions, the mandatory effect of decisions taken under national law, and obligations which may arise in the light of the relationship between various sub-regional agreements and the application of the most-favored nation clause of LAIA, which will probably be taken under consideration by the Committee in future.

The Inter-American Juridical Committee, among other matters, unanimously decided to accept and thank the Rapporteurs for the Reports presented during this ordinary sessions period; to compile all the works submitted to the consideration of the Committee, together with the text attached thereto; to set up a Drafting Group consisting of all the Rapporteurs, with Dr. José Luis Siqueiros as

Coordinator, which will prepare an Introductory Note to the compiled volume. This Editorial Group, with the support of the Secretariat of the Committee, will present this document to this Organization during its next ordinary sessions period in March 1995, which, once approved, will be submitted to the Permanent Council of the Organization of American States and the Special Trade Commission; to keep this topic on the Agenda of Inter-American Juridical Committee, so that during its next ordinary sessions period in March 1995, in coordination with the Special Trade Commission, it may carry out additional studies and undertake the tasks deemed most appropriate.

With the discussions ended, a Resolution was unanimously approved on this topic, in the ordinary session held on 23 August 1994 (See Part III. Documents. CJI/DO/II/doc.55/94).

1.2 Facilitation of International Activities by Individuals and Corporate Legal Entities

On this point, Rapporteur Dr. Luis Herrera Marcano presented a Memorandum during the session held on 23 August (See Part III. Documents. CJI/SO/doc.55/94).

Regarding the first of these topics, the Committee considered that both the North American Free Trade Association - NAFTA as well as the recent Free Trade Agreement signed by the Group of 3, highlight an important experiment in the regulation of transborder movements of individuals and corporate legal entities, especially with regard to business activities; the placement of investments and rendering of services. It thus also took into consideration that the World Trade Organization - WTO will establish an international system for handling this matter. It also felt that the limited number of ratifications of the Inter-American Convention on Personality and the Capacity of Corporate Legal Entities under International Private Law may taken as a sign that, for the moment, the national legislations of the Member-States of the Organization contain sufficient norms to cope with this issue. Taking into account these and other considerations, the Committee decided that, apparently, the facilitation of transborder movement of individuals could be handled with greater efficiency under the economic integration schemes or free trade agreements in which the Member-States of the Organization participate.

The Inter-American Juridical Committee requested the Rapporteur to present a Report for a forthcoming session on the principal juridical aspects that should be covered to facilitate the entry and temporary residence of individuals on business.

1.3 Securities Market. Normative System of Principles considered basic in the Regulation thereof in the Hemisphere

A Report was presented by the Working Group, prepared on the basis of an Aide Memoire written by Dr. Jonathan T. Fried, and supplemented by the Dr. José Luis Siqueiros (See Part III. CJI/SO/II/doc.31/94 rev.2). This covered the following principal points: 1 - Background, 2 - Council of Securities Regulators of the Americas - COSRA ; 3 - analysis of the efforts undertaken at the level of Government regulatory agencies and efforts carried out within the capitals markets; 4 - tentative proposals for consideration by the Inter-American Juridical Committee.

Backed by the General Assembly, the Committee continued with its consideration of the best way of fostering the development of basic norms for stock market regulations in the Americas, which the Committee considers as an important means for fostering the confidence, previsibility and trust among foreign investors. In meeting with senior representatives of stock market commissions of various countries that took part in the Council of Securities Regulators of the Americas - COSRA efforts, as well as the representatives of the International Bar Association, the Committee determined that, in keeping with its mandate to encourage cooperative relationships with other organizations, it could usefully foster greater dissemination and analysis of the work under way in other areas. The Committee is currently studying the feasibility of co-sponsoring Seminars or Colloquia in one or more Member-States on this matter.

As the result of its examination of the above-mentioned document, the Inter-American Juridical Committee issued a Resolution CJI/RES.II-10/94 (See Part III. Documents).

1.4 International Juridical Effects of Insolvency

On this topic, Dr. Rubin announced that he will forward a Report to be studied during the ordinary sessions period in March 1995. The Committee agreed to maintain this topic on its Agenda.

2. Democracy in the Inter-American System

On this topic, its Rapporteur Dr. Eduardo Vio Grossi presented a Report during the ordinary sessions period in August 1994 that served as the basis for a wide-ranging analysis within the Committee (See Part III. Documents. CJI/SO/II/doc.37/94 rev.1 corr.2) which focused broadly on the applicable juridical principles and state practices of the Organization of American States and its Member-States on this matter. This Report underlines that both representative democracy as well as non-intervention in the internal affairs of the Member-States are fundamental principles of the Inter-American System. He described the various elements that have contributed to better development of the principle of democracy in international law. The Committee considered during its discussion the practice of the American States on this matter as well as the applicable rules under international law.

The Committee concluded that the Report submitted by the Rapporteur constituted a complete and well-organized account of the practice and current state of international law applicable to this matter. It therefore resolved to forward this Report to the Secretary-General, as well as a summarized minutes of the session in which it was discussed, in order to make it available to the Organization of American States agencies responsible for studying this topic, in order that it may contribute to the analysis thereof. It also resolved to maintain this topic on its List of Topics and requested the Rapporteur to keep it informed on the development thereof (See Part III. Documents. CJI/RES.II-12/94).

3. Improvement of the Administration of Justice in the Americas: appointment of magistrates and court functionaries. Protection and guarantees for judges and lawyers in the exercise of their functions.

Rapporteur Dr. Jonathan T. Fried presented a Report on the Protection of Lawyers and Judges in the Exercise of their Functions, which analyzed this topic from the viewpoint of the principles, the importance of judicial independence and guarantees for lawyers. This document examined examples in various countries where the independence of the judiciary and lawyers, both individually as well as collectively, is being threatened. (See Part III. Documents. CJI/SO/II/doc. 42/94 rev. 1).

In Resolution CJI/RES.II-19/94 (See Part III. Documents), the Committee forwarded the Report to the Permanent Council for appropriate follow-up, requesting that it should be translated as soon as possible and forwarded in the official languages of the Organization of American States to the Member-States, in order to make it available to the competent authorities. It also recommended that the Permanent Council should consider the possibility of maintaining under constant analysis, through periodical reports and publications of the information, the problems which may threaten the independence of the Judiciary in Member-States, or hamper adequate protection for judges and lawyers in the exercise of their functions, as well as measures adopted to cope with these problems.

3.1 Facilitation of Justice. Simplification of Judicial Procedures

On this topic, Dr. Seymour J. Rubin announced that he would forward a Report for consideration during the ordinary sessions period in March 1995.

3.2 Human Rights and Delays in Justice

Having considered the presentation by its Rapporteur Dr. Luis Herrera Marcano, the Committee decided not to continue with the study of this topic, as it felt that it had been studied elsewhere by agencies within the Inter-American System responsible for protecting human rights.

4. Right to Information

After a broad-ranging discussion of the possible viewpoints for covering this topic, the Inter-American Juridical Committee decided to accept the offer of Dr. Mauricio Gutiérrez Castro, to assume responsibility for Reporting thereon, presenting a Report taking into consideration the background on this topic which will be submitted to the Secretariat.

5. Environmental Law

The Rapporteur on this topic, Dr. Galo Leoro Franco, advised the Inter-American Juridical Committee that there were no major innovations since the presentation of his last Report during the ordinary sessions period last January. The Committee also expressed the need to obtain more accurate guidelines on the study of this matter, as indicated in Resolution AG/doc. 3131/94 issued by the General Assembly. With this purpose, and through a unanimous decision, the Chairman of the Inter-American Juridical Committee sent a fax to the Permanent Council on 3 August (Letter CJI/307). This same day, the Chairman of the Permanent Council replied advising that this topic had

been transferred for study to the Environment Committee. It was decided to await a communication from this Committee, and to maintain this topic on its Agenda.

6. Peaceful Settlement of Disputes

The Report of the Rapporteur (Document CJI/SO/II/doc. 34/94 rev.1 dated 22 August 1994) offered an ample overview of the process of the peaceful settlement of disputes that has developed in the Organization of American States since 1923 up to the reform of its Charter in 1985, as the outcome of the Protocol of Cartagena de Indias. It includes an overview of state practice with regard to the use of resources covered in the various instruments of the Organization of American States, some of which, alongside the Pact of Bogota, (with its twelve ratifying States) have come into force for the nine Member-States, making the good offices of the Permanent Council available to all.

With regard to the current juridical situation covered by Art. 23 of the Charter of the Organization of American States that acknowledges the freedom enjoyed by the Member-States to have recourse - if they so wish - directly to methods of peaceful settlement of disputes available to them in accordance with the Charter of the United Nations or the instruments which have been established under its auspices for this purpose, either for disputes in general or for specific disagreements, in accordance with special treaties for these latter. The Report emphasized that the Member-States of the Organization of American States had a wide range of juridical possibilities.

The Report noted that the Inter-American Juridical Committee has carried out studies and also prepared a draft reform of the Bogota Pact (1985) with suggestions and recommendations in the field of peaceful settlement of disputes, which was submitted for comments to the Member-States, and thus to have acted as a guideline for implementing draft reforms or preparing a new document, perhaps in parallel to the Pact of Bogota.

This document acknowledged that all instruments may be improved, leading to the conclusion that this might perhaps be a good time for the States to reflect on the convenience of encouraging greater action by their agencies that can strive to foster good, friendly relationships among them, and which through the same circumstances opens the way to the possibility of helping them effectively to find means of peaceful settlement of disputes, regarding which they should act with the necessary political will to use any of the resources which the Organization has available on this matter.

The Committee had an initial interchange of opinion and considered that it should continue with the examination of this topic under the criteria outlined, as well as any other that may later be presented, whereby it decided to keep this topic on its Agenda.

This Report gave rise to Resolution CJI/RES.II-15/94 dated 25 August 1994 (See Part III. Documents).

7. Human Rights and the Principle of Non-Intervention

After the verbal presentation by Rapporteur Dr. Luis Herrera Marcano, the Committee

considered that it was not necessary to continue with the studies of this topic. The Committee, acknowledging the maximum hierarchy and importance of all juridical aspects of the protection of Human Rights, felt that the content of this topic has been amply covered in international instruments, jurisprudence and the practice of the Organization of American States, as well as its Member-States.

8. International Cooperation to Repress Corruption

The presentation of this topic by its Rapporteur Dr. Miguel Angel Espeche Gil prompted a broad-ranging discussion, and it was decided to commission the preparation of a proposal for a Working Group consisting of the Rapporteur and Dr. Herrera Marcano. The Working Group presented the draft Resolution which was not approved, and the Rapporteur was requested to prepare a fresh document for the next meeting.

9. Juridical aspects of Foreign Debt

During its January 1994 sessions, the Rapporteur, Dr. Miguel Angel Espeche Gil advised the Committee on the development of this topic, as well as the organization of a Seminar on this matter, held in Brasilia by the Latin American Parliament in September the previous year.

The Committee studied the updated document presented during this period by its Rapporteur (See Part III. Documents. CJI/SO/II/doc.46/94).

10. Inter-American Cooperation for Coping with International Terrorism

Dr. Miguel Angel Espeche Gil requested the Committee to analyze the convenience of discussing the topic of Inter-American Cooperation to cope with International Terrorism, and submitted a Memorandum (CJI/SI/II/doc.47/94) on 18 August 1994.

The Inter-American Juridical Committee studied this document, which included a proposal for a juridical focus, reaching the conclusion that, in order to define its role in the consideration of this matter, its should be postponed until the March 1995 session, after its treatment by the Permanent Council and decisions that may possibly be adopted in future by this organization. The Committee agreed to include this topic on its Agenda.

11. Application of International Law in the Internal Areas of Activity
of the Member States of the Inter-American System

Dr. Miguel Angel Espeche Gil proposed that the Committee should seek to obtain as much information as possible on this issue, with a view to possibly analyzing a posteriori the various viewpoints that are applied to international law by State agencies. He stated that this information, in addition to being academic, could be of much use to the nations and agencies in the Inter-American System. When studying this proposal, it also considered the need to foster greater knowledge of international law among magistrates and court functionaries, as well as the convenience of the

discipline of International Public Law being included mandatorily in the law studies curriculum in all law schools.

The Committee agreed to incorporate this topic into the Agenda for discussion at the 1995 Meeting with Juridical Advisors of Ministries of Foreign Affairs and hoped that, as far as possible, its members would make presentations thereon in future sessions.

PART III
DOCUMENTS

PART III

DOCUMENTS

A.	Annotated List of Topics of the Inter-American Juridical Committee, prepared by the International Law Development and Codification Department of the General Secretariat (OAS/Sec.Gral-CJI/doc.2/94)	29
B.	Resolutions approved:	
CJI/RES.II- 9/94	Homage to Dr. Seymour J.Rubin	59
CJI/RES.II-10/94	Cooperative Relations	61
CJI/RES.II-11/94	Acknowledgment of Dr. José Luis Siqueiros	64
CJI/RES.II-12/94	Democracy in the Inter-American System	65
CJI/RES.II-13/94	Juridical Dimension of International Trade and Integration	67
CJI/RES.II-14/94	II Joint Meeting of Juridical Advisors	69
CJI/RES.II-15/94	Peaceful Settlement of Disputes	71
CJI/RES.II-16/94	Moving the Offices of the Inter-American Juridical Committee	73
CJI/RES.II-17/94	Organization of the I Ordinary Sessions Period/1995	75
CJI/RES.II-18/94	Budget Program - 1996/1997	77
CJI/RES.II-19/94	Improvement of the Administration of Justice in the Americas - Protection and Guarantees for Judges and Lawyers in the Exercise of their Functions	83
CJI/RES.II-20/94	Course on International Law	20
CJI/RES.II-21/94	In Memoriam - Homage to Dr. Eduardo Jiménez de Aréchaga and Dr. José María Ruda	87
CJI/RES.II-22/94	Date, Agenda and Rapporteurs for the March 1995 - Ordinary Sessions Period	88
CJI/RES.II-23/94	Stock Exchange	91

C. Reports presented by the Rapporteurs

CJI/SO/I/doc. 1/94	System for the settlement of disputes in the Mercosur	95
CJI/SO/II/doc. 2/94	Settlement of disputes in NAFTA	105
CJI/SO/II/doc.19/94	Juridical Dimension of International Trade and Integration. Settlement of disputes in the Central American Integration System: Central American Common Market	129
CJI/SO/II/doc.21/94	System for the settlement of disputes in the American Integration Association - LAIA	Latin 137
CJI/SO/II/doc.25/94	Juridical Dimension of Integration - CARICOM Pact	148
CJI/SO/II/doc.31/94 rev.2	Stock Exchange - Report from the Working Group	154
CJI/SO/II/doc.34/94 rev.1	Peaceful settlement of disputes - An Overview	159
CJI/SO/II/doc.37/94 rev.1 corr.1	Democracy in the Inter-American System (Annex attached, Provisional Minutes 18 August 1994)	182
CJI/SO/II/doc.42/94 rev.1	Improving the Administration of Justice in the Americas	240
CJI/SO/II/doc.44/94	Settlement of disputes in the Mercosur	343
CJI/SO/II/doc.46/94	Juridical Aspects of Foreign Debt	346
CJI/SO/II/doc.47/94	Inter-American Cooperation to cope with International Terrorism	348
CJI/SO/II/doc.48/94 rev.1	Systems for the settlement of disputes in the Latin American Integration Association - LAIA	353
CJI/SO/II/doc.55/94	Memorandum presented by the Rapporteur on on Implementation of a System for Facilitating the International Activities of Individuals and Corporate Legal Entities	383
D. Report of the Chairman on activities carried out (CJI/SO/II/doc.20/94)		386

E. Report on the XXI Course on International Law
(CJI/SO/II/doc.67/94)

407

**ORGANIZATION OF AMERICAN STATES
GENERAL SECRETARIAT**

OEA/Sec.Gral
CJI/doc.2/94
25 July 1994
Original: Spanish

ANNOTATED LIST OF TOPICS

Inter-American Juridical Committee

(Document prepared by the Department of Development and Codification
of International Law of the General Secretariat)

For the use of the Inter-American Juridical Committee

ANNOTATED LIST OF TOPICS

Inter-American Juridical Committee

The Department of Development and Codification of International Law of the Secretariat for Legal Affairs of the General Secretariat of the Organization of American States has prepared this document, which includes background data and information on the various points on the list of topics of the Inter-American Juridical Committee, recording the development of the various issues that form its Working Agenda, in order to facilitate consideration thereof.

The list of topics approved by the Inter-American Juridical Committee during its August 1994 Ordinary Sessions Period consists of:

- 1) Implementation of the Enterprise for the Americas
- 2) Updating the document on the "The Development of Environmental Law in the Americas"
- 3) Juridical Dimensions of Integration
- 4) Improvement of the Administration of Justice in the Americas
- 5) Peaceful Settlement of Disputes
- 6) Human Rights and the Principle of Non-Intervention
- 7) Juridical View of Corruption in America
- 8) Democracy in the Inter-American System
- 9) Juridical aspects of Foreign Debt

Based on the presentation of the Annual Report of the Committee made by its Chairman to the Juridical and Political Affairs Commission of the Permanent Council of the Organization of American States on 4 April 1994, this Commission agreed with the above-mentioned list of topics, which was ratified by the Permanent Council (CP/doc.2479/94).

During its 24th Ordinary Sessions Period (Belém, 1994), the General Assembly of the Organization of American States took note of this list of topics.

I. Implementation of the Enterprise for the Americas

On 27 June 1990, President Bush announced his proposal known as Enterprise for the Americas, whereby he proposed to launch the process leading to the creation of an ample free trade zone.

On 22 August this same year, the Permanent Council of the Organization of American States set up an Ad-Hoc Working Group charged with the study of this initiative. In its Report on the work of this Group up to 29 November 1990 (CP/doc.2133/91 rev.1) it indicated, among other points, that: "In addition to the political and economic aspects of the Enterprise for the Americas, this involves various issues of a juridical nature...". Thus, "it was suggested within the Group that among these aspects of a juridical nature, there are some for which the Organization of American States is endowed with the appropriate mechanisms for the analysis and Codification thereof...".

Through Resolution CP/RES.559 (851/91) dated 11 April 1991, the Permanent Council of the Organization of American States commissioned the Inter-American Juridical Committee to carry out the following studies on juridical aspects of the Enterprise for the Americas :

1. The creation of a juridical facilitation benchmark for functioning at the international level of individuals and corporate legal entities under law.
2. Joint Companies - preparation of norms for associations of capital and corporate legal entities.
3. Preparation of norms for the regulation of international juridical businesses that require this.
4. Arbitration between States and between private economic agents among themselves, as well as States, with regard to international juridical business whose purpose extends beyond a private nature."

This request was presented in detail during a visit to the Committee by the Uruguayan representative to the Organization of American States, Ambassador Didier Opertti, during its Ordinary Sessions Period of August 1991.

The General Assembly of the Organization of American States, during its 21st Ordinary Sessions Period (Santiago, Chile, 1991), through Resolution AG/RES.1109(XXI-0/91), declared that the Organization should support and actively foster the rapid development of this initiative and requested the Permanent Council to: "2. ... to prepare a plan of action to support and foster the Enterprise for the Americas ...".

During its August 1991 Ordinary Sessions Period, the Inter-American Juridical Committee reformulated its list of topics in order to incorporate these issues and, in compliance with the request of the Permanent Council, appointed Rapporteurs for the four specific juridical issues indicated thereby. Through Resolution CJI/RES.II-2/91, the Committee additionally incorporated two new aspects:

1. Ways of preventing monopolistic practices as a consequence of the privatization process of state-owned companies.
2. Norms covering the issue and sale of stock in public companies, the role of such norms, and the development of the stock market.

Through this same Resolution, the Committee decided to set up a Working Group to prepare a draft program for joint treatment of the topic of □Implementation of the Enterprise for the Americas□, highlighting the most important topics and assigning priorities in the study thereof.

During its March 1992 sessions period, through Resolution CJI/RES.I-2/92, which was accompanied by an Exposition of Motives, the Committee decided to undertake additional studies on:

1. Norms and standards for the regulation and supervision of securities markets that buy and sell securities issued by private companies, in order to increase the efficiency of these markets and encourage investment by individuals and private institutions in these companies, thus promoting the development of capital markets and offering private companies the opportunity to obtain adequate financing through these markets.
2. A study of the legislation, regulations and policies in existence and scheduled in terms of the competence of the American States, with particular attention to the preservation of the public benefits of privatization and the prevention of monopolistic restrictive practices in business.

During this same sessions period, the Committee adopted the Report presented by Dr. Francisco Villagrán-Kramer on the topic of "Joint Companies - Preparation of Norms for Associations of Capital and Corporate Legal Entities" (CJI/RES.I-7/92 and CJI/RES.I-10/92), and maintained this topic on its Agenda. In this regard, the Committee stated that "It is inclined to recommend that the Member-States of the Inter-American System should examine the existing variations in order to incorporate into their legislation, where applicable, provisions that facilitate the setting up of Joint Companies in a country, with acknowledgment and operation thereof by other countries".

With regard to the topic "Arbitration between the States and between Economic Agents as well as between the States with regard to international juridical business whose purpose exceeds a private nature", the Committee approved the Report presented by the Rapporteur, Dr. José Luis Siqueiros, and adopted a series of conclusions on this point (CJI/RES.I-4/92 and CJI/RES.I-11/92). It therefore agreed to keep this topic on its Agenda.

Also during the March 1992 sessions period, the Committee heard the verbal Report of Dr. Luis Herrera Marcano, the Rapporteur for the topic "Creation of a Juridical Facilitation Benchmark for Operations at the International Level of Individuals Under Law as well as Corporate Legal Entities".

The state of compliance by the Committee with the mandates of the Permanent Council was presented by Dr. Seymour J. Rubin to the Working Group of the Permanent Council charged with studying the Enterprise for the Americas, on 11 March 1992 (CP/doc.2260/92 rev.1).

During its August 1992 sessions period, the Committee adopted the Report presented by Dr. José Luis Siqueiros on the "Preparation of Norms for the Regulation of Juridical Businesses that require this, i) International Contracts" (CJI/RES.II-18/92), considering that this reflected a broad-ranging study of international juridical regulations, acknowledging that "to the extent that it identified international contracts whose normativity is non-existent or insufficient, the use of the institutional services and skills of the Organization of American States, including this Juridical Committee, may lead to unnecessary duplication of efforts in this field".

During this same sessions period, the Committee approved the Final Report presented by Dr. Francisco Villagrán-Kramer on Joint Companies (CJI/RES.II-21/92) and resolved "that this topic does not immediately demand the adoption of an Inter-American Convention, but considers that the Report

could be analyzed by governments themselves in order to decide whether or not to incorporate into their national legislations legal provisions applicable to Joint Companies".

With regard to the study of the topic covering Securities Markets, the Committee resolved "to set up a Working Group consisting of Dr. Seymour J. Rubin and Dr. Juan Bautista Rivarola in order to formulate the outline of a Model Code for Securities Markets" (CJI/RES.II-19/92).

Finally, during this August 1992 sessions period, with regard to the topic of the □Facilitation of Action at the International Level for Individuals and Corporate Legal Entities under Law, the Committee resolved (CJI/RES.II-30/92), on the basis of the Report presented by its Rapporteur, Dr. Luis Herrera Marcano, and while keeping this topic on its Agenda, "to request the Secretary General to take the necessary steps for the Undersecretariat for Juridical Affairs to undertake a compilation of the norms in force in the Member-States with regard to the entry and length of stay of foreign businessmen".

On this topic, the Juridical and Political Affairs Commission of the Permanent Council, on hearing the Annual Report of the Committee in 1993, agreed with the previous Resolutions and submitted the respective Report, which the Council approved and forwarded to the General Assembly (AG/doc.2965/92).

In turn, the General Assembly of the Organization of American States, during its 23rd Ordinary Sessions Period (Managua, 1993), on hearing the comments and recommendations made by the Permanent Council on the Annual Report of the Committee, resolved the following:

"To recommend to the Inter-American Juridical Committee that it should continue the study of the topic "Securities Markets", taking into consideration that the smooth running of securities markets in the region requires each country to be endowed with a well-organized, fully-developed stock exchange system which fosters the expansion of transactions and trading, in all the countries involved as well as throughout the region as a whole" [AG/RES.1210 (XXIII-0/93)].

During its August 1993 sessions period, on taking under consideration the Partial Reports presented by Dr. Seymour J. Rubin and Dr. Juan Bautista Rivarola, the Committee decided to unify into a single topic (CJI/RES.II-14/93) the various points covering securities markets in its previous list of topics. This was described in the following manner: "Securities and Stock Markets. Normative Benchmark of the Principles considered as basic in the Regulation thereof throughout the Hemisphere".

Thus, with regard to this topic and Resolution, the Committee appointed Dr. Seymour J. Rubin and Dr. José Luis Siqueiros as Rapporteurs, and requested the General Assembly to provide expert assistance, reiterating the need to request information from the Member-States that have regulated their stock and securities markets.

During its January 1994 sessions period, with regard to stock and securities markets, the Committee reaffirmed the importance of establishing a dialog between governments and professionals through the organization of meetings and seminars, or other forms of interchange promoted by the Inter-American Juridical Committee (CJI/RES.I-5/94). During this same sessions

period, US specialist Dr. A. A. Sommer Jr. visited the Committee and spoke on various aspects of stock and securities markets. Also during this period, and as requested, the Undersecretariat for Juridical Affairs presented the Committee with a compilation of laws from the American States on this topic.

With regard to the topic on the facilitation of the international activities of individual persons and corporate legal entities, during its January 1994 sessions period, the Committee heard a second Report from its Rapporteur, Dr. Luis Herrera Marcano.

This Report contained the following two conclusions:

- 1) It would be advisable to wait until the set of norms arising from the Uruguay Round of GATT becomes available, before taking decisions on the future handling of this topic within the Committee;
- 2) It would be convenient for the General Secretariat, through the Undersecretariat of Juridical Affairs, to persist in inquiring why there have been no ratifications of the ratifications of the Inter-American Convention on Personality and Capacity of Corporate Legal Entities, as well as obtaining legislation from a representative number of Member-States on the issue of the entry of business people.

In its Resolution CJI/RES.I-6/94, in accordance with these conclusions, the Committee resolved to keep this topic on its list.

In accordance with the developments outlined above, for the August 1994 Ordinary Sessions Period the Committee approved as Item 1 thereof:

1. Implementation of the Enterprise for the Americas [CP/RES.557 (848/91) and CP/RES.559 (851/91)]
 - a) Facilitation of international activities by individuals and corporate legal entities
Rapporteur: Dr. Luis Herrera Marcano
 - b) The Securities Market. Benchmark Principles considered basic in its Regulation in the Hemisphere
Rapporteurs: Dr. Seymour J. Rubin
Dr. José Luis Siqueiros

The Juridical and Political Affairs Commission of the Permanent Council of the Organization of American States, when considering the Annual Report of the Inter-American Juridical Committee in 1994 and analyzing the section covering stock and securities markets, agreed "to commission the Inter-American Juridical Committee to study the normative scheme of the principles considered as basic in the regulation of stock markets in the hemisphere, in the manner proposed by this Committee" (CP/doc.2479/94).

In turn, the General Assembly of the Organization of American States, during its 24th Ordinary Sessions Period (Belém, 1994) resolved "to recommend to the Inter-American Juridical Committee that, due to the increase in regional interchange, it should continue with studies on the most appropriate mechanisms for the facilitation of international activities by individuals and corporate legal entities, in accordance with its Resolution CJI/RES.I-6/94", and "to request the Inter-American Juridical Committee, in accordance with its Resolution CJI/RES.II-14/93, to maintain on its list of topics, in the manner proposed thereby, the study of stock markets, and the normative scheme of the principles considered as basic in the regulation thereof in the Hemisphere."

II. Updating the document on "The Development of Environmental Law in the Americas"

During its July-August 1979 sessions period, at the suggestion of Dr. Sergio González Gálvez, the Committee included in its Agenda the topic of "Ways for the Development of Environmental Law". During its next sessions period, in January-February 1980, the appointed Rapporteur, Sir William Douglas, presented a Preliminary Report, and the then Juridical Advisory Board of the Organization of American States prepared a thematic identification document. Through its Resolution dated 7 February 1980, the Committee resolved "To request the Rapporteur to continue the studies regarding environmental pollution and the ecological consequences thereof, with a view to the preparation of a Draft Convention on this issue".

In August 1982, the new Rapporteur on this topic, Dr. Galo Leoro Franco, presented a document which, having outlined the documentation compiled, concluded that it would be appropriate to continue with the study of this issue.

During the July-August 1986 sessions period, Dr. Galo Leoro Franco presented a second document that covered various aspects linked to the juridical mechanisms for environmental protection.

During the August 1987 sessions period, the Inter-American Juridical Committee, after the presentation by Dr. Victor H. Martínez, Vice-President of Argentina, whose text is published on pages 169 and following of the volume corresponding to this year of the Reports and Recommendations of the Inter-American Juridical Committee, approved Resolution CJI/RES.II-19/87. Among its comments, the Committee indicated: that "after signature of the Convention for the Protection of the Plant and Animal Life and the Scenic Beauties of the Countries of the Americas, dated 1940, developments were noted in other continents towards new principles and mechanisms for inter-regional cooperation in terms of nature conservation", and resolved: "To emphasize the need to foster the organization of a specialized conference in order to set up the Inter-American Nature Conservation System."

The General Assembly of the Organization of American States, during its 18th Ordinary Sessions Period (San Salvador, 1988), and taking into consideration the previous recommendation of the Committee, resolved "to ask the General Secretariat to carry out a multi-disciplinary study leading to the preparation of a Draft Convention in order to set up an Inter-American System for Nature Conservation, and through the Permanent Council to present this to the General Assembly at its 19th Ordinary Sessions Period [AG/RES.948 (XVIII-0/88)]. The period granted to the Permanent

Council was extended by the General Assembly during its next Ordinary Sessions Period [AG/RES.1016 (XIX-0/89)], which was repeated one year later [AG/RES.1050 (XX-0/90)].

During the August 1988 sessions period of the Inter-American Juridical Committee, the Rapporteur, Dr. Galo Leoro Franco advised the Committee that his next Report would contain the □Draft Declaration or Resolution that could be adopted, if applicable, by the General Assembly of the Organization of American States as an initial contribution to the quest for solutions in the field of transborder pollution, which is fundamental in this matter" (Inter-American Juridical Committee, Reports and Recommendations 1987, pages 87-93).

In August 1988, the Rapporteur presented his third Report to the Inter-American Juridical Committee, which included a Draft American Declaration on the Environment. In August the following year, the Committee adopted this Draft Declaration (CJI/RES.II-2/89) and, through Resolution CJI/RES.II-9/89, approved the "Report of the Inter-American Juridical Committee on the Draft American Declaration on the Environment". This latter Resolution contained a synopsis of the studies carried out by the Committee on this issue, as well as comments on the Articles of the Draft Declaration.

During its 19th Ordinary Sessions Period (Washington, 1989), the General Assembly of the Organization of American States, having studied the Annual Report of the Inter-American Juridical Committee, resolved: "to take note of the American Declaration on the Environment adopted by the Inter-American Juridical Committee, as well as the respective Report, and request the Permanent Council to proceed with examination of this topic" [AG/RES.1019 (XIX-0/89)].

During its 20th Ordinary Sessions Period (Paraguay, 1990), the General Assembly, through Resolution AG/RES.1050 (XX-0/90), decided to ask the Permanent Council to set up a Working Group in order to study the ways that could be used by the Organization of American States to work more effectively towards environmental protection, and which should present its conclusions and recommendation to the Permanent Council before 31 December 1990.

The Permanent Council presented its Report to the General Assembly, during its 21st Ordinary Sessions Period (Santiago, 1991), which resolved to adopt the "Inter-American Action Program for Environmental Conservation" [AG/RES.1114 (XXI-0/91)]. Among other matters, in Chapter III it lists "Active Measures to foster Regional Cooperation":

- r. To request the Inter-American Juridical Committee to prepare, with the cooperation of the General Secretariat, reference catalogues listing national environmental legislation.
- t. To undertake the updating, in cooperation with the Inter-American Juridical Committee and the General Secretariat of the Convention for the Protection of the Plant and Animal Life and Natural Scenic Beauties of the Countries of the Americas (1940) introducing new topics such as the preservation of bio-diversity, as well as studying the possibility of preparing an Inter-American Convention for the Conservation of the Environment.

This same Chapter recommends the Permanent Council to set up a Standing Committee which would, among other tasks, coordinate, assess and handle the implementation of the active measures of this Program. In compliance with this mandate, on 8 July 1991 the Permanent Council

set up the Environment Commission.

During the August 1991 sessions period, and having considered the Report presented by its Chairman to this Organization on aspects that warranted immediate attention, including Environmental Law in the Americas, the Committee resolved (CJI/RES.II-9/91) to assign priority to consideration of the topic: "The Process Leading to the Establishment of an Environmental Law in the Americas", whose Rapporteur was Dr. Galo Leoro F. On this matter, the Rapporteur presented his Report during the March 1992 sessions period, which was adopted by the Committee (CJI/RES.I-5/92) and that also resolved "to keep this topic on its Agenda in order to continue with the examination thereof in the light of outcome of the United Nations Conference on the Environment and Development". It thus appointed "the Rapporteur to represent the Committee at this Conference, to be held in June this year in the city of Rio de Janeiro (CJI/RES.I-9/92)." Dr. Leoro advised the Committee of his participation in this Conference during the sessions period immediately after the Conference.

During the consideration of the Annual Report of the Committee (1992) by the Juridical and Political Affairs Commission of the Permanent Council, several Delegations emphasized the convenience of the Committee, under this topic, covering the juridical aspects arising from the international responsibility of States for environmental damage caused by transborder pollution. This Report was approved by the Permanent Council and submitted to the consideration of the General Assembly, which, during its 22nd Ordinary Sessions Period (Nassau, 1992), resolved [AG/RES.1166 (XXII-0/92)]:

To accept and transmit to the Inter-American Juridical Committee the comments and recommendations of the Permanent Council of the Organization on its Annual Report.

To accept the recommendation of the Juridical Committee to continue with the consideration of the topic of "The Process Leading to the Establishment of an Environmental Law in the Americas" (CJI/RES.I-5/92), taking into account, among other matters, the outcome of the United Nations Conference on the Environment and Development.

During its August 1992 sessions period, accepting the recommendation of the Permanent Council, the Committee incorporated into its list of topics: "Responsibility in terms of Environmental Law", appointing Dr. Galo Leoro as the Rapporteur for this subject as well.

The General Assembly of the Organization of American States, during its 23rd Ordinary Sessions Period, (Managua, 1993), having considered the recommendation which, at the proposal of the Environmental Committee, was submitted thereto by the Permanent Council, resolved [AG/RES.1241 (XXIII-0/93)]:

To request the Inter-American Juridical Committee to update the document on "The development of an Environmental Law in the Americas" in the light of the outcome of the United Nations Conference on the Environment and Development (UNCED) and the decisions on Sustainable Development of the United Nations".

In this same Resolution, the General Assembly requested the PC, through its Environment

Commission, to study and decide on the convenience of updating the 1940 Convention, as well as studying and deciding on the convenience of adopting an American Declaration on the Environment. With regard to the first point, the Committee consulted the Member-States and has already received the first replies.

In turn, the Undersecretariat for Juridical Affairs compiled a periodically updated catalog of the environmental legislation of the Member-States, as well as the Treaties in effect on this matter, and submitted an outline of the various declarations on the environment to the Environment Commission of the Permanent Council.

During its August 1993 sessions period, the Committee received from the Rapporteur his Report on "Responsibility in Environmental Law". This was approved and adopted by the Committee, which resolved to forward it to the General Secretariat in order to force it to be submitted to the Permanent Council (CJI/RES.II-19/93).

During the next Ordinary Sessions Period of the Committee, in January 1994, the Rapporteur presented an update of the document on "The Development of an Environmental Law for the Americas". In Resolution CJI/RES.I-3/94), in which the Committee forwarded this work to the Permanent Council, it decided the following:

To request the Permanent Council, through its Environment Commission, to establish if possible, the range and modalities of cooperation of the Committee for carrying out the tasks mentioned in item t) of Chapter III of the "Inter-American Action Program for the Conservation of the Environment", adopted through Resolution AG/RES.1114 (XXI-0/91).

To maintain on its Agenda the topic of Environmental Law, in order to discuss and adopt, during its next Ordinary Sessions Period, a specific work-plan on this issue, taking into consideration the input of efforts towards the progressive development of international environmental law on the continent, and in particular the efforts undertaken by the Agencies of the Organization for the preparation of a Declaration or Pact on the Environment or the possible preparation of an Inter-American Convention on the Environment.

The Juridical and Political Affairs Committee of the Permanent Council, when considering the Annual Report of the Committee (1994), took note with satisfaction of its compliance with the mandate of the Permanent Council, with regard to "Responsibility in Environmental Law". It received the updated document on the "Development of an Environmental Law in the Americas" and agreed with the request submitted by the Committee with regard to the need for the Permanent Council, in assigning responsibilities on the issues mentioned by item t) of Chapter III of the "Inter-American Action Program for Environmental Conservation". Finally, the Juridical and Political Affairs Committee advised the Committee of its agreement to keeping this topic on its Agenda (CP/doc.2479/94). The Permanent Council accepted these recommendations.

Later, during the 24th Ordinary Sessions Period of the General Assembly (Belem, 1994), the General Assembly resolved "to recommend the Permanent Council to establish, if possible, the scope and the modalities of cooperation requested by the Inter-American Juridical Committee for

carrying out the tasks referring to Environmental Law"

III. Juridical Dimension of Integration

In 1988, during its 18th Ordinary Sessions Period (San Salvador), the General Assembly of the Organization of American States, at the recommendation of the Permanent Council, resolved [AG/RES.944 (XVIII-0/88)] "to recommend to the Inter-American Juridical Committee that it undertake an inventory of the juridical obstacles that must be removed in order to make integration more effective on the American continent".

The following year, the General Assembly repeated this request to the Committee, recommending it to assign priority to this topic on its Working Agenda [AG/RES.1019 (XIX-0/89)], which was once again requested during the 1990 Ordinary Sessions Period [AG/RES.1034 (XX-0/90)]. During this latter sessions period (1990), the General Assembly also approved the Declaration of Asuncion which, among other matters, states that: "the Organization will firmly support efforts fostering the elimination of all obstacles to integration, regardless of the nature thereof".

The Committee appointed Dr. Manuel A. Vieira as Rapporteur of this topic, and during its August 1990 Ordinary Sessions Period, approved, through Resolution CJI/RES.II-13/90, a first "Report on the Juridical Obstacles Hampering more Effective Integration at the Continental Level". Some paragraphs of this are transcribed below:

"...Although some States might be said to have legal obstacles blocking integration, they are not insurmountable. They are natural, political and economic obstacles requiring a strong political will backed by public support, exerting a stronger pressures.... Notwithstanding these considerations, the Committee analyzed those legal issues which, to a greater or lesser extent, would have to be changed or would in principle need special consideration..

...In view of its juridical nature, one of the key domestic issues is constitutional, which hampers legal acceptance of decisions issuing from agencies with supranational functions... At a different level but in parallel to the above-mentioned constitutional barriers, another class of obstacles involves the incompatible attitudes assumed by some States at the domestic level to encourage and enforce international commitments designed to develop integration efforts of which they could become members.

...In the analysis of the obstacles that must be removed ... a distinction must be made between current obstacles and those that will arise as integration becomes increasingly more prevalent.

..Within the framework envisaged for the nineties, Law will play a more significant role. Harmonization of the various legal systems prevailing in the hemisphere must be a priority issue.

.To promote integration, the Committee believes that we should continue with our efforts to achieve proper legal regulation in areas such as international transportation,

insurance, international contracts, and bilateral or continental joint ventures."

When this Report was being considered by the Juridical and Political Affairs Committee of the Permanent Council, "most Delegations confirmed their support for a study of the juridical problems involved with integration... and in view of the focus that should be given to this topic, various Delegations thought that, due to its size, it was necessary to stipulate the scope thereof", adding that "the general examination of this problem should be considered as ended, moving into a new stage consisting of the study of concrete problems or aspects involved in this issue" (AG/doc.2683/91).

During its 21st Ordinary Sessions Period (Santiago, 1991), the General Assembly, through Resolution AG/RES.1104 (XXI-0/91), entitled "Juridical Obstacles to Integration", resolved: "to request the Permanent Council to urgently... identify and examine which are the top priority issues for the preparation of coordinated normative solutions fostering the economic and social integration of the region, assigning as it deems pertinent to other competent agencies of the Organization of American States the implementation of studies and preparation of documents on these issues, coordinating action therewith in this regard".

In turn, when considering the Annual Report of the Committee, the General Assembly, during this same 21st Ordinary Sessions Period, resolved [AG/RES.1129 (XXI-0/91)]:

To recommend to the Inter-American Juridical Committee that it should consider the juridical aspects which, in terms of integration, are specified in the comments and recommendations of the Permanent Council and in its Annual Report, as well as those covered by Resolution CP/RES.559 (851/91) (*Note: Resolution relative to the Enterprise for the Americas*), with regard to the topic "Juridical Obstacles that must be removed in order to Foster more Effective Integration on the American Continent".

In compliance with the first of these Resolutions passed by the General Assembly, the Permanent Council set up a Working Group on Juridical Obstacles to Integration, which began its task on 31 October 1991. This Group prepared a questionnaire to be sent to the governments in order to discover their points of view on the role appropriate to the Organization of American States in the integration processes under way. The Group later prepared a Questionnaire addressing the various mechanisms as well as regional and sub-regional integration organizations. Both the Questionnaires and the replies received were published in the respective informative documents of the Working Group.

In compliance with the second of these Resolutions passed by the General Assembly, the Inter-American Juridical Committee approved the following topic on its Agenda:

Juridical obstacles that must be removed in order to foster more effective integration on the American continent

- a) Preparation of a comparative table of the constitutional texts and the juridical consequences that prompt the development of integration processes.

Rapporteur: Dr. Jorge Reinaldo A. Vanossi

- b) International Transportation
Rapporteur: Dr. Juan Bautista Rivarola
- c) Insurance
Rapporteur: Dr. Manuel A. Vieira
- d) International Contracts
Rapporteur: Dr. José Luis Siqueiros
- e) Joint Companies
Rapporteur: Dr. Francisco Villagrán-Kramer

During its March 1992 sessions period, the Committee heard the Reports covering the comparative table of constitutional texts, as well as joint companies, and carried out a first interchange of information on the Preliminary Report on International Transportation.

With regard to joint companies, through Resolution CJI/RES.I-7/92, in addition to resolving to maintain this topic on its Agenda, which was approved the same year by the General Assembly of the Organization of American States, the Committee stated that ..."it was inclined to recommend that the Member-States of the Inter-American System should examine the variations and existence of provisions facilitating the setting up of joint companies in the country and the acknowledgment and operation thereof in other countries, in order to incorporate them into their legislation, where appropriate.

Through Resolution CJI/RES.I-6/92, the Committee adopted the Report presented by its Rapporteur on the preparation of a Comparative Table of the Constitutional Texts, and submitted this to the consideration of the Permanent Council .

The General Assembly of the Organization of American States, during its 22nd Ordinary Sessions Period (Nassau, 1992), resolved "to request the Permanent Council, the Inter-American Juridical Committee and the General Secretariat to continue to coordinate activities covering the political and technical analysis of the juridical dimension of regional integration" [AG/RES.1163 (XXII-0/92)].

During its next sessions period in August 1992, through Resolution CJI/RES.II-21/92 the Committee adopted the Final Report presented by its Rapporteur on the topic of "Joint Companies" and resolved that "this topic does not at the moment require the adoption of an Inter-American Convention, but it feels that this Report should be analyzed by the governments themselves in order to decide whether or not to incorporate into the national legislations legal provisions applicable to Joint Companies". This proposal was accepted by the Committee on Juridical and Political Affairs of the Permanent Council of the Organization of American States, when hearing the Annual Report of the Committee.

During this same August 1992 sessions period, the Committee also considered a lengthy Preliminary Report on International Transportation.

During its 23rd Ordinary Sessions Period (Managua, 1993), the General Assembly of the

Organization of American States repeated its request "to the Permanent Council of the Organization of American States, the Inter-American Juridical Committee and the General Secretariat that they should continue to coordinate the activities relevant to fostering a study in greater depth of the political and technical analysis of the juridical dimensions of regional integration".

In turn, the Permanent Council of the Organization of American States, in the recommendation of the Working Group on Juridical Obstacles to Integration, requested the Committee in the session held on 28 October 1992 to formulate comments and observations that might arise over a questionnaire addressed to the governments prepared by the group, taking into account the replies received. During its March 1993 sessions period, the Committee commissioned Dr. José Luis Siqueiros and Dr. Jonathan T. Fried to prepare a Report regarding compliance with this request from the Permanent Council .

During its August 1993 sessions period, the Committee considered the Report from Dr. José Luis Siqueiros and the Report from Dr. Jonathan T. Fried. In his Report, Dr. José Luis Siqueiros formulated a series of considerations, one of which queried the title of the topic. In his Report, this Rapporteur stated: "I do not believe that the concept of juridical obstacles is very appropriate... their components are not juridical obstacles or impediments as such that must be removed in order to achieve integration. What is desired is to improve their normativity, updating or harmonizing this".

The Rapporteur then analyzed the questions submitted for the consideration of the governments. The Committee adopted this Report and resolved (CJI/RES.II-15/93): to eliminate from its Agenda this specific topic, without adversely affecting the ongoing study of all aspects concerning the juridical dimensions of integration.

Also with regard to this topic, the Committee resolved to begin studies of legislation covering bankruptcy and insolvency (CJI/RES.II-13/93).

During this same sessions period, when establishing the list of topics for its next sessions period, the Committee incorporated the topic of "The Juridical Dimension of Integration", centering this on the "Methods of Settlement of Sub-Regional Integration and Free Trade Schemes":

- i. Cartagena Agreement
- ii. Caricom Pact
- iii. Mercosul
Rapporteurs: Dr. Ramiro Saraiva Guerreiro
Dr. Miguel Angel Espeche Gil
- iv. North American Free Trade Treaty (NAFTA)
Rapporteurs: Dr. José Luis Siqueiros
Dr. Jonathan T. Fried

During its January 1994 sessions period, the Committee heard Reports from Rapporteurs Dr.

Saraiva Guerreiro, Dr. José Luis Siqueiros and Dr. Jonathan T. Fried, and resolved (CJI/RES.I-4/94):

To continue to implement special studies on the juridical regimes covering the settlement of disputes adopted under economic integration schemes:

- a) Cartagena Agreement (Andean Group)
- b) Central American Integration System and Central American Common Market (CACM)
- c) Caribbean Community (CARICOM)
- d) Group of Three Economic Integration Group (G-3)
- e) Latin American Integration Association (LAIA)
- f) Bilateral Free Trade and/or Economic Support Agreements signed within LAIA.

The Committee shall:

- a) Examine the above-mentioned special studies.
- b) Carry out a comparative examination of the regimes for the settlement of disputes.
- c) Prepare conclusions on the basic guidelines and relevant elements of the above-mentioned procedures.
- d) Prepare recommendations on the improvement of such procedures, as well as the convenience of developing procedures of this type in economic integration schemes where pertinent, and as technical background information for the development of international economic law and economic integration law, and as a basis for future work by the Committee on this matter

When establishing the Agenda for its next sessions period (August 1994), in Item 3 "Juridical Dimension of Integration" it resolved to appoint the following Rapporteurs:

- a) Cartagena Agreement
Rapporteur: Dr. Alberto Zelada Castedo
- b) Caricom Pact
Rapporteur: Dr. Philip T. Georges
- c) The Mercosul

Rapporteurs: Dr. Ramiro Saraiva Guerreiro
Dr. Miguel Angel Espeche Gil

- d) North American Free Trade Agreement (NAFTA)
Rapporteurs: Dr. José Luis Siqueiros
Dr. Jonathan T. Fried
- e) Juridical regulations for settling disputes in Bilateral Free Trade and Complementary Economic Treaties.
Rapporteur: Dr. Alberto Zelada Castedo
- f) The Central American Common Market
Rapporteur: Dr. Mauricio Gutiérrez Castro
- g) The Central American Common Market
Rapporteur: Dr. Luis Herrera Marcano

When considering the Annual Report of the Committee (1994), the Juridical and Political Affairs Committee of the Permanent Council took note of these Resolutions of the Committee and expressed its satisfaction regarding the proposal of studying the methods for the settlement of disputes in some integration schemes whose processes are under way in the region (CP/doc.2479/94), which recommendations were adopted by the Permanent Council .

During its 24th Ordinary Sessions Period (Belém, 1994), the General Assembly resolved the following:

"To request the Inter-American Juridical Committee to assign top priority to the study on the way on all aspects of the juridical dimension of integration, particularly with regard to methods for the settlement of disputes in integration and free trade agreements, in accordance with Resolution CJI/RES.I-4/94, and requesting the Committee to cooperate on these topics with the Special Trade Commission, and taking note of Resolution CJI/RES.II-15/93, whereby it eliminates from its list of topics the issue of juridical obstacles to integration".

IV. Improvement of the Administration of Justice in the Americas

In 1985, the Inter-American Juridical Committee approved Resolution CJI/RES.I-02/85, "Improvement of the Administration of Justice in the Americas", whereby, as an advisory agency of the Organization of American States on juridical affairs, "acknowledging the importance of the Administration of Justice in the Americas for the rule of law, the preservation of human rights and peace, and taking into account that the administration of autonomous efficient and moral justice is the best guarantee for achieving well-balanced development that reduces inequalities in a climate of freedom", resolved to request information from the Member-States of the Organization of American States through the General Secretariat thereof "on the progress of the efforts by the corresponding governments and private groups such as juridical associations towards the improvement of the Administration of Justice in the Americas", appointing Dr. Seymour J. Rubin and Dr. Roberto

MacLean Ugarteche as Rapporteurs on this topic.

This same year, during its Ordinary Sessions Period in August 1985, through Resolution CJI/RES.II-11/85, and having heard from its Rapporteurs, the Committee resolved to recommend that the General Secretariat should organize a seminar with magistrates, judges and specialists, emphasizing the convenience of meetings with international law societies and associations of lawyers and judges.

During its January 1986 Ordinary Sessions Period, in CJI/RES.I-04/86, having considered the communication from the Secretary General of the Organization of American States dated 23 August 1985 on the positive response from the various Member-States of the Organization and the Reports of the Rapporteurs on this topic which mentioned not only the manifestations of interest on the part of national and international of legal organizations, the Committee resolved to forge ahead with the organization of the Seminar on this matter, and suggested a possible list of topics, which it repeated during its next sessions period (CJI/RES.II-11/86, as well as during the January 1987 sessions period (CJI/RES.I-02/87).

On 7 and 8 August 1987, a seminar was held in Rio de Janeiro at the Getúlio Vargas Foundation on "Improvement of the Administration of Justice in the Americas", sponsored by the Inter-American Juridical Committee, in which experts from various countries in the region took part, as well as the members of the Inter-American Juridical Committee itself.

As a consequence of this meeting, during the August 1987 Ordinary Sessions Period, through Resolution CJI/RES.II-18/87, the Committee decided to keep this topic on its Agenda and requested the co-Rapporteurs to take the necessary steps to set up a Working Group to assist them, consisting of experts in various fields of law. In the Exposition of Motives accompanying this Resolution, they outlined the context made to date by the co-Rapporteurs, as well as making general comments on the above-mentioned Seminar.

A second Seminar was held on this same topic in August the following year, also in Rio de Janeiro, in which institutions from various American nations took part, such as the Inter-American Federation of Lawyers, and the Inter-American Lawyers Foundation, as well as the Presidents of Judges Associations. It was agreed at this meeting that, in order to foster the development of democracy, it is necessary to improve the Administration of Justice in the Americas, and that it would be important to encourage the study of both long-standing problems (better training for judges and lawyers), as well as alternative systems for the settlement of disputes (reconciliation, mediation, arbitration). There was also agreement on the need to improve the interchange of information. In function of these suggestions, through Resolution CJI/RES.II-1/88, the Committee put forward the list of topics for a third seminar on this matter.

In August 1989, through CJI/RES.II.1/89, the Committee resolved "to recommend the establishment of an Inter-American Association of a private nature that would work in close collaboration with government and intergovernmental agencies, and in common agreement with the General Secretariat of the Organization of American States, in order to streamline at the hemispherical level discussion an examination of methods and activities leading to the improvement of the Administration of Justice in the Americas", and proposed this association should be called the Inter-American Association for the Administration of Justice in the Americas - IAAJA.

The General Assembly of the Organization of American States, during its 19th Ordinary Sessions Period (Washington, 1989), resolved [AG/RES.1019 (XIX-0/89)] "to take note of the Resolution on the improvement of the Administration of Justice in the Americas and to recommend to the Committee that it should consider a study of this topic, advising the Assembly of the results thereof".

In 1990, the Committee reiterated the importance that it assigned to the study of the improvement of the Administration of Justice in the Americas and requested the Rapporteurs "to continue with their efforts on this topic" (CJI/RES.II-4/90). The General Assembly of the Organization of American States, in turn, during its 21st Ordinary Sessions Period (Santiago, 1991), requested the Committee to continue with the study of this topic [AG/RES.1129 (XXI-0/91)].

During its August 1991 sessions period, in Resolution CJI/RES.II-7/91, the Committee decided that the Rapporteurs for this topic should continue to study it on the basis of the following guidelines:

They should continue with these efforts and seek financing, both public and private, for the preparation of a series of Reports and for cooperation, principally in the following sectors:

- Access to justice for needy persons without resources;
- Alternative methods for the settlement of disputes;
- Better training for judges and other employees in the administration of justice, including arbitration judges;
- Instruct those interested on ways of access to the courts or alternative methods for the settlement of disputes.

From this period onwards, Dr. Seymour J. Rubin was the only Rapporteur on this topic.

During its Ordinary Sessions Period held in Nassau in 1992, the General Assembly of the Organization of American States reiterated its recommendation to the Committee to continue with the study of this topic [AG/RES.1166 (XXII-0/92)].

When establishing its working Agenda for the August 1992 sessions period, the Committee resolved the following:

Improvement of the Administration of Justice in the Americas
Rapporteur: Dr. Seymour J. Rubin

- a) Facilitation of access to justice
- b) Human rights and the delayed application of justice
- c) Protection and guarantees for judges and lawyers in the exercise of their functions

- d) Simplification of judicial procedures
- e) Appointment of Magistrates and Court functionaries.

The Committee later appointed Dr. Manuel A. Vieira as Rapporteur for point b), "Human rights and the Delayed Application of Justice".

In February 1993, the Inter-American Development Bank organized the Seminar on the Administration of Justice held in San José, Costa Rica, which was attended by Dr. Philip Telford Georges as the Observer appointed by the Inter-American Juridical Committee.

During its August 1993 sessions period, the Committee reiterated the need to continue with the study of this topic (CJI/RES.II-17/93) and, when preparing the list of topics for its forthcoming sessions, grouped various points under this topic, in the following manner:

- a) Streamlining access to justice. Simplification of judicial procedures.
- b) Human rights and delays in justice.
- c) Appointment of Magistrates and Court employees. Protection and guarantees for judges and lawyers in the exercise of their functions.

Dr. Seymour J. Rubin was appointed Rapporteur for Item a); Dr. Jonathan T. Fried was appointed Rapporteur for Item c), and during the following sessions period, Dr. Luis Herrera Marcano was appointed Rapporteur for Item b).

When considering the Annual Report of the Committee in April 1994, the Juridical and Political Affairs Committee of the Permanent Council of the Organization of American States emphasized "the importance for the general strengthening of the fundamental institutions of the State, of this topic focusing on the Administration of Justice", and "agreed to request the Inter-American Juridical Committee to continue with the studies on this topic, cooperating with the various institutions that are active in this field" (CP/doc.2479/94).

During its 24th Ordinary Sessions Period (Belém, 1994), the General Assembly of the Organization of American States then resolved "to request the Inter-American Juridical Committee, in compliance with its Resolution CJI/RES.II-17/93, to continue with studies on the improvement of the Administration of Justice in the Americas and to seek to cooperate on this matter with government, intergovernmental and non-government institutions acting in this field".

V. Peaceful Settlement of Disputes

During its first Ordinary Sessions Period (San José, Costa Rica, 1971), the General

Assembly of the Organization of American States resolved "to charge the Inter-American Juridical Committee, in the light of the provisions of Article 26 of its Charter, to study treaties and conventions involved in the Inter-American Peace System..." [AG/RES.54 (I-O/71)].

In September 1971, the Committee prepared a Statement on the Strengthening of the Inter-American Peace System (see Inter-American Juridical Committee "Recommendations and Reports", 1967-1973, page 392 and following), in which it concludes: "...that the best way to consolidate and improve the inter-American Peace System is the Pact of Bogotá, which should be ratified by the States that have not yet done so".

In response to this statement, the government of Ecuador formulated a series of comments, stating that the Pact of Bogotá had negative aspects that helped reduce its applicability and the refusal of certain States to ratify it. In view of these comments, on 13 February 1973, the Committee issued a new statement (see Idem page 556 and following) in which it resolved to □maintain its statement dated September 1971 on the strengthening of the inter-American Peace System□.

The General Assembly of the Organization of American States, during its 13th Ordinary Sessions Period (Washington, 1983), approved Resolution AG/RES.680 (XIII-0/83). In it, the General Assembly took note that, according to the inter-American Treaties and Conventions in force, such as the Pact of Bogotá of 1948, there are many procedures for handling the peaceful settlement of disputes, and resolved "to request the General Secretariat, with the assistance of the Inter-American Juridical Committee, to prepare a study of these procedures and additional actions that could be taken to promote update or expand them...".

In compliance with this Resolution, the General Secretariat prepared the document entitled □Peaceful Settlement of Disputes within the Juridical and Institutional Structure of the Organization of American States□.

During its Ordinary Sessions Period in July-August 1984, the Committee approved a lengthy Resolution on this matter. This was accompanied by an Annex prepared by Rapporteur Dr. Sergio González Gálvez, with a dissident reasoned vote from Dr. Roberto MacLean Ugarteche and supporting reasoned votes from Dr. Galo Leoro Franco and Dr. Luis Herrera Marcano (see this text in Inter-American Juridical Committee □Reports and Recommendations□, 1984). In this Resolution, the Committee decided □to make a formal statement on the convenience of directing its efforts on this topic to □additional action that could be taken to promote update and expand these procedures□, and recommended a series of measures designed to strengthen the system for the peaceful settlement of disputes within the institutional and juridical system of the Organization of American States.

On the other hand, from 1973 onwards, the General Assembly of the Organization of American States had set up a special commission to propose the restructuring and reforms needed to update the inter-American system. During successive periods of the General

Assembly, this Commission proposed reforms in the various instruments that constitutes the System. In 1984, during its 19th Ordinary Sessions Period (Brasilia, 1984), the General Assembly resolved through Resolution AG/RES.745 (XIV-0/84), □to request the Permanent Council, ... with the assistance of the Inter-American Juridical Committee, to prepare a Draft Reforms of the basic instruments of the Organization of American States in order to strengthen institutional mechanism for Inter-American Cooperation□.

In August 1985, the Permanent Council commissioned the Inter-American Juridical Committee to carry out an examination of the American Treaty on Peaceful Settlement of Disputes (Pact of Bogota, 1948) taking into account the reservations stated by the signatory states thereof, as well as reasons that could be causing various Member-States to avoid ratifying it, in order to determine if, in order to ensure its validity, reforms were required for this instrument.

With regard to this mandate, the Committee appointed Dr. Galo Leoro as the Rapporteur, who presented a detailed Report this same month. Through Resolution CJI/RES.II-13/85, the Committee issued a lengthy statement which analyzed the articles of the Pact of Bogota and recommended amendments thereto (see the text of this statement as well as the reasoned votes of various members of the Inter-American Juridical Committee in □Reports and Recommendations□, 1985, pages 60-101).

In turn, the government of Colombia presented a draft Inter-American Treaty for the Peaceful Settlement of Disputes, regarding which, during its 16th Ordinary Sessions Period (Guatemala, 1986), the General Assembly resolved [AG/RES.821 (XVI-0/86)] to request comments thereon, from the Member-States of the Organization of American States, and assigned the study thereof to the Permanent Council . Regarding this study, during the 17th Ordinary Sessions Period of the General Assembly (Washington, 1987), through Resolution AG/RES.877 (XVII-0/87), the General Assembly resolved □to request the Inter-American Juridical Committee to update the study of the reasons whereby a large number of states are not signatories to the American Treaty on the Peaceful Settlement of Disputes - Pact of Bogota".

Under this mandate, in 1988 (CJI/RES.II-10/88) the Inter-American Juridical Committee resolved "to request the General Secretariat of the Organization of American States to contact the corresponding Member-States of the Organization in order to request them to advise it, for transmission to this Committee, of the reasons whereby they have not as yet signed the inter-American Treaty on the Peaceful Settlement of Disputes - Pact of Bogota".

In this same 1988 sessions period, the Committee appointed Dr. Galo Leoro Franco and Dr. Luis Herrera Marcano as co-Rapporteurs on this topic. They presented a Preliminary Report which was examined in detail by the Committee on 24 August, approving a Provisional Report (CJI/RES.II-11/88). In this Report, the Committee stated, among other matters, that "...in view of the importance of this topic and its eminently political nature, as

the ratification of the treaty corresponds fully to an act appropriate to the sovereignty of the State, and that this may be affected by motives of a juridical order, it would not be possible for the Inter-American Juridical Committee to assume the responsibility, without some objective foundation for responding to this legitimate concern of the General Assembly ...; ... most of the non-ratifying states have not made any statements that would allow examination of their respective positions through this means ... and that ... only with the replies received from the States would it be feasible for the Inter-American Juridical Committee to study them and reach updated general and specific conclusions on this situation, which is in fact of much concern...".

In 1989, the General Assembly took into account the comments of the Committee and extended its mandate for the study of this topic, requesting that "it should take into account, in addition to the documents existing within the Organization, other background matters on this issue" [AG/RES.1019 (XIX-0/89)].

During its August 1989 sessions period, the Committee once again studied this topic and noted that only three States had replied, whereby it agreed to request the Secretary General to once again ask the States to forward their replies with the greatest possible urgency.

In 1990, when it once again brought this topic under study, the Committee considered on the one hand that it had not obtained additional responses from the States and that on the other hand, its juridical opinion was expressed in its statement dated 1985, commented that "...the Committee considered that this topic should not continue on its Agenda" (CJI/RES.II-7/90).

In 1991, when this Resolution was under examination by the Juridical and Political Affairs Committee of the Permanent Council of the Organization of American States, various delegations expressed "their interest in the Committee continuing to study this topic of the peaceful settlement of disputes *in genere* in order to ensure that all Member-States have effective procedures and mechanisms for this purpose". (CP/doc.2157/91)

The Permanent Council adopted the Report of the Commission and the General Assembly and during its 21st Ordinary Sessions Period (Santiago, 1991) resolved to "accept and transmit to the Inter-American Juridical Committee the comments and recommendations of the Permanent Council of the Organization of American States on its Annual Report [AG/RES.1129 (XXI-0/91)].

Since then, the Committee has included in its list of topics the peaceful settlement of disputes, appointing Dr. Galo Leoro Franco as the Rapporteur thereof.

VI. Human Rights and the Principles of Non-Intervention

In 1959, the Inter-American Juridical Committee prepared a document entitled "Draft Instrument on Cases of Violations to the Principle of Non-Intervention". During its second Ordinary Sessions Period (Washington, 1972), the General Assembly of the Organization of American States commissioned a study on this topic from the Permanent Council which in turn requested the Committee, should it consider this necessary, to add fresh elements to its 1959 statement. The Committee appointed Dr. Edmundo Vargas Carreño as Rapporteur and promptly set up a Working Group consisting of the Rapporteur, with Dr. Reinaldo Galindo Pohl and Dr. William Barnes.

In February 1974, the Committee presented its Report on "Cases of Violations of the Principle of Non-Intervention" to the Permanent Council, enumerating the acts that could be characterized as intervention. It added an exposition of motives, as well as the reasoned vote of various members of the Committee (see Inter-American Juridical Committee "Recommendations and Report", 1974-1977, pg. 95 and following). The above-mentioned Report was approved by the Permanent Council and forwarded by the General Assembly to the governments for their comments [AG/RES.184 (V-O/75)].

In 1985, in its Report on the "Definition and Development of the Principles which should Regulate Relations between the States, in addition to those already included in the Charter of the Organization of American States and other Inter-American instruments" (CJI/RES.I-07/85), the Committee stated that "...when beginning to examine the possibility of preparing an instrument that would list the large number of cases that constitute intervention, on the basis of the Draft of the Inter-American Juridical Committee itself, dated 1959, it was felt that the adoption of a project such as that mentioned would take place in a manner similar to that contained in Article 18 of the Charter of the Organization of American States; this would thus consolidate this principle and would help guarantee peace and tranquillity on the continent, by clearly enumerating acts that would necessarily mean a violation of the Principle of Non-Intervention ...".

In 1989, Committee Member Dr. Seymour J. Rubin requested the introduction of the topic "Study of Legitimacy in the Inter-American System and the Inter-Relationship thereof with the Provisions of the Charter of the Organization of American States on Self-Determination, Non-intervention, Representative Democracy, and Protection of Human Rights" into the Agenda of the Inter-American Juridical Committee. The proposer and Dr. Francisco Villagrán-Kramer were appointed Rapporteurs.

During its August 1991 sessions period, the Rapporteurs presented a first Report on this topic, of which presentation the Committee resolved to take note and to continue with the study, once new observations and comments on this matter has been received. During this same sessions period, in view of the comments made by Dr. Francisco Villagrán-Kramer on the topic of "Human Rights and the Principle of Non-Intervention", the Committee resolved (CJI/RES.II-10/91):

1. To incorporate into the Agenda the topic of "Human Rights and the

Principle of Non-Intervention", and for the purpose of continuing the study thereof, to appoint Dr. Francisco Villagrán-Kramer as its Rapporteur.

2. To forward to the General Secretariat of the Organization of American States and the Inter-American Human Rights Institute, a copy of this study, requesting their opinion on it. It also requested the General Secretariat of the Organization of American States to forward background information on this topic as well as its comments thereon.

The Juridical and Political Affairs Committee of the Permanent Council of the Organization of American States, when considering this Resolution through the examination of its Annual Report in 1992, requested the Committee to continue with the study in question and agreed that the Committee could request the Inter-American Human Rights Commission and Court for their collaboration in compiling documents for the further study of this topic (CP/doc.2265/92).

During its 22nd Ordinary Sessions Period (Nassau, 1992), the General Assembly of the Organization of American States resolved "to note that the Inter-American Juridical Committee has incorporated into its Agenda the topic of "Human Rights and the Principle of Non-Intervention" [AG/RES.1166(XXII-O/92)].

The Rapporteur presented a Report to the Committee, but, during its August 1992 Ordinary Sessions Period advised that, due to his imminent departure at the end of his mandate, he would not be able to accept the task of Reporting on this topic and that he consequently removed this Report from consideration, whereby the Committee appointed Dr. Luis Herrera Marcano as Rapporteur. During the same sessions period, various members of the Committee requested that the "Member-States of the Organization of American States should consider the possibility of extending the system of suspension of rights of Member-States... to cases of reiterated violations of Human Rights".

VII. Juridical Aspects of Corruption in the Americas

During the August 1992 Ordinary Sessions Period, the Inter-American Juridical Committee incorporated into its Agenda the topic of "First Approach to Juridical Aspects of Corruption in the Americas", appointing Dr. Jorge Reinaldo A. Vanossi as Rapporteur, who presented a Preliminary Report (CJI/SO/II/doc.2/92).

The Juridical and Political Affairs Committee of the Permanent Council of the Organization of American States, when considering the Annual Report of the Committee in 1993, agreed to recommend that it continue with the study of this topic (CP/doc.2380/93).

At the end of the mandate of Dr. Jorge Reinaldo A. Vanossi as a member of the Committee, Dr. Miguel Angel Espeche Gil was requested to prepare a Report on this topic (CJI/RES.II-23/93).

VIII. Democracy in the Inter-American System

As indicated in Chapter VI, in 1989, Dr. Seymour J. Rubin proposed the inclusion in the Agenda of the Committee of the topic of "Study of Legitimacy in the Inter-American System and the Inter-Relationship of the Provisions of the Charter of the Organization of American States on: Self-Determination, Non-Intervention, Representative Democracy, and Protection of Human Rights. The Rapporteurs, Dr. Seymour J. Rubin and Dr. Francisco Villagran-Kramer, presented a first Report in August 1991.

During the August 1992 Sessions Period, the Rapporteurs presented a new Report (CJI/SO/I/doc.13/91 rev.2), which included the following parts: **Introduction**. **Part I**. The System, prior to the Protocol of Cartagena de Indias.

(1) The First Regional American Scheme. (2) The UN Charter and the effects thereof. (3) The Pact of Bogota 1948. (4) Strengthening and effective exercise of Democracy and its relationship to Human Rights. (5) The Scope of the Principle of Non-Intervention. **Part II**. The Protocol of Cartagena de Indias. **Part III**. The Commitment of Santiago for democracy and the renovation of the regional system. (1) Nature of the Commitment of Santiago. (2) Scope of the Commitment of Santiago. **Part IV**. Application of the Principle of Legitimacy 1991-1992.

The Committee resolved to study this topic during a forthcoming session, without having, to date, included it again in its list of topics.

In March 1993, Dr. Eduardo Vio Grossi proposed the inclusion of the topic "Democracy in the Inter-American System". The Committee agreed to incorporate this into its list of topics and appointed the proposer as its Rapporteur.

Dr. Vio Grossi presented a first preliminary Report in August 1993, consisting of an Introduction, Part I covering applicable law, Part II covering the action of the states, and Part III referring to the actions of the Organization of American States (CJI/SO/II/doc.10/93). In January 1994, the Rapporteur presented a second Preliminary Report (CJI/SO/doc.11/94) which analyzed some aspects of Part I of the first Preliminary Report and stated his intention of presenting a third Preliminary Report which would contain an analysis of all the aspects indicated in the first of the above-mentioned Reports.

The Juridical and Political Affairs Committee of the Permanent Council of the Organization of American States, when considering the corresponding Annual Report of the Inter-American Juridical Committee in April 1994, requested the Committee to continue with the study of this topic, "insofar as this refers to one of the basic supports of the Inter-

American System" (CP/doc.2479/94), and the General Assembly of the Organization of American States, during its 24th Ordinary Sessions Period (Belem, 1994), resolved "to exhort the Inter-American Juridical Committee to continue with studies on Democracy in the Inter-American System, as this is one of the fundamental topics of the Organization".

IX. Juridical Aspects of Foreign Debt

On opening the July-August 1989 Sessions Period, the Chairman of the Committee, Dr. Jorge Reinaldo Vanossi, in his Report (CJI/RES.II-5/89) indicated that, on 18 May 1989, he had received a note from Dr. Seymour J. Rubin advising him of the discussions and decisions of juridical aspects of foreign debt that had taken place in the Assembly of the Spanish-Portuguese American Institute of International Law, and in particular on the possibility of requesting a consultative opinion from the International Court of Justice regarding the validity of unilateral hikes in interest rates by creditors, as well as the possible future responsibility of the states to which these creditor banks belong. On this point, the Chairman took note of a communication on this same matter forwarded to him by the Argentine Chancellery, as well as a communication from the Undersecretariat of Juridical Affairs of the Organization of American States, advising him that this topic had been handled by the Permanent Council of the Organization of American States.

Dr. Seymour J. Rubin and Dr. Roberto MacLean Ugarteche proposed that the legal aspects of foreign debt should be incorporated into the Agenda of the Committee, which decided to do so, appointing as its Rapporteurs, the proposers and Dr. Francisco Villagran-Kramer.

In August 1990, Dr. Francisco Villagran-Kramer presented a Report entitled "Notes for the Study of Foreign Debt", and stated that "in order to continue properly with the consideration of this topic, the Committee had to stipulate the focus, nature and scope of the statement which it could issue on this matter". The Committee then held a broad-ranging debate on this matter (See Inter-American Juridical Committee, "Reports and Recommendations", 1990, pages 82 and 83), in which it established a consensus among its members "with regard to the need to reach clearcut terms of reference that allow this issue to be approached in a manner that will permit Committee to reach a positive final result".

In 1993, the Committee once again included this topic in its Agenda, appointing Dr. Miguel Angel Espeche Gil as Rapporteur. During the August sessions period of the same year, the Rapporteur presented a Report entitled "Juridical Aspects of Foreign Debt" (CJI/SO/II/doc.2/93 rev.2). In this regard, the Committee adopted Resolution CJI/RES.II-18/93 which indicated that:

GIVEN the persistence of the problem of the foreign debt that jointly affects all the countries of the Inter-American System;

IN ACCORDANCE WITH the aspiration to foster justice in international economic relations;

TAKING INTO ACCOUNT the need to respect the norms of International Public Law and Private Law, in the search for solutions that further the harmonization of all the legitimate interests in play, removing obstacles to the sustained development and well-being of the peoples of the Continent;

CONSIDERING the initiatives undertaken by academic organizations, parliaments and international forums, such as that which suggests the insertion of a consultative procedure submitted to the International Court of Justice, it being advisable that this topic should be studied in greater depth in quest of fair and equitable solutions to the problem;

RESOLVES:

1. To continue the examination of this topic and request the Rapporteur to keep the Committee promptly advised of the advances in its development;
2. To annex the Report entitled "Legal Aspects of Foreign Debt" to this Resolution;

Dr. Luis Herrera Marcano added an explanation of his affirmative vote, "...on the understanding that by attaching this to the Report of the Rapporteur, this did not constitute any statement by the Committee on the contents thereof...".

In January 1994, Dr. Miguel Angel Espeche Gil informed the Committee on the recent developments of this topic, as well as the organization of a seminar on this matter in September 1993, held in Brasilia, arranged by the Latin-American Parliament.

When considering the Annual Report of the Juridical Committee for 1994, the Juridical and Political Affairs Committee of the Permanent Council of the Organization of American States took note of the Resolutions adopted by the Committee (CP/doc.2479/94).
25 July 1994.

RESOLUTIONS APPROVED



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/RES.II-9/94

HOMAGE TO DR. SEYMOUR J.RUBIN

(Resolution adopted in the Ordinary Sessions Period
held on 9 August 18 1994)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS:

Dr. Seymour J. Rubin, as a Member of the Inter-American Juridical Committee for twenty years, has contributed input of extraordinary value to the efforts of this Organization, as the outcome of his valuable experience in international affairs, and his knowledge of the various branches of Law in the U.S.A, which is indispensable to the work of the Committee;

During the course of his long and fruitful activities as a Member of this Committee, Dr. Rubin has accumulated a valuable collection of knowledge on the issues under study by this Organization;

The Statutes of the Inter-American Juridical Committee permit it to invite qualified persons to take part in its work;

The term of office of Dr. Rubin expires in December;

RESOLVES:

1. To consider Dr. Seymour J. Rubin as an Honorary Member Emeritus of the Inter-American Juridical Committee, with a standing invitation to attend its Sessions;

2. To express its most sincere thanks to Dr. Seymour J. Rubin for his extraordinary contributions supporting the efforts of the Inter-American Juridical Committee, wishing him continued success in his activities;

3. To hand the text of this Resolution to Dr. Rubin, signed by the Members of the Inter-

American Juridical Committee.

This Resolution was approved unanimously at the 9 August 1994 regular session, with the following members present:

Drs. José Luis Siqueiros, Ramiro Saraiva Guerreiro, Luis Herrera Marcano, Miguel Angel Espeche Gil, Galo Leoro Franco, Mauricio Gutiérrez Castro, Jonathan T. Fried, and Philip Telford Georges.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/RES.II-10/94

COOPERATIVE RELATIONS

(Resolution adopted at the regular session,
held on 11 August, 1994)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSCIOUS of its responsibilities under Article 108 of the Charter of the Organization of American States;

RECOGNIZING the importance of coordinating its activities with those of other international organizations and entities, consistent with Article 32 of its Statutes;

REAFFIRMING its authority under Articles 23 and 24 of its Statutes to invite specialists in various subjects to take part in its discussions and to hold joint meetings with entities that specialize in the study of international juridical problems;

NOTING the recommendation of the General Assembly in paragraph 11 of resolution AG/doc.3131/94 that the Committee continue, with the assistance of the General Secretariat, to coordinate its activities with regional and global organizations, especially through regional and sub-regional integration organizations, the United Nations, the Hague Conference on Private International Law, and the International Institute for the Unification of Private International Law (UNIDROIT);

RECALLING that the participation of representatives of the Committee and of the International Law Commission of the United Nations as observers in each other's regular sessions continues to enrich the work of both organizations;

WITH A VIEW TO promoting the breadth of perspectives on international legal issues that may be provided by the Committee's Course on International Law;

CONVINCED that wider dissemination of its work and enhanced dialogue with international organizations engaged in activities of interest to the Committee, including the World Bank and the Inter-American Development Bank, as well as with bar associations and the international legal community is essential to promoting the codification and progressive development of international law and the rule of law in the Americas,

RESOLVES:

1. To request the Chairman of the Committee to explore with representatives of the following organizations, among others, opportunities for enhanced cooperation and avoidance of duplication of work, consistent with its continuing cooperation with the International Law Commission, including in particular for extending invitations to participate as lecturers at the Committee's Course on International Law and to participate as observers at the sessions of the Committee on the basis of reciprocity and in accordance with Article 22 of its Statutes:

- (a) the United Nations, in respect of legal matters under its consideration;
- (b) Hague Conference on Private International Law;
- (c) UNIDROIT;
- (d) European Juridical Committee;
- (e) Afro-Asian Legal Consultative Committee; and
- (f) UNCITRAL;

2. To request the Chairman of the Committee to explore with representatives of the following bar associations, among others, the possibility of holding joint meetings during sessions of the Committee in accordance with Article 24 of its Statutes and to take such administrative steps with the General Secretariat as may be appropriate to arrange such meetings:

- (a) the International Bar Association;
- (b) the International Law Association;
- (c) the Inter-American Bar Association;
- (d) the International Commission of Jurists;
- (e) the Instituto Hispano Luso-Americano de Derecho Internacional (IHLADI);
- (f) national societies of International Law; and
- (g) national bar associations and associations of legal professionals;

3. To instruct the Secretary of the Committee to enter into contact with those law faculties of the universities of the member countries and centres for inter-American legal studies amenable to enhanced collaboration on international legal issues, including the Legal Working Group of the European Council for Social Research on Latin America (CEISAL) and the International Development Law Institute, to enable such universities and centres to become familiar with the activities of the Committee and to explore opportunities for strengthening cooperative relations with such entities, and to report to the Committee at its next session on the results of these contacts; and

4. In collaboration with the General Secretariat, to explore the possibility of inviting one professor of international law to participate as an observer at each session of the Committee, in a manner that provides an academic from each member country in turn the opportunity to do so.

This Resolution was approved unanimously at the 11 August 1994, regular session by the following members: Ramiro Saraiva Guerreiro, Jonathan T. Fried, Luis Herrera Marcano, Alberto Zelada Castedo, Miguel Angel Espeche Gil, Galo Leoro F., Mauricio Gutiérrez Castro, Seymour J. Rubin, José Luis Siqueiros and Philip Telfod Georges.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/RES.II-11/94

ACKNOWLEDGMENT OF DR. JOSÉ LUIS SIQUEIROS

(Resolution adopted at the regular session
held on 18 August 1994)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS:

Dr. José Luis Siqueiros has acted as Vice-Chairman and Chairman of the Inter-American Juridical Committee with singular dedication and efficiency;

In carrying out his activities as Chairman, Dr. José Luis Siqueiros has acted correctly when representing the Committee to the main bodies of the Organization of American States, as well as other organizations devoted to the study of international juridical issues;

The activities of Dr. José Luis Siqueiros have been of crucial importance in the preparation and organization of the V Specialized Inter-American Conference of International Private Law - CIDIP-V held in Mexico, which he chaired;

RESOLVES:

1. To express its thanks to Dr. José Luis Siqueiros for his correct guidance and distinguished representation of the Inter-American Juridical Committee during his term of office as Chairman;

2. To congratulate Dr. José Luis Siqueiros for the brilliant success achieved during his term of office as Chairman and - largely due to his efforts - by the V Specialized Inter-American Conference of International Private Law - CIDIP-V.

This Resolution was approved unanimously at the 18 August 1994 regular session by the following members: Drs. Ramiro Saraiva Guerreiro, Jonathan T. Fried, Luis Herrera Marcano, Alberto

Zelada Castedo, Miguel Angel Espeche Gil, Galo Leoro F. and Eduardo Vío Grossi.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/RES.II-12/94

DEMOCRACY IN THE INTER-AMERICAN SYSTEM

(Resolution adopted at the regular session
held on 22 August 1994)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS:

During its March 1993 regular sessions period it included on its Agenda, at the suggestion of Dr. Eduardo Vío Grossi, the topic of Democracy in the Inter-American System, and appointed him the Rapporteur thereof;

During its August 1993 and January 1994 regular sessions periods the Rapporteur presented two Preliminary Reports on this matter (CJI/SO/II/doc.10/93 and CJI/SO/II/doc.11/94);

The Juridical and Political Affairs Committee of the Permanent Council requested him to continue the study of the topic □insofar as it refers to one of the basic pillars of the Inter-American System□ (CP/doc.2479/94);

During its XXIV regular sessions period, the General Assembly resolved to exhort him to □continue his studies of Democracy in the Inter-American System, as this involves one of the fundamental topics of the Organization□ (AG/doc.3145/94);

During the current regular sessions period, the Rapporteur presented his Report on the above-mentioned topic (CJI/SO/II/doc.37/94 rev.1), which formed the basis for an important analysis carried out by the Committee;

As indicated by this analysis, although the international juridical norms covering Democracy in the Inter-American System have achieved a level of progress that distinguishes the Organization of

American States, at the same time this brings up questions that, in view of the development of International Law on this issue, are of great interest to both the Inter-American Juridical Committee and other competent agencies of the Organization.

RESOLVES:

1. To congratulate Dr. Eduardo Vío Grossi for his valuable Report on Democracy in the Inter-American System, which constitutes a complete and well-organized account of the practice and current state of International Law applicable to this matter;
2. To forward this Report to the Secretary General, together with the summarized Minutes of the session in which it was studied, in order to make it available to the agencies of the Organization responsible for handling this matter, so that it may provide input for their analysis; and
3. To continue during its next regular sessions period the analysis of this topic begun during this sessions period, for which purpose it requests the Rapporteur to keep it advised of the development this topic could undergo by this date.

This Resolution was approved unanimously at the 22 August 1994 regular session by the following members: Drs. Ramiro Saraiva Guerreiro, Jonathan T. Fried, Luis Herrera Marcano, Alberto Zelada Castedo, Miguel Angel Espeche Gil, Galo Leoro F., Eduardo Vío Grossi and José Luis Siqueiros.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/RES.II-13/94

JURIDICAL DIMENSION OF INTEGRATION
AND INTERNATIONAL TRADE

(Resolution adopted at the regular session
held on 23 August 1994)

- a) Methods of peaceful settlement of disputes in regional and sub-regional integration and free trade schemes.

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS:

The Resolution of the General Assembly (AG/doc.3131/94) in resolute item 4) requests this Committee to assign top priority to the studies currently under way on the juridical aspects of integration, particularly with regard to the methods for the peaceful settlement of disputes, in regional and sub-regional integration schemes and free trade agreements;

The Reports presented during this regular sessions period by Committee Members Mauricio Gutiérrez Castro, José Luis Siqueiros, Philip Telford Georges, Luis Herrera Mercano and Alberto Zelada Castedo on methods for the settlement of disputes in a) the Central American Integration System (CAIS); b) the Latin American Integration Association (LAIA); c) the CARICOM Pact; d) the Group of 3 (Mexico, Venezuela and Colombia); and e) Systems for the settlement of disputes under the framework of the Latin American Integration Association (LAIA), which, together with the Reports presented previously by Drs. Ramiro Saraiva Guerreiro, Jonathan T.Fried and José Luis Siqueiros on: f) the MERCOSUR (with the addition of an Annex on the Protocol covering investment funding in this sub-regional agreement) and g) NAFTA respectively, in compliance with the topic mentioned in the previous Paragraph;

WHEREAS these Reports endowed this Committee with an overview of the focus and

methodologies of these schemes for the settlement of disputes within the juridical dimension on integration, cooperating in these efforts, as suggested by the General Assembly of the Organization of American States, with the Special Trade Commission,

RESOLVES:

1. To take note of the Reports received during this regular sessions period covering the topic of methods for the settlement of disputes in various regional and sub-regional integration and free trade schemes;
2. To thank the authors thereof for their valuable input for the study of this issue;
3. To compile all the works submitted to the Committee, together with the texts attached thereto;
4. To set up a Drafting Group consisting of all the Rapporteurs, coordinated by Dr. José Luis Siqueiros, which will prepare an Introductory Note to this compiled volume. This Introductory Note will highlight the analogies, compatibilities and possible discrepancies that may exist among the various schemes in the region;
5. The Drafting Group, with the support of the Committee Secretariat, will present this document to this Organization during its next regular sessions period in March 1995. Once adopted, it will be forwarded to the Permanent Council of the Organization of American States and the Special Trade Commission;
6. To keep this topic on the Agenda of the Committee, so that during its next regular sessions period in March 1995, in coordination with the Special Trade Commission, it may carry out additional studies and adopt the tasks it deems most appropriate.

This Resolution was approved unanimously at the 23 August 1994 regular session by the following members: Drs. Ramiro Saraiva Guerreiro, Jonathan T. Fried, Luis Herrera Marcano, Alberto Zelada Castedo, Miguel Angel Espeche Gil, Galo Leoro F., Eduardo Vío Grossi and José Luis Siqueiros.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/RES.II-14/94

II JOINT MEETING WITH JURIDICAL ADVISORS

(Resolution adopted at the regular session
held on 23 August 1994)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

IN VIEW OF the provisions of Articles 104 and 108 of the Charter of the Organization of American States, Articles 3 and 31 of the Statutes of the Inter-American Juridical Committee, and Articles 3, 7 and 21 of its Regulations:

RECALLING Article 12, item e) of its Statute authorizes it to "establish relationships of cooperation with universities, institutes and other teaching centers, with law schools and bar associations, as well as with local and international commissions, committees, organizations and other bodies devoted to the development and codification of international law, or the study, examination, teaching or dissemination of juridical matters of international interest";

TAKING INTO ACCOUNT the experience arising from the I Joint Meeting of Juridical Advisors held under Resolution CJI/RES.1-7/93 in Rio de Janeiro on 5-6 August 1994;

WHEREAS the General Assembly requested □the Committee to continue with this type of Meeting□ (AG/doc.3131/94);

RESOLVES:

1. To invite the most senior civil servants of the Ministry of Foreign Affairs of each Member-State in the international juridical field, or the next-highest ranked in the absence thereof, as well as from the Organization of American States, to the II Joint Meeting of Juridical Advisors to be held at the head offices of the Inter-American Juridical Committee in Rio de Janeiro on 3-4 August 1995;

2. The purpose of this Meeting will be the interchange of opinions on the following issues:
 - a) Juridical and Inter-American issues of the greatest current interest, as well as those that currently demand the attention of these bodies;
 - b) The experience and structure of these Advisory or Consultatory Boards, Councils or Departments of the Ministries of Foreign Affairs of the Member-States;
 - c) The work of the Inter-American Juridical Committee;
 - d) The application of International Law within the domestic sphere.
3. The participation of the senior civil servants invited will be on a personal basis, and their views shall neither compromise nor commit their respective States;
4. Travel and accommodation costs for the civil servants invited shall not be borne by the Organization of American States;
5. Within the framework of this meeting, these civil servants may participate in the development of the XXII International Law Course organized by the Inter-American Juridical Committee;
6. To request the Secretary General to proceed with the indications supplied by the Chairman of the Inter-American Juridical Committee, rendering the necessary collaboration for the arrangements and organization of this Meeting, and assigning the funding required thereby.

This Resolution was approved unanimously at the 23 August 1994 regular session by the following members: Drs. Ramiro Saraiva Guerreiro, Jonathan T. Fried, Luis Herrera Marcano, Alberto Zelada Castedo, Miguel Angel Espeche Gil, Galo Leoro F. and Eduardo Vio Grossi and José Luis Siqueiros.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/RES.II-15/94

PEACEFUL SETTLEMENT OF DISPUTES

(Resolution adopted at the regular session
held on 24 August 1994)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS:

In its Resolution AG/RES.1129 (XX-0/91) the General Assembly decided to accept and forward to the Inter-American Juridical Committee the comments and observations made by the Permanent Council of the Organization on its Annual Report;

In these comments and observations made by the Permanent Council of the Organization on its Annual Report, it stated that the Member-States were interested in the Inter-American Juridical Committee continuing with its *in genere* study on the topic of the Peaceful Settlement of Disputes, in order to ensure that all the Member-States have effective mechanisms and procedures for this purpose AG/doc.2683/91, dated 30 April 1991);

During its August 1991 regular sessions period it included on its Agenda the topic of the Peaceful Settlement of Disputes;

During this regular sessions period, the Rapporteur for this topic, Dr. Galo Leoro F., presented his Report, which gave an overview of this matter and prompted broad-ranging examination and comment by the Committee.

RESOLVES:

1. To thank Dr. Galo Leoro F. For his Report on the Peaceful Settlement of Disputes - An Overview, a profound and broad-ranging commentary and study of the procedures for the peaceful settlement of disputes offered by the Organization of American States and the United Nations, that also mentioned a Draft Amendment to the Pact of Bogotá, as well as putting forward suggestions and recommendations in this field formulated by this Committee;
2. To forward this Report to the Secretary General, in order to make it available to the agencies of the Organization of American States, as a contribution to the analysis and adoption of decisions on this issue;
3. To keep this topic on its Agenda in order to continue with the examination thereof.

