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ANNUAL REPORT
OF THE INTER-AMERICAN JURIDICAL COMMITTEE
TO THE GENERAL ASSEMBLY

(covering the regular periods of sessions in January and August 1996)

Rio de Janeiro
1996

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CJI/RES.II-15/95 Homage to Dr. Galo Leoro Franco

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CJI/SO/II/doc.59/95 rev. 1	Date, Agenda and Rapporteurs for the January 1996 regular period of sessions
CJI/SO/II/doc.2/96	The most-favored nation principle and its application in the Americas, and other forms of favoring the less-developed nations: a first approach to its analysis.
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CJI/SO/II/doc.9/96 rev. I	Derecho de la información: acceso y protección de la información y datos personales
CJI/SO/II/doc. 14/96 rev.1	Juridical Dimension of integration: the most-favored nation clause in the economic integration treaties signed by the nations of Latin America
CJI/SO/II/doc.33/96	Report by the Committee on the development of private international law: analysis and comments on the document entitled The law in a new inter-American order, by the Secretary General of the OAS
CJI/SO/II/doc.34/96	Informe del Observador del Comité Jurídico Interamericano, Embajador Miguel Ángel Espeche Gil, ante la Comisión de Derecho Internacional de las Naciones Unidas
CJI/SO/II/doc.49/96	Date, Agenda and Rapporteurs for the August 1996 regular period of sessions

Annex:

OEA/Sec.Gral/CJI/doc.2/96 rev.3	Annotated Agenda of the Inter-American Juridical Committee for the August 1996 regular period of sessions.
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ANNUAL REPORT
TO THE GENERAL ASSEMBLY

INTRODUCTION

This Annual Report, which reflects the work of the Inter-American Juridical Committee during 1996, was prepared in conformity with Article 53 (f) of the Charter of the Organization and the instructions handed down by the Assistant al in a note dated 6 December 1995.

This Annual Report consists of three Parts. The first (Part I), covers the activities of the Committee. Part II contains the Resolutions adopted during its period of sessions. And Part III compiles both the Reports presented by its members during these same period of sessions, as well as the Annotated Agenda of the Inter-American Juridical Committee prepared by the Secretary for Legal Affairs through the Department of International Law (OEA/Sec.Gral/ CJI/doc.2/96 rev.3, 18 June 1996). Part III is available for consultation at both the offices of the Committee as well as at the above-mentioned Secretariat.

PART I

ACTIVITIES

1. Membership of the Committee

During 1996, the Inter-American Juridical Committee consisted of the following members: Ramiro Saraiva Guerreiro, Jonathan T.Fried, Luis Herrera Marcano, Alberto Zelada Castedo, Miguel Ángel Espeche Gil, Galo Leoro Franco, Mauricio Gutiérrez Castro, Eduardo Vío Grossi, José Luis Siqueiros, Keith Highet and Olmedo Sanjur G.

On 10 April 1996, the Permanent Council elected Dr. João Grandino Rodas (Brazil) to the seat left vacant by the resignation of Dr. Ramiro Saraiva Guerreiro, for a period of two years running from 10 April 1996 to 31 December 1998.

2. Election of Members

During the XVI regular period of the General Assembly, Dr. Jonathan T.Fried (Canada) was re-elected and Dr. Luis Marchand Stens (Peru) and Brynmor Thornton Innis Pollard (Guyana) were elected, with terms of office running from 1 January 1997 to 31 December 2000.

3. Chairman and Deputy Chairman

The Chairmanship of the Inter-American Juridical Committee was exercised by Dr. Ramiro Saraiva Guerreiro. Due to his resignation from this position, from 16 February onwards and in conformity with Article 11 of the By-Laws of the Inter-American Juridical Committee, the Deputy Chairman, Dr. Jonathan T.Fried, took over the Chair.

During the session held on 12 August 1996, the Committee elected Dr. Eduardo Vío Grossi as Chairman and Dr. Keith Highet as Vice-Chairman.

4. Secretariat

In conformity with Article 28 of the Statutes of the Committee and Executive Order N°. 96-04, the technical support and secretarial services were supplied by the Secretariat for Legal Affairs of the General Secretariat, in the persons of Secretary Dr. Enrique Lagos, the Director of the Department of International Law, Dr. Jean-Michel Arrighi, and the Secretary of the Inter-American Juridical Committee, Dr. Manoel Tolomei Pereira Gomes Moletta.

5. January 1996 regular period of sessions

The first regular period of sessions of the Inter-American Juridical Committee in 1996 was held from 29 January to 10 February at its offices in Rio de Janeiro.

This Meeting was also attended by OAS representatives Dr. Jorge García González, Special Advisor to the Secretary General, William M. Berenson, Director of the Department of General Legal Services and Acting Secretary for Legal Affairs; Enrique Lagos, Director of the Department of Development and Codification of International Law.

5.1. Activities of the Chairman between period of sessions

During the inaugural session of the January period of sessions, Dr. Ramiro Saraiva Guerreiro gave a verbal report on the activities carried out during the recess, highlighting the progress made in the cooperation program between the Committee and various international legal organizations dedicated to the study and development of international law. The various institutions with which the Committee began or improved its cooperation relations are: *Asian-African Legal Consultative Committee, American Bar Association, Federación Interamericana de Abogados (FIA), Inter-American Bar Foundation, International Bar Association, International Commission of Jurists, The American Society of International Law, United Nations Commission on International Trade Law (UNCITRAL), The Hague Conference on Private Law, Council of the Bars and La Societies of the European Community (CCBE), Institute of International Law, International Institute for the Unification of Private Law (UNIDROIT), International Juridical Institute, International Law Association, Instituto Hispano-Luso-Americano (IHLADI), United Nations International Law Codification Division, University of British Columbia, Canadian Council of International Law, Canadian Bar Association, Canadian Foundation for the Americas (FOCAL), Canadian Council for the Americas, Canadian International Development Agency (CIDA), Instituto dos Advogados Brasileiros (IAB), Instituto de Direito Internacional e Relações Internacionais / São Paulo University, and the Ordem dos Advogados do Brasil / Rio de Janeiro Chapter (OAB-RJ).*

5.2. Agenda

During the January 1996 regular period of sessions, the topics listed in the Agenda CJI/SO/II/doc.59/95 rev.1. were taken under consideration. The respective Rapporteurs presented the following Reports, which are attached hereto in Part III, Documents:

CJI/SO/II/doc.27/95 rev.1	Juridical dimension of integration - the jurisdictional system for the settlement of disputes in the Andean Group;
CJI/SO/I/doc.2/96	The most-favored nation principle and its application in the Americas, and other forms of favoring the less-developed nations: a first approach to its analysis;
CJI/SO/I/doc.4/96	Juridical aspects of foreign debt;
CJI/SO/I/doc.5/96	Inter-American cooperation to confront terrorism;
CJI/SO/I/doc.6/96	Democracy in the Inter-American System: additional report;
CJI/SO/I/doc.9/96 ¹	Right to information: access to and protection of personal data and information;
CJI/SO/I/doc.14/96 ²	Juridical dimension of integration: the most-favored nation clause in the economic integration treaties signed by the nations of Latin America.

The following Resolutions were adopted as listed below, whose texts are given in Part II of this Report:

CJI/RES.I-1/96	-	Homage to the memory of Dr. Andrés Aguilar Mawdsley;
CJI/RES.I-2/96	-	Democracy in the Inter-American System;
CJI/RES.I-3/96	-	Juridical dimension of integration and international trade, the most-favored nation principle and its application in the Americas, and other forms of favoring the less-developed nations;
CJI/RES.I-4/96	-	Procedures for the preparation and adoption of Inter-American

¹ Part III includes revision 1 of this document, presented during the August 1996 regular period of sessions

² *Ibid.*

legal instruments under the aegis of the Organization of American States;

- CJI/RES.I-5/96 -Right to Information: access to and protection of personal data and information;
- CJI/RES.I-6/96 -Inter-American cooperation to confront international terrorism
- CJI/RES.I-7/96 -The Law in a new inter-American order;
- CJI/RES.I-8/96 -Date, agenda and rapporteurs for the August 1996 regular period of sessions;
- CJI/RES.I-9/96 -Juridical aspects of foreign debt;
- CJI/RES.I-10/96- Juridical dimension of integration and international trade: methods for the settlement of disputes in regional and sub-regional integration and free trade schemes;
- CJI/RES.I-11/96- Homage to Dr. Ramiro Saraiva Guerreiro;

5.3. Appointment of Observers

The Committee resolved to appoint the following members as Observers:

- Dr. Keith Highet, to accompany the presentation of the Annual Report of the Inter-American Juridical Committee to the Permanent Council in Washington D.C.;
- Dr. Olmedo Sanjur G. to the General Assembly of the OAS, held in Panama City;
- Dr. Miguel Ángel Espeche Gil, to the Inter-American Specialized Conference on Terrorism, held in Lima in April, and the United Nations International Law Commission meeting in Geneva in June;
- Dr. José Luis Siqueiros, to The Hague Conference on Private International Law;
- Drs. Eduardo Vío Grossi and Luis Herrera Marcano to the Inter-American Specialized Conference on Corruption, held in Caracas in March 1996.

6. August 1996 regular period of sessions

The second regular period of sessions of the Inter-American Juridical Committee in 1996 was held from 5-29 August at its offices in Rio de Janeiro.

This Meeting was also attended by OAS representatives Dr. Enrique Lagos, Director of the Department of Development and Codification of International Law, and Dr. Jean-Michel Arrighi, Director of the Department of International Law. The sessions were also attended by Dr. Claudia Patricia Rivero Medina, representative of the Ministry of Law and Justice, Colombia.

6.1 Activities of the Chairman between period of sessions

When opening the August period of sessions, the Chairman, Dr. Jonathan T. Fried, commented on the presentation of the 1995 Annual Report of the Inter-American Juridical Committee to the General Assembly held in Panama City in June 1996, as well as the report forwarded to the Chairperson of the Working Group on the Americas Summit, Ambassador Harriet Babbitt, which accompanied the publication by the Committee on the *Juridical dimension of integration and international trade: studies of the methods for the settlement of disputes in regional and sub-regional integration and free trade schemes in the Hemisphere*.

6.2. Agenda

As an earlier matter, the Agenda was reformulated (CJI/SO/II/doc.49/96) in order to include the mandate handed down by the General Assembly contained in Resolution N°. AG/doc.3755/96, instructing the Committee to issue its opinion on the matter of "the validity of under international law of the Helms-Burton Act."

In compliance with the above-mentioned mandate handed down by the General Assembly, the Committee assigned top priority to the study of this topic, taking up virtually the entire first three weeks of the period of sessions.

On 23 August 1996 an *Opinion* was unanimously adopted that consisted of four Parts, namely: background; protection of the property rights of nationals; extra-territoriality and the limits set by International Law on the exercise of jurisdiction; and finally, the conclusions.

The Committee then approached the topics related to the Law in a new inter-American order (CJI/SO/II/doc.33/96), the most-favored nation principle (CJI/SO/II/doc.14/96 rev.1) and the right to information (CJI/SO/II/doc.9/96 rev.1), with the Reports presented given in Part III of this Report.

Consequently, during the II regular period of sessions, various Resolutions were adopted as listed below, whose texts are given in Part II of this Report:

- CJI/RES.II-14/96 -Resolution on the Opinion of the Inter-American Juridical Committee in compliance with Resolution N°. AG/doc.3375/96) of the General Assembly of the Organization of American States, entitled "Freedom of trade and investment in the hemisphere";
- CJI/RES.II-17/96 - III Joint-Meeting with Legal Advisors;
- CJI/RES.II-18/96 - XXIV Course on International Law;
- CJI/RES.II-21/96 -Right to information;
- CJI/RES.II-22/96 -Seminar on Democracy in the inter-American system;
- CJI/RES.II-23/96 -Juridical dimension of integration and international trade;
- CJI/RES.II-25/96 -Agenda and rapporteurs for the February-March 1997 regular period of sessions.

6.3. Acknowledgments and homages

In compliance with Resolution (CJI/RES.I-11/96) dated 16 August 1996, homage was rendered to Ambassador Ramiro Saraiva Guerreiro, former member and former Chairman of the Inter-American Juridical Committee, in a ceremony held at the Getúlio Vargas Foundation.

Homage was also rendered to the memory of Dr. Manuel A.Vieira (CJI/RES.II-12/96); and the efforts of Drs. Miguel Ángel Espeche Gil (CJI/RES.II-13/96); Galo Leoro Franco (CJI/RES.II-15/96); and Jonathan T. Fried (CJI/RES.II-16/96) were also formally acknowledged.

On this occasion, the Committee manifested its satisfaction with the appointment of Dr. Enrique Lagos to the position of Secretary for Legal Affairs of the General Secretariat of the Organization.

The Committee also expressed its thanks to the *Universidad Argentina de la Empresa* (UADE) for the publication of the document entitled *Dimensión jurídica de la integración y del comercio internacional: estudio de los métodos de solución de controversias en los esquemas regionales e sub-regionales de integración y libre comercio en el hemisferio*.

6.4 Reports from the Observers

The Committee also took under consideration the Reports presented by Dr. Miguel Ángel Espeche Gil, the first a verbal Report on the Inter-American Conference on Terrorism held in Lima, Peru, and the other on the meeting of the United Nations International Law Commission in Geneva (CJI/SO/II/doc.34/96).

Dr. José Luis Siqueiros also presented his verbal Report as an Observer at the Special Meeting for the Study of Inter-American Conventions on the Recognition of Civil and Commercial Decisions, held at The Hague.

Finally, Dr. Eduardo Vío Grossi presented his Report on the Inter-American Convention against Corruption, adopted at the Specialized Conference on this topic held in Caracas last March. This Conference adopted a Resolution acknowledging the Inter-American Juridical Committee for its input and support in the process of preparing this international legal text.

6.5 III Joint-Meeting with Legal Advisors to the Ministries of Foreign Affairs of the Americas

In view of the importance assigned by this organization to maintaining contact with the Legal Advisors of the Ministries of Foreign Affairs, and taking into consideration Resolution N°. AG/doc.3405/96 in which the General Assembly commissioned the " ... Inter-American Juridical Committee to organize, when deemed opportune, a third meeting of this type, in order to extend the links between the Committee and the Legal Advisors of the Ministries of Foreign Affairs of the Member States", the Committee resolved to hold the III Joint Meeting on 7 and 8 August 1997.

6.6. Administrative Matters

Outstanding among the administrative matters covered by the Committee during this period of sessions are those linked to a complementary agreement with the host country (CJI/RES.II-24/96); the offices of the Committee (CJI/RES.II-20/96); preparation for the celebration commemorating the centenary of the Committee (CJI/RES.II-19/96); and the Cooperation Agreement with the Inter-American Human Rights Institute.

The Committee also received, analyzed, and stated its satisfaction in terms of Executive Order N°. 96-04.

Finally, and in view of the importance of taking under consideration various administrative matters directly linked to upgrading its functional structure, and in order to efficiently comply with the mandates both the Charter of the Organization, the General Assembly and the Permanent Council, as well as complying with the purposes established in its Articles of Statutes and Statutes, the Inter-American Juridical Committee agreed that the I regular period of sessions in 1997 would be held from 24 February to 7 March in Washington D.C., and the II regular period of sessions this same year would be held at its offices in Rio de Janeiro from 4 to 29 August.

7. XXIII Course on International Law

In August 1996, the Inter-American Juridical Committee held its XXIII Course on International Law at the head offices of the Getúlio Vargas Foundation in Rio de Janeiro, Brazil.

The speakers were distinguished experts from the Americas and Europe who covered international legal topics that are important in the world today, stressing the study of topics related to international jurisdiction in terms of the law of the sea, international crimes, and the settlement of international trade disputes: arbitration in the GATT - WTO system. The Course was attended by students from many of the Member States.

In conformity with established practice, the Inter-American Juridical Committee received visits from the following speakers taking part in the Course, in order to exchange ideas and opinions on their respective special specialties, as well as assessing the level of the Course for future updating and improvement:

- Dr. Eduardo Valencia-Ospina, Secretary, International Court of Justice;
- Prof. Felipe Paolillo, Professor, Public International Law, University of Uruguay;
- Ambassador José Antonio Tijerino, Permanent Representative of Nicaragua to the OAS;
- Prof. Jacob Dollinger, Professor, Private International Law, Rio de Janeiro State University
- Dr. Didier Operti, Minister of Home Affairs and Professor, Private International Law, University of Uruguay;

- Ambassador Beatriz Ramacciotti, Permanent Representative of Peru to the OAS;
- Dr. Fernando Brito, Advisor to the Secretary General of the OAS for the Security within the Hemisphere;
- Dr. Daniel Bardonnet, Professor, University of Paris, Secretary of the International Law Academy, The Hague;
- Dr. Antônio Augusto Cançado Trindade, Judge, Inter-American Human Rights Court.

The Committee also discussed the topics and guidelines that will shape the Program for the next Course on International Law, approving Resolution N°.CJI/RES.I-18/96 on this matter.

The keynote theme of the Course will be "The interaction between International Law and national law today", with lectures focusing on the following aspects:

- A) Introduction: Relationships between International Law and national law
- B) The progressive expansion of the scope of International Law
 1. With regard to the individual:
 - a) Simultaneous regulation of Human Rights by International Law and national law;
 - b) The application of humanitarian law at the national level;
 - c) International justice in criminal matters;
 2. On political and social matters:
 - a) Democracy and International Law in the inter-American system;
 - b) Environmental law;
 - c) Labor law and International Law;
 3. On economic affairs:
 - a) Trade and economic integration agreements and their effects at the national level;
 - b) Regulation of foreign investment in the hemisphere;
 - c) Intellectual property in International Law;
 4. The sole responsibility of the State
- C) New developments in the sources of International Law and their effects on national law
 1. Procedures for the preparation, incorporation and application of treaties in the light of internal juridical arrangements. Illustrative case histories;
 2. Procedure for preparing treaties under the aegis of the OAS;
 3. International common Law and national law;
 4. Resolutions of international organizations as sources of International Law;
 5. General principles of law as a source of International Law;
 6. Interaction between Public International Law and Private International Law;
 7. Influence of NGOs and companies in the application of national law;
 8. The initiative of international organizations.

This Annual Report was approved at a regular session held on 29 August 1996, in the presence of the following members: Drs. Eduardo Vío Grossi, Keith Highet, Miguel Ángel Espeche Gil, Mauricio Gutiérrez Castro, João Grandino Rodas, and Luis Herrera Marcano.

CJI/RES.I-1/96**HOMAGE TO THE MEMORY OF
DR. ANDRÉS AGUILAR MAWDSLEY**

(Resolution approved in the regular session held on 6 February 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING LEARNED of the recent death of the eminent jurist Dr. Andrés Aguilar Mawdsley;

IN VIEW OF the extraordinary contributions made by Dr. Andrés Aguilar Mawdsley to the field of International Maritime Law, particularly through his outstanding participation in the III United Nations Conference on Maritime Law;

TAKING INTO ACCOUNT the very important activities of Dr. Andrés Aguilar Mawdsley fostering laws essential to the human *persona*, particularly during his service as a member and Chairman of the Inter-American Commission on Human Rights; and

BEARING IN MIND that Dr. Andrés Aguilar Mawdsley was in office as Judge of the International Court of Justice at the time of his death;

RESOLVES:

1. To render its sad and sincere homage in admiration and acknowledgment of the memory of Dr. Andrés Aguilar Mawdsley, whose passing away is an irreparable loss not only to his homeland, Venezuela, which he served with loyalty and great professionalism, but also to the OAS and the International Court of Justice, in which organizations he performed brilliantly, to the benefit of the development of International Law and the prestige of the American Continent.

2. To honor the memory of Dr. Andrés Aguilar Mawdsley as an eminent American jurist at the inaugural session of the XXIII International Law Course, to be held at its head offices in Rio de Janeiro in August 1996.

3. To forward a copy of this Resolution as a way pension fund expressing its condolences to the widow of Dr. Andrés Aguilar Mawdsley, the Government of the Republic of Venezuela, the competent agencies of the OAS, and the International Court of Justice.

This Resolution was approved during the regular session held on 6 February 1996, in the presence of the following Members: Drs. José Luis Siqueiros, Alberto Zelada Castedo, Olmedo Sanjur, Ramiro Saraiva Guerreiro, Mauricio Gutiérrez Castro, Eduardo Vío Grossi, and Keith Highet.

CJI/RES.I-2/96

DEMOCRACY IN THE INTER-AMERICAN SYSTEM

(Resolution approved in the regular session held on 6 February 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS:

I. In its Resolution CJI/RES/I-34/95 it resolved:

1. To propose to the corresponding agencies of the Organization that they should adopt the following measures in view of the effective progressive development of International Law in relation to Representative Democracy:
 - a) To coordinate with other international organizations in order to carry out studies, organize seminars, round-tables and other ways of analyzing and studying the experiences and positions of the OAS and the above-mentioned international organizations in matters of Representative Democracy; and
 - b) To distribute Report CJI/SO/II/doc.37/94 rev.1 corr.2, as well as Supplementary Report CJI/SO/I/doc.7/95 rev.2 and this Resolution to the Member-States for forwarding thereby to their respective Law and Political Science Schools, requesting their observations and comments from the viewpoint of the progressive development of International Law in terms of the effective exercise of Representative Democracy.
2. To continue with the study of this topic, with special emphasis on the following aspects:
 - a) Identification and typification of possible future illicit international attempts against the effective exercise of Representative Democracy, with a study of the responsibility deriving therefrom for the State and individuals;
 - b) Possible international illegality due to actions that distort or are intended to distort election results, to impose constraints of freedom of expression through the vote, or to adversely affect the authenticity of electoral scrutineering;
 - c) The relationship between the effective exercise of Representative Democracy, International Security and Peace, and Human Rights; and
 - d) The juridical scope of the measures or administrative actions that could be adopted by the OAS with a view to the re-establishment of the effective exercise of Representative Democracy.

II. The Rapporteur has outlined the guidelines and constraints that he feels would affect the continuation of the study of this topic in his Additional Report on Democracy in the Inter-American System, presented during this regular sessions period (CJI/SO/I/doc.6/96, dated 31 January 1996); and

III. The competent agencies of the Organization have not as yet had the opportunity to pronounce on the provisions of the above-mentioned Resolution CJI/RES.I-3/95,

RESOLVES:

1. To bear in mind the guidelines and constraints mentioned in Additional Report CJI/SO/I/doc.6/96 when implementing the decisions of the competent agencies of the Organization with regard to CJI/RES.I-3/95, as well as the comments made on this document during the session that centered on the analysis thereof.

2. To reaffirm, at its own discretion and without adversely affecting the decisions of the above-mentioned competent agencies, that one measure which appears - at this stage of the study or analysis of this topic - to be effective in fostering the progressive development of International Law in relation to the effective exercise of Representative Democracy, is the organization by the Committee of seminars or round-tables that analyze the issues submitted thereto with scientific rigor, on the basis of the above-mentioned documentation issued on this matter.

3. To forward this Resolution to the Secretary-General and the Permanent Council so that, should they deem it appropriate, it may be taken under consideration when adopting the decisions mentioned in Item 1, enjoying the corresponding cooperation from the Secretariat for Legal Affairs and the Union for the Promotion of Democracy.

This Resolution was approved during the regular session held on 6 February 1996, in the presence of the following Members: Drs. José Luis Siqueiros, Alberto Zelada Castedo, Olmedo Sanjur, Ramiro Saraiva Guerreiro, Mauricio Gutiérrez Castro, Eduardo Vío Grossi and Keith Highet.

Dr. Miguel Ángel Espeche Gil submitted a Reasoned Vote, which is attached to this Resolution.

REASONED VOTE

(presented by Dr. Miguel Ángel Espeche Gil with regard to the Resolution on Democracy in the Inter-American System (CJI/RES.II-2/9, dated 6 February 1996)

I agree, through my affirmative vote supporting the Resolution of the Committee dated 6 February on *Democracy in the Inter-American System*, which indicates the guidelines for the juridical development of this fundamental principal that constitutes the essence of the *affectio societatis* of the OAS.

In the previous Resolution on this topic, (CJI/RES.I-3/95) the Committee decided to continue its study of this issue with special emphasis on *The possible international illegality of actions that distort or are intended to distort the results adopted either to curtail freedom of expression through the vote, or to adversely affect the authenticity of electoral scrutineering*, (sub-item b, item II), a clause that is repeated in the new Resolution.