This Resolution was approved unanimously at the 24 August 1994 regular session by the following members: Drs. Ramiro Saraiva Guerreiro, Jonathan T. Fried, Luis Herrera Marcano, Alberto Zelada Castedo, Miguel Angel Espeche Gil, Galo Leoro F., Eduardo Vío Grossi and José Luis Siqueiros.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/RES.II-16/94

MOVING THE OFFICES OF THE
INTER-AMERICAN JURIDICAL COMMITTEE

(Resolution adopted at the regular session
held on 20 August 1994)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS the Brazilian Government has offered the Inter-American Juridical Committee premises in the Itamaraty Palace to set up its offices in Rio de Janeiro, and has begun the processes necessary to house such offices;

AS the extraordinary historical and artistic importance of the Itamaraty Palace, declared a historic monument of Brazil, demands that the premises of the Inter-American Juridical Committee should be implemented in a manner worthy thereof and compatible with the requirements of this Organization;

AS, due the above-mentioned reasons, it is urgent to proceed with the scheduling and design of the offices of the Inter-American Juridical Committee in the Itamaraty Palace, and as a consequence of this scheduling, to estimate the corresponding costs thereof and obtain the necessary funding;

RESOLVES:

1. To request the Secretary General, in coordination with the Brazilian Government, to have a schedule and design for these premises prepared by duly-qualified persons, as well as listing the furniture, fixtures, fittings and other equipment necessary to ensure the functioning of the Inter-American Juridical Committee in the Itamaraty Palace offices in a manner appropriate to the high status of this historic monument;

2. To request the Secretary General to seek the funds necessary to implement the schedule outlined in the above-mentioned Paragraph, in either the current or next two-year budget of the Organization;
3. To ask the Chairman of the Committee to coordinate everything connected with the matters covered by this Resolution with the Brazilian Government and the Secretary General, during the breaks between the sessions periods.

This Resolution was approved unanimously at the 20 August 1994 regular session by the following members: Drs. Ramiro Saraiva Guerreiro, Jonathan T. Fried, Luis Herrera Marcano, Alberto Zelada Castedo, Miguel Angel Espeche Gil, Galo Leoro F., Eduardo Vío Grossi and José Luis Siqueiros.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/RES.II-17/94

ARRANGEMENTS FOR THE FIRST SESSIONS PERIOD - 1995

(Resolution adopted at the regular session
held on 20 August 1994)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS the General Assembly of the Organization of American States and its Permanent Council has assigned this consultative agency topics for study of the greatest importance, such as the Juridical Dimensions of Integration and International Trade, Democracy in the Inter-American System, Environmental Law, and the Administration of Justice in the Americas, among others;

WHEREAS it is most appropriate to foster an interchange of criteria between the members of the Inter-American Juridical Committee and General Secretariat, the Permanent Council and its Commissions, in order to coordinate the focus and development off such important issues, particularly during times when the Organization is opening up to new guidelines;

WHEREAS Article 110 of the Charter allows the Inter-American Juridical Committee to hold sessions outside its head offices in special cases, and the sessions period held in Washington D.C. in March 1992 resulted in a useful and successful meeting;

WHEREAS the analysis of the budget carried out by the Committee indicates that holding the sessions period in Washington D.C. would not involve an appreciable increase in the costs thereof which could in any case be covered by funding assigned to the two-year period under way;

RESOLVES:

1. To hold its first 1995 sessions period at the head offices of the Organization in Washington D.C., between 13 and 24 March;
2. To request the support of the Secretary General in putting this decision into effect, and to this end, to forward to him a list of the services necessary, taking into account that the costs thereof will be borne by the budget allocations assigned to the first sessions period in Rio de Janeiro, as well as unused budget funding assigned to the current year.

This Resolution was approved unanimously at the 20 August 1994 regular session by the following members: Drs. Ramiro Saraiva Guerreiro, Jonathan T. Fried, Luis Herrera Marcano, Alberto Zelada Castedo, Miguel Angel Espeche Gil, Galo Leoro F., Eduardo Vío Grossi and José Luis Siqueiros.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/RES.II-18/94

BUDGET PROGRAM
FOR THE TWO-YEAR PERIOD
1996-1997

(Resolution adopted at the regular session
held on 25 August 1994)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS:

In accordance with Article 36 of the Statutes of the Committee (approved by Resolution AG/RES.89 (II-0/72)), it should present its Work Program for each fiscal period to the Secretary General, for the purposes of preparing the Draft Budget Program of the Organization (Article 117 c) of the Charter);

According to this same Article 36 of the Statutes of the Committee, and in compliance with Article 117 c) of the Charter, the Secretary General should consult this body when preparing the Draft Budget Program of the Committee, or if it is not in meeting, the Chairman thereof;

Through the Resolution on the Regular Sessions Periods of the Inter-American Juridical Committee (AG/RES.1173 (XXII-0/92)), adopted during its XXII Regular Sessions Period, the General Assembly decided that "as from 1994 onwards the Budget Program will include the allocations necessary for the purpose of complying with its recommendation that as from 1993 and in compliance with Article 15 of its Statutes, the Committee should hold two regular sessions periods;"

Through the Resolution on the Annual Report of the Inter-American Juridical Committee (AG/doc.3131/94), adopted during its XXIV Regular Sessions Period, the General Assembly decided "to recommend the Inter-American Juridical Committee, in compliance with Article 32 of its Statutes

and Article 108 of the Charter of the Organization of American States, to continue - with the assistance of the Secretary General - to coordinate its activities with those carried out on juridical issues by the international organizations in the regional and universal spheres, particularly the regional and sub-regional integration organizations, the United Nations Organization, the Hague Conference on International Private Law, and the International Institute for the Unification of Private Law (UNIDROIT);

Through the Resolution on Cooperative Relations (CJI/RES.11-10/94) adopted during its August 1994 regular sessions period, the Committee decided to develop a broader program of cooperation and coordination with other international and non-government organizations;

RESOLVES:

1. To adopt the following program of activities for the 1996-1997 two-year period;

1996

I. Juridical Consultancy and Development of International Law

- a. Organization of two regular sessions periods at the head offices of the Committee, each lasting 28 days (Article 15 of the Committee Statutes), in order to carry out its functions with regard to the rendering of Juridical Consultancy and the Development and Codification of International Law, including the preparation of opinions, studies and preliminary drafts of conventions, contracting consultants and other types of technical assistance for the preparation of informative reports.
- b. Travel
 - (i) Trips by representatives of this Organization to present the Annual Report of this Organization to the Permanent Council and General Assembly to the Organization of American States;
 - (ii) Trips by representatives of the Committee to Geneva as Observers at the Human Rights Commission of the United Nations, and the meetings of the other three international or non-government organizations, such as UNIDROIT, the Hague Conference on International Private Law, and non-government organizations in the regional and universal spheres;
 - (iii) Trip made by a representative of the Committee to coordinate activities with the Special Trade Commission.
- c. Publications
 - (i) Publication of the Reports and Recommendations of the Committee since 1990 in

Spanish, and since 1987 in English;

- (ii) Publication of the Reports of the Committee, e.g. those covering the Settlement of Disputes in Regional and Sub-Regional Integration and Free Trade Treaties, Peaceful Settlement of Disputes, Improvement of the Administration of Justice in the Americas, and Democracy in the Inter-American System.

II. International Law Course

- a. Organization of the XXIII International Law Course in Rio de Janeiro in August 1996, for 34 students, meaning at least one from each Member-State, with the participation of the members of the Committee, plus six guest lecturers, lasting 30 days;
- b. Preparation and publication of the basic materials on international public law for distribution to the students prior to the start of the course;
- c. Printing of the volumes corresponding to the classes given during the years 1992, 1993, 1994, 1995, and 1996;

III. Services rendered by the Secretariat

- a. Functioning of the Secretariat of the Committee in Rio de Janeiro;
- b. Rehabilitation of the Library of the Committee, including the acquisition of juridical periodicals and books, the installation and maintenance of a data-base, and on-line research services for Members;
- c. Travel
 - (i) Trip by the Secretary of the Committee to Washington D.C. and to the General Assembly;
 - (ii) Three trips by the Secretary of the Inter-American Juridical Committee within the host country for coordination activities;
- d. Termination of the design, reconstruction and move of the offices of the Committee to the Itamaraty Palace.

1997

I. Juridical Consultancy and Development of International Law

- a. Organization of two regular sessions periods at the head offices of the Committee, each lasting 28 days (Article 15 of the Committee Statutes), in order to carry out its functions with regard to the rendering of Juridical Consultancy and the Development and Codification of International Law, including the preparation of opinions, studies and

- preliminary drafts of conventions;
 - b. Organization of the III Meeting of Juridical Advisors, lasting two days in August 1997;
 - c. Travel
 - (i) Trips by representatives of this Organization to present the Annual Report of this Organization to the Permanent Council and General Assembly to the Organization of American States;
 - (ii) Trips by representatives of the Committee to Geneva as Observers at the Human Rights Commission of the United Nations, and the meetings of the other three international or non-government organizations, such as UNIDROIT, the Hague Conference on International Private Law, and non-government organizations in the regional and universal spheres;
 - (iii) Trip made by a representative of the Committee to coordinate activities with the Special Trade Commission.
 - d. Publications
 - (i) Publication of the Reports and Recommendations for 1997;
 - (ii) Publication of the Reports of the Committee;
- II. International Law Course
- a. Organization of the XXIV International Law Course in Rio de Janeiro in August 1997, for 34 students, meaning at least one from each Member-State, with the participation of the members of the Committee, plus six guest lecturers, lasting 30 days;
- In order to streamline the administrative procedures for the Course, it is necessary to introduce modifications therein, which will require additional budget funding.
- b. Note should be taken of the need to introduce modifications into the manner used to prepare and publish the basic materials on international public law for distribution to the students prior to the start of the course;
 - c. Printing of the volumes corresponding to the classes given in 1997;
- III. Services rendered by the Secretariat
- a. Functioning of the Secretariat of the Committee in Rio de Janeiro;
 - b. Continuation of the rehabilitation of the Library of the Committee, including the acquisition

of juridical periodicals and books, maintenance of the data-base, and on-line research services for Members;

c. Travel

- (i) Trip by the Secretary of the Committee to Washington D.C. and to the General Assembly;
- (ii) Three trips by the Secretary of the Inter-American Juridical Committee within the host country for coordination activities;
- d. If necessary, termination of the design, reconstruction and move of the offices of the Committee to the Itamaraty Palace.

2. To request the Secretary General, when preparing the Draft Budget Program of the Inter-American Juridical Committee for the 1996-1997 two-year period, to pay special attention to the following subjects:

- a. in accordance with the Resolution of the General Assembly (AG/doc.3131/94), the Committee will continue to assign top priority to the study it is currently carrying out of all the juridical aspects of integration, especially with regard to the methods for the settlement of disputes related to integration and free trade agreements, and which due to the provisions of this Resolution, should coordinate these matters with the Special Trade Commission;
- b. in accordance with Article 108 of the Charter and the Resolution of the Committee (CJI/RES.II-10/94) on this matter, the Committee will continue to assign high priority to strengthening its links with other international government and non-government organizations in the area of international law, to which it will need financing to fund the trips which will allow the members of the Committee and its Secretary to consolidate this cooperation;
- c. The publication, dissemination and circulation of the Reports and Recommendations of the Committee represent a useful source of input for the Member-States. Over the past few years, the funds assigned to this purpose over the past few years have proven insufficient for the Organization to fulfill its obligation as covered in Article 117 item d) of its Charter, and Article 30 of the Statutes of the Committee, which refer to its publications;
- d. With regard to the International Law Course:
 - (i) in order to improve the preparation and administration of this Course, additional budget funding will be requested;
 - (ii) the Committee has decided to improve the program, functioning and materials to be used by the participants in the Course. This includes the preparation of a handbook of basic materials for the students, and the timely publication of the lectures given each year;

e. With regard to the services rendered by the Secretariat:

- (i) over the past few years, the funds available for the library have been insufficient to allow it to respond to the needs of the Members of the Committee and the juridical community;
- (ii) the Committee has already requested the General Secretary to coordinate with the Brazilian government authorities regarding the planning and implementation of moving the offices of the Committee to the Itamaraty Palace;
- (iii) the Committee assigns its Secretary the responsibility for taking the steps necessary to strengthen the relationships between the Secretary General of the Organization of American States as well as with other organizations. However, to date no budget funding has been available under the travel category for financing compliance with these functions.

3. To attach to this Resolution the current Work Program of the Committee, containing its Resolution on the Topics, Date and Rapporteurs for the August 1994 Regular Sessions Period;

4. To forward this Resolution to the Secretary General for the purposes covered in Article 117 item d) of the Charter of the Organization, requesting him, in accordance with Article 6 of the Statutes of the Committee, to maintain the necessary consultations on this matter with the Chairman of this Organization.

This Resolution was approved unanimously at the 25 August 1994 regular session by the following members: Drs. Ramiro Saraiva Guerreiro, Jonathan T. Fried, Luis Herrera Marcano, Alberto Zelada Castedo, Miguel Angel Espeche Gil, Galo Leoro F. and Eduardo Vío Grossi.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/RES.II-19/94

IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE
IN THE AMERICAS

PROTECTION AND GUARANTEES FOR JUDGES AND LAWYERS
IN THE EXERCISE OF THEIR FUNCTIONS

(Resolution adopted at the regular session
held on 25 August 1994)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING TAKEN NOTE of the Report of the Rapporteur, Dr. Jonathan T. Fried, on Protection and Guarantees for Judges and Lawyers in the Exercise of their Functions, (CJI/SO/II/doc.42/94) as part of the works relative to the topic of Improvement of the Administration of Justice in the Americas;

REAFFIRMING that the independence of the Juridical Power and the guarantees for the exercise of advocacy are essential to the smooth functioning of all juridical systems, in order to maintain the state of law in the Member-States, as well as to ensure respect for human rights and the fundamental liberties;

RECOGNIZING that the juridical systems on the Continent offer the juridical resources to ensure the legality of the acts of government agencies;

DEEPLY CONCERNED over the existence of threats against the independent exercise of Juridical Power and the legal profession;

RECOGNIZING the constructive measures already taken by various Member-States to strengthen the independence of the Judiciary;

RECALLING the efforts of the VII and VIII Conferences of the United Nations on the Prevention of Crime and the Treatment of Offenders in this respect;

RESOLVES:

1. To remit to the Permanent Council the Report of the Rapporteur, revised in the light of the comments of the members of the Committee during its August 1994 regular sessions period, and to request that it be translated as soon as possible, so that it may be forwarded in the official languages to the Member-States of the Organization, in order to make it available to the competent authorities ;
2. To recommend to the Permanent Council that it should propose to the General Assembly that it should exhort the Member-States to:
 - a) Pay attention to the importance of Resolution 40/146 of the United Nations, which, based on the Basic Principles of the Independence of the Judiciary, approved by the VII Conference of the United Nations on the Prevention of Crime and the Treatment of Offenders; Resolution no. 45/121 of the United Nations, which reaffirms the Basic Principles of the Role of Lawyers, approved by the VIII Conference of the United Nations on the Prevention of Crime and the Treatment of Offenders; and other international Resolutions attached to the Report of the Rapporteur; and
 - b) Distribute these documents broadly among the pertinent juridical authorities and others of equal competence.
3. Recommend that the Permanent Council consider the possibility of keeping under ongoing examination, through regular Reports and the publication of information, the problems that could threaten the independence of the Judiciary in the Member-States, or hamper the adequate protection of judges and lawyers in the exercise of their functions, as well as measures that have been adopted to cope with these problems.

This Resolution was approved unanimously at the 25 August 1994 regular session by the following members: Drs. Ramiro Saraiva Guerreiro, Jonathan T. Fried, Luis Herrera Marcano, Alberto Zelada Castedo, Miguel Angel Espeche Gil, Galo Leoro F. and Eduardo Vío Grossi.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/RES.II-20/94

COURSE ON INTERNATIONAL LAW

(Resolution adopted at the regular session
held on 25 August 1994)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONVINCED that the Course on International Law offers specialized education to university lecturers, lawyers and civil servants from the Member-States;

DETERMINED to ensure that the Course continues to interest renowned lecturers and students in the discussion of the juridical terms of current interest in the Americas;

RECALLING that the Course offers a special opportunity for the interchange of ideas among students, lecturers, representatives of international organizations and the members of the Committee;

WISHING to improve the outline, program and materials for the Course as well as streamline the administration thereof;

RESOLVES:

1. That the Program of the Course on International Law for 1995 will stress topics featuring Human Rights and the Peaceful Settlement of Disputes, attempting to schedule lectures consecutively, as far as possible;
2. To request the Secretary General to take the steps necessary to obtain the participation of lecturers in the Course from:

- a) representatives of international organizations with professional experience in juridical affairs, such as the Human Rights Commission, UNIDROIT, the Inter-American Human Rights Court, and the Inter-American Human Rights Commission;
 - b) other professionals, particularly from the Member-States, who are highly qualified in the topics on the Program;
 - c) Juridical consultants taking part in the II Joint Meeting with Juridical Advisors from the Chancelleries of the Member-States;
3. To request the Secretary General to prepare the basic materials on international public law for distribution to the students prior to their arrival at the Course;
 4. To request the Secretary General to publish the lectures given in the 19921, 1993 and 1994 Courses ;
 5. To invite the members of the Committee to give lectures on various aspects regarding the settlement of disputes, based on the work of the Committee on the Peaceful Settlement of Disputes and the Settlement of Disputes in Regional and Sub-Regional Free Trade Agreements ;
 6. When preparing the Program, to include as far as possible other international topics of current interest, such as Law of the Sea, protection for foreign investments, the Argentina-Chile Arbitration over Landmark 62 - Mount FitzRoy, and the interpretation of treaties and the application of international law to internal juridical systems.

This Resolution was approved unanimously at the 25 August 1994 regular session by the following members: Ramiro Saraiva Guerreiro, Jonathan T. Fried, Luis Herrera Marcano, Alberto Zelada Castedo, Miguel Angel Espeche Gil, Galo Leoro F., and Eduardo Vío Grossi.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/RES.II-21/94

IN MEMORIAM - HOMAGE TO
DR. EDUARDO JIMENEZ DE ARECHAGA
AND DR. JOSÉ MARIA RUDA

(Resolution adopted at the regular session
held on 25 August 1994)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING LEARNT with deep sadness of the deaths this year of the eminent American international jurists Eduardo Jimenez Arechaga and José Maria Ruda, who showed wisdom, prudence and brilliance as Presidents of the International Court of Justice; and

IN PROOF OF GRATITUDE for their admirable contributions to international law with which they enhanced the juridical tradition of the Continent;

RESOLVES:

To offer homage of admiration and acknowledgment to the memory of Dr. Eduardo Jimenez de Arechaga and Dr. José Maria Ruda, whose disappearance is an irreparable loss for their respective countries of Uruguay and Argentina, as well as for all the nations in the Inter-American System;

To bring this to the knowledge of the governments of the Member-States of the Organization of American States and the distinguished families of the departed.

This Resolution was approved unanimously at the 25 August 1994 regular session by the following members: Drs. Ramiro Saraiva Guerreiro, Jonathan T. Fried, Luis Herrera Marcano, Alberto Zelada Castedo, Miguel Angel Espeche Gil, Galo Leoro F. and Eduardo Vío Grossi.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/RES.II-22/94

DATE, AGENDA AND RAPPORTEURS
FOR THE MARCH 1995 REGULAR SESSIONS PERIOD

(Resolution adopted at the regular session
held on 25 August 1994)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

In compliance with the provisions of its Regulations, agreed to hold its 1995 regular sessions period between 13 - 24 March.

It approved the following Agenda, on the understanding that the matters would be covered in the order in which they are presented below:

1. The Juridical Dimension of Integration and International Trade :

a) Methods for settling disputes in sub-regional integration and free trade schemes:
(AG/doc.3131/94-item 4)

Work Group

Coordinator: Dr. José Luis Siqueiros

Co-Rapporteurs: Drs. Alberto Zelada Castedo, Philip T. Georges, Miguel Angel Espeche Gil, Jonathan T. Fried, and Mauricio Gutiérrez Castro.

- i) Cartagena Agreement
- ii) CARICOM Pact
- iii) MERCOSUR
- iv) North American Free Trade Agreement (NAFTA)
- v) Juridical systems for the settlement of disputes in bilateral free trade and economic supplementation schemes;

- vi) Central American Integration System
 - vii) G-3 (Mexico, Venezuela and Colombia)
 - viii) Latin American Integration Association (LAIA)
- b) Facilitation of international activities by individuals and corporate entities
(AG/doc.3131/94-item 2)
Rapporteur: Dr. Luis Herrera Marcano
- c) The securities market. Benchmark principles considered basic to its regulation in the Hemisphere.
(AG/doc.3131/94-item 3)
Rapporteurs: Drs. Seymour J. Rubin
Jose Luis Siqueiros
- d) International juridical effects of insolvency
Rapporteurs: Drs. Seymour J. Rubin
Jose Luis Siqueiros
Jonathan T.Fried
2. Democracy in the Inter-American System
(AG/doc.3131/94-item 7)
Rapporteur: Dr. Eduardo Vío Grossi
3. Improvement of the administration of Justice in the Americas.
(AG/doc.3131/94-item 5)
- a) Streamlining Access to the Courts. Simplification of judicial procedures.
Rapporteur: Dr. Seymour J. Rubin
 - b) Appointment of Magistrates and Court Employees.
Protection and guarantees for judges and lawyers in the exercise of their functions.
Rapporteur: Dr. Jonathan T. Fried.
4. The Right to Information
(AG/doc.3131/94-item 6)
Rapporteur: Dr. Mauricio Gutiérrez Castro
5. Environmental Law
(AG/doc.3131/94-item 8)
Rapporteur: Dr. Galo Leoro F.
6. Peaceful Settlement of Disputes.
(AG/doc. 2683/91) (AG/doc. 2771/92 rev.1)
Rapporteur: Dr. Galo Leoro F.

7. International Cooperation to Repress Corruption
Rapporteur: Dr. Miguel Angel Espeche Gil

8. Juridical Aspects of Foreign Debt.
Rapporteur: Dr. Miguel Angel Espeche Gil.

9. Inter-American Cooperation to Cope with International Terrorism
Rapporteur: Dr. Miguel Angel Espeche Gil.

This Resolution was approved unanimously at the 25 August 1994 regular session by the following members: Drs. Ramiro Saraiva Guerreiro, Jonathan T. Fried, Luis Herrera Marcano, Alberto Zelada Castedo, Miguel Angel Espeche Gil, and Eduardo Vío Grossi.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/RES.II-23/94

STOCK MARKETS

(Resolution adopted in the Ordinary Sessions Period
held on 18 August 18 1994)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS:

The Inter-American Juridical Committee resolved during its March 1992 ordinary sessions period to include the study of Stock Markets in its list of topics, in order to increase the efficiency of their operation and thus encourage foreign investment;

As described in the Report of the Working Group (document CJI/SO/II/doc.31/94 rev.2) this initial Resolution was reiterated in later sessions periods, during which this Working Group received valuable information from the Chairmen of the Securities and Exchange Commissions of both Brazil and Mexico, as well as the Vice-President of the Capitals Markets Forum of the International Bar Association;

WHEREAS these precedents and reports were not involved to the fact that the Council of Securities Regulators of the Americas - COSRA at the hemispherical level, and IOSCO at the International level, had been developing basic standards for the regulation of these securities, which principles are described in the document mentioned n the previous paragraph, and which are attached to this document, in which the progress and informal consultations carried out by the Committee and the Working Group are described, since the January session;

RECALLING that Article 108 of the Charter of the Organization of American States and Article 31 of the By-Laws of this Committee commission the latter to establish cooperative links with academic centers, as well as international organizations dedicated to the study and dissemination of information on juridical issues of general interest, and as explained in the attached document, these efforts by the Committee to develop more concrete norms or principles would in the best of cases be a repetition of the above-mentioned efforts; it is thus preferable that this body should instead act as a catalyst in this matter, coordinating its activities with the competent agencies in the public and

private sectors, seeking to channel funding from Institutions interested in this activity.

RESOLVES:

1. To offer its thanks for the Working Group Report in document CJI/SO/II/doc.31/94 rev.2.

2. To commission the Working Group to continue its studies, adding legislative material in this area, with the support of the General Secretariat, as well as the bibliography listed on norms, standards and principles that are considered basic in this matter.

3. In order to firm up the objectives indicated in the previous paragraph, and encourage the analysis and dissemination of the norms, standards and principles that could regulate this matter, the Working Group will prepare a study designed to encourage the inflow of funding and ensure closer cooperation with government agencies, foundations and private groups, in order to organize symposia, seminars and other fora, with the participation of the General Secretariat of the Organization of American States and specialists from organizations such as COSRA, IOSCO, the Capitals Markets Forum of the International Bar Association, the World Bank, the Getúlio Vargas Foundation, and representatives of stock markets in South America, as well as other Institutions with duties and responsibilities in this field.

4. To request the Working Group to prepare a Report on the commissions contained in the above-mentioned points, to be presented at the next sessions period of the Committee.

This Resolution was approved unanimously at the 18 August 1994 regular session, with the following members present: Drs. Ramiro Saraiva Guerreiro, Jonathan T.Fried, Luis Herrera Marcano, Alberto Zelada Castedo, Miguel Angel Espeche Gil, Galo Leoro F. and Eduardo Vío Grossi.

REPORTS PRESENTED BY THE RAPPORTEURS



ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/I/doc.1/94
30 September 1993
Original: Portuguese

SYSTEM FOR RESOLVING DISPUTES IN THE MERCOSUR

By Dr. Ramiro Saraiva Guerreiro

The major factor in the system in force for resolving disputes in the MERCOSUR is its provisional character.

Under Article 3 of the Treaty of Assuncion, dated 26 March 1991, "during the transition period which shall extend through to ... 31 December 1994, and in order to facilitate the establishment of the Common Market, the Party-States adopt a System for Resolving Disputes ... given in Annex III of the Treaty.

The above-mentioned Annex III indicates that disputes which may arise among the Party-States due to the application thereof should be resolved by means of direct negotiations and at later stages through the intervention of the Common Market Group or the Common Market Council. This provision is of merely historical interest. Annex III itself determines the preparation - within 120 days of the entry into force of the Treaty - of a temporary system which will operate until 31 December 1994.

In compliance with this commitment, the Presidents of the MERCOSUR nations signed the Brasilia Protocol on 17 December 1991, during the first Meeting of the Council, later ratified by them all and which is today the system for resolving disputes within the MERCOSUR.

As mentioned, this is a provisional legal instrument. At the moment, its application is planned only during the current year - 1994 - as in accordance with the Treaty of Assuncion, the Common Market "should be fully set up and running smoothly by 31 December 1994".

Despite the brevity of its scheduled lifespan, the Brasilia Protocol is of clear legal interest, due to its adaptation to the phase of a process, during which, for a limited period, the Parties in this

venture must define institutions of a supranational character which will probably include a Regional Court of Law.

For the present transition phase, the system adopted seems satisfactory and in major aspects represents considerable progress. We refer to an essential characteristic which is the mandatory arbitration jurisdiction, regardless of ad hoc commitment, organized in such a way that under no circumstances whatsoever may a Party-State dissociate itself from the process or hamper the pace thereof. It is obvious that an arbitration system does not have the same that may be attributed to a Permanent Court of Law. It is probable that the current system will be replaced by a Permanent Court, with competence to impose constitutional and legal controls, in order to resolve disputes arising from non-compliance with community law, for uniformization, and for consultations with national judiciary agencies regarding the interpretation of such law. It would thus be expensive, burdensome, unnecessary and premature at the moment, although this should be studied and negotiated in the near future.

The Protocol schedules natural stages in the resolution of disputes: a) direct negotiations; b) appeal to the Common Market Group which may, if it wishes, consult a group of specialists, and c) arbitration procedures.

Only the Party-States may have recourse to arbitration procedures. Private individuals and corporate legal entities adversely affected by legal or administrative measures that violate the Treaty of Assuncion, or other community law norms, even if derived, may only appeal to the National Section of the Common Market Group (Foreign and Treasury Ministries) which shall decide if the claim is well-founded, in which case discussions will be entered into with the National Section of the plaintiff's Party-State and, if necessary, the matter will be taken to the Common Market Group.

In most cases, the Common Market Group will take decisions in accordance with the recommendations of the Group of Specialists, if set up. If - with or without consultation with the Group of Specialists - the Common Market Group does not resolve the issue, for which a unanimous decision by its Members is necessary, the Party-State which brought suit may appeal to arbitration. This means that in all cases, a solution to the dispute is guaranteed. It should be noted that an Arbitration Court may not hand down a non liquet decision because, in addition to the Treaty of Assuncion, and agreements concluded under its sphere of application and derived norms, the arbitration judges have recourse to international law (Article 19 of the Brasilia Protocol) and probably also to the general principles of law common to the legislations of the Member-States.

As at the moment the agencies set up by Treaty of Assuncion are essentially inter-Governmental and not supranational, they do not adopt decisions, in the case of the Council, or the Resolutions, in the case of the Common Market Group, that are applied directly to private individuals or corporate legal entities. Additionally, even in the Party-States, they are not applied without the consent thereof, as approval requires a consensus agreement. In future, this should be implemented and only then will private individuals and corporate legal entities be constituted as legitimate parties in a community court.

There is no reason to describe here the provisional system for resolving disputes in the MERCOSUR, whose essential characteristics we have mentioned briefly above. For those who wish to study this topic in greater detail, we attach herewith: a) the text of the Treaty of Assuncion, giving

the structure and spheres of competence of the Council of Ministers and Common Market Group mentioned in this Report; b) a descriptive study of the Brasilia Protocol published by "Edições Aduaneiras"; and c) the text of the Brasilia Protocol.

We would also mention as being of interest the Report entitled "Solución de Controversias en el MERCOSUR", by Jorge Pérez Otermin, published by the Instituto Artigas del Servicio Exterior, in October/November 1991, in Montevideo.

CUSTOMS PUBLICATIONS

Article by Paulo Roberto de Almeida

The System for Resolving Controversies

The establishment and progressive affirmation of supranational law courts constitutes one of the most important phenomena within the international community over the past few decades, similar in its effects to the appearance of international law at the dawn of the modern era, as the modern national state was taking shape; efforts have been under way to regulate the droit des gens in view of the absolute sovereignty of brute force. The legal organization with which efforts are currently under way to endow the relationships among political communities is intended to replace the almost exclusive resource to war through the use of a few rules agreed upon in common to resolve conflicts and clear up outstanding matters. Typically, diplomatic and political means of resolving disputes have been fine-tuned since the XVI century; direct understandings (talks and negotiations) good offices, mediation, consultation and reconciliation, have also frequently been prompted by the collective initiative of various states.

The legal methods - meaning arbitration and court decisions - have begun to firm up gradually since the end of the last century, and have gained notable institutional impulse from the two Peace Conferences held at The Hague, the Treaty of Versailles, and the setting up of the League of Nations. The slow progress chalked up since then by jurisdictional systems not constrained by the principle of the absolute sovereignty of national states - particularly the International Court at The Hague and the European Community Courts of Law - today represent the most successful efforts in resolving disputes among States and strengthening the reign of reason where force was formerly predominant. The unceasing reinforcement of this type of institution seems likely to continue to characterize developmental trends in international public law over the next few decades.

Another major normative and institutional tendency - which corresponds, politically speaking, to the globalization and regionalization of the world economy, in parallel to the extraordinary development and diversification of international organizations, including non-governmental organizations, is the appearance of a new type of law, alongside its variants, which have long been well-known. This new type of law derives from the exponential development over recent years of major economic blocs set up in the forms of customs unions or common markets. This involves law that is neither international nor domestic and national, but rather an intermediate type of law developed by the integration agencies, that is called community law in the case of common markets of the European type, for example.

The Luxembourg Court in fact represents one of the most effective guarantees for building up a community on the continent of Europe, as well as providing stricter controls over the legality of the actions of Member-Nations. Together with the Andean Pact Court, it is constitutes a clearcut example of the importance of maintaining juridical unity within a community under construction, affirming in a peremptory manner the principle of the superiority of community law over the various national legal codes and systems.

The slow appearance and gradual affirmation of supranational law courts in Europe, as well as their possible future stumbling-blocks in Latin America, clearly show that these processes are not exempt from political difficulties nor practical choices. No legal system can operate within a political vacuum, which is why, in the relatively blank terrain of mandatory normativity for supranational jurisdictional systems, consideration should be given to the **voluntas** of the political communities that really exist, regarding the smooth transfer of sovereignty that is implicit in all international juridical systems.

The European experience shows quite clearly that the existence of a well-designed integrationalist project that is closely attuned to the aspirations of the national communities involved is the strongest guarantee of a **retraite paisible** of the notion of absolute sovereignty. Furthermore, community law needs to be consolidated in a manner that is independent of the immediate interests of the State, which may be ensured by the institution of judicial organizations set up as independent agencies within an economic integration organization. The European example has borne fruit, marking in an indelible manner the current stage of development of international public law, including in Latin America.

After the initiative - still not totally consolidated but largely positive - within the sphere of action of the Andean Group, of preparing a community law specifically for Latin America, the continent's Southern Cone is in its turn beginning to move away from the pre-history of integrationalist law and is starting to enter this *age of reason* of building up a community.

The Treaty of Assuncion covers the adoption of a system for resolving disputes during the transition period, which should be replaced by a permanent system as from the entry into force of the definitive institutions in this new area of integration. This Treaty does not mandatorily require the establishment of Courts of Law, meaning a permanent organization endowed with exclusive obligatory competence, but it is probable that it will be set up during the later stages of the integration process for this sub-region.

In Annex III, this Treaty indicates that disputes that arise among the Party-States due to the implementation thereof should be resolved through direct negotiations, and at later stages through the intervention of the Common Market Group or Common Market Council. This Annex also determines the preparation within 120 days of the entry into force of the Treaty of the transitory system mentioned above.

In November 1991, the Member-Nations negotiated a Draft Treaty Protocol which was slightly modified - on the bases of suggestions from Brazil - and was approved by the Council of Ministers. It should be signed during the first Meeting of the MERCOSUR Presidents during their meeting in Brasilia on 17 December 1991.

The Protocol sets up the system for resolving disputes during the transition period which covers four levels or instances of resolatory courts, with suitable proceedings for each. In addition to direct negotiations among the parties involved and the intervention of the Common Market Group, as already covered in the Treaty of Assuncion itself, the resource of an arbitration system was adopted (through an ad hoc court) and provisions were also made for a fast-track procedure handling claims put forward by private individuals and corporate legal entities. Basically, however, the mechanisms covered herein configure two supplementary methods of resolving disputes: traditional diplomatic methods of negotiation, and resource to a court of arbitration.

It should be emphasized that, in accordance with the characteristics of the transition process, which did not set up community-type structures but only directive agencies with national representation, it was decided not to set up a Court of Justice within the MERCOSUR through the Protocol on the Resolution of Disputes, with characteristics similar to those of its European or Andean counterparts, but rather to establish an ad hoc arbitration system that would operate exclusively in order to resolve the matter under dispute. Nevertheless, in view of the difficulties foreseen for taking decisions within the MERCOSUR, during the transition period, the decisions of the Common Market Group or Common Market Council should be taken by consensus. The Party-States acknowledge the jurisdiction of the arbitration courts as mandatory and agree to comply with the decisions handed down thereby.

The structure of the Protocol, without mentioning the traditional, informative and declaratory Preamble, is as follows:

Chapter I: Range of Application

Chapter II: Direct Negotiations

Chapter III: Intervention of the Common Market Group

Chapter IV: Arbitration Procedures

Chapter V: Lawsuits brought by private individuals or
corporate legal entities

Chapter VI: Final Provisions

The first Chapter consists solely of an explanatory Article that outlines the application of the procedures under the Protocol, which are: disputes that may arise among the Party-States over interpretation and application, or non-compliance with the provisions on the Treaty of Assuncion, in agreements signed within their legal spheres, as well as decisions and resolutions issued respectively by the Common Market Council or the Common Market Group.

The Brasilia Protocol does not outline a commercial arbitration system, as it is not a mechanism for resolving conflicts among private individuals or corporate legal entities, nor for taking decisions on the application of national legislations, except insofar as these or other measures of the Member-Nations enter into conflict with community law, meaning the decisions and norms of the Common Market.

Chapters II and III cover the procedures for Courts of the First Instance, where it is hoped that most - if not all - issues may be resolved, for the cases representing disputes among two or more parties. Direct negotiations shall take place through traditional diplomatic channels, with the parties in conflict advising the Common Market Group of the actions taken, as well as the results

thereof. This first resolatory court may not sit for a period of fifteen days as from the date on which one of the parties brings suit.

If an agreement cannot be reached through direct negotiations within a reasonable period, or if the issue is resolved only partially, either of the parties in dispute may submit their case to the consideration of the Common Market Group, which will issue an opinion on the case within thirty days, formulating recommendations to resolve these differences. In its assessment of the case, the Common Market Group may request the assistance of specialists if it considers this necessary. These experts are taken from a list of twenty four specialists, appointed equally by the Party-States; they shall also act in the case of suits brought by private individuals or corporate legal entities. The expenses incurred in this type of procedure should be borne equally by the Party-States involved in the dispute, or in proportions to be determined by the Common Market Group.

The core of the Protocol is dominated by a description of the functioning of the arbitration system, based on an ad hoc arbitration court with a bench of three arbitration judges, whose jurisdiction the Party-States acknowledge as being mandatory and competent to resolve all matters covered in the Protocol. Additionally, these states agree to comply with the decisions of the arbitration court established to rule on a specific case.

This procedure comes into operation when the dispute cannot be resolved through the mechanism stipulated above, in which case one of the parties involved may advise the Administrative Secretariat of the MERCOSUR of its intention to have recourse to the arbitration system. Within a period of fifteen days, each of the Party-States shall designate from a list of ten national arbitration judges prepared by each of them and recorded at the Administrative Secretariat, one arbitration judge, plus an alternate. The third judge shall be chosen in common agreement from the names that are not citizens of the nations involved in the dispute, and shall preside over the arbitration court.

Should no agreement be reached by the parties over this third arbitration judge, the Administrative Secretariat shall select this judge by drawing lots from the names on a second list of sixteen arbitration judges prepared by the Common Market Group, half of whom shall be citizens of the four MERCOSUR nations, with the remainder coming from third party countries. Should one of the Party-States involved in the case fail to appoint its arbitration judge within the period indicated, this shall prompt the Administrative Secretariat to proceed with the selection thereof, in accordance with the order of precedence established in the respective national list.

Arbitration judges noted on these lists should be jurists of noted competence in matters that may form the subject of dispute. A priori, the possibility is not discarded that Government employees - in this case probably judges - may also appear on the lists of national arbitration judges. On the other hand, although the Common Market Group may not agree to the suggestion of the ad hoc Group whereby the second half of the common list should consist of jurists from "third party Latin American countries". it is quite probable that the extra MERCOSUR arbitration judges on this list which would be mobilized if all four Member-Nations were to be involved in a dispute, would be leading personalities in the international legal community, possibly judges in the Andean Courts of Law, or specialists from other countries renowned for their work in this specific area (Court of Luxembourg, GATT panels etc).

The limiting prerequisite stipulated in the Article on the appointment of the arbitration judges -

that they should be "jurists of acknowledged competence" - will in principle clearly prevent university professors, diplomats or civil servants from other professional areas (economists, administrators, political scientists etc) from acting as arbitration judges in the ad hoc Arbitration Court of the MERCOSUR, even though they may have effective experience in the relevant issue (previous participation in GATT panels, for example). This limitation does not exist however, for specialists that may be called in by the Common Market Group in the case of proceedings covering cases brought by private individuals or corporate legal entities, or who may act as aides or advisors to the Common Market Group when its direct intervention is involved.

Once set up, the Arbitration Court shall establish its headquarters in the territory of one of the Party-States and shall adopt its own rules and procedures, providing guarantees that each of the parties involved shall have full opportunity to present their arguments and proof as deemed pertinent. The Party-States involved in the dispute shall appoint their representatives to court, in addition to aides and advisors for the defense of their rights, and shall advise the Arbitration Court of instances undergone previously.

The decisions of the Arbitration Court are taken by a majority vote, and should be motivated and signed by the President of the Court and the other arbitration judges, who may not issue dissident votes. An important aspect of arbitration proceedings and the process of resolving disputes is that, in order to ensure the independence of the Court and the full freedom of action of its judges, their votes must be kept secret.

The deadline for handing down decisions has been set at sixty days, and may be extended for an additional period of no more than thirty days, but during this interval the Court may implement additional measures that it deems necessary to prevent serious, irreparable damage or harm to one of the Parties involved in the case. The Parties in the case should immediately comply with any provisional measure decided on by the Court, unless it sets pre-determined deadlines.

The decisions of the Arbitration Court are not subject to appeal, and compliance therewith is mandatory for the Party-States involved, as from the notification thereof. This notification has the power of court sentence for them, and should be complied with within a period of fifteen days, unless the Court itself sets another deadline. Should a Party-State fail to comply with the decision handed down by the Court within a period of thirty days the other Party-States may implement temporary compensatory measures, such as the suspension of concessions or other equivalent steps designed to enforce compliance therewith.

The possibility of a Party-State requesting, within fifteen days, clarification of the contents of a decision handed down by the Arbitration Court is covered, as well as the manner in which this should be handled. The Court has the same length of time to hand down its decision, and may suspend compliance with the decision until a later decision is taken on the application submitted.

Expenditures on arbitration proceedings shall be borne in the case of national arbitration judges by each Party-State involved in the dispute. Other legal costs and the pecuniary compensation of the President of the Court shall be covered equally by the Party-States involved. The Court may stipulate different proportions to cover "common" outlays.

In addition to the arbitration system, the Protocol also makes provision for a fast-track

mechanism for resolving disputes, which may be used in the case of suits brought by private individuals or corporate legal entities. These may be prompted by the sanction or application by any of the Party-States of legal or administrative measures that are restrictive, discriminatory in effect, or that involve unfair competition, in violation of the Treaty of Assuncion, of the Agreements arising therefrom, or decisions and resolutions issued by the Common Market Group and Common Market Council.

In this case, the parties affected should formalize their claims at the National Section of the Common Market Group for their country of residence, attaching thereto written proof backing up the real existence of the violation and the existence or threat of damage. Unless the issue has already formed the subject of proceedings in courts of the first instance (direct negotiations, Common Market Group intervention) or has been submitted to arbitration, the National Section of the Common Market Group may establish direct contact with its counterpart in the member-state involved in the case, or may forthwith submit the case for examination by the Common Market Group.

Should this latter organization not turn the claim down, it shall immediately proceed to convoke a group of experts, consisting of three names from a third list, to be set up within a maximum period of thirty days. If a claim against a Party-State is deemed to be well-founded, any other Party-State may request the implementation of corrective measures or the cancellation of the measures questioned. Failure to comply with this decision within a period of fifteen days may lead to arbitration proceedings as covered in Chapter IV of the Protocol.

The group of experts described here - as we have already noted - may also advise and counsel the Common Market Group. These names are drawn from a common list of twenty four names, with six representatives being designated by each Party-State, chosen from experts of acknowledged competence in the matter. The expenditures incurred during this fast-track procedure shall be covered in the proportions as determined by the Common Market Group; should an agreement not be reached, they shall be borne in equal amounts by the parties directly involved therein.

The Protocol shall remain in force until the date of entry into force of the permanent system for resolving disputes for the Common Market, which should take place during 1995. Adhesion by a state to the Treaty of Assuncion implies *ipso jure* adhesion to the Protocol on the resolution of disputes.

The experience of the European Economic Community, as well as that of the Andean Group, indicated in the Chapter on Resolving Disputes and in parallel to typically diplomatic procedures, emphasizes the convenience of adopting jurisdictional methods. In the CECA (1951) and ECC (1957) Treaties, for example, Courts of Law were set up which were assigned by the signatory states on an exclusive competence higher than that of national jurisdictions, either to interpret the norms contained in the treaties, or to hand down decisions in the case of specific conflicts, disputes or controversies. The investiture of the members of these Courts takes place through a collective decision of the member-states. In the case of the Cartagena Agreement, despite the fact that this process took ten years to mature, in 1979 it was finally decided to set up a jurisdictional agency that could guarantee the legality of sub-regional Andean integration.

This need is justified by the importance of economic, social and political transformations

prompted by the process of setting up a common economic area and customs union, and a fortiori, a common market involving two or more nations. From the institutional viewpoint, a new type of law necessarily emerges: integration law or community law, which then takes precedence over the domestic law of each of the Party-States involved in this process.

It is understood that decisions as fundamental as the definition of harmonious common economic policies (in the industrial and agricultural sectors for example), the removal of constraints on the free circulation of production factors (labor and capital), the right to establish companies with local treatment, the setting of common rules for foreign trade and free competition policies, in addition to many others of equal importance, requires the availability of effective juridical norms that can be complied with. This means establishing institutions whose decisions will be effectively imposed and implemented.

During the transition period, both for reasons of a practical nature as well as to avoid heavy financial costs during a phase of economic difficulties for all the Party-States involved, the Governments of the MERCOSUR Member-Nations decided to set up the simplest possible structure and system for resolving disputes without adversely affecting its relative effectiveness in the practical handling of the solutions proposed. The system suggested is probably the most suitable for the current stage of the integration process of Latin America's Southern Cone.

This does not mean that all political and juridical problems - not to mention economic woes - that will occur in the Member-Nations during the transition period will be satisfactorily resolved with the full simple application of the procedures stipulated in the Brasilia Protocol. In fact, many of them extend beyond the scope of the Protocol. To highlight one issue, the right of veto, for example - or the need for consensus, which comes to the same thing - represents a primary hurdle to an agile and efficient decision-taking process. Unless various types of decision-taking processes are stipulated for various cases of differences in interpretation with regard to the normative content of community law being prepared within the MERCOSUR, the political difficulty represented by a deep-rooted controversy can only be cleared up by an agency totally independent of the executive law courts of the Party-States.

The most effective formula for ensuring uniform interpretations of the norms of a necessarily complex system such as a Common Market, consists in granting a judicial agency this function of interpreting community law in a mandatory manner. This judicial agency should be totally independent of the normative agencies of the integration system. However, it is not easy to achieve an adequate regime for resolving disputes as sophisticated as that incorporated into the judicial agency of the European Community. Experience built up through the application of this structure to resolving disputes set up under the Brasilia Protocol may be confirmed in practice as the embryo of the future Law Courts of the MERCOSUR. During this transition phase, it is important that it should demonstrate relative effectiveness in the satisfactory handling of inevitable matters left pending that all rapid processes of business reconversion involve, with the implicit social costs thereof, that must necessarily be caused within national economic systems. The rationale whereby this effectiveness should be judged is an upturn in the social well-being of the communities involved, which is also the principal criterion underlying the actual integration process.

In the case of the MERCOSUR, the economic benefits that will arise from full implementation of this Common Market will be as extensive as the guarantee that latent protectionist trends in the

Member-Nations can be minimized by the independent action of a lower court that can at an opportune moment develop into a full Court of Law.

DI01.94I
Disk I.394



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/I/doc.2/94
1 August 1994
Original: Spanish

SETTLEMENT OF DISPUTES WITHIN NAFTA

By Dr. José Luis Siqueiros

1. Background

The North American Free Trade Agreement, known in Mexico by the initials **TNLC** and in the United States, Canada and most other countries by the English initials **NAFTA**, was signed by the Executives of the three signatory countries on December 17, 1992.

Now it will undergo the process of approval by the legislative bodies of each of the countries

Party to the Agreement, in accordance with their own constitutional systems.1/ It will be promulgated and published in Mexico, once ratified by the Senate. If these steps are followed through, the Agreement will become effective on January 1, 1994.

The instrument is a lengthy document comprised of twenty two Chapters and numerous Annexes, totaling approximately 2000 pages in length.2/ It formally provides for the creation of a free trade zone between Mexico, Canada and the United States, within the scope of the General Agreement on Tariffs and Trade (GATT).3/ It is intended to eliminate trade barriers, foster fair competition, multiply investment opportunities, provide adequate protection for intellectual property rights, and establish effective procedures for the application of the Treaty and for the settlement of disputes which may arise in the course of its implementation.

NAFTA provides that other countries or groups of countries may become Parties to the Agreement with the consent of the three original Parties, and in accordance with the terms and conditions established thereby, once the internal approval processes have been concluded in each country.4/

If indeed it is true that the NAFTA negotiators kept the provisions and overall context of the Free Trade Agreement (FTA) between Canada and the United States (which has been in effect since January 1, 1989) 5/ very much in mind, it is also true that many of its Chapters were modified, and several of its frameworks, including that covering mechanisms for the settlement of disputes, acquire innovative features.

The FTA between the United States and Canada has two Chapters, Chapter 18 and Chapter 19, which govern the settlement of disputes. Chapter 18 6/ provides for institutional arrangements and deals primarily with the avoidance or settlement of disputes arising from the interpretation and application of the Treaty. Chapter 19 7/ outlines the mechanisms for the settlement of disputes arising from unfair trade practices, basically anti-dumping and the imposition of compensatory quotas or countervailing duties.

With the modifications outlined below, not in essence but rather with regard to their

1. As a matter of interest, the document will be in fact be a Treaty of Mexico, to be ratified in accordance with the Constitutional procedures applicable thereto (Articles 76, I and 133 of the Political Constitution of the United States of Mexico). For the USA, this will be an Executive Agreement that will be signed by its Federal Executive and which will require final approval by Congress and later a law to implement it. With regard to Canada, the Pact will require the approval of Parliament and later legislation to implement it.

2. Publication of the text of the last FTA authorized by SECOFI.

3. General Agreement on Trade and Tariffs (GATT. Basic Documents of International Economic Law. CCH International, Vol.I, 1990, pages 3-76.

4. Article 2205.

5. Data in "Basic Documents ..." page 359-524

6. Articles 1801 to 1808.

7. Articles 1901 to 1904.13.

implementation mechanisms, the context of Chapter 18 of the FTA has been transferred to Chapter XX of the NAFTA, with changes addressing only the mechanisms of implementation. The general outline of Chapter 19 of the U.S.-Canada Agreement has been followed in Chapter XIX of the new trilateral Treaty. The mechanisms outlined in Chapter XI (on investments),^{8/} XIX and XX may be the most significant in the Treaty concerning dispute settlement, more particularly the last-mentioned as it is generic. However similar mechanisms are present in other Chapters that deal with financial services^{9/} and agriculture.^{10/}

This Report analyses the provisions of NAFTA that address the procedures for dispute settlement involving:

- a) investment issues, meaning matters that arise between one Party (the recipient state) and an investor from the other Party State;
- b) matters such as those arising from anti-dumping, compensatory quotas or countervailing duties;
- c) matters covered by Chapter XX of the Treaty, referring to the institutions and mechanisms for resolving disputes over the interpretation and application thereof.

With regard to disputes over investments in terms of financial services, a brief overview of the Articles of Chapter XIV follows, which regulates them; with regard to private trade disputes over agricultural products, mention will be made only of the provision that establishes the setting up of an Advisory Committee on these matters.

2. Resolution of Disputes between Investors and the Recipient State

Chapter XI of the Treaty, entitled "Investment" is divided into two sections. Section A covers investments as such, their sphere of application and the minimum conditions for the legal treatment of investors. Section B covers the settlement of disputes that may arise between the Party receiving the investment and the investor concerned.

Without going into greater detail on the norms and standards contained in Section A, its objective may be summarized as being to ensure investors ^{11/} (a Party to the Pact, a company or citizen thereof) treatment that is no less favorable than that meted out by the Party under similar circumstances to its own companies and citizens. Thus, granting the status of "most-favored nation" means that this may be no less favorable than that granted to the investors of the other Party or citizens of a country that is not a Party to the Treaty. On the other hand, the above-mentioned

8. Chapter 11, Sub-Chapters A and B of the Treaty, with its Annexes.

9. Articles 1414 and 1415 of the Treaty.

10. Article 707 of the Treaty.

11. See Article 1139 of the NAFTA Pact defining the concepts and terms used in Chapter XI

investors will enjoy treatment in accordance with international law, which is fair and equitable, with full protection and security. 12/

None of the Parties may impose nor have imposed on investors from other Parties any specific performance requirements for their activities related to the establishment, administration, operation and conduct of their investments, defined in very broad terms, including any restrictions on top management or membership of Boards.13/

Favorable treatment for foreign investors also includes freedom to transfer funds abroad, as well as the right to receive fair compensation without delay and in liquid form, in case of expropriation or nationalization.14/

If some of the obligations imposed on the Party receiving the investment are subject to reservations and exceptions contained in Annexes I, I, II and IV of the deed15/, which reservations and exceptions are listed for each Party and alleviate the strictness of the basic principles, the core of Chapter XI is that disputes which may arise as a result of violation of the rights guaranteed to investors in Section A shall be resolved through the arbitration mechanism regulated in Section B of this same Chapter.

Foreign investors that suffer losses and damages as a consequence of failure to comply with the provisions or obligations in Section A may have recourse to this mechanism, or when adversely affected by disciplines imposed on monopolies or state-owned companies.16/

As stated by one of the Mexican staff involved in the NAFTA negotiations, "In order to ensure that disputes that may arise between foreign investors and the host state be resolved through consultation or negotiation, a period of six months is stipulated as from the implementation of the measures which are alleged to be in violation of the Chapter, in order to start arbitration proceedings. Thus, arbitration proceedings under this Section may not be brought within a period of three years as from the implementation of the measure that harmed the investor."17/

As the negotiation of this scheme was one of the fundamental concerns necessary to ensure the smooth functioning of parallel procedures with regard to the same measures, and in order to avoid the possibility of contradictory decisions being handed down by arbitration courts and domestic courts, Section B contains a specific Annex that comes into action in the case of suits brought

12. **"Minimum treatment level" defined in Article 1105.**

13. **See Articles 1106 and 1107.**

14. **See Article 1110.**

15. **The reserves and exceptions to the Chapters on Investment, Transborder Trade in Services and Financial Services given in Annexes I, I, II, IV, V, VI and VI of Tome I of the SECOFI Edition, Mexico D.F., 1992.**

16. **Article 116 covers the obligations established in Article 1503 (2) for "state-owned companies" and paragraph 3(a) of Article 1502 on "Monopoly and state-owned companies", when they act in a manner incompatible with the provisions of Section A.**

17. **Dr. Fernando Hefty Etienne "El Capítulo de Inversión en el Tratado de Libre Comercio con Norteamérica", included in the publication "Panorama Jurídico del Tratado de Libre Comercio", I, Universidad Iberoamericana, Law Dept, Mexico, 1993, pages 30 and following.**

against the Mexican State. This stipulates that the investor must decide whether to resolve its dispute through either the Mexican courts or international arbitration. Once this choice has been made, it shall be definitive and no other way of resolving this dispute shall be used. This preserves the possibility of suitable administrative resources being brought in, without the foreign investor thereby renouncing its rights to international arbitration. The purpose of this is to ensure that the administrative authority can compensate for harm caused to the foreign investor, prior to this latter going to arbitration. In order to streamline arbitration procedures, the possibility of using any of the following arbitration rules is covered:

- a) The ICSID Convention on the Settlement of Disputes over Investments between States and Citizens of Other States, signed in Washington on 18 March 1965;
- b) The ICSID Supplementary Mechanism for use when one of the Parties is a member of ICSID;
- c) The Arbitration Rules of UNCITRAL (United Nations Commission on International Commercial Law) approved by the Assembly General of the United Nations on 15 December 1976.

To date, of the three nations that signed the NAFTA Pact, only the USA is also a member of ICSID, whereby disputes that may arise between Mexican and Canadian investors over the measures adopted by any of the nations may only be resolved by the implementation of the UNCITRAL Arbitration Rules, at least until these nations join ICSID.

Section B contains provisions designed to ensure that consent to arbitration procedures is confirmed by the Parties, with due compliance with the Arbitration Rules outlined above, which shall be applicable thereto with the exception of concrete regulations covered in Section B.

The procedure for appointing arbitration judges and setting up an Arbitration Court is designed to guarantee the neutrality thereof. It thus stipulates that, unless an agreement is reached between the Parties involved in the dispute, the Arbitration Court shall consist of three Arbitration Judges. Each Party shall appoint a judge, and the third - who shall act as the President of the Arbitration Court - shall be selected from a list of forty-five Arbitration Judges which shall be agreed upon between the Parties prior to the entry into force of NAFTA, regardless of their nationality.

Under no circumstances whatsoever may the President of the Arbitration Court be a national of the Complaining Party. On the one hand this is designed to ensure the neutral composition of the Court, while on the other it creates an additional responsibility for the forty five arbitration judges listed.

An innovation introduced by Section B is the inclusion of a section on the aggregation of cases, whereby a Court may assume jurisdiction over various matters arising from the same measure implemented by the recipient of the investments, and thus all these cases may be heard by a single Arbitration Court. This would ensure an efficient throughput of lawsuits and would also, from the point of view of the State allegedly responsible, avoid a number of arbitration cases being heard in parallel, as they all arise from the same act.

It is stipulated that the law applicable shall be the NAFTA Pact itself, as well as international law. Thus, the arbitration procedure shall be held in the national territory of one of the Parties, which shall in turn be a Party to the New York Convention on the Acknowledgment and Execution of Foreign Arbitration Decisions. As Mexico, the USA and Canada are all Parties to this Convention, it should be studied in the light of possible adhesions to NAFTA and handled in such way as to avoid arbitration procedures taking place in jurisdictions totally alien to the region.

It is thus particularly important that the arbitration decision handed down may only order payment of compensation of a monetary nature; even though the decision may also order restitution of property, the state responsible for complying with this decision should be also be given the possibility of paying monetary compensation in an alternative manner. However, in no case whatsoever may the decision order any modification in the measure implemented, nor the elimination thereof, as this will form the subject of the scheme for resolving disputes covered in Chapter XX.^{18/}

3. Solution to Anti-Dumping Disputes, Compensatory Quotas or Countervailing Duties

Chapter XIX covers unfair trade practices known as dumping and subsidies, which in both cases give rise - under the commercial legislation of the three nations involved - to the imposition of compensatory quotas or countervailing duties. This means the application of additional customs dues on imports that are considered unfair to local manufacturers of similar products, in order to re-establish fair competition in trade.^{19/}

The disputes covered by this Chapter are those that arise when one of the Parties to NAFTA adopts legislative or regulatory reforms to the prejudice of another Party, or when definitive resolutions issued by domestic administrative authorities are deemed to violate the Treaty, which should be reviewed by an Arbitration Panel.

As this involves legislative reforms, the Party that feels adversely affected thereby, may request the establishment of a bi-national Panel that will hand down a declaratory opinion on the reform proposed, declaring whether or not it is incompatible with NAFTA, GATT or their Codes of Conduct. The initial declaratory opinion shall be converted into a definitive statement, unless one of the Parties applies for reconsideration. If this not effective, a process of mutual consultations follows, whereby the Party allegedly to blame shall rectify its conduct. If this does not occur, the affected Party may take equivalent legislative actions against the other, or may terminate the Treaty through advance notice.^{20/}

In brief, the Panel may not hand down a binding decision, but shall be limited to opinions that foster consultation and negotiation between or among the Parties in conflict. If no satisfactory

18. **Ibid, page 40.**

19. **For more information on this topic, see the study by Dr. Julio C. Treviño "La solución de controversias sobre antidumping y cuotas compensatorias en el Capítulo 19 del TLC", included in the same publication mentioned in Note 17 above, page 53 and following.**

20. **Articles 1903 and 1904.**

solution is reached, the Party affected shall proceed to retortion or denunciation of the act.

With regard to definitive resolutions issued by top-level domestic administrative agencies, meaning those competent to take decisions on unfair trade practices, the Party that feels it has been adversely affected by the above-mentioned Resolution shall retain the option of having recourse to a judicial appeal in accordance with domestic law, or submitting the matter to an Arbitration Panel. This latter choice shall be implemented at the request of any of the Parties involved (normally the importer Party or the Party whose goods are subject to the Resolution challenged). This application may be submitted at its own initiative, or at the request of a private individual who, under local norms, may apply for a judicial review.

Under this second hypothesis, the interested Party is not authorized as a Party to the proceedings, and is merely a type of Co-Complainant of the Party (Signatory State) affected by the Resolution, although with the right to appear and be represented by lawyer before the Arbitration Panel, and to request information and submit proofs and allegations.

The purpose of this Panel is to determine if the competent authorities of the importer Party issued the definitive Resolution in compliance with the legislation applicable in their own country, including relevant provisions regarding unfair practices, regulations, administrative practices and judicial precedents. It should also take the general principles of law into consideration.

The Panel shall follow the procedures established by the Parties on the entry into force of the Treaty and shall hand down decisions within a period of 315 days as from the date on which its establishment was requested. This Panel decision may confirm the determination of the administrative authority, or may request it to adopt measures congruent with the decision of the Arbitral Panel. In practice, we believe that this will involve either revocation or fundamental modification. The decision of the Panel shall be binding on the Parties and none of them may establish in their domestic legislation the right to challenge this decision in its courts. Provision is made only for an exception appeal called extraordinary objection, for cases in which one of the Parties claims bias, conflict of interest or some serious violation of the Rules of Conduct by the members of the Arbitral Panel. This appeal shall be resolved by a Committee consisting of three federal or appeal court judges or former judges selected from a special list.^{21/}

According to Annex 1901.2, the bi-national Panels shall consist of five members, two of whom shall be appointed by each Party involved in the dispute, with the fifth member elected by common agreement. The Panelists shall be selected from the list of 75 individuals. Each of the Parties shall appoint 25 citizens of the USA, Canada and Mexico. In addition to complying with prerequisites of prestige and probity, these individuals shall also prove their independence, with preference being given to jurists of good reputation. The President of the Panel shall be elected from the lawyers that constitute it, by a majority vote, or - if no majority vote is reached - by drawing lots.

Article 1905 establishes a broad-ranging system whose purpose is to protect and safeguard the entire Panel Review System set up in this Chapter, as well as ensuring compliance with its decisions. Should any irregularity occur, the Party affected may request consultation with the other Party involved.

21. Annex 1904.13 in the same Chapter.

If these two-way consultations prove fruitless, the Complaining Party may request that a Special Committee be set up to review the actions of the Panel and grant the Parties a fresh opportunity for consultation or modification of matters covered, similar to a court of appeal or court of the second instance.^{22/}

4. Disputes over Investments with regard to Financial Services

Chapter XIV of NAFTA refers to measures covering financial institutions, and investments made by one Party in the national territory of another Party, as well as trade in transborder financial services.

When a dispute arises in these areas, the mechanisms covered in Chapter XX, Section B, of the Treaty shall be applied, with the modifications given in Articles 1414 and 1415 is of Chapter XIV. In this case, we would be faced with a dispute of a specifically financial nature, and the members of the Panels should be selected from a list of some 15 individuals with the necessary qualifications and aptitudes to take action in this matter. The criteria that shall prevail in the negotiation is that the Panelists shall have experience and knowledge of the financial field.^{23/}

This type of dispute is correlated to conflicts that may arise over investments (Chapter XI).^{24/} When a case is brought by an investor from one of the Parties, either on its own account or on behalf of a company, under Section B of Chapter XI, and this investor goes to arbitration, the defending Party (recipient State) may excuse itself in accordance with Article 1410 (Chapter XIV).

The purpose of this exception is that the Arbitration Court that will hear the case may submit this topic to the Financial Services Committee set up by the Party States in accordance with Article 1412, so that this Committee may decide whether and to what extent the invocation of Article 1410 is a valid defense against the claim brought by the investor.

The decision of the Financial Services Committee shall be forwarded to the Arbitration Court and the Free Trade Commission. This decision shall be binding on the Court.

If this exception is approved by the Committee, the Arbitral Panel shall consist of members from the list of specialists in financial law, and shall hand down a decision in compliance with the provisions of Chapter XX, Section B.^{25/} In this case, the Arbitration Court that initially heard the case brought by the investor shall declare itself incompetent and shall in all cases wait until the definitive decision of the Panel is handed down, which is binding on the Arbitration Court.

22. Annex 1904.15 outlines the reforms that should be introduced into the domestic legislation of each of the three Signatories of the Treaty. The Canadian list contains eleven reforms planned, with twenty one for Mexico and thirteen for the USA.

23. See Article 1401.

24. This inter-relationship is confirmed in Articles 1101, paragraph 3, 1410, 1414 and 1415.

25. See Article 1414, paragraph 1.

The Arbitration Court may hand down a decision on the issue only in the case that the exception is not allowed by the Committee which exempts itself from handing down a decision, and where in the final instance the Party in dispute does not request the establishment of the Panel within the deadlines laid down Article 1415, paragraphs 3 and 4.^{26/}

5. **Private Trade Disputes over Agricultural Products**

Chapter VI of the Treaty on Agricultural Products and Sanitary and Phyto-Sanitary Measures establishes that an Agricultural Trade Committee shall be set up, consisting of representatives of each of the three signatory nations. Article 707 rules that this Committee shall in turn set up an Advisory Committee for Settling Private Trade Disputes over Agricultural Products, consisting of people with experience or specialized knowledge of this type of dispute. This Advisory Committee shall submit reports and recommendations to the Committee, outlining the systems in each of the Party States, in order to reach a rapid and effective solution to disputes of this nature, taking into account any special circumstances, such as the perishable nature of certain agricultural products. Without adversely affecting the establishment of the above-mentioned Advisory Committee, and without denigrating its duties and responsibilities, we feel that the mechanisms for resolving disputes in this area will be those covered in Chapter XX, which are generic for these matters.^{27/}

6. **Institutional Provisions and Procedures for Settling Disputes**

Chapter XX of the NAFTA Agreement is divided into three Sections. Section A covers institutions, including the Free Trade Committee and the Secretariat. Section B (the largest) covers the generic procedures and the settlement of private trade disputes. For the purposes of this study, we will concentrate principally on an analysis of Sections B and C. Nevertheless, a few brief comments should be made on Section A.

6.1. **Section A**

The Trade Commission

The highest-level agency in the NAFTA is manned by staff from all three Parties at Ministerial level; its duties and responsibilities ^{28/} include preventing or resolving all controversies which may arise by reason of the interpretation or application of the Treaty of wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of the Agreement or cause nullification or impairment under Annex 2004 of this Chapter.^{29/}

26. See Article 1415, paragraph 4.

27. See Article 2004.

28. Article 2001, paragraph 2, sub-item (c).

29. In Annex 2004, paragraph 1 of Chapter XX authorizes the Parties to have recourse to the mechanism established thereby in cases indicated, considered as annulling or eliminating the expected benefits.

The Commission has authority to establish *ad hoc* or Standing Committees, which are working groups or groups of experts, and may delegate responsibilities to them. The Commission is to establish its own rules and procedures and all its resolutions must be arrived at by consensus.30/

The Commission will utilize the Secretariat made up of the three national sections. The Secretariat will give administrative assistance to the Panels and Committees established in accordance with Chapter XIX and those formed pursuant to Chapter XX, according to the procedures set forth in each of the Chapters.

6.2 **Section B**

Settlement of Disputes

The underlying principle of Chapter XX is that of amicable agreement. The Parties undertake to come to an agreement on the interpretation and application of the Treaty, and by cooperation and consultation, to reach a mutually satisfactory solution to all disputes.

6.3. **GATT Dispute Settlement**

If any controversy arises with respect to the provisions of the NAFTA which is also a controversy under the General Agreement on Tariffs and Trade (GATT), or those agreements negotiated under the GATT or under a successor agreement, it may be resolved in either forum as the complaining Party chooses. 31/

However, before the complaining Party initiates proceedings before the GATT, it will have to notify any Third Party. If the Third Party would rather resort to the procedures established by the NAFTA it shall so inform the notifying Party, and both, by reciprocal consultation, shall strive to agree upon a single forum. If they do not reach an agreement, the dispute will be settled according to the guidelines established in the NAFTA.

There are, however, exceptions to this rule. The exceptions deal with matters related to environmental and conservation agreements, the agricultural sector, and sanitary and phyto-sanitary measures or standards (Chapter IX). In these areas, the responding Party may object to the dispute being brought before the GATT, and may request that the Commission follow the procedures for dispute settlement set out in the NAFTA. If the complaining Party had already initiated procedures pursuant to Article XXII of the GATT those procedures must be stayed without delay. Except for the situation just described, once a procedure has been initiated under either the GATT or the NAFTA, the chosen forum shall exclude the other.

30. Article 2001, paragraph 4.

31. Article 2005.

6.4 Consultation

When a Party believes that any actual or proposed measure taken by any other Party may have an adverse effect on the operation of the Treaty, it may resort to the mechanism of consultation through the Offices of its Section in the Secretariat. To do this, the Party must submit sufficient information to allow for an in-depth review of the measure being contested. Then an exchange of opinions will take place and the Parties should attempt to find a solution that will not have a detrimental effect on any of the Parties.32/

6.5 The Commission - Good Offices, Conciliation and Mediation

In the event the Parties are unable to agree upon a solution through consultation within certain time limits, usually between 30 and 45 days, any Party may request in writing that the Commission meet. The requesting Party must state the provisions of the Treaty it deems to be applicable, and must provide the other Parties and its Section with copies of its request.

The Commission must attempt to settle the controversy without delay, and to this end it may:

- a) seek the advice of technical consultants or create working groups or groups of experts;
- b) have recourse to good offices, conciliation, mediation and other procedures for the settlement of controversies; or
- c) issue recommendations to enable the Parties to come to a mutually satisfactory solution of the dispute.

The Commission may consolidate two or more proceedings if it deems such a course of action advisable.33/

6.6 Arbitral Panel Proceedings

In the event the efforts of the Commission do not meet with success within the specified terms, any of the consulting Parties may request that an Arbitral Panel be established, and must inform the other Parties and its Section of the Secretariat. When a Third Party believes it has a substantial interest in the matter, it may participate as a complaining Party,34/ or limit itself to submitting oral or written communications.35/ The Commission will then establish an Arbitral Panel.

32. Article 2006.

33. Article 2007.

34. Article 2008, paragraph 3.

35. Article 2013.

The Arbitral Panel will have five members, chosen from a list of 30 individuals who meet the required qualifications. The individuals on the roster of Panelists will be elected by consensus of the Parties for three-year terms. Panelists may be reelected.

The Panelists must be versed in the areas of law, international trade, dispute settlement, multinational business and other aspects of the NAFTA; moreover, they must evidence objectivity, reliability and sound judgment.36/

An important factor will be their impartiality, therefore, they must be independent and not in any way related to any of the Parties.37/ They must furthermore adhere to the Code of Conduct established by the Commission.38/ They may be nationals of any country, even if their country of origin is not a Party to the NAFTA. In exceptional cases, individuals not on the roster may be designated as Panelists, but in such an event, any of the disputing Parties may challenge the designation without stating the cause. If Panelist does not adhere to the Code of Conduct, the Parties, after consultation, may remove him and replace him according to the foregoing rules.

The two disputing Parties must first agree upon the designation of the chair. If they do not do so within fifteen days following the date the request is made, one Party, chosen by lot, will elect a chair from the roster of Panelists. The elected chairman may be a national of the Party to the NAFTA.

Within a fifteen day term following the designation of the Chairman, each one of the Parties in the dispute must choose two Panelists from the list. The Parties cannot choose their own nationals as Panelists. This innovative procedure, very unique in mechanisms of this kind, is known by the term "inverse selection process.39/

If there are more than two disputing Parties, once the chair has been designated, each one of the complaining Parties must choose a Panelist and the Party complained against must choose the other two, by the inverse selection process mentioned above.40/

The Treaty provides a special list of experts for controversies in the field of financial services.

6.7 Rules of Procedure

The Commission must establish Model Rules of Procedure. The Annexes to Chapter XX 41/ establish a general framework and parameters for these rules. According to article 2012 of the NAFTA the rules must make provision for the following principles:

-
- 36. Article 2009, paragraph 2(a).**
 - 37. Article 2009, paragraph 2(b).**
 - 38. Article 2009, paragraph 2(c).**
 - 39. Article 2011, paragraph 1(b).**
 - 40. Article 2011, paragraph 2(2).**
 - 41. Annex 2005 of Chapter XX.**

- a) the right to at least one hearing before the Panel must be guaranteed, as well as the opportunity of submitting initial and rebuttal briefs;
- b) all hearings before the Panel, deliberations and the initial report, as well as all submissions and communications, shall be kept confidential.

Except in the event the Parties agree upon an *ad hoc* procedure, the procedure shall be governed by the Model Rules. During the twenty days after submission of the request to set up the Arbitral Panel, the mission of the Arbitration Judges shall be:^{42/}

"To examine, in the light of the relevant provisions of the NAFTA, the matter referred to the Commission (as set out in the request for a Commission meeting) and to make findings, determinations and recommendations as provided in Article 2016(2).^{43/} This refers to the initial report which the Panel must prepare. Any one of the Parties can request that the terms include, as subject matter of the dispute, any matter giving rise to the nullification or impairment of benefits and include the Party's wish that the Panel issue determinations on the degree of adverse trade effects caused by the measure under dispute.^{44/}

6.8 Experts and Scientific Review Boards

The Panel may, at the request of one of the contending Parties or on its own initiative, request information and technical advice. The Panel may also request that a scientific review board issue a written report on any matter of fact relating to the environment, health, safety and other scientific issues. The scientific review board will be appointed by the Panel, and will be made up of highly qualified independent experts. The Panel will take into consideration the report submitted by the Scientific Review Board, as well as any observations made by the Parties.^{45/}

6.9 Initial and Final Report by the Panel

Within 90 days following the date on which the last Panelist is designated, or within any other term agreed upon by the Parties or established by the Model Rules, the Panel will submit an initial report to the disputing Parties which will include:

42. The English text of the document alludes to the "terms of reference" taken from the Arbitration Procedure Rules of the International Chamber of Commerce. The French and Spanish texts of the above-mentioned Regulation (Article 13, paragraph 1) refer to the "acte de mission" and "acta de misión" respectively. This covers the establishment of the mandate granted by the Parties to the Arbitration Judges to settle points under dispute.

43. Article 2012, paragraph 3.

44. Article 2012, paragraph 5.

45. Articles 2014, 2015.

- a) the findings of fact;
- b) the determination on whether the measure under dispute is or would be incompatible with the obligations deriving from the Treaty or if it gives rise to its impairment or nullification;
- c) its recommendations for the settlement of the dispute.

Within 14 days following its presentation, the Parties may make their observations on the initial report. The Panel can also request that any interested Party submit its observations. The Panel may also reconsider its report or conduct subsequent reviews.

Within 30 days following the presentation of the initial report, the Panel will present its final report which will explain how the votes were cast, if there was not a unanimous vote. However, the identity of the Panelists voting for or against will not be disclosed. The disputing Parties will transmit the final report to the Commission by confidential communication, including all relevant Annexes, and the report will be published within 15 days after receipt by the Commission.^{46/}

6.10 Implementation of Reports Issued by the Panels

Once the final report has been presented to the disputing Parties, they will (hopefully) agree upon the resolution of the controversy. It must not be forgotten that we are dealing with a dispute between sovereign nations, and that the final report is not an Arbitral award and thus it is not compulsory in nature, unless explicitly provided for by the Treaty itself. The Treaty only anticipates that the resolution which the Parties reach will normally comply with the Panel's determinations and recommendations, and that the resolution will result in the non-implementation or removal of the measure under the dispute which does not conform with the Treaty itself or which has caused impairment of its benefits. If no such resolution is agreed upon, the non/complying Party may make redress to the prejudiced Party with the payment of compensation.^{47/}

If the Party complained against does not reach a satisfactory agreement with the complaining Party or Parties, the latter may suspend benefits of equivalent effect, i.e., it may take retaliatory measures, which will last until the dispute is finally settled.

If the Party affected by the retaliatory measure considers that the measure is excessive, it will request the Commission to establish a new Panel to determine if the level of the benefits suspended is in fact excessive.^{48/}

46. **Articles 2016, 2017.**

47. **Article 2018, paragraph 1,2.**

48. **Article 2019, paragraph 1,2,3.**

6.11 **Section C**

Interpretation of the NAFTA in Domestic Judicial and Administrative Proceedings

When a matter concerning the interpretation or application of the Treaty arises in a domestic judicial or administrative proceeding, the possibility exists that the court or administrative entity may request the views of a Party. In such an event, the Party so requested will notify the other Parties and its Section of the Secretariat. Once the matter has been turned over to the Commission, the Commission will determine the appropriate response, which will then be provided to the requesting entity through the offices of the Party in whose territory the entity is located. When the Commission is unable to agree upon the adequate response, any one of the Parties may submit its own views to the interested court or entity, in accordance with the rules of the forum.^{49/}

The Parties to the NAFTA also agree not to grant private persons the right to action in their internal legislation, in order to prevent them from bringing suit against any of the Parties when they consider that a measure implemented by one of the Parties is incompatible with the Treaty.^{50/}

6.12 **Settlement of Private Commercial Disputes**

To the extent possible, the Parties shall promote and facilitate the use of arbitration and other alternative mechanisms for the settlement of commercial disputes between private Parties. To this end, the Parties shall make provision for domestic proceedings which will ensure the compliance, recognition and enforcement of Arbitral awards.

The Parties will be considered to be in compliance with the provisions mentioned above if they are Party to the New York (1958) and Panama (1975) Conventions on the Recognition and Enforcement of Arbitral Awards and on International Commercial Arbitration, respectively, and abide by their provisions.

The Commission will establish an advisory Committee whose members will be experts in the area of commercial disputes. The Committee will submit reports and issue recommendations to the Commission on matters for which an Arbitral or other analogous procedure may be advisable in order to settle disputes within the free trade zone.^{51/}

7. **Parallel Agreements on Environmental and Labor Cooperation**

After the NAFTA Pact was signed by the Executives of the three signatory nations on 17 December 1992, two of the Chiefs of States (USA and Canada) left office.

The new President of the USA, William Clinton, elected by a Democratic Party majority, faced

49. Article 2020, paragraph 1,2,3.

50. Article 2021.

51. Article 2022 paragraph 4.

opposition from his own supporters over the ratification of the Agreement by Congress. In order to lighten criticism of the pact negotiated by the previous administration (Republican Party), Clinton proposed to his fellow Party-members that new parallel or supplementary agreements should be negotiated, complementing the original Treaty. These Agreements would be concentrated in areas that, in the view of the critics, were not sufficiently covered in the NAFTA Pact, specifically regarding environmental cooperation, labor matters and emergency measures.52/

The parallel agreements were negotiated from February through August 1993, and were approved and signed simultaneously by the Executives of the three countries on 14 September this same year. These agreements are those mentioned in the heading, as well as one other that covers the establishment of a fund to finance environmental infra-structure projects in the border area between Mexico and the USA.53/

The two parallel agreements that contain Chapters (Parts) on the settlement of disputes are those covering environmental and labor cooperation, to which we direct our attention in this Report.

8. Environmental Cooperation Agreement for North America

This Agreement was signed by the Governments of the three nations. Its objectives include increased protection for and improvement of the environment in the territories of the signatory-nations, as well as boosting sustainable development on the basis of cooperation and mutual support in environmental and economic policies.

This document has a Preamble, seven Parts 54/ and four Annexes.55/

Part Five covers consultations and settlement of disputes. Any of the Party States may request in writing consultation with any other Party over the existence of an ongoing series of omissions in the effective application of the environmental legislation of this other Party. "Ongoing series" should be taken to mean a long-standing course of action or omissions that recurs after the date of entry into force of the Agreement.56/ The Parties in consultation shall do their utmost to reach a mutually satisfactory solution through these consultations.

52. The emergency measures are regulated in Chapter VII of the Treaty and cover the possibility of implementation thereof in cases where the goods or services of one country are imported into the territory of another in such high quantities that in itself this constitutes a substantial cause of serious damage or threatens the national industry in competition therewith.

53. This involves a fund with bilateral contributions of appreciable amounts, set up to underwrite the costs of treatment of toxic wastes in watercourses, pollution of aquifers and solid wastes produced by municipalities.

54. The Parts of the Agreement refer to the Objectives, Obligations, Commission for Environmental Cooperation, Cooperation and Supply of Information, Consultations and Settlement of Disputes, General Provisions, and Final Provisions.

55. This involves Annexes 34, 36A, 36B and 41. The first three are related to the Chapter on Consultations and the Settlement of Disputes.

56. Articles 22 and 45,1(b).

8.1. Start of the Procedure

If the Parties in consultation fail to settle the matter in the 60 days after the delivery of the request for consultations, either of them may call for an Extraordinary Session of the Council.^{57/} The Council shall meet within 20 days from the date of delivery of the request, and shall immediately devote itself to settlement of the dispute. To this end, it may summon technical aides and have resource to good offices, reconciliation, mediation or other procedures for the settlement of disputes, or may formulate recommendations,^{58/} all in order to reach a mutually satisfactory outcome.

8.2. Formation of Arbitral Panels

When the Council has met as stipulated in the previous paragraph and has nevertheless been unable to reach a settlement of the dispute within a period of 60 days, the Council itself may, through a two-thirds majority vote of its Members, and when allegations are made of the existence of an ongoing series of omissions, convene an Arbitral Panel.

The Panel shall examine if this ongoing series of omissions does effectively exist and is caused by the Defending Party in the application of its environmental legislation covering work-places, companies, corporations or sectors that produce goods or render services.

When the Third Signatory Party considers that it has a substantial interest in the matter, it shall have the right to participate as a Complaining Party against prior notification to the Parties and the Secretariat.^{59/}

The Council shall prepare and keep a list of some 45 individuals with the necessary aptitudes, willing to serve on this Panel. Its members shall be elected by consensus for a period of three years, and may be re-elected. In addition, they should also:

- a) have specialized knowledge or experience in environmental law or the application thereof;
- b) be objective, trustworthy and of good repute;
- c) be independent, meaning that they are not linked to any of the Parties;
- d) comply with the Code of Conduct that shall be laid down by the Council.

57. The Council consist of representatives of the Parties at the Secretary of State or equivalent level. The Council, together with the Secretariat and the Public Joint Advisory Committee, form the Commission for Environmental Cooperation. Article 8 of the Agreement.

58. Article 23, (1), (2), (3) and (4).

59. Article 24 (1) and (2). A comparison of these provisions and in general of most of Chapter 5 of the Parallel Agreement with the norms regulating the procedure in Chapter XX of the NAFTA Pact, may show a broad analogy.

In contrast to the terminology used in Chapter XX, the members of the Panel shall be called Panelists rather than Arbitration Judges.

8.3 Selection of the Panel

Article 27 of this parallel agreement closely follows the Regulation laid down by Article 2011 of NAFTA. With minor differences regarding deadlines and more specific terminology,^{60/} it regulates the election of the Panelists according to the same procedure. Appointment takes place through the cross-selection system. With regard to this matter, we refer to the comments and observations made in Item 6.6 above which, *mutatis mutandis* are relevant here.

8.4 Rules of Procedure

The Council shall establish Model Rules of Procedure. They shall follow the outline of those set out in Chapter XX of the NAFTA Pact, except that, instead of establishing that the Panel Hearings shall be confidential, they stipulate that no Panel may reveal which Panelists support majority or minority opinions.

The purpose of these Panels (mandate of the Panelists) shall be to examine if, in the light of the applicable provisions of the Agreement, there is in fact an ongoing series of omissions by the Defending Party in the effective application of its environmental legislation; it shall then issue its conclusions, decisions and recommendations as pertinent.^{61/}

The potential participation of the Third Signatory Party is regulated in this Procedure, granting the Panel powers to call on expert technical assistance.

8.5 Preliminary and Final Reports of the Panel

Unless the Parties in dispute agree otherwise, within the 180 days after the appointment of the last Panelist, the Preliminary Report shall contain: a) the conclusions to date; b) the decision on whether or not there has in fact been an ongoing series of omissions by the Defending Party with regard to its environmental legislation; and if so c) its recommendations for the settlement of this dispute.

The Parties in dispute may make observations on the Preliminary Report, and the Panel may then - on its own initiative or at the request of a Party to the dispute, request additional comments or reconsider its Report, in order to implement a subsequent examination.^{62/}

60. Article 2011 mentions "incontrovertible refusal" of Panelists proposed that do not appear on the roster. The correlated Article of the Parallel Agreement refers more appropriately to "refusal without express cause".

61. See Article 28.

62. See Article 31, which follows Article 2016 of the NAFTA Pact very closely.

See Article 34. In this aspect the Parallel Agreement differs from the system covered in Chapter XX of the NAFTA Pact. This latter establishes that the Parties in dispute shall agree on the settlement of the dispute, with the consequences commented on in point 6.10 above.

The Panel shall present its Final Report within sixty days after presentation of the Preliminary Report. The Parties in dispute shall submit it to the Council within 15 days after the issue thereof. Five days later it shall be published.

8.6 Compliance with the Final Report

When a Panel has determined in its Final Report, that there is in fact an ongoing series of omissions, the Parties in dispute may agree on a mutually satisfactory plan of action, which shall normally be tailored to the determinations and recommendations of the Panel.^{63/} This plan of action should be agreed upon within 60 days after the date of the Final Report. If the Parties in dispute fail to reach an agreement on this plan, or - having established a plan - one of the Parties deems that the other is not complying fully therewith, either of them may request the Panel to convene again.

The negotiators of the Agreement wished to give the Parties adequate time to allow such decision to summon the Panel again to mature. It sets reasonable deadlines for submitting this request, both prior to reaching a consensus agreement on the plan of action, as well as after the presentation of the Final Report.^{64/}

When the Panel meets again to agree on the plan of action, it shall determine if that proposed by the Defending Party is sufficient to rectify the series of omissions, in which case it shall approve it. Should this not be the case, it shall establish outline this plan in accordance with the legislation of the Defending Party. In addition, it may if necessary impose a monetary contribution on the Party at fault ^{65/} within 90 days after the new start of the work of the Panel.

Should the Panel be convened again (for the second time) to decide if the Defending Party is complying fully with the plan of action, it shall determine:

- a) if the Defending Party is duly complying with the plan;
- b) if not, it shall impose a monetary contribution (fine) in accordance with the parameters given in Annex 34 within 60 days after the date on which the Panel was reconvened.

63. See Article 34. In this aspect the Parallel Agreement differs from the system covered in Chapter XX of the NAFTA Pact. This latter establishes that the Parties in dispute shall agree on the settlement of the dispute, with the consequences commented on in point 6.10 above.

64. The application may not be submitted in less than 60 days, nor after over 120 days after the date of the Final Report.

65. Annex 34 of the Agreement stipulates that during the first year (as from the date of its entry into force) the monetary contribution shall be not greater than US\$ 20 million or the equivalent thereof in local currency. After the first year, the monetary contribution shall be no more than 0.007% of the total trade in goods between the Parties in the dispute. "Fines" shall be paid into a fund set up in the name of the Commission and shall be used, under the supervision of the Council, to upgrade the environment or support the implementation of the environmental legislation of the Defending Party.

The provisions handed down by the Panel shall in either case be definitive.^{66/}

After six months as from the date of the decision of the Panel convened for the second time, the Complaining Party may once again request that the Panel be summoned for the third time in order to determine if the plan of action is being complied with in full. The Panel shall take a decision one way or the other within 60 days.

8.7 Suspension of Benefits

Should the Defending Party fail to pay the fine within 180 days after the date on which this was imposed by the Panel, under either of the two possibilities examined, the Complaining Party or Parties may suspend the benefits granted under NAFTA to an amount no greater than that necessary to cover the fine.

In the case of Canada, should the Panel impose a fine, this shall be converted into a court order or writ, which may be presented to a competent Canadian Court for execution. This is a summary procedure, and the decision of the legal authorities is not subject to review.^{67/} In the case of Mexico and the USA, the final decision of the Panel is not executable in a normal court. Thus, if the Defending Party does not comply with the above-mentioned decision, meaning if it fails to pay the fine at the last resort, the other Complaining Party or Parties may suspend trade benefits by increasing customs duties on goods from this country. This increase may be maintained in force solely for the length of time necessary to bring in the funding necessary through the above-mentioned increase as needed to cover the fine imposed thereon. The Complaining Party that exercises commercial retaliations shall try to suspend such benefits within the sector or sectors in which the ongoing series of omissions by the Defending Party is located.^{68/}

Through the above, the deadlocks reached in trilateral negotiations over non-compliance were overcome by two alternative means. Canada did not accept commercial retaliation. Mexico and the USA will be subject to temporary suspension of the benefits under the Free Trade Treaty if they have not paid the economic sanctions or if the ongoing series continues.

9. North American Labor Cooperation Agreement

This document follows a pattern very similar to its namesake covering environmental matters. It also consists of a Preamble, seven Chapters or Parts^{69/} and seven Annexes.^{70/}

66. In order to give an idea of the complexity and profusion of these dispositions, in accordance with Anglo-Saxon mental structure and technique, it is enough to state that Article 34 (Review of Compliance) takes up one and a half pages, with five hundred and five words, and is divided into 6 sections, 9 items, and 5 sub-items.

67. See Annex 36A and Article 36 (2) of the Agreement.

68. See Annex 36B and Article 36 (2), (3) (4) and (5) of the Agreement.

69. The Parts of the Agreement refer to the Objectives, Obligations, Commission for Labor Cooperation, Consultations and Assessment for Cooperation, Settlement of Disputes, General Provisions, and Final Provisions.

70. This involves Annexes 1, 23, 39, 41A, 41B, 46 and 49. Annexes 39, 41A and 41B refer to the Part covering the Settlement of

Its Preamble recalls that the three Governments have expressed their determination to create new job opportunities, to improve working conditions, and living standards, protecting, expanding and implementing basic workers' rights. It thus acknowledges that the protection of basic workers' rights will spur the adoption of high-productivity competitive strategies.

In Part Five, which is examined in this Report, it stipulates that after the presentation by the EEC 71/ of its Final Report to the Council of Ministers which (together with the Secretariat) shall form the Labor Cooperation Commission,72/ any of the Parties may request in writing consultations with any other Party with regard to the existence of an ongoing series 73/ of omissions by this other Party in the effective application of the above-mentioned norms with regard to the general topic covered in the Report.

This request for consultations shall be forwarded to the other Parties as well as to the Secretariat. The Parties in consultation shall do their utmost to achieve a mutually satisfactory settlement of the matter.

9.1 Start of the Procedure

Article 28, under the same heading, is identical to Article 23 of the Environmental Agreement, which is why we refer back to the comments made thereon in point 8.1 above.