In my reasoned vote dated 31 March 1995, I stated:

There is a justified trend to qualify election fraud and other practices that skew election results as international illicit acts, similar to *coups d'état*, as both adversely affect the juridical asset that the Inter-American System strives to protect through international law, i.e. the effective exercise of Representative Democracy. The right of citizens to having their freely-expressed vote authentically scrutineered and constituting the genuine basis of representation for governments thus elected is a coherent, ethical and logical requirement of Representative Democracy, a value intrinsic to the Inter-American System.

In view of the level of development of international law at the Inter-American level, I am convinced that one may already identify and typify such as illegal international acts, because they run counter to the principle of the effective exercise of Representative Democracy. The right of citizens to have their freely-expressed vote properly scrutineered - as this constitutes the real basis of the representation of governments elected in this manner - is a requirement of coherence, ethics and logic for Representative Democracy, an intrinsic value in the Inter-American System.

The Inter-American System should undertake the "punitive intention" to sanction these fraudulent practices, just as it does for *coups d'état*. Governments that take power through *coups d'état* are just as illegal as those that originate in or are perpetuated by electoral fraud. Both result in governments that illegitimately - in one way or the other - appropriate political power, thus adversely affecting the juridical asset of "the effective exercise of Representative Democracy", which is the cornerstone of this system.

At this stage in the development of International Law, the Hemisphere-wide system as a whole, and each OAS Member-State in particular, should do its utmost to guarantee juridical security, which means that the governments of the other States in the Organization should be equally legitimate and based on the genuinely representative character of the will of the people, freely-expressed and fully-respected.

The international obligations undertaken by Member-States should provide conditions of stability and confidence based on the legitimacy of the representation by the signatory governments, and with the reasonable expectation that these obligations cannot be claimed as null and void in future as having been introduced by governments taking power through *coups d'état* or fraudulent elections. Juridically speaking, there is no similarity between an international act where one of the parties is not a legitimate government, and the case where both signatories are legitimately-elected governments.

The signature of international agreements requires authenticity of representation, meaning the legally-constituted *persona* of the parties, just as is the case for contracts signed under domestic law.

In the OAS, the effective exercise of Representative Democracy and its corollary of the legitimacy of governments is no longer an issue that falls under the aegis of domestic affairs of state, but rather corresponds to the sphere of International Law, as is the case in the European Union.

Matters that are illicit in the domestic law of the Member-States of the System in terms of the formation of governments through fraudulent election practices will also tend to be so under International Law, as explained here. As the various forms of election fraud are typified and criminalized in all the legislations of the Member-States, it will be necessary to draw up a compilation of these norms.

The actions undertaken by the OAS through civil missions sent to observe election processes may well be supplemented through electoral assistance programs.

This line of thinking could well result in the development of the following topics:

1. IDB financing for programs designed to enhance the authenticity of election processes;
2. Programs to protect voter rolls and systems to detect false registrations and other illegal practices;
3. Compilation of OAS experiences in supervising elections;
4. Detection of electronic methods designed to distort election results;
5. Technical assistance to political parties with parliamentary representation to check and control election processes;
6. In-depth study of the juridical methods for safeguarding the "Human Right" of the citizens of the Member-States to intervene freely in genuine election processes and ensure that the results thereof are properly respected.

CJI/RES.I-3/96

**JURIDICAL DIMENSION OF INTEGRATION
AND INTERNATIONAL TRADE**

**The most-favored nation principle and the application thereof in the Americas,
and other ways of favoring the less-developed countries**

(Resolution approved in the regular session held on 7 February 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

IN VIEW OF its Resolution adopted on 18 August 1995 (CJI/RES.II-14/95) in which it agreed to include the topic of "*The most-favored nation principle and the application thereof to the Americas and other forms of favoring the less-developed countries*" on its Agenda, in compliance with the task assigned to this organ by the General Assembly of the OAS;

WHEREAS one of the Rapporteurs appointed to this topic, Dr. José Luis Siqueiros, has presented a Report (CJI/SO/I/doc.2/96) under this same title constituting a preliminary approach to the analysis thereof within the framework of a multilateral trade system, in accordance with the GATT and the World Trade Organization - WTO;

RECALLING also that Dr. Alberto Zelada Castedo, also a Rapporteur, presented a Preliminary Report entitled *Juridical dimension of integration: the most-favored nation clause in economic integration treaties signed by the nations of Latin America* (CJI/SO/I/doc.14/96) on the use of the most-favored nation clause in the main multilateral economic integration treaties signed by the Latin American nations;

NOTING the justified absence of the third Rapporteur, Dr. Jonathan T. Fried, who has not as yet submitted his Report on this matter;

TAKING INTO CONSIDERATION that this Committee listened attentively to the verbal presentations of both Rapporteurs, prompting wide-ranging discussion by the members of this Committee and whose opinions on this issue are recorded in the corresponding Minutes;

BEARING IN MIND that, according to the information presented by the Rapporteurs, as well as the discussions of the Committee, the examination of the adoption and application of the most-favored nation clause in economic integration treaties among the vast majority of the States in the Hemisphere takes on special importance for efforts attempting to outline and implement a program leading to the establishment of a hemisphere-wide free trade system in compliance with the guidelines approved during the Summit Meeting held in Miami on 9-11 December 1994;

TAKING INTO ACCOUNT that, with regard to the effects of the most-favored nation clause contained in Article I of the 1947 GATT, which is binding on the vast majority of States in the Hemisphere, the examination and consideration of the more favorable differentiated treatment system is also of particular importance, applied under the auspices of this Organization to favor the developing countries, as well as the principle of reciprocity; and

CONSIDERING that these Reports and the discussion thereof by this organ prompt questions and open up fresh perspectives with regard to the scope of the conclusions thereof, as well as the inter-relationship between the most-favored nation clause, more favorable differentiated treatment for the less-developed nations and the principles of non-discrimination, national treatment and reciprocity;

RESOLVES:

1. To thank Committee Members Drs. José Luis Siqueiros and Alberto Zelada Castedo for their valuable input on this issue which is of such importance in international trade, and of particular interest in stimulating the economies of the less-developed nations.

2. To continue with the study of this topic in order to prepare and issue conclusions and considerations pertinent thereto, in compliance with the mandate received from the General Assembly of the OAS, and for such purpose to study the Reports presented by the Rapporteurs, including that to be submitted by the third Rapporteur at the next sessions period, as well as later developments on this topic at other levels of the Organization, including the Special Trade Commission.

3. To forward the text of this Resolution to the Meeting of Ministers of Trade of the Hemisphere to be held in Cartagena de Indias, Colombia, in March 1996, through the Chairman of the Committee and the pertinent agency within the Organization, together with the Reports presented by Rapporteurs Drs. José Luis Siqueiros and Alberto Zelada Castedo, as well as the minutes of the session of the Committee that held a preliminary discussion on this topic.

This Resolution was adopted at the regular session held on 7 February 1996, by the following members: Drs. José Luis Siqueiros, Alberto Zelada Castedo, Olmedo Sanjur, Ramiro Saraiva Guerreiro, Mauricio Gutiérrez Castro, Eduardo Vío Grossi, Galo Leoro F. and Miguel Ángel Espeche Gil.

CJI/RES.I-4/96

**PROCEDURES FOR THE PREPARATION AND ADOPTION OF
INTER-AMERICAN JURIDICAL INSTRUMENTS UNDER THE
AUSPICES OF THE ORGANIZATION OF AMERICAN STATES**

(Resolution approved in the regular session held on 8 February 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS:

The General Assembly of the Organization decided through Resolution AG/RES.1329 (XXV-0/95) to commission the Secretary-General to prepare Draft Guidelines on the entire preparation process of inter-American juridical instruments for review, revision and comment by the Inter-American Juridical Committee, prior to submission thereof to the Permanent Council, and which should later be presented to the General Assembly in the form of a report on this matter;

In this same Resolution the General Assembly stressed that the Organization is an important forum for the formulation of Inter-American instruments and as such should undertake this study to establish the guidelines for the entire preparation process of inter-American juridical instruments;

During the August 1995 regular sessions period, in compliance with the provisions of Resolution AG/RES.1329 (XXV-0/95), the Secretary-General presented the document entitled "*Guidelines for the preparation of inter-American legal instruments: background study*" (OEA/Sec.Gral/CJI/Doc.7/95, 16 August 1995) prepared by the Department of Codification and Development of International Law of the Secretariat for Legal Affairs;

During the above-mentioned August 1995 regular sessions period, it was decided to include on its Agenda the topic of "*Processes for preparing and approving inter-American legal instruments under the auspices of the Organization of American States*";

During this regular sessions period the Rapporteurs appointed to this topic were not available, due to reasons arising from their respective professional activities that were duly justified in a timely manner; and

In view of the importance of this topic, it nevertheless proceeded to consider in a preliminary manner, during the course of this same regular sessions period, the document prepared by the Secretary-General, suggesting criteria and general guidelines on the focus and principal aspects that should be included in the analysis requested from the Committee by the General Assembly,

RESOLVES:

1. To thank the Secretary-General for the document entitled "*Guidelines for the preparation of inter-American legal instruments: background study*" (OEA/Sec.Gral/CJI/Doc.7/95, 16 August 1995) prepared in such an efficient and professional manner by the Department of Codification and Development of International Law of the Secretariat for Legal Affairs;

2. To forward the Rapporteurs for this topic, Drs. Luis Herrera Marcano and Jonathan T.Fried, the documentation and the Minutes containing the transcription of the discussions that took place during this regular sessions period, so that they may present a Report thereon during the next regular sessions period in August 1996.

3. To rank this topic as top priority during its next regular sessions period, on the basis of the Report to be presented by the Rapporteurs thereof, and comment thereon, as requested by the General Assembly, for submission to the Permanent Council of the Organization

This Resolution was adopted at the regular session held on 8 February 1996, in the presence of the following members: Drs. José Luis Siqueiros, Alberto Zelada Castedo, Olmedo Sanjur, Ramiro Saraiva Guerreiro, Mauricio Gutiérrez Castro, Eduardo Vío Grossi, Galo Leoro F., Miguel Ángel Espeche Gil and Keith Highet.

CJI/RES.I-5/96**RIGHT TO INFORMATION****Access to and protection of personal data and information**

(Resolution approved in the regular session held on 8 February 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS:

THE juridical analysis of the right to information has been included on its Agenda since 1980 and that this has prompted various contributions from its members;

THAT during the XXV regular sessions period of the General Assembly of the Organization held in Montrouis, Haiti, in 1995, it decided "To request the Inter-American Juridical Committee to maintain on its Agenda the topic of the study of the right to information [AG/RES.1328 (XXV-0/94)]";

RECALLING that in Resolution CJI/RES.II-9/95, prompted by the contents of the verbal report presented in August 1995 by the Rapporteur, Dr. Mauricio Gutiérrez Castro, on the scope and complexity of this issue and the various aspects involved in the study thereof, he was requested to develop the topic of "*Access to and protection of personal data and information*";

WHEREAS during the January 1996 regular sessions period the Rapporteur presented the first Report on this issue, entitled "*Right to information. Access to and protection of personal data and information*" (CJI/SO/II/doc.9/96), in addition to making a detailed presentation on the juridical treatment of data and information,

RESOLVES:

1. To express its acknowledgment to Dr. Mauricio Gutiérrez Castro for his broad-ranging presentation on this topic.
2. To request the Rapporteur to alter the name of the topic to the following: *Access to and protection of personal data and information*.
3. To request the Rapporteur to continue his study of this topic and present a definitive report to the next regular sessions period in August 1996.

This Resolution was adopted at the regular session held on 8 February 1996, in the presence of the following members: Drs. José Luis Siqueiros, Ramiro Saraiva Guerreiro, Mauricio Gutiérrez Castro, Eduardo Vío Grossi, Galo Leoro F., Miguel Ángel Espeche Gil and Keith Highet.

CJI/RES.I-6/96**INTER-AMERICAN COOPERATION TO CONFRONT TERRORISM**

(Resolution approved in the regular session held on 8 February 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS:

THE Committee heard the Report of the Rapporteur (CJI/SO/I/doc.5/96), which took into consideration the documents forwarded as background data by the Department of Codification and Development of International Law;

THE Resolution of the XXV General Assembly of the OAS (AG/RES.1328 (XXV-0/95)) dated 9 June 1995 exhorts the Inter-American Juridical Committee to continue with its study of juridical measures for inter-American cooperation to combat terrorism;

IN January the Rapporteur received a new working paper from the Department of Codification and Development of International Law entitled "*Draft inter-American convention for the prevention and elimination of terrorism*", and deemed it opportune to carry out a preliminary analysis and comment on the contents thereof, then submitted to the consideration of the Committee;

THIS topic is on the Agenda of the Permanent Council, which has set up a Working Group, and warranted the decision of the XXV General Assembly to hold a Specialized Inter-American Conference, (Lima, April 1996),

RESOLVES:

1. To take under consideration the Report and Comments presented by the Rapporteur, as well as additions thereto during the August 1996 sessions period, together with the document entitled "*Draft inter-American convention for the prevention and elimination of terrorism*", based on the outcome of the Specialized Inter-American Conference to be held in Lima in April this year.

2. To keep this topic on its Agenda and commission the Rapporteur to present a Report during the August regular sessions period that will also outline the outcome of the Specialized Inter-American Conference to be held in Lima, in April this year, as well as other innovations that may arise on this matter, so that this Committee may adopt the most appropriate criteria at the time.

This Resolution was approved during the regular session held on 8 February 1996, in the presence of the following Members: Drs. José Luis Siqueiros, Alberto Zelada Castedo, Ramiro Saraiva Guerreiro, Mauricio Gutiérrez Castro, Eduardo Vío Grossi, Galo Leoro F., Miguel Ángel Espeche Gil and Keith Highet.

CJI/RES.I-7/96

THE LAW IN A NEW INTER-AMERICAN ORDER

(Resolution adopted during the regular session held on 9 February 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

AS it officially received the document entitled *The law in a new inter-American order* during its session on Tuesday 6 February, prepared by the Secretary-General and presented by him on Friday 2 February to the Permanent Council;

BEARING IN MIND that the Secretary-General decided that this document should be forwarded to this Organ by the hand of his personal representative, Dr. Jorge García González, together with a letter addressed to the Chairman thereof;

TAKING INTO ACCOUNT that, in compliance with the instructions received from the Secretary-General, Dr. García proffered a lengthy, detailed presentation on the contents and scope of this document during the above-mentioned session, which was followed by a preliminary exchange of opinions and comments among the members of this Organ;

NOTING that the above-mentioned document constitutes a broad and deep analysis of issues of a juridical character that, in the view of the Secretary-General, the Organization should undertake in the immediate future;

AWARE that in addition this document brings up seven issues that are directly and specifically affect its work, namely:

- a) the allocation of tasks for which the Secretary-General should provide support;
- b) the manner of providing such support;
- c) its agenda or order of the day
- d) relationships with other organs;
- e) the duration of its sessions periods;
- f) the dissemination of its work;
- g) the International Law Course;

FEELING that in view of its importance and content, particularly Chapter III, the above-mentioned document should undergo a lengthy analysis thereby, as the consultative agency of the Organization for legal affairs;

RESOLVES:

1. To express its particular satisfaction at the initiative of the Secretary-General in preparing and presenting the document entitled *The law in a new inter-American order*, while at the same time emphasizing the efforts that it feels should be undertaken by the Organization as an element that distinguishes it in the field of International Law, prompting an interesting, useful, timely and necessary discussion on this issue.

2. To stress that in the above-mentioned document the Secretary-General states that "the strengthening and support of the Inter-American Juridical Committee should be an objective of our entire Organization".

3. To thank to the Secretary-General for forwarding the document in question by the hand of his personal representative, Dr. Jorge García González, immediately after the presentation thereof to the Permanent Council, and while the Committee was still in session, so that it could express its views on the contents and scope thereof as soon as possible.

4. To include an analysis of this document on the Agenda of its next regular sessions period in August, on a priority basis, in order to formulate the observations and comments it deserves.

5. To reformulate its agenda for the next regular sessions period, in compliance with Article 30 of its By-Laws, taking into account the suggestions put forward by the Secretary-General in this document regarding the need to undertake a critical examination of the topics under study thereby, which will be expressed in the corresponding Resolution.

6. To commission the Chairman of the Committee to forward this Resolution to the Secretary-General and the Permanent Council.

This Resolution was approved during the regular session held on 9 February 1996, in the presence of the following Members: Drs. José Luis Siqueiros, Alberto Zelada Castedo, Ramiro Saraiva Guerreiro, Mauricio Gutiérrez Castro, Eduardo Vío Grossi, Galo Leoro F., Miguel Ángel Espeche Gil and Keith Highet.

CJI/RES.I-8/96

**DATE, AGENDA AND RAPPORTEURS
FOR THE AUGUST 1996 REGULAR SESSIONS PERIOD**

(Resolution adopted during the regular session held on 9 February 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS:

ARTICLE 30 of its Statutes stipulates that at the end of each regular sessions period, the agenda and date should be agreed for the next regular sessions period;

THAT in the document entitled *The law in a new inter-American order* the Secretary-General suggested that this Organ carry out a critical examination of the topics that are currently on its agenda and propose to the next General Assembly the removal of some mandates and the reformulation or incorporation of others;

AS stated in Resolution CJI/RES.I-7/96, this critical examination will be carried out during the next regular sessions period;

IT nevertheless seems convenient to carry out this suggestion as far as possible and where applicable;

RESOLVES:

One: To hold its second 1996 regular sessions period from 5 - 30 August 1996.

Two: To remove from its Agenda, as the corresponding purposes thereof have been achieved, the following topics:

- a) Methods for the settlement of disputes in regional and sub-regional integration and free trade schemes;
- b) Facilitation of international activities by individual persons and corporations;
- c) Environmental law; and
- d) Juridical Aspects of Foreign Debt.

Three: to reword the topic of *Right to Information*, which shall now be called: *Right to Information: access and protection of information and personal data*.

Four: To include the following topics at its own initiative:

- a) Examination of the composition of the International Court of Justice, in the light of the provisions of Article 9 of its By-Laws(CJI/SO/I/doc.22/96).
Rapporteur: Dr. Keith Highet; and
- b) Compliance with certain obligations established by the United Nations Convention on Maritime Law (CJI/SO/I/doc.23/96).
Rapporteur: Dr. Keith Highet.

Five: To approve the following agenda in accordance with the scheme set out below:

I. NEW TOPICS

A. INCLUDED AT THE INITIATIVE OF ANOTHER ORGAN

1. Procedures for preparing and approving inter-American juridical instruments under the auspices of the Organization of American States
(AG/doc.3269/95)
Rapporteurs: Drs. Luis Herrera Marcano and Jonathan T.Fried

B. INCLUDED AT ITS OWN INITIATIVE

2. Analysis and commentary on the working document entitled *The law in a new inter-American order*, presented by the Secretary-General
(CJI/RES.I-7/96)
3. Examination of the composition of the International Court of Justice, in the light of the provisions of Article 9 of its By-Laws
(CJI/SO/I/doc.22/96)
Rapporteur: Dr. Keith Highet
4. Compliance with the obligations established by the United Nations Convention on Maritime Law
(CJI/SO/I/doc.23/96)
Rapporteur: Dr. Keith Highet

II. TOPICS ON WHICH PRELIMINARY OR PARTIAL REPORTS HAVE ALREADY BEEN PREPARED

A. INCLUDED AT THE INITIATIVE OF ANOTHER ORGAN

5. Peaceful settlement of disputes
[AG/RES.54 (I-O/71)]
Rapporteurs: Drs. Galo Leoro F., Keith Highet, and Alberto Zelada Castedo
6. Juridical dimension of integration and international trade:
[AG/RES.944(XVIII-O/88)]
 - a) most-favored nation principle and its application in the Americas, and other ways of benefiting the less-developed nations
[AG/RES.1328 (XXV-O/95)]
Rapporteurs: Drs. José Luis Siqueiros, Alberto Zelada Castedo and Jonathan T.Fried
 - b) The securities market. Benchmark principles considered basic to its regulation in the Hemisphere
(CJI/RES.II-2/91)
Rapporteurs: Drs. José Luis Siqueiros and Jonathan T.Fried
with the collaboration of Dr. Seymour J. Rubin

B. INCLUDED AT ITS OWN INITIATIVE

7. Improvement of the administration of Justice in the Americas.
(CJI/RES.I-2/985)
 - a) Appointment of magistrates and court employees. Protection and guarantees for judges and lawyers in the exercise of their functions
(CJI/RES.II-17/93)
Rapporteur: Dr. Jonathan T. Fried
8. Democracy in the Inter-American System

(CJI/SO/II/doc.10/93)
Rapporteur: Dr. Eduardo Vío Grossi

9. The right to information Access to and protection of personal data and information (January 1980)
Rapporteur: Dr. Mauricio Gutiérrez Castro
10. International cooperation to repress corruption in the American nations (CJI/SO/II/doc.2/92)
Rapporteurs: Drs. Eduardo Vío Grossi and Luis Herrera Marcano
11. Inter-American cooperation to confront terrorism (August 1994)
Rapporteur: Dr. Miguel Ángel Espeche Gil

III. TOPICS ON WHICH NO REPORTS HAVE BEEN PREPARED

A. INCLUDED AT THE INITIATIVE OF ANOTHER ORGAN

Nothing pending.

B. INCLUDED AT ITS OWN INITIATIVE

12. Juridical dimension of integration and international trade [AG/RES.944(XVIII-O/88)]
 - a) International juridical effects of insolvency (CJI/RES.II-13/93)
Rapporteurs: Drs. José Luis Siqueiros and Jonathan T.Fried, with the collaboration of Dr. Seymour J. Rubin
13. Improvement of the administration of Justice in the Americas (CJI/RES.I-2/85)
 - a) Facilitation of access to the courts. Simplification of judicial procedures (CJI/RES.II-17/93).
Rapporteur: To be appointed, with the collaboration of Dr. Seymour J.Rubin

This Resolution was approved during the regular session held on 9 February 1996, in the presence of the following Members: Drs. Alberto Zelada Castedo, Ramiro Saraiva Guerreiro, Mauricio Gutiérrez Castro, Eduardo Vío Grossi, Galo Leoro F., Miguel Ángel Espeche Gil and Keith Highet.

CJI/RES.I-9/96**JURIDICAL ASPECTS OF FOREIGN DEBT**

(Resolution adopted during the regular session held on 9 February 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS the Rapporteur for this topic, Dr. Miguel Ángel Espeche Gil, presented a fresh Report (CJI/SO/I/doc.4/96) during this regular sessions period, outlining the program of the initiative whereby the General Assembly of the United Nations requested a consultative opinion from the International Court of Justice regarding the international juridical aspects of foreign debt, accompanied by documentation and citing the bibliography published on this issue, as well as the latest statistics on the amount of debt involved;

IN VIEW OF the appreciable doctrinary advances achieved by this initiative, particularly the work and seminars organized by the European Council for Social Surveys of Latin America - CEISAL - *Consejo Europeo de Investigaciones Sociales sobre América Latina* and the decision of the XII European Union / Latin America Inter-Parliamentary Conference adopted at its Meeting in Brussels in June 1995, as well as other coincident demonstrations from various international organizations and fora, and finally the beginning of treatment of this issue by the General Assembly of the United Nations,

RESOLVES:

1. To thank Dr. Miguel Ángel Espeche Gil for his presentation of this updated information and outline of the progress of this initiative.
2. To finalize the efforts of this Rapporteur and exclude the above-mentioned topic from the Agenda of the Inter-American Juridical Committee.

This Resolution was approved during the regular session held on 9 February 1996, in the presence of the following Members: Drs. Alberto Zelada Castedo, Ramiro Saraiva Guerreiro, Mauricio Gutiérrez Castro, Eduardo Vío Grossi, Galo Leoro F., Miguel Ángel Espeche Gil and Keith Highet.

Dr. Miguel Ángel Espeche Gil submitted an Explication of Vote, which is attached hereto.