9.2 Setting up Arbitration Panels

In a manner similar to that covered by the Environmental Agreement, the Council shall convene an Arbitration Panel when allegations are made of the existence of an ongoing series of omissions by the Defending Party regarding the effective implementation of its technical norms and standards ruling on industrial security, safety and hygiene, underage workers, or the minimum wage.

This "ongoing series" 74/ of omissions may be: a) related to trade; b) fall under mutually-recognized labor laws.

The provisions covering the establishment of the Panel, including the lists of possible Panelists, the requirements for such office, and the feasibility of a Third Signatory Party intervening in the matter are the same as those stipulated in the provisions covering the same purposes as those in

Disputes.

- 71. Expert Evaluation Committee.**
- 72. Regarding the application of technical labor norms of a Party, in terms of industrial safety, security and hygiene, underage workers and minimum wages.**
- 73. "Ongoing series" means sustained or recurrent conduct.**
- 74. "Ongoing series" means sustained or recurrent conduct.**

the Environmental Agreement.^{75/}

9.3 Selection of the Panel and Rules of Procedure

These provisions are practically the same as those in the Environmental Agreement ^{76/} with the obvious difference that the mission of the Panelists is to examine if the ongoing series of omissions by the Defending Party does in fact consist of a failure to comply with technical labor norms and standards covering industrial security, safety and hygiene, underage workers, or the minimum wage, in order to issue its conclusions, decisions and recommendations in timely fashion and as pertinent.

9.4 Preliminary and Final Reports. Compliance Therewith

Part Five of the Labor Agreement parallels the measures approved in the correlated Part of the Environmental Agreement, with regard to the formulation of the Preliminary Report of the Arbitration Panel, the presentation of its Final Report and the rules for compliance therewith, including detailed norms on the consequences of non-compliance with the plan of action. On this matter, comments on the relevant procedures for the imposition of monetary contributions ^{77/} and the suspension of NAFTA trade benefits are equally valid. Canada's reservation over the implementation of Panel decisions as a court order or writ in its domestic courts is also applicable to labor matters.^{78/} The possibility of temporarily suspending the benefits of the Free Trade Treaty for Mexico and the USA, if the Panel decision does result in compliance therewith or payment of the economic sanction, uses the same procedures as established in the homologous Agreement.^{79/}

10. Final Reflections

It is obvious that the attitude of the negotiators when seeking settlement of disputes was to encourage cooperation when trying to reach an agreement. This stance is clearer still with regard to the interpretation and application of the Treaty. In accordance with the scheme outlined in Chapter XX (which is generic on this topic) the Parties shall at all times seek to reach a mutually satisfactory outcome through cooperation and consultation on any topic that may affect the functioning of the Treaty.

Only when the Free Trade Commission shall have exhausted its good offices, as well as reconciliation and mediation, may the Parties apply to have an Arbitration Panel set up to settle the

75. **Articles 30 and 31 of the Labor Agreement are practically identical to Articles 25 and 26 of the counterpart Environmental Agreement.**

76. **Compare Articles 32 and 33 of the Labor Agreement with Articles 27 and 28 of the Environmental Agreement.**

77. **Annex 39 of the Labor Agreement is identical to Annex 34 of the Environmental Agreement.**

78. **Annex 41A of the Labor Agreement is identical to Annex 33A of the Environmental Agreement.**

79. **Annex 41B of the Labor Agreement is identical to Annex 36B of the Environmental Agreement.**

dispute. This Panel shall issue a Preliminary Report and a final decision, which is not an expert opinion nor a binding resolution, but simply a recommendation on the non-execution or elimination of the measure not in compliance with NAFTA or which may give rise to the annulation or detriment thereof. Failure to comply with this recommendation alone shall prompt the imposition of retaliatory measures or the possible annulation of the deed. The Commission is not empowered to intervene in the execution of the final determination of the Panel. A court of higher instance has been obviated in order to foster an agreement between the Parties involved in the dispute.

The negotiators of the Parallel Agreements were more strict. Refusal to comply with the Final Report of the Arbitration Panel prompts a series of more drastic consequences that range from the imposition of a substantial economic sanction (in the case of Canada) to the suspension of trade benefits under the Treaty to an amount equivalent to the fine or monetary compensation imposed (in the case of Mexico and the USA).

Notwithstanding its differences compared to other integrationalist systems (the most notable example being the Cartagena Agreement) there is no supra-national court to resolve disputes jurisdictionally. Neither is it similar to the system adopted in the MERCOSUR reflected in the Brasilia Protocol, where the decisions of the Arbitration Court are not subject to appeal and are binding on the Party States involved.

Perhaps the reason for all this is that in a Free Trade Area such as NAFTA, no community law is established that is more suitable to higher stage of integration. In the case of the Andean Group, a later Treaty signed by the Party States acknowledges a court with the "capacity to hand down community law and settle disputes that may arise thereunder and interpret such uniformly". This scheme is not suitable for a Free Trade Zone, nor for a Customs Union. When the Parties involved in a dispute are the States themselves, it is not easy for them to give up their sovereignty nor to delegate jurisdictional functions to supra-national organizations.

Another aspect of the problem which differs from the interpretation and application of the Treaty where private parties play a more participatory role, as is the case with foreign investment, is that the focus is more diverse. International arbitration here seems to be the best alternative. The mechanisms covered in the respective Chapter have thus been accepted by the Signatory States with no great difficulty.

A positive factor is the encouragement of the use of arbitration in the settlement of trade disputes that may arise among private parties. The NAFTA rules that each Party shall establish suitable mechanisms that will ensure compliance with Arbitral Pacts, acknowledging the New York and Panama Conventions. Without going into the merits of these provisions, it should be noted that their inclusion in Chapter XX, designed to regulate the settlement of disputes between sovereign states, is out of context.



ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/II/doc.19/94
1 August 1994
Original: Spanish

THE JURIDICAL DIMENSION OF INTEGRATION

SETTLEMENT OF DISPUTES IN THE CENTRAL AMERICAN INTEGRATION SYSTEM
(CAIS) OR THE CENTRAL AMERICAN COMMON MARKET

(presented by Mauricio Gutiérrez Castro)

Although the title of the matter assigned to this Rapporteur under the topic of "The Solution to Disputes in Sub-Regional Free Trade and Integration Schemes" seems to cover the same ground twice, the truth is that, both chronologically and conceptually, they are different. The Central American Common Market predates the Central American Integration System, having been set up by the Treaty of Managua, containing the General Central American Economic Integration Treaty, signed on 13 December 1960, while the Central American Integration System - CAIS, arose from the Tegucigalpa Protocol under the Charter of the Organization of Central American States signed in Tegucigalpa on 13 December 1991.

The Managua Treaty refers only to commercial and economic aspects of Central American integration, and implemented - as clearly indicated by Honduran jurist Dr. Roberto Ramírez - very important integrationalist aspects, such as the Central American Common Market, and Common Customs Duties for Free Trade in various goods produced in Central America; and a privileged situation for setting up Central American companies or firms that could develop large-scale industries in various sectors that would buttress economic development in this region.

With regard to monetary aspects, integration took place at various levels, such as through the Central American Monetary Council, the Central American Monetary Fund, the Central American Clearing House, and the Central American Dollar-Equivalent Peso. This replaced the US dollar in commercial operations by the Central American Peso; Central Banks carried out compensatory clearing operations and only the outstanding balances among them were settled in US dollars.

The Central American Common Market did not have a genuinely supranational juridical order: the Resolutions passed by its agencies had no legal validity unless approved by their respective

governments. This undoubtedly hampered the normal development of the Common Market, as the States did not wish to yield up any of their sovereignty, due to a lack of the political benchmarks and juridical institutions required to maintain and develop this. On the other hand, as indicated by the above-mentioned Dr. Roberto Ramírez, not all the branches of government within the States were in favor of integration, as was the case with various Home and Foreign Relations Ministries, as the Agreements and Resolutions were only signed and ratified by the Ministers of the Economy and Central Banks. Various government resolutions and provisions were frequently anti-integrationalist, as integration existed only in Trade.

The outcome of these experiments and experiences was the creation of the CAIS, which entered into operations on 1 February 1993. With this, a drive were launched - as indicated in the Protocol - to foster Central American integration at the global level, by means of economic, social, cultural and political integration. The primary objective of this was to confirm Central America as a region of democracy, development, peace and freedom, based principally on respect and furtherance of human rights. In proposing options that were not only economic and commercial, but also social and political, efforts were made to avoid the errors of the Common Market, as experience showed that Integration requires certain juridical and political contexts for it to function properly, as this cannot be a process isolated from political decisions and juridical solutions. In view of all this, as emphasized by the Secretary-General of CAIS, Dr. Roberto Herrera Cáceres, integration has ceased to be sectorial - meaning commercial or economic - and is moving forward towards global integration, meaning that it should simultaneously cover economic, social, cultural and political aspects, promoting development in a harmonious and well-balanced manner.

Article 12 of the above-mentioned Protocol creates the Central American Court of Justice, as an agency of the CAIS, in order to implement its purposes, which are to guarantee respect for the law in the interpretation and implementation of the Protocol, as well as its supplementary instruments and deeds arising therefrom. This is stipulated in its Charter and Bylaws, which regulate its integration, functioning, duties and responsibilities. Additionally, Article 35 of this Protocol determines that □All disputes arising over the application or interpretation of the provisions contained in this Protocol and other supplementary instruments or deeds deriving therefrom should be submitted to the Central American Court of Justice.□

There is not, nor has there ever been - at least within our knowledge of International Law, Integration Law, or Community Law - a Court which is more complete in its organization, competence, duties and responsibilities than the Central American Court of Justice. We find its predecessor in the Central American Court set up in Cartago in 1907, which established the precedents for the establishment of an international vinculatory Court of Justice, and to which private individuals challenging the State would have access as active parties, as subject to International Law.

The current Central American Court of Justice, as declared in its Charter, represents the national consciousness of Central America; as a depository of the values that constitute Central American nationality, it has a broad-ranging jurisdiction and competence to hear cases between the States of the Isthmus and lawsuits between individual persons or corporate legal entities and the governments of States or organizations within the Central American Integration System. It has mandatory contentious jurisdiction for the States, as well as voluntary, acting as an arbitrator both de facto and de jure.

Worthy of particular mention is its competence to try - at the request of one of the parties involved - cases that may be brought among the fundamental agencies and branches of government of the States, and when court decisions are not in fact respected. In this matter, the Central American Court of Justice goes beyond any other integrationalist concept, starting out on the path that could someday lead it to be a State court. In practice, this provision - which its predecessor court enjoyed in 1907 - arose as a measure of protection for the Judiciaries of States that lack juridical defense mechanisms, except in the case of the existence of special constitutional tribunals, offering protection against aggressive actions threatening their independence by the Executive and Legislative Branches.

In addition to the jurisdictions already mentioned, it was also assigned the responsibility of acting as a Permanent Consultation Agency of the Central American Law-courts, handing down decisions on consultations submitted thereto, as well as issuing recommendations that foster the establishment of uniform laws.

Due to the newness of the competence of the Central American Court and the lack of dissemination of information about it, we transcribe below the principal Articles covering its competence and other faculties.

Article 22. The competence of the Court will be:

- a) to hear at the request of any of the Member-States, lawsuits that may be brought among them. Exceptions to this are border, territorial and maritime disputes, tried only on receipt of an application that must be submitted by all the parties concerned. The respective Chancelleries must first try to come to an agreement, without adversely affecting their power to bring suit later in any stage of the case;
- b) to try cases annulling or breaching the agreements of the organizations within the Central American Integration System;
- c) to rule on, at the request of any interested party, the legal, regulatory, administrative or any other type of provisions laid down by a State, when they affect the Agreements, Treaties and any other normative regulation under Central American Integration Law, or the Agreements and Resolutions of its agencies or organizations;
- ch) to try and hand down decisions if it so resolves, as an arbitrator, on issues where it is cited by the parties as the competent Court of Justice. It may also hear, try, and resolve ex aequo et bono cases if the parties involved so desire;
- d) to act as a tribunal of permanent consultation to the Supreme Courts of Justice of the States, with an illustrative character;
- e) to act as a consultation agency for the agencies or organizations of the Central American Integration System with regard to the interpretation and application of the Tegucigalpa Protocol for Reforming the Charter of the Organization of the Central American States, as well as the supplementary instruments and deeds arising therefrom.

- f) at the request of the injured party, to hear and resolve lawsuits that may arise between the fundamental agencies and branches of government of the States, and when court sentences handed down are not complied with.
- g) to rule on issues brought forward directly and individually by anyone affected by the agreements of the Agency or Organization of the Central American Integration System.
- h) to hear disputes or cases that may arise between a Central American State and any other whatsoever, when they agree to submit their case to this Court.
- i) to carry out comparative studies of the legislations of Central America in order to foster their harmonization and prepare uniform draft bills for implementing a Central American Juridical Union. This task will be carried out directly or by means of specialized Institutions and Organizations such as the Central American Judicial Council and the Central American Integration Law Institute;
- j) to hear as a final court of appeal, the administrative resolutions laid down by the Agencies or Organizations of the Central American Integration System that directly affect a member of the staff thereof and whose replacement has been refused.
- k) to resolve any prejudicial consultation requested by all judges or law-courts hearing a case pending a decision, forwarded in order to obtain the uniform application or interpretation of the Norms that constitute the juridical organization of the Central American Integration System set up under the Tegucigalpa Protocol, its supplementary instruments or deeds arising therefrom.

Article 23. The State may formulate consultations of an illustrative nature to the Court regarding the interpretation of any international convention or treaty in force; also with respect to conflicts among treaties as such or with the internal law of each State.

Article 24. Decisions handed down by the Court in compliance with this Charter, Bylaws and Regulations covering the Central American Integration System shall be mandatory for the States belonging thereto.

Article 25. The competence of the Court does not extend to issues involving human rights, which are the exclusive sphere of responsibility of the Inter-American Human Rights Court.

Article 30. In accordance with the norms established above, the Court has the power to determine its competence in each concrete case, interpreting treaties or conventions pertinent to the matter under dispute, and applying the principles of both Integration Law and International Law thereto.

With regard to the competence of the Central American Court of Justice to judge disputes that arise under the Common Market Treaty and the Central American Bilateral Treaties, it should be emphasized that the Court is in fact competent to hear these cases, as it has broader duties and responsibilities than any other International Court.

In order to develop the above matters more fully, and although we have participated to some extent not only in the conceptualization of the Central American Court of Justice, but also in the preparation of its Charter, we prefer to quote words better qualified than ours, in this case those of Dr. Roberto Ramírez, a specialist in this field who was the true systematic organizer of the Charter of the Central American Court of Justice and made the following comments on the competence thereof in a personal letter to me:

"The Treaty of Managua, as its name indicates, refers only to the commercial and economic aspects of Central American Integration. It implemented very important integrationalist aspects, such as the Central American Common Market, and Common Customs Duties for Free Trade in various goods produced in Central America; a privileged situation for setting up Central American companies or firms that could develop large-scale industries in various sectors which buttressed economic development in this region. At the moment I can recall only the glass industry in Guatemala, tires in Costa Rica, and pulp and paper as well as iron and steel in Honduras".

With regard to monetary aspects, integration took place at various levels, such as through the Central American Monetary Council; the Central American Monetary Fund; the Central American Clearing House; the Central American Cheque - a face-value accounting and monetary unit; and the Central American Dollar-Equivalent Peso that replaced the US dollar in commercial operations by the Central American Peso: Central Banks carried out compensatory clearing operations and only the outstanding balances among them were settled in US dollars.

The Central American Common Market did not have a genuinely supranational juridical order: the Resolutions passed by its agencies had no legal validity unless approved by their respective governments. This undoubtedly hampered the normal development of the Common Market, as the States did not wish to yield up any of their sovereignty, due to a lack of the political benchmarks and juridical Institutions required to maintain and develop this. Not all the branches of government within the States were in favor of integration, as was the case with various Home and Foreign Relations Ministries, as the Agreements and Resolutions were only signed and ratified by the Ministers of the Economy and Central Banks. Various government resolutions and provisions were frequently anti-integrationalist, as integration existed only in Free Trade.

The Central American Court of Justice has multiple competence and may hear cases brought over disputes arising between States, as well as conflicting issues involving the agencies and organizations of the Central American Integration System. This is the Court that resolves questions arising between branches of government in the States, intervening when court sentences are not in fact complied with. It is the consultatory body of the Supreme Courts of Central America with illustrative powers; these are mandatory for the agencies and organizations of the Central American Integration System. Consultations by injured parties are also permitted, all in order to develop a uniform jurisprudence for the interpretation of the Tegucigalpa Protocol, its attached Treaties, and any other Agreements of a similar type.

As examples, we may mention some Articles of the Court Charter, which in our view are determining factors in outlining its competence to rule on Bilateral Trade Treaties and the Common Market Treaty. Item a) of Article 22 of the Charter states: It shall, at the request of any of the

Member-States, hear disputes that may arise among them.□ For the States that signed and ratified the Tegucigalpa Protocol, as well as the Court Charter Agreement, this competence is mandatory (El Salvador, Honduras and Nicaragua) in resolving the problems that may arise over matters of trade among the States.

Item c) of this same Article 22 is broader-ranging, more objective and concrete in stating: "At the request of any interested party it may rule on the legal, regulatory and administrative provisions or any others laid down by a State, when these affect the Agreements, Treaties and other normative provision of Central American Integration Law, or the Pacts or Resolutions of its agencies and organizations." This sphere of competence is not limited to the Law of the Central American Integration System under the Tegucigalpa Protocol, but rather covers all the Central American Treaties of any type whatsoever. This provision considers individual persons as subject to law, and not only the States, agencies and organizations of the Integration System.

The Tegucigalpa Protocol set up the juridical and institutional structure for the Central American Integration System for implementation in all the following sectors: political, institutional, cultural, social and economic, juridically establishing the Central American Integration System, in Articles 1, 2 and 3 of this Protocol.

The fundamental objective of the Central American Integration System is to confirm it a region of **peace, freedom, democracy and development.**

Among other purposes, item d) of Article 3 of the Protocol sets up a regional system of economic and social justice for the peoples of Central America. Item e) of this same Article refers to the implementation of an economic union, buttressing the Central American financial system; item f) of this same Article 3 states □To strengthen the region as an economic bloc in order to insert it successfully into the global economy.□

Article 12 of this same document determines the agencies of the System: the Meeting of the Presidents; the Council of Foreign Relations Ministers; the Executive Committee; and the General Secretariat. In another paragraph of this same Article, the Central American Court of Justice is set up, guaranteeing respect for the law in the interpretation and implementation of the Protocol and its supplementary instruments and deeds.

In my view, the Court should be at the level of the Meeting of the Presidents and the Council of Ministers, as it is higher-ranked than Parliament and the other organizations mentioned.

The Meeting of the Presidents is the supreme agency of the Central American Integration System, followed by the Council of Ministers, then the Executive Committee, and finally the General Secretariat. It seems to me that this order of ranking has a political and administrative character, but in the jurisdictional ranking the Central American Court should take priority due to its institutional nature.

Article 22 of the Protocol states that without adversely affecting the provisions of Article 10 thereof, the decisions of the Councils shall be mandatory for all Member-States, which may only challenge the implementation thereof through provisions of a legal nature. In this case, the Council - after prior pertinent technical studies - shall analyze the matter again and adjust its decision to the

respective legal regulations. Nevertheless, these decisions may be implemented by Member-States that have not objected thereto.

The Executive Committee and the General Secretariat have functions, duties and responsibilities of an administrative nature.

Disputes that may arise among these agencies shall be resolved administratively; however, should this procedure be exhausted, the Court shall, in accordance with its Charter, be competent to pronounce thereon, resolving this matter in terms of the Law.

The settlement of disputes that may arise among these agencies and organizations shall be resolved administratively, but should this procedure not prove sufficient, the By-Laws of the Court empower it with the competence to settle this matter in accordance with the Law.

The settlement of disputes in the Central American Integration System has a very clearcut international character, in the juridical order that set up the Protocol of Tegucigalpa, establishing that the Inter-American Court of Justice is the agency that will guarantee the Law of Integration. The By-Laws of the Court develop this principle in an organic, international manner, expressly stipulating the competence and jurisdiction thereof.

As this Court is the senior tribunal by juridical excellence, all issues or conflicts of any nature shall mandatorily be submitted to it for hearing, with the exception of disputes over boundaries, territorial or offshore limits, for which it is necessary that the parties in conflict shall submit voluntarily to the competence of the Court.

The Court is competent to hear issues and disputes arising within the Central American Integration System, as well as those arising between Central American States.

This Court is also the Court of Appeal for hearing appeals against the administrative sentences handed down by the agencies or organizations within the Integration System, when the interested party has been denied the recourse of reposition. (Item J, Article 22 of the By-Laws).

In the first instance, it may hear and decide on issues submitted directly and individually by any party affected by the agreements among the agencies and organizations of the Integration System. (Item G, Article 22 of the By-Laws).

In the sector on Economic Integration, however, no provision is made for altering the old Free Trade Treaty and the Bi-Lateral Agreements between the Central American nations. There is the Protocol of Guatemala, otherwise known as the Protocol of the General Central American Economic Integration Treaty, which was signed by the Presidents of Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica and Panama in Guatemala City on 29 October 1993. This Protocol will replace the General Central American Economic Integration Treaty and the Bi-Lateral Agreements between the States, but to date it has not been ratified by the Central American nations.

The Resolutions issued by the agencies of the Protocol of Guatemala admit the recourse of reposition before the Council of Ministers of Integration. (Item 8, Article 55 of the Protocol of Guatemala). As stated above, if this appeal for reposition is turned down, there is still the recourse of

an appeal brought before the Central American Court of Justice.

DII19.94I



ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/II/doc.21/94
2 August 1994
Original: Spanish

REGIME FOR SETTLING DISPUTES IN THE
LATIN AMERICAN INTEGRATION ASSOCIATION - LAIA

(presented by Dr. José Luis Siqueiros)

1. **Background**

In Resolution No. CJI/RES.II-15/93I, the Inter-American Juridical Committee agreed to remove the topic □Juridical Obstacles to Integration□ from its agenda, without ceasing to continue to study all aspects concerning the juridical dimension of integration.

In a later Resolution (CJI/RES.I-4/94I), adopted on 27 January 1994, the Committee noted that over the past few years appreciable major developments have taken place in the field of regimes for settling disputes within the multilateral and bilateral economic integration projects or programs of the Member-States of the Organization of American States. It was thus agreed to continue to carry out special studies on the regimes for the settlement of disputes adopted under the various economic integration schemes in this continent, including that of the Latin American Integration Association - LAIA.

Notwithstanding the provisions of the earlier Resolution, when approving the date, topics and Rapporteurs for the August 1994 Ordinary Sessions Period, in the section devoted to the Juridical Dimensions of Integration, item a) Methods for the Settlement of Disputes in Sub-Regional Integration and Free Trade Schemes, the LAIA scheme was not included, probably because at that time there was no formal system for the settlement of disputes under the aegis of this Association.

The Author of this Report was unaware that the LAIA Representatives Committee had set up a Work Group during its Meeting of 11 November 1992 in order to analyze a proposal put forward by the General Secretariat of the Association, with a Draft Agreement. This Work Group met during July, August and September 1993, with the participation of the eleven Representatives, and the backing of the General Secretariat. During the course of these Meetings, an interchange of ideas and suggestions took place that produced a text reflecting the observations of all the participants. This text, which is analyzed below, may take the form of:

- a) A Regional Agreement, or
- b) An Additional Protocol to the Treaty of Montevideo (1980).

2. **The Latin American Free Trade Association - LAFTA**

The organization that preceded LAIA was set up under the Treaty of Montevideo, signed on 15 February 1960, which contained no norms covering the settlement of disputes. Nevertheless, through the Council of Ministers of Foreign Affairs and motivated by the wish to establish a system for the settlement of disputes that could arise under the Treaty, representatives of the Governments signed a Protocol for this purpose.

This Protocol was signed in Asuncion, Paraguay, on 2 September 1967. It established mechanisms designed to settle disputes arising between signatory States, referring exclusively and solely to the specific cases prompted by the Treaty of Montevideo and its other Protocols, as well as the Resolutions and Decisions issued by its agencies.

Shortly before, the Rules of Procedure (provisional mechanisms) were approved for adoption in July 1967, which included setting up a Special Jurists Commission. In accordance with the Protocol, the Parties would seek a settlement of the dispute through direct negotiations. If these were unsuccessful, the parties would have recourse to arbitration, setting up an Arbitration Court for this purpose. Its competence would be mandatory for the parties and its decisions binding, with the power of a judicial sentence, open only to appeal over interpretation. In exceptional cases, Article 33 of the Protocol allowed a review appeal. If one of the parties involved in litigation should fail to comply with the sentence, the Conference could issue a Resolution adopting the necessary measures, without adversely affecting the rights of the party involved to implement counterpart measures.

In accordance with Article 37 of the Protocol under analysis, its duration was undefined, and it was only subject to cancellation together with the Treaty of Montevideo (1960). When LAIA was set up in 1980, all the LAFTA agencies ceased to exist as from the entry into force of the new Treaty on 18 March 1981, thirty days after the deposit of the third deed of ratification.

3. Draft Regional Agreement or Additional Protocol to
Treaty of Montevideo (1980)

As already discussed, the Treaty that set up LAIA in 1980 makes no mention of any standards constituting a legal system for the settlement of disputes that may arise among the Signatory-States. This Draft - which is currently under consideration - contains various Chapters with the following contents: range of application; direct negotiations; reconciliation procedures; arbitration procedures; applications from private individuals; entry into force and duration; cancellation and final provisions.

3.1 Range of Application

A wide variety of disputes may arise under an instrument of this type. Normally, the differences involved are prompted by the interpretation and application of the Treaty. In other cases, an alleged action may not be in compliance with the Treaty, according to the injured party, implying negation or damage to the obligations agreed to in this document. Under Free Trade Agreements, mechanisms are frequently set up to settle damages caused by unfair trade practices such as dumping and compensatory quotas.

When the parties involved are also members of the General Agreement on Trade and Tariffs - GATT, these disputes may be handled through the mechanisms covered in its Article XXIII. In the North American Free Trade Association Treaty - NAFTA, disputes that may arise over its provisions - also covered in GATT - may be settled in either court, at the discretion of the plaintiff (with certain safeguards regarding the matter under dispute). However, once a case is brought in one of these courts, the others are excluded.

Nevertheless, as a general rule, disputes are handled by the Signatory-States. An exception to this rule is found in Chapter XI - Investments, of the NAFTA Treaty, whose Section B regulates the settlement of disputes arising between a party receiving the investment and the investor on the other hand, which may include a company or citizen thereof.

The inclusion of a Chapter on Investments, which covers the participation of private parties in the mechanisms for the settlement of disputes, is unusual in Integration or Free Trade Schemes. The legitimization of private parties in disputes, whether individuals or corporate legal entities, is far more heterodox. In NAFTA,

the settlement of such disputes is handled through arbitration proceedings in accordance with CIADO regulations, its Supplementary Mechanism, or UNCITRAL Regulations.

With the above-mentioned exception, the parties to a dispute are normally Signatory-States to an Agreement or Treaty. Private parties adversely affected by unfair trade practices may challenge a Definitive Resolution⁸⁰ that affects them and request a judicial review, in accordance with domestic judicial procedures. The alternative, and this is the trend in more modern instruments, is to have recourse to the national agency established in the international agreement in order to handle the complaint through the appropriate channels (negotiations, consultations, reconciliation, or arbitration).

The LAIA Draft is slanted towards the more traditional style, establishing that its range of application is limited to disputes arising over the interpretation, application or failure to comply with the provisions of the Treaty of Montevideo (1980) and the Resolutions, Decisions or Agreements adopted by the agencies of this Association. This means disputes arising from agreements reached under its aegis, and whenever these commitments do not expressly contain other mechanisms for the settlement of disputes, whose results (Resolutions) are both mandatory and not subject to appeal.

Interpreting this provision *a contrario sensu*, for any Free Trade Agreement at the bilateral or sub-regional level among LAIA nations that contains settlement procedures whose final outcome does not lead to a binding decision not subject to appeal, the mechanisms stipulated in the Regional Agreement or Additional Protocol in point may be applicable to the dispute in question.

With regard to the complaints of private parties, we refer to Item 3.5 below.

3.2 Direct Negotiations

In keeping with the spirit that permeates most schemes for the settlement of disputes, this Draft favors an initial phase of direct negotiations between the parties to the dispute. They should advise the Committee of Representatives, through the General Secretariat, of the start of this negotiation process, as well as the final outcome thereof. Direct negotiations - unless otherwise agreed by the parties involved - shall not continue for a period of over thirty days.

3.3 Reconciliation Procedures

Should the direct negotiations stage prove unsuccessful, either of the parties involved in the dispute may bring the matter up before the Committee of Representatives. The General Secretariat should issue a Report on this subject, and once this has been received by the Committee, an Ad-Hoc Reconciliation Group shall be set up.

This Group shall consist of three Conciliators appointed by drawing lots from a list prepared as from the date of the entry into force of the Agreement or Protocol. To this end, each Member-State shall appoint a Conciliator, thus constituting a list of twenty-two Conciliators, which shall be kept up-to-date by the General Secretariat.

The reconciliation procedures shall comply with the Regulations to be established in a timely fashion by the Committee of Representatives. Should this not yet be approved, the Ad-Hoc Group shall determine the procedures to be followed, ensuring that each nation has a full opportunity to be heard and state its positions, without adversely affecting the right of the Group of Conciliators to request additional technical information necessary.

During a period of thirty days as from the date of its establishment, with an extension of another thirty days being permitted, the Group shall analyze the dispute and formulate acceptable recommendations and solutions. Should the parties involved accept the conciliatory measures within the deadlines set by the Ad-Hoc Group, the dispute is taken as being settled.

⁸⁰ When this is established by a top-level domestic administrative authority.

3.4 Arbitration Procedures

If the dispute cannot be settled by reconciliation procedures, either of the parties may have recourse to arbitration procedures. The Member-States declare that they acknowledge as obligatory *ipso facto* the jurisdiction of the Arbitration Group set up in each case to hear and settle disputes that reach this stage.

The Arbitration Group consists of three members appointed from a list consisting of thirty three jurists with sound training and acknowledged competence. Each of the LAIA Member-States shall nominate three arbitration judges.

The Arbitration Group shall be set up in the following manner: each Member-State involved in the dispute shall appoint an arbitration judge from the above-mentioned list (logically, one of the three nominated by the country concerned). The third judge - who shall chair the bench - may not be a citizen of any of the nations involved in the dispute, and may be appointed by common agreement between the arbitration judges selected by the nations in dispute. If such an agreement is not reached, the third judge shall be appointed by means of a random draw from the general list prepared by the General Secretariat.

Should all the nations be involved in the dispute, the Chairman of the Arbitration Bench shall be appointed by a random draw from a short-list of three jurists prepared by the Committee of Representatives, consisting of citizens of nations that are not members of LAIA.

The arbitration mechanism - wrongly referred to in the Draft as an □appeal□⁸¹, shall comply with the Case Law Regulations to be issued opportunely by the Committee of Representatives. Prior to the issuance of these Regulations, the Arbitration Group shall adopt the case law norms it may deem appropriate to the case. In all cases, the adjectival rules guarantee the parties involved in the dispute a full and fair opportunity for both sides to be heard.

Should the parties involved authorize it to do so, the Arbitration Group may hand down a decision as a friendly settlement (*ex aequo et bono*). With the exception of this hypothesis, the arbitration judges shall base their decisions on the Agreement or Protocol in question, the Treaty of Montevideo (1980), Agreements signed under the aegis thereof, or Resolutions laid down by the agencies of the Association, taking into account the principles and provisions of International Law applicable thereto.

The Arbitration Group should hand down a decision or Resolution within a period of thirty days as from the date on which it is set up. Its decisions may be taken by a majority vote. The Draft seems to ban written justifications for dissident votes, as balloting must take place on a strictly confidential basis.

These decisions are binding and not subject to appeal, having the force of a court judgment on the participant nations. Article 29 of the Draft establishes that □should the appeal (*sic*) brought be approved (*sic*), the Resolutions should contain the specific measures to be adopted by the defendant nation.□ We feel that this wording is unfortunate. What this may perhaps mean is the measures to be adopted by the nation condemned in the decision, as the original defendant may in fact have brought counter-suit and could win a counter-appeal.

The costs and other outlays incurred by the Arbitration Group and during the procedures shall be covered by the nations involved on an equal basis.

3.5 Requests from Private Parties

Private parties, whether individuals or corporate legal entities, that habitually reside or have their corporate head offices in a Member-State are □qualified□ to bring before the national organization assigned by this country (very probably its Ministry of Trade), their complaints regarding the interpretation, application or failure to comply with the norms covered in Article 1 of the Agreement (Protocol). This means those falling within the scope of its application⁸², by the other Member-State.

⁸¹ In case law terminology, □appeal□ is the measure allowed under law to the party (or third party) injured by a Resolution, in order to obtain the revocation or modification thereof, usually in a higher Court of Justice.

⁸² See Item 3.1 above

Note should be taken of the active legitimization of private parties in this scheme. Their potential participation in this mechanism for the settlement of disputes is not confined to a determined sector or some alleged damage under a specific chapter, but rather covers the interpretation, application or failure to comply with the entire range of matters included in the Treaty of Montevideo (1980), as well as the Resolutions, Decisions and Agreements adopted by the agencies of the Association.

Private parties should supply the necessary information to the national organization appointed by the Member-State of which they are resident or where their company is head-quartered, so that this national organization can assess the grounds of the claim. On the basis of the evidence and antecedents presented to the domestic agency, it shall determine the pertinence of bringing into play the mechanisms designed to handle the settlement of disputes. Should this decision prove positive, it shall proceed through the Government of the Member-State concerned

It should be mentioned that a private party claiming damages becomes a co-plaintiff of the Member-State and may be the reason behind the triggering of the appropriate mechanism, from its initial phase through to the arbitration processes. Obviously, the litigant party will be the Government rather than the private party.

3.6 Entry into Force and Duration

The Regional Agreement (Additional Protocol) will tend to be of unlimited duration and shall come into force on the date on which it is ratified by six of its signatories. The Draft under consideration here mentions that these signatories shall have implemented it in their territories. In the opinion of the Rapporteur, it would be more technical to stipulate that the Agreement (Protocol) would enter into force once sanctioned by domestic constitutional agencies and with the deed of ratification deposited by six Member-States. The Draft under analysis refers to the date on which the Signatory-States incorporate it into their legal systems, which in some systems would not be necessary if it is assumed that the international legal instrument is self-applicable.

3.7 Cancellation of Participation or Withdrawal

The deed of cancellation of participation or withdrawal shall be forwarded to the General Secretariat of LAIA after a period of one hundred and eighty days, the period of notice required for the state withdrawing or resigning to advise the remaining Member-States of its intention.

3.8 Final Provisions

The Representatives Committee shall have a period of sixty days to issue the regulations for the reconciliatory and arbitration procedures covered in items 3.3 and 3.4 above.

It will be interesting to analyze the regulatory mechanisms prepared by the Representatives Committee based on Article 35, item b) of the Treaty of Montevideo (1980). This would presumably be backed up and assisted by legal experts specializing in procedures for settlement of disputes and will follow closely the schemes adopted in similar instruments. These possibilities will shape the operational norms of the Ad-Hoc Conciliators Group and the Arbitration Group, the bodies mentioned in Chapters III and IV of the Regional Agreement (Additional Protocol).

The Member-States shall advise the General Secretariat as soon as possible of which national agency shall assess and settle the claims of private individuals in the cases analyzed in item 3.5 above.

4. The Range and Importance of this New Instrument

Note should be taken of the importance of the new system for the settlement of disputes as a regional benchmark. There is no doubt that the absence of such a scheme in the Latin American integration process has caused a gap in its operability.

In the case of LAFTA, it took seven years to issue the Asuncion Protocol. Under LAIA, fourteen years have already gone by with this lack. The good intentions of the Signatory-States towards the promotion of harmonious, well-balanced economic and social development in the region may be slowed by this gap prompting the appearance of different criteria among the members. These divergences range from methods and priorities to viewpoints and key concerns. Nations that are better developed economically will have different readings from the less well-developed countries regarding the objectives of their participation. The geographical situation in the hemisphere, the specific composition of foreign trade in each country, and other political and macro-economic factors will all tend to lead to widely-varying conceptualizations of the Treaty. All this may result in disputes.

Let us take an example. In Article 44, LAIA states that the advantages, favors, exemptions, immunities and privileges that the Member-States apply to products originating in or destined for other countries that are not members of the Association and not covered in the Treaty of Montevideo (1980) or the Cartagena Agreement, shall be unconditionally extended to the other Member-States. In other words, ratification of the Most Favored Nation clause.

When Mexico - a LAIA member - signed the North American Free Trade Agreement and joined the U.S.A. and Canada - which are not LAIA members - its ten associates in LAIA interpreted the above-mentioned Article 44 as an automatic springboard for achieving Most Favored Nation status. In turn, Mexico resisted accepting the strict interpretation of the text and proved reluctant to extend to its Latin American partners the same advantages, exemptions and concessions acquired vis-à-vis the U.S.A. and Canada, arguing that the exceptional situation created by NAFTA should be negotiated with each of its associates in LAIA.

If there had been a system for the settlement of disputes set up under the Treaty of Montevideo (1980), these differences might well have been resolved by means of the scheme proposed here: meaning negotiation, reconciliation and arbitration in the final instance. In the absence of such a regime, and in order to prevent the disintegration of LAIA while fostering a cordial understanding of the realities of this problem, the Council of Foreign Affairs Ministers of the eleven countries agreed to sign an Interpretative Protocol for Article 44 of the Treaty of Montevideo (1980), which was signed in Cartagena de Indias on 13 June 1994. This Protocol will enter into force for the Member-States that ratify it -in accordance with their respective constitutional procedures - when the eighth Deed of Ratification is forwarded to the General Secretariat of LAIA.

One the same day, the Council of Foreign Affairs Ministers of LAIA issued Resolution 44 (I-E) on the functions, duties and responsibilities of the **Special Group** covered in Article 4 of the Interpretative Protocol for Article 44 of the Treaty of Montevideo (1980)⁸³.

This Resolution states that if the outcome of the bilateral negotiations stipulated in Article 3 of the Interpretative Protocol is considered inadequate by the country affected, meaning when in the view of the country that negotiated the suspension of obligations with the country that so requested (e.g. Mexico), the outcome is not sufficient to re-establish the balance of rights and obligations arising from the Treaty of Montevideo (1980), and the agreements reached under the aegis thereof, the Committee of Representatives shall appoint - in consultation with the countries directly involved - the above-mentioned Special Group. This will consist of three or five members, selected from a list drawn up by the Committee from names put forward by the eleven LAIA members (three names from each country), as well as the list of the GATT panelists.

The Resolution in question establishes the personal qualities required for the names on this list as well as the members of the Special Group, in addition to the processes for their selection, resignation, withdrawal or impediment, procedural norms (the GATT case rules may be applied on a supplementary basis), appraisal

⁸³ The Council of Ministers also issued Resolution No. 43 (I-E) containing Norms for the transition period until the Interpretative Protocol goes into force.

of the compensation offered, or the determination thereof by the Special Group, etc..

These proceedings shall be confidential, and their decision final and definitive for the countries involved, announced to the countries involved and the Committee of Representatives within a non-extendible period of sixty days.

The Special Group will take its decisions on the basis of the provisions of the Treaty of Montevideo (1980) and the agreements signed under the aegis thereof, particularly the Interpretative Protocol for Article 44 of the Treaty of Montevideo (1980), and the Agreements and Decisions adopted by the political agencies of the Association.

The Special Group shall take its final decision by means of a majority vote without recording the voting preference of each of its members.

The above-mentioned countries shall be obliged to follow the procedures established in Article 4 of the Interpretative Protocol.

This in fact constitutes a complete small scheme for the settlement of disputes.

5. Conclusion

The Treaty of Montevideo (1980) - LAIA illustrates the convenience of establishing regimes for the settlement of disputes, under the aegis of Inter-American Free Trade and Integration Agreements. It is quite obviously important to have a suitable system for resolving the differences that may arise in interpretation and compliance with bilateral or multilateral deeds signed or to be signed in this area.

Under the topic of the Juridical Dimension of Integration, it is desirable that the Inter-American Juridical Committee should obtain - as expressed in Resolution No. CJI/RES.I-4/94 - an overall view of the focus and methodology of these schemes at the hemispherical level.

LAIA (and the Agreements signed under its aegis) are particularly relevant as they involve a regional scheme. This is why it is expected that the Draft Regional Agreement or Additional Protocol analyzed in this Report will be approved in the near future by the plenipotentiaries of the Member Governments.

ANNEXES

Annex I - Draft Regional Agreement or Additional Protocol.

LAIA/CR/dt 106/Rev.2 1 October 1993

Annex II - Final Minutes of the First Extraordinary Meeting of the

Council of Foreign Affairs Ministers and Interpretative
Protocol for Article 44 of the Treaty of Montevideo (1980).
Cartagena de Indias, 13 June 1994.

Annex III - Resolutions 44 (I-E) and 43 (I-E) of the Council of Foreign

Foreign Affairs Ministers. Cartagena de Indias, 13 June 1994.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/II/doc.25/94

4 August 1994

Original: English

JURIDICAL DIMENSION OF INTEGRATION

CARICOM PACT

(presented by Dr. Philip Telford Georges)

While this short paper is primarily concerned with the dispute settling mechanisms under the Treaty establishing the Caribbean Community (CARICOM), it may be useful to sketch very broadly a picture of the institutions created by the Community. It provides the context in which such dispute settling mechanisms will be expected to work.

The Community came into being in July 1973 when Barbados, Guyana, Jamaica and Trinidad & Tobago signed the Treaty at Chaguaramas in Trinidad. These were described as the "More developed countries" (MDC's). It was contemplated that 9 other members would join - all of them then not independent though enjoying full internal self government. The Bahamas became independent a few days after the signing. Montserrat is still a non self-governing country. Great Britain is responsible for its foreign relations and defence. The 7 others - Antigua, Belize, Dominica, Grenada, St.Kitts - Nevis, Saint Lucia and St. Vincent and the Grenadines have since achieved independence. These 7 countries and Montserrat are referred to in the Treaty as "Less Developed Countries" (LDC's). The Commonwealth of the Bahamas is not placed in either category. The population of CARICOM is now approximately 5.5 million. Of that number 4.5 million live in the MDC's.

Although the principal objectives are economic, one member of the Community, the Bahamas, is not a member of the Common Market set up by the Agreement which is an Annex to the Treaty. There are, however, other objectives defined in the Treaty towards the fulfillment of which the Bahamas can work along with other members. These include the coordination of foreign policies of Member States and functional co-operation which involves the efficient operation of common services for the benefit of the people, the promotion of greater understanding among peoples of the British Caribbean and the advancement of their social, cultural and technological development. The areas of functional co-operation cover a very wide field. They are set out in the Schedule to the Treaty -

- "1. Shipping
- 2. Air Transport

3. Meteorological Services and Hurricane Insurance
4. Health
5. Intra-Regional Technical Assistance
6. Intra-Regional Public Service Arrangements
7. Education and Training
8. Broadcasting and Information
9. Culture
10. Harmonisation of the Law and Legal systems of Member States
11. Position of Women in Caribbean Society
12. Travel within the Region
13. Labour Administration and Industrial Relations
14. Technological and Scientific Research
15. Social Security

The principal institutions of the Community are the Conference of Heads of Government and the Common Market Council. The Conference determines the policy of the Community. The Council which consists of Ministers designated by Member States is charged with ensuring the achievement of the Common Market.

The Treaty sets up a Secretariat to service the meetings of the Community and its institutions and to take appropriate follow up action on decisions made, to initiate and carry out studies on questions of economic and functional co-operation and to provide services to Member States at their request in respect of matters relating to the achievement of the objectives of the Community.

Prior to the establishment of the Community there existed important institutions of co-operation among its member countries. The University of the West Indies was the recognized academic institution in the region and had been run co-operatively. The Caribbean Examinations Council certified levels of student achievement at the end of the secondary level of education. The Council of Legal Education set the regulations for admission to the legal profession and controlled admission.

In other areas the Caribbean Meteorological Council, the Regional Shipping Council, the Caribbean Development Bank and the Caribbean Investment Corporation were all mechanisms for co-operation in the Region. They were recognized under the Treaty as Associate Institutions of the Community.

The Treaty did not mark the birth of co-operation among members. There was already significant co-operation. Even in the economic area there had been the Caribbean Free Trade Association. The Treaty sought to establish more effective instruments of co-operation and to define more precisely the objectives of co-operation, particularly economic co-operation and the pace at which it was to be achieved.

The Conference is empowered to reach a decision which is binding on all members. It can also make a recommendation which is not binding, but a member which does not comply with a recommendation must within 6 months submit a report to the Conference explaining its non-compliance. The Treaty does not elaborate on the consequences of a report considered unacceptable.

All members have one vote. Decisions or recommendations are valid if supported by the affirmative votes of not less than three-quarters of the members including at least 2 of the MDC's.

There are a number of institutions other than the Conference established by the Treaty. One such Institution is the Standing Committee of Ministers responsible for Foreign Affairs. That Committee is empowered only to make recommendations to Governments and such recommendations can only be made by an affirmative vote of all competent Member States participating in the deliberations.

The other Institutions - the Conference of Ministers responsible for Health and the Standing Committees of Ministers responsible for Finance, Agriculture and Mines can make both binding decisions and recommendations. Decisions of these Institutions are binding if three-quarters of its members including at least

two of the MDC's vote in favour. Recommendations which have no binding force must be supported by the votes of two-thirds of the members including 2 MDC's.

Although the nature of the subjects dealt with in the Treaty is general there is an Article dealing with settlement of disputes. Article 19 provides -

"Any dispute concerning the interpretation or application of this Treaty, unless otherwise provided for and particularly Articles 11 and 12 of the Annex shall be determined by the Conference."

The Conference which is an assembly of Heads of State is not the type of body which could be expected to resolve a dispute relating to the interpretation of a Treaty. The word "application" adds little in my view to the work "interpretation" since the application of the Treaty must depend on the interpretation of the particular provision which it is sought to apply. The Conference is a body established to reach policy decisions and that approach would no doubt be applied to the resolution of any dispute arising out of the interpretation or application of the Treaty.

The Annex to the Treaty which establishes the Common Market of 12 members (The Bahamas not being a member) is a very detailed document.

It provides rules for determining whether or not goods are of common market origin. It purports to regulate the imposition of import duties on goods of common market origin. It empowers Member States to deal with dumped or subsidised imports. Except in specified circumstances quantitative import restrictions are prohibited for example for the purpose of safeguarding balance of payments.

This short summary of the areas regulated by the Annex indicates that the likelihood of disputes arising between members is significant.

The disputes procedure is set out in Articles 11 and 12 and reads -

"Article 11"

Disputes Procedure Within the Common Market

1. If any Member State considers that any benefit conferred upon it by this Annex or any objective of the Common Market is being or may be frustrated and if no satisfactory settlement is reached between the Member States concerned any of those Member States may refer the matter to the Council.
2. The Council shall promptly make arrangements for examining the matter. Such arrangements may include a reference to a Tribunal constituted in accordance with Article 12 of this Annex. The Council shall refer the matter at the request of any Member State concerned to the Tribunal. Member States shall furnish all information which may be required by the Tribunal or the Council in order that the facts may be established and the issue determined.
3. If in pursuance of the foregoing provisions of this Article the Council or the Tribunal, as the case may be, finds that any benefit conferred on a Member State by this Annex or any objective of the Common Market is being or may be frustrated, the Council may, by majority vote, make to the Member State concerned such recommendations as it considers appropriate.
4. If a Member State to which a recommendation is made under paragraph 3 of this Article does not or is unable to comply with such recommendations the Council may, by majority vote, authorise any Member State to suspend in relation to the Member State which has not complied with the recommendation the application of such obligations under this Annex as the Council considers appropriate.
5. Any Member State may at any time while any matter is under consideration under this Article request the Council to authorise as a matter of urgency, interim measures to safeguard its position. If the matter is being considered by the Tribunal such request should be referred by

the Council to the Tribunal for its recommendations. If it is found by a majority vote of the Council that the circumstances are sufficiently serious to justify interim action, and without prejudice to any action which it may subsequently take in accordance with the preceding paragraph of this Article, the Council may, by majority vote, authorise a Member State to suspend its obligations under this Annex to such an extent and for such period as the Council considers appropriate.

Article 12

Reference to Tribuna

1. The establishment and composition of the Tribunal referred to in Article 11 of this Annex shall be governed by the following provisions of this Article.
2. For the purpose of establishing an ad hoc tribunal referred to in Article 11 of this Annex, a list of arbitrators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General. To this end, every Member State shall be invited to nominate two persons, and the names of the persons so nominated shall constitute the list. The term of an arbitrator, including that of any arbitrator nominated to fill a vacancy, shall be five years and may be renewed.
3. Each party to the dispute shall be entitled to appoint from the list an arbitrator to an ad hoc tribunal. The two arbitrators chosen by the parties shall be appointed within 30 days following the date on which the notification was received by the Secretary-General. The two arbitrators shall within 15 days following the date of the last of their own appointments, appoint a third arbitrator from the list who shall be the chairman; as far as practicable the chairman shall not be a national of any of the parties to the dispute.
4. Where the first two arbitrators fail to appoint a chairman within the period prescribed, the Secretary-General shall within 15 days following the expiry of that period appoint a chairman. If any party fails to appoint an arbitrator within the period prescribed for such an appointment, the Secretary-General shall appoint an arbitrator within 15 days following the expiry of such period. Any vacancy shall be filled in the manner specified for the initial appointment.
5. Where more than two Member States are parties to a dispute, the parties concerned shall agree among themselves on the two arbitrators to be appointed from the list. In the absence of such appointment within the prescribed period, the Secretary-General shall appoint a sole arbitrator whether from the list or otherwise, for the purpose.
6. An ad hoc tribunal shall decide its own procedure and may, with the consent of the parties to the dispute, invite any party to this Annex to submit its views orally or in writing.
7. The Secretary-General shall provide the ad hoc tribunal with such assistance and facilities as it may require.
8. The expense of the ad hoc tribunal shall be defrayed in such manner as determined by the Council.
9. Member States undertake to employ the procedures set out in this Article for the settlement of any dispute specified in paragraph 1 of Article 11 and to refrain from any other method of disputes settlement."

The Council is a political body consisting of a Minister of Government designated by each Member State. It is the principal organ of the Common Market and charged with the formulation of policy. Having regard to the detailed regulations contained in the Annex, dispute between members may well require painstaking investigation of facts and legal analysis of the relevant provisions. The procedure apparently contemplates that the Council could undertake these tasks itself since the complaint is made to the Council and the party to a dispute can, however, request that a Tribunal be appointed to examine the complaint and the use

of the mandatory word "shall" in Article 11(2) supports the argument that the Council would be obliged to refer the matter to a Tribunal if requested to do so.

It would also appear that once a matter is referred to a Tribunal and the Tribunal reaches a decision the Council is not empowered to review that decision.

DII25.94I



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/I/doc.31/94 rev.2

16 August 1994

Original: Spanish

STOCK MARKET

Working Group Report
August 1994

(Based on an Aide-Memoire prepared by Dr. J.T. Fried
and supplemented by Dr. José Luis Siqueiros)

I - BACKGROUND

During its ordinary sessions period of March 1992, the Inter-American Juridical Committee, through Resolution CJI/Res.I.2/92, resolved:

To undertake additional studies in the following fields:

- a) Standards and guidelines for the regulation and supervision of markets on which securities issued by private companies are bought and sold, in order to increase the efficiency of these markets and encourage investments by private individuals and companies in such ventures, thus furthering the development of capital markets, and offering private companies the opportunity to obtain adequate financing through these markets.
To the extent permitted by the resources available, it was thought to be convenient that the Rapporteur should consult experts on the use of securities markets;

In its August 1992 session, the Committee approved the following Resolution (CJI/RES.II-19/92):

1. To set up a Working Group consisting of Dr. Seymour J. Rubin and Dr. Juan Bautista Rivarola, in order to formulate the outlines of a model code for Securities Markets.
2. To request the Secretary-General through the Juridical Affairs Secretariat, to assign funding for commissioning juridical studies on this topic, taking into account the importance and transcendence thereof under the Enterprise for the Americas;

During the August 1993 sessions, this same Resolution, this same Committee, in Resolution CJI.RES.II-14/93, resolved:

1. To join in one single item the topics covered by sub-item b) and c) of item 2 of the List of Topics (Implementation of the Enterprise for the Americas), whereby it was described as follows:

Stock and securities markets. Normative system of the principles considered basic in the regulation thereof in the hemisphere.

2. To appoint as co-Rapporteurs Dr. Seymour J. Rubin and José Luis Siqueiros.

3. To request the Secretary-General through the Juridical Affairs Sub-Secretariat for the corresponding funding, in accordance with the Resolution issued by this Committee (CJI/RES.I-10/93). These funds are intended for the payment of advice and counseling from specialists in securities markets regulations, one expert on the USA and Canada, and the other specializing in the more advanced Latin American countries in this area;

4. To reiterate to the Secretary-General, through the Juridical Affairs Sub-Secretariat that the Governments of the Member States that have regulated their securities market should remit to this Organization an up-dated example of the respective regulations; as such legislations are received these will be forwarded to the Committee for consultation by the co-Rapporteurs.

Based on Item 4 of the previous Resolution, the Secretary-General forwarded to the Inter-American Juridical Committee through the Juridical Affairs Undersecretariat, legislation on Securities Markets from: the Bahamas, Brazil, Bolivia, Chile, Colombia, El Salvador, Guatemala, Honduras, Saint Lucia, St. Kitts and Nevis, Mexico and Paraguay.

Before the end of 1993, the Inter-American Juridical Committee was advised that the budget situation of the Organization would not allow it to assign funds for this purpose.

During the ordinary sessions period of this Committee in January 1994, a meeting was held with Mr. Al Sommer, representing the Morgan, Lewis & Bockius brokerage house, and Deputy Chairman of the Capital Market Forum of the International Bar Association (IBA) to analyze developments in this field, and study the possibility of launching an interchange of information with the IBA and other organizations.

In January 1994, this Organization, through Resolution CJI/RES.I-5/94 agreed:

1. To set up a Working Group consisting of the Rapporteurs on this topic, to continue the efforts of the Committee on this matter.
2. To request this Working Group to cooperate fully with the General Secretariat of the Organization of American States and other agencies.
3. That the Working Group should consider appropriate co-participation in studies and Seminars, preferably in cooperation with stock market regulatory agencies, law schools, universities and other institutions in order to foster fair and efficient functioning of securities markets.
4. To seek financial backing among the groups and associations mentioned above to underwrite the research and consultation of the Working Group.
5. That this item should be maintained on the List of Topics of the Inter-American Juridical Committee.

During the August 1994 sessions period, the Committee was visited by Dr. Thomas Tosta de Sá, Chairman of the Brazilian Securities and Exchange Commission - CVM - *Comissão de Valores Mobiliários* and Dr. Zuli Fontain, Director of the International Relations Department of this same organization, which regulates securities markets in Brazil. Both of these executives, invited by the Chairman of the Inter-American Juridical Committee, spoke on the objectives of COSRA at the hemispherical level, as well as IOSCO at the universal level, leaving for the files of the Committee a copy of the Charter of the Council, as well as a communication therefrom giving information on its III Annual Meeting held in Quebec, Canada, in June 1994. The members of the Committee enjoyed an interchange of ideas with these visitors regarding the possible participation of this Organization in the dissemination and promotion of the activities of this regulatory agency.

II - COUNCIL OF SECURITIES REGULATORS OF THE AMERICAS - COSRA

This Council has to date held three meetings: the first in the USA in 1992, the second in Buenos Aires in June 1993, and the third in Quebec, Canada on June 23 and 24 of 1994.

As the outcome of these meetings, the regulators of the eleven Latin American countries that - together with the USA and Canada - constitute COSRA, have approved various principles for harmonizing the regulation of stock exchanges in the Western Hemisphere. These include the transparency of stock exchange operations, automatic data traces, clearing and settlement systems that guarantee fast, effective transfer, as well as strict supervision of investment associations operating across national borders. During the Quebec meeting, the principles of corporate disclosure were also approved, as well as enforcement cooperation.

The fourth COSRA meeting is scheduled to take place in São Paulo in June 1995, when it will undoubtedly continue with its schedule of developing basic principles and norms.

III - ANALYSIS OF THE EFFORTS UNDERTAKEN AT THE LEVEL OF GOVERNMENT REGULATORS AND EFFORTS CARRIED OUT BY THE CAPITALS MARKETS FORUM

1. The Council of Securities Regulators of the Americas - COSRA has done its utmost to develop the basic norms and guidelines for the regulation of stock exchanges on the American continent.

2. The Capitals Market Forum of the International Bar Association (IBA) is equally active through ongoing efforts to promote the dissemination of information and interchange of operations on this topic, including the publication of leaflets (none of which have been yet translated into Spanish or Portuguese), the organization of Working Groups and discussions, and the sponsorship of conferences and other programs.

3. To date, the outcome of the efforts of COSRA have not been either discussed nor disseminated at the Inter-American level, nor does COSRA have mechanisms for exchanging opinions with either academic communities or the juridical profession.

4. It should be noted that modernization in this field of regulation is already on the list of topics of certain development banks. For example, the Asia Development Bank organized a Seminar on the supervision and regulation of stock markets in Manila on July 11-13, 1994. The World Bank has allocated funds for the modernization of the program related to the public sector for Latin America, as well assigning high priority, *inter alia*, to the promotion of more effective regulations in the economic field, and better administration and effectiveness in compliance with decisions. Together with UNCTAD and Colombia's Economic Competence Tribunal, the World Bank organized a Conference in Bogota in June 1994 on Trade and Laws of Competence and Regulation.

IV. PRELIMINARY PROPOSALS - INTER-AMERICAN JURIDICAL COMMITTEE

Based on these matters, the following conclusions have been reached:

1. The work of developing the basic norms for the regulation of stock markets in the Americas is already, under the auspices of COSRA, at a relatively advanced stage, whereby the efforts of the Committee to develop more concrete principles would be in most cases merely repeating these efforts.
2. Very little attention has been paid to the importance of education and the facilitation of dialogues between participants in the market, practicing lawyers and the academic legal community with regard to the development of stock exchange regulations, such as the work of COSRA.
3. As noted in the consideration of the Inter-American Juridical Committee Resolution dated January 1994, this places it in a privileged situation for acting as a catalyst in this field, particularly bearing in mind the provisions of Art. 108 of the Charter of the Organization of American States, Art. 31 of its By-laws and Art. 21 through 23 of its Regulations.
4. Consequently, the Working Group, during its current session, proposes the following resolute points:
 - a) To take under consideration the comments and informal consultations carried out by the Committee and the Inter-American Juridical Committee Working Group since its January session;
 - b) To commission the Inter-American Juridical Committee Working Group to continue the studies under way, adding legislative material in this area with the support of the Secretary-General, as well as the Bibliography related thereto on norms and principles considered as basic in this matter;
 - c) To further the dissemination of these norms and principles through a strategy of economic cooperation and close collaboration with

- agencies in the public and private sectors, considered appropriate thereto;
- d) In order to achieve the objectives indicated in the previous Report of the Working Group, with the support of the Committee, it should prepare a study underwriting the organization of symposia, seminars and other fora, with the participation of the Secretary-General of the Organization of American States and specialists from organizations such as COSRA, IOSCO, and the International Bar Association Capitals Market Forum, the World Bank, the Getulio Vargas Foundation, Stock Exchange representatives on the continent, as well as other institutions with duties and responsibilities in this field; and
 - e) To request the Inter-American Juridical Committee Working Group to prepare a Report on the works commissioned contained in the previous points, for presentation during the next sessions period of the Committee.

DII31R2.94I



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/II/doc.34/94 rev.1
13 August 1994
Original: Spanish

PEACEFUL SETTLEMENT OF DISPUTES

AN OVERVIEW

(presented by Dr. Galo Leoro F.)

The General Assembly of the Organization of American States, in view of the corresponding Report presented by the Permanent Council in Resolution No. AG/RES.1120 (XXI-0/91), recommended to the Inter-American Juridical Committee that include the topic of □Peaceful Settlement of Disputes□ in its agenda.

The Committee appointed me Rapporteur for this topic. As the above-mentioned political branches of the Organization tagged other issues before the Committee - including matters related to Environmental Law which were also assigned to the author hereof - as higher priority, the issue of peaceful settlement of disputes was studied only gradually. I am now pleased to present some comments thereon, with particular regard to attempting to identify some guidelines in this

important matter that would lead to a study of this topic within a concrete framework.

Background

Few topics have been subject to as much constant and reiterated consideration in the Latin American nations as the peaceful settlement of disputes. This dates back to the past century, with the Amphictionic Conference in Panama in 1826, at which the Treaty of Perpetual Union, League and Confederation was adopted, which included Articles on reconciliation. Other later conferences - such as those held in Lima, Peru and Santiago, Chile, gave rise to Treaties that, with different slants due to the interests they were protecting at the time, were focused on the security of the member-States, offering these means for achieving peaceful settlement of disputes.

Later came the International American Conferences, already featuring Inter-American criteria, concerned with the same matters and adopting Treaties designed to ensure the peaceful settlement of disputes.

In 1938, at the VIII International American Conference in Lima, the then Pan-American Union had an ample network of Treaties on arbitration, reconciliation, mediation, good offices and other matters relative to the settlement of disputes.

The fact that America has available, in disperse form, a good number of conventions all fostering peaceful settlement of disputes (they are listed in Article LVIII of the Bogotá Pact)⁸⁴ led this Conference, through its Resolution No. XV, to recommend that the International Jurisconsultancy Commission should undertake to draft a definitive version of a Peace Code, taking into account the Mexican Draft Peace Code, as well as the U.S.A.'s Draft Consolidation of American Peace Pacts.

The Inter-American Conference on the Problems of War and Peace held in Mexico in 1945 forged ahead with this same idea. In Resolution No. XXXIX it was to recommend to the Inter-American Juridical Committee that it should present a draft Inter-American Peace System, which would focus on gradually phasing-in the application of various methods for the settlement of disputes.

The Inter-American Juridical Committee thus prepared four separate Drafts between 1944 and 1947 in a single drive, which followed different methodologies: the first was a simple coordination of existing instruments; the second was an alternative that tended to incorporate a system that progressively tended to reach a final and definitive method for the settlement of disputes; the third, dated 1945, took into account the provisions of the United Nations Charter, and was careful to incorporate rules close to the new content of the Charter; finally, the fourth and final Draft of the Inter-American Peace System, dated 18 November 1947, formed the immediate predecessor to the adoption of the American Treaty on Peaceful Solutions, or the Bogotá Pact, at the IX International American Conference held in the Colombian capital.

The Bogotá Pact differed from the draft suggested by the Inter-American Juridical Committee. Effectively, the Committee had - following the recommendation in Resolution No. X of the Inter-American Conference on the Maintenance of Peace and Security in the Continent, held in September 1947, which approved the Inter-American Reciprocal Assistance Treaty - IRAT - stipulated arbitration as the mandatory method in its Draft. During the Bogotá Conference, this subject was altered, introducing a type of semi-automatism, based on juridical hypotheses that unfortunately blocked the mandatory shift from one method to another, until a definitive solution be reached, as this Rapporteur advised the Inter-American Juridical Committee in his Report on the Examination of the American Treaty on Peaceful Solutions dated 19 August 1985, On the basis of this Report and the discussions that took place this same month, the Committee recommended some reforms in the Bogotá pact, in an effort to simplify the Treaty in certain aspects, while respecting most of its original text and the constraints?? imposed by this instrument on reaching a peaceful settlement of disputes in its Articles V, VI and VII.

1. The above-mentioned Article refers to the following Treaties: (a) Treaty to Avoid or Prevent Conflicts between the American States, 3 May 1923; (b) General Convention on Inter-American Conciliation, 5 January 1929; (c) General Treaty on Inter-American Arbitration, 5 January 1929, and Additional Protocol on Progressive Arbitration, 5 January 1929; (d) Additional Protocol to the Inter-American Convention, 26 December 1933; (e) Non-Aggression Anti-War and Conciliation Treaty, 10 October 1933; (f) Convention to Coordinate, Extend and Ensure Compliance with the Treaties between the American States, 23 December 1936; (g) Inter-American Treaty on Good Offices and Mediation, 32 December 1936; (h) Treaty on the Prevention of Disputes, 23 December 1936.

Since 1954 concern began to appear over the lack of application of the American Treaty for Peaceful Solutions. The International American Conference, held this same year in Caracas, ruled that the Permanent Council should carry out a survey to study the convenience of revising this instrument. The outcome of this survey was not too clear, as the various positions resulting therefrom did not produce any clearcut criteria that could underwrite a study of the possible codifications of the Pact.

The I General Assembly of the Organization of American States, held in San José, Costa Rica, in 1971, charged the Inter-American Juridical Committee to carry out a study - in the light of the provisions of Article 26 of the Charter - of the experience of the Treaties and Conventions forming the Inter-American Peace System, with a view to strengthening this system.

However, the Committee did not study the experience of the application of these instruments as no such experience was found, and thus could not present its study as requested. It therefore represented a purely theoretical study based on this directive, and concluded that □the best way to consolidate and fine-tune the Inter-American Peace System is the Bogotá Pact, which should be ratified by the States that have not yet done so.□

This criterion was reiterated yet again by the Inter-American Juridical Committee on 13 February 1973, taking into account the comments in the above-mentioned document issued by the Government of Ecuador. Shortly after, still in 1973, the General Assembly of the Organization of American States set up a Special Commission for the Study of the Inter-American System, and to propose the corresponding reforms. This Commission, known as the CEESI, after three years work prepared a Draft of the IRAT reforms, as well as another covering reforms in the Organization of American States Charter, this latter far broader in scope than ever attempted to date, and studied the Draft Reforms for the Bogotá Pact, presented by the Ecuadorian Delegation, although with regard to this Treaty, no draft reforms were proposed.

In 1985, the proposition that had prompted the creation of the Special Commission for the Study of the Inter-American System some years previously arose yet again, returning to the reform of the basic instruments: the Charter of the Organization of American States and the Bogotá Pact, as in 1975 in San José, Costa Rica, efforts had been made to formally approve the Protocol of Reforms for the American Reciprocal Assistance Treaty, a document that has not as yet entered into force.

In August this year the Permanent Council asked the Inter-American Juridical Committee to carry out an Examination of the Bogotá Pact taking into account the reservations formulated by the signatory States thereof, as well as the reasons that may have prevented some Member-States ratifying it, in order to determine - ensuring its feasibility - the need to formulate reforms for this document.

The resulting study was presented by the Inter-American Juridical Committee to the Permanent Council on August 1985. Passed on to a Sub-Committee of the Juridical and Political Affairs Commission of the Permanent Council, in order to prepare Draft Reforms for the Bogotá Pact, this Sub-Committee adopted a Draft to be submitted for the consideration of the Extraordinary General Assembly called to reform the Charter and the Pact itself. This General Assembly was held in December 1985 in Cartagena de Indias, Colombia at which - with only three days for discussion of such important measures - the topic of alterations to the Pact did not even come up for consideration.

Based on the Draft Reforms for the Bogotá Pact prepared by the Inter-American Juridical Committee, in 1986 the Colombian Government presented to the General Assembly of the Organization of American States, held in Guatemala in 1988, a Draft Treaty for Peaceful Solutions. The General Assembly requested the Permanent Council to study it, requiring it for this purpose to obtain the comments of the Member-States.

In 1987, this same General Assembly requested this Committee to □update he study of the reasons why a larger number of States are not Parties to the American Treaty for Peaceful Solutions or the Bogotá Pact. This Resolution determined that the Inter-American Juridical Committee should assign the corresponding Report to Dr. Luis Herrera Mercano and the under-signed. These Rapporteurs requested the views of the non-signatory States regarding their reasons for not having signed, so that they could prepare an adequate Report. As soon as they noted that only three States had replied to this request, they completed a fresh Report, stating that, taking into act the fact that ratification is an eminently political and sovereign act and that without the respective information from the States, the Committee should not assume facts or circumstances hypothetical to the consultation. For this reason they stated that this topic should be removed from its Agenda, with which the Inter-American Juridical Committee agreed.

The Permanent Council, having been advised of this Report, placed on record its interest in the Committee continuing with its study on the topic of Peaceful Settlement of Disputes, and in accordance with its criteria, this study should be *in genere*. The General Secretariat was assigned the responsibility of carrying out a study of this same topic, and presented an important document entitled "Peaceful Settlement of Disputes in the Inter-American System", dated July 1991, which is of special interest for information on the cases of application of the procedures for the peaceful settlement of disputes in the Organization. This is a valuable document with abundant juridical texts and various criteria, of which the Rapporteur only wished to leave on record that he disagreed with the opinion expressed in Paragraphs 2 and 3 of page 3 thereof, in relation to the competence of the International Court of Justice under the norms of the Pact of Bogota.

Thus, this oft-mentioned topic is found even among those of the Committee, and despite the qualification that this should be a generic or general study, this is not sufficient to pinpoint the problem(s) that remain to be studied and to which it may be hoped that further consideration will be given, and that furthermore this may offer some prospects for its later continuation within the Permanent Council and the General Assembly.

Instruments and Methods for Peaceful Settlement of Disputes

If the Inter-American Treaty of Peaceful Settlement of Disputes is the principal instrument in this field, for several Latin American nations, the Treaties celebrated earlier still remain in force; they are listed in the above-mentioned Article LVIII of the Bogotá Pact, as may be noted from the Table on the following page.

The Bogota Pact is in force in Brazil, Colombia, Costa Rica, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the Dominican Republic and Uruguay - a total of twelve American States out of the 35 in the Organization of American States. Major reservations have been noted that tend to reduce the applicability of its clauses and which have in fact had this effect.

INTER-AMERICAN TREATIES FOSTERING THE PEACEFUL SETTLEMENT OF DISPUTES
IN FORCE AMONG THE VARIOUS MEMBER-STATES OF THE ORGANIZATION OF AMERICAN STATES

Treaty to Avoid or Prevent Conflicts between the American States 3 May 1923 (Gondra Treaty)	Rd		ARd		Rd		Rd	Rd		Rd	
General Convention on Inter-American Conciliation 5 January 1929	Rd				Rd		Rd	Rd	Rd	Rd	Rd
General Treaty on Inter-American Arbitration 5 January 1929	Rdr (1)				Rd		Rdr		Rd	Rdr	
Additional Protocol on Progressive Arbitration 5 January 1929	Rd				Rd						
Non-Aggression Anti-War and Conciliation Treaty 10 October 1933 (Saavedra-Lamas)	ARdr	Rdr			ARd		ARd	Rd	ARdr	ARdr	
Convention to Coordinate, Extend and Ensure Compliance with the Treaties between the American States 23 December 1936	Rd				Rd		Rd				Rdr
Inter-American Treaty on Good Offices and Mediation 23 December 1936	Rd				Rd		Rd				Rd
Treaty on the Prevention of Disputes 23 December 1936	Rd				Rd		Rdr				Rd

Ecuador ratified but did not deposit the corresponding Deed of Ratification of the Additional Protocol to the General Convention on Inter-American Conciliation, of 26 December 1933.

(1) Abandoned the first and second reservations formulated on signing the Treaty, due to 1 additional Protocol thereto.

Abbreviations: ARd = Adhesion Ratified and Deposited

Adr = Adhesion Ratified and Deposited with Reservations

Rd = Ratification Deposited

Rdr = Ratification Deposited with Reservations

El Salvador was a Party to the Bogotá Pact, but withdrew in 1973. It seems to have fallen away from all the other instruments, unless it is taken that this withdrawal could have had the effect of re-establishing its condition as a Party to all the Treaties whose effects ceased thereby, which would be juridically difficult.

The Inter-American Reciprocal Assistance Treaty is an instrument that has played an important role in the peaceful settlement of disputes and pacification of conflicts among States in the Organization. Article 7 of this Treaty served as a benchmark for a fair number of peace-making actions, as attested by the publications on the applications thereof brought out by the General Secretariat.

If the Inter-American Reciprocal Assistance Treaty is in fact an instrument designed to foster international security through acknowledgment of the right to legitimate individual and collective defense, as well as through the adoption of collective security measures that may be taken by the consultative organization, its possible use endows it with the quality of an instrument that can handle aspects of peaceful settlement of disputes and has assigned it a relevant position within the Inter-American System.

It is not the intention of this Report to enter into details of the application of the Inter-American Reciprocal Assistance Treaty, which at times has been heavily criticized by sectors of public opinion in Latin America. What cannot be ignored is that in some cases this was the sole feasible measure for achieving peaceful settlement of disputes and preventing the worsening of conflicts that may perhaps even have led to outbreaks of war. Of late, its use has been reduced, which does not diminish the history of its practice within the Organization of American States during past decades.

The Charter of the Organization of American States

Until the Cartagena de Indias Protocol (1985), the Charter of the Organization of American States did not empower any agency with sufficient faculties to handle the peaceful settlement of disputes using the methods of good offices and reconciliation, such as those now available to the Permanent Council, which may offer them at the request of only one the Parties involved in a dispute, constituting a valuable input for the efficiency of the Inter-American System for the peaceful settlement of disputes.

There is no doubt that the Buenos Aires Protocol (1967) empowered the Permanent Council with similar procedures, but only under the condition that all the Parties involved in a dispute should consent to its good offices and conciliatory actions. This did not constitute further progress, as the Inter-American Peace Commission had such faculties in accordance with the modification in its Statutes in May 1956, but which led to its paralization, as it had lost the faculty to act on its own initiative or at the request of only one of the Parties to a dispute, for those that arose over a principle.

The Inter-American Peace Commission vanished and with the Buenos Aires Protocol, the Inter-American Commission for Peaceful Settlement of Disputes was set up as a subsidiary body of the Council, with limited faculties similar to those of the Council itself. It never actually functioned. This Commission was in turn swept away by the Cartagena de Indias Protocol. In its place, the Permanent Council was assigned the faculty of setting up *Ad hoc* Committees with a mandate, established with the consent of the Parties involved in a dispute (Article 85 of the reformulated Charter). Appreciably more flexible than the Inter-American Commission for Peaceful Settlement of Disputes, this measure could at any time and to any extent halt or slow the functioning and development of the action, which is within its juridical capacity to offer the Permanent Council, among peaceful solutions. Should this occur, the Council would without doubt have to have recourse to Article 86, which is still more flexible, authorizing it by any means it may deem convenient, to investigate the facts involved in the dispute, including within the territory of any of the Parties thereto, with the prior agreement of the respective Government.

The Permanent Council is now endowed with a juridical capacity that in this matter may render extraordinary services to the Organization of American States Member-States. Article 83 is a key factor in this aspect, as it establishes that the Permanent Council shall watch over the maintenance of friendly relationships among the Member-States, and to this end shall help them in an effective manner to find peaceful settlements to disputes in accordance with the norms of the Charter itself.

The circumstance whereby the Permanent Council has been positively assigned the function on this supervision - as revealed by the used of the word oversee [?] in Article 83, is of the highest importance. Together with the above-mentioned function assigned also to the General Secretariat of the Organization of American States in Article 115, Paragraph 3, whereby it may bring to the attention of the General Assembly or Permanent Council any matter that in its opinion affects the peace and security of the continent or the development of its Member-States this constitutes highly valuable grounds for a united Inter-American vision seeking peace and the peaceful settlement of disputes, on a friendly basis, but firm and rich in fruitful possibilities for success which in this field has at times lacked only prompt, suitable international assistance. This would first of all involve the political will of the group, whereby the Permanent Council should act in order to achieve appreciable progress in the peaceful settlement of disputes that may arise, and second demand the undeniable will to serve the cause of peace, which constantly guides the General Secretariat in drawing the attention of political agencies to situations developing into disputes or international conflicts among Organization of American States Member-States.

It should also be added that the Permanent Council has, as additional measures that could play an important role in the peaceful settlement of disputes, not only the referential of the Bogotá Pact, but also the series of Treaties designed to foster the peaceful settlement of disputes that we have listed, whereby whether the various States are signatories to the former or the latter - including the General Inter-American Reconciliation Treaty (1929) for example), which in its Article 1 obliges the Parties thereto to submit to the above-mentioned method all disputes of any nature whatsoever, that have arisen or may arise among them, and cannot be resolved by diplomatic means , or the General Inter-American Arbitration Treaty (1929) according to Article 1 of which the Parties thereto agree to submit to arbitration all differences of an international character that have arisen or may arise among them, due to claim over a right or law brought by one against the other under a Treaty or for some other reason, and when this cannot be resolved through diplomatic channels and is of a juridical nature as being subject to decision through the application of the principles of law.

The Permanent Council cannot fail to take into account those Treaties still in force among States that may also be Parties to the above-mentioned juridical instruments which have neither lapsed nor fallen into disuse, nor ceased to have clauses of a mandatory nature not found in the Bogotá Pact.

The Consultation Meeting of Ministers of Foreign Affairs

Under Article 60 of the Charter, the Consultation Meeting of Ministers of Foreign Affairs has been rendering important services in cases of disputes between Member-States of the Organization of American States. In contrast to its actions with regard to the consultation agencies of these same Ministers, this latter acts in compliance with the provisions of the Inter-American Reciprocal Assistance Treaty - IRAT insofar as the measures thereof are obligatory, the Consultation Meeting is endowed with a broad-ranging faculty that can cover all problems of "an urgent character and in the common interest of the American states." Among these problems, and in function of the essential purposes of the Organization, is Article .2, item c) of the Charter: "To prevent the possible causes of difficulties and ensure the peaceful settlement of disputes that may arise among the Member-States."

If the Permanent Council cannot carry out the task assigned to it by Article 83 of the Charter, it is clear that the Consultation Meeting, through the same act that brings together the Chancellors of the Member-States, takes on particular importance for the consideration of problems involved with the peaceful settlement of disputes which are of common interest for the Member-States as well as for the Organization itself.

The Member-States of the OAS and the peaceful settlement of disputes in accordance with the Charter of the United Nations

The Member-States of the OAS, being at the same time Members of the United Nations, equally have recourse to the various procedures for the peaceful settlement of disputes established in the Charter of San Francisco. There is no need to go into details of such procedures and particularly the task which should be carried out in this field by the Security Council under Articles 33 to 38 of the United Nations Charter. The General Assembly, empowered with wide-ranging competence in this aspect, may act to foster the peaceful settlement of disputes in accordance with Articles 12 and 14 of the Charter and the Union For Peace Resolution dated 3 November 1950.

Despite a serious error in the wording, the Bogotá Pact, in its Article 11, establishes that "The Signatory Parties hereto recognize the obligation to settle the international disputes through peaceful regional procedures, prior to taking them to the Security Council of the United Nations" (it is considered that the General Assembly would always be open), as there is no point in submitting a dispute to the Security Council that has already been settled, the fact is that with regard to this point, the IRAT reform protocol of 1975 established very clearly, in accordance with the provisions of Article 52, Paragraph 4 of the United Nations Charter, that it will always be open to direct appeal by the Member-States of the Organization of American States in the manner established in Articles 34 and 35 of this Charter, which in Article 23 of the Charter of the Organization of American States in force is already a norm that has been definitively confirmed.

In its decision on "Functions and Faculties of the United Nations and the Regional Bodies with regard to the peaceful settlement of disputes", dated 21 August 1984, the Inter-American Juridical Committee made its criteria equally clear, in terms similar to those above.

The fact that the United Nations Organization offers a vast range of possibilities for the peaceful settlement of disputes is of vital importance to the Member-States of the Organization of American States which, in any circumstances, would have found that the regional organization can not render effective assistance in the peaceful settlement of disputes.

On this topic, I must state with satisfaction that the UN Secretariat has prepared a "Handbook on the Peaceful Settlement of Disputes between States", (New York, published in 1992), which constitutes an excellent support guide to help the States follow various procedures, both in the Charter of the worldwide organization as well as those covered in the juridical instruments adopted under its auspices, or in compliance with the norms of the various regional organizations, either for the settlement of political and juridical disputes in general, as well as for those that may arise over the interpretation or the application of instruments referring to specific fields in international relations, such as that of maritime law, treaty law (1969) or the agreement on international responsibility for damage caused by space objects (1972), to mention just a few.

With regard to the peaceful settlement of disputes between states to which we are referring, it is important to recall that the United Nations has the "General Revised Deed for the peaceful settlement of international disputes", dated 1949. Should talks break down, this instrument determines that the parties involved in a dispute should mandatorily have recourse to reconciliation for the settlement thereof.

It should be recalled that Guatemala presented a "Draft UN Conciliation Regulation" to the worldwide organization, whose text, and the report of the VI Commission appears in Doc.A/45/742 dated 20 November 1990. I do not know if the General Assembly in fact approved it.

Additionally, there are important declarations by the United Nations that should be taken into consideration with regard to the establishment of general principles relative to the peaceful settlement of disputes: The "Declaration on the Principles of International Law with regard to Friendly Relations and Cooperation between States in Conformity with the Charter of the United Nations" (Resolution 2625-XXV-1970) and the "Manila Declaration on the Peaceful Settlement of International Disputes", 1982.

Schematically, and without carrying out an exhaustive comparison, we can highlight various common aspects, as well as other characteristics of the systems for the peaceful settlement of disputes within the Organization of American States and the United Nations:

- "a) Common aspects of the Organization of American States and the United Nations systems
 - i) Obligation or commitment by the Parties to submit their disputes to a procedure for the peaceful settlement thereof (Organization of American States Charter, Articles 23 and 25, Pact, Article II and UN Charter, Article 2, item 3);
 - ii) Acknowledgment that the topics, which essentially fall under the domestic jurisdiction of the States, are thus not susceptible to submission to the procedures for the peaceful settlement of disputes (Pact, Article V of the UN Charter, Article 2, item 7);
 - iii) Recourse to the procedures for peaceful settlement of disputes without deprecating the inherent right to legitimate defense either individually or collectively, in case of armed attack (Article VII of the Pact and 51 of the UN Charter);

- iv) Acknowledgment of the freedom of the parties to elect the methods of peaceful settlement of disputes established (Pact, Article III and UN Charter, Article 33, Part I);
 - v) Acknowledgment that the International Court of Justice constitutes a common judicial body, with mandatory acceptance of the jurisdiction thereof over juridical disputes (Pact, Article XXXI) and only through an *Ad Hoc* Declaration in the UN (Charter, Article 92 and Statutes of the Court, Article 36, Paragraph 2);
 - vi) Acknowledgment in the case of a dispute over whether or not the International Court of Justice has the necessary competence or jurisdiction over the decision that it hands down on the issue (Pact, Article XXXIII, and Paragraph 6 of Article 36 of the Court Statutes);
 - vii) Acknowledgment of the obligatory character of the decisions of the international Court of Justice for the parties involved in a dispute (Pact, Article XLVI and L; UN Charter, Article 94 and Court Statutes, Article 60);
 - viii) Enumerate the negotiations, good offices, investigation, mediation, reconciliation, arbitration, judicial settlement, and other settlement measures agreed upon by the parties thereto (the UN Charter does not mention "good offices" but the Manila Declaration does so).
- b) Particular Aspects of the Organization of American States System
- i) Purpose: "not to allow any dispute between the American states to remain without a definitive solution thereto within a reasonable period of time (Article 26 of the Organization of American States Charter);
 - ii) Obligation of the Permanent Council to "strive to maintain friendly relations between the Member-States and to this end to help them in an effective manner to reach the peaceful settlement of disputes" in accordance with the provisions of the Charter.
 - iii) Availability of the Consultation Agency with basic competence to hear problems regarding collective inter-American security, endowed with peacemaking powers leading to the peaceful settlement of disputes through peaceful means in accordance with Article 7 of the Inter-American Reciprocal Assistance Treaty - IRAT.
 - iv) Established capacity and practice by the Consultation Meeting of Ministers of Foreign Affairs to hear disputes between Member-States of the Organization of American States, under Article 60 of its Charter, as well as urgent matters and those of common interest
 - v) The acknowledgment of an automatic hypothetical method, allowing movement from a procedure leading to the peaceful settlement of disputes
 - conciliation
 - to the International Court of Justice, when the former fails, within the limitations and modalities of the Pact of Bogotá (Articles XXXII, XXXIV, XXXV) which would result in mandatory arbitration due to the declaration of incompetence by the International Court of Justice, for motives not related to Articles V, VI and VII of the Pact (Articles XXXII through XXXV of the Pact) which could lead to arbitration in default, according to Articles XLII and XLV of the Pact, something that is truly innovative, although hypothetical to the extreme.
 - vi) Acknowledgment of the Senior Contracting Parties as mandatory, *ipso facto*, with no need for any special agreement, unless in effect under the Pact, with regard to any other American State, under the jurisdiction of the International Court of Justice, in all disputes of a juridical nature that may arise among them, and that these should be regulated by Article XXXI of the Pact (which repeats the same cases as Article 36 of the Statutes of the Court, although this involves a non-reciprocal or asymmetrical obligation) .
 - vii) Agreement not to bring any dispute before international jurisdiction when nationals have expedited the means to bring such before the competent domestic courts of the respective States (limitation on diplomatic claims and complaints) (Article VII of the Pact)..
 - viii) Inapplicability of the procedures to topics already resolved by agreement between the parties or through arbitration, or by a decision handed down

by an international court (acknowledgment of the principle of res judicata), all of which have been regulated by agreements or treaties in effect on the date of the signature of the Pact of Bogotá (acknowledgment of the principle of pacta sunt servanda) (Article VI of the Pact)

- ix) Recourse to the consultative opinion of the International Court of Justice, through the Permanent Council, if so agreed by the parties interested in a peaceful settlement of the dispute (Article LI of the Pact)
- x) Recourse to the Consultation Meeting of the Ministers of Foreign Affairs, when one of the parties fails to comply with the award handed down by the International Court of Justice or an arbitration decision, in order to take the measures necessary to implement the judicial decision, prior to having recourse to the Security Council of the United Nations (Article L of the Pact) and
- xi) Acknowledgment of a duty to submit international disputes to regional peace-making procedures, without adversely affecting their rights and obligations as Member-States of the United Nations, for having recourse to this Organization, in accordance with Articles 34 and 35 of its Charter. (Charter of the Organization of American States, Article 20, and United Nations Charter, Article 52, items 2 and 4).
- xii) Acknowledgment that when a dispute arises between the American States, only when in the view of one of them this cannot be resolved through the usual diplomatic channels, should the parties have recourse to any other peace-making procedure that will allow them to reach a solution, a principle which, erroneously in both the Spanish and English texts of the Pact of Bogotá (Article II, Paragraph) mentions that this recourse to other methods may only take place when in the opinion of the parties, the dispute cannot be resolved by direct negotiations.

c) Specific aspects of the United Nations System:

- i) Existence of a competent agency with broad-ranging basic duties and responsibilities in terms of the peaceful settlement of disputes and collective security (Security Council, Articles 33, 34, 35, 36, 37 and 38 of the United Nations Charter).
- ii) Intervention by the Security Council at its own initiative or at the request of only one of the parties involved in a dispute, within the terms of Articles 34 and 35 respectively of the Charter, meaning in disputes liable to constitute a threat to the maintenance of international peace and security or lead to international conflicts..
- iii) Intervention by the General Assembly in any matter involving the maintenance of international peace and security, at its own initiative or at the request of only one of the parties, in accordance with Article 14 (to recommend methods of peaceful settlement of disputes in any situation, regardless of the origin thereof) and Article 11, Paragraph 2 of the Charter, as well as the Pro-Peace Resolutions adopted by the General Assembly on 3 November 1950.
- iv) Acknowledgment that, prior to having recourse to the Security Council, the parties involved in the dispute have made every possible effort to reach peaceful settlements of disputes of a local nature by means of regional agreements (Article 52, Paragraph 2), all without adversely affecting the right of the parties to have recourse to the above-mentioned Council (Article 52, Paragraph 4).
- v) The establishment of coercive powers for the Security Council for implementing its decisions in the field of peaceful settlement of disputes, (Article 39 of the Charter)³
- vi) Acknowledgment of the optional jurisdiction of the International Court of Justice (Article 36, item 1 of the By-Laws), unless the parties accept, either

³ This interpretation, also put forward by the Belgian representative at the San Francisco Conference on 1945, is also the criterion used by well-known writers Leland M. Goodrich and Edward Hambro in their work Charter of the United Nations, Commentary and Documents Boston, 1946, pages 157-158.

generally or with reservations, in an express manner through the procedure covered in Item 2 of this same Article 6 of the By-Laws covering juridical disputes, or under a provision of the United Nations Charter, or Treaties in effect, or because in a particular case, the parties agreed to do so (By-Laws, Article 36, Paragraph 1).

- vii) Use of preventive methods to avoid a situation worsening through the adoption of provisional measures by the Security Council (Article 40), or through the investigation procedure (Article 34 of the Charter).

General Principles for the Peaceful Settlement of Disputes

Although under the previous scheme, various basic principles have already been outlined, such as the commitment by the Member-States to submit their disputes to procedures for peaceful settlement that they consider appropriate for a specific dispute, the Declaration of Manila on the Settlement of International Disputes (1982), together with the Declaration on the Principles of International Law regarding Friendly Relationships and Cooperation between States, in compliance with the United Nations Charter, (Resolution 2625, XXV, 1970) have established a framework for the development of peaceful settlement of disputes. There are certainly Treaties on special topics that establish specific norms and standards, whereby in a certain number of cases, some procedures for the peaceful settlement of disputes are mandatory, but the general principles are basically those found in these two United Nations Declarations, to which may be added the Declaration on the Prevention and Elimination of Disputes and Situations that could Threaten International Peace and Security and the Role of the United Nations in this Sphere. (Resolution 45/41)..

As all these Declarations and principles have other basic principles in counterpart, in view of which attempts are made to offer a juridical response, such as that of Article 2, Paragraph 4, of the United Nations Charter which establishes that, □The Members of the organization, in their international relationships, shall abstain from having recourse to threats or the use of force against the territorial integrity or political independence of any State, or in any manner incompatible with the purposes of the United Nations.□

The ban on the use of force in international relationships in other documents is found in a still more categorical manner, such as in the Non-Aggression Anti-War and Conciliation Treaty signed in Rio de Janeiro on 10 October 1933, which solemnly condemns wars of aggression, a principle which is found in almost identical terms in Article 3, Item f of the Charter of the Organization of American States, which is not repeated with equal force in Article 1 of the Pact of Bogotá. On the other hand, the General Assembly of the United Nations has approved various Resolutions designed to strengthen international peace and security and guarantee peaceful links and good neighbor policies among the States, which are supplementary tools that help maintain peace.

We now cover other principles in terms of the peaceful settlement of disputes.

As might be expected, there are few allusions □ none in the Charter of the Organization of American States nor in the Pact of Bogotá □ to the guidelines for the peaceful settlement of disputes. The main principle for this is found in the Charter of the United Nations and in various paragraphs and provisions of the above-mentioned Declaration 2625 (XXXV), as well as the Declaration of Manila adopted by the General Assembly of the United Nations. Its Charter effectively states that one of the purposes of this worldwide organization is:

□To maintain international peace and security and to this end to take effective collective measures to prevent and eliminate threats to peace, and to suppress acts of aggression other interruptions of peace, and to ensure through peaceful means and, in compliance with the principles of justice and international law, the settlement of disputes or international situations that could lead to a breakdown in peace.□

With regard to the States, it mentions the principle whereby:

□The Member-States of the Organization shall settle their international disputes by peaceful means in such a way that they do not place at risk neither peace, nor international security, nor justice.□ (Article 2, Paragraph 3 of the Charter).

Chapter V of the Charter of the Organization of American States is silent on the manner in which international disputes should be resolved. However, it

emphasizes that a special Treaty shall establish the appropriate means for settling disputes and shall determine the procedures pertinent to each of the peaceful methods in order to avoid any dispute between the American States continuing without a definitive solution within a reasonable length of time. (Article 26 of the Charter of the Organization of American States).

This special Treaty is no other than the Pact of Bogotá, although it is not easy for us to affirm that it has fulfilled this mission if its Signatory States have not voluntarily had recourse to this juridical instrument to settle their disputes,⁴ although it has all the known methods available: good offices, mediation, investigation and conciliation, juridical procedures, arbitration, consultative opinions and all procedures which, at the discretion of the parties involved in the dispute, should allow them to reach a settlement.

The Declaration of Manila formulated an inter-relationship among various principles that would constitute the juridical basis for having recourse to procedures for the peaceful settlement of disputes.

In addition to emphasizing as principles those contained in Article 1, paragraphs 1 and 2, and Paragraph 3 of the United Nations Charter, in relation to the guidelines leading to the settlement of disputes, and establishing that topics that essentially fall under the domestic jurisdiction of the States are not open to this recourse, the Declaration of Manila spotlights various others which, by their very nature, are designed to produce specific effects in this field, such as the principles of equality of rights and the free determination of peoples; the principle of the sovereign equality of the States and that they should comply in good faith with the obligations that they have undertaken in terms of the United Nations Charter.

The reference to these principles obviously establishes an atmosphere of applicability for the peaceful settlement of disputes, which could expand or shrink, depending on the case and, with regard to this last point, similar in effect although of a different order to Articles V, VII and VII of the Pact of Bogotá. Everything depends on the circumstances and the interest of the States in taking up positions which in some way could outline the framework of these principles, leading to the peaceful settlement of disputes.

The principle of the equality of rights, invoked together with that of the free determination of peoples proclaimed in the Declaration of Manila, taking into consideration the period when they were adopted, when both Namibia and Palestine both lacked rights equivalent to those of other States precisely because they could not exercise free determination, to the extent that the right to use force in the struggle against colonialism or to ensure the right of free determination has been widely acknowledged, makes it quite understandable that this defends the possibility that certain non-sovereign political organizations could have recourse to procedures for the peaceful settlement of disputes which would otherwise be denied to them.

The principle of the sovereign equality of States proclaimed in Article 2, Paragraph 1 of the United Nations Charter is equally emphasized in the Declaration of Manila, as it was previously in the Declaration on the Principles of International Law regarding Friendly Relationships and Cooperation between States (Resolution 2625, XXV) and which in the Charter of the Organization of American States is clearly expressed in Article 9 in the form of the juridical equality of American States, whereby they acknowledge the enjoyment of equal rights and equal capacity to exercise them, as well as equal duties and responsibilities. These principles, due to their obvious significance, in turn lead to the principle of free selection of the procedures for the peaceful settlement of disputes.

This free selection is acknowledged in Article II of the Pact of Bogotá, in Article 25 of the Charter of the Organization of American States, and in Article 33, Paragraph 1 of the United Nations Charter.

Very briefly, this outlines the juridical framework on which, in general terms, rests the peaceful settlement of disputes of the Member-States of the Organization of American States, and which can be directed, if wished, to the options offered by the United Nations Organization.

The Signatory States to the American Treaty for the Peaceful Settlement of Disputes or others still in effect on this matter, have instruments to which recourse may be had in case of a dispute among them. We have already seen that some nations in the Organization of American States, have nevertheless had recourse to the various other Treaties for the peaceful settlement of disputes, using either arbitration or conciliation, prevention of disputes, good offices and mediation, as well as others mentioned in Article LVIII of the Pact of Bogotá.

With regard to the peaceful settlement of disputes, it seems that there is no special cause for the concern shown by the Member-States of the Organization of

American States. Although not forming part of any Treaty for the peaceful settlement of disputes, as is the case with the States which have joined the Organization of American States over the past few years, they nevertheless have the Permanent Council available, and may have recourse to its good offices, as well as the Consultation Meeting of the Ministers of Foreign Affairs, should they so prefer.

All this seems to fall within a system that should offer a certain amount of assurance that all disputes among the Member-States of the Organization of American States can find some means for peaceful settlement within the regional Organization, and that Chapter V ☐ although Article 26 of the Charter refers to a special Treaty for the peaceful settlement of disputes ☐ can line up other relevant points in the Charter to support this valuable effort by the above-mentioned political agencies of the Organization. On the other hand, we should not forget that the sense of solidarity of the American States should be a force that underwrites peace on the American continent, not only because this is mentioned in the Charter, but also because this constitutes a sociological reality that influences the understanding and cooperation among the American nations, enriched by the input of the new States on this Continent which are today members of the Organization of American States.

The Development of Inter-American Law over the Past Few Years

We have stated that the overview of the system for the peaceful settlement of disputes within the Organization of American States, despite its shortcomings, some of which have been taken under consideration by this Committee, particularly with regard to the Pact of Bogotá, may allow it to be said that there are good possibilities for settling disputes among the Member-States, but the circumstances whereby the political agencies of the Organization have required the Committee to maintain the topic of the Peaceful Settlement of Disputes on its Agenda always brings up the question of whether, notwithstanding, the systems for the peaceful settlement of disputes at the regional level have various defects in their principles, or in the contractual norms and standards of its Treaties, which warrant fresh consideration and modifications.

But in the past, as soon as such concerns have been brought forward, not only by the political agencies of the Organization of American States but also through individual requests by the Member-States, and work has started on this topic with suggestions or drafts being submitted, matters have made no progress. What has been noted is that the Permanent Council has been granted the powers to offer its good offices in case of disputes among the Member-States of the Organization of American States at the unilateral request of either party, under the Protocol of Cartagena de Indias (1985).

It seems to us, and we repeat that the reform implemented by the above-mentioned Protocol of Cartagena de Indias has filled a large gap within the Organization, as there was no agency whatsoever assigned specifically to provide assistance and offer its good offices at the request of only one of the parties involved in a dispute. This meant that the Permanent Council had a sizable task that it could handle as it had done in other fields, not only in close compliance with the respective provisions, but also the spirit and express purposes of the Organization.

We have noted lately that asking questions and getting answers in the spirit of the provisions of Charter has been leading the Organization of American States towards the development of an Inter-American Law in certain spheres which was quite unsuspected only a few years ago. I refer to the developments that have taken place in the field of the promotion and consolidation of democracy in the Americas, which has without doubt revitalized the Organization of American States, empowering it for the purposes of Resolutions and Declarations that finally resulted in the Protocol of Washington dated 14 December 1992, which has nevertheless not yet entered into force. On the other hand, it is clear that the Organization has already gone through a period of innovations in its purpose of promoting compliance with and defense of human rights, as assigned to the Inter-American Commission on Human Rights and the Inter-American Human Rights Court (Article 111 of the Charter and Item k of Article 3 of the Principles thereof).

The history of this process of incorporating matters relating to human rights into the international sphere ☐ the first major manifestation of which was the American Declaration of the Duties and Rights of Man adopted in Bogota in 1948 ☐ has left a trail paved with resistance and anxiety, as this meant that the defense of these rights corresponded to the private or domestic sphere of the States. However, in 1969, the American Convention on Human Rights was signed, whereby the defense and promotion of human rights became inter-American in scope, opening up a new and dynamic field in international law applicable within the Organization.

So what about the efforts of the past four or five years to achieve the legitimization of a true promotion and consolidation of representative democracy with due

respect for the principle of non-intervention? The Declaration of Santiago, first, the activities of the Organization of American States under these provisions, and practice noted through the political will of the Member-States, are spotlighting not only the development of norms and standards of the Charter, but also a type of influence in the United Nations, whose Security Council approved Resolution N^o. 940 dated 31 July 1994, whereby it had to base its authorization of the use of force by Member-States in Haiti not only on the protection of international security, but also on the need to foster human rights and protect democratic regimes freely elected by the people.

Unfortunately, no equivalent action has taken place in other areas involving the peaceful settlement of disputes, although as mentioned previously, initiatives have cropped up from time to time trying to reformulate or revise the Pact of Bogotá, or trying to set up instruments parallel thereto such as a document submitted by the Government of Ecuador (Draft Inter-American Treaty for the Peaceful Settlement of Disputes) as well as another draft put forward by Brazil (Constitutive Treaty Establishing the Inter-American Peace Council) at the II Extraordinary Conference of the Organization of American States held in 1965 in Rio de Janeiro).

Need for a Movement endowing the Organization of American States System
for the Peaceful Settlement of Disputes with Greater Effectiveness.

The Inter-American Juridical Committee is not responsible for requesting possible new amendments to the Pact of Bogotá, since it formulated them in 1985, in its pronouncement on this matter. Another study of this topic is definitely not required. It has been said that the Signatory States to this Treaty consider, in the light of the Convention on Treaty Law, that only they have the right to amend or maintain it as is, being the States that ratified this document. Although this may be a position acceptable with regard to any Treaty, we must remember that this Pact is not an instrument existing separate from the purpose of the Charter of the Organization, and that as such it is of little interest for all the Member-States of the Organization of American States, whether or not they ratified this Treaty, if Article 26 of the Charter establishes that a special treaty will establish the appropriate means for the settlement of disputes and will determine the pertinent procedures for each of the peaceful means to do so, in order to ensure that no dispute whatsoever between the American States continues without a definitive solution within a reasonable length of time.

The Pact of Bogotá is a special Treaty which on the other hand through ratification thereof, releases the ratifying States from the effects of the Treaties listed in Article LVII thereof, of which they may have been signatories. This is and will always be a Treaty of interest to all the Member-States, as is also the Inter-American Reciprocal Assistance Treaty - IRAT in its specific field, whereby it would be convenient for the ratifying States to accept the possibility should this situation arise at any time that this should be revised in accordance with the criteria of all the Member-States of the Organization of American States, as has already occurred effectively with the CEESI, with regard to both IRAT and the Pact (1973-1975).

Under the current circumstances, it is not easy to adopt criteria which could to some extent resolve the issue of the lack of effectiveness of the system for the peaceful settlement of disputes of the Organization of American States.

As we have already mentioned, Ecuador and Brazil have both submitted Draft Treaties parallel to the Pact of Bogotá, whereby, if it proves feasible to revive this idea, it would be necessary for the current Member-States of the Organization of American States to decide to take this up in order to have available an instrument that could attract a majority ratification, which was not the case with the Inter-American Treaty for the Peaceful Settlement of Disputes, far less that the Signatory States thereto should use it voluntarily to settle their disputes.

A recent case of its invocation before the International Court of Justice, in the above-mentioned suit brought by Nicaragua against Honduras, shows that even if the ratifying States which include the latter above are not willing to accept the application of binding provisions. There is no other meaning to the argument put forward by Honduras whereby it did not acknowledge the mandatory jurisdiction of the Court under Article XXXI of the Pact of Bogotá, despite its clear and concrete stipulations. However, the Court decided that Honduras did in fact fall under its mandatory jurisdiction.

This obviously produces a paradox which Juan Carlos Puig⁵ analyzed and outlined as follows:

⁵ Controlling Latin American Conflicts: Ten Approaches, published by Michael A. Morris and Victor Millán, Westview Press, Boulder, Colorado, U.S.A. 1983, page 11.

□ From the point of view of the peaceful solution of international conflicts, the countries of Latin America offer a paradoxical image. It is probable that in few regions of the world have so many praises been sung to peace, to understanding among brother countries, and to the need of avoiding war in every possible way. No other regional group has produced so many Treaties, Conventions and Resolutions with the objective of promoting conciliation and understanding among States, and no other group possesses such a diversified and at times sophisticated panoply of juridical recourses. However, frequently these nations have been inclined to adopt pre-jurisdictional forms of settlement, that is forms which do not envisage compulsory jurisdiction or enforcement of the award. On the other hand, when some procedure of this kind was agreed upon, generally it only entered into force for a few states, or it was displaced by diplomatic negotiations.□

If this is the situation, with a prevailing feeling of reticence if not resistance to accepting the methods for the peaceful settlement of disputes previously agreed in Treaties on this issue, there would be little point in developing a Treaty parallel to the Pact of Bogotá or any other which could, in the sphere of non-judicial procedures, be conceived as a mandatory recourse for the signatories thereto.

But perhaps it would be worth the States addressing their attention to a way of approaching this problem under a system different from juridical methods that imply mandatory acceptance of the court award or arbitration decision, as the case may be, in order to comply with the purpose of seeking peaceful settlement to disputes. However, we always run up against the need for the Member-States of the Organization to adopt a new policy on this matter, which does not mean only the availability of this possible instrument, but also acting with the political will to comply unfailingly with its provisions.

The major difficulty at the moment seems to be that, although the States accept the commitment to have mandatory recourse to methods for the peaceful settlement of disputes, they do not necessarily have recourse to them or do not reach the point of agreeing on a common procedure. Worse still, the Pact of Bogotá offers an easy way out from recourse thereto, through the provision contained in Article II, Paragraph 2 of this instrument, which states:

□ Consequently, should two or more of the Signatory States become involved in a dispute that, in the opinion of the parties thereto, cannot be settled through direct negotiations using the normal diplomatic methods, the parties agree to make use of the procedures established in this Treaty in the form and under the conditions stipulated in the following articles, or the special procedures, which allow them to reach a solution, at their own discretion.□

We have already stated earlier that this norm implies that it is necessary for the parties (two, three, or however many) may be involved in a dispute, to have exactly the same opinion, that the dispute cannot be resolved by direct negotiation, and only then will they be in a juridical position to have recourse to the procedures of the Pact or even to □ the special procedures which allow them to reach a solution, at their own discretion.□ This is a major stumbling-block. It also contradicts Article 25 of the Charter of the Organization of American States, which establishes that it is necessary for only one of the parties in a dispute to decide that it cannot be resolved by the usual diplomatic means, when □ the parties should agree on any other peaceful procedure that allows them to reach a solution.□

Article 25 of the Charter of the Organization of American States saves the application of the Pact of Bogotá from total deadlock by requiring that the criterion used by the parties involved in a dispute that deem it cannot be resolved through negotiation, nor through the above-mentioned provisions, nor the usual diplomatic means, which could lead to something similar to a veto, challenging any other method for the peaceful settlement of the dispute, without this agreement, but it has not yet been decided is the Charter □ as the constitutive deed of the Organization □ should prevail in terms of its general norms and standards over other special provisions in other Treaties within the Inter-American System, such as the Pact.

It thus seems necessary that the States should act subject to the provisions of Chapter V of the Charter of the Organization of American States with regard to the peaceful settlement of disputes, and should lose their fear of submitting a dispute to a procedure for peaceful settlement which would after all in some way break through the *status quo* of the latent or active maintenance of a conflict, where a lack of definition may represent higher economic and political costs than complying with the commitment to submit it to some method for the peaceful settlement of disputes.

It is possible that in this position there are factors of a domestic political order that are important and powerful enough to discourage the quest for a peaceful settlement to a dispute, which might be right for both or all the States involved in a conflict, or for only one of them, highlighting the unacceptability of questioning recourse to the Treaties or even to direct negotiations.

All this cannot be resolved by more changes or modifications to existing treaties covering the peaceful settlement of disputes, nor through the adoption of new instruments.

The systems for the peaceful settlement of disputes are in fact procedural instruments □ some of which may be better than others □ but to which no recourse can be had without the political will of the States, and without some substantive norm or standard that underwrites some effective obligation to call on one of these resources.

Other regional organizations, such as the OAU - Organization of African Unity, which are in open opposition to the International Court of Justice for reasons that are too lengthy to enter into here, produced on 30 June 1990 not a Treaty but a Declaration of the Assembly of the Heads of State and Government on the Establishment within the Organization of African Unity Regarding a Mechanism for the Prevention of Conflicts, and the Administration and Settlement Thereof.□

This is simple procedure that does not actually have juridically conceived articles, but rather lays down norms and standards for actions that it describes as appropriate for achieving its purpose.

In Paragraph 9, this document acknowledges that □There has been no other domestic factor that has contributed more to the social and economic problems in this Continent than the scourge of conflicts within and among our countries. This has brought death and human suffering, engendering hatred and dividing nations and families. Conflicts have forced millions of our people into a wandering life as refugees or internally-displaced persons, deprived of their means of sustenance, human life and hope. Conflicts have consumed scarce resources and undermined the capacity of our countries to cope with the imperative needs of our people.□

This is a dramatic declaration of a terrible reality that has no parallel whatsoever in the Americas, which we mention only because of the recognition by the Organization of African Unity of this situation, which led it to setup the mechanism for the prevention of conflicts in order to empower the Organization to provide □rapid action for the administration and finally the settlement of disputes wherever and whenever that may occur.□

In the United Nations, the Declaration adopted on 31 January 1992 at the Summit Meeting of the Security Council (Heads of State) requested the Secretary-General of the United Nations to prepare □an analysis and recommendations regarding the means for strengthening and streamlining, within the framework of its Charter, the capacity of the United Nations in terms of preventive diplomacy, the establishment of peace and the maintenance of peace.□

The Secretary-General thus presented a document entitled □A Program for Peace□, which voiced doubts over whether the preventive measures that could be proposed would really prove effective. In relation to this aspect, he said:

□The manifest desire of the Member-States to work together is a source of renewed strength for our common enterprise. However, its success is far from assured. Although in my Report I refer to the means of enhancing the capacity of the Organization to achieve and keep the peace, it is vital that all Member-States should remember that it is of little use to seek out better techniques and mechanisms if this new spirit of a common endeavor is not prompted by willingness to adopt the difficult decisions demanded by an opportunity such as this.□

The Report Is very interesting, set in the environment that arose with the end of the Cold War, but in an international context largely characterized by □soaring population growth, overwhelming debt burden, trade barriers, drugs and the increasing differences between rich and poor,□ Not only does it specifically mention these circumstances, but it also notes that since the United Nations was founded in 1945, twenty million people have died in over one hundred major conflicts all over the world. It emphasizes the powerlessness of the United Nations when faced with many of these crises, due to the repeated use of the veto in the Security Council (27 times in all), and notes that since 31 May 1990 not single veto has been repeated, although the demands made on the United Nations have increased.

With direct regard to the subject of this Report, the □Program for Peace□ prepared by the Secretary-General of the United Nations refers to the United Nations Charter and the various Resolutions adopted by its General Assembly for the peaceful settlement of disputes, expressing something that is becoming increasingly clear: □The United Nations has had broad-ranging experience in the application of these peace-making measures. If some conflicts remain unresolved, it is not through a lack of knowledge of the techniques of peaceful settlement, nor because such techniques were inadequate. The fault lies primarily in the lack of

the political will of the parties to seek an outcome to their disputes through the means suggested in Chapter VI of the Charter, and secondly to the lack of authority assigned to a third party if this procedure is selected. The indifference of the international community to these problems, or the importance assigned thereto, may well also undermine the possibilities for settlement. We should first of all study these issues if we wish to enhance the capacity of the Organization to impose the peaceful settlement of disputes.⁶

Just how true are these words with regard to problems over the peaceful settlement of disputes within the Organization of American States? Without failing to acknowledge the actions and activities of the Inter-American Juridical Committee regarding the peaceful settlement of disputes, whereby all instruments can be improved, we must delve still deeper and perhaps accept that one of the fundamental factors lacking in the Inter-American System is this political will of the parties involved in a dispute to agree on a method for seeking a peaceful solution thereto.

Perhaps it would be convenient and of interest at the mom for the States and the agencies with functions assigned by the Charter to foster the peaceful settlement of disputes, to think about their own conduct and the need to exercise their functions with greater decision and with a spirit of inter-American solidarity that firmly addresses the maintenance of peace and the peaceful settlement of disputes, without being concerned over whether or not they can contribute in this field with recommendations rather than mandatory juridical awards. The prestige of the inter-American juridical community should always be a factor in helping and persuading States airing a dispute, to do so within the framework offered by the Charter, unless they prefer to have recourse to the various Treaties ruling on this important chapter of the relationships between the States. To a greater or lesser extent, all disputes arise from a source of friction and conflict that should be settled peacefully in this so-called American continent of peace.

DII34R1.94I

⁶ □A Program for Peace□, Boutros Boutros-Ghali, United Nations, New York. 1992, Pages 21-22.



ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/II/doc.37/94 rev.1 corr.2
23 August 1994
Original: Spanish

REPORT

DEMOCRACY IN THE INTER-AMERICAN SYSTEM

(presented by Dr. Eduardo Vío Grossi)*85

INTRODUCTION

The political actions undertaken by the Organization of American States in relation to events that signify the interruption of democracy in various countries of the Continent, and the 1992 Reform of the Charter of the Organization bring up the question of whether democracy has -within the Inter-American System- ceased to be a matter of exclusively internal or domestic jurisdiction of the State.

In order to reply to this question, we must first investigate the existence of the juridical-international concept of democracy or, which is the same thing, the law applicable to this matter, which could provide at least a partial answer to the question put forward.

Based on the reply to the above-mentioned question, and particularly in case of reaching a conclusion that democracy is effectively a juridical-international concept that would thus qualify to demand juridical-international rights and obligations, it would be appropriate to determine if the Organization of American States is duly qualified to demand these rights or to require compliance with these obligations, and in what manner it may do so. But for in-depth understanding of juridical-international norms, it is also vital to be aware of the practice of the subjects of international law involved, in order to be able to deduce therefrom an interpretation supplementary to that arising from

* The Rapporteur thanks Mr. Juan Aníbal Barría, Second Secretary, member of the Chilean Mission to the Organization of American States, for his collaboration.

the literal tenor of the texts.

All this is to determine the range and scope granted to Democracy within the Inter-American area by International Law.

PART I

THE LAW APPLICABLE

With regard to the first facet of this problem, meaning the juridical-international notion or concept of democracy, there are two relevant points. One has regard to what the juridical-international regime understands by democracy, within the Inter-American System, meaning how do the norms approach democracy. The other refers to the consequences of these juridical-international norms on the direction and range of the notion of democracy.

To all this should be added the latest reform of the Charter of the Organization of American States regarding democracy, which has not yet entered into force.

1. The Concept of Democracy in the Charter of the Organization of American States

Reference should certainly be made to the Charter of the Organization of American States as it seems peculiar in this respect. The manner in which it refers to democracy constitutes an exception in International Law. But in order to ensure a sound understanding of Inter-American juridical-international norms, it is appropriate first to outline the concern of the Organization for democracy.

1.1 Inter-American Concern for Democracy

The establishment of democratic governments has been an ongoing aspiration of the peoples of the Americas since the days of Independence.

The first official pronouncement is found in the Declaration of the □Principles of Inter-American Solidarity and Cooperation□, Resolution No. XXXVII of the Inter-American Peace Consolidation Conference held in Buenos Aires in 1936. Later, between 1936 and 1945, each Inter-American Conference made mention of this Declaration in Resolutions covering other topics.

In turn, the Inter-American Conference on the Problems of War and Peace held in Mexico in 1945 adopted the Declaration of Mexico, which established as an essential principle of the community of this hemisphere that □American man cannot conceive of living without justice□ and □nor can he conceive of living without freedom□.

On the other hand, in a Resolution on the Defense and Preservation of American Democracy, the above-mentioned Conference commissioned the Inter-American Juridical Committee to study a draft presented by Guatemala designed to combat the possible future establishment of anti-democratic regimes in the region. The Report of the Inter-American Juridical Committee was presented to the IX International American Conference.

During this IX Conference, held in Bogotá in 1948, Resolution No. XXXII was adopted; in its Paragraphs, the nations of the Americas reaffirmed their □conviction that only in a regime founded on the guarantee of the freedoms and rights essential to the human persona□ is it possible to achieve the target of effective social and economic development. Additionally, it condemned □the

methods of any system that tends to suppress political and civil rights and liberties ...□ The Bogotá Conference closed with the signature of the Charter of the Organization of American States and the American Declaration of Human Rights.

1.2 The norms of the Charter of the Organization of American States in relation to Democracy

The Charter of the Organization of American States, in its text in force, refers to Democracy on four occasions: twice in its Preamble, and then in Articles 2 and 3, confirming the essential Purposes of the Organization, and the Principles reaffirmed by the American States, respectively.

Paragraphs 3 and 4 of the Preamble emphasize that □ ... representative democracy is an indispensable condition for the stability, peace and development of the region,□ and that □the genuine feeling of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man.□

In turn, Article 2 states that:

□The Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes:

... to promote and consolidate representative democracy with due respect for the principle of non-intervention;□

Finally, Article 3 states that:

□The American States reaffirm the following principles:

... The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy.□

1.3 Comments on these Texts

The following considerations make some comments in the light of the objective method of interpreting the texts transcribed, meaning following the tone thereof, and restricted to the scope of this Report, which is Democracy in the Inter-American System.

a) Representative Democracy

The first comment warranted by the texts transcribed is that they refer to a special type of democracy, which is representative democracy.

There is no clearcut agreement regarding what the States represented at the IX International Inter-American Conference that adopted the Charter of the Organization of American States

understood on that occasion by representative democracy. Nevertheless, it may be claimed that this concept corresponds to what traditionally and normally is used to define representative democracy, particularly as no special meaning was assigned to it in the text of the Charter.

This being the case, representative democracy may be taken to mean a consistent political system in which citizens elect their governors for a determined period through secret processes and free information, who then exercise the prerogatives of the State in the name of the people, on the basis of the separation of powers.

Acceptance of this interpretation outlined above excludes from the sphere of the Charter of the Organization of American States all reference to other types of democracy, which are - in particular - direct democracy and the democracies known by other names.

b) Democracy as an assumption or condition

The second comment covers the ways in which the Incorporative Treaty of the Organization of American States approaches democracy.

One of these was to view it as a prior presumption or condition crucial to the existence of other values or institutions. Thus, in the first excerpt transcribed from the Preamble, representative democracy appears as □an indispensable condition for the stability, peace and development of the region.□ It is thus these values - stability, peace and development - that are higher and at the service of which representative democracy should be established and confirmed.

A similar situation is found with regard to the other Paragraph of the Preamble, whereby the guiding principles seen as Continent-wide aspirations are constituted into □a system of individual freedom and social justice, based on respect for the essential rights of Man,□ a regime that should be consolidated □within the framework of democratic institutions□ as an expression of the □genuine feeling of American solidarity and good neighborliness□. Democracy, or more accurately democratic institutions, are perceived as a means of achieving higher purposes, such as American solidarity, good neighborliness, individual freedom, social justice and respect for the essential rights of Man.

Finally, the same occurs with the provisions of item d) of Article 3 of the Charter in question, a provision that establishes that the □solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy.□ This exercise is thus a way of achieving solidarity and the other higher purposes that it also pursues.

Also present is the fact that, in the above-mentioned provision, the effective exercise of representative democracy is conceived as forming part of a principle reaffirmed by the American States and not as a principle declared by the Organization itself. Nevertheless, it is also appropriate to indicate that this proclamation falls within the framework of the Basic Convention of the Organization of American States, whereby it may be maintained that it is implemented for the purposes of inspiring the action of the above-mentioned Organization.

But in any case, the concordant interpretation of the transcribed paragraphs of the Preamble

and item d) of Article 3 of the Charter of the Organization of American States leads to the statement that this seems to consider representative democracy as a prerequisite or condition for the appearance of other principles or values.

c) Democracy as a purpose

The same conclusion may be reached on analyzing item b) of Article 2 of this same juridical-international instrument. According to this provision, □the Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims □ as its essential purpose, □the promotion and consolidation of representative democracy with due respect for the principle of non-intervention;□

Once again, democracy is conceived as a way of achieving or implementing other principles or values on which the Organization of American States is based. However, the difference in this provision, analyzed against the others quoted lies in the fact that it covers representative democracy as a purpose of the Organization of American States itself, meaning as an objective that should be achieved. In this order of ideas, while in the Preamble and item d) of Article 3 of the Charter of the Organization of American States, representative democracy seems to a task of the States, in item b) of Article 2 of this same normative body, democracy is perceived as an objective or task of the Organization itself.

According to the first provisions mentioned, representative democracy is perceived as a condition or assumption whose existence or creation is not assigned to the Organization of American States which, according to item 2 of Article 1 of its Charter □... has no powers other than those expressly conferred upon it by this Charter ...□

On the other hand, in item b) of Article 2 of this Charter, representative democracy is confirmed as an essential proposition of the Organization of American States itself.

This difference in emphasis in the treatment of representative democracy by the Charter of the Organization of American States is not, according to the texts under study, exempt from juridical consequences, meaning the rights and obligations of the Organization itself, and the rights and obligations of the American States.

d) Rights and duties of the Organization

As the Organization of American States has no powers other than those with which it is expressly endowed by its Charter, as already noted, it is appropriate to give a brief overview of the powers with which it is endowed thereby in turns of representative democracy.

Its purpose is apparently clear: the Organization shall □promote and consolidate representative democracy with due respect for the principle of non-intervention.□ Within this order of ideas, while the obligation to promote representative democracy is one of conduct or behavior, the obligation to consolidate it is the result. In the former, the relevant point is that the Organization of American States should implement promotional actions, regardless of whether or not it achieves its objective. In contrast, for the latter the important point is that it should achieve the consolidation of

representative democracy. But in complying with such obligations, the Organization of American States should respect the principle of non-intervention.

e) Rights and duties of the American States

Bearing in mind the limits of the rights and obligations of the Organization of American States with regard to democracy, it may be stated that with respect thereto, all the rest is the responsibility of the American States.

Thus each of them is responsible for the creation, exercise, maintenance and enhancement of democracy in its sphere. They are obliged to create it, effectively exercise it, maintain it and enhance it. All of them are committed as a condition or purpose to achieving solidarity, stability, peace, development, individual freedom, social justice and respect for the essential rights of man.

The obligations of the States in this matter are thus resultative. They should create the condition or assumption necessary - called representative democracy -- in order to achieve the other principles, values or objectives through the actions of the Organization of American States.

f) The promotion of representative democracy

As the Organization of American States is responsible for the promotion and consolidation of representative democracy, with everything else involved in this matter assigned to the States, it is appropriate now to determine the content of the first of these duties and responsibilities, which may be said to supplement those of the States.

In support of this, on the one hand, it should be taken into consideration that promoting means starting or advancing something, fostering its implementation, as only something that does not exist can be started, although its existence may be sought; on the other hand, the provision under analysis does not attribute to the Organization of American States the power of creating representative democracy where it does not exist, but empowers it only to strive to ensure its implementation, launching or advancing it. The promotion of representative democracy by the Organization of American States should thus be understood as an action supporting the American States in their compliance with their obligation to create, maintain, exercise and enhance this representative democracy.

g) The consolidation of representative democracy

The same occurs with the obligation of the Organization of American States to consolidate representative democracy, meaning to endow it with firmness and solidity or to unite or reunite whatever had fallen away, in order to keep it firm and secure. In other words, under this hypothesis, the existing situations may be consolidated as they owe their existence, as already mentioned, to the States themselves, rather than to our Organization.

h) Representative democracy and the principle of non-intervention

As indicated above, the Organization of American States should, as one of its essential propositions, and in accordance with Item b) of Article 2 of its Charter, □promote and consolidate representative democracy with due respect for the principle of non-intervention.□ This principle consequently constitutes a constraint not only on this purpose, but also with regard to all the powers of the Organization of American States, running counter to the provisions of Item 2 of Article 1 of its Basic Text:

□The Organization of American States has no powers other than those expressly conferred upon it by this Charter, none of whose provisions authorizes it to intervene in matters that are within the internal jurisdiction of the Member-States.□

Similarly, Item e) of Article 3 of the Basic Constitution of the Organization States that:

□The American States reaffirm the following principles:

□Every State has the right to choose, without external interference, its political, economic and social system, and to organize itself in the way best suited to it, and has the duty to abstain from intervening in the affairs of another State.□

Article 18 of this same juridical body refers in greater detail to the principle outlined in the following words:

No State or group of States has the right to intervene directly or indirectly for any reason whatsoever in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force, but also any other form of interference or attempted threat against the personality of the State, or against its political, economic and cultural elements.□

The matter to be resolved is thus how and to what extent the Organization of American States can and should promote and consolidate representative democracy while respecting and without adversely affecting the principle of non-intervention, particularly when a State has □the right to elect, without outside intervention, its political, economic and social system, and to organize itself in the manner it finds most convenient □

2. Interpretation of the norms laid down by the Organization itself

The norms mentioned in the preceding section have been interpreted by the Organization of the American States itself both through the Resolutions adopted by its agencies, particularly those competent in Human Rights, such as Resolution No.AG/RES.1080 (XXI-0/91), adopted by the General Assembly held in Santiago, Chile, in 1991.

These Resolutions definitively express the consequences that juridical international norms have on the direction and range of the notion of democracy, as well as the competence of the Organization of American States with regard there too.

2.1 Resolutions Adopted by Bodies of the Organization of American States

After the Bogotá Conference, attention was given to the development of the Inter-American juridical international instruments affecting the effective exercise of representative democracy.

Nevertheless, it should be noted that these same principles had already been incorporated into those covered by the Inter-American Reciprocal Assistance Treaty (IRAT), 1947, which stated "that the regional American community states as a manifest truth that the juridical organization is a necessary condition for security and peace, and that peace is based on justice and moral order, and thus on the international acknowledgment and protection of the rights and liberties of the human being, in the indispensable well-being of its peoples, and in the effectiveness of democracy, for the international implementation of justice and security".

A major step forward in the progressive development these standards took place in August 1959, at the V Consultancy Meeting of Ministers of Foreign Affairs, held in Santiago, Chile. This prepared a partial list of the attributes of representative democracy, set up the Inter-American Human Rights Commission, and requested the Inter-American Jurisconsultancy Council to prepare a Draft Convention on Human Rights, studying the juridical relationship between respect for human rights and the effective exercise of representative democracy, as well as preparing a Draft Convention on the Effective Exercise of Representative Democracy.

Additionally, the V Consultancy Meeting on the one hand clearly expressed in the Declaration of Santiago that "the existence of anti-democratic regimes constitutes a violation of the principles on which the Organization of American States is based, and a danger for the peaceful mutual living together in harmony throughout the hemisphere"; on the other hand, it emphasized that "a) There is no agency in the Organization that is competent to sanction in any way a Member-State whose political regime is not wholly adequate to the ideal scheme of representative democracy"; b) The Inter-American System does not authorize sanctions except in cases when this is in favor of the peace and security of the continent, in situations covered by the IRAT"; c) The Bogotá Charter leaves it up to the good faith of the Member-States, in accordance with their conduct aligned with the high ideals that it inspires"; d) Article 3, item d) of the Charter, indicates that the solidarity of the American States will never achieve its full scope corresponding to this term, except on the basis of the effective exercise of representative democracy"; and e) □in accordance with international American law in force, it can not trigger any mechanism to protect democracy unless this is also wielded for other reasons as protection against aggression, as clearly established in the Inter-American Reciprocal Assistance Treaty□.

The Report of the Inter-American Juridical Committee on Human Rights and the exercise of democracy, dated 1959, in turn reaffirms the relationship between both concepts and the juridical mandatory nature of the principles of the Charter. This was clearly stated in its Report, adopted by a majority vote, whereby "in the regime of the Bogotá Charter, there is no place for collective action to protect or restore democracy" unless that covered by "cases that are clearly enumerated in the Inter-

American Reciprocal Assistance Treaty".

It should also be emphasized that the XIV General Assembly held in Brasilia in 1984, which issued the Declaration of Brasilia, reaffirmed the will of the Member- States to unite their efforts in order to ensure a life of "freedom and dignity" for the peoples of the Americas. The same Assembly summoned a Special Sessions Period of this Agency for 1985, in order to examine, and in this case to adopt, proposed modifications to the Charter of the Organization of American States.

Finally, the Special General Assembly held in Cartagena de Indias, Colombia, in 1985, approved the Protocol of Amendments to the Charter of the Organization of American States, thus constituting another historic benchmark in the development of the democratic ideal in the Inter-American System.

On this occasion, it was added to the Preamble of the Charter that "representative democracy is an indispensable condition for the stability, peace and the development of the region".

More important still, in Chapter I, Article 2, item b), it added that the essential purposes of the Organization include:

"To promote and consolidate representative democracy with due respect for the principle of non-intervention."

2.2 Resolutions on Human Rights

Although the intention here is to analyze matters relative to democracy, as a concept independent of others in force within the Inter-American System, it is also necessary to refer to the link between this concept and human rights. Both are distinct imperatives within the Inter-American System, although closely linked. These lines are intended to link them, but it is solely in order to offer additional input for understanding the role of democracy in the Inter-American System.

The Inter-American Human Rights Commission, on the basis of the norms contained in the American Human Rights Convention, in the American Declaration of the Rights and Duties of Man, and in the Charter of the Organization of American States, has repeatedly affirmed that governments deriving from the will of the people, expressed in free elections, are those that provide the most solid guarantee that fundamental human rights will be observed and protected.

The Principle that the Commission has repeatedly upheld, is that there is a close link between democracy and human rights. Through this, in its annual pronouncements - whether general or special - it has clearly expressed in a categorical and recurrent manner that the effective exercise and implementation of individual rights and liberties established in the Pact of San Jose take place only within a democratic context.

The same idea was upheld by the Inter-American Human Rights Court. In its Sixth Consultative Opinion, it asserted that "representative democracy is a determining factor throughout the entire system of which the Convention forms a part". (Consultative Opinion, No.6, 9 March 1976, Series A, No.6, paragraph 34).

This is surely due to the fact that the importance of democracy is reiterated in a relevant manner by the American Convention on Human Rights. Its Preamble begins with the following words: "The

American States signatory to the present Convention, reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man...".

Article 29 then states that:

"No provision of this Convention may be interpreted as precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government...",

Article 32 adds that

"The rights of each person are limited by the rights of the others, by the security of all, and by the just demands of the general welfare, in a democratic society."

This Convention repeats the principle acknowledged by Article XXVIII of the American Declaration of the Rights and Duties of Man.

A review of the Annual Reports of the Inter-American Human Rights Commission corroborates the above statement. A first demonstration of this is the 1979/1980 Annual Report (Inter-American Human Rights Commission, Ten Years of Activities 1979-1981, pg.332). It notes that:
 Nevertheless, the democratic framework is a necessary element for establishing a political society endowed with full human values. The right to political participation allows the right to organize political parties and associations, whereby through open discussions and ideological struggles, social levels may be raised, together with the economic conditions of the community, excluding the monopoly of power by a single group or person. It should also be stated that democracy constitutes a solid link among the peoples of this hemisphere".

The Commission was still more explicit in its Report covering 1980-1981, which stated on this issue: "The States on this Continent, in the Charter of the Organization of American States, have reaffirmed as one of its basic principles that solidarity among them requires that the political organization thereof should be on the basis of the effective exercise of representative democracy. Other international instruments on human rights, such as the Pact of San Jose, signed in Costa Rica, have firmed up the right of every citizen to participate in public affairs, to vote and to be elected in genuine regular elections, held through fair universal suffrage, with the secret vote that guarantees freedom of expression of the will of the electors". Further on it adds that: The Commission in turn has upheld that within the alternatives that constitutional law recognizes as various forms of government, that of the democratic system should be the preponderant element for the full exercise of human rights within society", and adds in continuation: "Within this context, ahead of political rights and the right to political participation, governments have the obligation to permit and guarantee the organization of all political parties and other associations, unless these are set up to violate fundamental human rights; free discussion of the principal topics of social and economic development; holding general elections, freely and with the necessary guarantees that the outcome thereof represents the will of the people."

In turn, the Inter-American Human Rights Commission in its 1986 Report (Inter-American Human Rights Yearbook, 1976, pg.305), once again states clearly that "...only through the effective

exercise of representative democracy can human rights guarantee in full ... the experience that the Commission has noted in the facts, which is that serious violations of these rights have taken place or are taking place in some nations in the Americas, due principally to the lack of political participation by citizens at large, which is denied by the authorities in the exercise of power...". This experience confirms that only in a democracy can genuine social peace be achieved, with the respect for human rights, and that democracy is the only system that allows a harmonious interaction of different political concepts, whereby through the inter-institutional balance established, the necessary controls may be exercised to correct the errors and abuses of the authorities."

An examination of both the Annual Reports and the Special Reports of the Inter-American Human Rights Commission thus leads to the conclusion that democracy is viewed and understood by this Organization as the political regime best suited to ensuring full observance of human rights. It should be added that, in any case, the Inter-American Human Rights Commission has nevertheless not ventured to label democracy clearly and fully as an actual human right.

This statement is equally confirmed by a review of the statements of the political agencies of the Organization of American States, and more concretely those of the General Assembly, regarding the Inter-American Human Rights Commission Reports. The Resolutions adopted by the Plenary Organization all highlight the link between democracy and human rights. For example, in the Resolution adopted during the Sixth Plenary Session held on 27 November 1980, AG/RES.510 (X-080), the following comment is found: "That the democratic structure is an essential element for establishing a political society where human values may be fully implemented."

On this issue, the following comments may be formulated: first, that the expression "human values" is used, which has a philosophical and moral connotation more than a juridical slant - as was the case until 1986, when the term "human rights" came into use; second, that there seems to be no link between the considerative paragraph and the respective resolute text. In effect, this says nothing about the relationship between democracy and human rights, according to the text itself: "To recommend to the Member-States, that even though democratic systems of government may not have been re-established or improved, in which the exercise of power derives from the free and legitimate expression of the will of the people, in accordance with the characteristic circumstances of each country."

This shortcoming was to be partially resolved by the General Assembly of 1986, which in its Resolution No.835 (XXI-0/91) states: "to reiterate to the Governments that even though the representative democratic government regime may not yet have been re-established, there is an urgent need to put into execution the institutional mechanism pertinent to the restoration of this regime as soon as possible, through free, open elections with a secret vote, as democracy constitutes the best guarantee for human rights, and forms a firm basis for solidarity among the States of the Continent".

Similarly, it should be noted that in 1986 Resolution No.AG/RES.837 (XVI-0/86) was adopted, which, although in entitled Human Rights and Democracy, neither confirmed nor developed this relationship in the clearcut accurate terms found in the Inter-American Human Rights Commission Reports. Its contents are essentially principalistic, as it "reaffirms the inalienable right of all the American peoples to elect a political, economic and social system without foreign intervention, by means of an authentic democratic process, in a regime of social justice, whereby all sectors of its

citizens enjoy the guarantees necessary to participate freely and effectively, by means of universal suffrage."

This view, alluded to in the preceding paragraphs, is found in the Resolutions adopted by the Ministers of Foreign Affairs in their Ad Hoc Meetings, in virtue of the provisions of Resolution 1080 (XXI-0/91), at which the Inter-American Human Rights Commission has always been present, although it seems that practice shows - unfortunately - that interruptions in democratic processes are normally paralleled by obvious violations and abuses of the exercise of individual rights and liberties. This explains why, in the cases of Haiti, Peru and Guatemala, express calls have been formulated to the Inter-American Human Rights Commission for it to observe - and, depending on the case, to visit the respective country *in situ*, to check the situation of human rights and the guarantees thereof, reporting back to the agencies of the Organization.

Finally, attention should be drawn to the thinking of the Inter-American Human Rights Court on Democracy. Its concepts are of value with regard to certain pre-requisites and conditions that should be complied with in a democratic society in order to ensure suitable standing for human rights. In a consultative opinion, it commented: □In a democratic society, the rights and freedoms inherent to the individual, the guarantees thereof and the state of law constitute a triad, each of whose components are defined, completed and take on meaning in function of the others□ (Consultative Opinion No. 8, 30 January, 1987, series A, No. 8, Paragraph 20).

The Inter-American Court has also invoked democracy as a criterion constituting a condition for determining the direction and range of the clauses of the American Convention that allows the States to restrict specific rights in areas for the protection of □public order□, and other similar juridical items. In one opinion, the Court concluded that □fair requirements should thus guide the interpretation of the Convention, and in particular those provisions that are critically related to the preservation and functioning of democratic institutions.□ With regard to the comment that restrictions imposed on the exercise of the profession of Journalism have legitimate objectives, this judicial body underlined the following: □In no way whatsoever may □public order□ or □the common good□ be invoked as means to suppress a right guaranteed by the Convention, or to distort or diminish its real content. These concepts, when invoked as the basis of constraints of human rights, should form the subject of an interpretation based strictly on the □fair requirements□ of □a democratic society□ that takes into account the balance between the various interests in play, and the need to preserve the purposes and aims of the Convention... However, the Court considers that the same concept of public order demands that, within a democratic society, the widest possibilities should be guaranteed for the circulation of news, ideas and opinions, as well as the broadest possible access to information being available to society as a whole. Freedom of expression falls within the primary public order and is a key factor in democracy, which is not conceivable without free discussion, and without dissidence having the full right to manifest itself. (□Consultative Opinion No.5, 13 November 1985, Series A, No. 5, Paragraph 44, 67 and 69).

2.3 The Resolutions of 1991

Based on the modifications of the Charter in 1985, the situation changed substantially at the XXI Regular Sessions Period of the General Assembly of the Organization of American States.

With regard to this document, three Resolutions of interest were adopted on this occasion, which are significant:

a) The Santiago Commitment to Democracy and the Renovation of the Inter-American System

The former was agreed to by the □Ministers of Foreign Affairs and Heads of Delegations of the countries in the American States, representing democratically-elected governments, meeting in Santiago, Chile, on the occasion of the □above-mentioned Sessions Period, called □the Santiago Commitment to Democracy and Renovation of the Inter-American System□.

Among other considerations, this document emphasized that □...representative democracy is the form of government of the region, and its effective exercise, consolidation and improvement are shared priorities, □... that the principles confirmed in the Charter of the Organization of American States and the ideals of peace, democracy, social justice, integral development and solidarity constitute the permanent basis of the Inter-American System□.

It is for this reason that, it is declared in this document, among other things that □...an undeniable commitment to the protection and promotion of representative democracy and Human Rights in the region, with respect for the principles of free determination and non-intervention□; the □...decision to grant special priority... to strengthening representative democracy as an expression of the legitimate and free manifestation of the will of the people, with unwavering respect for the sovereignty and independence of the Member-States□; and □the... determination to adopt a set of effective, timely and expeditious procedures to ensure the promotion and protection of representative democracy, in accordance with the Charter of the Organization of American States□.

The Santiago Commitment to Democracy and the Renovation of the Inter-American System conclude by declaring that □...the firmest political commitment to the promotion and protection of Human Rights and representative democracy, an indispensable condition for the stability, peace and development of the region, as well as for the success of the process of change and renovation required by the Inter-American System on the threshold of the XXI century□.

b) Representative Democracy

The second Resolution, and perhaps the most important, which was accepted by the General Assembly of the Organization of American States, is Resolution No.1080 (XXI-0/91), entitled "Representative Democracy", whose considerative paragraphs and the two resolute paragraphs that confirm a permanent mechanism to safeguard democracy are transcribed below:

"THE GENERAL ASSEMBLY,

WHEREAS:

The Preamble of the Charter of the Organization of American States establishes that representative democracy is an indispensable condition for the stability, peace and development of this region;

Under the provisions of the Charter, one of the basic purposes of the Organization of American States is to promote and consolidate representative democracy, with due respect for the principle of non-intervention;

Due respect must be accorded to the policies of each member country in regard to the recognition of states and governments;

In view of the widespread existence of democratic governments in the hemisphere, the principle enshrined in the Charter that the solidarity of the American States and the high aims which it pursues require the political organization of those States to be based on effective exercise of representative democracy must be made operative; and

The region still faces serious political, social and economic problems that may threaten the stability of democratic governments,

RESOLVES:

1. To instruct the Secretary General to call for the immediate convocation of a meeting of the Permanent Council in the event of any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or the legitimate exercise of power by the democratically-elected government of any of the Organization's Member-States, in order to, within the framework of the Charter, examine the situation, decide on and convene an Ad Hoc Meeting of the Ministers of Foreign Affairs, or a special session of the General Assembly, all of which must take place within a ten-day period.

2. To state that the purpose of the Ad Hoc Meeting of the Ministers of Foreign Affairs or the special session of the General Assembly shall be to look into the events collectively and adopt any decisions deemed appropriate, in accordance with the Charter and international law....□

c) Unit for the Promotion of Democracy

Finally, Resolution AG/RES.1124 (XXI-0/91), called □Unit for the Promotion of Democracy □, should be mentioned, as in it the General Assembly on the one hand recalls its □Resolution AG/RES. 1063 (XX-0/91), dated 8 June 1990, whereby it requested the Secretary General to establish within the General Secretariat a Unit for the Promotion of Democracy, designed to offer a Support Program for democratic development and to develop a proposal for such a Program in consultation with the Permanent Council □, and on the other it supports the approval of the establishment by the Secretary General of this Unit, and expresses its satisfaction over the

participation thereof in election observation missions carried out by the Organization of American States in Haiti, Guatemala, El Salvador, Panama, Paraguay and Surinam, at the invitation of the respective governments thereof.

It should be emphasized that Provision 3 of the Resolution under analysis, mentions that the purpose of the empowerment of this Unit is to □Respond promptly and effectively to the Member-States which, in the full exercise of their sovereignty, request advice or assistance to preserve or strengthen their political institutions and democratic procedures.□

d) Comments on the texts

Noteworthy on this issue is firstly the fact that they are instruments very different to those covering the application of the provisions of the Charter of the Organization of American States with regard to democracy . On the one hand, is the Santiago Commitment to Democracy and the Renovation of the Inter-American System, which is no more than a political commitment adopted opportunely, and not by the 1991 General Assembly of the Organization of American States, nor as a Resolution thereby, and on the other, Resolutions Nos. AG/RES 1080 and 1124 (XXI-0/91), which in contrast have their own value assigned under international law.

Secondly, a distinction should also be made between Resolutions Nos. AG/RES.1080 and AG/RES 1124, both (XXI-0/91). Although, with regard to □Representative Democracy□, the former establishes a mechanism for the event that □facts may occur that may prompt an abrupt or irregular interruption in the institutional democratic political process, or in the legitimate exercise of power by a democratically-elected government in any of the Member-States of the Organization□, a mechanism that operates without and even against the wish of the State concerned, Resolution no. 1124, covering the Unit for the Promotion of Democracy, creates a support program for democracy in force, whereby this may only take place with the consent of the State involved.

Thirdly, the mechanism covered in Resolution No.1080 (XXI-0/91) basically consists of a hierarchized assignment of responsibilities to various bodies within the Organization of American States, should the conditions occur as covered by the above-mentioned Resolution. Effectively, should □events take place that prompt an abrupt or irregular breakdown in the democratic institutional political process or the legitimate exercise of power by a democratically elected government in any of the Member-States, the Secretary General should summon the Permanent Council, in order to □examine the situation, decide and convoke□ either an Ad Hoc Meeting of Ministers of Foreign Affairs or a Special Sessions Period of the General Assembly □all within a period of ten days.□

The obligation of the Secretary General is thus, in such a case, to summon the Permanent Council. This in turn should examine the situation brought before it and take the decision it deems best, either to call an Ad Hoc Meeting of the Ministers of Foreign Affairs, or a Special Sessions Period of the General Assembly.

But in any case, the summoning of the Permanent Council and the decision thereof should be adopted within a period of ten days as from the occurrence of the above-mentioned facts. The exact determination of when these facts occur is a question of fact decided by the bodies of the

Organization of American States.

Finally, attention should be drawn to the fact that the Resolution on Representative Democracy expresses or rather reiterates that the Ad Hoc Meeting of Ministers of Foreign Affairs or the Special Sessions Period of the General Assembly adopts the decisions it deems appropriate □in accordance with the Charter and international law□. Although it states that these bodies may not go beyond the Charter of the Organization of American States in adopting their decisions, but must remain within the framework thereof, they should do so in accordance with international law, which implies invoking norms not previously expressed in the former, but rather in the latter.

2.4 The Reform of the Charter of the Organization of American States

In December 1992, during the XI Special Sessions Period of the General Assembly of the Organization of American States, the Protocol of Washington was adopted, which is not yet in force as the corresponding ratifications have not yet been produced.

Under this Protocol, a new Article 9 was added to Chapter III of the Charter of this Organization:

□A Member of the Organization whose democratically-constituted government is overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Consultation Meeting, the Councils of the Organization, and the Specialized Conferences, as well as the commissions, work-groups and other bodies that may be set up.

- a) the power of suspension shall only be exercised when diplomatic efforts undertaken by the Organization to prompt the re-establishment of representative democracy in the Member-State affected have proven fruitless;
- b) The decision on suspension shall be adopted during a Special Sessions Period of the General Assembly, by an affirmative vote of two-thirds of the Member-States;
- c) The suspension shall enter into force immediately after approval thereof by the General Assembly;
- d) Notwithstanding the suspension, the Organization shall strive to undertake new diplomatic steps designed to help restore representative democracy in the Member-State affected;
- e) The Member subject to suspension should continue to comply with its obligations to the Organization;
- f) The General Assembly may lift the suspension by means of a decision adopted with the approval of two-thirds of the Member-States;
- g) The duties and responsibilities covered by this Article shall be exercised in accordance with this Charter.□

A number of relevant comments may be made on the provision transcribed above.

The establishment of a suspension mechanism in the system laid down by the Charter of the Organization of American States covering States that fail to respect the fundamental principles of the democratic system brings up a series of issues, such as on whom this sanction should be imposed, which bodies should apply the sanction, what are the effects thereof, how can this sanction be lifted, the effects of the reform of the Charter of the Organization of American States on the topic under analysis, and other juridical problems.

The juridical problems in question are analyzed in the above order.

a) On whom the sanction is imposed

In this matter, it should be recalled that the Members of the Organization of American States are States rather than Governments. In the international juridical regime, the subject of international law is the State, while the Government is merely a constitutive element of the State. Changes in government thus do not affect the international subjection of the State. In fact, the overthrow of the juridical order of a State does not affect the international obligations of the State, in accordance with the principle of continuity of the State. This means that - juridically speaking - it is the State to which the above-mentioned sanction may be applied, as the *de facto* government cannot represent it in the agencies of the Organization while the sanction remains in force.

b) The agency that should impose the sanction

Given the transcendence of the sanctioning measure, it seems quite logical that the General Assembly, as the highest body of the Organization, should be the competent body in this matter. Additionally, due to the severity of the sanction, an extra safeguard has been adopted, whereby the General Assembly may take such a decision only in a Special Sessions Period, backed by the affirmative vote of two-thirds of the Member-States. Sanctions shall be lifted by a similar quorum.

However, this additional safeguard does not impair the mechanism covered by Resolution No. 1080 (XXI-0/90) as - to the contrary - they are complementary, taking into the account that this mechanism should operate in advance in order for the suspension to be both feasible and timely.

c) Effects of the suspension

The effects are directed towards rights, as the Member-State is not exempted from fulfilling its obligations. The rights suspended are those inherent in the quality of a Member, such as the right to attend and participate in the actions and other activities of the bodies of the Organization, the right to vote in the various bodies, and the right to elect and be elected in the various bodies of the Organization.

This suspension does not affect the international staff members of the Organization who are citizens of the State under sanction, nor the rights of the State with regard to its being a signatory of

Treaties falling under the aegis of the Organization.

d) Effect of the reform mechanism of the Charter of the Organization of American States on the topic under analysis

As analyzed, the implementation of the will of the Member-States of the Organization has prompted a reform in its Charter. It is consequently important to determine in what manner the provisions of the reform affect the topic under analysis.

The system for the reform of the Charter presents certain particular characteristics that distinguish it: for example, that applicable in the case of the United Nations Charter, where a duly adopted reform is carried out, ratified by the established majorities, becomes obligatory for all Member-States.

In the case of the Charter of the Organization of American States, according to its Article 147, these are adopted by the General Assembly called for this purpose. However, they enter into force in compliance with the norm contained in Article 145.

According to this norm, a reform in the Charter will come into force among the States that ratify it when two-thirds of the Signatory-States have complied with this procedure. For the remaining States, the reform will come into force in the order in which they deposit their Deeds of Ratification.

Article V of the Protocol of Washington also establishes this, stating that:

□ ... it will enter into force among the States that ratify it, when two-thirds of the Signatory-States have deposited their Deeds of Ratification. With regard to the remaining States, it will come into force in the order in which they deposit their Deeds of Ratification.□

This means that the reform of the Charter may not be opposed by States that do not ratify it. They may be considered as third party States under the modified instrument.

Juridically, this situation implies that these States, as long as they do not ratify the corresponding reform, would have the right to claim that the application off sanctions against them could be illegal. At the same time, they would not have the right to vote on the sanction established under the reform of the Charter.

Indirectly, and as a consequence, this could affect the achievement of the objective of the reform based on the norms on this issue contained in the Charter. There are States that could dodge the possible application of sanctions by means of not ratifying the modificatory Instrument.

e) Other juridical problems

Having analyzed the juridical issues related to the Reform of the Charter of the Organization of American States, it is appropriate to analyze other aspects also included therein, which are surely no less important.

The application of sanctions, due to the seriousness of the implications thereof, should be surrounded by a series of guarantees and safeguards with regard to each case where it is imposed. First, it should respond to an effective infringement of a norm incorporated in the Charter. The typification of events taken as constituting an interruption of democracy should be analyzed in each case by the bodies of the Organization. Definitively, as this is a serious offense with major consequences, it should be the reaction of the system as a whole when faced with conduct that is qualified as being contrary to the Charter.

It should be recalled that item a) of Article 9 indicates that:

□The power of suspension will be exercised when the diplomatic steps undertaken by the Organization in order to foster the establishment of representative democracy in the Member-State affected have proven fruitless.□

The suspension of a Member-State is thus not the only possibility open to the Organization whenever an interruption in democracy occurs in a Member-State, nor is sanction automatic. A democratic system may alter in a number of ways that vary in seriousness. The response of the system should consequently take these particular factors into account. This is why it is deemed convenient to grant a certain amount of flexibility to the possible ways in which the system should react in specific cases. Briefly, there is the possibility of imposing suspension, but this is not the only alternative for reaction, as the body imposing the sanction may adjust or tailor this to each specific case. Furthermore, the gradations in the reaction of the system to a specific case may include a factor that allows positive pressure to be brought to bear, fostering a return to democracy.

This sanction or suspension should thus be an extreme measure, a last resort, applicable only when all previous measures have been exhausted. Suspension of the State is not always the first or only measure applicable in the case of an interruption in democracy. To the contrary, in certain cases a lighter sanction could be more helpful to the objective in view, or pressure from the system. It should not be forgotten that the basic objective towards which the Organization should work is speedy restoration of the damaged democratic system, rather than mere exclusion of the offender. It should also be important to consider that the sanction of suspension cannot be taken as an end in itself, without the actions of the Organization essentially striving to terminate the state of interrupted democracy. This involves spurring the restoration of democracy rather than merely excluding or suspending the offender. On the basis of this idea, the penalty of suspension may in certain cases not prove a suitable mechanism, but may rather trigger the opposite effect.

On the one hand, Item d) of Article 9 establishes that:

□The Organization shall, notwithstanding the measure of suspension, undertake new diplomatic steps intended to help re-establish representative democracy in the Member-State affected.□

On the other hand, in Item f) it states that:

□The General Assembly may lift the suspension through a decision taken with the approval of two-thirds of the Member-States.□

Finally, it is imperative to draw attention to the fact that the Protocol of Washington introduced reforms into the Charter intended to - as stated in Item g) of Article 2 of the Basic Constitution of the Organization of American States:

□To eradicate critical poverty, which constitutes an obstacle to the full democratic development of the peoples of the Hemisphere.□

In principle, as indicated by Item f) of Article 3 of this same normative body,

□The eradication of critical poverty is an essential part of the promotion and consolidation of representative democracy and constitutes a common shared responsibility of the American States.□

The concepts of democracy and critical poverty are thus linked in terms declaring that the latter hampers the adequate development and consolidation of the former, and the States consequently have the individual and collective obligation to eradicate poverty.

II - PART TWO

INTER-AMERICAN PRACTICE REGARDING DEMOCRACY

The problems linked to the interruption, establishment and consolidation of democracy have formed the subject of relevant and constant concern on the part of both the States of American continent as well as the Organization of American States. It has in particular expressed this - which is of interest to this document - in juridical doctrines outlined to illustrate the action of the States and in actions of the Organization of American States itself.

1. The Action of the States

It seems most convenient to have to hand on this matter information on conduct of the Inter-American System States in the light of the norms mentioned in the previous section, expressed in practices relative to an intended right to require that the other States in the same system should show respect for or the re-establishment of democracy.

The above-mentioned practice is based on doctrinaire constructions that have provided inspiration for the policies adopted by the States to cope with coups d'état. Thus, doctrines covering the recognition of *de facto* governments are basically the Tobar doctrine and the Estrada doctrine. One refers to democratic legitimacy, and the other to the irrelevance of democracy for these purposes.

1.1 The Doctrine and Practice of non-recognition

It is both useful and convenient to return to the statement expressed by the Inter-American Juridical Committee in its Draft Convention on Recognition of *de facto* Governments on this doctrine:

□The doctrine that postulates non-recognition of governments in the establishment of which force has been used, or any other unconstitutional element, was enunciated in a letter that Mr. Carlos Tobar, then Foreign Affairs Minister of Ecuador, addressed to the Bolivian Consul in Brussels in March 1907. In it, Tobar declared that □in a large number and with good credit, the American republics, apart from other humanitarian and altruistic consideration, could intervene in an indirect manner in the internal dissensions of republics on the continent. This intervention may consist at least of non-recognition of governments that have arisen through revolutions against the constitution.□ For the Ecuadorian Chancellor, an agreed or settled intervention is not actually an intervention□, adding that □the modern world intervenes in social issues.□ From here to the view that the American republics should, for reasons of solidarity □raise obstacles to this appalling multiple crime called internecine conflict.□

The Inter-American Juridical Committee added that □the doctrine of recognition, with the modality that may immediately afterwards advise of this, was incorporated into the treaties signed by the Central American Republics on 20 December 1907 and 7 February 1923. Both treaties stipulated that □the governments of the Signatory States shall not recognize any regime that may appear in any of the five republics through a coup d'état or revolution against the recognized government, and unless the freely-elected representatives of the people have reorganized the

country in a constitutional manner. The 1923 Treaty added, as additional requirements for recognition, that once the country has been reorganized in constitutional form, that none of those elected President, Vice-President or designated thereby may have become heads of State through a coup d'état or be linked thereto by family ties, or have been members of the Cabinet or held a high military rank when the revolution broke out or when checking the election.

The Tobar doctrine and that incorporated into the Central American Treaties are identical, insofar as they both seek to ensure respect for the constitutional order through the non-recognition of governments that have violated it. However, they differ with regard to the criteria with which they judge the revolutions that swept these governments to power. In the Tobar concept, the only fact that must have taken place is that a revolution against the constitution should prevent, without giving any consideration whatsoever to later events, recognition of the victorious government. Under the doctrine of the Central American treaties, in contrast, non-recognition is far more of a provisional measure, which would cease to be applied as soon as the new government should have reorganized the country in a constitutional manner.

Similarly, the Inter-American Juridical Committee recorded, in the same document, the Draft Resolution on the Protection and Preservation of Democracy in America in Case of Possible Future Installation of Anti-Democratic Systems on the Continent, presented by the Delegation of Guatemala at the Inter-American Conference in Mexico (1945), recommended that the American Republics should abstain from granting their acknowledgment, and maintaining relations with anti-democratic regimes that in future may be established in any of the countries on the continent; and particularly with systems that may arise due to a coup d'état against the legitimately-constituted democratic government. It additionally recommends as a specific norm to qualify these systems, the extent to which the will of the people of the respective country contributed to the establishment thereof, in the free appreciation of each State.

On proposing the non-recognition of anti-democratic regimes that may in future be established on the continent, the Guatemalan Draft was based on three specific reasons: 1) that antidemocratic regimes constitute a serious hazard to the unity, solidarity, peace and protection of the continent, 2) that it was not possible to expect sincere and effective collaboration from such regimes in the common war efforts, nor would they provide ample cooperation in the eminently democratic development of Pan-Americanism, in times of war, or in times of peace, and 3) that it was a universal aspiration that the rights of man should be internationally acknowledged and accepted, and that these rights, when faced with a regime based on violence and the impositions of a minority, would be seriously affected, suffering a deep-rooted interruption.

Nevertheless, in compliance with Resolution XXXVIII of the Inter-American Conference in Mexico, the Inter-American Juridical Committee issued an Opinion on the Guatemalan Draft, disagreeing with it with regard to the measures elected, that offer more disadvantages than advantages, and are found to be in opposition to the precious conquests of international law, which it would not be at all advisable to renounce. The Committee opined that the power that this Draft grants to each State to freely analyze if a new government is democratic, would clearly lead to intervention in the domestic affairs of another State, and that opening the way for any form of intervention would be a serious error. Finally, the Opinion alluded to the democratic convictions of the American nations, as well as to the principles of independence and non-intervention, expressing that there is no incompatibility between these two principles, and that it is not necessary

to sacrifice one due to a greater or lesser probability of making use of the other.□

1.2 Non-Intervention

The Inter-American Juridical Committee, in accordance with the document mentioned above, emphasizes that □the circumstance whereby, with a certain frequency in the American continent, use has been made of recognition as a means of coercion, has at times led to the thought that the act of recognition or non-recognition, intrinsically constitutes a manifest intervention by one State in the domestic affairs of another.□

This was basically the criterion that inspired the declaration formulated in 1930 by Mr. Genero Estrada, at the time the Foreign Affairs Secretary of Mexico. In accordance with the doctrine that carries his name, recognition □is a denigratory practice that may infringe on the sovereignty of the nations, placing them in a position whereby their internal affairs may be judged in some way by other governments, which in fact may assume a critical attitude in deciding favorably or unfavorably over the legal capacity of foreign regimes.□

For these reasons, as Estrada notes, the Mexican government limited itself in maintaining or withdrawing its diplomatic representatives as it deemed appropriate, and continuing to accept, also when it considered this suitable, similar diplomatic representatives accredited to Mexico by the respective nations, without qualifying either precipitately nor *a posteriori* the rights of foreign nations to accept and maintain or replace their governments or authorities.□

As may be noted, standing alone, this doctrine proposes only the abolition of the so-called expressed recognition. It consequently reserves the right of the State to □recognize□ or □not recognize□ by means of the maintenance or suspension of diplomatic relations with the new government. With this scope, the Estrada doctrine was yet again upheld by Mexico in a Draft Resolution presented by its Delegation to the Ninth International American Conference. This project, as □the so-called practice of express recognition of governments, insofar as this constitutes a public judgment of the legality of the government regime of a country, may mean intervention WHICH PROSCRIBES ...,□ established in its resolute part the following: □The practice of express recognition of governments in inter-American relations is definitively proscribed.□

The Inter-American Juridical Committee also recalled the Draft Convention on the Abolition of Recognition of *de facto* Governments□, presented by the Delegation of Ecuador at the Inter-American Conference in Mexico, which contained in its normative part these two provisions: □1) The custom of the recognition of *de facto* governments is abolished, in the order of reciprocal relations of the American republics. 2) The establishment of *de facto* government in any of them shall not affect the normality nor the continuity of the pre-existing diplomatic relations between the State in which a change of regime has occurred and the other States.□

In proposing the abolition of the recognition, the Inter-American Juridical Committee added that the Draft was based on essentially analogous reasons to those that acted as the basis for the Mexican doctrine, meaning that: 1) Recognition will, directly or indirectly, place at risk the domestic autonomy or sovereignty of the States and in a singular manner, their right to set up or remove governments in accordance with the expression of their free will□; 2) □the optional character of such

recognition confers on foreign governments the capacity to intervene in the inviolable order of domestic affairs of the State□, which pre-supposes □a type of moral coercion, thus configuring an imperative interference that corresponds to the typical types of intervention□; and 3) that this practice thus undermines □the axiom of the juridical equality of the States ... the principle of reciprocal equal treatment among the States and their fundamental right to mutual respect.□

The Ecuadorian Draft Convention, developing the ideas and postulates of the Mexican doctrine, certainly proposed the definitive abolition of the institution of the recognition of *de facto* government. It suggested that, when a State establishes a government of this type, pre-existing diplomatic relations between this State and the other State should not be broken off.

In compliance with Resolution XXXIV of the Inter-American Conference of Mexico, the Inter-American Juridical Committee undertook a study of the Draft Convention presented by the Delegation of Ecuador to this Conference. Although the Committee did not formulate a decision on this case, due to the fact that its members could not reach a formula that would definitively resolve the problem of the recognition of *de facto* governments, it was agreed that it was not possible to abolish an institution that constituted a practical necessity in international relations.

So far, these are the comments it made by the Inter-American Juridical Committee in its Declaration on the Draft Convention on the Recognition of *de Facto* Governments, dated 27 February 1949.

2. The action of the Organization of American States

Taking into consideration both the Law Applicable as well as the Practice of the States expressed in the above-mentioned doctrines, it is appropriate to analyze the actions of the Organization of American States in relation to democracy . There are two significant aspects. One, the concrete political actions implemented to protect democracy, and the other, on the coordination which this organization has developed with the United Nations.

2.1 Concrete political actions

On this issue, it is of interest to outline the direction and limits of the political actions undertaken by the Organization of American States to protect democracy, extracting therefrom the pertinent consequences. A quick overview of each case will illustrate how the action of the Organization of American States has been understood in practice, and what are its limits. In particular, it is interesting to study the differences between these cases. But to do so, it seems useful to formulate in advance some general comments on all of them.

a) General Considerations

Certainly, the actions of interest of those that imply conduct in defense of democracy and more specifically actions undertaken to re-establish democracy . The situation with the civil missions of the Organization of American States to observe electoral processes is different, such as Haiti (1990-1991), El Salvador (1990), Surinam (1990), Paraguay (1990) and Peru (1992-1993).

The above-mentioned actions are thus those undertaken in virtue of Resolution No.1080 (XXI-0/91), which has to date been implemented in three countries: Haiti, Peru and Guatemala. As is well-known, it is only with the respect to the first of these nations that the Ad Hoc Meeting continues open.

The development of these actions has shown that in practice, the procedure instituted by the Chancellors has shown flexibility, speed and a sense of timeliness in the decisions adopted thereby, in such a manner that the course of action outlined to handle each contingency has not been identical nor common to them all. The nature of such measures has been determined, as is obvious, by the characteristics of the domestic political situation of each nation, and the changes recorded there in over time. The breadth of the terms on which this Resolution was conceived has favored the actions of the Organization of American States agencies.

In any case, it should be borne in mind that actions undertaken by the Ad Hoc Meeting or the General Assembly may not have been nor may be discretionary, as they had and still have the Charter and the International Law as their juridical limits.

As mentioned before, a brief description follows of the principle actions undertaken by the Organization of American States under Resolution No.1080 (XXI-0/91) with respect to Peru, Guatemala and Haiti.

But, as a preliminary issue, it is appropriate to refer to the outlawing of Cuba from the Inter-American System, which, although adopted under the framework of IRAT, was upheld through the ideal shared by all the American States of adhesion to the representative democratic system, and on the other hand by the cases of the Dominican Republic, Peru, Nicaragua and Panama, forming the immediate antecedents to the Santiago Commitment.

Reference should also be made to Venezuela, which although it does not really fall within the framework of the above-mentioned Resolution 1080, shows the weight and significance acquired by the Santiago Commitment as a parallel political normative measure additional to the Charter of the Organization of American States, and which the bodies thereof have mentioned in their pronouncements in support and protection of democracy.

b) The case of Cuba

The exclusion of Cuba from the Inter-American System was a measure agreed upon at the VIII Consultancy Meeting held in Punta del Este, Uruguay, in 1962. Adopted at the height of the Cold War, this Resolution expressed that ☐the adhesion of any member of the Organization of American States to Marxism or Leninism is incompatible with the Inter-American System, and the alignment of such government with Communism runs counter to the unity and solidarity of the hemisphere☐ and that ☐the current government of Cuba, which has officially identified itself as a Marxist-Leninist government, is incompatible with the principles and purposes of the Inter-American System.☐ There was general agreement among the Delegations over these paragraphs, with the obvious exception of Cuba itself.

With regard to the statements that this ☐incompatibility excludes the current government of

Cuba from participation in the Inter-American System□ and that □the Council of the Organization of American States and other bodies and agencies within the Inter-American System should adopt without further delay the necessary steps to fulfill this Resolution□, was the subject of a favorable vote by only fourteen delegations.

Finally, seventeen delegations agreed that □the current government of Cuba, as a consequence of its reiterated acts, has voluntarily placed itself outside the Inter-American System.□

It should be added that one of the issues brought up in the discussion of this Resolution was the juridical basis thereof, in the light of the norms of the Bogota Charter. There was widespread agreement on this issue that membership of the Organization of American States rested on a commitment to observe the principle of representative democracy. However, the corollary arising from this rule meaning a removal from the Inter-American System, did not prompt similar support. One of the arguments given was that the Charter of the Organization did not stipulate such a sanction.

c) The cases of the Dominican Republic, Peru, Nicaragua and Panama

In late 1959, and although formally against the aggression and intervention of the Dominican Republic, presided over by Leonidas Trujillo, against Venezuela, the Permanent Council of the Organization of American States acting as a Consultant body under the IRAT, agreed to break off diplomatic relations with the Dominican Republic and to partially cut the economic links between the Member-States and this country.

In 1962, various special sessions of the Permanent Council of the Organization of American States were held to consider an request from the governments of the Dominican Republic, Venezuela, Honduras and Costa Rica, in view of the coup d'état that had taken place in Peru, to summon a Consultancy Meeting of Chancellors in order to □reaffirm democratic solidarity in America and consider the attitude that should be adopted by the Governments of the Member- States in view of regimes arising from coups d'état .□ Unfortunately, it concluded with a vote that did not manage to record a sufficient majority to approve the request for which this Meeting was called.

In May 1965, the X Consultancy Meeting of Chancellors - this time not under the framework of IRAT - resolved to transform the unilateral armed action of one of its Member-States in the Dominican Republic into a collective operation, through the transformation of the foreign military forces in Dominican territory into an □Inter-American force□. One of the purposes of this was □in the spirit of democratic impartiality, to cooperate in the restoration of conditions of normality in the Dominican Republic□ and to establish in this country an atmosphere propitious to the □functioning of democratic institutions□. Under the supervision of the Inter-American force, elections were held in the Dominican Republic that resulted in the re-establishment of a civil government.

Soon after, the domestic crisis in Nicaragua, and more particularly denunciations of violations of human rights triggered the Inter-American System into action, summoning the XVII Consultancy Meeting of Chancellors in September 1978. As the outcome of this Meeting, a mission for friendly cooperation and reconciliatory efforts was set up, which held talks - although unsuccessfully - with the Somoza government, seeking a peaceful democratic way out of the crisis. In a Resolution that

outlined the basis for a definitive alternative to conflict, and with the government affected taking part in the discussion, the Chancellors declared in June 1979 that the solution to the Nicaraguan case should be based on: □1) the immediate and definitive reinstatement of the Somoza regime; 2) installation in Nicaraguan territory of a democratic government whose composition includes the principal representative groups in opposition to the Somoza regime, and that reflects the free will of the people of Nicaragua; 3) guarantee of respect for Human Rights for all Nicaraguans without exception; and 4) the holding of free elections as soon as possible, leading to the establishment to an authentically democratic government that guarantees peace, freedom and justice□.

The action of the Organization of American States concluded with the Esquipulas agreement, an important political precedent covering the link between peace and security in the exercise of democracy and respect for Human Rights within each country.

In 1989, the action of the Organization of American States in Panama was directed towards seeking a consensual formula with General Manuel Antonio Noriega, that would provide a solution in a manner respecting the sovereign judgment of the Panamanian people, expressed in free elections.

d) The case of Venezuela

At dawn on 4 February 1992, an attempted coup d'état took place against the government of Venezuelan President Carlos Andres Perez. This attempt additionally seemed to aim at assassination of this Head of State. As is well-known, this armed uprising was wiped out this same day, so that political and institutional normality was not in fact interrupted.

This situation, as briefly outlined above, triggered a timely and immediate response from the Organization of American States which, through its Permanent Council, on 4 February promptly issued a Declaration of Support for the democratic government of Venezuela . In the considerative part thereof, it reaffirmed the value of the principle stated in the Charter of the Organization whereby □the solidarity of the Member-States and the high aims pursued thereby require the political organization thereof on the basis of the effective exercise of representative democracy,□ in parallel to the provisions of the Santiago Commitment. The Permanent Council then condemned and repudiated the attempted coup d'état and the attempt on the life of the Venezuelan President, at the same time reiterating □the decision of the Member-States to respect and strengthen the principle of democratic solidarity and to act jointly in accordance with the Charter and the Santiago Commitment, reaffirming that in the hemisphere there is no room for regimes of force.□

At the 1992 General Assembly, held in the Bahamas, a Resolution was adopted - AG/RES.1189 - which in its central part once again returns to a defense of □democracy as the political system of the American peoples and institutional system able to handle efficiently the various political, economic, social and ethical situations in our hemisphere, in order to continue fueling the integral development process of the Member-States.□

In 1993, at the General Assembly in Managua, a new Resolution was adopted entitled Support for the Process and Funding of Democratic Institutionality in the Republic of Venezuela, which neither went into further detail nor provided fresh input on the force and validity of the principle of

□democratic solidarity□, mentioned both in the Declaration of the Permanent Council as well as in the Resolution of the Bahamas Assembly.

It is nevertheless important to emphasize that the above-mentioned pronouncements of the political bodies of the Organization of American States concerning Venezuela make explicit mention of the Santiago Compromise. With its incorporation into the Declarations and Resolutions of the Organization of American States, in which additionally reference is made to the provisions of the Charter itself, norms that are conventional in character would be sufficient to cope adequately with interruptions in the democratic system of a Member-State of the Organization, showing the mandatory nature attributed to the Commitment achieved among the American States. Its repeated application may serve as proof with the regard to its existence as consuetudinary law. This in fact constitutes an additional source, parallel to that of the Charter of the Organization of American States, that can be used in future to uphold actions undertaken by the Organization fostering the preservation and protection of democracy.

e) The case of Peru

The dissolution of the Congress and the intervention of the Judiciary, decreed in April 1992 by the President of Peru, Alberto Fujimori, prompted the application of the mechanisms covered in Resolution 1080 (XXI-0/91).

Due to the provisions of this Resolution, the Secretary General requested the immediate summoning of the Permanent Council of the Organization which in turn decided to convoke an Ad Hoc Meeting of Ministers of Foreign Affairs, which adopted three Resolutions, on different dates. The first: Resolution MRE/RES 1/92, dated 13 April 1992, stated that □the events that have taken place in Peru seriously affect the institutional order and alter the rule of representative democracy in a Member-State of the Organization□, and resolved to issue a call whereby □the democratic institutional order should be urgently reestablished in Peru, putting an end to all actions that affect the rule of Human Rights...□. To this end, it requested the □Chairman of the Ad Hoc Meeting of Ministers of Foreign Affairs, together with the Chancellors invited thereby and the Secretary General, to travel to Peru and implement immediate actions in order to set up a dialog between the authorities of Peru and the political forces represented in the Legislative branch, with the participation of other democratic sectors designed to establish conditions and the commitment among the parties leading to the re-establishment of a democratic institutional order, with full respect for the separation of powers, human rights and state of law.□

In the second meeting, held on 18 May 1992, it was decided □to take note of the compromise wished by the President of the Republic of Peru in calling immediate elections for a Constituent Congress, through an electoral act surrounded by all guarantees of the free expression of the will of the people, and designed to re-establish representative democracy in his country.□ In this document, it also recommended the Secretary General to □render the assistance formally required thereof, including observation of the elections, in order to ensure a swift return to the representative democratic system of government.□

The installation of a Constituent Congress - the outcome of an election that was subject to consideration by the Organization of American States through its Electoral Observation and

Assistance Mission - determined the closing of the Ad Hoc Meeting.

f) The case of Guatemala

On 25 May 1993, the President of Guatemala decreed the widespread suspension of various individual guarantees of the Political Constitution, the dissolution of Congress, the removal of the members of the Supreme Court and the Court of Constitutionality, as well as the nation's Attorney-General.

These facts brought the democratic process to an abrupt halt, once again bringing into force the procedures covered by Resolution No.1080 (XXI-0/91). The Secretary General thus called for the immediate convocation of the Permanent Council. Instead of studying the situation, it resolved to call an Ad Hoc Meeting of Ministers of Foreign Affairs. However, before it could meet, the Council accepted the invitation of the Government of Guatemala for the Secretary General of the Organization to head up a fact-finding mission to this country, prior to the Ad Hoc Meeting of Ministers of Foreign Affairs. Thus, when the Ad Hoc Meeting was in fact held, political and constitutional normality had been restored, whereby the Resolution of the Chancellors thanked the Mission for its efforts in Guatemala, and requested the Secretary General, together with the Chancellors, to invite it to return to Guatemala to continue supporting the efforts of the Guatemalan people to re-establish the Constitutional order through dialog and agreement, and to report back on the results of its mission to this Ad Hoc Meeting of Ministers of Foreign Affairs at a fresh meeting to be held on Sunday 6 June in Managua.□

On this date, a meeting of Ministers took place. As soon as it had heard the report of the Secretary General, which noted the election of Mr. Ramiro de León Carpio as the new President of the Republic, it was decided that the functions of the Ad Hoc Meeting should cease.

g) The case of Haiti

Immediately after the ousting of President Jean-Bertrand Aristide, the Organization of American States adopted a series of decisions. The Ministers of Foreign Affairs adopted Resolutions No. MRE/RES.1/91, MRE/RES.2/91, MRE/RES.3/92, MRE/RES.4/92 and MRE/RES.5/93. In turn, the Permanent Council issued Resolutions CP/RES.575 (885/92), CP/RES.594 (932/92) and CP/RES.610(968/93), as well as Declarations CP/Dec.8 (927/93), CP/Dec.9 (931/93), CP/Dec.10 (934/93) and CP/Dec.15 (967/93).

The more significant aspects of these Resolutions and Declarations have been outlined with singular precision in some of them. For example, on 30 September 1991, the Permanent Council of the Organization of American States, meeting at the request of the Secretary General, summoned an Ad Hoc Meeting of Ministers of Foreign Affairs, which took place on 3 October. In its first Resolution, the American Chancellors defined the purpose of their actions: to demand full compliance with the state of law and the immediate restoration of President Jean-Bertrand Aristide to the exercise of his legitimate authority. In agreement with these purposes, the Ad Hoc Meeting recommended the Member-States of the Organization of American States to adopt various measures designed to implement □the diplomatic isolation of those who hold the *de facto* power in Haiti.□ In another

paragraph, it recommended all the States to □suspend their economic, financial and commercial links with Haiti, as well as technical cooperation and aid if this be the case, with the exception of strictly humanitarian aspects.□ In this, it also requested □the Secretary General of the Organization, together with the group of Ministers of Foreign Affairs from the Member-States to travel urgently to Haiti and to express to those who hold the *de facto* power, the rebuttal of the American States of the interruption in the constitutional order...□. It also decided □to transmit this Resolution and to exhort the United Nations and specialized agencies to take into account the spirit and objectives thereof.

A few days later, the Ad Hoc Meeting of the Ministers of Foreign Affairs adopted a new Resolution as a consequence of the worsening of the situation in Haiti, Resolution MRE/RES./91, dated 8 October, whereby it exhorted the Member-States to □immediately proceed with a freeze of the assets of the Haitian State and apply a trade embargo to Haiti, with the exception of actions of a humanitarian character.□ Additionally, and in compliance with the request of President Aristide, the Resolution set up □a mission of civil character for the re-establishment and strengthening of constitutional democracy in Haiti (OAS-DEMOC), which should travel to this country...□. The organization of this mission was entrusted to the Secretary General. It also empowered him to □keep open the channels of communication with democratically-constituted political institutions and other sectors in Haiti, in order to foster a dialog designed to ensure the return of President Jean-Bertrand Aristide to his functions.□

As a result of actions undertaken by the Secretary General of the Organization of American States, at the Head Offices of the Regional Organization, two Protocols were signed on 23 and 25 February 1992, known as the Protocols of Washington.

The first of these instruments was signed by President Aristide and the Parliamentary Negotiation Commission, represented by the Presidents of the Senate and Chamber of Deputies, with a view to finding a definitive solution to the Haitian crisis. The second was signed by President Aristide and the Prime Minister appointed thereby, as agreed in the first Protocol.

The Haitian National Assembly never submitted its approval of the first Protocol to the vote. Nevertheless, on 8 May 1992, the *de facto* authorities, the Presidents of the Senate and the Chamber of Deputies, as well as the Commander-in-Chief of the Armed Forces of Haiti, signed an Agreement in Ville d□Accueil, whereby a consensus government was convened. No reference was made to President Aristide in this Agreement, nor to the Protocols of Washington.

In view of this, the Ad Hoc Meeting reacted on 18 May 1993, approving a new Resolution in which it reiterated its full support for the Protocol dated 23 February 1992 and exhorting the Member-States to adopt additional measures, such as extensions of the verifications of the trade embargo on Haiti, not granting or revoking visas to the protagonists and partners in the coup d'état, and reducing diplomatic missions to Haiti. It also exhorted States outside the region, meaning all States that maintained economic and commercial links with Haiti, particularly the countries in the European Economic Community, to take steps to reinforce the effectiveness of the embargo, requesting the cooperation of international financial institutions and the United Nations in the application of new sanctions.

The Ad Hoc Meeting of the Foreign Affairs Ministers of the Organization of American States adopted yet another Resolution, dated 13 December 1992, in which various Paragraphs refer to

cooperation with the United Nations, with Paragraph 8 being of singular transcendence on this matter, for which reason it is transcribed herewith: □To empower the Secretary General of the Organization of American States to take extreme actions under the framework of the Charter in search of a peaceful solution to the Haitian crisis and, in contact with the Secretary General of the United Nations, to explore the possibility and the convenience of bringing the Haitian situation to the Knowledge of the Security Council of the United Nations for the immediate universal application of the embargo on trade recommended by the Organization of American States.□

In January 1993, the Secretary General of the Organization of American States appointed as its Extraordinary Representative for Haiti the same person appointed earlier by the Secretary General of the United Nations to cover this topic, former Argentine Chancellor Mr. Dante Caputo. This is perhaps the clearest example of the cooperation and coordination between these two Organizations.

At the General Assembly of the Organization of American States held in Managua, on 6 June 1993 the Ad Hoc Meeting of Ministers of Foreign Affairs adopted a new Resolution which - among other affirmations - reiterated its decision to continue humanitarian aid, coordinated with the United Nations.

Resolution No. 841 issued by the Security Council, which banned sending oil and weapons at the same time as it froze the assets outside the country owned by the supporters of those who seized power in Haiti, prompted top-level negotiations between President Jean-Bertrand Aristide and the Head of the Armed Forces, General Raoul Cédras, at Governor's Island, New York, on 3 July 1993. The resultant pact, known as the Governor's Island Agreement, established - among other aspects - the appointment of the new Prime Minister by President Aristide, the separation of the powers of the State, the promulgation of a law of amnesty and the reinstallation of President Aristide to his legitimate functions, thus paving the way for his return on 30 October 1993.

As a consequence of the above-mentioned Agreement and in order to implement it, on 16 July 1993, the New York Pact was adopted, whereby the Haitian political powers agreed to respect a political truce of six months, in order to guarantee a stable and peaceful transition period. Having concluded this Pact, President Aristide put forward the name of Mr. Robert Malval for the position of Prime Minister. Notwithstanding the discussions prompted by this appointment, it was ratified by the National Assembly on 25 August 1993.

Almost simultaneously with the ratification of the Prime Minister by Parliament, the Organization of American States recommended its Member-States to lift the sanctions imposed on 8 October 1991 on the Haitian government. A similar measure was adopted by the Security Council on 17 August, adding that the sanctions would be reimposed if the Governor's Island Agreement was not complied with in full.

However, new and more serious acts of violence took place in Haiti. The assassination of the Minister of Justice, Mr. Guy-François Malary, was repudiated by the international community. At the regional level, the Permanent Council of the Organization of American States expressed its concern over these events through Resolution No. 967/93, dated 12 October.

At the General Assembly of the Organization of American States, held in Belém do Pará, Brazil,

a Resolution was adopted by the Ad Hoc Meeting of Ministers of Foreign Affairs, dated 9 June 1994, which - among other matters - stated: "In recognition of the support granted by the countries which, having economic and commercial relations with Haiti, suspended them in application of Resolution No. MRE/RES.5/93, issued in June 1993, the Member-States of the Organization of American States and the United Nations support and reinforce the measures implementing this embargo, such as the suspension of commercial flights, and the freeze placed on the assets of *de facto* regime and its supporters, as stipulated by resolutions No. MRE/RES.2/91 of October 1991, MRE/RES.3/92 of May 1992 and MRE/RES.4/92 of December 1992, as well as those suspending international financial transactions with Haiti."

2.2 The coordination between the Organization of American States and the United Nations, with regard to international democracy, peace and security.