JURIDICAL ASPECTS OF FOREIGN DEBT

REMOVAL OF THIS TOPIC FROM THE AGENDA OF THE INTER-AMERICAN JURIDICAL COMMITTEE

(Resolution CJI/RES.I-9/96, 9 February 1996, Article 2 d)

EXPLICATION OF VOTE

(Article 37 of the By-Laws)

(presented by Dr. Miguel Ángel Espeche Gil)

The topic of *Juridical aspects of foreign debt*, referring particularly to attempts to bring the issue of foreign debt before the International Court of Justice by means of a request for a consultative opinion submitted by the General Assembly of the United Nations, has been on the Agenda of the Committee since it was first included thereon in 1993. In the first Resolution covering this issue, the Committee adopted the Report of the Rapporteur with no comments. The successive reports presented by the undersigned in 1994 and 1995 received the same treatment, with the Committee taking them under consideration and requesting the Rapporteur to continue to keep this topic updated.

During the current regular sessions period in January 1996, discussion arose over whether or not this topic should be removed from the Agenda, as the Committee could not retain it on the Agenda in terms of the By-Laws, while merely taking it under consideration without issuing an opinion thereon. In regulatory terms, there is no doubt that the Committee may only maintain on its Agenda topics for which it issues statements of some type. As it has no intention of issuing such comments, removal of the topic is the correct procedure. On the other hand, as the initiative of requesting a consultative opinion from the International Court of Justice at The Hague has developed appreciably over the past few years in a number of international fora, and has lately come under discussion by the Group of 77 at the General Assembly of the United Nations, perhaps the time has already passed for the Inter-American Juridical Committee to have issued a statement thereon. Notwithstanding, the undersigned feels that foreign debt is one of the most important issues and of the greatest juridical transcendence in contemporary international life, affecting all the countries in the Hemisphere as well as the international economic system. As this is basically a juridical issue - involving international rights and obligations - the Committee is competent to approach it. The documentation and bibliography accompanying this series of reports provide the necessary bases for appropriate treatment thereof.

With these comments, I accede to the removal of this topic from the Agenda of the Committee. I will nevertheless provide updated information for any of my colleagues on the Committee who may request it, as available during the August 1996 regular sessions period.

CJI/RES.I-10/96**JURIDICAL DIMENSION OF INTEGRATION
AND INTERNATIONAL TRADE****Methods for the settlement of disputes in regional and
sub-regional integration and free trade schemes**

(Resolution adopted during the regular session
held on 10 February 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

IN VIEW OF its Resolution CJI/RES.II-14/95 adopted by the Committee during its second regular sessions period in August 1995;

WHEREAS:

During this current sessions period and in compliance with the provisions of Item 3 of Resolution CJI/RES.II-14/95 adopted by the Committee, one of the Rapporteurs for this topic, Dr. Alberto Zelada Castedo, presented a revised version of the report entitled *The jurisdictional system for the settlement of disputes in the Andean Group* (CJI/SO/I/doc.27/95 rev.1) which included commented references on the Jurisprudence of the Court of Justice of the Agreement of Cartagena, as well as an examination of a Draft Modificatory Protocol for the Treaty setting up this Court, which is under consideration by the Member-States of the Andean Group;

With the presentation of this revised report, the stuthes on methods for the settlement of disputes in regional and sub-regional integration and free trade schemes, as requested of the Committee,

RESOLVES:

1. To take note of the revised report entitled *The jurisdictional system for the settlement of disputes in the Andean Group* (CJI/SO/I/doc.27/95 rev.1) and thank its Rapporteur Dr. Alberto Zelada Castedo for the preparation thereof.

2. To incorporate the revised report mentioned above in Item 1 of this Resolution in the publication to be issued containing all the stuthes prepared by the Committee on methods for settlement of disputes in regional and sub-regional integration and free trade schemes.

3. To remove from its Agenda the topic of *Methods for the settlement of disputes in regional and sub-regional integration and free trade schemes*, which falls under the general heading of *Juridical dimension of integration and international trade*, with adversely affecting the possibility that it may be included thereon at a later date when necessary to consider additional reports or updates presented in compliance with the provisions of Item 3 of Resolution CJI/RES.II-14/95 of the Committee.

This Resolution was approved during the regular session held on 10 February 1996, in the presence of the following Members: Drs. Alberto Zelada Castedo, Ramiro Saraiva Guerreiro, Mauricio Gutiérrez Castro, Eduardo Vío Grossi, Galo Leoro F., Miguel Ángel Espeche Gil and Keith Highet.

CJI/RES.I-11/96**HOMAGE TO AMBASSADOR RAMIRO SARAIVA GUERREIRO**

(Resolution adopted during the regular session
held on 10 February 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING HEARD the announcement of resignation presented by Ambassador Ramiro Saraiva Guerreiro from his position as a Member of the Inter-American Juridical Committee;

IN VIEW OF his outstanding record of service of his country, the Federative Republic of Brazil, and his brilliant performance for nine years on the Committee, culminating in his skillful, well-balanced and effective handling of the Chair, in which position his well-known talents as a jurist were most evident, as well as his diplomatic abilities and courtesy;

HAVING EARNED through his distinction and honorable actions the respect and esteem of the Members of the Inter-American Juridical Committee,

RESOLVES:

1. To express its acknowledgment to Ambassador Ramiro Saraiva Guerreiro as a Member and Chairman of the Inter-American Juridical Committee, regretting his resignation therefrom.
2. To highlight his important intellectual contribution to the work of this Committee and as well as his perceptive and always fair conduct of these discussions.
3. To hold a ceremony during the next regular sessions period in August 1996, at which a copy of this Resolution will be handed to him, signed by all the Members of the Committee.

This Resolution was approved during the regular session held on 10 February 1996, in the presence of the following Members: Drs. Alberto Zelada Castedo, Mauricio Gutiérrez Castro, Eduardo Vío Grossi, Galo Leoro F., Miguel Ángel Espeche Gil and Keith Highet.

CJI/RES.II-12/96

**HOMAGE TO THE MEMORY OF
DR. MANUEL A. VIEIRA**

**(Resolution adopted during the regular session
held on August 1996)**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING TAKEN NOTE of the deeply-regretted death on June this year of the eminent jurist, Dr. Manuel Adolfo Vieira:

TAKING INTO CONSIDERATION the extraordinary contributions made to the Inter-American Juridical Committee by Dr. Manuel A. Vieira through his outstanding participation as a Member and more particularly as the Chairman of this Organ;

BEARING IN MIND the extraordinary work of Dr. Manuel A. Vieira in furthering private international law and fostering the essential rights of the human *persona*,

RESOLVES:

1. To render its deeply-felt and sincere homage in admiration and acknowledgment of the memory of Dr. Manuel A. Vieira, whose departure is an irreparable loss not only to his homeland, Uruguay, which he served with loyalty and great professionalism, but also to the entire international juridical community.

2. To forward a copy of this Resolution, as manner of expressing its condolence, to the widow of Dr. Manuel A. Vieira, and the Government of the Republic of Uruguay.

Rio de Janeiro, August 7, 1996

(s) Jonathan T. Fried

Eduardo Vío Grossil

Miguel Ángel Espeche Gil

Mauricio Gutiérrez Castro

Olmedo Sanjur

João Grandino Rodas

Keith Highet

Luis Herrera Marcano

Alberto Zelada Castedo

Galo Leoro Franco

José Luis Siqueiros

CJI/RES.II-13/96**HOMAGE TO DR. MIGUEL ÁNGEL ESPECHE GIL**

(Resolution adopted during the regular session
held on 22 August 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

IN VIEW OF the approaching departure of Ambassador Miguel Ángel Espeche Gil at the end of his term of office on 31 December 1996, as a member of the Inter-American Juridical Committee, to the work of which he made valuable contributions;

RECALLING that Ambassador Espeche Gil has been a member of the Committee for two terms of office, the first from 1965 to 1967, and the second from 1993 to 1996, having additionally warranted the respect and esteem of all members of the Committee,

RESOLVES:

1. To place on record its acknowledgment of Ambassador Miguel Angel Espeche Gil, and express its gratitude for his extraordinary work with this organization, of which he has been an outstanding member due to his position as a jurist, diplomat and man of letters.

2. To forward the text of this Resolution to the Ambassador Espeche Gil, signed by the members of the Inter-American Juridical Committee.

Rio de Janeiro, August 22, 1996

(s) Jonathan T. Fried

Eduardo Vío Grossi

Mauricio Gutiérrez Castro

Olmedo Sanjur

João Grandino Rodas

Keith Highet

Luis Herrera Marcano

Alberto Zelada Castedo

Galo Leoro F.

José Luis Siqueiros

CJI/RES.II-14/96

**RESOLUTION ON THE
OPINION OF THE INTER-AMERICAN JURIDICAL COMMITTEE
IN FULFILLMENT OF RESOLUTION AG/DOC.3375/96
OF THE GENERAL ASSEMBLY OF THE
ORGANIZATION OF AMERICAN STATES,
ENTITLED "FREEDOM OF TRADE AND INVESTMENT IN THE HEMISPHERE"**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS the mandate contained in Resolution AG/doc.3375/96, approved by the General Assembly on June 4, 1996 during its XXVI regular period of sessions under the title of "Freedom of Trade and Investment in the Hemisphere", instructed the Inter-American Juridical Committee "to examine and decide upon the validity under international law of the Helms-Burton Act ... as a matter of priority, and to present its findings to the Permanent Council";

HAVING CARRIED OUT a complete, broad-ranging and detailed examination of this matter, taking into account the various viewpoints discussed during the consideration, and in accordance with conclusions reached,

RESOLVES:

1. To approve unanimously the Opinion of the Inter-American Juridical Committee that constitutes an Annex to this Resolution, issued in compliance with Resolution AG/doc.3375/96 of the General Assembly, adopted on June 4, 1996 during its XXVI Regular Period of Sessions, and entitled "Freedom of Trade and Investment in the Hemisphere";

2. To instruct the Chairman of the Committee, in fulfillment of the above-mentioned Resolution AG/doc.3375/96, to forward this Resolution to the Permanent Council, by the hand of the Secretary General of the Organization of American States, together with the Opinion of the Committee.

In a regular session held on 23 August 1996, this Resolution was approved unanimously in the presence of the following members: Drs. Eduardo Vío Grossi, Keith Highet, Miguel Ángel Espeche Gil, Mauricio Gutiérrez Castro, Olmedo Sanjur G., Jonathan T. Fried, João Grandino Rodas, Luis Herrera Marcano, Alberto Zelada Castedo and José Luis Siqueiros.

CJI/SO/I/doc.67/96 rev.5
23 August 1996
Original: Spanish

**OPINION OF THE INTER-AMERICAN JURIDICAL COMMITTEE
IN RESPONSE TO RESOLUTION AG/DOC.3375/96 OF THE
GENERAL ASSEMBLY OF THE ORGANIZATION,
ENTITLED "FREEDOM OF TRADE AND INVESTMENT IN THE HEMISPHERE"**

INTRODUCTION

1. This Opinion is adopted pursuant to the provisions of Resolution AG/doc.3375/96 approved by the General Assembly on 4 June 1996 during its XXVI regular period of sessions and entitled "Freedom of Trade and Investment in the Hemisphere" (Annex A), by which it instructed the Inter-American Juridical Committee, during this period of sessions, "to examine and decide upon the validity under international law of the Helms-Burton Act [known as the "Cuban Liberty and Democratic Solidarity Act - Libertad Act"] ... as a matter of priority, and to present its findings to the Permanent Council."

2. The Committee understands that this Opinion, issued in accordance with the jurisdiction assigned to it by Article 98 of the Charter of the Organization,¹ has no binding effect on Member States or the organs of the Organization.

3. The Committee issues this Opinion on the basis of the following premises:

- a) In the performance of its assignment the Committee did not intend to interpret or pronounce on the internal legislation of any Member State.
- b) The expression "the legislation" used in this document refers to a law whose content is similar to that of the Helms-Burton Act.
- c) The Committee understands that Resolution AG/doc.3375/96 adopted by the General Assembly is intended to safeguard the international public order of the hemispheric system. It is thus necessary to stress the prevalence of certain rules of international law in the inter-American system that should be respected by the juridical systems of Member States.
- d) The Committee interpreted its mandate set forth in paragraph I of the Introduction as relating to the conformity of the legislation under examination with public international law. This has been identified with the rules of international law as alluded to in Article 38, paragraph 1 of the Statute of the International Court of Justice. However its application excludes those rules contained in instruments of a sub-regional or universal character to which not all States of the OAS are party.

¹ Article 98 (formerly Article 104): "The purpose of the Inter-American Juridical Committee is to serve the Organization as an advisory body on juridical matters: to promote the progressive development and codification of international law, and to study juridical problems related to the integration or the developing countries of the Hemisphere and, insofar as may appear desirable, the possibility of attaining uniformity in their legislation."

e) The Committee considered that the mandate received from the General Assembly did not require an opinion on bilateral issues between Member States, which is why it makes no statement on the specific measures adopted by the Government of the United States of America in relation to Cuba such as the embargo imposed for over three decades, while nevertheless noting that such measures raise legal questions in the light of the norms established in Articles 18 and 19 of the Charter of the OAS

f) The Committee examined the provisions of the legislation covering matters such as the admission of aliens and activities with regard to international financial institutions. Regarding these matters the Committee did not deem it convenient to issue a statement, as it notes that there are legal mechanisms for settling any possible disputes regarding these issues. Nonetheless the Committee stresses that these matters may bring up questions of international law such as respect for human rights and the principle of *pacta sunt servanda*.

g) The Committee examined two principal areas of legal questions suggested by the legislation: the protection of the property rights of nationals and the extraterritorial effects of jurisdiction.

A. PROTECTION OF THE PROPERTY RIGHTS OF NATIONALS

4. The Committee considered that the enactment of the legislation in some cases and its possible application in others could have the juridical effect of:

- a) Transforming the espousal² of a State-to-State claim under international law into a domestic legal claim asserted under internal law by a national against nationals of third States.
- b) Conferring the right to make such claims on persons who were not nationals at the time of the alleged loss.
- c) Attributing responsibility for acts of a foreign State to private persons who might be nationals of third States.
- d) Authorizing the determination of the quantum of compensation in a manner that could increase it to three times the loss caused by the act of expropriation.
- e) Creating liability for a private defendant for the total value of an asset expropriated without taking into account the value of the "benefit" derived by him from its use or the claimed "loss" caused to the alleged original owner by such use.
- f) Allowing claims that should be filed against a foreign State to be enforced by means of proceedings brought against the nationals of third States without endowing them with effective means to refute or contest the allegations against them or the third State in respect of the existence or the valuation of such claims, including on the basis of conclusive certifications issued by an internal administrative commission.
- g) Confusing a claim for damages or restitution, based on nationalization, with an action

² The expression "*arrogación*" in the Spanish text is used as the equivalent to "*interposición diplomática*" (diplomatic interposition) which is also used when a State espouses a claim by a national.

in rem to claim wrongfully "confiscated property" and in addition with an action *in personam* for unjust enrichment from the use of such wrongfully "confiscated property" by any person subsequently involved in such use in a broad-ranging and indeterminate manner.

- h) Creating liability for nationals of third States for the lawful use of expropriated property in the territory of the expropriating State or for the lawful use of property which does not itself constitute expropriated property.

5. The Committee considered the rules of international law applicable to diplomatic protection, State responsibility, and the minimum rights of aliens regarding the protection of property rights of nationals. In the Committee's view the following principles and rules are generally accepted by the Member States in this regard:

- a) Any State that expropriates, nationalizes or takes measures tantamount to expropriation or nationalization of property owned by foreign nationals must respect the following rules: such action must be for a public purpose, nondiscriminatory, and accompanied by prompt, adequate and effective compensation, granting to the expropriated party effective administrative or judicial review of the measure and *quantum* of compensation. Failure to comply with these rules will entail State responsibility.
- b) The obligation of a State in respect of its liability for acts of expropriation consists of the restitution of the asset expropriated or adequate compensation for the damage caused, including interest up to the time of payment.
- c) When a national of a foreign State is unable to obtain effective redress in accordance with international law, the State of which it is a national may espouse the claim through an official State-to-State claim. It is a condition for such espousal that from the time of the occurrence of the injury until the **settlement** of the claim the holder thereof must without interruption have been a national of the claimant State and not have the nationality of the expropriating State.
- d) Claims against a State for expropriation of the property of foreign nationals cannot be enforced against the property of private persons except where such property is itself the expropriated asset and within the jurisdiction of the claimant State. Products grown or produced on such property do not under customary international law constitute expropriated property.
- e) Any use by nationals of a third State of expropriated property located in the expropriating State where such use conforms to the laws of that State, as well as the use anywhere of product or intangible property not constituting the expropriated asset itself, does not contravene any norm of international law.
- f) The nationals of foreign States have the right to due process of law in all judicial or administrative procedure, that may affect their property. Due process includes the possibility of effectively contesting both the basis and quantum of the claim in a legal or administrative proceeding.

6. In the light of the principles and norms set out in paragraph 5, above the Committee

considers that the legislation under analysis does not conform to international law in each of the following respects:

- a) The domestic courts of a claimant State are not the appropriate forum for the resolution of State-to-State claims.
- b) The claimant State does not have the right to espouse claims by persons who were not its nationals at the time of injury.
- e) The claimant State does not have the right to attribute liability to nationals of third States for a claim against a foreign State.
- d) The claimant State does not have the right to attribute liability to nationals of third States for the use of expropriated property located in the territory of the expropriating State where such use conforms to the laws of this latter State, nor for the use in the territory of third States of intangible property or products that do not constitute the actual asset expropriated.
- e) The claimant State does not have the right to impose liability on third parties not involved in a nationalization through the creation of liability not linked to the nationalization or unrecognized by the international law on this subject, thus modifying the juridical bases for liability.
- f) The claimant State does not have the right to impose compensation in any amount greater than the effective damage, including interest, that results from the alleged wrongful act of the expropriating State.
- g) The claimant State may not deprive a foreign national of the right in accordance with due process of law to effectively contest the bases and the quantum of claims that may affect his property.
- h) Successful enforcement of such a claim against the property of nationals of a third State in a manner contrary to the norms of international law could itself constitute a measure tantamount to expropriation and result in responsibility of the claimant State.

B. EXTRATERRITORIALITY AND THE LIMITS IMPOSED BY INTERNATIONAL LAW ON THE EXERCISE OF JURISDICTION

7. The Committee understands that the legislation would result in the exercise of legislative or judicial jurisdiction over acts performed abroad by aliens on the basis of a concept termed "trafficking in confiscated properties."

8. The Committee has also examined the applicable norms of international law in respect of the exercise of jurisdiction by States and its limits on such exercise. In the opinion of the Committee, these norms include the following:

- a) All States are subject to international law in their relations. No State may take measures that are not in conformity with international law without incurring

responsibility.

- b) All States have the freedom to exercise jurisdiction but such exercise must respect the limits imposed by international law. To the extent that such exercise does not comply with these limits, the exercising State will incur responsibility.
- c) Except where a norm of international law permits, the State may not exercise its power in any form in the territory of another State. The basic premise under international law for establishing legislative and judicial jurisdiction is rooted in the principle of territoriality.
- d) In the exercise of its territorial jurisdiction a State may regulate an act whose constituent elements may have occurred only in part in its territory: for example an act initiated abroad but consummated within its territory ("objective territoriality") or conversely an act initiated within its territory and consummated abroad ("subjective territoriality").
- e) A State may justify the application of the laws of its territory only insofar as an act occurring outside its territory has a direct, substantial and foreseeable effect within its territory and the exercise of such jurisdiction is reasonable.
- f) A State may exceptionally exercise jurisdiction on a basis other than territoriality only where there exists a substantial or otherwise significant connection between the matter in question and the State's sovereign authority, such as in the case of the exercise of jurisdiction over acts performed abroad by its nationals and in certain specific cases of the protection objectively necessary to safeguard its essential sovereign interests.

9. The Committee examined the provisions of the legislation that established the exercise of jurisdiction on bases other than those of territoriality and concluded that the exercise of such jurisdiction over acts of "trafficking in confiscated property" does not conform with the norms established by international law for the exercise of jurisdiction in each of the following respects:

- a) A prescribing State does not have the right to exercise jurisdiction over acts of "trafficking" abroad by aliens unless specific conditions are fulfilled which do not appear to be satisfied in this situation.
- b) A prescribing State does not have the right to exercise jurisdiction over acts of "trafficking" abroad by aliens under circumstances where neither the alien nor the conduct in question has any connection with the territory and where no apparent connection exists between such acts and the protection of its essential sovereign interests.

Therefore, the exercise of jurisdiction by a State over acts of "trafficking" by aliens abroad, under circumstances whereby neither the alien nor the conduct in question has any connection with the territory and there is no apparent connection between such acts and the protection of its essential sovereign interests, does not conform with international law.

CONCLUSION

10. For the above reasons the Committee concludes that in the significant areas described above the bases and potential application of the legislation which is the subject of this Opinion are not in conformity with international law.

In a regular session held on 23 August 1996, this Resolution unanimously in the presence of the following members: Drs. Eduardo Vío Grossi, Keith Highet, Miguel Ángel Espeche Gil, Mauricio Gutiérrez Castro, Olmedo Sanjur G., Jonathan T. Fried, João Grandino Rodas, Luis Herrera Marcano, Alberto Zelada Castedo and José Luis Siqueiros.

CJI/RES.II-15/96**HOMAGE TO****AMBASSADOR GALO LEORO FRANCO**

(Resolution adopted during the regular session held on 23 August 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE.

CONSIDERING

That Ambassador Gait) Leoro Franco is ending his tenure as member of the Inter-American Juridical Committee December 31 1996, after having contributed with his invaluable knowledge and experience in international affairs to both enrich the work of this Committee and make a unique contribution to the legal development of the Inter American System,

That Ambassador Leoro has acted for sixteen years as member of the Committee where he has given proof of his lofty human qualities and in-depth legal culture, with special emphasis on his able and efficient work as Chairman of this Committee during 1985 and 1986,

RESOLVES

1. To express its gratitude and appreciation to Ambassador Galo Leoro Franco for his outstanding work as member and Chairman of the Inter-American Juridical Committee, in favor of the development of International Law, and to wish him the continuation of his successes in the performance of the important public duties he carries out for his home country, the Republic of Ecuador.

2. To deliver to Ambassador Galo Leoro Franco the text of this Resolution signed by the members of the Inter-American Juridical Committee.

This Resolution was approved during the regular session held on August 1996, in the presence of the following Members: Drs. Eduardo Vío Grossi. Keith Highet, Miguel Ángel Espeche Gil, Mauricio Gutiérrez Castro, Olmedo Sanjur, Jonathan T. Fried, João Grandino Rodas, Luis Herrera Marcano, Alberto Zelada Castedo, and José Luis Siqueiros.

CJI/RES. II-16/96

**HOMAGE TO
DR. JONATHAN T. FRIED**

(Resolution adopted during the regular session held on 23 August 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE.

CONSIDERING that in February 1996 Dr. Jonathan T. Fried took office as Chairman of the Committee, a position he held with dedication, brilliance and fairness.

RESOLVES:

1. To put on record its appreciation for the skilled and wise work done by Dr. Fried while chairing the Inter-American Juridical Committee.

This Resolution was approved unanimously during the regular session held on 23 August 1996, in the presence of the following Members: Drs. Eduardo Vío Grossi, Keith Highet, Miguel Ángel Espeche Gil, Mauricio Gutiérrez Castro, Olmedo Sanjur G., João Grandino Rodas. Luis Herrera Marcano, Alberto Zelada Castedo. and José Luis Siqueiros.

CJI/RES.II-17/96**III JOINT MEETING WITH LEG~L ADVISORS**

(Resolution adopted during the regular session held on 27 August 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE~

IN VIEW OF the provisions of Articles 98 and 102 of the Charter of the Organization of American States, 3 and 31 of the Statutes of the Inter-American Juridical Committee, and 3, 7 and 21 of its By-Laws;

BEARING IN MIND that Article 12, item 12 of its Statutes authorizes it to "establish cooperative relationships with universities, institutions and teaching centers, with colleges and lawyers associations, as well as with national and international commissions, organizations and entities dedicated to the development and codification of International Law or the study, investigation, teaching or dissemination of Legal Affairs of international interest";

WHEREAS the General Assembly resolved "to take note, with satisfaction, and acknowledge the importance of the II Meeting of the Inter-American Juridical Committee with the Legal Consultants and Advisors of the Ministries of Foreign Affairs of the Member States of the Organization, and to call upon the Inter-American Juridical Committee to organize a third Meeting of this type at a time deemed opportune thereby, in order to continue the links between the Inter-American Juridical Committee and the Legal Consultants and Advisors of the Ministries of Foreign Affairs of the Member States" (AG/doc.3405/96).