The actions undertaken by the Organization of American States with regard to Haiti bring up the issue if the relations between international democracy, peace and security, and more specifically, the issue of coordination between this Organization and the United Nations on such matters. This relationship has been guided by the pertinent provisions and conventions, and has produced a coordinated policy between these two organizations.

a) The norms applicable

Article 33 of the United Nations Charter states that:

"1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, industrial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice."

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.□

Chapter VIII of this same Basic Convention states, with regard to the matter covered by this document:

"Regional Arrangements

Article 52

1. No provision in this Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.

3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the States concerned or by reference from the Security Council.□

4. ...

Article 53

1. The Security Council shall use these regional organizations or agreements, if appropriate, to apply coercive measure under its authority. However, coercive measures shall not be applied under regional agreements or through regional organizations without the authorization of the Security Council ...

2.

Article 54

The Security Council shall at all times be kept fully informed of the activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of peace and security.□

The Charter of the Organization of American States contains numerous specific references to the United Nations Organization. There are provisions covering the link between these two intergovernmental organizations, as well as many others ruling on the cooperative relations that should exist between them.

With regard to the former, the Preamble indicates that the American States are:

"... determined to preserve the noble undertaking that humanity has conferred upon the United Nations, whose principles and purposes they sovereignly reaffirm ..." □

In turn, Article 1 states that:

"Within the United Nations, the Organization of American States is a regional agency."

Article 2 establishes the essential purposes of the Organization of American States:

... to fulfill its original obligations under the Charter of the United Nations..."
Finally, Article 136 of the Constitutive Treaty of the Organization states that:

"None of the provisions of this Charter shall be construed in such a manner as

impairing the rights and obligations of the Member-States under the Charter of the United Nations."

In this way, the central basic document of the Organization of American States explicitly stipulates the character of its link with the United Nations, meaning that this is an organization whose activities fall within the area of the United Nations, but it is not an agency thereof. This is why, with the exception of certain concrete aspects - specifically the peaceful settlement of disputes and the maintenance of international peace and security - in which joint common action is indispensable, in all other actions undertaken by the Organization of American States in the economic, social, cultural and political fields, it enjoys full autonomy and independence of the United Nations.

Notwithstanding with the particular nature of the Organization of American States, which is legitimately allowed to determine its purposes and principles, to define its fields of action, and to adopt norms for its functioning, the above-mentioned provisions also indicate the juridical limits of its capacity, meaning it may not contravene the purposes and principles established in the Charter of San Francisco.

The regional organization should tailor its actions to the purposes and principles of the worldwide organization, and in the event of a clash or conflict between them, this latter shall take precedence over the former, under the provisions of Article 103 of the Charter of San Francisco which states:

"In the case of conflict between the obligations undertaken by the Members of the United Nations under this Charter and their obligations contracted in virtue of any other international agreement, the obligations imposed by this Charter shall prevail."

With regard to the cooperation norms expressly established in the Charter of the Organization of American States, the most relevant are: Article 53 which, in item k) empowers the General Assembly, among its principle duties and responsibilities, to

"strengthen and harmonize the cooperation with the United Nations and its specialized agencies."

And article 117 item h), stipulating that one of functions of the General Secretariat is to

"establish cooperative relations, in accordance with the resolutions of the General Assembly or the Councils, with specialized Organizations and other national and international organizations."

The system that should rule is thus one of collaboration and coordination, under no circumstances whatsoever involving either dependence or subordination.

The former Secretary General of the Organization of American States, Mr. João Clemente Baena Soares, has explained the significance of this relationship. He said: "Cooperation by nature implies working together with others in order to achieve a common purpose. The Organization of American States should not be a simple implementer of decisions issued by the United Nations or by one of its agencies. If it is intended to establish a relationship of collaboration on the basis of prescriptions by one organization over another, this would be weakening the concept of cooperation."

Further on, he reaffirmed this line of thinking, underlining that "cooperation between the Organization of American States and the United Nations may not be based on hierarchical principles, as there is no dependence or subordination between them. Neither should this be established on the principle of specialization, as both organizations are general. To the contrary, a common basis for purposes and principles should be recognized between the two organizations, as well as in the diversity of their spheres of competence" (OAS/Ser.P. AG/doc.2930/93).

In brief, it may be stated that the parallel nature of both systems is currently accepted, in both tasks and functions regarding the settlement of disputes and maintenance of international peace and security, assigned to each Organization by their respective Charters.

b) Coordinated Action

The interchange of notes between the Secretaries General of both institutions, as well as the Resolutions adopted by the agencies thereby, particularly the Security Council of the United Nations, offer the following juridical elements that inspire and uphold the actions of each of these Organizations with regard to Haiti.

With reference to the Resolutions adopted by the United Nations, those adopted by the Security Council should be borne in mind, particularly Nos.841 (1993), 861(1993), 862 (1993), 867 (1993), 873 (1993), 875 (1993), 950 (1994), 917 (1994) and 940 (1994). The Declarations of the Chairman of the Security Council in 1993 should also be recalled (S/26567, S/26633 and S/26668), as well as in 1994 (S/PRST/1994/2).

With regard to these, it is appropriate to recall first that on 11 October 1991, the General Assembly of the United Nations adopted a Resolution on the Situation of Democracy and Human Rights in Haiti, in which it "called on the Member-States of the United Nations to adopt measures supporting the resolutions of the Organization of American States." Additionally, it asked the Secretary General to consider the possibility of providing the support requested by the Secretary General of the Organization of American States, in order to comply with the mandates contained in both resolutions of the Ad Hoc Meeting.

Later, Resolution No. 841, dated 16 June 1993 imposed a mandatory embargo on trade with Haiti. Its basic grounds are: 1) a declaration issued by the Security Council on 26 February 1993, that noted with concern the frequency of various humanitarian crises including massive displacements of the population, developing into threats to international peace and security, or may make such threats worse; 2) the concern of the Security Council that the maintenance of this situation "may contribute to an atmosphere of fear of persecution and economic dislocation that could increase the number of Haitians seeking refuge in the neighboring Member-States"; 3) the need for effective cooperation between the regional organization and the United Nations; and 4) that the request of the Permanent Representative of Haiti should "define a single and exceptional situation that justifies the adoption of the extraordinary measures by the Security Council in support of the efforts deployed under the framework of the Organization of American States."

On the basis of the above, the Council determined, in accordance with Article 39 of the Charter of the United Nations that "under these singular and exceptional circumstances, the continuation of

this situation threatens international peace and security in the region."

Other consequences, and acting in virtue of Chapter VII, the Council decided that a series of measures "which are in keeping with the trade embargo recommended by the Organization of American States should enter into force, unless the Secretary General, taking into account the opinions of the Secretary General of the Organization of American States, should inform the Council that, in the light of outcome of the negotiations headed by the Special Envoy to Haiti of the Secretary General of the United Nations and the Secretary General of the Organization of American States, at this moment, the imposition of such measures is not justified"; and that "if at any time after the presentation of the above-mentioned report of the Secretary General, and taking into account the opinions of the Secretary General of the Organization of American States, should the former advise the Council that the *de facto* authorities in Haiti are not complying in good faith with what was agreed during the above-mentioned negotiations, the provisions outlined in Paragraphs 5 through 14 shall immediately enter into force...".

The Security Council of the United Nations adopted Resolution No. 873 on 13 October 1993, in which it re-established the oil and weapons embargo against Haiti, and froze the financial assets outside the country of the military authorities. This embargo was followed by a naval blockade, authorized by the Security Council, as the Head of the Army, General Cédras, refused to step down.

By means of Resolution No. 875, dated 16 October, the Security Council exhorted all States to adopt measures appropriate to the circumstances of this case, and as necessary to guarantee strict compliance with Provisions 841 and 873 regarding the supplies of oil or oil products, or arms and war matériel of all types, at the national level or through regional mechanisms and organizations, and in cooperation with the legitimate government of Haiti, and in particular to halt all sea traffic to Haiti whenever necessary to inspect and check cargoes and destinations. In this Resolution, additionally, the Security Council ratified its willingness to consider adopting supplementary measures that might prove necessary in order to guarantee compliance with this Resolution.

Later, the Security Council adopted Resolution No. 917, under the framework of Chapter VII of the Charter of the United Nations. This accentuated the measures isolating Haiti, banning land, sea and air traffic to and from the island, as well as forbidding the entry of the military protagonists of the coup d'état into the territories of the Member-States, freezing the funds and financial resources of persons connected with this coup d'état, as well as other measures affecting trade to and from Haiti.

Finally, on the 31 July 1994, and "acting in accordance with Chapter VII of the Charter of the United Nations", the Security Council adopted Resolution No. 940, which "authorizes Member-States to set up a multinational force under unified command and control, and under this order to have resource to all the measures necessary to facilitate the departure from Haiti of its military governors, in compliance with the Governor's Island Agreement, ensuring the prompt return of its legitimately-elected President and the re-establishment of the legitimate authorities of the government of Haiti, as well as establishing and maintaining stable surroundings allowing the application of the Governor's Island Agreement, in the knowledge that the costs of this temporary operation shall be borne by the Member-States participating therein."

Additionally, in this Resolution and among other decisions, the Security Council approved the establishment, through approval of this Resolution, of an advanced group of the UNMIH consisting of no more than 60 persons, including a group of observers, to set up the appropriate coordination

measures for the multinational force, so that it may carry out the functions of supervising the operations of the multinational force and other functions described in Paragraph 23 of the Report of the Secretary General dated 15 July 1984 (S/1991/828), as well as to evaluate the requirements and prepare for the deployment of the UNMIH, once the mission of the multinational force has been completed."

The Security Council also stated that "it decides that the multinational force shall take its mission as terminated with the various functions described in Paragraph 9 below, when it has set up stable and secure surroundings, and the UNMIH has the power and structure sufficient to assume all its functions. The Security Council shall implement this decision, taking into account the recommendations formulated by the Member-States forming the multinational force, on the basis of the evaluation made by the commander of this force, and those formulated by the Secretary General."

In the same Resolution, and among other decisions, the Security Council also "asks that the UNMIH should help the legitimate constitutional authorities of Haiti to establish surroundings propitious to holding free, flawless legislative elections which would be organized by these authorities, and when these authorities so request, shall be placed under observation by the United Nations, in cooperation with the Organization of American States."

With regard to the interchange of Notes, on 19 June 1992, Secretary General of the United Nations forwarded a Note to the Secretary General of the Organization of American States, attaching to it a letter sent to him by President Aristide in which the latter requested that the United Nations should render assistance to the Organization of American States "in order that it may implement in effective form" Resolutions MRE/RES.2/91 and MRE/RES.3/92 of the Ad Hoc Meeting of the Ministers of Foreign Affairs of the Organization of American States", particularly with regard to the "embargo and sending a multinational mission to Haiti."

The following passage in the Note of the Secretary General of the United Nations is of interest: "...In order to ensure that any action adopted by the United Nations should be in compliance with the appropriate distribution of tasks between the two Organizations, I ask you to kindly advise me of your points of view on the requests of President Aristide, as soon as possible."

In reply to his counterpart at the United Nations, on 10 July 1992 the Secretary General of the Organization of American States formulated the following reflections with regard to cooperation between the two Organizations: "Reference is made in this letter to Chapter VII of the Charter of the United Nations as the basis of the actions of the Organization of American States regarding the political crisis in Haiti. In fact, the mandate of the Organization of American States comes from its own Charter, and in this case additionally the Ad Hoc Meeting of the Ministers of Foreign Affairs summoned in conformity with the Resolution 1080/91 of our General Assembly to consider the situation in Haiti."

He thus emphasized that "this Resolution, in my opinion, constitutes a clear advance in favor of Democracy in the American Hemisphere. It starts out from the premise that an alteration in the democratic process of any nation in this hemisphere affects the region as a whole. This involves a creation belonging to this region, and as such is transferable only with difficulty to other spheres...". He continues: "the current crisis in Haiti is domestic in character; this is an alteration in its recently-

initiated democratic process, and consequently makes joint action necessary, in compliance with the commitments that link the American countries. The Charter of the Organization of American States thus contains various references in support of democratic institutions...". Immediately after quoting the corresponding provisions in the Charter, he adds that "the community of American nations, brought together in the Organization of American States thus has its own characteristics, one of the most outstanding of which involves the promotion and consolidation of democracy (OAS/SER f/v.1-MRE/INF.15/92).

The Secretary General of the Organization of American States, on receipt of the assignment of the Ad Hoc Meeting of Ministers of Foreign Affairs dated 13 December 1992, then proceeded to explore, together with the Secretary General of the United Nations, "the possibility and convenience of bringing the Haitian situation to the knowledge of the Security Council in order to prompt the universal application of the commercial embargo recommended by the Organization of American States", and forwarded a note to Secretary Boutros-Ghali, dated 21 December 1992, in which he expressed that "it would be necessary to carefully determine the grounds and juridical consequences of any possible future action by this Organization."

In the light of this basic premise, he put forward a series of reasons and concerns, which it is of interest to note below:

"a) it should be understood that the universal application of a trade embargo against Haiti by the Security Council would pre-suppose the adoption of a mandatory decision that should be based on the general powers of the Article 25 of the Charter or on the specifics of Chapter VII with regard to threats to peace, interruptions in peace or acts of aggression; in this latter case, this also would imply expressly or tacitly, pronouncing on the nature of the Haitian crisis.

b) on the assumption that this Security Council would be willing to impose an embargo against Haiti, this brings up the question of whether this Organization would handle this topic in its global aspect and not solely with regard to the trade embargo.

c) Taking into account the fact that the General Assembly of the United Nations has been concerned with the case of Haiti and has given its support to cooperation with the actions of the Organization of American States on this matter, should the Security Council assume the functions that are assigned to it in accordance with the Charter, the General Assembly may not formulate fresh recommendations on this topic, unless so requested by the Security Council itself (Article 12, paragraph 1).

d) The Ad Hoc Meeting of the Ministers of Foreign Affairs of the Organization of American States at no time considered that the efforts it is devoting to solving the Haitian crisis in a peaceful manner have been exhausted. It should thus be understood that Article 52, Paragraph 2 of the Charter of the United Nations is not yet applicable to the Haitian situation, and consequently the Organization of American States may continue to "implement all possible efforts" at the regional level, without adversely affecting the coordination of the pertinent actions with the United Nations."

Finally, it asks if "it would be possible for the Security Council to decide on the universal application of a trade embargo against Haiti not under the framework of Chapter VII of the Charter

and in particular Article 41 thereof." (OAS/Ser.G.CP/INF.3388/93).

Although there was no reply from the Secretary General of the United Nations to the question put forward, on 16 June 1993, the Security Council of the United Nations met in New York to discuss the situation with regard to Haiti, in response to a request expressed by the Representative of Haiti for this Organization to impose a trade embargo against Haiti as recommended by the Organization of American States, in a universal and mandatory manner. The Security Council unanimously adopted Resolution No. 841, based on the juridical grounds of Chapter VII of the Charter of the United Nations.

The same occurred with Resolutions No. 917 and 940, adopted by the same Organization, and those to which references had already been made; these Resolutions are self-explanatory, especially the latter.

CONCLUSIONS

This outline first leads to the conclusion that concern over the rule of Democracy in each of the Member-States of the Organization of American States existed long before it was juridically enshrined.

Both the Tobar and Estrada doctrines, as well as the various pronouncements made by bodies of the Organization of American States, including the Inter-American Juridical Council, prior to the above-mentioned juridical confirmation, are eloquent demonstrations of the profound and permanent interest of the Inter-American System in democracy. To these official expressions, may be added private proposals and other unilateral suggestions such as that formulated in 1945 by the Foreign Affairs Minister of Uruguay, Mr. Eduardo Rodríguez, all of which do no more than provide proof of this statement.

Along with same order of ideas, it is appropriate to indicate that, when referring to democracy and particularly after the 1984 reform, the Charter of the Organization of American States consequently resolved for the Organization and its Member-States the problem of guaranteeing the establishment, exercise, promotion and consolidation of Democracy in the States. In doing so, on the one hand it exteriorized the firm, decided and unshakable will of the States to commit themselves to establishing the exercise of democracy in their respective political systems, and on the other, the obligation of the Organization of American States to promote and consolidate it.

In other words, the Charter of the Organization of American States has established, with regard to democracy, juridical international obligations, both for the Member-States as well as for the organization itself. Therefore, and taking into consideration that doctrine agrees that while an issue does not fall under the domestic or exclusive jurisdiction of a State if it is regulated by international law, it may be stated with good grounds that, in the Inter-American System, democracy is not yet a matter falling within the sphere of the domestic or exclusive jurisdiction of the States. Today, democracy on the American continent is an issue regulated by International Law.

This regulation distinguishes this system from others on our planet. It should be recalled in this regard that the Organization of American States is the only international organization whose basic convention refers to democracy and perhaps in this respect, a phenomenon is occurring similar to that which took place with Human Rights. On the American continent, these have developed in a manner far superior or different to that which has taken place in other latitudes. Democracy in the Americas is no longer an act of internal or domestic jurisdiction or exclusive to the State, and this may presage what will take place at worldwide level.

The juridical international regulation of democracy in the terms whereby the Organization of American States and its Member-States undertake obligations with regard thereto, thus implies that violations thereof may prompt international responsibility, which may however feature a peculiarity, compared to the general norms regulating this institution.

Although under general international law, the violation of an international obligation implies the appearance of a new obligation, meaning that of reparation for the violation of any obligation concerning democracy engendered within the Inter-American system, the obligation is to reestablish the same democracy, meaning that in this case the only way of providing reparations is to comply

with the principal obligation of establishing, exercising, promoting and consolidating the democracy which has been violated.

Confirming this, it should be emphasized that democracy is approached in America by international law as an obligatory comportment, with an obligatory outcome. With regard to behavior, while it is an obligation of the States to effectively exercise representative democracy, and an obligation of the Organization of American States to promote it. It is also an obligation of results insofar as the State should establish it and the above-mentioned Organization should strive towards the consolidation thereof.

However, on the other hand, both compliance with these obligations as well as the requirements that they should be complied with are limited by the principle of non-intervention, which is manifest in the right of each State to elect, without outside interference, its own political, economic and social systems, and to organize itself in the manner it deems most appropriate.

Having complied with the requirements to establish, exercise, promote and consolidate democracy, and taking into consideration the above-mentioned principle of non-intervention and the need to harmonize with this, it may be stated that, in the light of the practice of the States and the Resolutions adopted by the bodies of the Organization of American States, particularly with regard to Human Rights , the States and the Organization itself may, when faced with the violation of an obligation involving democracy, and in view of the re-establishment thereof by the State in breach of agreement, it may carry out all those actions that are designed solely and exclusively to exercise an appropriate function recognized under international law.

The States may thus only carry out acts that emanate from the exercise of their own sovereignty and which do not affect third party States nor that of the Party in breach of compliance. As an illustration, although it is legitimate for a State to break off relations with a State whose government is not democratic or not to recognize it, it is not permitted to intervene in the electoral processes of the latter, nor to carry out any acts that imply threat or use of force.

In the case of an interruption in democracy in a Member-State, the Organization of American States is empowered to take action in compliance with the mandates granted thereto. These are of two types. One is the result of the general norms that regulate the Organization, whereby it may take formal knowledge of the matter and adopt Resolutions that will have their own value or that inherent in that of the decisions of the cooperation organizations, meaning that in order to be implemented they would require a consensus of each State. This means that Resolutions, in addition to not being permitted to imply the use of force, may consequently consist only of recommendations regarding the actions that each State may decide to execute in a sovereign manner.

In order to adopt this type of non-mandatory or non-binding resolutions for its Member-States, the Organization set up a mechanism in Resolution No. 1080 (XXI-0/91). Putting this mechanism to use is a duty assigned to the Secretary General and the Permanent Council, in the case of an interruption in democracy. The former should summon the latter, which should examine the situation and take the decision with regard to whether or not to call an Ad Hoc Meeting of Ministers of Foreign Affairs, or to summon a Special Sessions Period of the General Assembly.

The second type of mandate may arise after the recent reform of the Charter of the Organization

of American States comes into force. In virtue of this, depending on the case, participation in bodies of the Organization may be suspended for a State whose government is not democratic, although it shall continue to be a Member thereof, with all the obligations corresponding thereto.

Within these limits, the action of both States as well as the Organization of American States in defense of democracy thus respects the principle of non-intervention.

Notwithstanding this, the recent practice of the Organization of American States, and more particularly with regard to Haiti, seems to indicate that the interruption in democracy in one of the Member-States may constitute a threat to international peace and security, whereby it ranges beyond the exclusive competence of this organization, and becomes shared with the United Nations.

Should this occur, the Security Council of the United Nations shall be empowered to qualify this situation and to adopt the Resolution corresponding thereto, whose analysis goes beyond the scope of this Report. Nevertheless, it is appropriate to indicate that, should the Security Council resolve on any measure under the aegis of Chapter VII of the Charter of this Organization, the Organization of American States may act under the scope given by the fundamental text to the regional agreement, in conformity with that stipulated in its own Charter. Along with the same order of ideas, it should not be forgotten that, in compliance with the provisions of the UN Charter, the Organization of American States itself may launch the intervention thereof in the case of an interruption in democracy in the American States, by keeping it informed of the activities that it is undertaking in order to maintain international peace and security.

In a different order of matters than that outlined in this Report, it may be concluded that, in accordance with the development of international law in America, with regard to democracy, and although this appears closely linked to other concepts, values, proposals or principles such as human rights, solidarity among the American States, social justice and - more recent still - critical poverty, it is no less certain that this may be approached and conceived juridically as a reality with its own content. In other words, this is now treated juridically independent of other components which may nevertheless shape it in a manner different to that which is established.

This immediately implies that an interruption in democracy constitutes a peculiar phenomenon that may be noted independent of other events. Within this context, it may be stated that a violation of human rights does not always necessarily mean an interruption in democracy, as this phenomenon does not automatically lead to this. The mechanisms established, or which may be established, for the promotion and defense of both values are and should be different.

This is particularly important with the regard to the links that may exist between the phenomenon called democracy and that known as international peace and security. Although there is no doubt that the strengthening of democracy is a supportive element in the maintenance of international peace and security, they are distinct realities, juridically speaking, which thus warrant different treatment. This gives rise to the urgency, in view of the events in Haiti, of stipulating the contents of both these phenomena, as well as procedures for approaching them.

The decision adopted on this issue would certainly define the role to be played in the future by the Organization of American States, as well as the specific characteristics of the Inter-American System in the current international structure.

DII37C2.94I

TABLE OF CONTENTS

INTRODUCTION	182
1. PART I	184
THE LAW APPLICABLE	184
1. The Concept of Democracy in the Charter of the Organization of American States	184
1.1 Inter-American Concern for Democracy	184
1.2 The norms of the Charter of the Organization of American States in relation to Democracy	185
1.3 Comments on these Texts 185	
a) Representative Democracy	186
b) Democracy as an assumption or condition	185
c) Democracy as a purpose	187
d) Rights and duties of the Organization	188
e) Rights and duties of the American States	188
f) The promotion of representative democracy	188
g) The consolidation of representative democracy	189
h) Representative democracy and the principle of non-intervention	189
2. Interpretation of the norms laid down by the Organization itself	190
2.1 Resolutions Adopted by Bodies of the Organization of American States	190
2.2 Resolutions on Human Rights	192
2.3 The Resolutions of 1991	195
a) The Santiago Commitment to Democracy and the Renovation of the Inter-American System	196
b) Representative Democracy	196
c) Unit for the Promotion of Democracy	197
d) Comments on the texts	198
2.4 The Reform of the Charter of the Organization of American States	199
a) On whom the sanction is imposed	200
b) The agency that should impose the sanction	200
c) Effects of the suspension	201
d) Effect of the reform mechanism of the Charter of the Organization of American States on the topic under analysis	201
e) Other juridical problems	202

II - PART TWO	204
INTER-AMERICAN PRACTICE REGARDING DEMOCRACY	204
1. The Action of the States	204
1.1 The Doctrine and Practice of non-recognition	204
1.2 Non-Intervention	206
2. The action of the Organization of American States	207
2.1 Concrete Political Actions	208
a) General Considerations	208
b) The case of Cuba	209
c) The cases of the Dominican Republic, Peru, Nicaragua and Panama	209
d) The case of Venezuela	211
e) The case of Peru	212
f) The case of Guatemala	212
g) The case of Haiti	213
2.2 The coordination between the Organization of American States and the United Nations, with regard to international democracy, peace and security	216
a) The norms applicable	216
b) Coordinated Action	219
CONCLUSIONS	224



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

August 1994, Ordinary Sessions Period

MINUTES N^o 16

covering the ordinary session held on
18 August 1994

PROVISIONAL MINUTES
(Art. 53 or the Regulations)

Present: Dr. Ramiro Saraiva Guerreiro (Chairman) Dr. Jonathan T. Field (Vice-Chairman) Dr. Luis Herrera Marcano, Dr. Alberto Zelada Castedo, Dr. Miguel Angel Espeche Gil, Dr. Galo Leoro Franco, Dr. Eduardo Vio Grossi and Dr. Jose Luis Siqueiros.

Also present at this session was Dr. Enrique Lagos, Temporary Under-Secretary for Juridical Affairs.

The Secretariat of the Inter-American Juridical Committee, Dr. Manoel Tolomei Pereira Gomes Moletta acted as Secretary of the Meeting.

Topics

1. Voting on the Draft Resolution on the Securities Market
(CJI/SO/II/doc.39/94 rev.1)
2. Democracy in the Inter-American System (CJI/SO/II/doc.37/94)
3. Visit by Professor Hector Faundez Ledesma to the Inter-American Juridical Committee head offices

--- X ---

1. Voting on the Draft Resolution on the Securities Market (CJI/SO/II/doc.39/94 rev.1).

At 3.02 p.m., the CHAIRMAN opened the session by putting the Draft Resolution on the Securities Market to the vote, in its latest revision (CJI/SO/II/doc.39/94 rev.1).

After the reading of this document by the Secretary, the Resolution was approved (CJI/SO/II/doc.23/94), maintaining the wording of the draft prepared by the Rapporteur, with various comments on form and style.

2. Democracy in the Inter-American System (CJI/SO/II/doc.37/94)

Following the Order of the Day, the Chairman requested Dr. Vio Grossi to present his Report on Democracy in the Inter-American System (CJI/SO/II/doc.37/94), which was distributed in advance.

Dr. Vio Grossi opened his presentation by emphasizing that the topic of Democracy in the Inter-American System is a theme that, as shown by recent practice, has taken on very special connotations in the case of Haiti.

He therefore explained that this Report consisted of two parts: the law applicable to this matter and the practice followed by the Organization with regard to democracy. He thanked Mr. Juan Anibal Barria, a member of the Chilean Mission at the Organization of American States, who cooperated with his valuable experience. He also offered his thanks for the cooperation offered by the current Temporary Deputy Secretary of Juridical Affairs, Dr. Enrique Lagos, who helped obtain the relevant documentation, and Ambassador Espeche Gil, who made some terminological comments that were most useful to this Report.

He emphasized that the topic was approached on the basis of two principle themes: the law applicable and the practice of the States, leaving aside expressions based more in the sphere of □should be□, than in the juridical □being□.

Specifically with regards to the topic of Democracy in the Inter-American System, the norms and standards show that although there is an obligation, the Organization had no effective means of acting to protect the democratic system. With the alterations to its Charter in 1991, it was endowed with two ways of doing this: one being recommendations that are not binding on the States, which are merely recommendations and do not have the power of a Security Council Resolution in accordance with Chapter VII; the other being suspension. The Organization can currently recommend and expel, while the States may implement actions falling within the sphere of their own sovereignty and no further, meaning they cannot violate international law and may not undertake armed intervention. Leaving aside what is established under law, the practice of the States has also shown the same, indicating that the problem of democracy has increased in importance, allowing the Organization to act with increasingly greater decision.

The Rapporteur explained that he did not wish to mention all the cases in which States did not

recognize a government, broke off relations, or took unilateral action or attitudes, when a *coup d'état* took place. He mentioned the cases of the Dominican Republic, Peru, Nicaragua, Panama, Venezuela, Guatemala and Haiti, to show the rising concern of the Organization regarding democracy, spotlighting its increasing action with regard to certain cases. Haiti is the most obvious case of this intention on the part of the Organization, but he also put forward the problem that perhaps the actions undertaken by the Organization of American States would prompt the intervention of the United Nations, triggering the mechanism protecting security and international peace. He emphasized the importance of the Organization supporting the topic of international peace and security as well as democracy within the Inter-American System, because this latter is not a topic under international law, but one that rather falls under the internal jurisdiction of each State. The Rapporteur then said that although the States have the right to select their own regimes, it could be said that they also have the obligation to establish a democracy in keeping with the guidelines and characteristics desired. The Organization may only promote or help the consolidation of democracy, and take note of when it either exists or ceases to exist. Finally, he emphasized that the purpose of his presentation had been to provide an overview of the current state of law in terms of democracy in the Americas, and indicate some problems or lines of action.

The Chairman thanked Dr. Vio Grossi for his broad-ranging and interesting Report which mirrors painstaking efforts to separate what is actually law from what could become law, as this is the way to develop juridical obligations and a very important practical quality. He also stated that the document emphasized two basic ideas: first, that this topic is not strictly one of internal jurisdiction, as it is subject to discussion by the Organization, under the procedure that he himself believes, and which naturally has the limits established in the Charter. This has the effect of exempting from blame the Member-States that comply with the recommendation to the Organization, as they are not acting unilaterally, but rather in function of an authorization issued by the Meeting of Ministers. It should be recalled that democracies are not established through sanctions, and far less is it an endogenous phenomenon imposed from outside inwards, which is fruitless, and nor is it consolidated.

It has lately been decided that the Organization may study anti-democratic constitutional changes and adopt a position with regard thereto. This in some way constitutes an acquired principle that could develop in the future.

The Chairman declared that this Report could be useful to the Chancelleries as well as to Organization, as in the future it could influence the practice of the States. With regard to the case of Haiti, he thought that this was an abnormal and exceptional case, from which it would be risky to draw conclusions, and that much care should be used in the treatment thereof.

Dr. Leoro then congratulated the Rapporteur, and stated that he felt that this study constituted a work with solid juridical basis, in which the Rapporteur had developed the process that culminated in the amendments to the Charter of the Organization of American States and the Declaration of Santiago on Representative Democracy. He added that these modifications had imposed a system for endowing the amendment to Article 2 with applicability, including among the purposes of the Organization those of promoting and consolidating democracy. He added that there are nevertheless still problems of a juridical order, and that it was necessary to know whether or not the measures which had been taken recently respected the principle of non-intervention. He recalled that the Report stated that these measures had been taken without adversely affecting the principle of non-intervention, and that this had fallen under the field of international law, moving out of the domestic

realm of the States, if this topic had been internationalized, but nevertheless the core of this topic lay in knowing whether this internationalization should force measures such as the blockade imposed on Haiti, taking into account that the practice of the States constitutes a situation that, if based on the Charter, could arrive at an application that would be considered legitimately accepted or, if based on a declaration, would endow such with the value of consuetudinary law.

Dr. Leoro also stated that he had doubts with regard to whether or not the measures taken effectively fell under the sphere of international law, as the Washington Protocol was not yet in force. The suspension imposed on a State that had violated the principle of representative democracy, preventing its participation in the agencies of the Inter-American System by withdrawing its voting rights, does not imply that it does not continue subject to the other obligations established by the Charter.

In a recent Resolution dated 31 July 1994, the United Nations Security Council also referred to the situation of violations of human rights and the breakdown of democracy in Haiti, using this as a juridical justification to qualify the situation as a breakdown or threat to international security and peace. This interpretation does not follow those traditionally taken by the United Nations Security Council, but is rather adapted to the current circumstances. Dr. Leoro also added that the Charter of the Organization of American States did not make provision for this type of act that could really be considered as a breakdown in peace or a threat to international peace and security, far less when this takes place in an island-state lacking adequate means to threaten international peace in the terms in which this concept is normally understood.

He also recalled that the cases listed in the Report presented by the Rapporteur made a point of showing that there has been a progressive advance in the practice of the States in this matter, and that this may at some time in the future, result in an effective juridical system. There is currently no clearcut juridical base other than taking action through a political interpretation whereby the definition of the acts linked to the promotion, consolidation and respect for democracy in regard to the principle of non-intervention, is subject to the fluctuating changes that it may undergo in the Assembly and the State representations. He added that the Protocol of Washington should have cleared up various ambiguous points that still remain in this area.

Dr. Fried thanked Dr. Vio Grossi and congratulated him for his broad-ranging Report which was, without the slightest doubt, of much use as a source of reference to the members of the Legal Consultation Board of Canada, as well as the Consultation Boards of the other Member States. He stated first that by outlining the genealogy of the legal concepts of representative democracy, he had left out the development of a concept of self-determination within the United Nations, which culminated in the positive statement issued by the international community that the decisions taken by the colonial peoples to choose between independence and maintenance of an association with the metropolitan power, should respect the principle of participation and representative voting. This position was re-affirmed in the case of the Eastern Sahara.

He also emphasized that another interesting issue was the lack of precision in the term □non-intervention□ and its current scope, as many people consider intervention to be the equivalent of coercion or the use of force, while for others it means a simple public comment on a specific situation which may constitute an intervention. This would be the case of China which, for example, rebuts any comments about human rights, alleging that this constitutes an intervention. In the case of

Nicaragua, the International Court of Justice seems to recognize the difference between humanitarian aid and economic assistance, in counterpart to military or paramilitary activities. In an era of economic assistance, the promotion of democracy through monitoring elections by the United Nations and the Organization of American States itself, as well as assistance from international financing institutions, it would be interesting to analyze how these elements are related to the concept of non-intervention.

Finally, Dr. Fried showed interest in hearing the suggestions of the Rapporteur with regard to the best way of disseminating this Report.

Dr. Espeche Gil added his thanks and congratulations to the Rapporteur on behalf of the other members of the Inter-American Juridical Committee, emphasizing that Dr. Vio Grossi had achieved a major step forward in the development of this issue, without losing sight of its juridical target. This analysis was due to the profoundly political nature of this topic and the difficulty encountered in considering it in terms of the law. He emphasized that this study also opened the way to in-depth studies of various topics linked thereto, such as extreme poverty, which is now opening up as a fresh field for international law and which is without doubt linked to the issue of representative democracy. Another topic is that of the conduct of the States with regard to □whether repeated application may serve as respective proof of the existence thereof as consuetudinary law□, as expressed in page 44 of the Report.

Dr. Espeche Gil recalled that the Rapporteur hinted, on a sound basis, at the incongruence of the norms and standards, which makes it utterly impossible to interpret the Charter in terms of sub-item e) of Art. 3, as this states that □each State should have the right to elect its political system without outside interference□, meaning that it may elect a non-democratic system, and thus constituting utter incompatibility between this norm and the decisions of the System fostering democracy. Thus, if we follow the strictly juridical line, this situation becomes insoluble. This means that in some way, it should be made clear that this standard in Article 3, would in interpretive terms make it impossible to coherently apply the norms which are being developed to protect democracy. He indicated that another topic of interest was that of the □genuineness□ or □legitimacy□ of election results, as this has nothing to do with the lack of freedom in the elections, nor is it linked to pressures or violence in the voting process, unless connected to the results of the balloting process. He felt that attention should be drawn to the actions undertaken by the Organization, sending observers to monitor various election processes, a healthy practice that should perhaps be subject to more stringent standardization.

Dr. Zelada emphasized the importance of the Report presented, as it prompts thought and reflection. He said that he had the impression that the problem of democracy in the Inter-American System had two aspects: the first covers the conditions that the Organization believes should exist for the States to be or continue to be members, and the second aspect covers the international cooperation actions that the Organization can or should promote to encourage the development and strengthening of democratic systems. Seeing things from this double viewpoint, the treatment could be different, as the promotion of international cooperation for the strengthening, development and enhancement of the democratic systems of the Member States of the OAS, could well be linked into cooperative actions in other areas that are also undertaken by the Organization. For example, the objectives of the Organization include encouraging cooperation for economic, social, cultural, scientific and educational development, so that this political development could well form part of the

agenda of cooperative actions, as representative democracy is a target of political development.

He added that another issue that should come under consideration is that, according to the practice followed by the States, the Inter-American System as a whole should react to the collapse of a democratic regime. The first step to be taken, apparently with agreement among all the States, is over the possibility of applying sanctions consisting of expulsion, although this is more elegantly called suspension in the Inter-American System, as the State should fall under sanction, or whoever represents the State, or whoever is responsible for the situation prompting the downfall of the democratic regime. There would also be agreement over the functioning of various institutional mechanism such as the Security Council, the Ad Hoc Meeting of Ministers of Foreign Affairs, or the General Assembly. Finally, he emphasized that there is agreement that other measures covered in the Charter of the Organization and international law should be adopted.

Given the difficulty of advancing towards achieving an agreement, the probable normative development of the following issues was left pending: first, defining whether or not the breakdown of a system of representative democracy is really a threat to security in the hemisphere; second, the need for more precise norms and standards defining what is understood by diplomatic gestures; defining what type of diplomatic gestures, mediation, conciliation and arbitration should be employed. He also emphasized that there is a lack of more accurate norms defining what other types of measures may be adopted other than expulsion, as well diplomatic negotiations, as there are two options, either defining accurately measures of a group character that the Organization may apply and implement, or that the juridical text such as the Charter of the United Nations should simply list the possible measures, leaving the application of these measures to the discretion of each State.

Dr. Zelada stated that there is no schedule for States wishing to implement measures on their own account, while feeling confident that they are doing so in compliance with a code of conduct, thus avoiding any slur on their prestige through the application of measures that may be considered outside the range of the stipulations of the Charter, or norms and standards under common or conventional international law. It is thus necessary to reflect on the further normative development of the interrelationship between actions taken to cope with a breakdown in a democratic regime developed by the Organization of American States and the United Nations, as it is important - as is the case of Haiti - to define if the breakdown in the democratic regime within the Inter-American System is the responsibility of this system or the United Nations system.

Dr. Saraiva Guerreiro emphasized that this discussion reveals that this topic had marked traits of a political order, thus requiring much flexibility in discussion thereof.

Dr. Herrera Marcano advised that he would deliver a series of documents to the Rapporteur on this topic prepared by Dr. Caminos, and indicated that he was not surprised by the quality and worth of the Report presented by Dr. Vio Grossi, thus adding his congratulations to those of his colleagues.

He also thought that the basic problem was centered on defining what is democracy, what is protection and defense, and what is promotion and consolidation of democracy as well as what is intervention. Throughout the provisions of the Charter, two ideas are developed: 1) democracy is necessary in all the American States in order for the Charter to make sense and function, which is why the Organization must promote it; 2) intervention is banned. These two concepts are crucial to the Organization. Everything revolves around precisely what is meant by intervention and what are

human rights and in both cases, they would depend on a juridical interpretation, which he sees as being most appropriate whereby it would stipulate what the States understand by intervention or non-intervention, taking into consideration that their position has varied considerably.

With regard to the concept of representative democracy, the problem lay in determining if in a country, at any given moment, the Government that effectively rules it is or is not democratic and representative. This could involve pronouncements on the domestic processes of the States, which would lead to the analysis that is currently considered as intervention, and on this would depend the measures that could be adopted for the re-establishment or promotion of democracy.

Dr. Herrera recorded that at the start, the principle of non-intervention was placed before the principle of self-determination. The principle of self-determination served as a first undermining of the concept of intervention in domestic affairs, but a regime that breaks away from the pre-existing concepts with regard to what were considered domestic affairs is that of human rights. This development took place over the past thirty years, and today no-one would claim that speaking of human rights is an unacceptable intervention in the domestic affairs of a State. The doctrine of humanitarian intervention would allow the use of force and even the use of unilateral force by one State when the violation of human rights reaches a certain level of intolerability. This process is of particular importance, as there is currently a struggle under way to expand or reduce the interpretation of intervention, as well as the definition of domestic affairs, because there has been a dizzying speed up in the changing interpretation of this, since the end of the Cold War.

Also worthy of note is that this is a phenomenon specific to the American continent, as the question of representative democracy is never discussed in cases such as those of Saudi Arabia, Myanmar nor is it expected that international actions be taken to re-establish or impose democracy in these countries. It would seem that the concept of international American law is reappearing as a special law within universal international law, reaching the point that, in the view of the United Nations Security Council, the lack of democracy in an American nation constitutes a threat to peace, but the lack of democracy in an African nation does not.

Dr. Siqueiros added his congratulations to those expressed by his colleagues to Dr. Vio Grossi, emphasizing that this was an excellent document, one of the best Reports ever been presented to the Committee.

As food for thought, he emphasized the similarity between two elements: first the breakdown of democracy in one of the Member States of the Organization, and second, that this breakdown threatened international peace and security, in which case it moves beyond the exclusive competence of the Organization of American States in the Americas, and becomes the shared responsibility of the United Nations. This dichotomy operates with reciprocal synergy, as the Organization of American States may launch the intervention process by the United Nations to safeguard the American principle of defense of democracy in a State in this region. The problem lies in assessing what part of the interpretation, and what part of the instrumentation of this symbiosis between the two principal parties depends on extra-juridical factors, as well as very specifically on political factors which by their very nature are changeable.

Finally, Dr. Siqueiros suggested that, in the Resolution that the Committee had just adopted on the magnificent Report presented by its Rapporteur, it should take into consideration that Resolution

940 dated 31 July 1994 does not offer complete unanimity of criteria, and in particular some American States were not and are not in agreement with the use of force, which is the outcome of this document.

Dr. Lagos begged pardon for his intervention, and emphasized that he could not remain silent when faced with the presentation of a Report of such quality and solidity as that presented by Dr. Vio Grossi, and that this was a topic that was of acute significance within the Inter-American System, and that the various agencies and bodies of the Organization were permanently involved with it. He also agreed with the comments of the Committee regarding the necessity to clarify still further the concept of representative democracy as this is the object of the protection of this entire topic. The relative character of all the assessment elements involved in the identification of the possible compatibility between this action and the commitment of the Organization to the principle of non-intervention, prompted the need for greater precision in the structure and juridical system established, in order to comply with the purpose of consolidation and defense of representative democracy. Finally, Dr. Lagos emphasized the importance of this matter, and the need that the Inter-American Juridical Committee should submit the thoughts that it deems apt on this matter in a topic so vital to the Organization.

The Chairman thanked Dr. Lagos for his comments and passed the floor to Dr. Vio Grossi to hear his thoughts on the various comments.

Dr. Vio Grossi thanked his colleagues for their praise of his work, and put forward various additional thoughts that the comments had prompted. First, he stated that, on analyzing the juridical nature and the range of the norms covering democracy, it may be concluded that in the Americas only democratic Governments are admitted. However, rather than speaking about a truly American international law, this is rather the application of international law in a specific manner to the Americas, and in this case this would only be accepted here by democratic Governments in general terms. It should be emphasized that this involves a process that is still developing, that cannot solve all problems, and which will even throw up more difficulties, without forgetting that certainly the interpretation of these norms and standards must take into account their contexts. The Charter of the United Nations is today used in a very different manner to that in which it was used some years ago, and obviously concepts such as humanitarian intervention have taken on a distinct connotation.

The Rapporteur put forward as his second comment, the importance assumed by the definition of domestic jurisdiction of the States, with regard to the relationship between democracy and non-intervention, recalling that the development of events and more intensive international relations have made it vital that international law should cover more topics than previously, and that today it can only be determined scientifically what constitutes domestic jurisdiction as such, distinguishing it from that which is not regulated by international law. Thus, in order to establish the relationship between the principle of non-intervention and democracy, it must be seen to what point democracy is regulated by international law. The Organization of American States could certainly adopt non-binding resolutions along these lines, simply making recommendations to the States, and as a consequence these latter could adopt decisions that emanate solely from their sovereignty and thus do not affect the rights of third party States. The third comment refers to the character of the international obligation of maintaining democracy and the obligation of promoting and consolidating it by the Organization. The mechanism covered by the Charter for this purpose is flexible in character but not automatic, with there being no mandatory sanctions nor adoption of decisions. The only mandatory factor is that of

the Secretary General calling the attention of the Permanent Council to such issues, and for this body to adopt the decision summoning the General Assembly or the Ad Hoc Meeting of Ministers of Foreign Affairs.

With regard to the links between this topic and the issue of international peace and security, the Rapporteur stated that this is a topic that falls under the auspices of both the Organization of American States and the United Nations. The only difference between them lies in the mechanisms with which they are empowered to safeguard international peace and security, as the Organization of American States does not have a Chapter VII such as that of the United Nations Charter, and as such has no supra-national facilities to act. He emphasized that the Organization of American States was a mechanism of permanent political consultation with regard to problems of international peace and security, but its functions did not inherently include wielding a mechanism to re-establish international peace and security.

Democracy may be a condition of international peace and security or, as is becoming the case, international peace and security are conditions for democracy. It may be said that democracy exists today because there is more international peace and security today. These concepts are very different, although linked, should be treated differently.

Finally, Dr. Vio Grossi repeated his thanks for the kind words about his Report.

The Chairman then emphasized the qualities of the Report, and suggested that during the next session, this topic should be taken under consideration yet again, in order to define a Resolution that could be adopted in this regard, also taking into consideration connected topics on the agenda.

3. Visit by Professor Hector Faundez Ledesma to the Inter-American Juridical Committee head offices.

Before closing the session, the Inter-American Juridical Committee was visited by Dr. Hector Faundez Ledesma, a Venezuelan lawyer, who had lectured at the XXI International Law Course on □International Jurisdiction□ and □The Contribution of International Organizations to the Formation of International Law□. Having heard the comments of Dr. Faundez Ledesma on his participation, the Chairman thanked him for his presence and the fruitful suggestions designed to improve the course.

The Chairman then read the topics that would form the Order of the Day for the following session. The session was declared closed at 6.50 p.m.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/II/doc.42/94 rev.1
28 November 1994
Original: English

IMPROVING OF THE ADMINISTRATION OF JUSTICE
IN THE AMERICAS

REPORT ON
PROTECTION AND GUARANTEES FOR JUDGES
AND LAWYERS IN THE EXERCISE OF THEIR FUNCTIONS

(presented by Dr. Jonathan T. Fried)

Although the subject of "Improving the Administration of Justice in the Americas" has been on the agenda of the Inter-American Juridical Committee since 1985⁸⁶, it was only in 1992 that the Committee first decided to address "Protections and Guarantees for Judges and Lawyers in the Exercise of their Functions". At its August, 1993 session, the Committee reiterated the need to continue studies on the subject⁸⁷, and requested Jonathan T. Fried to serve as Rapporteur for this subject.

This paper constitutes the first report of the Rapporteur, prepared with the able research assistance of James T. Stringham, Victoria Bazan, and Monica Phillips.

I. WHY ARE JUDGES AND LAWYERS SO IMPORTANT? SOME PHILOSOPHICAL FOUNDATIONS

The judicial function is an intrinsic element of any effectively functioning legal system, and necessary to

86 CJI/RES.I-02/85, wherein the Committee resolved to solicit information from member states on the subject "...recognizing the importance of the administration of justice for the rule of law, the preservation of human rights and of peace, and taking into account that a moral, efficient and autonomous administration of justice is the best guarantee for achieving balanced development that reduces inequality in a climate of liberty...".

87 CJI/RES.II-17/93.

ensure the rule of law.

A. Judging and the Legal System

Historians and philosophers both consider the concept of rules to be an inevitable feature of organized society.^{88/} In any community, rules provide a framework within which individuals may conduct social relations. Within the universe of such social norms, the notion of "law" holds a special place. While some dictates for behaviour may derive from religion, customs or manners, "law" refers to those rules possessing certain defining characteristics:

1. Laws are coercive in character, both in respect of the source of their authority and of their enforceability.^{89/} In other words, laws derive from an authoritative source.^{90/}
2. Laws are accepted as binding and are observed as such by the community.^{91/}
3. Laws are general in nature, providing "norms of conduct set for a given community" rather than individual commands.^{92/}

For there to be a legal system, a process must exist by which it can be determined whether a given rule is a "law", and by which general norms can be applied to particular facts. Accordingly, a legal system comprises the laws themselves *and* additional elements describing the process of making "rules", their observation and the effects of non-compliance, and the institutions and procedures for interpreting and applying rules, including for resolving disputes.^{93/}

In fact all systems, in different ways, compromise between two social needs: the need for certain rules which can, over great areas of conduct, safely be applied by private individuals to themselves without fresh official guidance or weighing up of social issues, and the need to leave open, for later settlement by an informed,

88 Roberts, Pelican History of the World, p. 57ff.; Pollock and Maitland, History of English Law (2d ed.), p. xciii; H.L.A. Hart, The Concept of Law, p. 121; Friedmann, Legal Theory, p. 14.

89 Austin, The Province of Jurisprudence Determined (1832); Pollock, First Book of Jurisprudence, at 28; Kelsen, Principles of International Law (1952), at 5.

90 H.L.A. Hart's "secondary rules of recognition" are those rules, themselves "laws", which society accepts as defining the authoritative source of "primary rules of obligation", i.e., those which directly regulate conduct.

91 "...(A)s probably most competent jurists would today agree, the only essential conditions for the existence of law are the existence of a political community, and the recognition by its members of settled rules binding upon them in that capacity...", Brierly, The Law of Nations (6th ed. [Waldock], 1963), at 71.

92 Friedmann, *supra*, note 1, at 16.

93 Hughes, "Rules, Policy, and Decision-Making", 77 Yale L.J. 411 (1968). In The Morality of Law (1964) at p. 6ff., Lon Fuller derives eight requirements for "inner morality" of law from the nature of a legal system: (1) generality; (2) promulgation; (3) prospective legal operation; (4) intelligibility and clarity; (5) avoidance of contradictions; (6) avoidance of impossible demands; (7) constancy of the law through time; and (8) congruence between official action and the rule as declared.

official choice, issues which can only be properly appreciated and settled when they arise in a concrete case.^{94/}

The role of authoritatively determining how a law is to be applied to particular cases is embodied in the judicial function.^{95/} While it has been argued that, at least in theory, "...the notion of law does not include of necessity the existence of a distinct profession of lawyers, whether as judges or as advocates...",^{96/} study by legal anthropologists provides convincing proof that judicial authority and adjudicative procedures are well-developed in "primitive" societies.^{97/}

This judicial function was recognized even in revolutionary France. The tendency of the Parlements to identify with the aristocracy and to ignore progressive legislation led to a marked separation of powers and

94 Hart, *supra* note 3, at 127.

95 Professor Dworkin catalogued instances where more than a merely mechanical application of a general rule to specific facts is required in an early work, "Judicial Discretion", 60 J. Phil. 624 (1963) at 627:

- "(i) In many cases a court is pressed to, and in some cases does, overrule a textbook rule, and substitute a new one.
- (ii) Even when, as is more often the case, a court is determined to follow a particular textbook rule if it applies, that rule may be so ambiguous that it is not clear whether it applies, and the court cannot decide simply by studying the language in which the rule has been expressed.
- (iii) Sometimes two textbook rules by their terms apply, and the judges must choose between them. In some such cases the need for choice may be disguised, in that only one rule is mentioned, but research (or imagination) would disclose another rule that the court could have adopted as easily.
- (iv) Sometimes a court itself will state that no textbook rule applies to the facts. Often the gap may be cured by what is called "expansion" of an existing rule, but sometimes a wholly new rule must be invented.
- (v) A large, and increasing, number of cases are decided by citing rules so vague that it is often unhelpful even to call them ambiguous: the critical words in such rules are "reasonable", "ordinary and necessary", "material", "significant", and the like."

96 Pollock and Maitland, The History of English Law (2d. ed.), Vol. I, at xcvi. The authors go on to note that "...justice can be administered according to settled rules by persons taken from the general body of citizens for the occasion, or in a small community even by the whose body of qualified citizens...In Athens, at the time of Pericles, and even of Demosthenes, there was a great deal of law, but not class of persons answering to our judges or counsellors. the Attic orator was not a lawyer in the modern sense. Again, the Icelandic sagas exhibit a state of society provided with law quite definite as far as it goes, and even minutely technical on some points, and yet without any professed lawyers. The law is administered by general assemblies of freemen, though the court which is to try a particular cause is selected by elaborate rules. There are old men who have the reputation of being learned in the law; sometimes the opinion of such a man is accepted as conclusive; but they hold no defined office or official qualification. In England...there was no definite legal profession till more than a century after the Norman Conquest. In short, the presence of law is marked by the administration of justice in some regular course of time, place and manner, and on the footing of some recognized general principles."

97 Hoebel, The Law of Primitive Man (1954).

regulation of the judiciary. Rule-making was the legislature's domain^{98/} and the *Tribunal de Cassation* was established to ensure that judicial interpretation of statute conformed to the legislature's intent.^{99/} Yet the tribunal's mandate recognized that the function of interpretation was essentially judicial, and led ultimately to the evolution of the present day *Cour de Cassation*.^{100/}

In the United States, eminent judges have described their task as resolving disputes about applying laws to concrete controversies.^{101/}

The role of determining which rules are "laws" is also inherent to the judicial function. Even countries governed under a system of "parliamentary sovereignty" must still have a procedure to determine whether a measure sought to be enforced is in fact a law. In countries of the British Commonwealth, for example, a court "...must inquire whether the measure has in fact been enacted by a body which is authorized, under the existing law, to pass it, and whether it was enacted in the correct manner and form; this is merely an application of the rule of law."^{102/} A line of cases beginning with the *Trethewan* case^{103/}, and including *Harris v. Minister of the Interior*^{104/}, *Lynange v. The Queen*^{105/}, and *The Bribery Commissioner v. Ramasinghe*^{106/} support the

98 de Vries cites the Law of August 16-24, 1790, Title II, Article 10, establishing the new courts: "They shall issue no general rulings ('reglements') but shall address themselves to the legislative body wherever they believe it necessary either to interpret a law or to enact a new one.", Cases and Materials on the Law of the Americas (New York: Columbia University, 1976) at 166.

99 Dawson, Oracles of the Law (Ann Arbor: University of Michigan Law School, 1968) at 377-78.

100 "It will be noted that the Tribunal of Cassation was not itself expected to provide authoritative interpretations of the statutes involved in the cases that came before it. On the contrary, its original function, consistent with its separate, non-judicial nature, was merely to quash judicial decisions based on incorrect interpretations of statutes. Such cases would then go back to the judiciary for reconsideration and decision; that was, after all, a *judicial* function.... However, by a gradual, but apparently inevitable, process of evolution, the tribunal came to perform the second step, as well as the first. Thus it not only indicated that the judicial decision was wrong; it also explained what the correct interpretation of the statute was. During this same period, the tribunal's nonjudicial origin dropped from view, and it came to be called the Court of Cassation; thus judicialized, it assumed a position at the apex of the system of ordinary courts.", Merryman, The Civil Law Tradition (California: Stanford University Press, 1985) at 40-41.

101 Holmes, "The Path of the Law", 10 Harv. L.Rev. 457 (1897); Cardozo, The Nature of the Judicial Process (1921); Pound, "A Survey of Social Interests", 57 Harv. L.Rev. 1 (1944).

102 Winterton, "The British Grundnorm: Parliamentary Supremacy Re-examined", 92 L.Q.R. 591 (1976); Heuston, "Sovereignty", in Oxford Essays in Jurisprudence (Guest, ed., 1961) at 217; Gray, "The Sovereignty of Parliament Today" 10 U.T.L.J. 54 (1953).

103 (1932) A.C. 526 (J.C.P.C.)

104 (1952) (2)S.A.L.R. (A.D.) 428.

105 (1967) 1 A.C. 259 (J.C.P.C.)

106 (1965) A.C. 172 (J.C.P.C.). For commentaries on these cases, see Winterton, *supra* note 17; Tarnopolsky, The Canadian Bill of Rights (2d ed., 1975); McWhinney, Case Comment, 30 Cdn. Bar Rev. 692 (1952); Friedmann, "Trethewan's Case, Parliamentary Sovereignty and the Limits of Legal Change", 24 Aust.L.J. 103 (1950).

proposition that the fact that a legislature is sovereign does not affect the necessity of judicially determining whether in fact the legislature has acted. Objections based on doctrines of "parliamentary privilege" and the "enrolled bill rule" to court examination of the validity of parliamentary acts are contrary to long-standing authority^{107/} and may be interpreted as stemming from the notion that parliament is a court of record, and not from any notion of parliamentary sovereignty.^{108/}

The question of which rules are laws is pivotal in the aftermath of a revolution or a coup d'etat. Courts in common law jurisdictions have been called upon "to resolve issues of the survival of the constitutional order and the validity, legitimacy, and legislative power of usurper regimes."^{109/} Relying on the *Estrada* Doctrine, "extra-constitutional regimes in post-colonial civil-law settings do not consider their legitimacy and validity open to judicial or international question."^{110/} Nonetheless, *de facto* governments often seek recognition and legitimacy from their highest courts;^{111/} in return, these courts may insist on pledges from the new regime to respect the constitution and the rule of law.^{112/}

It is, therefore, necessary to provide for the judicial function in any legal system to apply general rules to specific cases, and to determine which rules are laws.

B. Judges, Lawyers and Governmental Authority

The collective relation of persons in an organized society to a sovereign authority or government was at issue well before the advent of the modern nation-state. Two political and philosophical currents of monumental proportions, namely, the concept of the rule of law and the notion of inherent limits on governmental authority, have come together in the twentieth century to demand the maintenance of an independent judiciary and legal profession.

107 *Stockdale v. Hansard*, (1839) 112 E.R. 1112

108 Winterton, *supra* note 17. See also Swinton, "Challenging the Validity of an Act of Parliament: The Effect of Enrollment and Parliamentary Privilege", 14 Osgoode H.L.J. 345 (1976).

109 Mahmud, "Jurisprudence of Successful Treason: Coup d'Etat & Common Law" (1994) 27 Cornell Int'l L.J. 49-140 at 51-52. Mahmud details the situation of the Grenadian courts after the coups d'etat in 1979 and 1983 as follows: "the *Mitchell* court refused to validate a usurper regime that had already fallen. Still the court, itself a product of the usurper regime, invoked the doctrine of necessity to validate both its own existence and its jurisdiction." *ibid* at 126.

110 *Ibid*, at 52.

111 Galleher, "State Repression's Facade of Legality: the Military Courts in Chile" (1988) 2 Temple Int'l & Comp. L.J. 183; see also Vaughn, "Proposals for Judicial Reform in Chile" (1992-93) 16 Fordham Int'l L.J. 577-607.

112 Rosenn, "Judicial Review in Latin America" (1974) 35 Ohio State L.J. 785-819 at 813; see also Lynch, "Constitutional Ambiguity and Abuse in Argentina - the Military Reign 1976-83", (1989) 6 Journal of Human Rights 353-382; Feinrider, "Judicial Review and the Protection of Human Rights under Military Governments in Brazil and Argentina" (1981) 5 Suffolk Transnational L.J. 171-199; Biles, "The Position of the Judiciary in the Political Systems of Argentina and Mexico" (1976) 8 Lawyer of the Americas 287; Galleher, *supra* note 26.

1. The Rule of Law

The rule of law finds its modern origins in the Magna Carta of 1215. King John agreed to the demands of a group of nobles that:

No freeman shall be taken or (and) imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgement of his peers or (and) by the law of the land.

On the eve of the Enlightenment, John Locke stated that even a sovereign legislature must rule "by promulgated standing laws, and [interpreted by] known authorized judges".^{113/} The customs of the people that enjoyed habitual obedience, the "common law", thus served as the basis for the concept of the rule of law, or "the supremacy of positive law".^{114/} And, as noted above, an institution other than the legislature itself must be able to decide whether a law is properly promulgated.

Colonial governance has also left a legacy reinforcing the rule of law in the Americas, and thereby the necessity of a judiciary equipped to enforce it. Prior to the passage of the *Colonial Laws Validity Act* of 1865^{115/}, no legislature of a British colony was considered to have any authority to legislate contrary to the rules and principles of the British common law. Although s. 3 of the Act removed the prohibition on legislation repugnant to British common law, it continued to bar colonial legislation contrary to acts of the Imperial Parliament.^{116/} In granting authority to the colonial legislatures to remake their constitutions and create courts, section 5 of the Act stipulated that this could be done only "provided that such Laws shall have been passed in such Manner and Form as may from time to time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the time being in force in the said Colony". Colonial and Imperial judges were thus long accustomed to making determinations regarding the consistency of legislative measures with higher authority.

More recently, the British *West Indies Act* of 1967, which introduced a concept of Associated Statehood, has been described as a "colonial export model" of the Westminster system, differing from Britain in several important respects: the absence of the doctrine of the sovereignty of Parliament, the existence of the power of judicial review, the specification of fundamental rights provisions, and the fact that these constitutions are committed to writing".^{117/} Although "(t)he constitutions do not anywhere explicitly give the Supreme Court jurisdiction to review substantive legislation and to pronounce upon the *vires* of such legislation"^{118/}, the power of judicial review arises from the fact of written constitutions defining law-making powers.^{119/}

113 Locke, Second Treatise on Civil Government para. 136.

114 Cappelletti and Cohen, Comparative Constitutional Law (1979) at 10.

115 28 & 29 Vict. c. 63 (1865)

116 See Wheare, The Statute of Westminster and Dominion Status (3d ed. 1947).

117 Gilmore, "The Associated States of the Commonwealth Caribbean: The Constitution and the Individual", 11 *Lawyer of the Americas* 1 (1979).

118 Forbes, "The West Indies Associated States: Some Aspects of the Constitutional Arrangements", 19 *Soc. & Econ. Studies* 59 (1970), at 82.

119 Alexis, "The Basis of Judicial Review of Legislation in the New Commonwealth and the USA", 7 *Lawyer of the Americas* 567 (1975); Carnegie, "Judicial Review of Legislation in the West Indian Constitutions", 1971 *Pub.L.* 276.

Federalism also demands an arbiter between different levels of government, each with a claim to legislate within their own sphere. A functioning judiciary is essential to this task.^{120/}

In the civil law tradition, the principle of *legalité* is integral to an *état de droit*^{121/}. The French revolutionary government reacted to the excesses of the French Parlements during the *ancien régime* by establishing a rigorous separation of powers and regulating the judiciary.^{122/} However, the need for judicial review of administrative actions led to the evolution of a parallel system of administrative courts, with the *Conseil d'État* at the apex.

Administrative court remedies are intended to enforce the French concept of *legalité*. The term *legalité* embodies twin notions of compliance with delegated authority and with standards of due process. The notion of compliance with delegated authority is an aspect of the hierarchy of norms, and that of due process is expressed in the term "general principles of law".^{123/}

Thus in both common and civil law systems, the judicial function is inherent to maintaining the rule of law.

-
- 120 Dicey stated that the supremacy of a constitution is fundamental to a federal state, and implies that judicial control over legislation is essential "...to prevent either the legislature of the federal unit or those of the member states from destroying or impairing that delicate balance of power...", The Law of the Constitution (10th ed., Wade, ed., 1959) at 144. Former Chief Justice of Australia Owen Dixon, in "The Law and the Constitution", 51 L.Q.R. 590 (1935), observed that "(t)he rival conception of the supremacy of law over the legislature is the foundation of federalism. Under that system, men quickly depart from the tacit assumption to which a unitary system is apt to lead that an Act of Parliament is from its very nature conclusive. They become accustomed to question the existence of power and to examine the legality of its exercise."
- 121 Alternatively, an *estado de derecho*, *stato di diritto*, or *Rechstaat*. "This concept of the state according to law is based on the principle that not only must all power of the public bodies forming the state stem from the law, or be established by law, but that this power is limited by law. According to this concept, the law becomes, as far as the state is concerned, not only the instrument whereby attributions of its bodies and officials are established, but also the instrument limiting the exercise of those functions. Consequently, the *etat de droit*, or state according to the rule of law, is essentially a state with limited powers and subject to some form of judicial control.... In its most common sense, this may refer to the subjection of the state not only to formal law, but also to all the sources of the legal order of a given state. This implies, therefore, that all state bodies are required to obey the law of the state, and particularly, the law as enacted by Parliament. This has given rise to the 'principle of legality' applied to government or administrative actions, according to which the administration must act in accordance with the law and can be controlled judicially to that end." Brewer-Carias, Judicial Review in Comparative Law, (Cambridge: Cambridge University Press, 1989) at 7.
- 122 Decree of Dec. 22, 1789, Art. 7, states "They [the administrators of departments and the districts] cannot be disturbed in the exercise of their administrative functions by any act of the judicial power."^a The Law of Judiciary Organization of 16-24 August 1790, Art. 13, states: "Judicial functions are distinct and shall always remain separate from administrative functions. Judges may not, subject to the penalties of *forfaiture*, interfere in any manner with the operations of administrative bodies, or summon administrators to appear before them to account for the exercise of their functions." Both cited in DeVries, Civil Law and the Anglo-American Lawyer (New York: Oceana Publications, 1976) at 91.
- 123 *Ibid*, at 126. See text accompanying note 13, *supra*.

The state is not only a set of bureaucracies. It is also a legal order. Normally, this legal order textures social relations along the territory covered by an entity internationally recognized as a nation-state. This texturing is effective when most social agents, even though they may lack detailed knowledge of the law, abide by it, expect others to do so, and know that, in case of conflict, they may have access to fair adjudication by one segment of the state apparatus, the judiciary. Civil and political rights (democracy) as well as contract and property rights (capitalism) may be written on paper, but they are effective only when and where the above expectations are actually met.^{124/}

2. Limits on Governments and the Enforcement of Rights

The scope of sovereign authority has been a central concern of political and legal philosophers since ancient times.^{125/} Aristotle drew the distinction between positive law, deriving its authority from being promulgated as law, and natural law, inherent in human nature, and Roman jurisprudence distinguished between the *jus gentium* and the *jus civile*. As Henkin notes, however, the Stoics and their successors "did not perceive natural law as a higher law invalidating and justifying disobedience to man-made laws that did not measure up, but as a standard for making, developing, and interpreting law: law should be made and developed so that it will correspond to nature".^{126/} The Old Testament itself provides a concept of fundamental law, set out in the Five Books of Moses in such texts as the Ten Commandments.^{127/}

As reflected in the writings of St. Thomas Aquinas, Christianity traced natural law to divine origins, superior to society's rules. In the Iberian peninsula, the *Fuero Juzgo*, an amalgamation of Roman and Gothic law completed in 694, required, "that the prince be merciful, just and pious - worthy of his responsibility. The king is bound by the laws since all men are equal before God. His authority must be based upon wise law. Injustice undermines the legitimacy of his authority."^{128/} In 1075, Pope Gregory VII declared the Roman Catholic Church to be independent of the Holy Roman Empire, and the Concordat of Worms signed in 1122 recognized the jurisdiction of the Church over a number of matters.^{129/} Jurists were thus forced to consider the

124 O'Donnell, "Some Reflections on Redefining the Role of the State", in Bradford (ed.), Redefining the State in Latin America, Paris, OECD, 1994, at p. 252.

125 "The belief, then, in the need to subordinate certain acts of the law-making power to higher, more permanent principles is not confined to our own time. It may be traced, through the Enlightenment philosophers, the English courts of equity, the French Parlements, the medieval scholastics, and early Church fathers to its earliest direct origins in Greco-Roman civilization." Cappelletti and Cohen, *supra* note 29, at 5.

126 Henkin, The Rights of Man Today (1978) at 5.

127 Cogan, "Moses and Modernism", 92 Mich. L. Rev. 1347 (1994), suggests that Mosaic fundamental law "...is not withheld, hidden, or discretionary; it is express. Typically, it is not general, vague, or ambiguous;; it is specific and intended to be clear. Although delivered orally at first, it is then written...[but] while the form of Mosaic fundamental law...is presented in what appears to be a static form, much of that law was in fact the product of what we may rightfully term 'a progressive form' of lawmaking...[which] reflected a crystallization of understandings and traditions that had evolved over centuries...thus leaving us with an example...of a people who were given, who were able to accept, and who thrived for fifteen centuries on a text that combined...differing accounts of fundamental law." *ibid* at 1350.

128 de Vries, *supra* note 13, at 63.

129 Berman, Law and Revolution: The Formation of the Western Legal Tradition (1983) at p. 98.

proper sphere of jurisdiction of church and of state. "The twelfth and thirteenth centuries gave rise to theorizing by both canon and Roman lawyers about the nature and scope of governmental power, on the one hand, and, on the other, to speculation about the appropriate means of restraining its arbitrary exercise.130/

The *Siete Partidas*, dating from 1260 and promulgated in 1348, "were not so much rules for conduct in the Roman sense but rather medieval-type principles of proper conduct and of the well-ordered society and polity that approached the sanctity and status of being moral treatises."131/ A canon of statutory interpretation enacted in 1769, the *Lei da Boa Razão*, directed the Portuguese and Brazilian judiciary to apply Roman law to fill legislative lacunae only when it accorded with "good human sense", which was understood to mean natural law.132/ In England, Sir Edmond Coke stated that "...when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void."133/

Just as canon law and Papal authority provided a check on the otherwise unlimited claims of a right to rule by royalty in continental Europe, the "Glorious Revolution" and the *Charter of Rights* of 1688 marked the first significant check on the arbitrary authority of King James I. In his Second Treatise on Government published in 1690, John Locke began the transformation from natural law to natural rights and the evolution from divine to secular foundations for such rights: laws must not violate the natural rights of individuals that exist by the "law of Nature". In the context of claims against royal prerogative, parliamentary sovereignty itself was at the time considered to be subject to fundamental law.134/

130 Reid, "'Am I, by Law the Lord of the World': How the Juristic Response to Frederick Barbarossa's Curiosity Helped Shape Western Constitutionalism", 92 Mich. L.Rev. 1647 (1994) at 1649. His review essay of Kenneth Pennington's The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition provides a superbly succinct summary of "medieval constitutionalism". He notes that the fourteenth-century jurist Baldus (1327-1400) maintained that the emperor could invade the *dominium* of others and confiscate private property only when he had a *ratio motiva*, and that *ratio* carries with it a basic concept of justice and precluded "arbitrary actions" *ibid* at 1652. "[In] the juridical culture of the twelfth century...Roman and canon lawyers...formed a kind of seedbed from which grew the whole tangled forest of early modern constitutional thought.", Tierney, Religion, Law, and the Growth of Constitutional Thought (1982) at 1, quoted by Reid, *ibid*, who observes that "[i]n a series of important articles, Tierney demonstrated that the canonists of the twelfth and thirteenth centuries developed sophisticated theories of rights -- theories that had far-reaching, if little-noticed, influence on the development of Western jurisprudence.", *ibid* at 1661.

131 Wiarda, "Law and Political Development in Latin America: Toward a Framework for Analysis", 19 A.J.C.L. 434 (1971) at 439.

132 Rosenn, "The Jeito - Brazil's Institutional Bypass of the Formal Legal System and its Development Implications", (1971) 19 Am. J. Comp. L. 514, at 519, states: "'Good human sense' theoretically meant consistent with natural law, defined as 'the essential intrinsic and unalterable truths which Roman ethics had established, and which were given formal recognition by divine and human laws to serve as moral or legal rules of Christianity'."

133 *Dr. Bonham's Case*, 8 Co.Rep.113b, 77 E.R. 638 (C.B., 1610).

134 Keeton, "The Judiciary and the Constitutional Struggle 1660-1688", 7 J. Soc. Pub. Teach. L. 56 (1963); Phillips, "The British Constitution from Revolution to devolution: 17 W & M L. Rev. 423 (1976); Dixon, *supra* note 35; Dixon, "The Common Law as an Ultimate Constitutional Foundation" 31 Aust.L.J. 240 (1957); Radin, "The Myth of Magna Carta" 60 Harv. L. Rev. 1060 (1947); Monpensier, "The British Doctrine of Parliamentary Sovereignty: A Critical Enquiry", 26 La. L. Rev. 753 (1966). See also Jennings, The Law and the Constitution (3d ed. 1943) at 138-140; Gough, Fundamental Law in English

In the course of the eighteenth century the ideas that governmental authority depends on the consent of the governed (the "social contract" of Locke and Rousseau) and that certain rights are inherent to human beings and thus are inalienable culminated in the American Declaration of Independence of 1776 and the French Declaration of the Rights and Duties of Man of 1789, codifying the political philosophy that had guided the American and French revolutions. A constitution is a social contract in fact: a society chooses what limited powers it wishes to grant to government, and no exercise of authority by government beyond that authorized under the constitution is permitted. As stated by Thomas Paine in The Rights of Man, "representative government is freedom". Experience had shown, however, that parliaments alone do not necessarily afford protection for the rights the people retained against their government:

The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.^{135/}

This echoed Montesquieu's conception of political liberty in *De l'Esprit des Lois*:

When legislative power and executive power are in the hands of the same person or the same magistrates body, there is no liberty ... Neither is there any liberty if the power to judge is separate from the legislative and executive powers ... All is lost if the same man, or the same body of princes, or people exercised these three powers: that of laws, that of executing public resolutions and that of wishes or disputes of individuals. ^{136/}

As early as 1787, then, judges were seen as essential to preventing the exercise of arbitrary power by the executive and legislative branches infringing on the natural rights of the citizen.

Article 16 of the French Declaration states that "A society in which the guarantee of rights is not assured or the separation of powers is not determined has no constitution at all." Early decisions of the *Conseil d'Etat* affirmed that "natural and imprescriptible human rights" limited the public power.^{137/} Providing effective judicial means for the protection of fundamental rights and liberties is now recognized as integral to an *état de droit*.^{138/}

Constitutional History (1955).

135 The Federalist No. 47 (James Madison).

136 Chapter VI, Volume XI, as quoted in Brewer-Carias, *supra* note 36, at 12.

137 Szladits, The International Encyclopedia of Comparative Law, (Paris: J.C.B. Mohr(Paul Siebeck)) at 29, citing passages from the *arrêt Blanco*, Trib. Confl. 8 Feb. 1873, Rec. Cons. d'Etat suppl. n. 61., states: An important change came when the Law of 24 May 1872 conferred upon the *Conseil d'Etat* a delegated jurisdiction (*justice deleguee*) by which the administration became subject to the control of a veritable court. This constituted a period of growth in the course of which a series of leading decisions ("grands arrêts") the fundamental principles of modern administrative law were established and the judicial control of the administration extended further and further. The two leading ideas directing this process were, on the one hand, the primacy of the individual and the affirmation of "natural and imprescriptible human rights," limiting the public power, and on the other hand, the concept of the public service, which extended the power of the administration by subjecting it to a law "whose special rules vary according to the needs of the service."

138 Brewer-Carias, *supra* note 36, at 7-8. "In fact, French citizens possess a powerful weapon against legislative social injustice and discrimination: their ability to challenge laws as repugnant to fairness and public policy as enunciated by the Declaration of the Rights of Man, incorporated in the Preamble

It should be emphasized, therefore, that more than a century of American history and a strong line of precedents -- to say nothing of contemporary writings -- stood behind Chief Justice Marshall in 1803 when, interpreting the somewhat confused terms of article VI, paragraph 2 of the Federal Constitution of 1789, he enunciated the principle, supposed to be essential to all written Constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument.^{139/}

The dominant concepts in the first civil codes of France, Austria, Italy and Germany were individual private property and individual freedom of contract, reflecting a belief that these fundamental rights "were guarantees of individual rights against intrusion by the state."^{140/} In the 19th century, Latin American nations inherited this civil law tradition from the Iberian peninsula, and adapted it to their own circumstances together with the written constitutional models of the United States and France.^{141/}

Brazil, for example, borrowed *habeas corpus* from the British and incorporated it into the Brazilian 1830 *Penal Code*.^{142/} Article 72(22) of the Constitution of 1891 provided an expansive form of *habeas corpus* which was used to challenge the constitutionality of statutes and decrees:

Habeas corpus shall lie whenever an individual suffers, or is in imminent danger of suffering, violence or coercion through illegality or abuse of power.^{143/}

In the early 20th century, Brazilians brought *habeas corpus* suits to protect freedom of speech and assembly, and political and electoral rights. However, a constitutional amendment in 1926 reduced the scope of the writ to cases where an individual's power to come and go was threatened.^{144/} In response to this retreat, the 1934 Constitution of Brazil provided a new remedy - the *mandado de segurança* (writ of security) - for the protection of fundamental rights other than personal liberty.^{145/}

to the French Constitution. The fact that individual rights are provided by statute rather than by a constitution, although guaranteed by the Constitution's Preamble, suggests that the French legal system is blessed with greater flexibility to adapt to social, economic and technological changes than in the United States, where the Supreme Court often is chained to precedent and partisanship.", Kublicki, "An Overview of the French Legal System from an American Perspective", 12 Boston U. Int'l L. J. 57 (1994), at p. 90.

139 Cappelletti and Cohen, *supra* note 29, at 11, quoting from *Marbury v. Madison*, (1803) 1 Cranch (5 U.S.) 137.

140 Merryman, "The Public Law-Private Law Distinction in European and American Law" 17 Journal of Public Law; cited in de Vries, *supra* note 13, at 97.

141 Clark, "Judicial Protection of the Constitution in Latin America" (1975) 2 Hastings Constitutional L.Q. 405; Wiarda, *supra* note 43.

142 Rosenn, *supra* note 27.

143 *Ibid*, translation, at 789.

144 *Ibid*.

145 *Ibid*, at 792; Brewer-Carias, *supra* note 36, at 319.

The 1988 Constitution^{146/} provides *habeas corpus* to protect against illegal deprivations of liberty, and *mandado de segurança* to protect those rights unprotected by *habeas corpus*. *Habeas corpus* may be used to challenge the constitutionality of statutes and executive acts on their face, whereas *mandado de segurança* only prevents the application of a law against the party that sought the writ.^{147/} To relieve Brazilians from bringing individual *mandado de segurança* actions to protect their rights, the Constitution provides a collective writ of security to protect the rights of a group. In addition, the Constitution provides a new action - *habeas data* - to discover information which the government holds about a plaintiff.^{148/}

In Mexico, the *juicio de amparo* (trial for protection) was conceived as a procedural instrument to "protect against official acts, those fundamental rights of the citizenry, including the right to challenge laws of dubious constitutionality."^{149/} *Amparo* first appeared in state constitution of Yucatan in 1841.^{150/} Influenced by de Tocqueville's descriptions of judicial review in the United States of America,^{151/} the drafters of the 1847 *Acta de Reformas* added *amparo* to the restored 1824 Mexican Constitution.^{152/} Article 25 declared:

The Federal Courts shall protect (*ampararán*) any inhabitant of the Republic in the exercise and preservation of the rights allowed him by this Constitution and by constitutional laws against any attack by the Legislative and Executive, whether Federal or State. These courts shall restrict their action to giving protection in specific cases heard before them, without power to make general declarations regarding the law or the acts underlying the case in question.^{153/}

The fundamental features of judicial review through *amparo* were set out in the Constitution of 1857, and refined in the Constitution of 1917.^{154/} The Constitution grants the federal courts the exclusive jurisdiction to hear *amparo* actions.^{155/} Like the *mandado de segurança*, the *amparo* remedy only applies to the aggrieved

146 *Constituição da República Federativa do Brasil* (Oct 5, 1988)

147 Rosenn, *supra* note 27, at 792.

148 Rosenn, "A Comparison of the Protection of Individual Rights in the New Constitutions of Colombia and Brazil", (1992) 23 University of Miami Inter-American L.Rev. 659 at 682-3.

149 Fix Zamudio, "A Brief Introduction to the Mexican Writ of *Amparo*" (1979) 9 California Western Int'l L.J. 306 at 311.

150 *id.* at 312-13.

151 *Id.* at 309; Karst and Rosenn, "Law and Development in Latin America: A Case Book" *Latin American Studies Series* Vol. 28 (Los Angeles: University of California Press, 1975) at 127.

152 Fix Zamudio, *supra* note 64 at 312-13.

153 Fix Zamudio, "Judicial Protection of the Individual Against the Executive in Mexico" (1970) 2 *Gerichtsschutz Gegen die Exekutive* 713 at 716.

154 *Constitución Política de los Estados Unidos Mexicano* (1917)

155 Karst and Rosenn, *supra* note 66, at 127 cite Article 103 as follows:

"The federal courts shall decide all controversies that arise:

I. Because of law or acts of the authorities that violate individual guarantees;
II. Because of laws or acts of the federal authority restricting or encroaching on the sovereignty of the States;
III. Because of laws or acts of State authorities that invade the sphere of federal

party seeking relief.^{156/} However, the Supreme Court and collegiate tribunals may establish *jurisprudencia* by holding the same point of law in five consecutive judgments; *jurisprudencia* are binding on lower courts.^{157/}

Amparo has evolved from its origins as a remedy to protect rights so that "amparo now serves as the guardian of the entire Mexican judicial order, from the highest constitutional precepts to the most modest ordinances of municipal government."^{158/} It has been described as having five diverse functions:

(1) protection of individual guarantees; (2) testing allegedly unconstitutional laws; (3) contesting judicial decisions; (4) petitioning against official administrative acts and resolutions; and (5) protection of the social rights of farmers subject to the agrarian reform laws.^{159/}

The *amparo de la libertad* protects the individual and social rights set out in the first 29 articles of the Constitution (the Mexican "Bill of Rights") against violations by acts of an authority.^{160/} It may be invoked against all agencies and authorities belonging to the Executive, as well as officials including the President, Cabinet ministers, civil servants and judges.

The constitutionality of statutes and regulations may be challenged directly by *amparo contra leyes*. As noted above, finding a law unconstitutional in one case does not have a general (*erga omnes*) declaratory effect. However, *jurisprudencia* is often quickly established because of the frequency of challenges on constitutional questions.^{161/}

The most common form of *amparo*, accounting for more than 80 per cent of the *amparo* cases, is the *amparo judicial* or *amparo casación*.^{162/} It is used to review judicial and quasi-judicial decisions in criminal, civil, administrative and labour cases for procedural errors and errors in the application of the law.

authority...".

156 Karst and Rosenn, *supra* note 66, at 128 cite Article 107 as follows:

"All controversies mentioned in article 103 shall follow the legal forms and procedures prescribed by law, in accordance with the following bases:

I. A trial in *amparo* shall always be granted upon the request of the aggrieved party.
II. The judgment shall only affect private individuals, being limited to according them the relief and protection pleaded for in the particular case, without making any general declaration as to the law or act on which the complaint is based...".

157 Fix Zamudio, *supra* note 64, at 347; Cabrera and Headrick, "Notes on Judicial Review in Mexico and the United States" (1963) 5 Inter-American L.Rev. 253 at 265.

158 Fix Zamudio, *supra* note 64, at 348.

159 *Ibid.*, at 317. Others suggest a simpler classification, dividing *amparo* into two classes: legality *amparo* (*amparo de la legalidad*) and constitutionality *amparo* (*amparo contra leyes*); Rosenn, *supra* note 27, at 797-98. Legality *amparo* protects the citizen's civil right to legality - *garantía de legalidad*; Cabrera and Headrick, *supra* note 72, at 255-56.

160 Brewer-Carias, *supra* note 36, at 164.

161 Cabrera and Headrick, *supra* note 72, at 265.

162 Fix Zamudio, *supra* note 64, at 324.

The *amparo administrativo* is used to challenge administrative acts which violate the Constitution or statute law.^{163/} In effect, this form of *amparo* constitutes a system of administrative review.

The final type, *amparo agrario* protects peasants' property rights against acts of agrarian authorities.

Consistent with the Brazilian and Mexican experience, from the latter half of the 19th century to the present day, most Latin American republics have enshrined fundamental human rights in their constitutions, and provided some form of judicial review to protect these rights.^{164/} The mechanisms for judicial review are varied: some have used expansive forms of *habeas corpus*,^{165/} while others created legal institutions, such as *amparo*^{166/}, *mandado de segurança*^{167/}, and *accion popular*^{168/}.

In contrast to the Latin American states, Canada and countries of the Commonwealth Caribbean, along with the United States, have long relied on prerogative writs such as *certiorari*, *mandamus*, prohibition, and *habeas corpus* to provide effective avenues for judicial review of administrative action. Canada enshrined fundamental human rights in its constitution only recently - in 1982. The *Canadian Charter of Rights and Freedoms*^{169/} applies to the federal Parliament and government, and the provincial legislatures and governments. Section 24(1) sets out the role of the courts in enforcing *Charter* rights:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 52 of the *Constitution Act, 1982*^{170/} provides an explicit basis for judicial review of legislation, declaring that the Constitution of Canada is "the supreme law of Canada" and that "any law that is inconsistent with the provisions of the Constitutions is, to the extent of the inconsistency, of no force and effect."

In the second half of the twentieth century, both the United Nations and Inter-American human rights systems have recognized that judicial means of control are essential to protecting the rights of citizens from infringing actions by other branches of government. For example, the *Charter of the Organization of American States*,^{171/} the *American Declaration of the Rights and Duties of Man*^{172/} and the *American Convention on*

163 Brewer-Carias, *supra* note 36, at 164.

164 *id.*

165 In addition to Brazil (1830), Peru (c.1916) and Columbia (1991).

166 In addition to Mexico (1857), Guatemala (1879), El Salvador (1886), Honduras (1894), Central American Federation (1898), Nicaragua (1911), Panama (1941), Costa Rica (1949), Argentina (1957), Bolivia (1967), Paraguay (1967), and Ecuador (1967).

167 Brazil (1934).

168 Colombia (1910).

169 *Canada Act, 1982*, Schedule B, Part I.

170 *Canada Act, 1982*, Schedule B.

171 Signed 30 April 1948; OEA/Ser.A/2, Rev. 3 [Treaty Series No. 1-E] (hereinafter, *Charter*).

172 Res. XXX, adopted by 9th International Conference of American States, 30 March - 2 May 1948; Final

Human Rights^{173/} posit that human rights are inherent and that a nation's juridical and political institutions should protect these rights.^{174/}

The *Declaration* provides that every person has the right to resort to the courts to ensure respect for his legal rights^{175/} and that states have an explicit, converse obligation to make available a simple and rapid procedure whereby the court will protect a person from acts of authority that violate any fundamental constitutional rights.^{176/} Accused persons have the right to be presumed innocent until proven guilty, and the right to be given an impartial and public hearing and to be tried before a court previously established in accordance with pre-existing laws.^{177/}

The *Charter* commits Member States to "dedicate every effort" to ensuring that adequate provision be made for all persons to have due legal aid in order to secure their rights.^{178/}

The *Convention* provides that every person has the right to a fair trial, including the right to a hearing by a competent, independent and impartial tribunal previously established by law; the right to the assistance of legal counsel of his own choosing and to communicate freely and privately with that counsel.^{179/} Everyone has the right to simple and prompt recourse to a competent court for protection against acts that violate his fundamental rights; State Parties are obliged to ensure that a person claiming such a remedy shall have his rights determined by a competent authority, to develop the possibilities of judicial remedy, and to ensure the competent authorities enforce the remedies when granted.^{180/}

In sum, the observations of Mr. Justice Howland in a Canadian case could as well have been made in respect of any of the legal systems of the Americas:

...judicial independence, like the rule of law, is one of the cornerstones of our legal system. The courts stand between the state and the individual to maintain the supremacy of the law. They safeguard the rights of the individual and ensure that there is no interference with his or with her liberty which is not justified by the laws.^{181/}

Act of 9th Conference, at 38-45 (hereinafter *Declaration*).

173 Signed 22 November 1969; OEA/Ser.A/16 [Treaty Series No. 36] (hereinafter *Convention*).

174 For example, the *Declaration* states "Whereas...The American peoples have acknowledged the dignity of the individual, and their national constitutions recognize that juridical and political institutions, which regulate life in human society, have as their principal aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness..."

175 Article XVIII.

176 *Ibid.*

177 Article XXVI.

178 Article 44(i).

179 Article 8.

180 Article 25.

181 Howland J., *R. v. Valente* (1983) 2 C.C.C. (3d) 417 at 423. See Colin Bradford, "Redefining the Role of

II. CONSEQUENTIAL IMPERATIVES

The previous section sets out the necessity for a legal system to provide for the judicial function, to provide for judicial review to ensure the Rule of Law, and to provide for a judicial check on the exercise of legislative or executive authority when individual human rights are infringed. What factors are necessary for the judiciary and bar to perform these functions on a practical level? Although the answer is somewhat different for judges than for lawyers given their different roles in society, a number of guarantees have been consistently identified as necessary.

A. Independence of the Judiciary

According to Kaufman "[t]he essence of judicial independence is...the preservation of a separate institution of government that can adjudicate cases or controversies with impartiality."^{182/} It is the judge's duty to decide the matter before him or her impartially, in accordance with his or her assessment of the facts and understanding of the law and without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.^{183/}

The independence of the judiciary is commonly referred to as comprising two basic elements: the collective independence of the judiciary as an institution and the independence of individual judges.^{184/}

1. Institutional/Collective Independence

a. Separation of Powers

Central to the concept of institutional independence of the judiciary is the idea that the judiciary not be under the authority of the executive or legislative branches of government and continue to retain impartiality and independence. President Roosevelt's efforts to "pack" the Supreme Court met with widespread criticism in the United States. The Rule of Law also demands that a legislature not be permitted to pass legislation that reverses with retroactive effect a judgement of a court or otherwise purports to interfere with the judicial function.^{185/}

the State: Political Processes, State Capacity and the New Agenda in Latin America", and Alain Touraine, "From the Mobilising State to Democratic Politics", in Bradford (ed.), *supra* note 39, for a discussion of the importance of legal and judicial institutions and procedures to facilitating participation in the democratic political process. Touraine states, "For development to take place in the absence of any unifying actor, there must be as much autonomy as possible amongst the three factors mentioned above -- more specifically, among the agents of investment, of redistribution and of national integration, and therefore amongst economic activity, socio-political debate and judicial and administrative institutions."

182 Kaufman, "The Essence of Judicial Independence" (1980) 80 Columbia L. Rev. 671.

183 See *Universal Declaration of Human Rights*, G.A. Res. 217A (III), 10 December, 1948; 3(pt. 1) GAOR, Res. A/410, at 71-77.

184 Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges", Ch. 52 of Judicial Independence: The Contemporary Debate (Dordrecht: Martinus Nijhoff, 1985) at 598.

185 See *Convention*, *supra* note 88, Article 9 (Principle of Legality and of Non-Retroactivity).

b. Administration

The administration of justice as a system requires that judges be given administrative independence from the other branches of government. Budgeting and expenditures, appointment and supervision of staff and assignment of case loads must be within judicial control. This is necessary to prevent sanction or reward in the form of distribution of resources and to guarantee timely access to the courts.