RESOLVES

1. To invite the most senior functionary in the international juridical area of the Ministry of Foreign Affairs of each Member State, or else the next most senior person, as well as from the Organization of American States, to the III Joint Meeting of Legal Advisors, to be held at the seat of the Inter-American Juridical Committee in Rio de Janeiro on 7 and 8 August 1997.

2 The purpose of the Meeting will be the exchange of opinions on the following topics:

- a) International and inter-American topics of the greatest relevance at the time, as well as those requiring the attention of these entities from August 1996 through July 1997;
- b) The work of the Inter-American Juridical Committee during the year, over the same period;
- c) The preparation and application of Treaties celebrated by the States in the Inter-American System;
- d) The structure, jurisdictions and functions of the legal advice departments of the Ministries of Foreign Affairs.

3. The participation of the senior functionaries invited will be on a personal basis, and their views shall not commit their respective States.

4. The travel and accommodation expenses for the state functionaries invited shall not be borne by the Organization of American States.

5. Within the framework of the Meeting, these functionaries may participate in the development of the XXIV Course on International Law organized by the Inter-American Juridical Committee.

6. To request the Secretary General to send the invitations proffered by the Chairman of the Inter-American Juridical Committee, render the cooperation necessary for the organization and holding of this Meeting, and supply the funding needed for this purpose.

This Resolution was approved unanimously during the regular session held on 23 August 1996, in the presence of the following Members: Drs. Eduardo Vío Grossi, Keith Highet, Miguel Ángel Espeche Gil, Mauricio Gutiérrez Castro, Olmedo Sanjur G., João Grandino Rodas, Luis Herrera Marcano and Alberto Zelada Castedo.

CJI/RES.II-18/96**XXIV COURSE ON INTERNATIONAL LAW**

(Resolution adopted during the regular session held on 27 August 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE

WHEREAS for the past 24 years it has organized an Course on International Law, with the cooperation of the General Secretariat of the Organization, in Rio de Janeiro during August each year, simultaneously with its second regular period of sessions;

TAKING INTO ACCOUNT that in its Resolution AG/doc. 3405/96 the General Assembly stressed the importance of this Course and expressed its support for focusing its program on a core topic;

BEARING IN MIND the need to update the agendas or criteria guiding the organization of the XXIV Course on International Law to be held in Rio de Janeiro in August 1997, and

IN VIEW OF the provisions of Articles 98 and 102 of the Charter of the Organization of American States, 3 anti 12 item c, and 28 of its Statutes, and 7 of the By-Laws of the Committee,

RESOLVES

1. The XXIV Course on International Law will be held in Rio de Janeiro between 4 and 29 August 1997, both dates inclusive.

2. The core topic and title of the Course will be "The interaction between international law and national law in today's world".

3. The purpose of the Course will be to analyze, from various viewpoints, the changes under way in International Law with the major consequence of directly regulating the activities of the State and particularly its citizens with increasing frequency and intensity. In other words, the purpose will be to study these new guidelines featured by the traditional topic of the relationship between international law and national law, particularly within the inter-American system.

4. The methodology of the Course will consist of spotlighting the current development of International Law on the basis of the specific keynote topic selected, in a manner that will nevertheless offer a global overview of this field of Law and which will cover each of the topics listed below from the viewpoint of the relationship between international law and national law.

5 The topics of the Course will be as follows:

A) Introduction: Relationships between international law and national law:

B) Progressive expansion of the scope of international law

1. In relation to the individual:

- a) Simultaneous regulation of human resources by international law and national law;
- b) The application of humanitarian law at the national level;
- c) International justice in criminal matters;

2. In political and social affairs:

- a) Democracy and international law in the inter-American system
- b) Environmental law;
- c) Labor law and international law;

3 In economic affairs:

- a) Trade pacts and economic integration agreements and their effects on national law;
- b) Regional of foreign investment in the hemisphere;
- c) Intellectual property under international law;

4 The exclusive province of the State

C. New developments in the sources of international law and their effects on national law:

1. Preparation incorporation and application procedures for treaties in the light of national legal arrangements. Illustrative case-studies;
2. Procedure for preparing treaties Under the aegis of the OAS;
3. International common law and national law;
4. Resolutions of international organizations as, sources of international law;
5. General principles of law as a Source of international law;
6. Interaction between public international law and private international law;
7. Influence of NGOs and companies in the application of national law;
8. The initiative of international organizations;

6. This outline Agenda will not determine the order, extent or sub-division of the topics, nor the length of time dedicated thereto. Neither does it prevent the topics listed therein from being sub-divided, covering each sub-division as a separate unit.

7. The topics will be covered in lectures held preferably in the morning, with round tables and working groups organized preferably in the afternoons.

8. The lecturers for the Course will be:

- a) Those invited directly by the Committee;
- b) Those sent by institutions and States invited by the Committee;
- c) The members of the Committee themselves and the Secretariat for Legal

Affairs who volunteer and are appointed by the Committee for this purpose.

9 The Course may be attended by:

- a) Fellows appointed by the Organization of American States;
- b) Fellows appointed by the Member States of the Organization. and
- c) Persons who are accepted as such and pay the corresponding fees.

10. The Secretariat for Legal Affairs will be responsible for requesting the lecturers invited to take in the Course to submit the texts of their presentations for publication.

11. The maximum number of students in the Course will be sixty. Preference will be given in accordance with the order established in the preceding item.

12. To participate in the Course, students must be graduates in Law, Political Science, History or follow another similar career and comply with the other entry requirements established by the Organization, particularly with regard to languages.

13. The Course will be promoted through the system determined by the Secretariat for Legal Affairs, which will in all cases include a leaflet with the main outlines thereof, for distribution among the Law Schools and principal universities of the Americas.

14. The Secretariat for Legal Affairs will be responsible for preparing these lists of topics, in constant coordination with the Chairman of the Inter-American Juridical Committee, who shall report back to the next regular period of sessions regarding compliance therewith.

This Resolution was approved unanimously during the regular session held on 27 August 1996, in the presence of the following Members: Drs. Eduardo Vío Grossi, Keith Highet, Miguel Ángel Espeche Gil, Mauricio Gutiérrez Castro, Olmedo Sanjur G., João Grandino Rodas, Luis Herrera Marcano, and Alberto Zelada Castedo.

CJI/RES.II-19/96**PREPARATION
FOR THE CENTENARY OF THE
INTER-AMERICAN JURIDICAL COMMITTEE**

(Resolution adopted during the regular session, held on 27 August 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS

Its most remote predecessor is found in the Resolution adopted by the III International American Conference held in this City, which Set Lip the International Commission of American Legal Experts on 23 August 1906,

Through the Resolution adopted in 1939 by the Meeting of the Ministers of Foreign Affairs of the American Republics, held in Panama, this Organization was then renamed the Inter-American Neutrality Commission;

Through a Resolution adopted by the Consultation Meeting of the Ministers of Foreign Affairs of the American Republics held in this City in 1992, the recently- appointed Commission became the Inter-American Juridical Committee;

In accordance with Article 98 of the Charter of the OAS, "its purpose is to serve as the consultative body of the Organization in legal affairs; to foster the progressive development and codification of International Law and study juridical problems linked to the integration of the developing countries on the continent, and the possibility of standardizing its legislations as far as seems convenient";

In accordance with Article 101 of this same Charter, "it represents the group of Member States of the Organization, and has the broadest technical autonomy";

Through the Protocol of Buenos Aires, 1967, it was promoted to the level of a principal entity within the Organization,

BEARING IN MIND:

That as such, and as the Inter-American consultative body on legal affairs, it has enjoyed an uninterrupted existence since 23 August 1906, and

In view of this, it is the oldest existing entity in the Inter-American System; and

In view of the above provisions and Article 3 of its Statutes and of its By-Laws;

RESOLVES:

1. To consider 23 August each year as its anniversary date; and

2. To instruct the Chairman and Vice-Chairman to prepare, with the cooperation of the Secretariat for Legal Affairs, a Draft Program to be presented during the August 1997 period of sessions, for the preparation of the commemoration the centenary of its existence.

This Resolution was approved unanimously during the regular session held on 27 August 1996, in the presence of the following Members: Drs. Eduardo Vío Grossi, Keith Highet, Miguel Ángel Espeche Gil, Mauricio Gutiérrez Castro, Olmedo Sanjur G., João Grandino Rodas, Luis Herrera Marcano, and Alberto Zelada Castedo.

CJI/RES.II-20/96**OFFICES OF THE INTER-AMERICAN JURIDICAL COMMITTEE**

(Resolution adopted during the regular session, held on 28 August 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARING IN MIND that the Government of the Federative Republic of Brazil submitted to its consideration the possibility of granting it the right to use and install its offices in a sector of the Itamaraty Palace,

RECALLING that, due to the extraordinary historical and artistic importance of the Itamaraty Palace, the Committee manifested its determination to accept this offer;

TAKING INTO ACCOUNT that the amounts in the price-quotes submitted for the repair and refurbishing of the sector offered for use, located in an Annex of the Itamaraty Palace, considerably exceed the funds that the Organization of American States can allocate for this purpose;

RESOLVES:

To request the Secretary General to prepare a study on the basis of the pertinent technical and financial data, after prior consultation with the Government of the Federative Republic of Brazil, regarding the feasibility of transferring the offices of the Committee to the Annex attached to the Itamaraty Palace, use of which has been offered by the host country.

This Resolution was approved unanimously during the regular session held on 28 August 1996, in the presence of the following Members: Drs. Eduardo Vío Grossi, Keith Highet, Miguel Ángel Espeche Gil, Mauricio Gutiérrez Castro, Olmedo Sanjur G., João Grandino Rodas, Luis Herrera Marcano, and Alberto Zelada Castedo.

CJI/RES.II-21/96**RIGHT TO INFORMATION****Access to and protection of personal data and information**

(Resolution adopted during the regular session, held on 28 August 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARING IN MIND

That legal analysis of the right to information has been included on its Agenda since 1980 and that this has prompted various contributions from its members;

That during the XXVI regular period of sessions held in Panama City, Republic of Panama, in 1996, it decided "To request the Inter-American Juridical Committee, to consider if the topic of relative to International Law adds particular relevance to aspects concerned with access thereto and the protection of data of a personal nature, including those introduced through mail and computerized transmission systems" (AG/doc.3405/96);

RECALLING that in Resolution CJI/RES.II-9/95, prompted by the contents of the verbal report presented in August 1995 by the Rapporteur. Dr. Mauricio Gutiérrez Castro, on the scope and complexity of this issue and the various aspects involved in the study thereof, he was requested to develop the topic of "Access to and protection of personal data and information";

WHEREAS during the January 1996 regular period of sessions the Rapporteur presented the first Report on this issue, entitled "Right to information: access to and protection of personal data and information" (CJI/SO/I/doc.9/96), in addition to making a detailed presentation on the juridical treatment of data and information;

WHEREAS during the current regular period of sessions the Rapporteur presented a second Report on this matter, accompanied by the documentation pertinent thereto;

WHEREAS for the purposes of preparing the Final Report the Rapporteur needs access the an official agency or office for the control and protection of personal data;

RESOLVES

1. To request the Rapporteur to continue his study of this topic and present a Final Report to the next regular period of sessions in August 1997.

2. To request the Secretariat for Legal Affairs to request the pertinent institutions or agencies to issue the corresponding invitation. in order that the Rapporteur may visit them and learn about their functioning and the problems involved in ensuring better, protection of personal data.

This Resolution was approved unanimously during the regular session held on 28 August 1996, in the presence of the following Members: Drs. Eduardo Vío Grossi, Keith Hight, Miguel

Ángel Espeche Gil, Mauricio Gutiérrez Castro, Olmedo Sanjur G., João Grandino Rodas, Luis Herrera Marcano, and Alberto Zelada Castedo.