At first sight many would not regard the control of finance and administration as providing any threat to judicial independence. But if the matter is given more consideration, it is to my mind apparent that the control of the finance and administration of the legal system is capable of preventing the performance of those very functions which the independence of a judiciary is intended to preserve, that is to say, the right of the individual to a speedy and fair trial of his claim by an independent judge. To take a wholly fanciful example for the purpose of illustration, the enforcement of the rule of law by judges would be wholly frustrated by the refusal to appoint judges, to provide Courtrooms for them to sit in or staff to service those Courts. To take a much less fanciful example, there is in my view an interference with the enforcement of the rule of law if there is a failure to finance the appointment of sufficient judges or the provision of adequate Courts and Court staff to meet society's current demands for justice. The integrity of the legal system does not depend solely on the integrity of each individual judge. It also depends on the ability of the citizen to come before the independent judge and receive his judgment.^{186/}

c. Jurisdiction

The administration of justice also requires that the jurisdiction of the Courts be respected. This includes guarantees against the abrogation of judicial authority. As stated in the *Convention*, OAS Member State parties are obligated to guarantee that the competent judicial authority established under law will decide the rights of all persons who seek a remedy, to improve access to judicial remedies, and to guarantee that competent executive authorities will implement judicial decisions when rendered.^{187/}

The requirement that governments respect the pre-established jurisdiction of the judiciary also carries implications for the recent trend in several American countries to create specialized administrative tribunals. These administrative adjudicators frequently hold temporary appointments subject to renewal at the pleasure of the executive, and as a result may be vulnerable to real and perceived external influences. Thus, if administrative tribunals are entrusted with judicial or quasi-judicial authority, their members should be afforded the same protection as the judiciary.

2. Individual Independence

For individual independence, a judge should not be regarded as a civil servant, but rather as an autonomous officer of the state.^{188/}

The independence of the individual judge is comprised of two essential elements: substantive independence and personal independence. Substantive independence means that in the making of

186 Browne-Wilkinson, "The Independence of the Judiciary in the 1980's", 1988 Public Law 44 at 44-45.

187 *Convention, supra* note 88, Article 25(2).

188 Lederman, "The Independence of the Judiciary", in Marshall Judicial Ethics Casebook, Winter 1990. See also Henderson, "The Independence of the Judiciary" (1980) 14 The Law Society Gazette 236.

judicial decisions and exercising other official duties, individual judges are subject to no other authority but the law. Personal independence means that the judicial terms of office and tenure are adequately secured. Personal independence is secured by judicial appointment during good behaviour terminated at retirement age, and by safeguarding judicial remuneration. Thus, executive control over terms of service of the judges, such as remuneration, pensions, or travel allowance is inconsistent with the concept of judicial independence. Still much less acceptable is any executive control over case assignment, court scheduling, or moving judges from one court to another, or from one locality to another.^{189/}

Judges thus require long term job security, guarantees of adequate salary and pensions in order to effectively maintain independence. Similarly, the judge requires protection against incursion into this personal autonomy, including protection from criticism, civil and criminal immunity and protection from removal from office. Each of these elements is discussed in turn.

a. Adequate Remuneration

Judges require adequate remuneration. If a judge's salary can be increased or decreased at the whim of the executive there will always be a suspicion in the mind of the public that this influences decisions. In a similar vein, because judges are required by most countries to cease involvement with business, salaries must be sufficient to attract and retain qualified candidates, taking into consideration that previous income or tax-shelters will be discontinued. A rational, objective process is required to ensure adequate judicial salaries.

The concept of promotions should not appear in the judicial system. This concept could induce judges to tailor decisions in order to gain favour. The range of salaries among various levels of the judiciary should therefore also remain fairly narrow.

Inadequate salaries or financial resources available for court administration may also invite corruption of other court personnel, such as reporters and bailiffs.

b. Security of Tenure, including Discipline and Removal

Security of tenure, subject to the usual requirement for "good behaviour" is essential. Judges who can be dismissed at the pleasure of the executive will be both actually subject to influence and will appear to society to be susceptible to influence. Both the grounds and procedures for removal should be set out in law.

If a Judge is to be truly independent there must be adequate safeguards to ensure that he cannot be removed arbitrarily. Decisions which are adverse to a government, or to a section of the community, should not place the Judge in peril of losing his office. However, the public must be protected by permitting the removal of a Judge who through inability becomes incapable of carrying out his judicial functions, or misbehaviour so that his judicial standing is seriously prejudiced.^{190/}

c. Appointments

Judicial selection should be, in fact and appearance, free of political motivation, and should properly be based on such objective criteria as knowledge and experience in the law. Judicial appointments should not be made based on the political orientation of the candidate. Inclusion of a consultative element in the process for

189 Shetreet, *supra* note 99, at 598-99.

190 Sears, "The Appointment of Judges and the Termination of their Office", 24th Biennial Conference of the International Bar Association (London: International Bar Association, 1992), at 7.

judicial appointments helps to ensure impartial selection.

Five types of judicial selection processes are used in the Americas:

1. free executive selection with some form of legislative or judicial approval as a check;
2. free executive selection;
3. executive selection from a list of pre-screened candidates prepared by the judiciary or legislature;
4. legislative selection; and
5. popular elections.^{191/}

Although the appointments process differs from country to country, the underlying principle that the appointments process should not be designed in a manner that leads to actual or perceived bias or favour on the part of the judge is an essential element of any system of appointments. Further, as discussed below, no system of appointments can function to protect the judiciary where executive decrees, especially common during states of siege, operate to suspend the usual system for appointments.

d. Immunity

Judicial immunity is also essential for the independence of the judiciary. Judges must be able to render decisions without fear of reprisal by either party or of any requirement to answer for or explain decisions after they are rendered with reasons.

e. Physical Security/Personal Safety

It is obvious that for the judiciary to perform its functions, the physical security of judges, staff and court facilities must be preserved. Judges must have the authority to protect their courts and proceedings.

3. Emergencies and States of Siege

On more than one occasion, and in various countries of the hemisphere, circumstances have arisen where governments have considered it necessary to limit or curtail the exercise of rights by their citizens. Most legal systems authorize derogations from at least certain constitutionally-guaranteed rights in time of war or other emergency. Among the rules set out in various international human rights instruments is "...the vital principle that though the emergency may bar the enforcement of certain rights temporarily, it does not abrogate the rule of law:^{192/} Thus, Article 27(1) of the *Convention* recognizes that a State may take measures derogating from its

191 See discussion at Section IV(A)(2)(c), *infra*. Malcolm Rowat, Chief of the Public Sector Modernization Unit for Latin America and the Caribbean Region, notes that "In many countries, judgeships are not considered prestigious positions. In some cases they are elected, in others appointed, for a fixed term thereby compromising their independence.", Rowat, "Creating an Enabling Environment for Private Sector Development in the Latin American Region", speech to the American Conference Institute Conference on Doing Business with Latin America, Chicago, October 17-18, 1994.

192 Dess, "Study of the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms Under Article 29 of the Universal Declaration of Human Rights -A Contribution to the

obligations in such circumstances only "...to the extent and for the period of time strictly required by the exigencies of the situation..." 193/ Article 27(2) states that despite this authorization, not even a war or state of emergency authorizes any suspension of specified rights (e.g., right to juridical personality, right to life, freedom of conscience and of religion, political participation) "...or of the judicial guarantees essential for the protection of such rights."194/

"This means that the ordinary courts of a State should not abdicate their responsibility of testing the legality of a declaration of emergency, even if it may be considered necessary or advisable to leave the political organs of the State with a certain, and preferably implied, margin [of] appreciation".195/

Thus, even in time of emergency, civilians for example should continue to be tried in ordinary courts if charged with ordinary criminal offences, and detention should be subject to *habeas corpus* so as to permit the judiciary to supervise the legality of executive action.

B. Independence of the Legal Profession

The independence of the bar is essential the administration of justice. Lawyers should be free to accept any client, and in accordance with the responsibility of the profession should remain free to provide impartial and independent advice, even on matters that are controversial or political in nature.196/

1. Institutional/Collective Independence

a. Access

Access to independent legal advice is thus also critical to the administration of justice. Increasingly, legal aid is viewed as a necessary component of a political system functioning on the basis of the Rule of Law, since it ensures to those without adequate resources fair and impartial treatment before the courts.

b. Regulation

Independence of the profession can be assured only if it is free of unwarranted government regulation. Lawyers should therefore be authorized by law to set and enforce their own standards of professional conduct.

c. Membership

Entry to the legal profession should be regulated on basis of skill, competence, and knowledge and be free from discrimination on basis of race, political belief, or other extraneous factors.

Freedom of the Individual Under Law", UN Commission on Human Rights, Subcommission on Prevention of Discrimination and Protection of Minorities, Thirty-Third Session, E/CN.4/Sub.2/432/Add.7, at para. 7.

193 *Convention, supra* note 88.

194 *ibid.*

195 Dess, *supra* note 107, at para. 150.

196 Dess, *supra* note 107 at para. 967-969. See also "Report of the Seminar on National and Local Institutions for the Promotion and Protection of Human Rights", UN Document ST/HR/Ser.A/2, at 44.

2. Individual/Personal Independence

a. Representation

Lawyers must be free to represent either party in a dispute and oppose government actions on behalf of clients. Lawyers must believe themselves to be free to act for any citizen, in any way within the confines of suitable practice. Without this guarantee, lawyers may resist the request of a citizen for representation for fear of reprisal, and the fundamental right to counsel would lose its meaning.

Freedom to properly represent a client entails consequential rights, such as the right of the lawyer to meet with his or her client, to obtain information relevant to the client's case, and to have access to sites necessary for his representation. Conversely, no system of law should permit the lawyer, in his capacity as counsel, to be identified with his client's cause, no matter how unpopular, i.e., to be penalized for his advocacy.

b. Privileged Communications

The right to representation requires that lawyers also enjoy privilege in respect of communications with clients and immunity for statements made in good faith and in support of a client's position or rights.

c. Physical Security/Personal Safety

Lawyers must be free from threats or physical danger in the exercise of their profession.

3. Emergencies and States of Siege

The preservation of judicial guarantees for the protection of rights from which derogations are not permitted in time of war or emergency requires that the individual and collective independence of the bar not be compromised in such circumstances.

III. THE EXTENT OF THE PROBLEM: THREATS TO INDEPENDENCE

Regrettably, the Americas have witnessed a great number and variety of threats to the independence of judges and other legal professionals, including outright subversion of the role of the courts, attacks on legal professionals, and more subtle threats such as the erosion of judicial salaries and the coercive use of disciplinary proceedings.

Because they usually practice outside government employ, lawyers face threats to personal safety and the removal of their right to practice. Prosecutors also tend to face legal persecution, disciplinary action and removal from their jobs.

Judges face both threats to their personal security and removal from the bench, punitive transfers and legal persecution. The independence of the judiciary has also been threatened by individual harassment or persecution and by actions that undermine the administration of justice as a system. Such actions as limiting guarantees of tenure or adequate salaries also affect each judge's individual independence.

1. The System of Justice

a. Abrogation of Judicial Powers

The most obvious form of executive interference with the judiciary is formal abrogation of judicial authority, often by *de facto* military regimes.

In 1960 Cuba formally abrogated judicial independence after the acquittal of forty-five members of Bastista's air force on genocide charges. President Castro convened a special tribunal to reverse the acquittals. Judicial independence was formally abolished by the *Judicial Organizational Law of 1973* which explicitly subordinated the judiciary to the Council of Ministers. These measures were confirmed by the 1976 constitution and the 1977 *Judicial Organization Law*.

Similarly, in 1977, Uruguay instituted the *Institutional Act* and explicitly abolished the independence of the judiciary by discarding the tripartite separation of powers and eliminating the judiciary as a separate branch of government. The Uruguayan government gave itself the power to dismiss any judge for any reason. All court administration and control was transferred to the Minister of Justice, who was granted full authority over judicial salaries.

In Ecuador, President Velasco Ibarra abrogated the 1967 constitution, reformed the Supreme Court and took over the government after the Supreme Court invalidated several executive decrees.

Argentina, Brazil, El Salvador and Peru have each revamped court membership pursuant to institutional acts issued by *de facto* regimes.^{197/}

In Argentina, the Supreme Court has a guarantee of tenure for life. Despite this, the Court has been replaced *en masse* six times since 1946 (1946, 1957, 1966, 1973, 1976, 1983).^{198/} Judge Raul Alberto Borrino was removed from a case dealing with an allegation of torture by the police and the judge subsequently

197 Rosenn, "The Protection of Judicial Independence in Latin America", 102-3 Law and Justice 30 (1989); Roberts, "The Writ of Amparo: A Remedy to Protect Constitutional Rights in Argentina" 31 Ohio St.L.J. 831 (1970).

198 "Between 1930 and 1970 constitutional guarantees were suspended approximately forty-five percent of the time. The Supreme Court was forced to recognize and 'legitimate' the seizures of power in 1943, 1955, 1962 and 1966. Members of the Court were forced to pledge fealty to the goals of the 1946 and 1966 'revolutions'...In March, 1976...the judges of the Supreme Court and all Superior Tribunals (of the provinces) were relieved of their duties, and the security of tenure of office was suspended for all judges and judicial officials. Within two weeks of the coup, twenty-four judges were permanently removed from office.", Feinrider, *supra* note 27, at p. 187. Campos, *The Argentine Supreme Court: The Court of Constitutional Guarantees* (Brsk, trans., 1982), in analyzing the provisional government established by General Uriburu in 1930, stated "[t]he high court...wrestled with the consequences of recognizing a government which had come to power following a patent breach of constitutional order in deposing the elected government of President Yrigoyen. But the Court, as the only remaining legitimate remnant of constitutional democracy, responded with both firmness and prudence...[The Court's resolution] was an attempt to reconcile dedication to constitutional principles with practicality" by acknowledging the authority of provisional governments while reaffirming its own authority to protect individual rights. See Note, "Constitutional Ambiguity and Abuse in Argentina - The Military Reign 1976-1983", 6 J. Human Rts. 353 (1989), for a detailed review of the way in which Argentine Courts deprived themselves of the ability to review executive action under extraordinary authority by concluding that declaration of a state of siege is a non-reviewable "political question". See also Zoglin, "The National Security Doctrine and the State of Siege in Argentina: Human Rights Denied", 12 Suffolk Trans. L.J. 266 (1989).

assigned to the case dropped all charges and free the officers.^{199/} Also in 1991, Judge Jose Ignacio Torrealday was removed from his post while investigating illegal adoptions and brought to trial. During the trial his tires were slashed.^{200/} In 1990, the new government of Argentina enlarged the Supreme Court from five to nine members, and appointed to it five lawyers with ties to the ruling party.^{201/}

In Brazil, the Supreme Federal Tribunal was expanded in 1965 from eleven to sixteen by the military government. Three years later three highly independent judges were forced to retire, the Chief Justice stepped down under protest, and the size of the court was returned to eleven members.^{202/}

In 1979, the military *junta* in El Salvador dismissed the entire Supreme Court and appointed judges more sympathetic to the regime. Similarly, the retirement age for judges was often modified under President Valasco to allow the appointment of new judges or the replacement of those deemed unacceptable.

In Peru, on April 5, 1992, President Alberto Fujimoro suspended the Constitution, revoked the independence of the judiciary and suspended Congress. Some 30 prosecutors and 137 Magistrates and Judges were dismissed by mid-May of that year.^{203/}

b. Incursions into Jurisdiction

American constitutions rarely restrict the incursion of special tribunals into regular judicial jurisdiction. Incursions into jurisdiction can occur through the creation of special tribunals outside the regular court system or the curtailment of the powers of review of the ordinary courts.^{204/} For example, in 1965, Brazil began to try civilians accused of national security crimes outside the court system through military tribunals. Brazilian courts of ordinary jurisdiction were prevented from invalidating this extension because of a provision excluding judicial review of all government acts based on various *Institutional Acts*.^{205/} In 1966, the Organia government promulgated a law regulating *amparo* to limit access to judicial remedies^{206/} and a subsequent Decree granted

199 Brody, Reed, ed., The Harassment and Persecution of Judges and Lawyers 1990-1. Centre for Independence of Judges and Lawyers of the International Commission of Jurists: Switzerland, 1991 (hereinafter *ICJ 1990-1*); Lawyers' Committee for Human Rights. In Defence of Rights: Attacks on Lawyers and Judges in 1991: New York, 1991 (hereinafter *Lawyers' Committee 1991*).

200 *Lawyers' Committee 1991*.

201 Brody, Reed, ed., The Harassment and Persecution of Judges and Lawyers July 1989-June 1990, Centre for Independence of Judges and Lawyers of the International Commission of Jurists: Switzerland, 1990 (hereinafter *ICJ 1989-90*).

202 *id.* Feinrider, *supra* note 27, notes that the military government also 'retired' a number of lower judges.

203 Brody, Reed, ed. The Harassment and Persecution of Judges and Lawyers June 1991-May 1992, Centre for Independence of Judges and Lawyers of the International Commission of Jurists: Switzerland, 1992 (hereinafter *ICJ 1991-1992*).

204 Rosenn, *supra* note 112.

205 Feinrider, *supra* note 27 notes that Institutional Act No. 6 "narrowed the Court's jurisdiction to hear appeals in *mandado de seguridad* cases, and eliminated its appellate jurisdiction for cases in which civilians had been tried by military courts for 'national security' crimes.

206 See Feinrider, *supra* note 27, at 191 for a detailed description of the limits imposed.

jurisdiction to military courts over civilians for several common crimes. In 1982, Guatemala enacted a decree-law which provided for Tribunals of Special Jurisdiction to deal with people accused of violating a declared state of seige or participating in other subversive activity. Similar legislation has been in effect at various times in Chile, Colombia, El Salvador, Peru and Uruguay.

c. Judicial Salaries

All countries in the Americas face problems in varying degrees in seeking to maintain judicial salaries at appropriate levels.

In 1985, the Argentinean Supreme Court held that the constitutional guarantee of the irreductability of judicial salaries should be interpreted as real, rather than nominal and affirmed a lower court ruling requiring monetary correction of judicial salaries to compensate for inflation.^{207/} In the United States, judicial salaries have also declined in real dollars. Lawsuits have been instituted by judges challenging the constitutionality of Congress' failure to raise salaries.^{208/} Canadian courts are also considered seriously under-funded.^{209/}

d. Failure to Enforce Judicial Decisions

Several instances of refusal by the executive or legislative branches to implement judicial decisions over the last several years illustrate the scope of this threat to independence.

In Chile, under the Allende government, the executive refused to enforce a decision ordering the return of illegally occupied land, seized factories and asserted the President's right to review every judicial decision.

In Colombia, in 1989, Judge Marta Luz Hurado of the 6th Public Order Courts issued warrants on charges of terrorism against a battalion commander, an army major and the commander of police at Segovia in respect of the massacre of 43 people in response to which, according to witnesses, the police failed to intervene. The army refused to place the officers under arrest and a Military Judge held there were no grounds on which to institute pre-trial proceedings against the police.

e. Adequacy of Resources

Adequate resources and control over their disposition is crucial for the judiciary. Most countries in the region allocate a more or less fixed percentage of the national budget (2 - 3 per cent) to the judicial sector, though often even this amount is not made available. As a result, the court infrastructure has deteriorated badly over the years. This includes not only overall courtroom facilities but also the informatics base which is essential for proper records management, statistical analysis, case flow management analysis, ong-range planning and maintenance of archives. As such, most Latin American courts do not have systematic records for cases pending, disposed of, as well as judicial opinions for access by the public. In some countries, this has allowed court clerks to become key players in docket management and prone to bribery.^{210/}

207 Rosenn, *supra* note 112.

208 *Ibid.*

209 Lederman, *supra* note 103.

210 Rowat, *supra* note 102.

In 1989 in Argentina amnesty was granted to members of the military charged with human rights violations between 1973 and 1983, largely because of the length of time and resources required to clear up the cases.

2. Legal Professionals Individually

a. Discipline and Removal of Judges

Judicial independence remains threatened by acts or censure or removal of judges for political reasons. Instances of improper discipline or removal have been reported in many member countries over several years.^{211/}

In Chile, Judge Rene Garcia Villegas of the 20th Criminal Court of Santiago was suspended at half salary for two weeks on October 25, 1988 for making public statements to newspaper journalists and on video about torture practices of the state security police. He was removed from his post in January of 1990 on grounds of "lack of good behaviour as required by law". Garcia had pursued more than 30 complaints of torture by the state security police and from October 1989 to his removal received 6 death threats, one involving the ransacking of his home on October 5, 1989.^{212/} Judge Carlos Cerdá Fernandez of the Santiago Court of Appeal faced disciplinary proceedings for refusing to close a case against several officers of the armed forces implicated in kidnapping and disappearances. He was suspended for two months at half pay and was subsequently dismissed, ostensibly based on a poor evaluation.^{213/} This removal was overturned on appeal and he was reinstated in 1991.^{214/}

In Nicaragua, in July of 1990, President Chamorro by decree removed the President of the Supreme Court and replaced him with a new member appointed under an expansion of the Court.^{215/}

211 Reports of unwarranted discipline or removal of judges and lawyers include Argentina: three lawyers faced disciplinary action (*ICJ 1989-1990*), six judges removed (*ICJ 1990-1991*), 2 judges removed unilaterally (*ICJ 1991-1992; Lawyers' Committee 1991*), three lawyers dismissed or removed from specific cases (*Lawyers' Committee 1991*); Chile: two judges removed from the bench unilaterally or disciplined (*ICJ 1989-1990*); Lawyers' Committee for Human Rights, *In Defence of Rights: Attacks on Lawyers and Judges in 1990*, New York, 1990 (hereinafter *Lawyers' Committee 1990*), one Judge facing discipline (*ICJ 1990-1991*), one judge removed from the bench (*Lawyers' Committee 1991*); El Salvador: two judges forced to resign after political pressure (*ICJ 1990-1991*); Nicaragua: one judge (President of Supreme Court) removed unilaterally (*ICJ 1990-1991*); Colombia: one judge disciplined (*ICJ 1991-1992*), three judges facing discipline Lawyers' Committee for Human Rights, *In Defence of Rights: Attacks on Judges and Lawyers in 1992*, New York, 1992 (hereinafter *Lawyers' Committee 1992*); Brazil: two lawyers removed from cases (*Lawyers' Committee 1992*); Haiti: closure of one judge's court (*Lawyers' Committee 1992*).

212 Brody, Reed ed. *The Harassment and Persecution of Judges and Lawyers January 1988-June 1989*. Centre for Independence of Judges and Lawyers of the International Commission of Jurists: Switzerland, 1989 (hereinafter *ICJ 1988-1989*).

213 *ICJ 1990-1991; Lawyers' Committee 1990*.

214 *Lawyers' Committee 1991*.

215 *ICJ 1990-1991*.

In Panama, Judge Luis Guillermo Zuniga had his telephone lines tampered with and is currently facing disciplinary hearings for releasing a former military officer on bail.216/

b. Personal Security of Judges and Lawyers

In recent years a number of countries have witnessed an alarming number of attacks on legal professionals, with only some of the cases having been followed up through investigation or the laying of charges.217/ Attacks against judges and lawyers range from assassinations to kidnapping and death threats. The number of reported threats in the United States far exceeds those reported in other countries, possibly as a result of the high reporting rate of threats by both judges and lawyers as well as because of the concerted effort by the government to maintain accurate statistics. Both Colombia and Peru also show higher rates of violence against legal professionals than other countries, due in part to a number of high-profile attacks in these two countries that led to increased vigilance in reporting and scrutiny by non-governmental organizations.

The data available suggests that physical security is a problem in virtually every member country and is increasingly prevalent. Further, statistics may be misleading, since persons murdered or attacked may be subject to death threats or other forms of harassment before the attacks. Conversely, those arrested, detained or kidnapped are often the victims of torture while in custody or subject to illegal searches upon arrest. Finally, statistics are thought to be grossly underrepresentative for many countries due to the success of various intimidation campaigns and the lack of systematic collection of data by governments.218/

In Colombia, the Andean Commission of Jurists calculates that an average of twenty-five judges and lawyers have been assassinated or have been attacked each year since 1979.219/ In 1989 alone, there were nine known assassinations of judges, two attempted assassinations and countless death threats. By 1990, these numbers had increased to eleven judges assassinated and nine who faced attempts on their lives.220/

216 *ICJ 1990-1991.*

217 *ICJ 1989-1990.*

218 All statistics cited in this section are based on threats to judges and lawyers in their professional capacity. Cases unrelated to the profession or cases which could not be confirmed are not included in either the *ICJ* or the *Lawyers' Committee* reports.

219 *Justicia Para La Justicia: Violencia Contra Jueces y Abogados en Colombia: 1979-1991*, Colombian Section, Andean Commission of Jurists (1992), cited in Pahl, "Concealing Justice or Concealing Injustice?: Colombia's Secret Courts", 21 Denv. J. Int'l L. & Pol'y 431 (1993). Pahl goes on to note that "in all, 515 cases of violence against judges and lawyers have been reported between 1979 and 1991, 329 of which have been murders or attempts to murder. And, of the approximately 4,500 Colombian judges, roughly 1,600 have received threats to themselves or their families."

220 *ICJ 1988-1989* reported eleven lawyers assassinated and by the 1989-1990 report that number had increased to twenty-five murders and eight attempted murders. From June 1990 to May 1991 the *ICJ* reported five assassinations of judges, thirty assassinations of lawyers and four attempts on the lives of lawyers. From June 1991 to May 1992 there were two assassinations and three attempted assassinations reported against judges and fifteen assassinations and three attempts against lawyers. The decrease in 1992 is largely attributed to a decrease in violence related to drug prosecutions. The *Lawyers' Committee* reported seven assassinations and one attempted assassination of judges in 1990 and twenty-five assassinations and two attempts against lawyers. The *Lawyers' Committee* 1991 report indicated four judicial assassinations with two attempts and ten assassinations of lawyers, with three attempted assassinations. For 1992 the *Lawyers' Committee* reported two assassinations and two attempts against judges and ten assassinations and three attempts against lawyers. (*ICJ 1989-1990; ICJ*

Between 1989 and 1990, the reports indicated that at least two of the murdered judges requested but did not receive any police protection.^{221/} Harassment and arrests of judges and lawyers in Colombia has also been reported.^{222/}

In Peru, in 1989-90, seven assassinations of judges were reported along with two attempted assassinations.^{223/} In 1990-91, six assassinations and five attempts were reported against judges, with one attempt reported against a court staff member.^{224/} Lawyers also faced assassinations, death threats, kidnapping and bombings.^{225/}

In 1989, Judge Robert S. Vance and Judge Robert E. Robinson of the United States were killed by mail bombs. The killings are believed to be related to race relations in the country. Judge John P. Coderman was injured by a bomb concealed in package left outside his apartment in December of 1989.^{226/}

The problem of physical security also extends to court staff. A number of staff and other court officials have been subject to violence in various countries. In Colombia, three judicial secretaries and one court official^{227/} were assassinated in 1990. Judge Jorge Gomez Lizarazo fled Colombia after death threats. The

1990-1991; *ICJ 1991-1992; Lawyers' Committee 1990; Lawyers' Committee 1991; Lawyers Committee 1992*).

221 Enrique Low Murta and Samuel Alonso Rodriguez Jacome. See *ICJ 1989-1990; Lawyers Committee 1990*.

222 *ICJ 1989-1990; ICJ 1990-1991; ICJ 1991-1992* report: from July 1989 to June 1990 three lawyers detained, two subject to torture, five "disappearances", and two kidnappings; from June 1990 to May 1991 seven lawyers kidnapped; from June 1991 to May 1992 one judge kidnapped and one lawyer kidnapped. *Lawyers' Committee 1990; Lawyers' Committee 1991* report: one judge kidnapped, one lawyer arrested and detained and four lawyers kidnapped in 1990 and one judge kidnapped and two lawyers who "disappeared" in 1991.

223 *ICJ 1989-90; Lawyers' Committee 1990*.

224 *ICJ 1990-1991; Lawyers' Committee 1991; ICJ 1989-1990* reports one incident of torture and two bombings against judges; from June 1990 to May 1991 one illegal search and one bombing were reported by judges; and from June 1991 to May 1992 seven assassinations, two attempted assassinations and seven death threats were reported against judges and one bombing was directed against a court staff member.

225 The ICJ reported from January 1988 to June 1989 two assassination attempts, two assassinations and eight death threats against lawyers, from July 1989 to June 1990 eight death threats, three assassinations, one attempted assassination and one "disappearance", from June 1990 to May 1991 seven assassinations, three bombings, four attempted assassinations and six death threats, and from June 1991 to May 1992 three assassinations, one attempted assassination, five death threats, one kidnapping and one bombing. The Lawyers' Committee findings were similar: in 1990 six judicial assassinations, one attempt; six assassinations of lawyers, one attempted assassination, two bombings, six death threats and one kidnapping; in 1991 one judicial assassination, two attempts, two death threats and two illegal searches, one lawyer assassinated, four attempts, two death threats and two bombings with one staff member assassinated; in 1992 one attempted assassination against a lawyer, one "disappearance", two cases of detention, two illegal searches and one staff member who received a death threat.

226 *ICJ 1989-1990*.

227 Efrain Bonilla Camacho, Secretary of the Municipal Criminal Court in Alcala, Javier Humberto Gomez Castano, Secretary of the 17th Municipal Criminal Court in Medellin and a secretary and official of the Judicial Commission of the 75th Court of Criminal Investigation in Bogota. See *ICJ 1990-1991 and*

day after an article in which he denounced the Colombian military for human rights violations appeared in the New York Times, his personal secretary was killed.^{228/} Twelve members of the Judicial Commission of Inquiry of the region of Magdalena Media, including two magistrates (Mariela Morales Caro and Pablo Antonio Beltran Palomino) and their secretaries, six judicial detectives and two drivers were shot dead on January 18, 1989 while investigating massacres, political killings and "disappearances" in the region.^{229/} Judge Luis Miguel Angarite, a member of the Judicial Commission of the 75th Court of Criminal Investigation was killed along with several staff members in an ambush in Bogota.^{230/}

In his report on his visit to Colombia, the Special Rapporteur on Summary and Arbitrary Executions of the UN Commission on Human Rights, S. Amos Wako, noted that victims of extra-judicial execution in Colombia have included various justices of the Supreme Court, several other judges and judicial officials. In the same report Asonal Judicial (the union representing judicial official and workers) estimated that one-fifth of the 4,379 judges in Colombia were under the threat of death.^{231/}

Killings in Colombia have not always been connected to the international drug trade.^{232/} Marta Lucia Gonzalez was forced to flee Colombia in September of 1988 after receiving death threats related to an investigation of mass killings at a banana plantation.^{233/} Judge Maria Elena Diaz Perez took over and was assassinated July 28, 1989.^{234/}

Attacks on judges in Peru have forced the concentration of the courts into the departmental capitals, greatly impeding the access to justice. Both the Andean Commission of Jurists, an affiliate of the ICJ, and the Peruvian office of Amnesty International have been damaged by explosions, impeding independent scrutiny of incidents.^{235/}

Cesar Carlos Armando Salazar, a civil judge of the Superior Court of Justice of Ayacucho, had his home

Lawyers' Committee 1991.

228 *Lawyers' Committee 1991; ICJ 1988-1989* reported ten staff assassinations, and *ICJ 1989-1990* reported ten assassinations and three attempted assassinations from June 1991-May 1992. The Lawyers' Committee reported nineteen staff assassinations in 1990 and eight assassinations with one attempted assassination in 1991.

229 *ICJ 1988-1989.*

230 *Lawyers' Committee 1991.*

231 U.N. document E/CN.4/1990/22/Add.1. Death threats have also been recorded in great numbers against lawyers and staff: see *ICJ 1988-1989; ICJ 1989-1990; ICJ 1990-1991; ICJ 1991-1992; Lawyers' Committee 1990, 1991, 1992.*

232 Pahl, *supra* note 129, states that according to the Andean Commission study, "...of the 240 cases of violence against the judiciary with a known author or cause, eighty have been linked to paramilitary groups, fifty-eight to drug traffickers, forty-eight to state agents (including the military and the police), thirty-two to guerrillas, and twenty-two to other factors".

233 *ICJ 1988-1989.*

234 *ICJ 1989-1990.*

235 *Ibid.*

dynamited. The group believed responsible (the *Camando Rodrigo Franco*) is a paramilitary group dedicated to violence against members and supporters of the Shining Path (*Sendero Luminoso*) guerillas. Six months earlier, Amando Salazar was forced to move to the departmental capital after repeated death threats in the province of Cangallo.

Arrest and detention of judges and lawyers has also been reported in Peru.^{236/} On May 28, 1990, Diesel Alfonso Amasifuen Pinchi was detained by members of the national security force and upon his release, reported having been tortured.^{237/} Judge Abner Torres Pinnedo was arrested on September 28, 1990 after intervening in the beating of a civilian by a member of the National Police in Villa Rica. Judge Torres was subsequently assaulted while in custody and required hospital treatment.^{238/}

Other forms of harassment of the judiciary reported in Peru include criminal complaints^{239/} and penal actions^{240/} for unpopular decisions. The case of Judge Moises Ochoa Giron is an example of several forms of harassment. The judge was investigating possible military involvement in the murder of a journalist. The military refused to identify members known only to the Court by pseudonyms. The judge was visited in his office by soldiers demanding information on the case and at his home by approximately thirty soldiers who claimed to be looking for a subversive. A number of the soldiers illegally searched the judge's home. An Americas Watch report indicated that an army document dated March, 1991 was made public which urged the creating of a military court to hinder the process of the Ochoa investigation.^{241/}

In the United States, 230 judges and 101 prosecutors received threats in the period from October 1988 to September 1989. The number of incidents has been steadily increasing in the last few years.^{242/}

Argentina^{243/}, Bolivia^{244/}, Brazil^{245/}, Canada^{246/}, Chile^{247/}, Cuba^{248/}, the Dominican Republic^{249/},

236 *ICJ 1988-1989; ICJ 1989-1990; ICJ 1990-1991; ICJ 1991-1992* reports: from January 1988 through June 1989, one lawyer detained; from July 1988 through June 1990, one judge and two lawyers detained; from June 1990 through May 1991, two judges and four lawyers detained; and from June 1991 through May 1992, two judges and five lawyers arrested or detained. *Lawyers' Committee 1990; 1991; 1992* reports: in 1990, one judge detained; in 1991, two lawyers detained; and in 1992 seventeen lawyers detained or arrested.

237 *ICJ 1989-1990; Lawyers' Committee 1990.*

238 *ICJ 1990-1991; Lawyers' Committee 1990.*

239 Judge Victor Segundo Roca Vergas of Lima acquitted an alleged leader of the Shinning Path and a military commander subsequently filed a complaint against him; *ICJ 1989-1990*.

240 Judge Cesar San Martin Castro of the Superior Court of Lima faced penal action after granting a petition of *habeas corpus* during a state of emergency relying on the Peruvian Constitution and the Inter-American Advisory Opinion 08/87 of the Inter-American Court of Human Rights. These charges were subsequently dismissed; *ICJ 1989-1990*.

241 *Lawyers Committee 1991; ICJ 1990-1991.*

242 The U.S. Marshall's Report in *ICJ 1989-1990* reports 335 threats against judges and 110 threats against prosecutors in the period from October 1989 to June 30, 1990, and the U.S. Marshall's Report in *ICJ 1990-1991* and in *ICJ 1991-1992* reports that from October 1, 1990 to September 30, 1992, 240 threats were reported against judges.

243 *ICJ 1989-1990; 1990-1991; 1991-1992* reports: from July 1989 to June 1990, attempted assassinations, two

Ecuador^{250/}, El Salvador^{251/}, Guatemala^{252/}, Haiti^{253/}, Honduras^{254/}, Mexico^{255/}, Panama^{256/} and

death threats and one bombing involving judges; from July 1990 through May 1991, nine death threats and one attack against judges, one staff member assassinated and one death threat, and one death threat against a lawyer; from June 1991 through May 1992 death threats against judges. *Lawyers' Committee 1990; 1991; 1992 reports*: in 1990, one illegal search, three death threats, one bombing, one attempted assassination against judges, one death threat against a lawyer; in 1991, one death threat and one attempted assassination against judges, and one death threat and one arrest involving lawyers; in 1992 eight death threats against judges and two attacks against lawyers, as well as six bombings or fires in courts.

- 244 From July 1989 through June 1990, three threats against lawyers, *ICJ 1989-1990* and *Lawyer's Committee 1990*; in 1992 1 lawyer arrested, *Lawyers' Committee 1992*.
- 245 *ICJ 1988-1989; 1989-1990; 1990-1991; 1991-1992 reports*: from January 1988 through June 1989, one lawyer assassinated, one attempted assassination and one case of unwarranted detention; from July 1989 through June 1990, one lawyer assassinated, three attempted assassinations, three death threats, four cases of detention or arrest and one assault; from July 1990 through May 1991 one death threat against a judge, eleven death threats against lawyers; from June 1991 through May 1992, four death threats against lawyers, one assassination and two cases of detention; *Lawyers' Committee 1990; 1991; 1992 reports*: in 1990 one judge detained, seven lawyers detained and one assassinated; in 1991 five death threats against a lawyer and one assassination; and in 1992, three lawyers assassinated and seven death threats. The *Journal do Brasil* of August 5, 1994, following the assassination of a criminal court judge (Luis Leite Araujo), reported that the President of the Judicial Tribunal of Rio de Janeiro admitted that the majority of judges in Rio have been threatened, but that the federal Military Police had yet to provide adequate security. The article also reported that a group of men had been investigated for "casing" the summer home of the President of the Tribunal, that the gas line to his home had been cut off, and that his son's car had been vandalized; and that several judges and the chief prosecutor had received telephone threats in connection with prosecutions of participants in the *jogo do bicho* (a Brazilian "numbers racket").
- 246 One judge assassinated, one attempted assassination and one lawyers assassinated; The Canadian Bar Foundation, Report to the Canadian Bar Association on the Independence if the Judiciary in Canada, August 20, 1985.
- 247 *ICJ 1988-1989; 1989-1990; 1990-1991; 1991-1992 reports*: from January 1988 through June 1989, two death threats against judges, two death threats against lawyers; from July 1990 through May 1991, one judicial bombing, one death threat, one detention and one death threat against a lawyer; *Lawyers' Committee 1990; 1991; 1992 reports*: in 1990, one death threat against a judge, one lawyer arrested; in 1992 one illegal search, one assassination, one bombing and six kidnappings, all involving lawyers.
- 248 *ICJ 1988-1989; 1990-1991 reports*: from January 1988 through June 1989, one lawyer detained, from June 1990 through May 1991, two lawyers detained; *Lawyers' Committee 1992 reports*: one lawyer arrested.
- 249 *Lawyers' Committee 1992 reports*: in 1992, one lawyer arrested and one lawyer assassinated.
- 250 *ICJ 1990-1991; 1991-1992 reports*: from June 1990 through May 1991, one lawyer assassinated; from June 1991 through May 1992, two lawyers detained; *Lawyers' Committee 1992 reports*: in 1992, two lawyers detained.
- 251 *ICJ 1988-1989; 1989-1990; 1990-1991; 1991-1992 reports*: from January 1988 through June 1989, one judge assassinated; from July 1989 through June 1990, one lawyer arrested, two detained and one

Paraguay^{257/} have all recorded attacks against the judiciary and/or legal professionals in recent years.

c. Transfer of Judges

Transfer or re-assignment of judges has been used a punitive measure in a manner that has compromised the independence of the judiciary. For example, in El Salvador, after Judge Bernardo Ruada Murcia sentenced five members of the National Guard to long prison terms based on a jury finding them guilty of murdering four American nuns, the Supreme Court reversed the convictions and Ruada was transferred to northern Chalatenango Province, an area subject to frequent clashes between leftist guerillas and the army and two hours from the Judges home.^{258/}

tortured; from June 1991 through May 1992, one attempted assassination against a judge; *Lawyers' Committee 1991; 1992 reports*: in 1991, one attempted assassination against a judge, two lawyers who experienced interference with investigations; in 1992, one lawyer attacked.

- 252 *ICJ 1988-1989; 1989-1990; 1990-1991; 1991-1992 reports*: from January 1988 through June 1989, one judge kidnapped; from July 1989 through June 1990, one judge and one lawyer received death threats; from June 1991 through May 1992, two lawyers received death threats; *Lawyers' Committee 1990; 1991; 1992 reports*: in 1990, one lawyer assassinated; in 1991, two lawyers received death threats; in 1992 one judge and two lawyers received death threats.
- 253 *ICJ 1988-1989; 1989-1990; 1990-1991; 1991-1992 reports*: from January 1988 through June 1989, two lawyers assassinated; from July 1989 through June 1990, three lawyers detained, one subject to illegal search; from June 1990 through May 1991, two lawyers received death threats, three detained, and one assaulted; from June 1991 through May 1992, five judges arrested or detained, three lawyers arrested or detained and one subject to illegal search; *Lawyers' Committee 1990; 1991; 1992 reports*: in 1990, two lawyers received death threats, three arrested or detained; in 1991, two judges arrested, six lawyers arrested, four received death threats, one assaulted, and two detained; in 1992, three judges subject to illegal searches; one attempted assassination, one assassination and four arrested, eight lawyers arrested, two tortured, one detained, one searched illegally, one assassinated, one received death threat, and one staff member arrested.
- 254 *ICJ 1989-1990; 1990-1991 reports*: from July 1989 through June 1990, one lawyer detained and one assassinated; from July 1990 through May 1991, two lawyers detained, one tortured, one assassinated; *Lawyers' Committee 1991; 1992 reports*: in 1991, two lawyers received death threats, three detained, one assassinated, one assaulted; in 1992, one lawyer received a death threat.
- 255 *ICJ 1989-1990; 1990-1991 reports*: from July 1989 through June 1990, one judge assassinated, two lawyers assassinated and one death threat; from June 1990 through May 1991, one assault against a lawyer; *Lawyers' Committee 1990; 1991; 1992 reports*: in 1990, one judge assassinated, one kidnapped, one arrested and one receiving death threat; in 1991, one lawyer assassinated and two detained; in 1992, one lawyer received a death threat.
- 256 *ICJ 1990-1991 reports*: from June 1990 through May 1991, two attempted assassinations and one death threat against judges, and three lawyers received death threats.
- 257 *ICJ 1988-1989; 1989-1990; 1990-1991 reports*: from January 1988 through June 1989, six lawyers detained; from June 1990 through May 1991, two lawyers detained and one attempted assassination; *Lawyers' Committee 1991 reports*: in 1991, two lawyers detained and one attempted assassination.
- 258 Rosenn, *supra* note 112.

d. Freedom from Legal Persecution

Legal persecution of lawyers appears to be common in a number of countries of the Americas, through such techniques as taxation audits, disciplinary charges and criminal charges for offences such as "offending the military" which are often preferred against lawyers working for victims of torture. Recently, in the United States lawyers have been jailed for their refusal to testify against clients or former clients.^{259/} Other countries reported to have used these techniques against members of the legal community include Argentina, Brazil, Chile, El Salvador, Guatemala, Haiti, Paraguay, Peru and Venezuela.^{260/}

3. **Emergencies and States of Siege**

In Argentina, "[the] Argentine Supreme Court has developed the practice of issuing accords legitimating *de facto* governments in return for a promise by the leaders of the *golpe* to maintain the supremacy of the Constitution... The Brazilian Supreme Federal Tribunal similarly recognized the *golpe* that originally brought Getulio Vargas to power ... but has not made this a regular practice."^{261/}

Shortly after taking power, the Pinochet regime sought and obtained a judgement of the Supreme Court that the *coup d'état* was a legal act to remove a government that was "flagrantly illegitimate". The Court also "...pardoned the armed forces' flagrant violation of the 1925 Constitution, which stated specifically that any act in breach of Article 22 would be null and void. The Court reasoned that the Allende government's 'illegal' acts had rendered the Constitution invalid, and therefore, the armed forces were obligated only to 'respect the Constitution and the Laws of the Republic insofar as the present state of the country so permits...'"^{262/}

In 1985, the Peruvian government established various emergency zones on the basis of Article 231 of the Constitution, and granted military jurisdiction over military and common offences committed by military personnel in the designated areas.^{263/} On April 5, 1992, President Fujimori proclaimed an "emergency

259 See the case of Linda Backiel and her client Elizabeth Ann Duke, a political activist charged with possession of explosives; *ICJ* 1989-1990.

260 *ICJ* 1988-1989; 1989-1990; 1990-1991; 1991-1992 reports: from January 1988 through June 1989, in Brazil, one lawyer; in Chile, one judge and three lawyers; in Haiti, one judge; in Peru, one judge; from July 1989 through June 1990, in Chile, six lawyers; in Guatemala, one lawyer; in Paraguay, two lawyers; in Peru, one judge; in the United States, one lawyer; in Venezuela, one lawyer; from June 1990 through May 1991, in Argentina, one judge and five lawyers; in Brazil, two lawyers; in Chile, one staff member; in the United States, two lawyers; from June 1991 through May 1992, in Argentina, one lawyer; in the United States, four lawyers; *Lawyers' Committee* 1990;1992 reports: in 1990, in Argentina, one lawyer; in Brazil, one lawyer; in Guatemala, one lawyer; in Venezuela, one lawyer; in 1992, in Chile, one lawyer; in El Salvador, one lawyer; in Guatemala, two lawyers.

261 Rosenn, *supra* note 27, at p. 813.

262 Galleher, *supra* note 26.

263 Law 24,150, approved by Congress in June, 1985. A 1991 interim report by M. Pinto to the Inter-American Commission on Human Rights, "Measures Necessary to Enhance the Autonomy, Independence and Integrity of the Members of the Judicial Branch", OEA/Ser.L/V/II.80, Doc. 9, 23 September 1991 (hereinafter IACHR Report), at 13, notes that as of July 28, 1991, more than half of Peru was under the emergency zone system.

Government of national reconstruction" under which the judicial branch was reorganized.^{264/} On that day, military units took over the courts of justice, and in the following days police protection for judges hearing terrorism-related cases was withdrawn.^{265/}

IV. THE RESPONSE IN MEMBER COUNTRIES

Member countries have responded to the threats described above through constitutional, legal, and political measures. In respect of Colombia, the proposed cure has, according to a 1991 interim report to the Inter-American Commission on Human Rights^{266/}, undermined other values fundamental to the Inter-American system.

A. Independence of the Judiciary

1. Institutional/Collective Independence

a. Separation of Powers

The constitutions of most Latin American countries are modelled on the Constitution of the United States, which provides for separate and co-equal legislative, executive and judicial branches of government, and establishes a system of "checks and balances". As noted above^{267/}, however, it was not until *Marbury v. Madison* that the U.S. Supreme Court established its authority to judicially review actions of other branches of government for their conformity with the Constitution.

Recent constitutional developments in Brazil, Colombia and El Salvador are indicative of a current trend to entrench more explicitly the separation of powers necessary to ensure that the independence of the judiciary is protected in a manner that permits it to enforce the Rule of Law, or *estado do derecho*. The 1988 Brazilian constitution, for example, expands the *acao popular*, elevates the principle of *legalite*, or *moralidade administrativa*, to the constitutional level, and explicitly subjects all public authorities to these principles.^{268/} The 1983 Constitution of El Salvador, as revised by the Peace Accords in 1991 and 1993, explicitly guarantees the independence of the judiciary and the right of the courts to exercise judicial review in respect of administrative and constitutional questions.^{269/}

264 The *IACR Report*, *supra* note 178, at 14 notes that accusations of corruption against the judiciary were made public in February, 1992, that the President had earlier criticized the judicial branch for its alleged soft treatment of *Sendero Luminoso* guerrillas, and that in early April, the President rejected candidates for the Supreme Court submitted by the Association of Judges because he viewed the proposed names as political.

265 *IACR Report*, *supra* note 178, at 14.

266 *IACR Report*, *supra* note 178.

267 *supra*, text at note 54.

268 Federal Constitution, Article 5, LXXIII, and Article 37, quoted by Carlos Mario da Silva Velloso, Minister of the Supreme Federal Tribunal, in "Controle Externo do Poder Judiciario e Controle de Qualidade do Judiciario e da Magistratura: Uma Proposta", 195 R. Dir. Admin 9, at p. 17 (1994).

269 Article 86 provides: "Public power emanates from the people. The organs of government exercise this power independently within their respective attributions and competences established in this Constitution and the laws. The attributions of the organs are not delegable...Article 172 provides: "The

b. Administration

Significant steps have been taken in several countries to put the financial and functional aspects of administration of the judicial branch on a firm footing. For example, the 1988 Constitution of Brazil directs the judiciary to prepare the budget for the judicial branch for submission to Congress; expenditures are subject to audit by the Tribunal of Accounts.^{270/} In El Salvador, the *Ley de la Carrera Judicial*^{271/} gives the Supreme Court authority to develop the budget for the judicial branch. Colombia's constitution also permits the judiciary to develop its own budget for submission to the legislative branch.^{272/}

More creative approaches to effective administration are reflected in the constitutions of Costa Rica, Honduras, Guatemala, El Salvador and Panama, all of which mandate that a percentage of the government's budget be allocated to the judiciary. The amounts allocated vary from two percent (Guatemala) to six percent (Costa Rica, El Salvador) of the nation's ordinary annual receipts.^{273/}

The Inter-American Development Bank has identified modernization of legal and judicial systems as a priority area for Bank activity.^{274/}

c. Jurisdiction

Supreme Court of Justice, the Chambers of Second Instance and other tribunals established under law constitute the Judicial Organ. Corresponding exclusively to this organ is the power to judge and have executed judgements in constitutional, civil, penal, commercial, labour, agrarian, and administrative matters, as well as other matters determined by law...The Magistrates and Judges, in respect of the exercise of the jurisdictional function, are subject exclusively to the Constitution and the laws.

270 Article 99. Article 48(II) and Article 70 provide for legislative review and approval of the budget.

271 Decreto No. 415, Diario Oficial, January 13, 1993.

272 Article 256(5).

273 Rosenn, *supra* note 112, at p. 31.

274 "Generally, this area involves Bank assistance to member countries in their efforts to bring judicial codes in line with the new requirements for economic and social development, to strengthen trends that make laws responsive to these requirements, and to redefine the role of the law and jurisprudence in regulating economic and social relations...In particular, the Working Group has developed...an overview of the countries' ideas regarding the main initiatives the IDB could undertake to support programs (whether they are under way or are being planned) to improve the management of judicial power; enhance the training and careers of judges; streamline judicial procedures; identify alternative ways to solve conflicts; create broader access to the courts; and adapt the law and justice to conform with the new demands arising from the globalization of societies and economies, and, therefore, from the greater international integration of the countries concerned." Tomassini, "The IDB and the Modernization of the State", in Bradford (ed.), *supra* note 39. Bradford himself observes that "[t]he redefinition of the role of the state towards a broad integrative and interactive role is intimately related to the social fabric of each country. The *rule of law* and the *role of the judiciary* become crucial elements in shaping and maintaining the social order as well as providing essential support for private sector transactions and development. Therefore, new programmes to support judicial and legal reform, on which the Inter-American Development Bank has already embarked, are important innovations in this field.", Bradford, "Some Conclusions from the Conference Discussion", *id.*, at p. 263.

Again, newer constitutions in Latin America go some way towards ensuring constitutional protection of the judiciary's ability to exercise administrative and constitutional review.

As noted above, the 1988 Brazilian constitution provides for a collective writ of security, for a new *habeas data* procedure to facilitate court control over public authorities and to ensure access to information, and expanded standing to bring a direct constitutional action (*representacao*).^{275/} Colombia's constitution provides a similar remedy for information on government files,^{276/} and Article 86 creates an action of *tutela* as a summary procedure to protect fundamental constitutional rights "when they are violated or threatened by an action or omission of any public authority"^{277/} as a complement to the popular action, permitting any citizen to challenge the constitutionality of statutes before the Supreme Court.^{278/}

Protection of judicial jurisdiction has also taken on an international dimension in Central America. Since 1989, supreme court justices of Guatemala, El Salvador, Honduras and Nicaragua have met annually to review common functional and institutional problems. A *Consejo Judicial Centroamericano* was created as an "executive organ" of the group, comprising the Chief Justices of each of the courts.^{279/} At their 1990 meeting, the justices decided that, on the request of any judicial authority, the *Consejo* would convene on an urgent basis to examine threats to the independent exercise of judicial authority in any of the member countries. The *Consejo* has issued two advisory opinions, in respect of El Salvador and Nicaragua, under this authority.^{280/} Based on this experience, the Tegucigalpa Protocol^{281/} under the Charter of the Organization of Central American States created the Central American Court of Justice. In addition to a grant of broad jurisdiction over various aspects of the common market, Article 22 of the Statute of the Court^{282/} gives the Court jurisdiction:

- ... (f) at the request of the injured party, to hear and resolve lawsuits that may arise between the fundamental agencies and branches of government of the States, and when court sentences

275 See text accompanying notes 62 and 63, *supra*. The 1985 Diffuse Interests Law (Law No. 7347/85) "...extends to legally constituted organizations concerned with protection of the environment, historical patrimony, or consumers' rights (as well as to government organs and the public prosecutor's office -- *Ministério Público*) the right to sue those esteemed to be producing damage by commission or omission. An important aspect of this law is its recognition of the right to sue for entities that have not been personally damaged by the violation in question." Keck, "Sustainable Development and Environmental Politics in Latin America, in Bradford (ed.), *supra* note 39.

276 Article 15; see Rosenn, *supra* note 63, at 682.

277 Rosenn, *id.* at p. 683.

278 Rosenn goes on to describe other miscellaneous actions available in both Colombia and Brazil, including popular actions to protect public patrimony, *ibid* at p. 686.

279 For a description of the *Consejo* and its activities, see La Independencia Judicial (San Salvador, Supreme Court of El Salvador, 1992).

280 *id.*, at p. 51-59.

281 *Protocol de Tegucigalpa a la Carta de la Organizacion de Estados Centramericanos* (ODECA), signed 13 December, 1991, at Tegucigalpa. ____ UNTS ____; ____ OASTS ____; El Salvador Diario Oficial, 22 May, 1992.

282 *Estatuto de la Corte Centroamericana de Justicia*, signed December 10, 1992.

handed down are not complied with.^{283/}

This authority has been described as "...a measure of protection for the judiciaries of States that lack juridical defence mechanisms, except in the case of the existence of special constitutional tribunals, offering protection against aggressive actions threatening their independence by the Executive and Legislative Branches".^{284/}

2. Individual/Personal Independence

a. Adequate Remuneration

The underlying principle of a requirement to protect judicial salaries and pensions is to protect judges from financial retribution for rendering decisions contrary to the views of their governments, or conversely, to avoid creating a system of rewards for favourable decisions. Although the irreducibility of judicial salaries is often guaranteed as a formal matter, chronic inflation presents a special challenge. In Mexico, the Constitution of 1917 guaranteed the irreducibility of judicial salaries for sitting judges as determined by law and Article 127 of the Constitution prohibited the raising of salaries during the judge's term of office.^{285/} Because of severe inflation the Mexican government in 1982 replaced this prohibition with a provision requiring adequate compensation of judges to be determined annually in an equitable manner. Uruguay and Paraguay have dealt with the inflation issue by guaranteeing that judges' salaries will not be less than those of their well-paid Ministers' Secretaries of State. The Peruvian Constitution guarantees to judges compensation "that insures them a life worthy of their mission in the hierarchy".^{286/}

b. Security of Tenure

In general, removal or dismissal of judges in Latin American countries is entrusted to other members of the judiciary, whether by an appellate court or a council of magistrates. The Chilean system requires that the Supreme Court review all judges below the Supreme Court level annually and those found to be performing unsatisfactorily for two consecutive years will be automatically dismissed regardless of tenure. The impeachment model of the United States is followed by Argentina and Mexico while Brazil^{287/}, Haiti and Paraguay vary the impeachment and review process depending of the judge's level.

In El Salvador, the *Ley del Consejo Nacional de la JUDICATURA*^{288/} provides for an independent and periodic evaluation of the judges' work, presented to the Supreme Court for appropriate action by the Court. The *Ley de la Carrera Judicial*^{289/} provides for a merit-based competition and application process for judicial

283 "The Juridical Dimension of Integration: Settlement of Disputes in the Central American Integration System (CAIS) and the Central American Common Market", CJI/SO/II/doc19/94.

284 *Ibid.*

285 Rosenn, *supra* note 112 at 31.

286 *Id.*, at 32.

287 In Brazil, impeachment proceedings against ministers of the Supreme Tribunal may be brought in the Senate; Constitution Article 52(II).

288 Decreto No. 414, Diario Oficial, January 13, 1993. See also Velloso, *supra* note 173, where the Minister of the Supreme Court proposes a similar Council in Brazil.

289 Decreto No. 415, Diario Oficial, January 13, 1993.

appointments.

c. Appointments

As noted above, the appointments process varies from country to country. Newer constitutions tend to emphasize more explicitly the objectivity of the selection process, and thereby help to reinforce public confidence in the impartiality of those selected.

In Argentina, the President makes federal judicial appointments with the approval of the Senate. In Chile, appointments to the Supreme Court and the Court of Appeals are made by the President from a list of candidates compiled by the Supreme Court. In Mexico, the President, with the approval of the Senate, appoints the members of the Supreme Court who in turn appoint members of the Circuit and District Courts. In Panama, the Cabinet Council appoints member of the Supreme Court for 10-year terms and the Supreme Court appoints the appellate judges, who then appoint members of the lower courts. In Paraguay, the Senate must consent to the appointment of Supreme Court judges for their five year terms, and Supreme Court judges must consent to lower court appointments. Under the Peruvian Constitution, the President appoints judges from the recommendations of the national Council of Magistracy, but at the present time President Fujimori has disbanded superior courts and has assumed judicial functions. In 1989, Haiti restricted the previously unfettered power of the president to appoint judges. The President now chooses new members of the highest court, the Court of Cassation, for a term of 10 years from a list of three candidates prepared by the Senate.

In El Salvador, the *Ley del Consejo Nacional de la Judicatura*^{290/} establishes a National Council for the Judiciary, comprising lawyers nominated by the supreme court, other members of the bar, judges of various levels, law professors, and a representative of the Attorney General (as nominated by the Inspector General, Procurator General, and procurator for the Defence of Human Rights) all elected by the Legislative Assembly and acting in a personal, independent capacity, to make Supreme Court nominations to the Assembly. The Assembly confirms appointments from the list presented, by a public, two-thirds vote. Nominations for other judges are made to the Supreme Court.

In Brazil, judges enter their career only after completing a course of studies and licensing by the official bar association^{291/}; the President nominates and the legislature approves the names of magistrates of the Supreme Tribunal and Superior Tribunals^{292/} and ministers of the Supreme Tribunal are approved by an absolute majority vote in the Senate.

In the United States Article II, section 2 of the Constitution requires Senate ratification of presidential nominations to the Supreme Court and federal courts, while state and local judges may be popularly elected.^{293/}

d. Immunity

In Anglo-American jurisprudence, judges have generally been held to be immune from claims against the

290 *Supra*, note 197.

291 Article 93(1).

292 Articles 52(III)(a), 101, 104, 107, 111(1), 115, 119(II), 120(1)(III), 123. See Velloso, *supra* note 178.

293 It is open to question whether judicial elections in fact or in perception reduce judicial independence by exposing candidates to local pressures and inviting judges to engage in political activity.

performance of their tasks.^{294/} In contrast, most Latin American countries regard judges as regular citizens exposed to criminal and civil liability for negligent application of the law.

e. Physical Security/Personal Safety

The most dramatic response to threats to judges has been in Colombia. In 1984, President Virgilio Barco placed the country under a state of siege on the ground that the constitutional system was being disrupted by chronic violence and public disorder.^{295/} Special "Courts of Public Order" were established for drug cases, and were expanded in 1987 to include political crimes.^{296/} Funding for the establishment of these courts was partially provided by the Administration of Justice Program passed by the U.S. Congress in 1983.^{297/} Spurred by the assassination of the then Attorney General, Carlos Mauro Hoyos, a 1988 decree, known as the "Statute for the Defence of Democracy"^{298/} expanded the scope of crimes subject to special jurisdiction. On the same day, a second decree^{299/} was adopted that established a new chamber in the superior district courts as an appeals court for the Courts of Public Order and to hear cases involving a range of offences, including "...illegal coercion, torture, homicide, personal injury, kidnapping and kidnapping for extortion purposes against the person of a magistrate, judge, governor, public official...".^{300/} A third decree imposed more restrictive *habeas corpus* procedures in cases where detention is related to crimes of a public order nature.^{301/} In 1989, the government established a Security Fund for the Judicial Branch to pay for protection of judges and their families.^{302/} The 1990 Statute for the Defence of Justice^{303/}, in addition to combining and restructuring the jurisdiction of the Public Order Courts and the specialized chambers, included protection measures consisting of "establishment of a secret jurisdiction, based on shielding of the identity of those involved in the process, including judges and staff of the Public Prosecutor's office."^{304/} The 1991 Colombian constitution includes a transitory provision under

294 See discussion in Section V(A)(2)(d), *infra*.

295 Decree 1038, 1984.

296 Decree 1631 of August 27, 1987 gave the special courts jurisdiction to investigate and rule on all offences "when their intent appears to be to persecute or intimidate any inhabitant of the country on account of his beliefs and political opinions, whether party-related or not...".

297 The AOJ also provided funds for the establishment of special courts in El Salvador and Panama. In addition to criticising the absence of due process in these courts, the Lawyers Committee for Human Rights alleges that these courts provide a means to compensate for the absence of extradition treaties.

298 Legislative Decree 180 of January 27, 1988.

299 Decree 181, January 27, 1988.

300 Translation in *IACtHR Report*, *supra* note 178, at p. 3.

301 Decree 182, January 27, 1988.

302 Legislative Decree 1855, August 18, 1989.

303 Legislative Decree 2790, November 20, 1990, complemented by Decrees 99 and 390 of January 14 and February 8, 1991, respectively.

304 *IACtHR Report*, *supra* note 178, at p. 6.

which a Special Legislative Commission converted the various decrees into permanent legislation.^{305/}

The judges presiding in these Courts of Public Order have been described as "*jueces sin rostro*".

All communication is done either through two-way mirrors using Darth Vadaresque voice distorters, or in writing. Witness statements are authenticated by a complex system of fingerprints in lieu of signatures. Opinions are unsigned, with only a judicial number affixed to the decision. The identity of police agents and informants may be kept secret as well. As a final protection, a chief of security is assigned to each court to coordinate threat assessments, and the judges are provided with armed escorts to and from work.^{306/}

Although it was hoped that providing judges with anonymity would afford more effective protection from physical threats, violence has continued^{307/}, and serious questions have been raised regarding whether this system of courts respects basic human rights norms of the Americas.^{308/}

In Peru, a 1987 law^{309/} directed the judiciary, the office of the Public Prosecutor and the Ministry of the Interior to develop arrangements for protection of judges, attorneys, court officials and witnesses. An Organic Law on the Judicial Branch^{310/} set out specific rights of magistrates in this regard.^{311/} However, the April 5, 1992 declaration of an emergency government, as discussed in the next section, significantly altered the protection afforded to members of the judiciary.

305 *IACtHR Report*, *supra* note 178, at 10.

306 Pahl, *supra* note 134, at 434. See *IACtHR Report*, *supra* note 178, for a detailed exposition of the applicable rules and procedures.

307 *ibid.*, at p. 439, noting that "*una jefa sin rostro*" was threatened in June, 1992, and another assassinated in Medellin in September, 1992.

308 The *IACtHR Report*, *supra* note 178, criticizes the measures for creating conflicts of jurisdiction, slowing proceedings to the point that proceedings are not closed, crimes defined too broadly to be judicially administered, and as violating the *Declaration, Convention*, and jurisprudence of the Inter-American Court of Human Rights by permitting overly-broad powers of arrest, search, seizure and detention without arraignment, secret trials, and denial of due process (e.g., in respect of the right to face one's accuser).

309 Law 24,700 of June 22, 1987, cited in *IACtHR Report*, *supra* note 178, at 13.

310 Legislative Decree 767, December 4, 1991, in effect as of January 1, 1992.

311 Article 189 states: "The rights of magistrates are:

1. Independence in the exercise of their jurisdictional functions;
2. Stability in their position, pursuant to the Constitution and the relevant laws;
3. To be transferred, at their request and subject to prior assessment, when for duly demonstrated reasons of health or safety it is not possible for them to continue in their permanent position;
4. Protection and safety of their physical integrity and that of their families;...
7. Life insurance coverage when they work in emergency zones;..."; *IACtHR Report*, *supra* note 205, at 14.

3. Emergencies and States of Siege

The 1988 Brazilian constitution^{312/} places significant limits on the power of the Executive in times of emergency, including a requirement for Congressional ratification and a circumscribed list of rights that may be derogated.

Articles 213 and 214 of the 1991 constitution of Colombia also imposes limits on executive authority during states of siege or emergency:

During a state of internal commotion, no civilian may be investigated or tried by criminal military courts. Moreover, legislative decrees issued by the Executive during a state of exception may not suspend human rights or fundamental liberties. In all cases, the rules of International Humanitarian law must be respected.

The legislature is required to enact a statute that will regulate governmental powers during a state of exception and to set up judicial controls to protect individual rights, in conformity with international treaties. Measures adopted by the Executive during a state of exception must be proportional to the gravity of the actual facts, a provision that invites meaningful judicial scrutiny. Colombia's constitution also imposes liability upon the President and his cabinet ministers for any abuses committed during states of exception. Because states of exception have lasted for years, Colombia's new Constitution sharply limits their duration. States of exception usually may last only 90 days; Senate authorization is required to prolong them for an additional 180 days.^{313/}

The ability of the judiciary to enforce such limits is open to question, based on experience to date. Some authors have argued that, based on the judiciary's own perception that it is bound to respect the sphere reserved to the political branches of government, the judiciary has traditionally bowed to restrictions on its independence and to the suspension of civil liberties.^{314/} Other authors have argued that Latin American courts have been defiant activists despite periods of political unrest and constitutional suspension.^{315/}

In the United States civil liberties are expressed in unqualified terms and there are no limitation clauses. The Supreme Court of the United States can only save emergency legislation and the suspension of civil

312 Articles 131, 136.

313 Rosenn, *supra* note 63, at 679-680.

314 Alejandro Garro and Henry Dahl, "Legal Accountability for Human Rights Violations in Argentina: One Step Forward and Two Steps Backward", 8 Human Rights Law Journal 283 at 295; Feinrider, *supra* note 27, in respect of Argentina; Note, *supra* note 108; *Nunca Mas*, Informe de la Comisión nacional sobre la desaparición de personas (12a edición, 1986) is critical of how many members of the judiciary did not uphold their duties with dignity throughout the "Dirty War" and were often complacent to human rights violations. Conversely, the report points to those judges and prosecutors who, for fulfilling the duties and responsibilities, faced tremendous pressures. The *IACtHR Report*, *supra* note 178, at 15, states that "the suspension of constitutional rights [in Peru] since April 5, 1992...has meant a major and unlawful ascendancy of the Political over the Judicial Branch, which has in effect been taken over. To this must be added the dissolution of Parliament -- which had been characterized as seeking to find methods and means that would serve to remedy the situation of violence -- thus preventing any oversight over the state of emergency and depriving the Judicial Branch of an important ally."

315 René Provost, "Emergency Judicial Relief for Human Rights Violations in Canada and Argentina", 23 Inter-American Law Review 694 at 700; Feinrider, *supra* note 27, in respect of Brazil.

liberties if they are reasonable means of achieving a legitimate legislative purpose.^{316/}

B. Independence of the Bar/Legal Profession

1. Access and Representation

Newer constitutions afford an explicit guarantee of the right to counsel. Colombia's 1991 constitution guarantees the accused the right to counsel during investigation and trial.^{317/} The Brazilian constitutional guarantee is more broad, guaranteeing the right to assistance in criminal matters and legal aid in civil matters.^{318/}

2. Regulation

The legal profession is largely self-regulated throughout the Americas. Opinions vary, however, on the limits of such regulation, as evidenced by the current debate in Brazil about the proposed revised statute for the *Ordem dos Advogados do Brasil* (OAB).

3. Privileged Communications

The "solicitor-client" privilege is the subject of extensive literature in the United States.^{319/} In Anglo-American systems, the privilege is viewed as essential to promoting communication between lawyer and clients, and to encourage persons to seek legal advice, thereby helping to ensure that persons receive "professional advice by well-informed attorneys" by affording a promise of confidentiality.^{320/} Despite the clear recognition of the privilege, its scope remains subject to debate, for example regarding the lawyer's obligation to reveal the identity of a client or fee arrangements.^{321/}

A review of the protection afforded to lawyer-client communications in member countries is beyond the scope of this paper.

V. THE RESPONSE - CANADA AS AN EXAMPLE

Canada provides a useful example of a legal system which attempts to protect the independence of the judiciary and the legal profession.

A. Independence of the Judiciary

Canadian courts are organized in two systems: provincial and federal. The *Constitution Act, 1867* gives

316 Nowak and Rotunda, *Constitutional Law* (4th ed., 1991) ch.14.

317 Rosenn, *supra* note 63, at p. 670.

318 *Ibid.*

319 See Goode, "Identity, Fees, and the Attorney-Client Privilege", 59 G.W.L.Rev. 307 (1991), at p. 313.

320 *id.*, at 319. Goode also notes that some have argued that privilege also "promotes individual values such as privacy, autonomy, dignity, trust, and fairness".

321 *id.*

the provincial Legislatures the power to make laws in relation to the constitution, maintenance and organization of Provincial Courts.^{322/} There are typically three levels of provincial courts: inferior courts, superior trial courts, and superior courts of appeal.^{323/}

The *Constitution Act, 1867* confers on the federal Parliament the power to provide for a general court of appeal for Canada, as well as additional courts for the better administration of the laws of Canada.^{324/} The Supreme Court of Canada was established pursuant to this power; it sits as the final court of appeal for both the federal and provincial court systems. The Federal Court of Canada was also established pursuant to this power; it has two divisions, trial and appeal. Its jurisdiction is limited to subject matters conferred on it by federal statute^{325/}; those subject matters are further limited to those governed by the laws of Canada.^{326/} The Tax Court of Canada, whose jurisdiction is limited to income tax appeals, and the territorial courts of the Yukon and Northwest Territories, are also established pursuant to this power.

1. Institutional/Collective Independence

a. Separation of Powers

There is no general "separation of powers" in the Canadian Constitution.^{327/} In the framework of responsible government, "between the legislative and executive branches, any separation of powers would make little sense...".^{328/} Similarly, there is no defined separation between the judicial branch and the two political branches. Either the federal Parliament or the provincial Legislatures may confer non-judicial functions on its courts,^{329/} and with one notable exception, the Parliament and Legislatures may also confer judicial

322 Section 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, -...

(14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

323 This simplified scheme does not describe district and county courts (which have largely been amalgamated with superior courts), and specialized courts, such as unified family courts (which are usually deemed to be superior courts).

324 Section 101. The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

325 For example, *Federal Court Act*, R.S.C. 1985,c. F-7 as amended.

326 see Hogg, Constitutional Law of Canada (Toronto: Carswell, 1992) at 7-14 to 7-22 for a discussion of this limitation.

327 In particular, the *Constitution Act, 1867*.

328 Hogg, *supra* note 241 at 7-24.

329 *Ibid*, at 7-25. For example, they have conferred the traditionally executive function of rendering advisory opinions to the government upon the courts. By virtue of section 53 of the federal *Supreme Court Act*, R.S.C. 1985, c. S-26 the federal government may refer to the Supreme Court of Canada important questions of law or fact concerning the interpretation of the Constitution,

functions on bodies that are not courts.^{330/}

Nonetheless, the Supreme Court of Canada has found that the principle of judicial independence is essential and integral to the Canadian constitutional system, and that the courts must be completely separate in authority and function from the executive and legislative branches.^{331/}

b. Administration

There are no explicit constitutional guarantees of an independent judicial administration. However, the Supreme Court of Canada has held that institutional independence with respect to matters of administration bearing directly on the exercise of a judicial function is an essential condition of judicial independence for the purposes of s.11(d) of the *Canadian Charter of Rights and Freedoms*.^{332/} Thus, judicial control over matters such as the assignment of judges, sittings of the court and courts lists, allocation of court-rooms and direction of administrative staff carrying out these functions are essential to judicial independence.^{333/} However, a more independent role in other aspects of administration - financial (budgetary preparation, presentation and allocation of expenditure) and personnel (recruitment, classification, promotion, remuneration and supervision of support staff) - was not essential to judicial independence.^{334/}

In the Supreme Court of Canada, the court registrar superintends the officers, clerks and employees appointed to the Court, subject to the direction of the Chief Justice.^{335/} In the Federal Court of Canada, the organization of work falls to the Chief and Associate Chief Justices.^{336/} Similarly, in the Ontario courts, the

the constitutionality or interpretation of any legislation, the powers of the Parliament or the Legislatures, or any other questions which the government sees fit to refer.

330 *Ibid*, at 7-25-27.

331 *The Queen v. Beauregard* [1986] 2 S.C.R. 56; 30 D.L.R. (4th) 481 at 494: "Canadian constitutional history and current Canadian constitutional law establish clearly the deep roots and contemporary vitality and vibrancy of the principle of judicial independence in Canada. The role of the courts as resolver of disputes, interpreter of the law and defender of the Constitution requires that they be completely separate in authority and function from *all* other participants in the justice system."

332 *Valente v. The Queen*, *supra* note 96, at 190. Section 11(d) of the *Charter* states: "11. Any person charged with an offence has the right...(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

333 *Ibid*, at 188.

334 *Ibid*, at 188-89.

335 *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 15.

336 *Federal Court Act*, R.S.C. 1985, c. F-7, s.15(2) states: "Subject to the Rules, all such arrangements as may be necessary or proper for the holding of courts, or otherwise for the transaction of business of the Trial Division, and the arrangements from time to time of judges to hold such courts or to transact such business, shall be made by the Associate Chief Justice." The *Federal Court Rules*, C.R.C. 1978, c. 663, r. 200 states: "The Court may designate an officer of the Court as Administrator to manage the Court offices and supervise the employees of the Court, subject to the directions of the Chief Justice."

chief and regional senior judges direct the sittings and the assignment of the judicial duties of court.337/

In 1981, a report on the administrative independence of the Canadian judiciary noted that in the legal system, a provincial Minister of Justice or Attorney General may play multiple, seemingly conflicting roles, in that he or she:

- a. acts daily before the courts personally or, more often, through his substitutes, as attorney for public prosecution;
- b. provides the courts with the support staff and services needed for them to operate; and
- c. defends the budgets of the courts in Parliament.338/

The report recommended:

The political authorities should realize the ambiguity in the present position of Minister of Justice or Attorney General and separate the function of attorney for public prosecution from that of provider of court services.339/

Part III of the federal *Judges Act*340/ addresses this recommendation. It provides for a Commissioner for Federal Judicial Affairs, whose duties are to administer the salaries and benefits provisions of the Act for all federally appointed judges, to prepare budgetary submissions for the requirements of the Federal Court and the Tax Court, to be responsible for the administrative requirements of the support staff of those courts, and to do other tasks as required by the Minister of Justice within the Minister's responsibilities for the proper functioning of the judicial system in Canada. The Act also provides for staff to assist the Commissioner in carrying out those duties.341/

In Ontario, the Attorney General is charged with superintending all matters connected with the administration of the courts, other than matters that are assigned by law to the judiciary.342/ However, the

337 Ontario *Courts of Justice Act*, R.S.O. 1990, c. C-43, s.76(1) states: "The powers and duties of a judge who has authority to supervise and direct the sittings and the assignment of the judicial duties of his or her own court include the following:

1. Determining the sittings of the court.
2. Assigning judges to the sittings.
3. Assigning cases and other judicial duties to individual judges.
4. Determining the sitting schedules and places of sittings for individual judges.
5. Determining the total annual, monthly and weekly workload of individual judges.
6. Preparing trial lists and assigning courtrooms, to the extent necessary to control the determination of who is assigned to hear particular cases.

338 Deschenes and Baar, "Administrative Independence: Concerns of the Canadian Judiciary", in Morton, *Law, Politics and the Judicial Process in Canada* (Calgary: University of Calgary Press, 1985) at 120.

339 *Ibid.*, at 121.

340 R.S.C. 1985, c. J-1.

341 ss. 72-79.

342 *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 71.

Ontario Courts Advisory Council, made up of the Chief Justices and regional senior judges of the Ontario courts, makes recommendations on administrative matters to the Attorney General.^{343/} In addition, the Ontario Courts Management Advisory Committee, made up of the chief justices, representatives of the Attorney General, and barristers and solicitors from the provincial bar, makes recommendations on the administration of the courts to the relevant bodies and authorities.^{344/}

c. Jurisdiction

As noted above, the legislative branch may confer judicial functions on bodies that are not courts. In the past three decades, the federal Parliament and provincial Legislatures have created myriad administrative tribunals to adjudicate disputes which arise in specialized areas of the law, such as human rights, labour relations, immigration, transportation, and broadcasting. There is one notable exception to this trend. Canadian courts have interpreted the Judicature section of the *Constitution Act 1867*^{345/} as preventing the Legislatures from conferring judicial functions performed by provincial superior courts on another body unless that body meets the constitutional prescriptions for superior courts set out in the Constitution.^{346/} In addition, provincial administrative tribunals are always subject to judicial review by provincial superior courts on the grounds of jurisdiction; a privative clause cannot exclude judicial review on questions of the limits of the tribunal's jurisdiction.^{347/}

It is debatable whether recent changes to the constitutional amending mechanism have constitutionally entrenched the status of the Supreme Court of Canada as the final national court of appeal. As noted above, the Court is not established expressly in the Constitution, but rather by federal statute.^{348/} Any amendment to the Constitution of Canada in relation to the composition of the Supreme Court requires the unanimous consent of the legislative assembly of each province and the two houses of Parliament.^{349/} Any other amendments to the Constitution in relation to the Supreme Court requires the consent of the two houses of Parliament and the legislative assemblies of at least two-thirds of the provinces that have, in the aggregate, at least fifty per cent of the population of all the provinces.^{350/} Some publicists have suggested that these provisions entrench the Court in the Constitution by reference;^{351/} others argue that since the Supreme Court is not expressly provided for in the Constitution, these amending provisions will have no effect until the Constitution is amended accordingly.^{352/}

343 s.72.

344 s.73.

345 ss. 96-101.

346 *Re Residential Tenancies Act* [1981] 1 S.C.R. 714.

347 *Crevier v. A.-G. Quebec* [1981] 2 S.C.R. 220.

348 *Supreme Court Act*, R.S.C. 1985, c. S-26.

349 *Constitution Act, 1982*, s. 41(d).

350 *Ibid*, s.38, 42(d).

351 Shetreet, *supra* note 99, at 590.

352 Hogg, *supra* note 241, at 4-19 and 4-22.

2. Individual Independence

a. Adequate Remuneration

The Canadian Constitution allocates the responsibility for the remuneration of judges to the legislative branch. The *Constitution Act, 1867* stipulates that the Legislatures are responsible for the payment of Provincial inferior court judges,^{353/} whereas the Parliament of Canada is responsible for fixing and providing the salaries, allowances and pensions of the judges of the Supreme Court of Canada, the federal courts, and the provincial superior courts.^{354/} Pursuant to Parliament's power, the *Judges Act*^{355/} sets out the judges' salaries, allowances and pensions according to their office, and provides an annual adjustment for inflation; nonetheless, in this period of restraint in the public sector, the salaries for each office have been subject to a two year freeze in salaries commencing in 1992.^{356/} Pursuant to the Legislature's power, the provinces have conferred the task of setting the salaries of Provincial inferior court judges to their government executives, to be established by regulation.

There is no explicit guarantee of adequate remuneration in the Constitution. However, the Supreme Court has found that the financial security of judges "is crucial to the very existence and preservation of judicial independence as we know it"^{357/} and that it is an essential condition of judicial independence for the purposes of s.11(d) of the *Canadian Charter of Rights and Freedoms*.^{358/} Whether salaries are set by the Legislative or the Executive branch, the essential guarantee of financial security is that the right to a salary is established by law, and there is no way in which the Legislative or Executive branch can "interfere with that right in a manner to affect the independence of the individual judge."^{359/}

The power of Parliament to fix the salaries and pensions of superior court judges is not unlimited. If there were any hint that a federal law dealing with these matters was enacted for an improper or colourable purpose, if there was discriminatory treatment of judges vis-à-vis other citizens, then serious issues relating to judicial independence would arise and the law might well be held to be *ultra vires* s.100 of the *Constitution Act, 1867*.^{360/}

The *Judges Act* provides an independent mechanism for reviewing the adequacy of judges' remuneration. Every three years, the Minister of Justice must appoint a commission to "inquire into the adequacy of the salaries and other amounts payable under this Act and into the adequacy of judge's benefits generally."^{361/}

353 s. 92(4).

354 ss. 100-101.

355 R.S.C. 1985, c. J-1.

356 s. 25.

357 *The Queen v. Beauregard*, *supra* note 246, at 496.

358 *Valente v. The Queen*, *supra* note 96, at 176.

359 *Ibid*, at 186.

360 *The Queen v. Beauregard*, *supra* note 246, at 497.

361 s. 26.

This complex process is designed to preclude arbitrary interference by the executive branch of government in the determination and granting of the judicial compensation package, thereby upholding the principle and strengthening the practical manifestation of judicial independence.^{362/}

The Triennial Commission is granted six months to meet, entertain written submissions and conduct public hearings, and produce a report within its terms of reference. The most recent report recommended that the salaries of puisne judges should reflect what "the marketplace expects to pay individuals of outstanding character and ability"; according to the report, this would be roughly equivalent to the salaries of the most senior level of public servant, deputy ministers. The report noted that current salaries met this criterion.^{363/}

b. Security of Tenure

The *Constitution Act, 1867* provides that superior court judges will hold office during good behaviour but shall be removable by the Governor General on address of the Senate and House of Commons and shall cease to hold office at the age of seventy-five.^{364/} This constitutional guarantee does not apply to Provincial inferior court judges, and it is debatable whether it applies to judges of the federal courts.^{365/}

The Supreme Court of Canada has held that security of tenure is an essential condition of judicial independence for the purposes of s.11(d) of the *Canadian Charter of Rights and Freedoms*, and the power to remove a judge is sufficiently restrained by "the requirement of cause, as defined by statute, together with a provision for judicial inquiry at which the judge affected is given a full opportunity to be heard..."^{366/} However, the Court put no constraint on the executive or legislative branch to follow the report of the judicial inquiry: "The existence of the report of the judicial inquiry is a sufficient restraint on the power of removal, particularly where... the report is required to be laid before the Legislature."

By statute, judges of the federal courts hold office during good behaviour until the age of seventy-five, subject to removal by the Governor General on address of the Senate and House of Commons.^{367/}

The Canadian Judicial Council, established pursuant to Part II of the *Judges Act*, inquires and investigates into allegations and complaints against judges of the federal courts and the provincial superior courts.^{368/} The Council comprises the Chief Justice of Canada and the chief and associate chief justices of the superior

362 Triennial Commission, Report and Recommendations of the 1992 Commission on Judges' Salaries and Benefits (Ottawa: Department of Justice, 1993) at 6.

363 *Ibid*, at 11.

364 s. 99.

365 Hogg, *supra* note 241, at 7-24. Case law on this question is divided: *Addy v. The Queen* [1985] 2 F.C. 452 (T.D.) suggests that s.99 does apply to federal courts, but obiter comments in *Valente v. The Queen*, *supra* note 92, are contrary.

366 *Valente v. The Queen*, *supra* note 96, at 179.

367 *Supreme Court Act*, R.S.C. 1985, c. S-26, s.9; *Federal Court Act*, R.S.C. 1985, c. F-7, s.8; *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s.7; *Northwest Territories Act*, R.S.C. 1985, c. N-27, s.33; *Yukon Act*, R.S.C. 1985, c. Y-2, s.33.

368 Hogg, *supra* note 241, at 7-9.

courts.^{369/} At the request of the Minister of Justice of Canada or a provincial attorney general, the Council must commence an inquiry as to whether a judge should be removed for reasons of infirmity, misconduct, failing in the due execution of office, or having been placed, by conduct or otherwise, in a position incompatible with that office.^{370/} In addition, the Council may inquire into any complaint against a judge. The Council may conduct the inquiry, or may designate Council members to form an Inquiry Committee together with members of the bar appointed by the Minister of Justice. The inquiry body has the authority of a superior court, and must afford the impugned judge an opportunity to be heard, to cross-examine witnesses and to adduce evidence.^{371/} After the inquiry has been completed, the Council must report its conclusions to the Minister; if in the opinion of the Council, the judge has become incapacitated or disabled, it may recommend in its report that the judge be removed from office.^{372/}

In general, provincial inferior court judges may be removed by the provincial government before the age of retirement only for cause - misbehaviour or disability - following a judicial inquiry.^{373/} For example, under the Ontario *Courts of Justice Act*^{374/}, Ontario inferior court judges hold office until retirement at age 65, unless removed from office for cause by the Lieutenant Governor.^{375/} Cause can only be found if a complaint has been made to the Ontario Judicial Council, and a judicial inquiry has recommended removal on the ground that the judge has become incapacitated or disabled from the due execution of office by reason of infirmity, conduct that is incompatible with office, or having failed to perform the duties of office.^{376/}

The procedure for removal is commenced by making a complaint regarding the judge to the Judicial Council. The Council is composed of the Chief Justice of Ontario, four subsidiary chief justices, the Treasurer of the provincial bar society, and up to two appointees of the government.^{377/} The Council investigates into the complaint, giving the judge an opportunity to be heard and produce evidence on his or her behalf, and then may make a report to the provincial Attorney General recommending a full inquiry.^{378/} The provincial Lieutenant Governor in Council may appoint a judge of the provincial superior court to conduct an inquiry into the question of whether the judge should be removed from office.^{379/} The report of the inquiry must be laid before the Legislative Assembly, and an order for removal may be made by the Lieutenant Governor only on address of the Legislative Assembly.^{380/}

369 s. 59.

370 ss. 63,65.

371 ss.63-64.

372 s. 65.

373 *Valente v. The Queen*, *supra* note 96.

374 R.S.O. 1990, c. C-43

375 ss. 44, 46.

376 s. 46.

377 s. 47

378 s. 49.

379 s. 50.

380 s. 46.

c. Appointments

The *Constitution Act, 1867* stipulates that the Governor General has the power to appoint judges to the provincial superior courts,^{381/} the federal Parliament may provide for the appointment of judges to the federal courts,^{382/} and the provincial Legislatures have the power to appoint judges to their respective inferior courts.^{383/} Parliament and the Legislatures have passed laws empowering their respective Governors-in-Council to make appointments to federal courts^{384/} and provincial inferior courts.^{385/} By constitutional convention, a Governor-in-Council exercises his or her power on the advice of the government. Thus, the power to appoint judges lies with the federal and provincial executive branches. There is no public scrutiny of appointments in Canada.

Federal and provincial statutes set out minimum requirements for appointments. Justices of the Supreme Court of Canada must be or have been a judge of a superior court of a province, or a barrister or advocate of at least ten years standing at the bar at the time of their appointment.^{386/} Appointees to the Federal Court of Canada and Tax Court of Canada must be or have been a judge of a superior, county or district court, or a barrister or advocate of at least ten years standing at the bar.^{387/} Candidates for provincial superior courts must be a barrister or advocate of at least ten years standing at the bar of that province, or have been a barrister or advocate and a magistrate of that province for an aggregate of ten years.^{388/} Appointments to provincial inferior courts are usually conditioned on at least ten years standing at the bar.^{389/}

In practice, federal appointments are made by cabinet on the advice of the Minister of Justice for puisne judges and on the advice of the Prime Minister for chief justices.^{390/} In turn, the Minister of Justice bases a recommendation on the assessment of lawyer-applicants made by five-member, independent judicial appointment advisory committees established in each province and territory. The committees are composed of a judge representing the superior court of the province, a lawyer of the provincial or territorial bar society, a lawyer representing the provincial or territorial branch of the Canadian Bar Association, a representative of the federal Minister of Justice, and a representative of the provincial or territorial Attorney General.

381 s.96.

382 s. 101.

383 s.92(4).

384 *Supreme Court Act*, R.S.C. 1985, c. S-26, s.4; *Federal Court Act*, R.S.C. 1985, c. F-7, s.5; *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s.4; *Northwest Territories Act*, R.S.C. 1985, c. N-27, s.32; *Yukon Act*, R.S.C. 1985, c. Y-2, s.32.

385 For example, the *Ontario Courts of Justice Act*, R.S.O. 1990, c. C-43, s.42.

386 *Supreme Court Act*, R.S.C. 1985, c. S-26, s.5.

387 *Federal Court Act*, R.S.C. 1985, c. F-7, s.5; *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, s.4.

388 *Constitution Act, 1867*, s. 97 and 98; *Judges Act*, R.S.C. 1985, c. J-1, s. 3.

389 For example, *Ontario Court of Justice Act*, R.S.O. 1990, c. C-43, s.42.

390 Morton, *supra* note 253, at 61; Hogg, *supra* note 241, at 7-6.

Provincial appointments follow a similar appointment process. For example, in Ontario, the Attorney General forwards a list of proposed appointments to the Judicial Council for an assessment.^{391/}

d. Immunity

In English and Canadian common law, a superior court judge is protected by absolute immunity from any civil liability for anything he does or says in the performance of his functions as a judge.^{392/} As Lord Denning observed:

If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment, it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: "If I do this, shall I be liable in damages?" So long as he does his work in the honest belief that it is within his jurisdiction, then he is not liable to action... Nothing will make him liable except that it be shown that he was not acting judicially, knowing that he had no jurisdiction to do it.^{393/}

More recently, Lord Bridge of Harwich stated:

It is, of course, clear that the holder of any judicial office who acts in bad faith, doing what he knows he has no power to do, is liable in damages.^{394/}

These judgments were referred to by the Supreme Court of Canada; restating the rule, Chouinard, J. said, in part:

...superior court judges... could only be sued in damages where the qualifications made by Lord Bridge of Harwich, or before him by Lord Denning, applies, that is in the formula as stated by the former, a judge who in bad faith did something which he knew he did not have the jurisdiction to do, or as stated by the second, a judge who was not acting in the course of his judicial duties knowing that he had no jurisdiction to act.^{395/}

For provincial inferior court judges, the common law immunity rule may be narrower, shielding a judge only from liability for judicial acts done *within* their jurisdiction.^{396/} However, this immunity may be altered by statute. In some provincial jurisdictions, the common law rule for superior court judges is applied to inferior court judges;^{397/} in others, the rule for inferior court judges has been expanded.^{398/}

391 Ontario Courts of Justice Act, R.S.O. 1990, c. C-43, s.48

392 *Royer v. Mignault* (1988) 13 Q.A.C. 39, 50 D.L.R. 345 at 354; leave to appeal to S.C.C. refused (1988) 50 D.L.R. (4th) viii.

393 *Sirros v. Moore* [1974] 3 All E.R. 776 at 785

394 *McC v. Mullan* [1984] 3 All E.R. 908 at 916.

395 *Morier v. Rivard* [1985] 2 S.C.R. 716 at 744; 23 D.L.R. (4th) 1 at 21-22

396 *Shaw v. Trudel* (1988) 53 D.L.R. (4th) 481.

397 For example, Ontario Courts of Justice Act, R.S.O. 1990, c. C-43, s.82 states: Every judge of a court in Ontario and every master has the same immunity from liability as a judge of the Ontario Court (General Division).

The Quebec Court of Appeal has found that the immunity rule is an essential element of the constitutional principle of judicial independence.^{399/}

3. Emergencies and States of Siege

The *Emergencies Act*^{400/} permits the suspension of civil rights during extraordinary crisis periods, and then only on a temporary basis. The preamble of the Act acknowledges that the application of the *Emergencies Act* and a suspension of civil liberties would be subject to judicial review under the *Canadian Charter of Rights and Freedoms*.^{401/} In particular, it would be up to the courts to decide whether the application of the Act and a suspension of civil liberties were "reasonable and demonstrably justified in a free and democratic society."^{402/}

It should be noted that Parliament or the legislature of a Province may override any judicial determination of unconstitutionality by resorting to the "notwithstanding" clause of the Constitution.^{403/} By re-enacting an offending Act or provision with a "notwithstanding" declaration, Parliament could effectively suspend civil rights. However, popular opinion in such circumstances would likely serve as an effective check against any attempted abuse.

B. Independence of the Bar/Legal Profession

1. Institutional/Collective Independence

a. Access

The right to counsel is guaranteed in the *Canadian Charter of Rights and Freedoms*.^{404/} The accused

398 For example, the Manitoba Court of Appeal found that section 12 of the Manitoba *Provincial Judges Act* expanded the common law protection: *Shaw v. Trudel* (1988) 53 D.L.R. (4th) 481.

399 *Royer v. Mignault*, *supra* note 307.

400 R.S.C. 1985, c. 22 (4th Supp.) Prior legislation, the *War Measures Act*, was repealed by R.S. 1985, c. 22 (4th Supp.) s.80. To date, no part of the *Emergencies Act* has been proclaimed in force.

401 See Tenofsky, "The War Measures and Emergency Acts" (1989) 19 American Review of Canadian Studies 293.

402 *Canadian Charter of Rights and Freedoms*, s.1 states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

403 *Constitution Act, 1982*, s.33 states in part:

- (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

404 s. 10(b) states: Everyone has the right on arrest or detention...(b) to retain and instruct counsel without

must be afforded "a reasonable opportunity to retain and instruct counsel without delay", including the use of a telephone or other facility to make contact with counsel.^{405/} The accused must make a "reasonably diligent" effort to contact counsel,^{406/} and cannot insist upon the services of a lawyer who is unable or unwilling to represent him.^{407/} Where duty counsel and legal aid are available, the accused must be informed of these services.^{408/} It would appear that where an accused cannot afford counsel, legal aid must be provided.^{409/}

b. Regulation

The legal profession in Canada is governed by thirteen law societies. The societies are established by provincial statutes, and are therefore subject to legislative change by the provincial legislatures. Otherwise, however, the law societies are largely self-governing and autonomous in the exercise of delegated authority. To practice law and be heard before a provincial court, a lawyer must be licensed by and be a member of the provincial law society. Barristers and solicitors of any province are allowed to practise before the federal courts.^{410/}

c. Membership

The *Canadian Charter of Rights and Freedoms* has been used on two occasions to secure greater participation in the legal profession. In one case,^{411/} a citizenship requirement for entry into the profession in British Columbia was struck down on the basis that it violated the equality rights^{412/} of an entire class of

delay and to be informed of that right. See Hogg, *supra* note 235 at 47-6 to 47-13.

405 R. v. *Manninen* [1987] 1 S.C.R. 1233, 1241.

406 R. v. *Smith* [1989] 2 S.C.R. 368.

407 *Re R. and Speid* (1983) 43 O.R. (2d) 596 (C.A.)

408 R. v. *Brydges* [1990] 1 S.C.R. 190.

409 R. v. *Rowbotham* (1988) 63 C.R. (3d) 113 (Ont. C.A.) This case held that lacking the means to employ counsel violated the accused's s.7 and s.11(d) *Charter* rights. Section 7 reads "Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of natural justice." Section 11(d) reads "Any person charged with an offence has the right ... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."

410 For example, the *Supreme Court Act*, R.S.C. 1985, c. S-26, ss. 22-24 state:

"22. All persons who are barristers or advocates in a province may practice as barristers, advocates and counsel in the Court.

23. All person who are attorneys or solicitors of the superior courts in a province may practice as attorneys, solicitors and proctors in the Court.

24. All persons who may practice as barristers, advocates, counsel, attorneys, solicitors or proctors in the Court are officers of the Court.

411 *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 143; 56 D.L.R. (4th) 1.

412 *Canadian Charter of Rights and Freedoms*, s.15(1) states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

persons (permanent residents who were non-citizens) and that the violation could not be justified as a reasonable limit demonstrably justified in a free and democratic society.^{413/} The Supreme Court of Canada held that the requirement was not carefully tailored enough to meet the purported objectives of the requirement: familiarity with Canada and its laws, a commitment to Canadian society, and honourably and conscientiously carrying out a lawyer's public duties.

In the second case,^{414/} two law society rules were found to violate the mobility rights^{415/} of members of the Alberta Bar. One rule prohibited the joint practice of law in Alberta between bar members who were active in and ordinarily resident in Alberta, and members who were not active and resident in Alberta. A second rule prohibited members from being a partner or an associate with more than one law firm. The rules were enacted to discourage law firms in one province from establishing branch offices in Alberta. The Supreme Court of Canada found that the rules impaired the ability of lawyers to maintain viable associations for the purpose of obtaining a livelihood, and would make it practically impossible for a person to practise law in Alberta without taking up residence in the province.

2. Individual/Personal Independence

a. Representation

Lawyers are free to represent clients on any matter that they are competent to handle, subject to such ethical considerations as conflict of interest.^{416/}

b. Privileged Communications

Solicitor-Client privilege is recognized in common law, and protected in the federal and provincial evidence acts.^{417/} All information that must be provided in order to obtain legal advice and that is given in confidence for

413 *Canadian Charter of Rights and Freedoms*, s.1 states: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

414 *Black v. Law Society of Alberta* [1989] 1 S.C.R. 591; 58 D.L.R. (4th) 317.

415 *Canadian Charter of Rights and Freedoms*, s.6(2)(b) states: "Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right...to pursue the gaining of a livelihood in any province."

416 In commenting on the right of Canadian lawyer Douglas Christie to represent an individual charged with "hate crimes" under the Canadian *Criminal Code*, the general counsel of the Canadian Civil Liberties Association, Alan Borovoy emphasized the distinction between the lawyer as advocate and as citizen. He stated that "...we're so concerned that lawyers must feel free to defend the rights of unpopular people and that certainly important to a civil liberties organization. What we said was lawyers, like everyone else, must have the right not only to defend their client's rights, but also to endorse their views. But the moment they go beyond the mere defence of their client's rights to endorsing their client's views, then the rest of society is entitled at that point to judge the lawyers not as lawyers but as citizens expressing those views. So at that point, we're entitled to treat them as we would treat their clients"; quoted in *Canadian Lawyer*, Vol. 14(8), November, 1990.

417 For example, under s. 30 of the *Canada Evidence Act*, R.S.C. 1985, c. E-5, business records made in the ordinary course of business may be admitted as evidence, but "(10) Nothing in this section renders

that purpose enjoys the privilege of confidentiality. The privilege arises as soon as the client takes the first steps to obtain legal advice.^{418/}

VI. THE RESPONSE - INTERNATIONAL RECOMMENDATIONS

The protection of lawyers and judges, and of the independence of the judiciary, has long been the subject of international consideration. The International Bar Association adopted a "Code of Minimum Standards of Judicial Independence" in 1982 (attached as Annex I). In the same year, the Law Association for Asia and the Western Pacific (LAWASIA) adopted the "Tokyo Principles on the Independence of the Judiciary in the LAWASIA Region".^{419/} In 1983, the First World Conference on the Independence of Justice^{420/} adopted the "Universal Declaration on the Independence of Justice" (attached as Annex II). In 1985, the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders adopted "Basic Principles on the Independence of the Judiciary" welcomed by the General Assembly that same year (attached as Annex III). In 1990, the Eighth UN Congress adopted "Basic Principles on the Role of Lawyers", welcomed by the General Assembly in that year (attached as Annex IV). In 1991, the Inter-American Commission on Human Rights published an interim report, including recommendations (attached as Annex V) on "Measures Necessary to Enhance the Autonomy, Independence and Integrity of the Members of the Judicial Branch". And the Federacion Interamericana de Abogados, in its Resolution 13 adopted in April, 1993, "Study of the Essential Conditions that Guarantee the Independence and Efficiency of the Judiciary" (attached as Annex VI), urged states of the hemisphere to critically examine the norms that must be respected to ensure judicial independence. Various international academic associations have also addressed the topic.^{421/}

VII. CONCLUSIONS

That the independence of the judiciary, and the protection of lawyers and judges in the exercise of their functions, is essential to a functioning legal system, to the Rule of Law, to the effective exercise of administrative and constitutional review, and to enforcing human rights, is beyond dispute.

Such international instruments as the IBA Code of Minimum Standards of Judicial Independence, the Universal Declaration on the Independence of Justice, the UN Basic Principles on the Independence of the Judiciary and Basic Principles on the Role of Lawyers, and the Inter-American Commission on Human Rights' Measures Necessary to Enhance the Autonomy, Independence and Integrity of the Members of the Judicial

admissible in evidence in any legal proceeding ... such part of any record as is proved to be ... a record made in the course of obtaining or giving legal advice or in contemplation of a legal proceeding."

418 *Descoteaux v. Mierzwinski* [1982] 1 S.C.R. 860, 141 D.L.R. (3d) 590.

419 Reprinted in Shetreet, *supra* note 99.

420 Co-sponsored by the Canadian Judicial Council, the Canadian Judges Conference, the Canadian Association of Provincial Court Judges, the Canadian Bar Association, the Royal Society of Canada, the Canadian Institute for the Administration of Justice, and the Canadian Section of the International Commission of Jurists, with the support of the Governments of Canada and of Quebec.

421 Including the XIth International Congress of the Academy of Comparative Law and the VIIth Congress of the International Society of Procedural law (Wuerzburg); see Shetreet, *supra* note 99.

Branch comprehensively codify the minimum obligations on governments to ensure this independence and protection.

This study reveals, however, that the independence of the judiciary continues to be threatened throughout the Americas, and that the response in member countries has been less than consistent. Information is not, however, readily available on the actual situation in all member countries. It has long been recognized throughout the UN and OAS systems that publicity and dissemination of information^{422/} and regular reporting are essential means to ensure respect for internationally-agreed principles. A reporting and review process

...assumes that there is a need for a *constructive dialogue* between the State concerned on the one hand, and an independent international group of experts on the other. Reporting is not something that is imposed upon an unwilling State, nor is it something designed as an adversarial process. Rather it is premised on the assumptions first that every State is an actual or potential violator of human rights (no matter how good its intentions might be) and second that a degree of routinized international accountability is in the best interests of the State itself, of its citizens, and of the international community.^{423/}

On August 26, 1993, the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities of the UN Human Rights Commission recommended the creation of a monitoring mechanism on the independence and impartiality of the judiciary, particularly with regard to judges and lawyers, as well as court officials, and the nature of potential threats to this independence and impartiality.^{424/} In July, 1994, a UN Economic and Social Council decision approved a resolution of the Human Rights Commission to appoint a special rapporteur on the subject.^{425/}

It is therefore recommended that the Inter-American Juridical Committee resolve to recommend that the Committee on Political and Juridical Affairs:

1. propose that the General Assembly:

(a) call the attention of member states to the basic principles on the independence of the judiciary and on the role of lawyers, as set out in the International Bar Association Code of Minimum Standards of Judicial Independence, the Universal Declaration on the Independence of Justice, the UN Basic Principles on the Independence of the Judiciary and Basic Principles on the Role of Lawyers, and

422 See "Report of the Human Rights Committee: Revised Guidelines for the Preparation of State Party Reports", UN GAOR, 46th Session, Suppl. No 40, at 207, UN Doc A/46/40 (1991), which requests information on "...whether any special efforts have been made to promote awareness among the public and the relevant authorities of the rights contained in the various human rights instruments".

423 Alston, "The Purposes of Reporting", in Manual on Human Rights Reporting, UN Doc. HR/Pub/91/1, UN Sales No. E.91.xiv.1 (1991) at 13, quoted by Ginger, "The Energizing Effect of Enforcing a Human Rights Treaty", 42 DePaul L. Rev. 1341, at 1366. See Schwelb, "Civil and Political Rights: The International Measures of Implementation", 62 AJIL 827 (1968); Mower, "The Implementation of the UN Covenant on Civil and Political Rights", 10 Revue des Droits de L'Homme 271 (1970); Note, "Reporting Under the Covenant on Civil and Political Rights: The First Five Years of the Human Rights Committee", 76 AJIL 142 (1982).

424 Resolution 1993/39, based on the final report of the Special Rapporteur of the Sub-Commission, document E/CN.4/Sub.2/1993/25 and Add.1.

425 ECOSOC Decision 1994/251 of 22 July, 1994, approving Commission on Human Rights Resolution 1994/41 of 4 March, 1994.

the Inter-American Commission on Human Rights' Measures Necessary to Enhance the Autonomy, Independence and Integrity of the Members of the Judicial Branch;

- (b) urge member states to bring to the attention of judges, lawyers, members of the executive and the legislature and the public in general the international instruments in this field; and
 - (c) encourage all member states give priority to efforts to respect these principles;
2. maintain under continuous review developments in member countries that may threaten the independence of the judiciary or that impede adequate protection of judges and lawyers in the exercise of their functions, through:
- (a) developing a system for annual reporting by member countries on such threats and on steps taken to enhance independence and protection, as well as for receipt of information from non-governmental organizations on these matters;
 - (b) review of these reports by an appropriate organ of the Organization; and
 - (c) publishing, in an appropriate summary form, the results of such reports and reviews.

ANNEXES I TO VI TO THE
REPORT ON
PROTECTION AND GUARANTEES FOR JUDGES
AND LAWYERS IN THE EXERCISE OF THEIR FUNCTIONS
(CJI/SO/II/doc.42/94 rev. 1)

ANNEX I

INTERNATIONAL BAR ASSOCIATION
CODE OF MINIMUM STANDARDS OF JUDICIAL INDEPENDENCE

The Jerusalem Approved Standards as adopted in the Plenary Session of the 18th IBA Biennial Conference held on Friday, 22 October 1982, in New Delhi, India.

A. Judges and the Executive

1. (a) Individual judges should enjoy personal independence and substantive independence.
 - (b) Personal independence means that the terms and conditions of judicial service are adequately secured, so as to ensure that individual judges are not subject to executive control.
 - (c) Substantive independence means that in the discharge of his judicial function, a judge is subject to nothing but the law and the commands of his conscience.
2. The judiciary as a whole should enjoy autonomy and collective independence vis-à-vis the Executive.
3. (a) Participation in judicial appointments and promotions by the Executive or Legislature is not inconsistent with judicial independence, provided that appointments and promotions of judges are vested in a judicial body, in which members of the judiciary and the legal profession form a majority.
 - (b) Appointments and promotions by a non-judicial body will not be considered inconsistent with judicial independence in countries where, by long historic and democratic tradition, judicial appointments and promotion operate satisfactorily.
4. (a) The Executive may participate in the discipline of judges, only in referring complaints against judges, or in the initiation of disciplinary proceedings, but not the adjudication of such matters. The power to discipline or remove a judge must be vested in an institution which is independent of the Executive.
 - (b) The power of removal of a judge should preferably be vested in a judicial tribunal.
 - (c) The Legislature may be vested with the powers of removal of judges, preferably upon a recommendation of a judicial commission.
5. The Executive shall not have control over judicial functions.
6. Rules of procedure and practice shall be made by legislation or by the Judiciary in cooperation with the legal profession, subject to parliamentary approval.
7. The state shall have a duty to provide for the execution of judgments of the Court. The Judiciary shall exercise supervision over the execution process.
8. Judicial matters are exclusively within the responsibility of the Judiciary, both in central judicial administration and in court level judicial administration.

9. The central responsibility for judicial administration shall preferably be vested in the Judiciary or jointly in the Judiciary and the Executive.
10. It is the duty of the state to provide adequate financial resources to allow for the due administration of justice.
11. (a) Division of work among judges should ordinarily be done under a predetermined plan, which can be changed in certain clearly defined circumstances.
(b) In countries where the power of division of judicial work is vested in the chief justice, it is not considered inconsistent with judicial independence to accord to the chief justice the power to change the predetermined plan for sound reasons, preferably in consultation with the senior judges when practicable.
(c) Subject to (a), the exclusive responsibility for case assignment should be vested in a responsible judge, preferably the President of the Court.
12. The power to transfer a judge from one court to another shall be vested in a judicial authority and preferably shall be subject to the judge's consent, such consent not to be unreasonably withheld.
13. Court services should be adequately financed by the relevant government.
14. Judicial salaries and pensions shall be adequate, and should be regularly adjusted to account for price increases independently of Executive control.
15. (a) The position of the judges, their independence, their security, and their adequate remuneration shall be secured by law.
(b) Judicial salaries cannot be decreased during the judges' service except as a coherent plan of an overall public economic measure.
16. The Ministers of the government shall not exercise any form of pressure on judges, whether overt or covert, and shall not make statements which adversely affect the independence of individual judges, or of the Judiciary as a whole.
17. The power of pardon shall be exercised cautiously so as to avoid its use as an interference with judicial decision.
18. (a) The Executive shall refrain from any act or omission which pre-empts the judicial resolution of a dispute, or frustrates the proper execution of a court judgment.
(b) The Executive shall not have the power to close down, or suspend, the operation of the court system at any level.

B. Judges and the Legislature

19. The Legislature shall not pass legislation which retroactively reverses specific court decisions.
20. (a) Legislation introducing changes in the terms and conditions of judicial services shall not be applied to judges holding office at the time of passing the legislation, unless the changes improve the terms of service.

- (b) In case of legislation reorganising courts, judges serving in these courts shall not be affected, except for their transfer to another court of the same status.
- 21. A citizen shall have the right to be tried by the ordinary courts of law, and shall not be tried before ad hoc tribunals.

C. Terms and Nature of Judicial Appointments

- 22. (a) Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement, at an age fixed by law at the date of appointment.
- (b) Retirement age shall not be reduced for existing judges.
- 23. (a) Judges should not be appointed for probationary periods except for in legal systems in which appointments of judges do not depend on having practical experience in the profession as a condition of appointment.
- (b) The institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition.
- 24. The number of the members of the highest court should be rigid and should not be subject to change, except by legislation.
- 25. Part-time judges should be appointed only with proper safeguards.
- 26. Selection of judges shall be based on merit.

D. Judicial Removal and Discipline

- 27. The proceedings for discipline and removal of judges should ensure fairness to the judge, and adequate opportunity for hearing.
- 28. The procedure for discipline should be held in camera. The judge may however request that the hearing be held in public, subject to a final and reasoned disposition of this request by the Disciplinary Tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.
- 29. (a) The grounds for removal of judges shall be fixed by law and shall be clearly defined.
- (b) All disciplinary action shall be based upon standards of judicial conduct promulgated by law, or in established rules of court.
- 30. A judge shall not be subject to removal unless, by reason of a criminal act or through gross or repeated neglect or physical or mental incapacity, he has shown himself manifestly unfit to hold the position of judge.
- 31. In systems where the power to discipline and remove judges is vested in an institution other than the Legislature, the tribunal for discipline and removal of judges shall be permanent, and be composed predominantly of members of the Judiciary.
- 32. The head of the court may legitimately have supervisory powers to control judges on administrative matters.

E. The Press, the Judiciary and the Courts

33. It should be recognised that judicial independence does not render the judges free from public accountability, however, the press and other institutions should be aware of the potential conflict between judicial independence and excessive pressure on judges.
34. Subject to Standard 41, judges may write articles in the press, appear on television and give interviews to the press.
35. The press should show restraint in publications on pending cases where such publication may influence the outcome of the case.

F. Standards of Conduct

36. Judges may not, during their term of office, serve in Executive functions, such as ministers of the government, nor may they serve as members of the Legislature or of municipal councils, unless by long historical traditions these functions are combined.
37. Judges may serve as chairmen of committees of inquiry in cases where the process requires skill of fact-finding and evidence taking.
38. Judges shall not hold positions in political parties.
39. A judge, other than a temporary judge, may not practice law during his term of office.
40. A judge should refrain from business activities, except his personal investments, or ownership of property.
41. A judge should always behave in a manner as to preserve the dignity of his office and the impartiality and independence of the Judiciary.
42. Judges may be organized in associations designed for judges, for furthering their rights and interests as judges.
43. Judges may take collective action to protect their judicial independence and to uphold their position.

G. Securing Impartiality and Independence

44. A judge shall enjoy immunity from legal actions, and the obligation to testify concerning matters arising in the exercise of his official functions.
45. A judge shall not sit in a case where there is a reasonable suspicion of bias or potential bias.
46. A judge shall avoid any course of conduct which might give rise to an appearance of partiality.

H. The Internal Independence of the Judiciary

47. In the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and superiors.

ANNEX II

UNIVERSAL DECLARATION ON THE INDEPENDENCE OF JUSTICE

Unanimously adopted at the final plenary session of the First World Conference on the Independence of Justice held at Montreal (Québec, Canada) June 10th, 1983.

Preamble

Whereas justice constitutes one of the essential pillars of liberty;

Whereas the free exercise of fundamental human rights as well as peace between nations can only be secured through respect for the rule of law;

Whereas States have long established courts and other institutions with a view to assuring that justice be duly administered in their respective territories;

Whereas the Charter of the United Nations has established the International Court of Justice as its principal judicial organ in order to promote the peaceful solution of disputes between States, in conformity with the principles of justice and international law;

Whereas the Statute of the International Court of Justice provides that the latter shall be composed of a body of independent judges, elected regardless of nationality, which as a whole shall be representative of the main forms of civilisation and of the principal legal systems of the world;

Whereas various Treaties have established other courts endowed with an international competence, which equally owe exclusive allegiance to the international legal order and benefit from representation of diverse legal systems;

Whereas the jurisdiction vested in international courts shall be respected in order to facilitate the interpretation, application and progressive development of international law and the promotion of human rights;

Whereas national and international courts shall, within the sphere of their competence, cooperate in the achievement of the foregoing objectives;

Whereas all those institutions, national and international, must, within the scope of their competence, seek to promote the lofty objectives set out in the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the Optional Protocol to the latter Covenant and other pertinent international instruments, objectives which embrace the independence of the administration of justice;

Whereas such independence must be guaranteed to international judges, national judges, lawyers, jurors and assessors;

Whereas the foundations of the independence of justice and the conditions of its exercise may benefit from restatement;

The World Conference on the Independence of Justice recommends to the United Nations on the consideration of this Declaration.

I. INTERNATIONAL JUDGES

Definitions

1.01 In this chapter:

- (a) "judges" means international judges and arbitrators;
- (b) "court" means an international court or tribunal of universal, regional, community or specialized competence.

Independence

1.02 The international status of judges shall require and assure their individual and collective independence and their impartial and conscientious exercise of their functions in the common interest. Accordingly, States shall respect the international character of the responsibilities of judges and shall not seek to influence them in the discharge of these responsibilities.

1.03 Judges and courts shall be free in the performance of their duties to ensure that the Rule of Law is observed, and shall not admit influence from any government or any other authority external to their statutes and the interests of international justice.

1.04 When governing treaties give international courts the competence to determine their rules of procedure, such rules shall come into and remain in force upon adoption by the courts concerned.

1.05 Judges shall enjoy freedom of thought and, in the exercise of their duties, shall avoid being influenced by any considerations other than those of international justice.

1.06 The ethical standards required of national judges in the exercise of their judicial functions shall apply to judges of international courts.

1.07 The principles of judicial independence embodied in the Universal Declaration of Human Rights and other international instruments for the protection of human rights shall apply to judges.

1.08 Judges shall promote the principle of the due process of law as being an integral part of the independence of justice.

1.09 No reservation shall be made or admitted to treaty provisions relating to the fundamental principles of independence of the judiciary.

1.10 Neither the accession of a state to the statute of a court nor the creation of new international courts shall affect the validity of these fundamental principles.

Appointment

1.11 Judges shall be nominated and appointed, or elected in accordance with governing constitutional and statutory provisions which shall, if possible, not confine the power of nomination to governments or make nomination dependent on nationality.

1.12 Only a jurist of recognized standing shall be appointed or elected to be a judge of an international court.

1.13 When the statute of a court provides that judges shall be appointed on the recommendation of a government, such appointment shall not be made in circumstances in which that government may

subsequently exert any influence upon the judge.

Compensation

1.14 The terms of compensation and pension of judges shall be established and maintained so as to ensure their independence. Those terms shall take into account the recognized limitations upon their professional pursuits both during and after their tenure of office, which are defined either by their statute or recognized and accepted in practice.

Immunities and Privileges

1.15 Judges shall enjoy privileges and immunities, facilities and prerogatives, no less than those conferred upon chiefs of diplomatic missions under and recognized by the Vienna Convention on Diplomatic Relations. Only the court concerned may lift these immunities.

1.16 Judges shall not be liable for acts done in their official capacity.

1.17 (a) In view of the importance of secrecy of judicial deliberations to the integrity and independence of the judicial process, judges shall respect secrecy in, and in relation to their judicial deliberations;
(b) States and other external authorities shall respect and protect the secrecy and confidentiality of the courts' deliberations at all stages.

Discipline and Removal

1.18 All measures of discipline and removal relating to judges shall be governed exclusively by the statutes and rules of their courts, and be within their jurisdiction.

1.19 Judges shall not be removed from office, except by a decision of the other members of the court and in accordance with its statute.

Judges Ad Hoc and Arbitrators

1.20 Unless reference to the context necessarily makes it inapplicable or inappropriate, the foregoing articles shall apply to judges ad hoc and to arbitrators in public international arbitrations.

II. NATIONAL JUDGES

Objectives and Functions

2.01 The objectives and functions of the judiciary shall include:

- (a) to administer the law impartially between citizen and citizen, and between citizen and the state;
- (b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights;
- (c) to ensure that all peoples are able to live securely under the rule of law.

Independence

2.02 Judges individually shall be free, and it shall be their duty, to decide matters before them impartially, in accordance with their assessment of the facts and their understanding of the law and without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

2.03 In the decision-making process, judges shall be independent vis-à-vis their judicial colleagues and superiors. Any hierarchical organization of the judiciary and any difference in grade or rank shall in no way interfere with the right of the judge to pronounce his judgment freely.

2.04 The judiciary shall be independent of the Executive and Legislative.

2.05 The judiciary shall have jurisdiction, directly or by way of review, over all issues of a judicial nature.

2.06 (a) No ad hoc tribunals shall be established;

(b) Everyone shall have the right to be tried expeditiously by the established ordinary courts or judicial tribunals under law, subject to review by the courts;

(c) Some derogations may be admitted in times of grave public emergency which threatens the life of the nation but only under conditions prescribed by law, and only to the extent strictly consistent with internationally recognized minimum standards and subject to review by the courts;

(d) In such times of emergency:

I. Civilians charged with criminal offenses of any kind shall be tried by ordinary civilian courts, expanded where necessary by additional competent civilian judges;

II. Detention of persons administratively without charge shall be subject to review by ordinary courts by way of habeas corpus or similar procedures, so as to insure that the detention is lawful, as well as to inquire into any allegations of ill treatment;

(e) The jurisdiction of military tribunals shall be confined to military offenses committed by military personnel there shall always be a right of appeal from such tribunals to a legally qualified appellate court.

2.07 (a) No power shall be exercised so as to interfere with the judicial process.

(b) The Executive shall not have control over judicial functions.

(c) The Executive shall not have the power to close down or suspend the operation of the courts.

(d) The Executive shall refrain from any act or omission which preempts the judicial resolution of a dispute or frustrates the proper execution of a court decision.

2.08 No legislation or executive decree shall attempt retroactively, to reverse specific court decisions, nor to change the composition of the court to affect its decision-making.

2.09 Judges may take collective action to protect their judicial independence.

2.10 Judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the

impartiality and independence of the judiciary. Subject to this principle, judges shall be entitled to freedom of belief, expression, association and assembly.

Qualifications, Selections and Training

- 2.11 Candidates for judicial office shall be individuals of integrity and ability, well-trained in the law. They shall have equality of access to judicial office.
- 2.12 In the selection of judges, there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status, subject however to citizenship requirements.
- 2.13 The process and standards of judicial selection shall give due consideration to ensuring a fair reflection by the judiciary of the society in all its aspects.
- 2.14 (a) There is no single proper method of judicial selection provided it safeguards against judicial appointments for improper motives.
(b) Participation in judicial appointments by the Executive or Legislature is consistent with judicial independence, so long as appointments of judges are made in consultations with members of the judiciary and the legal profession, or by a body in which members of the judiciary and the legal profession participate.
- 2.15 Continuing education shall be available to judges.

Posting, Promotion and Transfer

- 2.16 The assignment of a judge, to a post within the court to which he is appointed is an internal administrative function to be carried out by the judiciary.

[Explanatory Note: Unless assignments are made by the court, there is a danger of erosion of judicial independence by outside interference. It is vital that the court not make assignments as a result of any bias or prejudice or in response to external pressures. These comments are not intended to exclude the practice in some countries of requiring that assignments be approved by a Superior Council of the judiciary or similar body.]

- 2.17 Promotion of a judge shall be based on an objective assessment of the candidate's integrity and independence of judgment, professional competence, experience, humanity and commitment to uphold the rule of law. Article 2.14 shall apply to promotions.
- 2.18 Except pursuant to a system of regular rotation, judges shall not be transferred from one jurisdiction or function to another without their consent, but such consent shall not be unreasonably withheld.

[Explanatory Note: Unless this principle is accepted, transfer can be used to punish an independent and courageous judge, and to deter others from following his example. This principle is not intended to interfere with sound administrative practices enumerated in the law. Thus exceptions may be made, for example, where a judge in his early years is transferred from post to post to enrich his judicial experience.]

Tenure

- 2.19 (a) The term of office of the judges, their independence, security, adequate remuneration and conditions of service shall be secured by law and shall not be altered to their detriment.

(b) Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or expiry of their term of office, where such exists.

2.20 The appointment of temporary judges and the appointment of judges for probationary periods is inconsistent with judicial independence. Where such appointments exist, they shall be phased out gradually.

[Explanatory Note: This text is not intended to exclude part-time judges. Where such practice exists, proper safeguards shall be laid down to ensure impartiality and avoid conflict of interests. Nor is this text intended to exclude probationary periods for judges after their initial appointment, in countries which have a career judiciary, such as in civil law countries.]

2.21 (a) During their terms of office, judges shall receive salaries and after retirement, they shall receive pensions.

(b) The salaries and pensions of judges shall be adequate, commensurate with the status, dignity and responsibility of their office, and be regularly adjusted to account fully for price increases.

(c) Judicial salaries shall not be decreased during the judges' term of office, except as a coherent part of an overall public economic measure.

2.22 Retirement age shall not be altered for judges in office without their consent.

2.23 The executive authorities shall, at all times, ensure the security and physical protection of judges and their families.

Immunities and Privileges

2.24 Judges shall enjoy immunity from suit, or harassment, for acts and omissions in their official capacity.

2.25 (a) Judges shall be bound by professional secrecy in relation to their deliberations, and to confidential information acquired in the course of their duties other than in public proceedings.

(b) Judges shall not be required to testify on such matters.

Disqualifications

2.26 Judges may not serve in an executive or a legislative capacity unless it is clear that these functions are combined, without compromising judicial independence.

2.27 Judges may not serve as chairmen or members of committees of inquiry, except in cases where judicial skills are required.

2.28 Judges shall not be members of, or hold positions in, political parties.

[Explanatory Note: This text is not intended to permit membership of judges in political parties in countries where under law or practice such is excluded, but to lay down standards limiting the scope of judicial involvement in countries where such membership is permissible.]

2.29 Judges may not practice law.

[Explanatory Note: See note 2.20]

2.30 Judges shall refrain from business activities, except as incidental to their personal investments or their ownership of property.

2.31 A judge shall not sit in a case where a reasonable apprehension of bias on his part may arise.

Discipline and Removal

2.32 A complaint against a judge shall be processed expeditiously and fairly under an appropriate practice, and the judge shall have the opportunity to comment on the complaint at the initial stage. The examination of the complaint at its initial stage shall be kept confidential, unless otherwise requested by the judge.

2.33 (a) The proceedings for judicial removal or discipline, when such are initiated, shall be held before a court or a board predominantly composed of members of the judiciary and selected by the judiciary.

(b) However, the power of removal may be vested in the Legislature by impeachment or joint address, preferably upon a recommendation of a court or board as referred to in 2.33 (a).

[Explanatory Note: In countries where the legal profession plays an indispensable role in maintaining the rule of law and judicial independence, it is recommended that members of the legal profession participate in the selection of the members of the court or board, and be included as members thereof.

2.34 All disciplinary action shall be based upon established standards of judicial conduct.

2.35 The proceedings for discipline of judges shall ensure fairness to the judge and the opportunity of a full hearing.

2.36 With the exception of proceedings before the Legislature, the proceedings for discipline and removal shall be held in camera. The judge may, however, request that the hearing be held in public, subject to a final and reasoned disposition of this request by the disciplinary Tribunal. Judgments in disciplinary proceedings, whether held in camera or in public, may be published.

2.37 With the exception of proceedings before the Legislature or in connection with them, the decision of a disciplinary Tribunal shall be subject to appeal to a court.

2.38 A judge shall not be subject to removal except on proved grounds of incapacity or misbehaviour, rendering him unfit to continue in office.

2.39 In the event that a court is abolished, judges serving in this court shall not be affected, except for their transfer to another court of the same status.

Court Administration

2.40 The main responsibility for court administration shall vest in the judiciary.

2.41 It shall be a priority of the highest order, for the state to provide adequate resources to allow for the due administration of justice, including physical facilities, appropriate for the maintenance of judicial

independence, dignity and efficiency, judicial and administrative personnel, and operating budgets.

2.42 The budget of the court shall be prepared by the competent authority in collaboration with the judiciary.
The judiciary shall submit their estimate of the budget requirements to the appropriate authority.

2.43 The judiciary shall alone be responsible for assigning cases to individual judges or to sections of a court composed of several judges, in accordance with law or rules of court.

2.44 The head of the court may exercise supervisory powers over judges on administrative matters.

Miscellaneous

2.45 A judge shall ensure the fair conduct of the trial and inquire fully into any allegation made of a violation of the rights of a party or of a witness, including allegations of ill-treatment.

2.46 Judges shall accord respect to members of the Bar.

2.47 The state shall ensure the due and proper execution of orders and judgments of the courts; but supervision over the execution of orders and judgments process shall be vested in the judiciary.

2.48 Judges shall keep themselves informed about international conventions and other instruments establishing human rights' norms, and shall seek to implement them as far as feasible, within the limits set by their national constitutions and laws.

2.49 The provisions of Chapter II: National Judges, shall apply to all persons exercising judicial functions, including arbitrators and public prosecutors, unless reference to the context necessarily makes them inapplicable or inappropriate.

III. LAWYERS

Definitions

3.01 In this chapter:

- (a) "lawyer" means a person qualified and authorized to practice before the courts, and to advise and represent his clients in legal matters;
- (b) "Bar Association" means the recognized professional association to which lawyers within a given jurisdiction belong.

General Principles

3.02 The legal profession is one of the institutions referred to in the preamble to this declaration. Its independence constitutes an essential guarantee for the promotion and protection of human rights.

3.03 There shall be a fair and equitable system of administration of justice, which guarantees the independence of lawyers in the discharge of their professional duties without any restrictions, influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3.04 All persons shall have effective access to legal services provided by an independent lawyer, to protect and establish their economic, social and cultural, as well as civil and political rights.

Legal Education and Entry into the Legal Profession

3.05 Legal education shall be open to all persons with requisite qualifications, and no one shall be denied such opportunity by reason of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or status.

3.06 Legal education shall be designed to promote in the public interest, in addition to technical competence, awareness of the ideals and ethical duties of the lawyer, and of human rights and fundamental freedoms recognized by national and international law.

3.07 Programmes of legal education shall have regard to the social responsibilities of the lawyer, including cooperation in providing legal services to the poor and the promotion and defence of economic, social and cultural rights in the process of development.

3.08 Every person having the necessary integrity, good character and qualifications in law shall be entitled to become a lawyer, and to continue in practice without discrimination for having been convicted of an offence for exercising his internationally recognized civil and political rights.

Education of the Public Concerning the Law

3.09 It shall be the responsibility of the lawyer to educate the members of the public about the principles of the rule of law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties, and the relevant available remedies.

Rights and Duties of Lawyers

3.10 The duties of a lawyer towards his client include: a) advising the client as to his legal rights and obligations; b) taking legal action to protect him and his interests; and , where required, c) representing him before courts, tribunals or administrative authorities.

3.11 The lawyer, in discharging his duties, shall at all times act freely, diligently and fearlessly in accordance with the wishes of his clients and subject to the established rules, standards and ethics of his profession without any inhibition or pressure from the authorities or the public.

3.12 Every person and group of persons is entitled to call upon the assistance of a lawyer to defend his or its interests or cause within the law, and it is the duty of the lawyer to do so to the best of his ability. Consequently the lawyer is not to be identified by the authorities or the public with his client or his client's cause, however popular or unpopular it may be.

3.13 No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or represented any client or client's cause.

3.14 No court or administrative authority shall refuse to recognize the right of a lawyer to appear before it for his client.

- 3.15 It is the duty of a lawyer to show proper respect towards the judiciary. He shall have the right to raise an objection to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing.
- 3.16 If any proceedings are taken against a lawyer for failing to show proper respect towards a court, no sanction against him shall be imposed by a judge who participated in the proceedings which gave rise to the charge against the lawyer.
- 3.17 Save as provided in these principles, a lawyer shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings, or in his professional appearances before a court, tribunal or other legal or administrative authority.
- 3.18 The independence of lawyers, in dealing with persons deprived of their liberty, shall be guaranteed so as to ensure that they have free and fair legal assistance. Safeguards shall be built to avoid any possible suggestions of collusion, arrangement of dependence between the lawyer who acts for them and the authorities.
- 3.19 Lawyers shall have all such other facilities and privileges as are necessary to fulfil their professional responsibilities effectively, including: a) absolute confidentiality of the lawyer-client relationship; b) the right to travel and to consult with their clients freely, both within their own country and abroad; c) the right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional work; d) the right to accept or refuse a client or a brief.
- 3.20 Lawyers shall enjoy freedom of belief, expression, association and assembly, and in particular shall have the right to: 1) take part in public discussion on matters concerning the law and the administration of justice, b) join or form freely local, national or international organizations, c) propose and recommend well-considered law reforms in the public interest and inform the public about such matters, and d) take full and active part in the political social and cultural life of their country.

Legal Services for the Poor

- 3.22 It is a necessary corollary of the concept of an independent bar, that its members shall make their services available to all sectors of society, so that no one may be denied justice, and shall promote the cause of justice by protecting the human rights, economic, social and cultural as well as civil and political, of individuals and groups.
- 3.23 Governments shall be responsible for providing sufficient funding for legal service programmes for the poor.
- 3.24 Lawyers engaged in legal service programmes and organizations, which are financed wholly, or in part, from public funds, shall receive adequate remuneration and enjoy full guarantees of their professional independence in particular by:
- the direction of such programmes or organizations being entrusted to an independent board, composed mainly or entirely of members of the profession, with full control over its policies, budget and staff;
 - recognition that, in serving the cause of justice, the lawyer's primary duty is towards his client, whom he must advise and represent in conformity with this professional conscience and judgment.

The Bar Association

3.25 There shall be established in each jurisdiction one or more independent and self-governing associations of lawyers, recognized in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person. This shall be without prejudice to their right to form or join, in addition, other professional associations of lawyers and jurists.

3.26 In order to enjoy the right of audience before the courts, all lawyers shall be members of the appropriate Bar Association.

Functions of the Bar Associations

3.27 The functions of the Bar Association in ensuring the independence of the legal profession shall be, inter alia:

- (a) to promote and uphold the cause of justice, without fear or favour;
- (b) to maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession;
- (c) to defend the role of lawyers in society and preserve the independence of the profession;
- (d) to protect and defend the dignity and independence of the judiciary;
- (e) to promote the free and equal access of the public to the system of justice, including the provision of legal aid and advice;
- (f) to promote the right of everyone to a fair and public hearing before a competent, independent and impartial tribunal, and in accordance with proper procedures in all matters;
- (g) to promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation;
- (h) to promote a high standard of legal education as a prerequisite for entry into the profession;
- (i) to ensure that there is free access to the profession for all persons having the requisite professional competence and good character, without discrimination of any kind, and to give assistance to new entrants into the profession;
- (j) to promote the welfare of members of the profession and render assistance to a member of his family in appropriate cases;
- (k) to affiliate with, and participate in, the activities of international organization of lawyers.

3.28 Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the Bar Association shall cooperate in assisting a foreign lawyer to obtain the necessary right of audience.

3.29 To enable the Bar Association to fulfil its function of preserving the independence of lawyers, it shall be informed immediately of the reason and legal basis for the arrest or detention of any lawyer; and for the same purpose the association shall have prior notice for: i) any search of his person or property, ii) any seizure of documents in his possessions, and iii) any decision to take proceedings affecting or calling into question the integrity of a lawyer. In such cases the Bar Association shall be entitled to

be represented by its president or nominee, to follow the proceedings, and in particular to ensure that professional secrecy is safeguarded.

ANNEX III

BASIC PRINCIPLES ON THE INDEPENDENCE OF THE JUDICIARY

Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan, Italy, in August and September, 1985, and welcomed by the 40th General Assembly of the United Nations in resolution 40/146, adopted December 13, 1985.

Whereas in the Charter of the United Nations the peoples of the world affirm, *inter alia*, their determination to establish conditions under which justice can be maintained to achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedom, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the Judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted or its decision is within its competence as defined by law.

4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to division. This principle is without prejudice to judicial review or to mitigation of commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.

6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.

7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of Expression and Association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, Selection and Training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of Service and Tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their terms of office, where such exists.

13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.

14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional Secrecy and Immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.

16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, Suspension and Removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

ANNEX IV

BASIC PRINCIPLES ON THE ROLE OF LAWYERS

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana, Cuba in August and September 1990, and welcomed by the 45th General Assembly of the United Nations in resolution 45/121, adopted December 14, 1990.

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights recalls the obligations of States under the Charter to promote universal respect for, and observance of, human rights and freedoms,

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the Safeguards Guaranteeing Protection of Those Facing the Death Penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest,

The Basic Principles on the Role of Lawyers, set forth below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of lawyers without having the formal status of lawyers.

Access to Lawyers and Legal Services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.

2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, color, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.

4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Special Safeguards in Criminal Justice Matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.

6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.

8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within hearing, of law enforcement officials.

Qualifications and Training

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.

10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, color, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement that a lawyer must be a national of the country concerned, shall not be considered discriminatory.

11. In countries where there exist groups, communities or regions whose needs for legal services are

not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

Duties and Responsibilities

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.

13. The duties of lawyers towards their clients shall include:

- (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
- (b) Assisting clients in every appropriate way, and taking legal action to protect their interests;
- (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.

14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.

15. Lawyers shall always loyally respect the interests of their clients.

Guarantees for the Functioning of Lawyers

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.

18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.

19. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.

20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.

21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.

22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationships are confidential.

Freedom of Expression and Association

23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

Professional Associations of Lawyers

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.

25. Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.

Disciplinary Proceedings

26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.

27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.

28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review.

29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.

ANNEX V

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

**1992 REPORT ON "MEASURES NECESSARY TO ENHANCE
THE AUTONOMY, INDEPENDENCE AND INTEGRITY OF THE
MEMBERS OF THE JUDICIAL BRANCH"**

RECOMMENDATIONS

1. Guaranteeing that the executive and legislative branches will not interfere in matters that are the preserve of the Judicial Branch;
2. Providing the Judicial Branch with the political support and the means needed for it to be able to fully perform its function of guaranteeing human rights;
3. Ensuring the exclusive exercise of jurisdiction by the members of the Judicial Branch, and elimination of special courts;
4. Guaranteeing that judges cannot be removed from office as long as their conduct remains above reproach, and ensuring that panels are set up to consider the cases of judges who are accused of unethical conduct or corruption;
5. Maintaining of the constitutional state; and declaration of states of emergency solely when absolutely necessary, in terms of Articles 27 of the American Convention on Human Rights and 4 of the International [Covenant] on Civil and Political Rights, structuring this system in such a way that it does not appreciably change the independence of the different organs of government, so that human rights legislation remains basically untouched;
6. Ensuring unrestricted access to the courts and legal remedies and enabling the victim, when called for, to take action to bring those responsible to book;
7. Ensuring the effectiveness of the judicial guarantees essential for the protection of human rights, and removing the obstacles that prevent their swift and appropriate application;
8. Guaranteeing due process of law -- accusation, defense, evidence and judgment -- through the public holding of trials;
9. Returning to judges the responsibility for disposition and supervision over persons detained;
10. Guaranteeing that judges will be immediately notified of all facts and situations in which human rights are restricted or suspended, regardless of the juridical status of the accused;
11. Removal of the procedural obstacles that cause trials to run on for extended periods of time, so that cases may be tried within a reasonable period and settled by means of judgments covering all points involved;
12. Ensuring separate hearings of criminal cases and of civil or administrative disputes involving compensation for injuries and losses.

ANNEX VI

FEDERACION INTERAMERICANA DE ABOGADOS

RESOLUTION 13
April, 1993

**Study of the Essential Conditions that Guarantee
the Independence and Efficiency of the Judiciary**

Whereas:

The overwhelming majority of the countries in the Hemisphere have re-established the basic norms of representative democracy;

That one of the most essential conditions for the consolidation of democracy is the respect for the norm of due process;

The existence of an independent, modern and efficient judiciary is an essential component of due process;

The ratification of the American Convention on Human Rights, and the legal value of the American Declaration of the Rights and Duties of Man, creates an obligation for the States of the Hemisphere to ensure respect for due process, including the existence of Judiciaries that are independent, modern, and efficient,

Resolves:

1. To recommend that the Hemispheric States undertake to critically review the norms that could effectively ensure the independence and efficiency of the judiciary.
2. To recommend that those studies should include, *inter alia*:
 - a. The systems to appoint and promote judges
 - b. Preparation of judges
 - c. Efficient judicial procedures
 - d. Access to justice under conditions of equality.
3. Keep the subject under consideration by the Inter-American Bar Association.

Anx42.94I
disk 56B

T A B L E O F C O N T E N T S

Page

I. WHY ARE JUDGES AND LAWYERS SO IMPORTANT?

SOME PHILOSOPHICAL FOUNDATIONS	241
A. Judging and the Legal System	241
B. Judges, Lawyers and Governmental Authority	245
1. The Rule of Law	245
2. Limits on Governments and the Enforcement of Rights	248
II. CONSEQUENTIAL IMPERATIVES	257
A. Independence of the Judiciary	258
1. Institutional/Collective Independence	258
a. Separation of Powers	258
b. Administration	258
c. Jurisdiction	259
2. Individual Independence	259
a. Adequate Remuneration	260
b. Security of Tenure, including Discipline and Removal	260
c. Appointments	261
d. Immunity	261
e. Physical Security/Personal Safety	262
3. Emergencies and States of Siege	262
B. Independence of the Legal Profession	263
1. Institutional/Collective Independence	263
a. Access	263
b. Regulation	263
c. Membership	263
2. Individual/Personal Independence	263
a. Representation	263
b. Privileged Communications	264
c. Physical Security/Personal Safety	264
3. Emergencies and States of Siege	264
III. THE EXTENT OF THE PROBLEM: THREATS TO INDEPENDENCE	264
1. The System of Justice	264
a. Abrogation of Judicial Powers	264
b. Incursions into Jurisdiction	266
c. Judicial Salaries	267
d. Failure to Enforce Judicial Decisions	267
e. Adequacy of Resources	268

2. Legal Professionals Individually	268
a. Discipline and Removal of Judges	268
b. Personal Security of Judges and Lawyers	269
c. Transfer of Judges	276
d. Freedom from Legal Persecution	276
3. Emergencies and States of Siege	277
IV. THE RESPONSE IN MEMBER COUNTRIES	278
A. Independence of the Judiciary	278
1. Institutional/Collective Independence	278
a. Separation of Powers	278
b. Administration	279
c. Jurisdiction	280
2. Individual/Personal Independence	281
a. Adequate Remuneration	281
b. Security of Tenure	282
c. Appointments	282
d. Immunity	283
e. Physical Security/Personal Safety	284
3. Emergencies and States of Siege	286
B. Independence of the Bar/Legal Profession	287
1. Access and Representation	287
2. Regulation	287
3. Privileged Communications	288
V. THE RESPONSE - CANADA AS AN EXAMPLE	288
A. Independence of the Judiciary	288
1. Institutional/Collective Independence	289
a. Separation of Powers	289
b. Administration	290
c. Jurisdiction	292
2. Individual Independence	293
a. Adequate Remuneration	293
b. Security of Tenure	295
c. Appointments	297
d. Immunity	298
3. Emergencies and States of Siege	299

B. Independence of the Bar/Legal Profession	300
1. Institutional/Collective Independence	300
a. Access	300
b. Regulation	301
c. Membership	301
2. Individual/Personal Independence	302
a. Representation	302
b. Privileged Communications	303
VI. THE RESPONSE - INTERNATIONAL RECOMMENDATIONS	303
VII. CONCLUSIONS	304
ANNEX I	308
ANNEX II	313
ANNEX III	328
ANNEX IV	332
ANNEX V	337
ANNEX VI	339



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/II/doc.44/94
18 August 1994
Original: Spanish

SETTLEMENT OF DISPUTES IN THE MERCOSUR

(presented by Ambassador Ramiro Saraiva Guerreiro)

There has been no alteration in the Methods for the Settlement of Disputes in the Mercosur since the presentation of the Report CJI/SO/I/doc.1/94, dated 30 September 1993.

2. However, this month the Protocol on the Promotion and Protection of Investments from States that are not Members of Mercosur was signed in Buenos Aires, containing provisions on the settlement of disputes between a Member-State and a third party State on issues covered by the Protocol.

3. Attached herewith is the text of the Protocol, which will come into force 30 (thirty) days after the deposit of the fourth deed of ratification, meaning when ratified by the current four members of the Mercosur. Future adherents to the Treaty of Asuncion will *ipso jure* adhere to the Protocol.

4. We transcribe below the text of section G of the Protocol, which covers issues between a Member State and a third party State.

G - SETTLEMENT OF DISPUTES BETWEEN A MEMBER-STATE AND A THIRD PARTY STATE

1. Disputes arising between a Member-State and a third party State with regard to the interpretation or application of the agreement signed between them shall, as far as possible, be resolved by diplomatic means.

2. If it proves impossible to settle a dispute in this manner within a reasonable period

of time to be stipulated, it shall be submitted to international arbitration .

In this case, provision is made for recourse to international arbitration, when diplomatic negotiations are not successful. However, it does not define the process of setting up and functioning of the Arbitration Panel.

5. In the case of disputes between an investor from a third party State and the Member-State receiving the investment, the following provisions are applicable from Section H of Article 2:

H - SETTLEMENT OF DISPUTES BETWEEN AN INVESTOR FROM A THIRD PARTY STATE AND A MEMBER-STATE RECEIVING THE INVESTMENT

1. Any dispute arising over the interpretation of an agreement on the reciprocal promotion and protection of investments arising between an investor from a third party State and a Member-State shall, as far as possible, be resolved through friendly talks.

2. Should it not prove possible to resolve this dispute within a reasonable period as from the moment at which it is brought forward by one or the other of the parties, it may be submitted, at the request of the investor:

- a) either to the competent courts of the Member-State in whose territory the investment was made;
- b) or to international arbitration, under the conditions described in Paragraph 3.

Providing the investor has submitted this dispute to the jurisdiction of the Member State in litigation or to international arbitration, the choice of one or the other of these procedures shall be definitive.

3. In the case of having recourse to international arbitration, the dispute may be submitted, at the request of the investor, to an Ad Hoc Arbitration Court, or to an international arbitration institution.

4. The arbitration panel shall decide on the basis of the provisions of the agreement signed on the right of the Member-State involved in the dispute, including the norms and standards regarding conflicts between legislations, in terms of the private agreements that may be concluded related to the investment and also on the basis of the principles of international law relative to the issue.

5. The arbitration sentences handed down shall be definitive and binding on the parties involved. The Party State shall carry them out in compliance with its legislation:.

Should the dispute not be resolved by means of friendly talks, it should be emphasized that the investor has the option to have recourse to the courts of the Member-State or international arbitration. One option excludes the other. However, it should also be noted that prior exhaustion of

domestic recourses is not necessary. In this case, the text does not describe a specific arbitration mechanism, but merely mentions an ad hoc tribunal (which must be negotiated and defined), or alternatively an international arbitration institution at the choice of the investor.

6. Section I defines the investments and the disputes covered by the agreement, in function of the date of the occurrence thereof.

7. Although the need has not arisen to modify or replace the Protocol of Brasilia, it is reasonable to assume that, as the integration process progresses, methods for the settlement of disputes specifically linked to the special Protocols may well have to be defined.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/II/doc.46//94
18 August 1994
Original: Spanish

JURIDICAL ASPECTS OF FOREIGN DEBT

(presented by Dr. Miguel Angel Espeche Gil)

During its March 1993 sessions period, the Inter-American Juridical Committee reincorporated this topic into its agenda, appointing Dr. Miguel Angel Espeche Gil as Rapporteur. During the August sessions period this same year, he presented a Report entitled □Juridical Aspects of Foreign Debt□, on which basis the Committee adopted Resolution CJI.RES.II-18/93 which emphasizes:

...

□IN VIEW of the persistence of the problem of foreign debt affecting all the countries in the Inter-American System as a whole;

...

TAKING INTO CONSIDERATION the need to respect the norms and standards of international public law and private law, in the quest for solutions allowing the harmonization of all legitimate interests in play, removing obstacles to sustainable development and the well-being of the peoples of the continent, and

WHEREAS the initiatives undertaken in academic and parliamentary bodies, as well as international fora, such as those that suggest the insertion of a consultatory procedure before the International Court of Justice, it is advisable that this topic should be studied in greater depth, seeking just and fair solutions to this problem;

RESOLVES:

1. To continue to study this topic and request the Rapporteur to keep the Committee updated regarding the development thereof.

2. To attach the Report entitled Legal Aspects of Foreign Debt to this Resolution.

Due to the provisions of Item 1 of the Resolution transcribed, in the January 1994 session, the Rapporteur advised the Committee regarding the development of this topic, as well as reporting back on a Seminar held in September 1993 on this issue, organized in Brasilia by the Latin American Parliament.

The Juridical and Political Affairs Committee of the Permanent Council of the Organization of American States took note of the Resolution of the Committee (CP/doc.2479/94).

During this August sessions period, Dr. Espeche Gil emphasized the recent increases in the interest rates imposed by the United States Federal Reserve Bank on foreign debt of the Latin American nations, which already exceeds US\$ 500,000 million. The Rapporteur also advised that there was no further news regarding alternative means of juridical treatment of this topic, with the exception of the comprehensive Report prepared by the Consultative Council of the Latin American Parliament, dated 21 April 1994, which outlines the current state of the proposal to submit juridical aspects of foreign debt to the International Court of Justice through the consultative procedure of Article 96 of the United Nations Charter. He then handed the Committee this text as well as the book entitled *La Deuda Externa - Solicitud de un Dictamen Consultivo a la Corte Internacional de Justicia de la Haya*, on Foreign Debt - Application for a Consultative Hearing submitted to the International Court of Justice at the Hague, by various authors, also published by the Latin American Parliament.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/II/doc.47/94
18 August 1994
Original: Spanish

INTER-AMERICAN COOPERATION TO COPE
WITH INTERNATIONAL TERRORISM

(presented by Dr. Miguel Angel Espeche Gil)

The recent terrorist attempts in various Latin American countries and the possibility that this type of crime may be repeated indiscriminately, brings forward the need to analyze the juridical measures for the prevention and repression of this scourge. I firmly believe that at this stage in events, the tasks of preventing fresh attempts should take high priority.

The attitude of utter skepticism regarding the possibilities of international law for coping with this type of crime that summarizes part of the doctrine, has the counterpart of the opinion of Prof. Jose Perez Montero, who in his work entitled *La lucha y la cooperación internacionales contra el terrorismo* (Yearbook American Hispano-Luso Institute for International Law) N°9, states:

□ Terrorism is an evil of such magnitude and seriousness that its complete eradication goes beyond the full possibilities of the law. Nevertheless, when faced with such evil, jurists cannot remain inactive and silent, they have the duty of seeking solutions and proposing measures that will help remedy or at least mitigate this□.

The treatment of this issue is not new in the Inter-American System. The Inter-American Juridical Committee has taken this topic under consideration on various occasions and in 1971 issued a Opinion that serves as a basis for the Convention to Prevent and Sanction Acts of Terrorism, Configured as Crimes against persons and connected extortion, when these are international in scope (Washington 1971). As noted in the document OEA/Sec.Gral - CJI/1/94 dated 20 July 1994, entitled □Juridical Matters under the consideration of various OAS Agencies□, □i. Study of some aspects of terrorism, attacks on individuals and connected extortion. In 1971, the General Assembly commissioned the Permanent Council to carry out the pertinent studies, supplementing the provisions of the □Convention to Prevent and Sanction Acts of Terrorism, Configured as Crimes against the People and Connected Extortion when these are international in scope (Washington

1971). In 1978, the General Assembly reassigned this commission to the Council, extending it to cover the study of a Draft Resolution on terrorism in general. To this end, in 1983 the Juridical and Political Affairs Commission of the Permanent Council set up a Working Group, which began its tasks by consulting Governments on this issue, to which only three States replied. In turn, the Under Secretariat of Juridical and Political Affairs agreed to recommend to the Permanent Council that a fresh consultation be forwarded to the Member States on the convenience of continuing to study this topic. To date, this has not been carried out.□

The alarming series of terrorist attacks assailing the countries on the American continent would comply with the following description, and the criminal actions to which we refer correspond to these parameters: this involves the conceptualization, preparation and start of implementation of crimes committed in the Americas with or without local support that results in massive losses of lives and goods. These facts correspond in all cases to the configuration of crimes in the countries where they have perpetrated, and may also fall under the definition of genocide (Article 2 of the Convention for the Prevention and Sanction of the Crime of Genocide).

With the worsening of other action covered by the definition of terrorism, the recent acts of violence assume a scope which denotes the use of measures similar to those of military operations. The episodes which took place through the use of explosives have been of a size and planning and effect similar to bombardments, with their lethal effects extending to the civil populations of the countries affected, beyond the assumed target of the actions. This leads us to wonder if we are not faced with what we could call □armed attacks□ such as those covered by the Inter-American Treaty for Reciprocal Assistance.

If the parameters sketched out above are accepted as outlining the concept of the crimes under examination, we are not far from the possibility of assimilating them - with the juridical and institutional consequences - to those that prompted the implementation of the provisions of the Inter-American Reciprocal Assistance Treaty -IRAT, whether or not this Treaty is mentioned.

This line of analysis leads us to a first approximation of a measure whereby, in order to cope with this new threat, it would not be necessary to adopt new juridical instruments with all the laborious process that is required prior to the signature of a treaty or convention and its later coming into effect.

The limited analysis made in this direction shows that various elements agree in confirming the reasonability of the application of the normative system in effect, particularly as Article 4 of the Inter-American Reciprocal Assistance Treaty - IRAT already defines the geographical scope thereof. On the other hand, to date it has not even been suggested that these attacks could have originated on the American continent.

The provisions of the Inter-American Reciprocal Assistance Treaty - IRAT are designed to □prevent and repress threats and acts of aggression against any of the countries of America; ... reaffirming the existence of the agreement that they have signed on matters involving the maintenance of international peace and security that are susceptible to regional action; ... that the signatories should reconfirm their agreement to the principles of Inter-American solidarity and cooperation; ... that the obligation of mutual help and common defense .. . should be essentially linked to democratic ideals and the wish to ensure permanent cooperation in order to achieve the

principles and purposes of a policy of peace ... that has resulted in an agreement with the objectives as stipulated ... sign this Treaty in order to ensure peace through all possible means, providing effective reciprocal aid to cope with armed attacks against any American State, and combat threats of aggression against them.

Along these lines, it may be concluded that the Inter-American community as a whole has been offended by armed attacks against various Member-States, as stipulated in Article 3 sub-item 1) of the Inter-American Reciprocal Assistance Treaty -IRAT.

We are faced with actions which - due to the characteristics of uncertainty with regard to their origin - are not wholly assimilable to acts of aggression that prompt the application of the Treaty. The attacks are clearly of a war-like nature.

This thus opens up the juridical possibility of summoning the consultation body in Article 8. This has brought forward faculties to agree on the measures required by the situation.

The mention in this Article of the actions that may be taken by the consultation body is merely enumerative and not binding, whereby it can adopt any other cooperative measure in terms of security as □who can do more does less□. All the measures of aid, assistance, cooperation, search and interchange of information, logistical support, extradition, assignment of responsibilities to the Inter-American Defense Board etc., that may be adopted would be fully legitimate, as well as the apprehension of those responsible for terrorist acts and the prevention of fresh attacks that may be planned against other Member-States. The informative measures reveal growing concern with regard to the possible existence of an increase in terrorist violence. Simply from an analysis of the above mentioned norm, it may be concluded that it would be legal to request and adopt preventive measures against repetition of attacks such as those recently suffered. The consultation body would thus be competent and in a position to adopt measures that would later have sufficient disuasory effect.

The initiative outlined above does not contradict but rather supplements the establishment of a cooperation mechanism that includes commitments regarding police, diplomatic and juridical collaboration between States to combat this scourge, eliminating restrictions on the range of political delinquency, which is the same concept as political crime, in order to streamline the extradition of the alleged terrorists, as well as imposing severe penalties on those responsible, without giving in to blackmail or extortion (in the case of other terrorist acts such as taking hostages), with consequent increased vulnerability of the respective juridical orders.

On the other hand, the political and international implications of this topic cannot avoid the possibility that States may be responsible for terrorist acts, but this aspect need not be approached through defensive and preventive measures as stipulated. The important point is to emphasize the possibility of setting up a defensive system without complications of a political or institutional character, that would also cover alleged aggressor States.

I put forward these considerations to the Working Group as a basis for launching a discussion on this vital topic.

ANNEX

The terrorist attack in Buenos Aires against the Israeli Embassy in May 1992 was additionally a violation of Article 2 of the Convention on the Prevention and Punishment of Crimes Against Internationally-Protected Persons, including Diplomatic Agents, dated 14 December 1973.

The case of an attack against an aircraft in Panama also violates the Convention for the repression of crimes against the security of civil aviation, signed in Montreal on 23 September 1971.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/II/doc.48/94 rev.1
26 August 1994
Original: Spanish

SYSTEMS FOR THE SETTLEMENT OF DISPUTES UNDER THE AUSPICES
OF THE LATIN AMERICAN INTEGRATION ASSOCIATION (LAIA)

(presented by Dr. Alberto Zelada Castedo)

I. THE LACK OF A REGIONAL SYSTEM OF MEASURES
FOR THE SETTLEMENT OF DISPUTES

1. To date, the agencies of the Latin American Free Trade Association (LAFTA) have not developed a system for the general application of measures for the settlement of disputes that could be implemented among the Member-States of the Organization with regard to the interpretation or the application of the norms contained in its juridical regulations.

However, this does not mean that the Treaty of Montevideo (1980), as well as other basic norms in these regulations, does not cover the possibility of implementing some procedures covering the control of legality and settlement of disputes , nor that efforts have not been made to adopt special systems that are regional in scope, nor that appreciable development has not been achieved in systems for the control of legality under partial economic integration schemes - both sub-regional and plurilateral as well as bilateral - in which the Member-States of the Association participate.

In the first case, these efforts have on the one hand led to the establishment of a procedure intended to facilitate the exercise of the competence attributed by the Treaty of Montevideo (1980) to the Representatives Committee of the Association, in terms of the settlement of disputes and, on the other hand, to the establishment of a system of measures for the settlement of disputes that could underwrite the application of the norms of the Interpretative Protocol of Art. 44 of the Treaty of Montevideo (1980) .

In the second case, the requirements prompted by the nature and scope of the commitments undertaken under the juridical regulations of the partial economic integration schemes, have triggered the development of various sets of measures for the control of the legality and settlement of disputes under the auspices of the integration programs of the Cartagena Agreement, the Southern Cone Common Market - Mercosur, and the Group of Three, as well as under the aegis of various so-called bilateral **□partial agreements□**, negotiated and signed over the past few years.¹

2. Apart from other reasons - without excluding those of a political nature - it is probable that the agencies of the Association have been led to make no special efforts towards adopting a system for general application to the settlement of disputes, under the assumption that, due to its individual characteristics, the juridical regime based on the Treaty of Montevideo (1980) does not offer much potential for conflicts.

II. THE **□FLEXIBLE□ OR □PERMISSIVE□ NATURE OF THE JURIDICAL REGIME OF LAIA WITH REGARD TO THE RULE OF THE PRINCIPLE OF □NON-DISCRIMINATION□**

3. The above-mentioned assumption originates in the interpretation that the normative system of the economic integration program set up by the Treaty of Montevideo (1980), different from the normative systems of other regional economic integration programs, is characterized by a certain ambiguity with regard to the stipulations of its basic instrument, as well as a certain **□flexibility□ or □permissivity□** with regard to the application of some basic principles, particularly the principle of **□non-discrimination□**.

4. With regard to the former, Art. 4 of the Treaty of Montevideo (1980) states that the basic purpose or target of the LAIA Economic Integration Program is to establish an **□area of economic preferences□** without clearly defining the material content thereof, merely enumerating its **□elements□**, **□components□**, or **□mechanisms□**. This norm thus states that **□for compliance with the basic functions of the Associations□**, the **□Member-States shall establish an area of economic preferences, consisting of preferential regional customs dues, under regional agreements and partial agreements□**.

The first two instruments are designed to formalize economic projects and programs that are based on the participation of all the Member-States of the Association, while the latter - meaning the partial agreements - is designed to serve as a means for implementing economic integration project or programs with the participation of a limited number of countries.

In addition to not stipulating the material content of the **□area of economic preferences□**, merely listing the components thereof, the Treaty of Montevideo (1980) does not establish a concrete program for achieving this objective. It simply states that one of the basic purposes of the **□partial-scope agreements□** will be to **□create the necessary conditions to extend the regional integration process through its progressive multilateralization□**.²

5. With regard to the principle of **□non-discrimination□**, the Treaty of Montevideo (1980) admits much **□flexibility□** in the application thereof. Its Art. 44 stipulates that only **□the advantages, favors, franchises, immunities and privileges that Member-States apply to products originating and/or intended for □any other**

¹ The system for control of legality, settlement of disputes and uniform interpretation of common law of the economic integration program of the Andean Group - which includes Bolivia, Colombia, Ecuador, Peru and Venezuela - was adopted through the Treaty of the Court of Justice of the Cartagena Agreement, signed on 28 May 1979.

The system for the settlement of disputes of the MERCOSUL - Southern Cone Common Market economic integration program - which includes Argentina, Brazil, Paraguay and Uruguay - was adopted, although in a provisional manner, through the Protocol of Brasilia, signed on 17 December 1991.

The system for the settlement of disputes of the Group of 3 economic integration program - which includes Colombia, Mexico and Venezuela - is contained in Chapter XIX of the Free Trade Treaty, signed on 13 June 1994.

Systems for the settlement of disputes adopted under bilateral partial scope agreements are analyzed in Chapter VII of this Report.

² Art. 7 of the Treaty of Montevideo (1980).

member of non-member nation through decisions or agreements that are not covered in this Treaty or in the Cartagena Agreement, will be immediately and unconditionally extended to the other Member-States.

Apart from the Cartagena Agreement, the measures covered in the Treaty for granting non-extensive trade advantages are those known as partial-scope agreements, which can be negotiated and signed both among the Member-States of the Association as well as between one or more thereof and third-party nations that are not members, within the Latin American region or from other regions, but which are considered as developing countries.

6. The range or more favorable scope and thus the most discriminatory of the advantages agreed under these pacts, are accurately determined in Art. 7, 25 and 27 of the Treaty of Montevideo (1980).

With regard to the partial-scope agreements signed between Member-States of the Association, Art. 7 states that the rights and obligations established shall enter into force exclusively for the Signatories thereof, or those that adhere thereto. With regard to the partial-scope agreements signed between Member-States and non-member third-party nations, either in Latin America or other regions with developing countries, Art. 25 and 27 stipulate that the concessions granted by the participant countries thereby shall not be extensive to the others, with the exception of nations at a relatively lower level of economic development.

Consequently, the possibility of a Member-States of the Association applying more favorable treatment in trade matters to the benefit another Member-Nation or non-member country in Latin America or a developing country, without this being mandatorily extensive to the other Member-Nations, is in the first place due to the contents of the most-favored nation clause contained in Art. 44 of the Treaty of Montevideo (1980), and secondly, the nature of the partial-scope agreements defined by Art. 7 of this same document.

Due to this latter provision, most-favored nation treatment may be extended to another member or to the remaining Member-Nations of the organization, not due to the most-favored nation clause, but rather as a consequence of adhesion to the respective partial-scope agreement.

7. In other words, the most-favored nation clause results from full application solely under the two sets of circumstances that follow:

1. When this involves more favorable advantages or tax exemptions granted between Member-States of the Organization or between such members and non-member nations in Latin America or other regions which are considered developing countries, through decisions or agreements that are not covered in the Treaty or in the Cartagena Agreement, and
2. When this involves more favorable advantages or tax exemptions granted by a Member-Nation to a non-member nation that does not belong to the Latin American region or which is not a developing country.

8. However, with regard to this latter circumstance, it should be noted that the commitment to apply the most-favored nation clause in an automatic and unconditional manner has been affected or made more flexible through the Interpretative Protocol of Art. 44 of the Treaty of Montevideo (1980).³

As determined by this document, a Member-State that signs an agreement with a non-member state which does not belong to the Latin American region and is not a developing country, may request the competent agencies of the Association to suspend - temporarily or definitively - the obligations established in Art. 44 of the Treaty.

III. POSSIBLE HYPOTHETICAL CONTROVERSIES REGARDING THE APPLICATION AND INTERPRETATION OF THE NORMS OR THE JURIDICAL REGULATIONS OF LAIA

³ This document was signed by the Ministers of Foreign Affairs of the LAIA member countries on 13 June 1994.

9. Acknowledging that the juridical regulations of LAIA are permissive with regard to the acceptance of granting preferential or discriminatory treatment, or that this Association is flexible with regard to the application of the most-favored nation clause, does not mean that it lacks rules, which are more or less precise and demand mandatory compliance therewith, regulating the formal and material conditions for the exercise of the rights which are recognized in favor of the Member-States of the Association.⁴

Acknowledgment of these specific traits cannot lead to the conclusion or assumption that the application of the norms of the juridical regulations of the Treaty of Montevideo (1980), or those which are established through other instruments adopted by the competent agencies of the institutional structure of the Association, are not liable to generate many difficult disagreements or disputes among Member-States.

Nevertheless, a study of the above-mentioned provisions, as well as an examination of the entire juridical regulations of the Association, leads to the conclusion that, with regard to the interpretation and application of many of its norms, the following possible disputes may arise among the Member-States of the Association:

1. Disputes over the interpretation and application of norms adopted through regional scope instruments (Regional Preferential Customs Dues and Regional Scope Agreements);
2. Disputes over the interpretation and application of the norms that regulate the negotiation and adoption of regional scope agreements between Member-States of the Association;
3. Disputes over the interpretation and application of the norms that regulate the negotiation and adoption of partial-scope agreements between Member-States of the Association and non-member nations in the Latin American region or other regions that are considered as developing countries;
4. Disputes over the interpretation and application of the norms that regulate the signature of agreements with other non-member nations; and
5. Disputes over the interpretation and application of the norms of the special juridical regulations established through partial-scope agreements - bilateral or plurilateral - and sub-regional agreements signed between Member-States of the Association.

10. If the validity of the above-mentioned hypothesis of disputes is accepted, it may be admitted that the reason whereby the agencies of LAIA have not as yet developed a global and regional regime of measures for the settlement of disputes does not necessarily reside in the more or less permissive or flexible characteristics of the juridical regulations of the Treaty of Montevideo (1980), but rather to the quality - or relatively limited breadth and depth - or the commitments undertaken for the development of a true regional economic integration program.

The efforts of the Member-Nations, since the Association was established in 1980, have been concentrated on implementing partial-scope economic integration schemes and projects. Over the past few years, from 1991 onwards, it has made an effort to assign more intensive efforts to seeking ways of implementing a global integration program through, among other means, the convergence or interface of the above-mentioned partial-scope schemes.

It is thus not surprising that, in this type of situation, the potential for conflict contained in the juridical regulations of LAIA has not been manifested to its full extent.

IV. ORIGINAL PROVISIONS ON THE CONTROL OF LEGALITY AND

⁴ These norms are contained specially in Resolution NE2 of the Council of Ministers, as well as in Arts. 25 and 27 of the Treaty of Montevideo (1980).

SETTLEMENT OF DISPUTES

11. Both the Treaty of Montevideo (1980) as well as other basic instruments in the juridical regulations of the Association, contain specific rules making provision for bringing some surveillance procedures into action, checking compliance with the norms of this juridical order, as well as various measures for the settlement of disputes.

These rules are related both to the conditions for the negotiation and signature of partial-scope agreements, as well as the range of competence attributed to certain agencies within the institutional structure of the Association.

A. Control of the legality of partial-scope agreements.

12. The initiative to implement surveillance procedures checking compliance with the norms that regulate the negotiation and adoption of partial-scope agreements is in the hands of the Member-States. In this respect, Art. 2 Item f of Resolution 2 of the Council of Ministers, states that any Member-Nation which considers that during the negotiation and signature of a partial-scope agreement, the pertinent general and procedural norms have not been observed, may submit a complaint on this matter to the Committee of Permanent Representatives.⁵ Similarly, it states that within a maximum period of sixty (60) days, this agency should hand down a decision thereon.

The exercise of this right by any Member-Nation, as well as the exercise of the powers conferred on the Committee of Representatives in this matter, may well trigger a dispute, should the complaint as well as the decision of this agency be challenged by one or all of the nations participating in the respective partial-scope agreements. Thus, a possible means for the solution of such a dispute would be that covered in Art. 35, Item m) of the Treaty of Montevideo (1980).⁶

13. Similar to the partial-scope agreements signed between the Member-States of the Association, partial-scope agreements signed between these Member-States and non-member third-party nations - either in the Latin American region or from other regions considered as developing countries - are also subject to certain monitoring procedures.

These procedures are based both on the norms of the Treaty of Montevideo (1980) that regulate the conditions or requirements for the negotiation and adoption thereof, as well as on those that fall under the competence of the Committee of Representatives of the Association.⁷

As stipulated by Art. 25 of the Treaty of Montevideo (1980), the partial-scope agreements signed by the Member-States of the Association with other countries and areas of economic integration in Latin America are subject to a process of multilateral consideration handled by the Committee of Representatives, in order to study the scope thereof and facilitate the participation of other Member-States in such agreements . Similarly, Art. 35, Item m) of the Treaty stipulates that the Committee has the competence to consider multilaterally the partial agreements signed by the nations in terms of Art. 25 .

Although these norms may not be sufficiently explicit, it can be taken as understood that the process of multilateral consideration is designed to allow the exercise of the right of any Member-State to bring a complaint regarding alleged failure to comply, during the negotiation and adoption of an agreement submitted to this consideration, with the general and procedural norms that regulate this issue.⁸ Thus, the process of multilateral consideration in fact becomes a way of

⁵ Resolution N° 2 of the Council of Ministers, Art.2 item f): If any Member-State considers that in the Agreement signed the general and procedural norms and standards have not been observed, it may bring a complaint before the Committee, which shall hand down a decision thereon within a maximum of 60 days.

⁶ According to Art. 35, Item m) of the Treaty of Montevideo (1980), the Committee of Representatives has powers to propose formulae in order to resolve issues brought forward by the Member-Nations, in case of alleged lack of compliance with some of the norms or principles of the Treaty.

⁷ On the one hand, the norms of Arts.25 and 27, and on the other, by the norms of Art.35, Items n) and ii) of the Treaty of Montevideo (1980).

⁸ Art. 5 Item f) of Resolution 2 of the Council of Ministers.

implementing surveillance procedures or control of legality.

14. With regard to the partial-scope agreements which may be signed between the Member-States of the Association and other developing countries or respective areas of economic integration outside Latin America, the control procedures are more stringent.

Art. 27 of the Treaty of Montevideo (1980) stipulates that such agreements shall be necessarily subject to a process designed to declare there compatibility with the commitments undertaken by the Member-States under the Treaty, taking into consideration the provisions of Items a) and b) of Art. 27.⁹ This provision agrees with the contents of Art. 35 Item n) of the Treaty, whereby the Committee shall be responsible for declaring the compatibility of the partial agreements signed by the Member-Nations under the terms of Art. 27.

It seems correct to assume that the highly-respected declaration of compatibility should be formalized through a Resolution issued by the Committee of Representatives, for the adoption of which the norms of the Treaty shall be applied, relative to the voting system of this agency.⁴²⁶

B. Spheres of Competence over the control of legality
attributed to the LAIA Secretariat

15. In addition to the above-mentioned provisions, the Treaty of Montevideo (1980) includes other provisions which essentially act as a basis or foundation for the implementation of procedures controlling the legality of other types of deeds, particularly those attributable to the Member-States of the Association.

16. On this matter, the attribution conferred on the LAIA Secretariat by Art. 38 Item i) of the Treaty of Montevideo (1980), is of particular interest. According to this norm, the Secretariat is responsible for analyzing, at its own initiative, for all countries, or at the request of the Committee, compliance with the commitments agreed upon, and assessing the legal provisions of the Member-States that alter directly or indirectly the concessions agreed upon.

On the other hand, this same Art. 38, Item a) grants this same Secretariat the powers to formulate proposals to the agencies of the Association in order to ensure better achievement of the objectives and compliance with the functions of the Association.

The supplementary exercise of these two important attributions, may prompt the implementation of a true surveillance procedure or control of legality. Nothing effectively prevents the Secretariat, on the basis of the outcome of the analyses arising from the exercise of the first of the above-mentioned attributions, proposing to any of the agencies of the Association, and, particularly, to the Committee of Representatives the adoption of measures leading to the rectification or resolution of situations of non-compliance that have been identified.

V. THE PROCEDURE FOR THE SETTLEMENT OF DISPUTES ESTABLISHED BY RESOLUTION 114 OF THE COMMITTEE OF REPRESENTATIVES

17. As one of the first results of the efforts to foster the development of norms designed to encourage better application of the basic provisions of the Treaty of Montevideo (1980), with regard to measures for the settlement of disputes, Resolution N° 114 of the Committee of Representatives of LAIA is noteworthy; this regulated procedures linked to the spheres of competence of these agencies as mentioned in Art. 33 Item m) of the Treaty, mentioned previously.⁴²⁷

⁹ Item a) of Art. 27 states that the concessions granted by the participant Member-States under the above-mentioned agreements shall not be extensive to the others, except in the case of countries of a lower level of economic development. In turn, Item b) of this same Art. 27 states that when these agreements include products already traded with other member countries under partial-scope agreements, the concessions granted may not be greater than those agreed therewith, and if so, shall be automatically extended to these countries.

426 Arts. 37 and 43 of the Treaty of Montevideo (1980).

427 LAIA/CR/Resolution 114 (22 March 1990).

According to this norm, the Committee of Representatives has the power to propose formulae to resolve issues brought forward by the Member-States, when there is an allegation of non-compliance with some of the norms or principles of the Treaty of Montevideo (1980).

This provision implicitly bears the prerogative or at least the possibility that the countries involved in a dispute over the above-mentioned non-compliance shall request the intervention of the Committee in order to find a solution to the dispute.

On the other hand, this same rule means that the intervention of the Committee is not limited to a simple study of the dispute, but rather includes the duty that this agency should propose formulae to the nations involved in order to resolve the dispute.

In brief, Art. 35 Item m) of the Treaty of Montevideo (1980) confers on the Committee of Representatives the power to exercise the functions that corresponds to a mediator.

18. Summarizing, the above-mentioned Resolution 114 issued by the Committee institutes a procedure designed to preserve the compliance with the norms of the Treaty of Montevideo (1980) and the commitments undertaken through the pacts agreed upon by the Member-States and the Resolutions issued by the agencies of the Association.⁴²⁸

his apparently involves a procedure fostering the surveillance of compliance with the commitments undertaken by the Member-States or, in other words, a procedure for control of the legality of acts attributable to the Member-States. However, as Resolution 114 is an attempt to establish procedural norms designed to guide the exercise of the powers attributed to the Committee under the above-mentioned Art. 33 Item m) of the Treaty of Montevideo (1980), it seems more correct to take this as meaning, in all cases, a system of measures for the settlement of disputes among the Member-States, arising as a consequence of complaints caused by the adoption of measures that involve non-compliance with the commitments agreed upon or the norms adopted.

19. In this order of ideas, Resolution 114 proposes the following means of solution:

1. During a first phase, consultation meetings should be held between the countries involved; and
2. At a second phase, the intervention - as a mediator - of the Committee of Representatives.

With regard to its sphere of application, this same Resolution states that such measures shall be applicable to disputes over non-compliance with norms and commitments formalized in the following instruments:

1. The Treaty of Montevideo (1980),
2. The agreements reached by Member-Nations, and
3. The Resolutions issued by agencies of the Association.

20. The consultation procedure⁴²⁹ may be brought into action on the basis of a request submitted by any of the Member-Nations and directed to the Member-State or States that, in its view, are applying measures incompatible with the commitments undertaken by means of the above-mentioned instruments. This request should contain an exposition of the reasons that justify it, as well as accompanying the background information deemed necessary for these purposes.⁴³⁰

⁴²⁸ Sole Article, paragraph one of Resolution 114 of the Committee of Representatives.

⁴²⁹ Bearing in mind its characteristics and above all its purposes, the expression "consultations" should be taken as a euphemism or avoiding the use of the expression "negotiations".

⁴³⁰ Sole Article, Item 1 and 2) of Resolution 114 of the Committee of Representatives.

The consultations among the countries involved should begin within five days of forwarding the respective application and should end within ten working days of the start thereof. At the end of this period, the country that requested the initiation of the procedure should advise the Committee of Representatives of the results achieved.⁴³¹

21. Should the consultations procedure not have reached a satisfactory outcome among the parties directly involved, the intervention procedure of the Committee of Representatives will be implemented, whenever the parties involved so request.

In this regard, Resolution 114 stipulates that, in this case, these countries may bring this issue before the Committee of Representatives for the purposes covered by Art. 35 Item m) of the Treaty of Montevideo (1980).⁴³²

In turn, this agency is obliged - exercising the functions of a mediator conferred on it by the above-mentioned norm - to propose to the countries involved, the formulae that it deems most appropriate for resolving the issue in question, within the 15 days after this issue has been submitted for its consideration.⁴³³

22. The adoption of Resolution 114 of the Committee of Representatives is a praiseworthy attempt to stipulate the range of the spheres of competence attributed to this agency under Art. 35 Item m) of the Treaty of Montevideo (1980) and above all to establish the conditions for the exercise thereof. Nevertheless, it must be acknowledged that the outcome thereof is not fully satisfactory.

Thus, mention should be made of the striking contrast between the greater precision of the norms covering the development of the consultation procedure and the insufficient precision of the norms covering the intervention procedure of the Committee of Representatives. Although the former clearly established the conditions under which they may be brought into use, the periods for the implementation thereof and, most import of all, that their specific purpose consists of reaching a satisfactory solution, the latter simply state the obligation of the Committee to exercise its functions, by proposing formulae to the countries involved, within a maximum period of 15 days.

Second, it is clear that the norms covering the intervention procedure of the Committee make no reference to the scope of its proposal, for example, which leads to the understanding that it is not binding on the countries involved and that a solution may only be reached whenever it is accepted thereby. These norms also fail to regulate the system or scheme for voting approval of the proposal of the Committee, as well as the conditions for the participation of the countries involved in the dispute in the preparation and adoption thereof.

23. Despite these shortcomings, Resolution 114 has the merit of expressing the results of the first efforts of the LAIA agencies to develop a regional system of measures for the settlement of disputes. From another point of view, it also has the merit of having established a broad range of issues - in practice all possible conflicts among the Member-States regarding non-compliance with the commitments arising from any norm in the juridical regulations of the Association - for the application of the procedure established.

VI. SYSTEM OF MEASURES FOR THE SETTLEMENT OF DISPUTES REGARDING THE INTERPRETATION AND APPLICATION OF THE INTERPRETATIVE PROTOCOL OF ART. 44 OF THE TREATY OF MONTEVIDEO (1980).

24. As outlined elsewhere in this report, under the most-favored nation clause stipulated in Art. 44 of the Treaty of Montevideo (1980), the advantages, favors, tax exemptions, immunities and privileges granted by any Member-State to a non-member state that is not a country in the Latin American region nor a

431 Sole Article, Item 3) of Resolution 114 of the Committee of Representatives.

432 Sole Article, Item 4) of Resolution 114 of the Committee of Representatives.

433 Sole Article, Item 5) of Resolution 114 of the Committee of Representatives.

developing nation, shall be immediately and unconditionally extended to the other Member-States.

However, under the recently signed Interpretative Protocol of Art. 44, any Member-State that has signed an agreement with a non-member state that is not a country in the Latin American region nor a developing nation - may request, regarding compliance with certain requirements or demands, the suspension - definitive or conditional - of the obligation to apply the most-favored nation clause, meaning the extension to the other countries of the advantages or preferences granted through the agreement in question.

25. The approval of this new and important possible exception to the Principle Of Non-Discrimination implicit in the above-mentioned Art. 44 led to the adoption, simultaneously and through Resolution 44 (I-E) of the Council of Ministers of Foreign Affairs, of a special system of measures for the settlement of disputes that may arise as a consequence of the application of this Protocol. From the spatial or territorial viewpoint, this system has a general range or scope, as it includes all the countries in the Association, although, from the viewpoint of the issues covered, its scope is restricted or limited to matters regulated by the Interpretative Protocol.

26. As the Protocol comes into force - for the Member-States that ratify it in accordance with the respective constitutional procedures - when the eighth instrument of ratification is deposited with the General Secretariat of LAIA⁴³⁴, the Council of Ministers adopted at the same time a set of norms to be applied on this issue, during the transition period until the entry into force of this instrument.⁴³⁵ Consequently, the system of measures for the settlement of disputes in Resolution 44 (I-E) is equally applicable to disputes that may arise as a consequence of the application of the norms for the transition period.

27. According to the Interpretative Protocol, and without prejudice to the full validity of the most-favored nation clause, the Member-Nations which are parties to agreements with third-party nations not covered in the Treaty of Montevideo (1980), may request the Committee of Representatives to temporarily suspend the obligations established in Art. 44 of the Treaty.⁴³⁶ On submitting this request, the country involved should undertake the commitment to hold talks with any other Member-Nation that so requests, with the following purposes:

1. To ensure that the concessions granted to the country with which talks area being held are maintained at a general level that is no less favorable than that which resulted from the agreements signed therewith previous to the entry into force of the agreement with a non-member third-party country
2. To expand the most-favored nation treatment granted to a third-party country in terms of non-tariff barriers to the Member-Nations that have complied with the obligation, agreed upon under the auspices of the Association, to eliminate this type of constraint; and
3. To adopt particular norms of origin should the system of origin agreed upon in the pacts or agreements with a non-member third-party country contain more favorable general or specific treatment, than that in force under the Treaty of Montevideo (1980).

More specifically, discussions over trade concessions or treatment shall aim at ensuring that the country which requests them shall receive compensation substantially equivalent to the loss of trade caused by the preferences granted in instruments not covered by the Treaty of Montevideo (1980).⁴³⁷

28. Authorization for the suspension of the obligations arising under Art. 44 of the Treaty of Montevideo (1980) may be definitive or conditional, depending on whether or not the corresponding application gives rise to a request to open talks with the applicant country.

Thus, according to the provisions of the Protocol, the Committee of Representatives will grant the suspension requested definitively for a period of five years renewable for a fresh period of no more than five years should no country manifest its intention to request talks . In counterpart, it will do so in a conditional manner , should some country request talks.⁴³⁸

434 Art. 7 of Interpretative Protocol of Art. 44 of the Treaty of Montevideo (1980).

435 The norms for the "transition period" are contained in Resolution 43 (I-E) issued by the LAIA Council of Ministers.

436 Art. 2 of the Interpretative Protocol.

437 Art. 3 of the Interpretative Protocol of Art. 44 of the Treaty of Montevideo (1980).

438 Submitting the dispute to a Special Group.

29. At first glance, it seems clear that these provisions of the Protocol - as well as those of Resolution 43 (I-E) - covering the quest to reach an understanding between the country that applies for authorization of suspension and the country which in turn asks for talks to be opened therewith, may run into difficulties with regard to the application thereof, particularly over adjustment of the compensation requested by the latter from the former to cover the alleged losses and damages arising from the advantages granted by the former to a non-member third-party country. Similarly, it is clear that these difficulties may well prompt, as a consequence, the appearance of disputes among the nations involved.

This is undoubtedly why both the Protocol as well as the above-mentioned Resolution 43 (I-E) make reference to measures to cope with such possible disputes. On this basis, the Council of Ministers through Resolution 44 (I-E), agreed on the adoption of a system to handle this situation.

This system proposes the following measures to resolve issues or settle disputes that may arise over the application of the Protocol and the norms of Resolution 43 (I-E):

1. Direct negotiations between the country applying for authorization or suspension and the country which considers itself affected; and
2. Submitting the dispute to a Special Group.

In principle, the implementation of these measures is restricted to the settlement of differences or disagreements over the type and scope of the compensation offered by the participant country in an agreement with a non-member third-party country to a Member-State of the Association that deems the effects of such agreement to be prejudicial thereto.

30. Similar to other systems for the settlement of disputes adopted under the auspices of LAIA, the use of this latter procedure is conditional on the direct negotiation procedure not achieving satisfactory results. Thus, under no circumstances may disputes be submitted to the Special Group without first having exhausted the possibilities of direct negotiations.

Within this order of ideas, Art. 1 of Resolution 44 (I-E) stipulates that if the outcome of bilateral negotiations is considered insufficient by the country affected , the Committee of Representatives shall appoint a Special Group, in consultation with the countries directly involved , in compliance with the provisions of Art. 4 of the Interpretative Protocol.⁴³⁹

31. The Special Group shall consist of three members, or five members at the request of the countries directly involved therein - which shall be selected from a short-list drawn up by the Committee, at the request of the Member-States of the Association, as well as the list of GATT panelists . The members of the Group may not be citizens of any of the Member-States involved in the dispute.⁴⁴⁰

32. The Special Group shall have the following duties:⁴⁴¹

1. To examine the viewpoint put forward by the countries directly involved ;
2. To assess whether or not the compensation offered at the end of the talks is adequate , and
3. To determine the compensation which, in its view, would be adequate should it consider that that which has already been offered is insufficient

⁴³⁹ Art. 4 of the Interpretative Protocol: "If the outcome of the negotiations is considered inadequate by the country affected to reestablish the balance of rights and obligations arising under the Treaty of Montevideo (1960) and the Agreements reached under the auspices of this Treaty, the Committee of Representatives shall appoint the members of a Special Group, in consultation with the nations involved, for the purposes of determining whether the compensation offered is adequate".

⁴⁴⁰ Art. 2 and 3 of Resolution 44 (I-E) issued by the Council of Ministers.

⁴⁴¹ Art. 7 of Resolution 44 (I-E) issued by the Council of Ministers.

33. Apart from these functions, the Special Group should implement, prior to issuing its final decision, a reconciliation procedure. To do so, it should summon the countries involved in the dispute to a **reconciliation hearing** and propose a **transactional solution**. Should this not be accepted, it will continue to implement the relevant procedures until the adoption of its **final decision**.⁴⁴²

In order to reach this decision, the Group shall take into account the norms of the Treaty of Montevideo (1980), the agreements celebrated under the auspices thereof - particularly the Interpretative Protocol of Art. 44 - and the agreements and decisions adopted by the political agencies of the Association.⁴⁴³

34. The final decision of the Special Group shall be definitive for **the countries directly involved**.⁴⁴⁴

At the same time, it will act as a basis for the Committee of Representatives, in compliance with the provisions of the Interpretative Protocol, to announce its decision on the corresponding application for suspension of compliance with the obligations arising under Art. 44 of the Treaty of Montevideo (1980).

35. As may be noted, the system of measures for the settlement of disputes established by Resolution 44 (I-E) of the Council of Ministers, combines, like other systems adopted under the auspices of LAIA, the procedure of direct talks with the arbitration judge, as, due to the sphere of competence thereon and above all to the juridical effects of its **final decision**, the Special Group has the standing of a true arbitration board.

However, in contrast to other systems, at the same time it institutes a reconciliation procedure for which the Special Group is responsible.

36. The adoption of this system is an eloquent demonstration of the need for provisions of this nature being more acute, insofar as the norms that are adopted under a system or program of economic integration become more demanding, and consequently more difficult to apply.

In this case, it is important to take into consideration the evidence that the Interpretative Protocol of Art. 44 of the Treaty of Montevideo (1980) is the outcome of an effort to reconcile two types of interests that in principle are opposed: on the one hand interest in preserving the power of the principle of non-discrimination and, on the other, the interest in creating the possibility for Member-States of LAIA to undertake talks on trade matters with third-party nations that are not members of the Association.

This without doubt accounts for the fact that, in order to fulfill satisfactorily the function of maintaining a reasonable balance between these interests, the Protocol included not only precise regulations but also the bases for the development for a special system of measures for the settlement of disputes.

VII. SYSTEMS FOR THE SETTLEMENT OF DISPUTES ADOPTED IN PARTIAL-SCOPE BILATERAL AGREEMENTS

37. Another manifestation of the efforts undertaken by the Member-States of LAIA for the development or adoption of systems of measures for the settlement of disputes is the incorporation of this type of device in several of the new bilateral Agreements signed between Member-States of the Association.

Among other characteristics, these new Agreements establish economic integration programs that are relatively more ambitious or wider-ranging, contrasting with the more limited targets set by all the other Agreements of this type negotiated and signed previously. Some of them adopt, as the core objective of the respective economic integration project, the establishment of a **free trade zone**, to this end incorporating programs eliminating automatic and linear trade barriers, subject to a pre-set time-schedule.

⁴⁴² [Art. 10 of Resolution 44 \(I-E\) issued by the Council of Ministers.](#)

⁴⁴³ [Art. 12 of Resolution 44 \(I-E\) issued by the Council of Ministers.](#)

⁴⁴⁴ [Art. 13 of Resolution 44 \(I-E\) issued by the Council of Ministers.](#)

At the same time, both these and other new Agreements expand the scope of the corresponding integration projects, including postulates over future undertakings targeting the removal of barriers to trade in services and capital flows, as well as special mechanisms and instruments fostering the development of economic cooperation activities in various areas of special interest to the participant nations.

38. From the institutional viewpoint, one of the most outstanding traits of these new Agreements is that they incorporate, as part of their basic norms, systems of measures for the settlement of disputes that may arise between the signatory nations, over the application of the norms in their corresponding juridical regulations. The expanded breadth and depth of the targets stipulated by these Agreements, as well as the increased sophistication of some of their instruments, explain to a large extent the need for the development of these systems.

39. The new partial-scope Agreements that are distinguished by their outstanding characteristics are the following:

1. The Economic Supplementation Agreement between Argentina and Chile, signed on 2 August 1991.
2. The Economic Supplementation Agreement between Chile and Mexico, signed on 22 September 1991.
3. The Economic Supplementation Agreement between Chile and Venezuela, signed on 2 April 1993.
4. The Economic Supplementation Agreement between Bolivia and Chile, signed on 6 April 1993.
5. The Economic Supplementation Agreement between Colombia and Chile, signed on 6 December 1993.

40. The Agreements signed between Chile and Mexico, Chile and Venezuela and Colombia and Chile - also known as «free trade Agreements» - adopt procedures for lifting automatic linear barriers to trade, proposing for this purpose the establishment of true «free trade zones» between the participant nations. In contrast, the Agreements signed between Argentina and Chile, and Bolivia and Chile maintain the procedure of phasing-out trade barriers based on periodic negotiations of preferential customs tariffs incorporated into the corresponding product lists.

All the Agreements incorporate provisions for the future development of programs designed to eliminate barriers to trade in services and the flow of capital and investments, as well as instruments or mechanisms for the development of special economic cooperation programs in various areas.

41. The systems of measures for the settlement of disputes - with the exception of the Argentina-Chile Agreement - are stipulated within the same Agreements. In the case of this latter Agreement, the corresponding system has been developed through an Additional Protocol, based on the pertinent norms contained in their basic Agreement.⁴⁴⁵

The actual systems of the Agreements between Chile and Venezuela, and between Chile and Colombia, are practically identical. In contrast, the Agreements between Argentina and Chile, Chile and Mexico and Chile and Bolivia feature various relatively significant differences.

A. Measures for the settlement of disputes and their sphere of application

42. All these systems establish the following measures for the settlement of disputes:

1. Direct negotiations between participant nations;
2. Intervention - in different modalities - of the Administration Agency of the Agreement; and

3. Arbitration.

There is a coincidence whereby the application of each of these methods should be handled successively and not indiscriminately or in compliance with the free choice of the interested nation. This presupposes that the Signatory States are obliged, in the first instance, to have recourse to the direct negotiations procedure, followed by, whenever the first instance has not managed to settle the dispute, the procedure of intervention by the Administration Agency. Similarly, they have the right to have recourse to arbitration only if the second procedure does not manage to settle a dispute either.

43. With regard to the scope of application, all these systems are similar insofar as the measures for settlement are applicable to disputes that arise for three reasons: 1) interpretation; 2) application; and 3) non-compliance of the norms in their respective Agreements or other juridical instruments.

The system of the Argentina-Chile Agreement, for example, make reference to two types of norms: 1) the provisions contained in the Economic Supplementation Agreement signed on 2 August 1991, 2) the agreements, protocols and other supplementary decisions or resolutions signed or to be signed under the aegis thereof.

The systems of the remaining Agreements in turn refer in a more general manner to the provisions of the respective Agreement. At the same time, they exclude from the scope of application of the means of settlement of disputes those which arise over the adoption or application of measures involving unfair trade practices.

B. Negotiations Procedures

44. With regard to the rules over the means of direct negotiations, there are no substantial differences among the systems discussed above.

However, there are differences with regard to the naming of the procedure. The Argentina-Chile Agreement and the Bolivia-Chile Agreement use the expression negotiations, while the remaining Agreements use the expression consultations. Taking the account the characteristics and above all the purposes of the procedure, it seems correct to acknowledge that this merely involves a simple semantic or formal difference that does not affect the nature of this means of settlement.

With the exception of the Argentina-Chile Agreement all these systems stipulate that the negotiations or consultations shall be implemented through the competent national agencies, meaning the organizations assigned the principal responsibility in each country for handling the matters covered by the application or development of the Agreement.

Despite this similarity, from the material viewpoint, among the three systems covering the negotiations or consultations procedure, the Bolivia-Chile Agreement introduces some elements or touches that stand out with regard to the development thereof. First, it establishes a type of preliminary instance, prior to the start of negotiations, and second, it offers the option that the negotiations may take place - as suggested by the plaintiff nation - through the respective competent national agencies or under the aegis of the Administrative Commission of the Agreement.

With regard to the former, the Agreement stipulates that the Signatory State that feels it is adversely affected by a situation of application that is not in keeping with the law or based on an interpretation that it does not agree with, or through a situation of non-compliance with the norms of the Agreement, may advise the Signatory State of its observations thereon, which should be replied to thereby in no more than 15 days. Should the defendant nation not respond within the period indicated, or should its reply fail to satisfy the signatory nation affected, a direct negotiation procedure shall immediately be implemented.⁴⁴⁶

With regard to the options for the development of the procedure, this same Agreement stipulates that talks may be held through the national

competent agencies or under the aegis of the Administrative Commission of the Agreement, as selected by the affected Signatory State.⁴⁴⁷

C. Intervention Procedure of the Administration Agency of the Agreements

45. With regard to the rules covering the intervention procedure of the Administration Agency of the respective Agreement, there are some differences between these systems under consideration that warrant particular attention.

There is a basic coincidence between all those systems - with the exception of the Bolivia-Chile Agreement - whereby the Administration Agency is assigned the function of acting as a means for the continuation of negotiations or consultations, at the same time empowering it to exercise the functions of a mediator or to implement mediation procedures with the collaboration of third parties.

The Bolivia-Chile Agreement stipulates that the Administrative Commission of the Agreement has only the function of acting solely as an institutional means for the development of the negotiation procedure. In order to comply with this assignment, it may request the opinions of individual specialists or specialized independent organizations, which will be taken into consideration as additional decisional elements.⁴⁴⁸

At the other extreme, the Argentina-Chile Agreement empowers the Economic Supplementation Council - which is the agency charged with the administration of the Agreement - with the functions of a mediator, granting it the right to formulate recommendations to the nations involved in a dispute that may foster the settlement thereof. In order to comply with this function, in addition to assessing the issue, the Council will provide opportunities for the parties involved in a dispute to express their respective positions and may request, when it considers necessary, the assistance and advice of experts selected from a list.⁴⁴⁹

In an intermediate position, the Chile-Mexico Agreement, the Chile-Venezuela Agreement, and the Colombia-Chile Agreement endow the respective administration agencies with two functions: 1) to continue the development of the negotiations procedure; and 2) to implement mediation procedure, through the appointment of a mediator elected from a list of experts which shall be opportunely prepared for this purpose. To this end, the three Agreements stipulate in the same terms that the Administration Agency shall give consideration to the corresponding charges and rebuttals in order to reach a satisfactory solution, either through its own action - seeming to mean the implementation of a negotiations process - or with the participation of a mediator.⁴⁵⁰

However, when these Agreements established the spheres of competence of their Administration Agencies, they stipulated that one of their responsibilities will be to propose to the Governments of the Signatory States the recommendations that it deems appropriate to settle a dispute that may arise over the interpretation and application of the respective Agreement.⁴⁵¹

This provision give rise to a disparity with the provisions covering the intervention of these Administration Agencies in the measures for the settlement of disputes or at least prompted doubts over the true functions assigned thereto.

46. With reference to the functions of spheres of competence assigned to the Administration Agencies of the Agreements, with regard to the application of the intervention procedures thereof, seeking settlement of a dispute, it must be admitted that the provisions of the Bolivia-Chile Agreement may be considered the most efficient. As underlined, this system stipulates that these functions shall be limited to serving as a means for the development of the

447 Art. 27. Paragraph One of the Economic Supplementation Agreement N° 22 between Bolivia and Chile.

448 Art. 27, paragraph 2.

449 Arts. 7 and 8 of the Second Additional Protocol to the Economic Supplementation Agreement N° 16 Argentina and Chile.

450 Art. 34, item c) of the Economic Supplementation Agreement N° 17 between Chile and Mexico.

451 Art. 34, item c) of the Economic Supplementation Agreement N° 17 between Chile and Mexico.

direct negotiations procedure.

In contrast, the provisions adopted by the remaining systems consist of endowing the Administration Agencies with the powers to propose or recommend formulas for settlement to the nations involved in a dispute - which is equivalent to endowing them with the function of mediator - and may as a result prove less efficient. As these are the Administration Agencies of bilateral agreements, in practice the same protagonists would be involved in these disputes - whereby they are thus expected to propose or recommend to themselves the formulae for the settlement thereof.

However, it must be acknowledged that the provisions regarding the Agreements signed by Chile with Colombia, Mexico and Venezuela to some extent resolve this difficulty by establishing, as mentioned, that the respective Administration Agency may have recourse to the assistance of a mediator in order to carry out this function.

D. Arbitration

47. In all the systems examined, arbitration or the arbitration procedure is reserved for the final instance, on the assumption that the dispute has not been settled either through direct negotiations or through the intervention procedures of the Administration Agencies of the Agreements.

The pertinent norms essentially regulate the following issued: a) appointment of the arbitration judges or members of the arbitration agency; b) duties, responsibilities and sphere of competence thereof; c) procedures; d) content and juridical effects of the decision of the arbitration agency; and e) measures to implement the decision and sanctions in case of non-compliance therewith.

In general terms, there is much similarity between the provisions on these matters contained in the systems under consideration.

48. All these systems stipulate that the arbitration procedure shall be the responsibility of ad-hoc agency (called arbitration tribunal, commission, or group, consisting of three or five members (the arbitration judges) appointed party by each of the countries involved in the dispute and party by common agreement between them.

More specifically, the Chile-Mexico Agreement - similar to the Colombia-Chile Agreement, and the Chile-Venezuela Agreement - stipulate as one of the duties and responsibilities of the sphere of competence of the Administrative Commission the Agreement will be that of appointing the mediators and arbitration judges for the settlement of disputes.⁴⁵²

The appointment of the third member - the coordinator - of the Arbitration Committee through common agreement between the Signatory States, is not covered in the Bolivia-Chile Agreement. This document stipulates that, in any case, this appointment shall be made by the Secretary-General of LAIA.⁴⁵³

49. An important element in the Argentina-Chile Agreement system that warrants attention and that does not exist in the other systems is the express declaration of the Signatory States regarding the mandatory jurisdiction of the Arbitration Court.

This commitment is expressed in a clause whereby the two countries declare that they acknowledge the jurisdiction of the Arbitration Court as obligatory ipso facto and without the need for a special agreement which shall be set up in each case to hear and settle all disputes covered by Art.1 of the II Additional Protocol to the Economic Supplementation Agreement No.16 signed between Argentina and Chile.⁴⁵⁴

452 Art. 34, item d) of the Economic Supplementation Agreement N° 17 between Chile and Mexico.

453 Art. 28, Paragraph One of this agreement stipulates that the Arbitration Commission shall "consist of three experts of acknowledged suitability, two of whom shall be appointed by each of the Signatory States and a third judge who shall chair the Bench. This latter may not be a citizen of the Signatory States and should be appointed by the Secretary-General of LAIA, from a list prepared annually by the Administrative Commission for this purpose".

454 Art. 1 of the II Additional Protocol to the Economic Supplementation Agreement N° 16 between Argentina and Chile.

50. The procedures for resolving possible discrepancies over the appointment of the arbitration judges or members of Arbitration Agencies established under the Argentina-Chile Agreement, are different from those established in the Agreements signed by Chile with Colombia, Mexico and Venezuela.

The first of the above-mentioned systems establishes that, should no agreement be reached between the Signatory States over the appointment of the third judge, the appointment thereof shall be made by the Secretary-General of LAIA. This same procedure shall be applied should one of the countries fail to appoint its arbitration judge within the period established for this purpose. In both cases, the respective appointment or selection handled by the Secretary-General shall be made by a random draw from a list prepared for this purpose by the Administration Agency of the Agreement. This list shall consists of citizens of third-party Member-States of LAIA.⁴⁵⁵

With regard to the Agreements signed by Chile with Mexico, Colombia and Venezuela, the wording of the pertinent norms - which are identical - leads to a certain confusion. According to these provisions, should no agreement be reached over the appointment of the third or fifth arbitration judge, depending on the case, the corresponding appointment should be made by the Secretary-General of LAIA, or the person designated thereby.⁴⁵⁶

The expression the appointment should be made by the appointment should be made by..., if taken literally, could be interpreted as meaning that, in the case of disagreement over the appointment of the third or fifth arbitration judge, it would be the Secretary-General of LAIA who then takes over this function. However, it seems reasonable to assume that the true intention of the Signatory States was to entrust to a senior official the responsibility of appointing the third or fifth arbitration judge.

All the systems are similar in that the member of the Arbitration Agency appointed in common agreement or in the lack thereof, according to the procedures outlined above, may not be a citizen of any of the Signatory States of the respective Agreements, and also that this person shall preside over the agency in question.

51. Under the Argentina-Chile Agreement, the procedural norms for the actions of the arbitration agency shall be adopted by this Court. In contrast, under the other systems, these norms must be approved by the administration agencies of the respective Agreements.

Without prejudice to the above, the basic provisions of all these systems stipulate a deadline for the corresponding arbitration agency to hand down its sentence or final decision.

52. With regard to the content of the decision of the arbitration agency, the norms of the five systems are very similar, as they must basically contain two elements: 1) the decision of the agency on the issue in dispute; and 2) the measures that the country affected may apply should the decision not be complied with.

Nevertheless, the norms of the Bolivia-Chile Agreement are more precise in this respect. Art.31 of this Agreement stipulates on this matter that "the Resolution of the Arbitration Commission should contain the decision thereof on whether the situation submitted for its consideration constitutes non-compliance or incorrect interpretation of the law and on the measures to be adopted by the defendant country to rectify the situation." Similarly, it should determine the measures that the adversely affected country may adopt should the defendant nation fail to comply therewith."

In contrast, the remaining systems make no reference to the determination, through the decision handed down by the arbitration agency, of the measures to be adopted by the defendant nation in order to clean up or rectify a situation of non-compliance with norms.

53. With regard to the juridical effects of the decision of the arbitration agency, all the systems are similar in that these are binding on the countries involved in the dispute.

455 Art. 12 and 13 of the Second Additional Protocol of the Economic Supplementation Agreement N° 16 between Argentina and Chile.

456 Art. 33, Item c) of the Economic Supplementation Agreement N° 17 between Chile and Mexico.

Under the system of the Argentina-Chile Agreement, this criterion is strengthened through an express provision whereby the decisions of the Arbitration Court, in addition to being binding on the Signatories, "will have the force of a court decision thereon."⁴⁵⁷

Similarly, all the systems coincide with regard to there being no appeal against the decision of the arbitration agency. Nevertheless, the systems of the Argentina-Chile Agreement and the Bolivia-Chile Agreement permit, with no prejudice to the above-mentioned general rule, the possibility of various appeals after the adoption of the decision.

The former admits the possibility that any country involved in a dispute may request the Arbitration Court for a "clarification" of its decision, or ask or an "interpretation of the manner in which it should be complied with".⁴⁵⁸ In turn, the latter acknowledges the right of any of the countries involved in the dispute to bring "an appeal for clarification" regarding the Resolution of the Arbitration Commission.⁴⁵⁹

54. As explained, all the systems examined in one way or another confer on the arbitration agency or court the power to authorize the application of sanctions or retaliatory measures by the country affected the failure of the other party to comply with the norms.

For example, the norms of the system of the Argentina-Chile Agreement stipulate that the "decision" of the Arbitration Court "shall include, when applicable, the specific measures that the adversely-affected country is entitled to apply, either due to non-compliance, wrongful interpretation, or due to any other action or omission that undermines the rights arising from the Economic Supplementation Agreement".⁴⁶⁰

Similarly, the provisions of the Chile-Mexico Agreement stipulate that "the Resolution of the arbitration judges shall contain the specific measures that may be applied by the nation adversely affected, due either to non-compliance, wrongful interpretation, or any other action or omission that undermines the rights arising from the implementation of the Agreement".⁴⁶¹

Finally, the norms of the system of the Bolivia-Chile Agreement stipulate that the Resolution of the Arbitration Commission "shall determine the measures that the affected country may adopt should the defendant nation fail to comply therewith".⁴⁶²

55. In addition to these regulations on the powers of the arbitration agency and the content on this matter of the corresponding decision thereof, all the systems examined include norms whereby the adversely-affected nation is authorized to apply measures to ensure compliance with the decision in question.

Thus, for example, the Argentina-China Agreement states that: if within a period of thirty days a Party-Nation fails to comply with the decision of the Arbitration Court, the other Party-Nation may adopt temporary compensatory measures, such as the suspension of concessions or others equivalent thereto, in order to ensure compliance therewith.⁴⁶³

Similarly, the Chile-Mexico Agreement establishes that non-compliance with the resolution of the Arbitration Group shall prompt the suspension

457 Art. 23, Item 1 of the Second Additional Protocol to the Economic Supplementation Agreement N° 16 between Argentina and Chile.

458 Art. 24 of the Second Additional Protocol to the Economic Supplementation Agreement N° 16 between Argentina and Chile.

459 Art. 32, Paragraph 1 of the Economic Supplementation Agreement N° 22 between Bolivia and Chile.

460 Art. 21 of the Second Additional Protocol to the Economic Supplementation Agreement N° 16 between Argentina and Chile. Art. 22 of this instrument states that such measures "may refer to suspension of concessions equivalent to the losses or damages caused by a total or partial withdrawal of concessions, or any other measure covered by the application of the provisions of the Economic Supplementation Agreement".

461 Art. 33, Item d) of the Economic Supplementation Agreement N° 17 between Chile and Mexico. This norm has the same wording as the provisions on this issue as the Agreements signed by Chile with Colombia and Venezuela.

462 Art. 31 of the Economic Supplementation Agreement N° 22 between Bolivia and Chile.

463 Art. 25 of the Second Additional Protocol of the Economic Supplementation Agreement N° 16 between Argentina and Chile.

of the Agreement as long as the causes that motivated such action do not cease.⁴⁶⁴

Finally, the Bolivia-Chile Agreement stipulates that non-compliance with the decision of the Arbitration Commission may cause temporary suspension by the adversely-affected country of some or all of the provisions of the Agreement.⁴⁶⁵

Additionally, all the systems examined make provision as a final resource for enforcing compliance with the decision or sentence of the Arbitration Agency, that the situation of non-compliance may be invoked as the cause of withdrawal from the respective Agreement.

VIII. SUMMARY AND CONCLUSIONS

56. Since it was founded in 1980, the Latin American Integration Association (LAIA) has not managed to develop a global system of measures for the settlement of disputes among its Member States from the viewpoint of the scope of the issues, or a regional system from the geographic or spatial viewpoint. This does not imply that various efforts on this matter have not been undertaken.

Noteworthy in this field is the effort to regulate the spheres of competence conferred on the Committee of Representatives of the Association by Art. 35, item m) of the Treaty of Montevideo (1980), expressed in the adoption by this Agency of its Resolution 114. Similarly, also worthy of note is the effort to adopt, through Resolution 44 (I-E) of the Council of Ministers of Foreign Affairs of the Association a system of measures for the settlement of disputes arising from the interpretation and application of the norms of the Interpretative Protocol of Art. 44 of the Treaty of Montevideo (1980), signed on 13 June 1994.

57. A probable explanation of the apparent lack of interest in the development of a global system may be the feeling that the juridical regulations of the Treaty of Montevideo 1980 seem to have a low potential for conflict as they are relatively flexible or permissive with regard to their application of the principle of non-discrimination among the LAIA Member-States. Nevertheless, another explanation seems more convincing, based on the assumption that the need to develop a system of this type has not as yet become imperative due to the lack of precision in the definition of the material content of the area of economic preference, as a basic tool of the regional economic integration program of the Association, as well as the lack of a real program to achieve this objective.

This latter view leads to the acknowledgment that, insofar as an economic integration system contains precisely programmed norms or provisions, which consequently implies broader, deeper commitments for the participant nations, will necessarily give rise to increased possibilities for the appearance of differences or disputes among them, spotlighting the urgent need for appropriate means of coping therewith.

58. At the moment, the LAIA Member-States are found in two partial economic integration schemes - either multilateral (such as the Andean Group, the MERCOSUR and the Group of 3) or bilateral - as the means for the development of special systems on the measures for the settlement of disputes. The quality of the commitments undertaken within these schemes has, without doubt, prompted development along these lines.

The results achieved thereby highlight the need for procedures for the settlement of disputes as being inherent in the implementation of relatively advanced indepth economic integration projects or programs.

59. The interest of the LAIA agencies in making a special effort to adopt a global regime seems to have become more accentuated over the past few years.

Firstly, the guidelines approved by the Council of Ministers of Foreign Affairs of the Association have emphasized the need for these efforts since 1991.⁴⁶⁶

464 Art. 33, Item d) of the Economic Supplementation Agreement N° 17 between Chile and Mexico.

465 Art. 32 of the Economic Supplementation Agreement N° 22 between Bolivia and Chile.

466 Resolution 30 (VII) and Resolution 32 (VII) of the Council of Ministers.

Second, in compliance with these guidelines, both the Secretariat as well as the Committee of Representatives of the Association have prepared separate projects on a system of measures for the settlement of disputes that is regional in scope.⁴⁶⁷

It may be assumed that, in a timely fashion and above all when the agencies of the Association adopt, as planned, a □program□ designed to encourage the □convergence□ and □interface□ between the various partial-scope economic integration schemes,⁴⁶⁸ the convenience of persisting with these efforts will become clearer, and more particularly that of endowing the Organization with a global system of measures for the settlement of disputes.

DII48R1.94I

⁴⁶⁷ 1) LAIA/SEC/Proposal 144/Rev.1 document, **Proposal for a System for the Regional Settlement of Disputes for the Latin American Free Trade Association**; and 2) LAIA/CB/dt 106/Rev.1 document, **Report of the Working Group on the Regional System for the Settlement of Disputes**.

⁴⁶⁸ Resolution 38 (VIII) of the Council of Ministers.

CONTENTS

Page

- | | | |
|-------|---|--|
| I. | The Lack of a Regional System of Measures for the Settlement of Disputes | |
| II. | The □Flexible□ or □Permissive□ Nature of the Juridical Regime of LAIA with regard to the Rule of the Principle of □Non-Discrimination□ | |
| III. | Possible Hypothetical Controversies Regarding the Application and Interpretation of the Norms or the Juridical Regulations of LAIA | |
| IV. | Original Provisions on the Control of Legality and Settlement of Disputes | |
| | A. Control of the Legality of Partial-Scope Agreements | |
| | B. Spheres of Competence over the □Control of Legality□ attributed to the LAIA Secretariat | |
| V. | The Procedure for the Settlement of Disputes established by Resolution 114 of the Committee of Representatives | |
| VI. | System of Measures for the Settlement of Disputes regarding the Interpretation and Application of the Interpretative Protocol of Art. 44 of the Treaty of Montevideo (1980) | |
| VII. | Systems for the Settlement of Disputes Adopted In Partial-Scope Bilateral Agreements | |
| | A. Measures for the Settlement of Disputes and their Sphere of application | |
| | B. Negotiations Procedures | |
| | C. Intervention Procedure of the Administration Agency of the Agreements | |
| | D. Arbitration | |
| VIII. | Summary and Conclusions | |

REFERENCE DOCUMENTS

I. JURIDICAL INSTRUMENTS

1. Resolution 114 of the Committee of Representatives (22 March 1990)
2. Resolution 30 (VI) issued by the Council of Ministers of Foreign Affairs (1 December 1991) Provisions for LAIA under the current circumstances of the integration process
3. Resolution 32 (VII) issued by the Council of Ministers of Foreign Affairs (30 November 1992) Provisions covering activities carried out by the Association
4. Basic instruments for Latin American and Caribbean economic integration. Marcelo Halperín, Compiler, Buenos Aires, Inter-American Development Bank - IDB-INTAL, 1992.
5. Art. 44 - Interpretative Protocol of the Treaty of Montevideo (1980) (13 June 1994)
6. Resolution 43 - (I-E) issued by the Council of Ministers of Foreign Affairs (13 June 1994). Norms covering the transition period until the Interpretative Protocol of Art. 44 of the Treaty of Montevideo 1980 takes effect
7. Resolution 44 - (I-E) issued by the Council of Ministers of Foreign Affairs (13 June 1994). Functions, duties and responsibilities of the Special Group covered by Art.4 of the Interpretative Protocol of Art. 44 of the Treaty of Montevideo (1980).

II. PARTIAL-SCOPE ECONOMIC SUPPLEMENTATION AGREEMENTS

8. Economic Supplementation Agreement N° 16 signed between Argentina and Chile (2 August 1991)
9. Second Additional Protocol of the Economic Supplementation Agreement N° 16 signed between Argentina and Chile (17 June 1992)
10. Economic Supplementation Agreement N° 17 signed between Chile and Mexico (22 September 1991)
11. Economic Supplementation Agreement N° 23 signed between Chile and Venezuela (2 April 1993)
12. Economic Supplementation Agreement N° 22 signed between Bolivia and Chile (6 April 1993)
13. Economic Supplementation Agreement N° 24 signed between Colombia and Chile (6 December 1993)

III. DOCUMENTS

14. Final Minutes of the Sixth Meeting of the Council of Ministers of Foreign Relations of the Latin American Integration Association LAIA/CM/VI/Final Minutes (1 December 1991)
15. Final Minutes of the Seventh Meeting of the Council of Ministers of Foreign Relations of the Latin American Integration Association LAIA/CM/VII/Final Minutes (30 November 1992)
16. Proposal for a Regional System for the Settlement of Disputes for the Latin American Integration Association LAIA/CR/dt 106/Rev.2 (1 October

1993)

17. Report by the Working Group on the Regional System for the Settlement of Disputes. LAIA/CR/dt 106/Rev. 2 (1 October 1993)
18. Understanding on the norm sand procedures that regulate the settlement of disputes within the World Trade Organization. Permanent Secretary of SELA/LATINTRADE SP/DRE/Di No.1-94
19. Outcome of Multilateral Trade Talks LAIA/SEC/Di 559 (8 April 1994). Source: Permanent Secretary of SELA/LATINTRADE
20. Final Minutes of the First Extraordinary Meeting of the Council of Ministers of Foreign Relations LAIA/CM/I-E/Final Minutes (13 June 1994)



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/II/doc.55/94

22 August 1994
Original: Spanish

MEMORANDUM PRESENTED BY THE RAPPORTEUR ON

IMPLEMENTATION OF A SYSTEM FOR FACILITATING THE INTERNATIONAL
ACTIVITIES OF INDIVIDUALS AND CORPORATE LEGAL ENTITIES

(presented by Dr. Luis Herrera Marcano)

BACKGROUND:

When commissioning the Committee to examine the topic of □Implementation of the Enterprise for the Americas□, the Permanent Council included as one of the points that warranted study the □Implementation of a Juridical Facilitation System for the Functioning at the International Level of Individual Subjects under law as well as Collective Subjects (Corporate Legal Entities)□ [CP/RES.557 (848/91) and CP/RES.559 (851/91)]. The title of this topic was altered to its current form in August 1992.

On 24 August 1992 the Rapporteur presented a Preliminary Report (CJI/SO/II/doc.30/92), followed by another Report (CJI/SO/I/doc.13/94) in January 1994.

MATTERS COVERED BY THIS TOPIC:

The following points of interest are particularly worthy of note under this topic:

- a) international acknowledgment of the personality and capacity of individual persons;

- b) international acknowledgment of the personality and capacity of corporate legal entities;
- c) entry into a State and stay therein by individual persons in order to:
 - i. Make investments and carry out other business related to trade in goods or services;
 - ii. Render transborder services;
 - iii. Work.
- d) Possibility of foreign corporate legal entities operating within the territory of a State, through investments or by rendering services.

CURRENT SITUATION OF THESE MATTERS:

Since the very beginning, the possibility of the Committee concerning itself with Point a) was discarded, as this is a matter covered by all legislations. Similarly, and for obvious reasons, it was deemed inconvenient to examine problems related to labor force migration, under Point c) III.

With regard to Point b), the Member-States were consulted regarding the reasons why they had not ratified the Inter-American Convention on Personality and Capacity of Corporate Legal Entities under International Private Law, signed in La Paz in 1984. The lack of response seems to indicate that this topic does not really constitute a problem, probably because the legislation in the various States already contains adequate regulations to guarantee its functioning.

With regard to the entry and stay of people intending to do business or make investments, as well as the transborder rendering of services, this topic has been regulated multilaterally in the NAFTA North American Free Trade Agreement between Canada, the U.S.A. and Mexico, as well as in the Group of 3 - G3 Free Trade Agreement between Colombia, Mexico and Venezuela. According to information in the press, a Resolution was recently approved on Competent Documents for each Member-State for the Movement of Persons within the MERCOSUR . Additionally, the recent bilateral Free Trade Treaty between Costa Rica and Mexico covers the regulation of this matter.

With regard to Point d), this will be regulated at the worldwide level for trade in services, when the agreements of the WTO - World Trade Organization (which replaces GATT) come into force in 1995. For investments, this is already covered by over a hundred bilateral conventions protecting investments underwritten by the countries in the Hemisphere, in addition to the two trilateral Treaties mentioned above.

POSSIBLE CONTRIBUTION BY THE INTER-AMERICAN JURIDICAL COMMITTEE:

In view of this, it would seem that the fields in which the Committee could make some useful contribution will be with regard to the entry and stay of individual persons wishing to do business or make investments, or act with regard to the transborder rendering of services.

On this matter, which clearly falls under the sovereign sphere of competence of each State as this involves matters related to public order and security, it would not be appropriate to propose the unification of domestic legislations. Nor, at the moment does there seem to be any outlook for

approval of an Inter-American convention on this matter. However, recent developments have shown that this topic is of particular interest in relation to the new free trade schemes under discussion on the Continent.

In view of this it is recommended that, under this topic, an effort be made to list the principal points regulated in the above-mentioned international deeds, as well as the instruments in effect involving countries outside the Continent, which could serve as a guide or reference for States involved in bilateral or multilateral negotiations on this matter.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/II/doc.20/94
1 August 1994
Original: Spanish

REPORT SUBMITTED BY DR JOSE LUIS SIQUEIROS,
CHAIRMAN OF THE INTER-AMERICAN JURIDICAL COMMITTEE,
ON THE WORK CARRIED OUT BY THIS ORGANIZATION BETWEEN
SEPTEMBER 1993 AND JUNE 1994, AS WELL AS HIS FUNCTIONS AS AN
INTER-AMERICAN JURIDICAL COMMITTEE OBSERVER AT VARIOUS EVENTS,
IN ACCORDANCE WITH THE RESOLUTION APPROVED BY THE
COMMITTEE ON 28 JANUARY 1994

Distinguished Members of the Committee

Due to the definitive absence of the Chairman of this Organization, Dr. Manuel A. Vieira, who resigned his position as Chairman of the Inter-American Juridical Committee on 27 August 1993, I took over the Chair of this body in accordance with the provisions of Article 11 of our Statutes, in order to exercise the office of Chairman until the end of the term of office of my predecessor, meaning until 5 August 1994.

In terms of the above-mentioned Article, Ambassador Ramiro Saraiva Guerreiro was elected as Vice-Chairman during the session held on 20 January 1994, a position which he will fill until 5 August this year, in accordance with the provision in the Statutes.

1. Ordinary Sessions Period - 17-29 January 1994

The Ordinary Sessions Period of the Committee, in accordance with the Agreement adopted by this Organization in the Minutes of the Meeting held on the last day of the August 1993 sessions, was held from 17-29 January this year. During this Ordinary Sessions Period, the Committee welcomed the two new Members who joined our organization in this capacity: Dr. Mauricio Gutiérrez Castro and Dr. Alberto Zelada Castedo.

The Committee sat for thirteen sessions during this period. The content thereof and the Resolutions adopted are set out in the Minutes of the Secretariat which were forwarded to the

Members, as well as in the Annual Report of the Inter-American Juridical Committee to the General Assembly (CJI/RES.I-8/94) approved unanimously during the Session held on 29 January last.

2. General Assembly of the Organization of American States on Inter-American Cooperation for Development

In compliance with the mandate assigned to me by this organization, I represented it at the Meeting of the XX Extraordinary Sessions Period of the General Assembly, held on 17 - 18 February 1994 in Mexico City. The theme of this Meeting focused on Inter-American Cooperation for Development.

The Plenary Assembly agreed to approve the following Resolutions:

- a) General Political Benchmark and Priorities for Joint Cooperation for Development, and
- b) Commitment to foster Joint Cooperation and the Elimination of Poverty.

On 22 February this year, I forwarded to the Secretariat of this Committee my Report on the activities carried out at this event, as well as the texts of the Resolutions adopted. I asked the Secretary to make known to the Members of the Committee the contents of my Report and the attachments thereto.

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

On 14-18 March this year, the V Specialized Inter-American Conference on Private International Law (CIDIP-V) was held in Mexico City. This Conference was attended by nineteen Delegations, as well as by many observers from government and non-government organizations.

I had the honor of being elected the President of this Conference, by acclamation.

Due to its short duration, work forged ahead at an intensive pace. The high academic level of most of its participants, as well as the effective administrative support of the Sub-Secretariat for Juridical Affairs, through its department for the Development and Codification of International Law, in harmonious cooperation with the Foreign Affairs Department of the Mexican Government, ensured a successful outcome.

The Plenary Assembly approved two Inter-American Conventions. One was on Law Applicable to International Contracts; the other covered International Traffic in Juveniles. I consider that these two multi-lateral instruments are of a high scientific level and that this Committee may well feel flattered as its input for the Drafts of both these Conventions was taken into consideration in formulating the definitive texts. Due to this, the Plenary Assembly approved Resolution No. 5/94 which expressly acknowledged the positive efforts of the Inter-American Juridical Committee fostering the progressive development and codification of international law at the Inter-American level. A copy of this acknowledgment is attached to this Report as an Annex.

In addition to the two Conventions concluded in Mexico City, on 18 March 1994, the Plenary

Assembly adopted twelve Resolutions. A general overview of the CIDIP-V is attached herewith as an Annex to this Report, and is available to any Members of the Committee who may wish to learn about its progress in greater detail.

4. Annual Report of the Inter-American Juridical Committee to the Permanent Council of the Organization of American States

On 4 April 1994, in Washington D.C., I had the honor of submitting the Annual Report of the activities of this Committee to the Permanent Council. The Report as such, together with its Annexes, was already in the hands of the Permanent Missions represented on the Council. I merely spotlighted the more important points and replied to some questions or concerns brought to the Table by some of the Ambassadors. Nevertheless, as a matter of form, I have prepared a brief summary of my activities at this Meeting, attached to this Report as a Annex.

5. Acting as an Observer at the International Law Commission, United Nations

On 28 June this year I attended one of the Meetings of the International Law Commission of the United Nations, as an observer from this Committee. I took advantage of this opportunity to extend to the Members of this Commission the cordial greetings of the Members of the Inter-American Juridical Committee, and gave them a brief presentation. In my speech, I tried to stress the mutual cooperation that both these organizations have traditionally maintained, as well as the convergence of some of their topics. I attach herewith a copy of these greetings and my presentation given on this date.

6. New Head of the Committee Secretariat

On April 1 1994, Dr. Manoel Tolomei Moletta took office as the Secretary of this Organization. He has an outstanding academic background and a distinguished record in the public sector in Brazil, as well as in the Organization of American States. His performance in this position during the past four months has been most satisfactory, and this will be his first period of sessions in office with the full Juridical Committee.

We welcome Dr. Manoel Tolomei Moletta and wish him all success in the exercise of his functions. The Chairman once again wishes to emphasize his acknowledgment of Dr. Renato Ribeiro, who continued to carry out his duties and responsibilities until 31 March this year, with the same elegance that has always characterized his fulfillment of his tasks.

I believe that I express the collective feelings of this body in wishing him health and success in his new activities.

Thank you very much for your attention.

Rio de Janeiro, 1 August 1994

José Luis Siqueiros
ANNEX I

ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE
TO THE PERMANENT COMMITTEE

4 April 1994 - Washington D.C.

Mr. Chairman, Representatives of the Member-States, Observers, Ladies and Gentlemen.

I am pleased to present the Annual Report covering the activities of the Inter-American Juridical Committee between 1 March 1993 and 29 January 1993, with three Ordinary Sessions Periods, in March and August 1993, as well as January 1994, brought forward on this occasion due to the fact that the CIDIP-V Meeting was also scheduled for March this year.

The Committee currently consists of eleven members, listed below in alphabetical order:

Dr. Miguel Angel Espeche Gil	(Argentina)
Dr. Jonathan T. Fried	(Canada)
Dr. Mauricio Gutierrez Castro	(El Salvador)
Dr. Philip Telford Georges	(Dominica)
Dr. Luis Herrera Mercano	(Venezuela)
Dr. Galo Leoro Franco	(Ecuador)
Dr. Seymour J. Rubin	(U.S.A.)
Dr. Ramiro Saraiva Guerreiro	(Brazil)
Dr. José Luis Siqueiros	(Mexico)
Dr. Eduardo Vío Grossi	(Chile)
Dr. Alberto Zelada Castedo	(Bolivia)

I am currently the Chairman of this organization, and Ambassador Saraiva Guerreiro is the Vice-Chairman. Dr. Renato Ribeiro acted as Secretary of the Committee during the period covered by this Report. The Sub-Secretariat for Juridical Affairs is represented by Dr. Hugo Caminos, its Under-Secretary, and Dr. Henrique Lagos, Director of the Department for the Development and Codification of International Law of this Sub-Secretariat.

As the Resolutions adopted during our March 1993 Sessions period have already been examined by this Permanent Committee and the General Assembly in its Ordinary Session held in August 1993, this Report will focus only on the activities carried out during our August 1993 and January 1994 Sessions.

Meetings with Chancellery Aides

Meeting of the members of the Inter-American Juridical Committee with the Aides and Advisors of the Ministers of Foreign Affairs of the Member-Nations of the Organization of American States (an instrument for hemisphere-wide cooperation in juridical matters).

An interchange of opinions took place on current events within the sphere of international law, at both the regional and universal levels, as well as on topics listed on the Inter-American Juridical

Committee Agenda. These Aides had the opportunity to share the experiences of the XX Course in International Law. Nine Chancellery Consultants attended, and the Meeting developed into an interesting forum for discussions of topics of interest to Foreign Affairs Ministers throughout the continent, as well as other issues studied by this organization in compliance with the mandates handed down by the General Assembly and the Permanent Committee.

It was agreed that this type of Meeting should be held in Rio de Janeiro every two years.

Compliance with mandates and recommendation handed down by the General Assembly and the Permanent Council

1. Input from the Inter-American Juridical Committee for Draft Conventions for the CIDIP-V.
 - a) Law applicable to international contracting;
 - b) General Outlines for a Draft Inter-American Convention on international traffic in juveniles: civil and penal aspects.
2. Comments and Observation on the Questionnaire on Juridical Obstacles to Integration

It was resolved to withdraw from the Agenda the specific topic of these Obstacles, without adversely affecting studies of those aspects involving the juridical dimension of integration.

This new focus is now centered on two aspects:

- I. New ways of settling disputes arising in regional and sub-regional integration schemes:
 - a) the Cartagena Agreement
 - b) LAIA
 - c) the CARICOM Pact
 - d) the MERCOSUR Agreement
 - e) NAFTA
 - f) Bilateral Free Trade Agreements and supplementary economic pacts
 - g) the Central American Common Market
 - h) the G-3 Group.
- II. Study of international insolvency and the bankruptcy of multinational companies.

3. Environmental Law

During the period covered by this Report, two papers were produced on this topic, of much

interest in terms of environmental protection and development (Inter-American Program for the Protection of the Environment).

- i. Responsibility in matters of environmental law;
- ii. An update of the earlier Inter-American Juridical Committee Report entitled □The Process Fostering the Establishment of an Environmental Law in the Americas, in the light of the Instruments approved by the United Nations on the Environment and Sustainable Development, as well as the possible updating of the Pan-American Convention signed in 1940 for the Protection of the Plants, Wildlife and Natural Scenic Beauties of the Nations□.

4. Improvement of the Administration of Justice in the Americas

Studies were continued, as well as cooperation with government, inter-government and non-government institutions in this field, by means of seminars and field surveys.

5. Implementation of the Enterprise for the Americas:
The Securities Market

Through the Reports of its members, the Inter-American Juridical Committee has concluded that it would be apposite to study the general bases or normative benchmarks of the basic principles for correct regulation of securities markets.

Indirect or portfolio investment (in debt, stocks or neutral capital) should be encouraged in order to spur an increased flow of capital to Stock Exchanges, benefiting the developing countries. The above-mentioned benchmark, which could be structured into a model law, harmonizing domestic legislations, or merely through the dissemination of its basic characteristics (transparency, traceable operations accounting, bans on insider trading, and methods of settling and resolving disputes) could all be agreed upon together with COSRA or IOSCO, or else through mutual backing with the IBA International Capitals Markets Forum, from the viewpoint of private law.

6. Facilitation of International Activities by Individuals
and Corporate Entities

Analysis of this topic and its various aspects continues under way.

7. The Right to Information

It was resolved to retain this topic on the Agenda (interest of the Venezuelan Ambassador, 4 April 1994).

8. Studies under way

- a) Democracy in the Inter-American System
- b) Juridical Aspects of Foreign Debt

9. Other Matters and Activities

XXI International Law Course - August 1994

José Luis Siqueiros

ANNEX II

"CIDIP-V/RES.5(94)

RECOGNITION OF THE WORK OF
THE INTER-AMERICAN JURIDICAL COMMITTEE

THE FIFTH INTER-AMERICAN SPECIALIZED CONFERENCE ON PRIVATE INTERNATIONAL LAW

WHEREAS:

The primary duty of the Inter-American Juridical Committee, in its capacity as an advisory body of the Organization of American States, is to promote the progressive development and codification of international law, contributing its technical support to effective juridical integration of the States of this hemisphere;

The Committee has discharged its assigned functions in exemplary fashion, preparing valuable draft conventions and other basic documents that have been very helpful in furthering the actual work of the Inter-American Specialized Conferences on Private International Law convened by the Organization;

For CIDIP-V the Committee prepared a draft Inter-American Convention on the Law Applicable to International Contractual Arrangements which served as a basis for the instrument adopted by this Conference, together with General Guidelines regarding the Draft Inter-American Convention on International Traffic in Minors, which was taken into account in preparation of the final instrument,

RESOLVES:

1. To express its thanks for the invaluable services rendered by the Inter-American Juridical Committee in promoting the progressive development and codification of international law at the inter-American level.

2. To request the General Assembly to continue to provide the Committee with the necessary cooperation, with a view to the future Specialized Conferences and meetings on private international law convened."

ANNEX III

GENERAL OUTLINE OF CIDIP-V469/

1. Specialized Inter-American Conferences on International Private Law - CIDIPs - under the auspices of the OAS

The Organization of American States - OAS, in compliance with the mandate granted it by Article 105 of its Charter, and consistently promoting the progressive development of international law and the codification thereof, has striven over the past nineteen years to achieve - through specialized conferences - the harmonization of this discipline in various aspects. In this task of codification, the Inter-American Juridical Committee has played an important role.

To date, five Specialized Inter-American Conferences on International Private Law - CIDIPs have been held, which have approved a total of twenty three Inter-American Conventions. The first four CIDIPs were held in Panama (1975); Montevideo (1979); La Paz (1984); and Montevideo (1989). As may be seen, these conferences are held at four to five year intervals. CIDIP-V was held by the General Assembly of the Organization of American States in Mexico City during March 1994.

2. Brief Overview of the CIDIPs I, II, III and IV

2.1 CIDIP-I - The First Specialized Conference was held in Panama City from 14-30 January 1975, and was attended by representatives from: Argentina, Brazil, Colombia, Costa Rica, Chile, Ecuador, El Salvador, U.S.A., Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Trinidad and Tobago, Uruguay and Venezuela, all members of the above-mentioned Organization. Barbados, Bolivia and Haiti did not attend. As the basis for the work on codification, eight Draft Conventions formulated by the Inter-American Juridical Committee were used. The outcome of the efforts of the First Specialized Inter-American Conference on International Private Law consisted of six important conventions: a) Inter-American Convention on Conflicts of Laws regarding Letters of Exchange, Promissory Notes and Invoices; b) Inter-American Convention on Conflicts of Laws regarding Cheques; c) Inter-American Convention on International Commercial Arbitration; d) Inter-American Convention on Rogatory Letter; e) Inter-American Convention on Receipt of Proof Abroad; f) Inter-American Convention on the Legal Regime of Powers for Use Abroad.

2.2 CIDIP-II - The Second Specialized Conference was held in Montevideo from 23 April - 8 May 1979, and was attended by representatives from the following Organization of American States Member-Nations: Ecuador, Argentina, Uruguay, Colombia, Haiti, Mexico, Brazil, Panama, Peru, Nicaragua, El Salvador, Venezuela, Paraguay, Guatemala, Trinidad and Tobago, Costa Rica, U.S.A., Dominican Republic, Honduras and Chile.

Work forged ahead at an intensive pace. The academic level of the various delegations was higher than that noted at CIDIP-I in Panama in 1975. Most of the participants were Ambassadors, Law Professors, Foreign Service Officers, or specialists in this matter. This Conference was also attended by observers from LAIA, IBD, the Inter-American Bar Association, the Hague Conference on International Private Law and other special guests.

The Second Specialized Inter-American Conference on International Private Law approved the following instruments :

- i. Inter-American Convention on the Extra-Territorial Effectiveness of Foreign Arbitration Findings
- ii. Inter-American Convention on Compliance with Preventive Measures;
- iii. Inter-American Convention on Proof and Information regarding Foreign Law;
- iv. Additional Protocol to the Inter-American Convention on Rogatory Letters;
- v. Inter-American Convention on Conflicts of Laws regarding Cheques;
- vi. Inter-American Convention on Conflicts of Laws regarding Commercial Companies;
- vii. Inter-American Convention on the Domicile of Individual Persons under International Private Law;
- viii. Inter-American Convention on the General Norms of International Private Law.

2.3 CIDIP-III - The Third Specialized Conference was held in La Paz, Bolivia, from 15-24 May 1984

It was attended by representatives from eighteen countries in the hemisphere: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Chile, Ecuador, El Salvador, U.S.A., Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela.

Also present were representatives of the Inter-American Juridical Committee, the Inter-American Human Rights Court, the Inter-American Women's Commission, the American Indigenous Peoples Institute, the Inter-American Children's Institute, and the Inter-American Development Bank.

In general terms, perhaps due to the successive postponements of its date or problems inherent in the organizational tasks of the host country, CIDIP-III did not achieve the brilliance of the Conferences held in Panama City and Montevideo.

However, despite the conflicts in its internal organization, the efforts made by all the delegates, backed by the Sub-Secretariat for Juridical Affairs of the Organization of American States, managed to crown this Meeting with success, approving four highly relevant Conventions:

- i. Inter-American Convention on Conflicts of Laws regarding the Adoption of Minors;
- ii. Inter-American Conference on Individuality and Capacity of Corporate Legal Entities under International Private Law;
- iii. Inter-American Conference on Competence in the International Sphere for the Extra-Territorial Effectiveness of Foreign Sentences and Decisions ;
- iv. Additional Protocol to the Convention on Receipt of Proof Abroad;

2.4 CIDIP-IV - The Fourth Specialized Conference was held in Montevideo to celebrate the Centenary of the International Private Law Treaties signed in this city in 1889. This Conference took place from 9-15 July 1989,

CIDIP-IV approved three Conventions:

- i. Inter-American Convention on International Restitution of Minors;
- ii. Inter-American Conference on Nutritional Obligations;
- iii. Inter-American Conference on International Road Cargo Transportation Contracts.

As it was not possible to achieve a sufficient consensus for the preparation of a Convention on International Contracting, the Conference only approved a set of Bases or Principles for the future study of this topic, covering the law applicable to this matter.

3. CIDIP-V

The Fifth Specialized Conference Inter-American Conference on International Private Law - CIDIP-V was summoned by the General Assembly of the Organization of American States through Resolution AG/RES.1024(XIX-0/89), approved on 18 November 1989.

In this Resolution, the General Assembly charged the Permanent Council of the Organization to prepare the Draft Agenda and Regulations for this Conference. Additionally, it asked the Inter-American Juridical Committee to prepare - as it had done for the previous Specialized Conferences - the Reports and Draft Conventions with the relevant Expositions of Motives on the issues covered by the Agenda for the CIDIP-V. The General Assembly thus requested the General Secretariat to prepare the technical and informative documents necessary for facilitating the preparation of this Conference. Similarly, the General Assembly decided to call a Meeting of Experts to prepare a Draft Convention on the Law Applicable to International Contracting, and requested the Inter-American Children's Institute to continue its studies on the topic of Minors.

In compliance with the mandate of the General Assembly, the Permanent Council, through Resolution CP/RES.588(911/92) dated 24 July 1992, approved the Draft Agenda. The conference approved this during its First Plenary Session held on 14 March 1994, in the following manner:

1. Law applicable to International Contracting;
2. Civil and Penal Aspects of Traffic in Juveniles;

3. Juridical Aspects of International Private Law concerning Technology Transfer Contracts;
4. Other Matters.

During this same Plenary Session, the Conference decided to include under the Item: Other Matters, the topic of International Civil Responsibility for Transborder Pollution, in order to prompt an interchange of ideas on this issue.

In compliance with the mandate handed down by the General Assembly, the Inter-American Juridical Committee had prepared a Draft Inter-American Convention on Law Applicable to International Contracting Matters, as well as the General Guidelines for a Draft Inter-American Convention on the Repression of International Traffic in Juveniles.

Through the Secretariat for Legal Affairs, the General Secretariat prepared the technical and informative documents and provided the Conference with Secretariat services.

The Permanent Council entrusted its Commission for Juridical and Political Affairs with the preparation and coordination of the documents for the use of the CIDIP-V.

The Meeting of Experts on International Contracting prepared a Draft Inter-American Convention on Law Applicable to International Contracts, while the Meeting of Experts called by the Inter-American Children's Institute prepared a Draft Inter-American Convention on International Traffic in Juveniles.

CIDIP-V opened on 14 March 1994 in Mexico City, and was attended by representatives from the following nineteen Organization of American States Member-Nations: Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, U.S.A., Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Uruguay and Venezuela.

Also accredited were Observers from Italy, Rumania, Russia and Spain, as well as the Inter-American Children's Institute, the Hague Conference on International Private Law, the Argentine International Law Association, the Ibero-American Case Law Institute, and the Brazilian International Law Society.

4. Sessions and Organization of the Conference

4.1 Inaugural Session

On 14 March 1994, at 9.30 a.m., the Conference was inaugurated at the head-quarters of the Mexican Foreign Affairs Department. Speeches were made by the Representative of the General

Secretary of the Organization of American States, Dr. Hugo Caminos; the Head of the Uruguayan Delegation, Dr. Didier Opertti; and the Mexican Secretary of Foreign Affairs, Dr. Manuel Tello, who then declared the Conference open.

4.2 Preliminary Session

The Preliminary Session of the Conference opened at 11 a.m. on 14 March, and was chaired by its Chairman-in-Office, Dr. José Luis Siqueiros.

In accordance with Article 16 of the Draft Regulations for the Conference, the Heads of the Delegations adopted agreements on the following points: Election of the Chairman, Agenda, Regulations, Work Commissions, Credentials and Styles Commissions, definition of the period during which the Delegations could submit amendments or drafts replacing the Convention Drafts, and the approximate duration of the Conference.

4.3 Chairman of the Conference

Dr. José Luis Siqueiros, Head of the Mexican Delegation, was elected Chairman of the Conference by acclamation. In compliance with Article 13 of the regulations, it was agreed that the Heads of the Participant Delegations would act as Vice-Chairmen of the Conference, in the order of precedence established by the Permanent Council in its Session of 9 February 199.

4.4 Regulations

The Conference approved the Draft Regulations prepared by the Permanent Council (CIDIP-V/doc.3/94) with one modification in its Article 16 (CIDIP-V/doc.3/94 rev.1).

4.5 Constitution of the Commissions

In compliance with Article 411 of the Regulations, during the First Plenary Session, the Conference decided to set up two Work Commissions, designated Commission I and Commission II. The former was assigned the topics of the Law Applicable to International Contracting, and Juridical Aspects of International Private Law concerning Technology Transfer Contracts. The latter was assigned the topic of Civil and Penal Aspects of the Traffic in Juveniles.

The Head Panels of the Work Commissions were set up in the following manner:

Commission I

Chairman:	Gonzalo Parra-Aranguren	Venezuela
Vice-Chairman:	João Grandino Rodas	Brazil
Rapporteur:	Louis Perret	Canada
Technical Secretary:	Jean Michel Arrighi	
Assistant Technical Secretary:	Michael Sullivan	

Minutes Secretary: Gladys Berly

Commission II

Chairman:	Didier Opertti	Uruguay
Vice-Chairman:	Peter H.Pfund	U.S.A.
Rapporteur:	Hermes Navarro	Costa Rica
Technical Secretary:	Reinaldo Rodríguez	
Assistant Technical Secretary:	Rubén Farje	
Minutes Secretary:	Celia Grossmann	

The Credentials Committee consisted of the following Delegations: Chile, Honduras, and Panama.

The Style Commission was made up from the Delegations of Brazil, Canada, Colombia and the U.S.A., whereby the four official languages of the Conference were represented, in accordance with Article 47 of the Regulations.

5. Conventions approved

As the outcome of the discussions noted in the Minutes of the Plenary Sessions and Minutes of Commissions I and II, as well as other documents related to various topics, the Fifth Specialized Inter-American Conference on International Private Law approved the following Conventions:

- a) Inter-American Convention on Law Applicable to International Contracts;
- b) Inter-American Convention on International Traffic in Juveniles.

The above-mentioned Conventions were signed during the Closing Session on 18 March 1994, by the Delegates of Brazil, Bolivia, Uruguay and Venezuela, who were fully empowered to sign the Conventions approved by the Conference. The Final Minutes were signed the same day by the Delegates of the nineteen accredited Delegations. These Conventions await, at the General Secretariat of the Organization of American States, the signature of the Member-States that did not do so at the Conference. They are also open for adhesion by any other State.

6. Brief Analysis of the Conventions Approved

6.1 Inter-American Convention on Law Applicable to International Contracts

During the discussions held by Commission I, the following documents formed the basic texts:

- a) The Draft approved by the Inter-American Juridical Committee in August 1991 (Law Applicable to International Contracting); and
- b) The Draft prepared by the Committee of Experts set up by the Sub-Secretariat of Juridical Affairs of the Organization of American States, which met in Tucson, Arizona, in November 1993. The text approved was entitled □Law Applicable to International Contracts□.

Both documents were based on the Convention of the European Economic Community signed in Rome in 1980, on Law Applicable to Contractual Obligations; the document approved during the Conference held at the Hague in 1986 on Law Applicable to International Commodities Contracts; and finally International Commercial Contracts, drafted by UNIDROIT.

Although there is no doubt that this new Inter-American Convention was inspired by the fundamental principles brought together in the instruments signed in Rome and the Hague, principally that stipulating that the contract should be ruled by the law elected by the parties thereto, should the parties not elect the applicable law or if the selection thereof proves ineffective, Article 9 of the Convention of Mexico moves away from the concept incorporated into the European instruments and known as □the most characteristic rendering□, which guides the court to locate the closest links that the contract may have with the law of a specific State on the basis of this concept, instead favoring and taking into consideration the general principles of international commercial law accepted by international agencies.

Additionally, the Convention of Mexico follows conventional law for the first time in the application of *lex mercatoria*, meaning the norms, customs and principles of international trade, as well as its uses and practices, in order to implement the requirements imposed by justice and fairness in finding a solution to a specific case (Article 10).

The approved text consists of a Preamble, thirty Articles and six Chapters.

It may be stated that the Convention of Mexico simplifies and modernizes international normativity on this matter, innovating with regard to the conflictual regulation of the European texts.

6.2 Inter-American Convention on International Traffic in Juveniles

As mentioned previously, the Inter-American Children□s Institute, together with the National System for the Integral Development of the Family (DIF) of the Mexican government, summoned a Meeting of Experts that was held in Oaxtepec, Mexico, in October 1993, in order to study a Draft that would cover both the civil and penal aspects of the international traffic in juveniles. The experts analyzed the preliminary drafts submitted earlier to the Mexican government and the Institute itself. After four days of discussions, a text was approved that acted as the basic document for Commission II in the Conference.

The second Convention approved regulates for the first time in the universal sphere the civil and penal aspects of the international traffic in juveniles, with a view to protecting the fundamental rights and higher interests of minors. It bans and condemns this traffic, setting up an international juridical cooperation system among the Member-States, and ensuring the rapid return of under-age

victims of this traffic to the State of their habitual residence.

The Convention of Mexico puts into effective practice the provisions of Articles 11 and 35 of the Convention on Children's Rights, adopted by the General Assembly of the United Nations on 20 November 1989.

The approved text consists of a Preamble and thirty five Articles contained in six Chapters.

7. Resolutions Approved

As usual in these Conferences, the General Assembly approved the Resolutions which resulted from the initiatives proposed by the Delegates of one or more Delegations. Some of them recommended the signature and ratification of International Conventions approved earlier at the regional universal level, on matters in which the participation of the Organization of American States Member-Nations was considered appropriate. Others expressed to governments, agencies, institutions and persons the acknowledgments of the Conference for their support and efforts, which were crucial to the success of this Conference. However, two important Resolutions are worthy of note. The first because it refers to one of the topics (the third) on the Agenda of the Conference, and the second because it requests the General Assembly of the Organization of American States the convocation of the Sixth Specialized Conference - CIDIP-VI, recommending the inclusion of various specific matters in its Agenda. We will examine these issues below.

7.1 Juridical Aspects of International Private Law concerning Technology Transfer Contracts

The respective Resolution - CIDIP-V/RES.1(94) - considers that on this topic the Conference carried out a general analysis of the most important aspects involved in this matter; that in accordance with the various criteria expressed by some of the participant Delegates, this issue has been examined in other international fora with different guidelines, and is currently acquiring a new focus, warranting further studies facilitating a better understanding thereof.

The Conference thus decided to request the General Secretariat, through the Sub-Secretariat for Juridical Affairs, to prepare a study covering the principal aspects of International Private Law affecting this issue, in order to submit this for the consideration of the Organization of American States Member-Nations, in order to hear their views on the convenience of continuing the study of this matter within the International Private Law Codification process underway on the continent.

7.2 Request to the General Assembly to hold the Sixth Specialized Inter-American Conference on International Private Law - CIDIP-V.

The Conference resolved to recommend to the General Assembly that, after the pertinent studies, the following matters should be included in the Agenda of the CIDIP-V.

- a) Commercial representation and mandate;
- b) Conflicts of laws regarding extra-contractual responsibility (clearly assigned to a specific area);

- c) Uniform commercial documentation for Free Trade;
- d) International bankruptcies;
- e) Problems of international private law regarding private international loan contracts;
- f) International third party responsibility for transborder pollution. Aspects of international private law. (This topic was included at the suggestion of the Uruguayan Delegation, and as the result of an interchange of ideas that arose under the point of Other Matters included in the Agenda of CIDIP-V);
- g) International protection for minors under international private law; ward and guardianship, custody, visits and filiation;
- h) Uniformity and harmonization of the international financial and commercial guarantee systems;

As Resolution CIDIP-V/RES.8(94) indicates, the General Assembly shall, having heard the views of the Member-States of the Organization of American States, announce the topics that prompt the greatest interest and timeliness for the next Conference.

8. Final Reflections

Notwithstanding its brief duration (five working days), CIDIP-V was a successful Conference at a high scientific level. The two Inter-American Conventions concluded in Mexico City in March 1994 may be considered as excellent within the process of progressive development and codification of international law. The efforts of the respective Commissions and the Plenary Assemblies were buttressed by: a) the technical documents prepared by specialists in both topics, and submitted to the consideration of the competent agencies of the Organization of American States well in advance of the event; b) the Meetings of Experts in Oaxtepec and Tucson, which prepared the instruments that acted as a basis for the discussion of the two Conventions; and c) the high academic level of the participants, as both Experts and Delegates, all of which prompted a positive discussion and consensus approval of the final texts.

It is to be hoped that the signature of both Conventions (already signed by four governments) takes place as soon as convenient and that they will soon - after ratification by two of the signatory nations - enter into force.

José Luis Siqueiros

ANNEX IV

Greetings and Brief Comments from Dr. José Luis Siqueiros,
Chairman of the Inter-American Juridical Committee (OAS) and
Observer of this Agency at the International Law Commission of the
United Nations. Geneva, Switzerland, 28 June 1994.

Mr. Chairman,
Members of the Commission

It is an honor for me to offer you cordial greetings on behalf of the Inter-American Juridical Committee, a consultative body within the United Nations Organization. The presence of an Observer from this Committee during the Annual Sessions Period of this illustrious Commission is a welcome tradition Reciprocally, the visit of a representative from this Commission to the head offices of our Organization in Rio de Janeiro almost every year allows us to strengthen the links of scientific cooperation and interchange of viewpoints on common tasks.

Just a few months ago I had the honor to receive a visit from Ambassador Carlos Calero Rodríguez, who with his habitual good humor and multi-faceted wisdom showed us the work under way by this distinguished body during its Forty-Fifth Session. We had the opportunity to bring ourselves up to date in detail on the wealth of problems under study, the projects and drafts concluded, and new issues under consideration.

Thanks also to the guidance and advice of my distinguished compatriot and illustrious member of this Commission, Ambassador Alberto Szekely, I was able to study the Agenda in detail as well as the internal methodology for handling issues brought forward. I would like to congratulate you all on your efforts to date and hope that your future tasks are crowned with success.

The Statute of our Committee assigns as one of its duties and responsibilities the task of establishing cooperative relationships with national and international Commissions, Organizations and other bodies devoted to the development and codification of international law, or the study, research, teaching or dissemination of juridical matters of international interest.

Within the Inter-American sphere, we have fostered this objective and during August last year we hosted a Meeting with the juridical consultants and advisors of the Foreign Affairs Ministries from all over the region. The purpose of this Meeting was to spur an interchange of opinions on current international juridical matters of interest to the Chancelleries in nations on the American continent.

This initiative bore fruit. The Meeting between the diplomatic advisors and the members of the Inter-American Juridical Committee constituted an apt forum for pinpointing topics of vital importance at both the regional and universal level. Coming immediately to mind are the discussions over the conceptualization of democracy within the Inter-American system, the violation of human rights by non-government groups, the drug trade, and terrorism, as challenges to the security of the continent.

The earliest predecessor of the Inter-American Juridical Committee dates back to the Third

International American Conference held in Rio de Janeiro in 1906, when the Permanent Jurisconsultancy Committee was set up. This first stage of its activities - from 1912 through 1939 - was fruitful. During this period it approved twelve draft documents on International Public Law, as well as what was to be the Bustamante International Private Law Code.

The second phase began in 1942, when this organization really became Institutionalized under the name it still preserves, and with permanent head-quarters in what was then the capital of Brazil. Later, when the Buenos Aires Protocol was approved under the aegis of the Organization of American States and its incorporative Charter was revised, the Inter-American Jurisconsultancy Committee was abolished and its duties and responsibilities transferred to the Inter-American Juridical Committee, elevating this latter to the level of a principal agency of the Organization. Its basic duties and responsibilities are to serve as a consultative body in juridical matters; to promote the progressive development and codification of international law, studying the juridical problems involved in the integration of the developing nations on the continent, as well as the possibility of uniformizing their legislations as far as may seem convenient.

Precisely on the topic of the juridical dimension of integration, the Committee already has comparative studies of the various sub-regional schemes with regard to methods for the settlement of disputes. These studies analyze methods for the settlement of disputes incorporated in integrationist systems with community law, compared to those adopted in Free Trade areas. Also included are the bilateral or trilateral schemes called economic supplementation schemes that fall under the aegis of LAIA or seek to converge into a possible future adhesion to the North American Free Trade Zone - NAFTA.

Another topic of much importance for the Committee is keeping up-to-date on the development of an environmental law for the Americas. Preliminary studies undertaken by our Organization have been reviewed and revised in the light of the instruments approved by the United Nations on the environment and sustainable development. Over the past two years, Resolutions have been approved covering the issue of responsibility under environmental law and the possibility of updating the Pan-American Convention - signed in 1940 - for the Protection of Plants, Wildlife and the National Scenic Beauties of the Countries on the continent. The Committee also complies with the mandates handed down by the General Assembly, as well as those contained in the Inter-American Action Program for Environmental Conservation.

With regard to issues involving encouragement and mutual protection for foreign investments, the Inter-American Juridical Committee has concluded, on the base of the Reports prepared by its members, the suitability of studying the general bases or even a normative benchmark establishing the basic principles for the proper regulation of Stock Exchanges. This involves analyzing the appropriate normative regulations necessary to create a climate of confidence in the inflow of foreign capital to the Stock Exchanges of the developing countries. This normative benchmark could be shaped into a model law, in harmony with internal legislations, or could involve merely the dissemination of the basic principles of regulation, such as transparency, traceable accounting practices, bans on insider trading, and methods for the settlement of disputes.

This field of international commercial law includes positions directed to problems arising from international insolvency and the bankruptcy of multi-national companies.

A motive of great satisfaction for the Organization of American States, and more particularly for this consultative agency was the success of the Fifth Specialized Conference on International Private Law, held in Mexico City during March 1994. This Conference approved the two Inter-American Conventions of singular importance. One covers the law applicable to international contracts. The concerns civil and penal aspects of international traffic in juveniles. Both instruments were based on and inspired by the technical documents prepared under the aegis of the Inter-American Juridical Committee.

Our Agenda still features work on topics related to the right to information, improving the administration of justice, democracy in the Inter-American system, and juridical aspects of foreign debt. The Committee decided to remove from its working agenda the topic on setting up an Inter-American Court for Criminal Matters, at least until the governments of the Member-States of the Organization of American States show more positive interest in pursuing these studies at the regional level, and offer our Organization guidance on the criteria that should be followed.

Moving away from this overview of the work of the Inter-American Juridical Committee, at the regional level, its efforts bear a certain resemblance and some degree of convergence with those being carried out by this distinguished Commission at the universal level. There may be differences with regard to issues or the focus on problems, but there are also major points of convergence with our efforts toward the progressive development and codification of international law. Economic interdependence and the trend towards globalization also have a juridical aspect. The problems of *jus gentium* converge in various geographical areas. State responsibility, crimes against peace and the security of humankind, international watercourses: all are issues that affect the regions and sub-regions of our planet.

In paragraph 4 of Article 26 of its Statutes, this distinguished Commission acknowledges the propriety of consulting with inter-government agencies devoted to the codification of international law. To this end, it has established and continues to maintain cooperative relationships with Committees and Commissions at the Inter-American level, as well as throughout Asia, Africa, Europe and the Arab world.

I am convinced that this cooperation and interchange will consolidate the objective that led the United Nations Organization to declare the 1990s the International Law Decade.

Thank you for your attention.



COMISSÃO JURÍDICA INTERAMERICANA
COMITÉ JURIDIQUE INTERAMÉRICAIN
COMITÉ JURIDICO INTERAMERICANO
INTER-AMERICAN JURIDICAL COMMITTEE

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

CJI/SO/II/doc.67/94
20 September 1994
Original: Spanish

XXI COURSE ON INTERNATIONAL LAW

FINAL REPORT

I. INTRODUCTION

The Course on International Law is an activity organized and sponsored by the Inter-American Juridical Committee since 1973, and made a permanent event in 1975, through a decision of the General Assembly of the OAS in its fifth session.

The main objective of the Course throughout these years has been to update scholars and professionals in a varied array of subject matters, both in Public International Law and Conflicts of Law.

In order to achieve this goal, the Inter-American Juridical Committee selects the themes for the classes to be given among those who most interest the inter-American legal community.

The XXI Course on International Law dealt specifically with the following subjects: Economic Integration, Free Trade Agreements, the results of the Fifth Specialized Inter-American Conference on Private International Law. Other matters which were discussed were: the protection of democracy in the Inter-American System, International Jurisdiction, with an emphasis on the International Court of Justice, aspects of the Latin-American Foreign Debt, Humanitarian Law and Law of the Sea.

II. SEAT AND DURATION

The XXI Course on International Law was seated in the premises of the Fundação Getúlio Vargas, at Praia de Botafogo 190, Rio de Janeiro. The Course's total duration was of four full weeks, from August 1 to 26. Classes were held from 9:30 to 11:00 a.m., and from 11:30 a.m. to 1:00 p.m. In the final week of the Course, there were also classes from 2:30 to 4:00 p.m. In accordance with the criteria already adopted in previous years, attendance was mandatory both to the classes and to the Working Group meetings.

III. COURSE PROGRAM

The Secretariat for Legal Affairs of the OAS prepared and submitted to the Inter-American Juridical Committee the schedule for the XXI Course, which was approved with some modifications by the Committee in its August 1993 meeting.

The Course's schedule suffered several modifications due to the non-acceptance of the invitations made to the following institutions: BID/INTAL, the Spanish Government, the Hague Conference on Private International Law, and the Inter-American Institute on Human Rights.

In addition, Professors Andreas Lowenfeld (United States of America) and Héctor Fix-Zamudio (Mexico) were unable to participate of the Course due to unexpected professional commitments.

The Course's official schedule, including the names of the professors, title and date of their conferences, is enclosed hereto.

IV. COURSE PARTICIPANTS

The General Secretariat of the OAS awarded scholarships for the XXI Course on International Law to 33 candidates presented by the Member States. Three of these candidates, from the United States of America, Mexico, and Colombia, were, however, unable to attend the Course.

For the second consecutive year, the Course hosted participants from Canada, Jamaica, and Surinam. It is also to be noted the participation, for the first time, of a representative from St. Kitts and Nevis, and the absence of representatives from the United States and Brazil.

Besides the participants awarded scholarships for the OAS, the Course had thirteen other participants selected by the Fundação Getúlio Vargas and by the Course Coordinators: five from Brazil, three from Paraguay, two from Panama, one from Bolivia, and one from Turkey.

This is the second consecutive year that the Course receives participants from other Continents, with a specific interest in increasing their knowledge of American International Law (in 1993 a Law Professor and Diplomat from Poland attended the Course).

The group of participants of this year's Course was comprised of eleven government officials, nine diplomats, six law professors (of both Public International and Conflicts Law), seven students, five of which of postgraduate programmes in International Law, four lawyers of governmental enterprises, one congressman (from Paraguay) and six members of the Judiciary.

Enclosed is a comprehensive list of the participants of the XXI Course.

V. COURSE COORDINATION

The XXI Course on International Law was directed by Dr. Hugo Caminos, Assistant Secretary for Legal Affairs of the OAS, with the assistance of Professor Daniela Trejos Vargas (Assistant

Coordinator), Mrs. Joyce Ozorio Junqueira (Course Secretary), and Professor Guilhermina Lavoz Coimbra (extracurricular activities). Also collaborated with the Course, on behalf of the host institution, Fundação Getúlio Vargas, Professor Suzana Feichas and Mrs. Myriam Goulart.

VI. OPENING CEREMONY

The Opening Ceremony of the XXI Course on International Law was held at 9:30 a.m. on August 1st, 1994, in the main auditorium of Fundação Getúlio Vargas.

Were present at this opening sessions Dr. José Luis Siqueiros and Ambassador Ramiro Saraiva Guerreiro, Chairman and Vice-Chairman of the Inter-American Juridical Committee, Dr. Jonathan T. Fried, member of the Committee, Dr. Hugo Caminos, Assistant Secretary for Legal Affairs of the OAS, Dr. Manoel Tolomei Moletta, Secretary of the Committee, and Professor João Paulo Reis Vieira, representing the President of Fundação Getúlio Vargas, Dr. Jorge Oscar de Mello Flores, who, for health reasons, was unable to attend.

After the Course's official opening, a minute of silence was observed in honor of the memories of Drs. Eduardo Jiménez de Aréchaga and José Maria Ruda, both deceased in the past year.

Following the Course's tradition of paying homage in the Opening Ceremony to a renowned scholar of the Americas, Dr. Jonathan T. Fried pronounced a conference in honor of the memory of Justice John Erskine Read, emphasizing the work of this Canadian jurist in the International Court of Justice and his valuable contributions for the development of International Law.

VII. WORKING GROUPS

The participants of the XXI Course were divided into two Working Groups, whose themes of study were previously defined by the Course's Direction.

Group A was in charged of discussing Cooperative relations between the United Nations and the OAS after the end of the Cold War, and Group B of discussing Humanitarian Law and Nonintervention, both themes concentrating in the international legal aspects of the Haitian Crisis.

Working Group meetings were held daily throughout the Course, from 2:30 to 4:00 p.m. The Working Group Reports were presented and discussed in a General Meeting on August 25, from 9:30 a.m. to 1:00 p.m.

Enclosed herewith is a list of the participants, Coordinators, and Rapporteurs of each Working Group.

VIII. OTHER ACTIVITIES

Upon invitation of the Director of the Federal Courts in Rio de Janeiro, Judge Maria Tereza Lobo, the Course participants visited the headquarters of the Federal Courts and met with the judges for

refreshments.

Upon invitation of Professors Gilza Anna de Souza and Guilhermina Coimbra, some of the Course participants exposed themes of their countries's law systems and aspects of International Law to students of the Faculdade Brasileira de Ciências Jurídicas.

The members of the Inter-American Juridical Committee invited the Course lecturers to attend the session of the Committee after their classes, whereby they had the opportunity to expose to the Committee Members the theme of the conferences just given and exchange views with respect to the Course.

The following lecturers visited the Inter-American Juridical Committee: Dr. Heather Forton, Head of the Environmental Section, Department of Foreign Affairs and International Trade (Canada), Dr. Arturo Fajardo Maldonado, former Foreign Minister, Professor of Public International Law (Guatemala), Dr. Héctor Faúndez Ledesma, Professor of Public International Law, Director of the Center for Graduate Studies (School of Juridical and Political Sciences, Central University of Venezuela), Dr. Jaime Ruiz de Santiago, Representative of ACNUR (Mexico), Dr. Keith Highet, lawyer, Counsel of International Law, member of the Editorial Council of the American Journal of International Law (United States of America), and Dr. Manuel Rama Montaldo, Professor of Public International Law, Secretary of the International Law Commission, jurist of the Division of Codification of the United Nations Departament for Legal Affairs (Uruguay).

IX. CLOSING CEREMONY

The final session and commencement ceremony of the XXI Course on International Law was held at 10:00 a.m. on August 26, 1944 in the main auditorium of Fundação Getúlio Vargas, with the presence of Professor Armando Cunha, Director of the Brazilian School of Public Administration (EBAP) of Fundação Getúlio Vargas, and Course Coordination members Professors Daniela Trejos Vargas and Guilhermina Coimbra.

Dr. Brenda Bloise, of Panama, in representation of the Course participants, delivered a speech thanking the Inter-American Juridical Committee, the OAS and the Fundação Getúlio Vargas for the opportunity to attend the Course. Finally, the participants who met the minimum attendance to the classes and Working Group meetings were awarded the Certificate of Attendance to the Course.

DII67.94I



INTER-AMERICAN JURIDICAL COMMITTEE
COMITÉ JURIDIQUE INTERAMÉRICAIN

ORGANIZAÇÃO DOS ESTADOS AMERICANOS

XXI COURSE ON INTERNATIONAL LAW

(August 1 - 26, 1994)

First week: August 1 - 5

August 1	9:30 Opening session <ul style="list-style-type: none">- Speech by the Chairman of the Inter-American Juridical Committee- Speech by the Representative of the Getúlio Vargas Foundation- Speech by the Representative of the OAS General Secretariat- Lecture in homage to Justice John Erskine Read, by Dr. Jonathan T. Fried
	12:00 General information for the Course participants
August 2	9:30 CIDIP-V Lecturer: Dr. José Luis Siqueiros
	11:30 Contemporary Law of the Sea (I) Lecturer: Dr. Hugo Caminos
August 3	9:30 Contemporary Law of the Sea (II) Lecturer: Dr. Hugo Caminos
	11:30 United Nations Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks Lecturer: Dr. Alberto Davérède
August 4	9:30 Agreement on maritime fishing between the Republic of Argentina and the European Union Lecturer: Dr. Alberto Davérède
	11:30 International Environmental Law (I) Lecturer: Dr. Heather Forton
August 5	9:30 International Environmental Law (II) Lecturer: Dr. Heather Forton

11:30 Working Group Meeting

Second week August 8 - 12

- August 8 9:30 Current "new" issues in International Economic Law
Lecturer: Dr. Seymour J. Rubin
- 11:30 Environmental Law shaped by the results of the Rio Conference
Lecturer: Dr. Galo Leoro F.
- August 9 9:30 The Inter-American System and protection of Democracy. The
Guatemalan Case
Lecturer: Dr. Arturo Fajardo Maldonado
- 11:30 Working Group Meeting
- August 10 9:30 The Uruguay Round and prospects for international trade
Lecturer: Dr. Arturo Fajardo Maldonado
- 11:30 Working Group Meeting
- August 11 9:30 Working Group Meeting
- 11:30 Working Group Meeting
- August 12 9:30 Representative of the Association of ex Fellows
- 11:30 Working Group Meeting

Third week August 15 - 19

- August 15 9:30 Recent Developments in International Trade Regulation
Lecturer: Dr. Jonathan T. Fried
- 11:30 Control of legality and dispute settlement in Free Trade Agreements
and economic complementation pacts under the aegis of LAIA
Lecturer: Dr. Alberto Zelada Castedo
- August 16 9:30 The Getúlio Vargas Foundation
Lecturer: Dr. Suzana Feichas
- 11:30 Working Group Meeting
- August 17 9:30 Working Groups
- 14:30 The current status of codification of international responsibility
Lecturer: Dr. Eduardo Vío Grossi

- August 18 9:30 International jurisdiction (I)
Lecturer: Dr. Héctor Faúndez Ledezma
- 14:30 Current concepts of the refugee
Lecturer: Dr. Jaime Ruiz de Santiago
- August 19 9:30 General conditions applicable to contracts: the work of UNIDROIT
Lecturer: Dr. Luis Olavo Baptista
- 11:30 International jurisdiction (II)
Lecturer: Dr. Héctor Faúndez Ledezma
- 14:30 Analysis of some current situations of refuge and repatriation
Lecturer: Dr. Jaime Ruiz de Santiago

Fourth week August 22 - 26

- August 22 9:30 Bond between commercial society and the State
Lecturer: Dr. João Grandino Rodas
- 11:30 Reservation to Treaties. Reappraisal, 25 years later (1969-1994) (I)
Lecturer: Dr. Manuel Rama Maldonado
- 14:30 Recent decisions of the International Court of Justice and their implications for future cases
Lecturer: Dr. Keith Hight
- August 23 9:30 Reservation to Treaties. Reappraisal, 25 years later (1969-1994) (II)
Lecturer: Dr. Manuel Rama Maldonado
- 11:30 International Humanitarian Law
Lecturer: Dr. Gerard Peytrignet
- August 24 9:30 Legal aspects of foreign debt
Lecturer: Dr. Miguel Angel Espeche Gil
- 11:30 Joint Meeting of Working Groups
- August 25 9:30 Presentation and discussion of the Reports of the Working Groups
- August 26 10:00 Closing Session and presentation of Certificates of Attendance

XXI Course Working Groups

GROUP A: "Cooperative relations between the OAS and the United Nations after the end of the Cold War"

GROUP B: "Humanitarian Law and Nonintervention".

XXI COURSE ON INTERNATIONAL LAW

PARTICIPANTS

1. Fellows selected by OAS

ARGENTINA	Favio Farinella Jorge Tolosa
BOLIVIA	David Soria Ruíz
CANADA	Stephanie Bernstein Susan McDonald
CHILE	Mónica Rojas Beals Ximena Fuentes
COLOMBIA	Enrique Cellis Durán
COSTA RICA	Gustavo Campos
ECUADOR	Vivian Mosquera
EL SALVADOR	Carmen Castillo
GUATEMALA	Mario Martínez Waldemar de la Peña
HONDURAS	Herminio Pineda
JAMAICA	Janet Crick
MEXICO	Guillermo Hernández
NICARAGUA	Edgard Fonseca
PANAMA	Brenda Bloise Max López
PARAGUAY	Blas Llano-Ramos María Insaurralde
PERU	Ena Carnero Luis Ugarelli

DOMINICAN REPUBLIC	Fernando Ramírez
ST. KITTS & NEVIS	Maria Angela Clarke
SURINAM	Marja Naarendorp
URUGUAY	Olga Beltrand
VENEZUELA	Dionisio Zamora Francisco Mujica

2. **Participants admitted by the Getúlio Vargas Foundation and Course Coordination**

BOLIVIA	Mario Guillermo Centella
BRAZIL	Carlos Henrique Moscardo de Souza Consuelo Gonçalves Mendes da Costa Daimo Silva Eliane de Miranda Rosa Jeanlise Velloso Couto
PANAMA	Jaime Ernesto Hughes Severino Rodríguez A.
PARAGUAY	Ana María M. de Barreto Mariana Beatriz Vásquez Rosana Sisa
TURKEY	Esra Ekmecki
URUGUAY	Edel Valy Comas

WORKING GROUP "A"

**"Cooperative Relations between the OAS and the UNO
after the end of the Cold War"**

Coordinator: Francisco Eudes Mujica B. (Venezuela)

Assistant Coordinator: Edgard H. Fonseca L. (Nicaragua)

Rapporteur: Max José López Cornejo (Panama)

Participants:

- | | | |
|-----|---------------------------------|--------------------|
| 1. | Mario Centella L. | (Bolivia) |
| 2. | David Soria Ruiz | (Bolivia) |
| 3. | Consuelo Mendes da Costa | (Brazil) |
| 4. | Eliane de Miranda Rosa | (Brazil) |
| 5. | Sonia Maria F. Santos (Brazil) | |
| 6. | Vivian Mosquera | (Ecuador) |
| 7. | Herminio Pineda | (Honduras) |
| 8. | Janet Crick | (Jamaica) |
| 9. | Ana Maria de Barreto (Paraguay) | |
| 10. | María Celina Insaurralde | (Paraguay) |
| 11. | Blas Llano-Ramos | (Paraguay) |
| 12. | Rosana Sisa | (Paraguay) |
| 13. | Mariana B. Vásquez | (Paraguay) |
| 14. | Luis Ugarelli | (Peru) |
| 15. | Maria Angela Clarke | (St.Kitts & Nevis) |
| 16. | Marja Naarendorp | (Surinam) |
| 17. | Esra Ekmekci | (Turkey) |
| 18. | Olga Beltrand (Uruguay) | |

WORKING GROUP "B"

"Humanitarian Law and Nonintervention"

Coordinator: Brenda Luz Bloise (Panama)
Rapporteur: Fernando Ramírez Sains (Dominican Republic)

Participants:

1. Jorge Tolosa (Argentina)
2. Favio Farinella (Argentina)
3. Jeanlise Velloso Couto (Brazil)
4. Carlos H. Morcardo (Brazil)
5. Susan McDonald (Canada)
6. Stephanie Bernstein (Canada)
7. Enrique Celis Durán (Colombia)
8. Gustavo Campos Fallas (Costa Rica)
9. Ximena Fuentes Torrijo (Chile)
10. Mónica Rojas Beals (Chile)
11. Mario Martínez Velásquez (Guatemala)
12. Waldemar de la Peña (Guatemala)
13. Guillermo Hernández Salmerón (Mexico)
14. Jaime Hughes León (Panama)
15. Severiano Rodríguez A. (Panama)
16. Ena Carnero Arroyo (Peru)
17. Edel V. Comas Pérez (Uruguay)