CJI/RES.II-22/96**SEMINAR ON DEMOCRACY IN THRE INTER-AMERICAN SYSTEM**

(Resolution adopted during the regular session, held on 28 August 1996) '

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS:

In its Resolution CJI/RES.I-3/95 it agreed to suggest to the corresponding agencies of the Organization that they should encourage "coordination with other international organizations with a view to organizing stuthes, seminars round tables and other ways of analyzing and studying the excs and positions of the OAS and these international organizations in matters of Representative Democracy";

In its Resolution CJURES.1-2/96 it agreed to "reaffirm that, in its view and without adversely affecting the decisions of the above-mentioned competent agencies, a measure that appears effective at this stage of the study or analysis of this topic in fostering the progressive development of International Law in relation to the effective exercise of Representative Democracy is the organization by the Committee of seminars or round tables at which, on the basis of the ... documentation issued on this matter, "the issues submitted thereto will be analyzed with scientific rigor";

In its Resolution AG/doc.3405/96, the General Assembly of the Organization resolved to "highlight the important contribution to the development of International Law represented by Resolution CJI/RES.I-3/95 on "Democracy in the inter-American system". In which it stresses the observance by both the OAS and its Member States of the principles and norms related to the exercise of Representative Democracy, which distinguishes it positively from other regions, and request the Committee, in conformity with the above-mentioned Resolution, to organize jointly with the Secretariat for Legal Affairs and the Unit for the Promotion of Democracy, and insofar as it has the necessary funds available, a seminar during which this important matter is analyzed from a juridical standpoint",

RESOLVES:

1. To request the General Secretariat to implement the necessary measures with a view to allocating the funds necessary to organize a seminar on Democracy in the. inter-American system.

2. To commission the Chairman of the Committee to prepare and organize the abovementioned seminar jointly with the Secretariat for Legal Affairs and the Unit for the Promotion of Democracy, and insofar as it has the necessary funds available.

3. In the exercise of the above-mentioned mandate, it may determine the place, time and participants of the above-mentioned seminar.

This Resolution was approved unanimously during the regular session held on 28 August 1996, in the presence of the following Members: Drs. Eduardo Vío Grossi, Keith Hight, Miguel Ángel Espeche Gil, Mauricio Gutiérrez Castro, Olmedo Sanjur G., João Grandino Rodas. Luis

Herrera Marcano, and Alberto Zelada Castedo.

CJI/RES.II-23/96**JURIDICAL DIMENSION OF INTEGRATION
AND INTERNATIONAL TRADE**

The most-favored nation principle and its application
in the Americas and other ways of favoring
the less-developed countries

(Resolution adopted during the regular session, held on 28 August 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

IN VIEW OF Resolutions AG/RES. 1328 (XXV-0/95) of the General Assembly of the Organization, CJI/RES.I-14/95 and CJI/RES.I-3/96 of the Committee;

WHEREAS

During the regular period of sessions of the Committee in January 1996, Dr. José Luis Siqueiros resented the Report entitled "*The principle of the most-favored nation and its application in the Americas, as well as other measures favoring the less-developed nations. A first approach to its analysis*" (CJI/SO/I/doc.2/96), as the Rapporteur on this topic, while Rapporteur Dr. Alberto Zelada Castedo also presented a preliminary version, subject to revision of the Report entitled "*The most-favored nation clause in economic integration treaties signed by the Latin American nations*" (CJI/SO/I/doc. 14/96);

Through its Resolution CJI/RES.I-3/96, the Committee agreed "to continue its study of this topic, leading to the preparation and issue of conclusions and comments pertinent thereto, in compliance with the mandate handed down by the General Assembly of the Organization";

During the current regular period of sessions Dr Alberto Zelada Castedo presented the final revised version of the above-mentioned Report;

The other Rapporteur for this topic, Dr. Jonathan T. Fried, has stated that he will present his Report on this matter at the next regular period of sessions of the Committee.

RESOLVES

1. To thank Committee member Dr. Alberto Zelada Castedo as the Rapporteur for the presentation of the final revised version of the Report entitled "*The most-favored nation clause in economic integration treaties signed by the Latin American nations*" (CJI/SO/I/doc. 14/96 rev. 1);

2. To continue with the study of this topic, leading to the preparation and issue of conclusions and comments pertinent thereto., in compliance with the mandate handed down by the General Assembly of the Organization",

This Resolution was approved unanimously during the regular session held on 28 August 1996, in the presence of the following Members: Drs. Eduardo Vío Grossi, Keith Hight, Miguel Ángel Espeche Gil, Mauricio Gutiérrez Castro, Olmedo Sanjur G., João Grandino Rodas, Luis Herrera Marcano, and Alberto Zelada Castedo.

CJI/RES.II-24/96**THE COMPLEMENTARY AGREEMENT**

(Resolution adopted during the regular session, held on 28 August 1996)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS Article 104 of the Charter of the Organization of American States establishes that "the Inter-American Juridical Committee shall have its Seat in the City of Rio de Janeiro, but in special cases may hold meetings in other places that is designated in a timely manner, after prior consultation with the corresponding Member State";

ACKNOWLEDGING the support and valuable cooperation received at all times from the host country, the Federative Republic of Brazil;

STRESSING that Article 2 of its Statutes stipulates that "the Committee represents the group of Member States of the Organization, and has full technical autonomy. The members of the Committee have total independence in their opinions and enjoy the privileges and immunities established by Article 13 of the Charter";

RECALLING that Article 132, previously 133, of the Charter of the Organization of American States affirms that it "shall enjoy in the territory of each of its members the juridical capacity, privileges and immunities necessary to exercise of its functions and the achievement of its purposes;"

TAKING INTO ACCOUNT THE provisions of the 1949 Agreement on Privileges and Immunities of the Organization of American States, of which the Federative Republic of Brazil is a signatory;

BEARING IN MIND the 1988 Agreement between the Government of the Federative Republic of Brazil and the General Secretariat of the Organization of American States on the functioning of its Office in Brazil, its obligations, privileges and immunities;

IN VIEW OF the convenience of signing an Agreement referring specifically to the Inter-American Juridical Committee, which expresses and consolidates the high levels of cooperation maintained with the host country of its Seat., the Federative Republic of Brazil.

RESOLVES:

1. To request the General Secretariat to explore with the government of the Federative Republic of Brazil the possibility of signing a Complementary Agreement, of an administrative and interpretative order with regard to the rules in effect and applicable to this matter, covering the functioning of the Inter-American Juridical Committee in this country.

2. To suggest that the above-mentioned Agreement should refer to the cooperation between the government of the Federative Republic of Brazil and the Committee on matters such as those concerning bibliographic and documentary information, with the sessions of the

Committee being held in any of the States of the Federative Republic of Brazil that may invite it to do so, the signature of cooperation agreements with Brazilian universities, and the scope and treatment accorded to the members of the Committee for exclusively protocolar purposes.

3. To charge the Chairman of the Committee and the Secretariat for Legal Affairs to implement this Resolution.

This Resolution was approved unanimously during the regular session held on 28 August 1996, in the presence of the following Members: Drs. Eduardo Vfo Grossi, Keith Highet, Miguel Ángel Espeche Gil, Mauricio Gutiérrez Castro, Olmedo Sanjur G., João Grandino Rodas, Luis Herrera Marcano, and Alberto Zelada Castedo.

CJI/RES.II-25/96**AGENDA FOR THE FEBRUARY - MARCH 1997
REGULAR PERIOD OF SESSIONS
AND GENERAL OUTLINE**

(Resolution adopted during the regular session, held on 28 August 1996)

1. AGENDA FOR THE I PERIOD IN 1997

- 1 Procedures for the preparation and adoption of Inter-American juridical instruments under the aegis of the Organization of American States (AG/d.(.)c.3269/95) Rapporteurs: Drs. Luis Herrera Marcano and Jonathan T. Fried
- 2 Analysis and comments on the working document entitled *The law in a new interAmerican order*, presented by the Secretary General (CJI/RES.I-7/96)
- 3 Draft Inter-American Convention for the elimination of all forms of discrimination due to any form of disability (AG/doc.3380/96). Preliminary Report: Secretariat for Legal Affairs

II. GENERAL OUTLINE**A INCLUDED AT THE INITIATIVE OF ANOTHER ORGANIZATION**

1. Announcement of the VI Inter-American Specialized Conference on Private International Law - CIDIP-VI. (AG/doc.3403/96).

B INCLUDED AT ITS OWN INITIATIVE

1. Representation of the principal legal systems of the Hemisphere at the International Court of Justice. in the light of the provisions of Article 9 of its Statutes (CII/SO/I/doc.22/96)
Rapporteur: Dr. Keith Highet
2. The application of the United Nations Convention on the Law of the Sea by the States in the Hemisphere (CJI/SO/I/doc.23/96)
Rapporteur: Dr. Keith Highet

III. TOPICS ON WHICH PRELIMINARY OR PARTIAL REPORTS HAVE ALREADY BEEN PREPARED**A INCLUDED AT THE INITIATIVE OF ANOTHER ORGANIZATION**

1. Inter-American cooperation to confront terrorism (August 1994)
Rapporteur: Dr. Luis Herrera Marcano
2. Juridical dimension of integration and international trade
[AG/RES. 1328(XXV-0/95)]
Rapporteurs: Drs. José Luis Siqueiros, Alberto Zelada Castedo and Jonathan T. Fried

B INCLUDED AT ITS OWN INITIATIVE AND WITH A MANDATE FROM THE GENERAL ASSEMBLY

1. Improvement of the administration of Justice in the Americas.
(CJI/RES.I-2/85) [AG/doc.3405/96]
Rapporteur: Dr. Jonathan T.Fried
2. The right to information: access to and protection of personal data and information
(January 1980) [AG/doc.3405/96]
Rapporteur: Dr. Mauricio Gutiérrez Castro
3. International cooperation to repress corruption in the American nations. Illicit enrichment and transnational bribery.
(CJI/SO/II/doc.2/92)
Rapporteur: Dr. Eduardo Vío Grossi

IV. TOPICS ON WHICH NO REPORTS HAVE BEEN PREPARED

A. INCLUDED AT THE INITIATIVE OF ANOTHER ORGAN

Nothing pending.

B. INCLUDED AT ITS OWN INITIATIVE

Nothing pending.

This Resolution was approved unanimously during the regular session held on 29 August 1996, in the presence of the following Members: Drs. Eduardo Vío Grossi, Keith Highet, Miguel Ángel Espeche Gil, Mauricio Gutiérrez Castro, João Grandino Rodas and Luis Herrera Marcano.

PART III
DOCUMENTS

CJI/SO/II/doc.27/95 rev.1
30 January 1996
Original: Spanish

JURIDICAL DIMENSION OF INTEGRATION

The jurisdictional system for the settlement of disputes
in the Andean Group

(presented by Dr. Alberto Zelada Castedo)

Summary

I. Background. II. Jurisdiction and competence of the Court. III. The direct application of community norms and the obligation to comply therewith. IV. Cases of Annulment. V. Cases of Non-Compliance. VI. Interpretation by pre-judicial means. VII. Juridical effects of Court decisions. VIII. Review, amendment, expansion and clarification of Court decisions. IX. Organization of the Court. X. Possible alterations in the Treaty setting up the Court. XI. General comments and conclusions.

I. Background

1. At the start, the Andean Group Economic Integration Program had no procedures of its own for controlling legality nor for settling disputes. To handle these issues, the original version of the Agreement of Cartagena set various rules on diplomatic methods, assigned to the Agreement Commission, and deferred the issue of using the means established by the Protocol of the Settlement of Disputes signed among the LAFTA nations.

Article 23 of the original text of the Agreement assigned to the Commission the competence to develop procedures for "negotiation, good offices, mediation and conciliation" in order to resolve "discrepancies" between Member States over the "interpretation or implementation" of this Agreement or the Decisions of the Commission. At the same time, it stipulated that "should no agreement be reached, the Member States shall be subject to the procedures established in the Protocol for Settlement of Disputes, signed in Asunción on 2 September 1967 by the Ministers of Foreign Affairs of the Signatories of the Treaty of Montevideo." ¹

2. This situation changed radically with the signature and entry into effect of the Treaty setting up the Court of the Agreement of Cartagena. This instrument formalized the establishment of a complex, advanced system of measures for the settlement of disputes, control of legality and uniform interpretation of the norms of the juridical arrangements of the Agreement, allocated to an independent jurisdictional agency of a permanent nature. ²

¹ The Protocol for the Settlement of Disputes signed in Asunción on 2 September 1967 by the LAFTA Member States established a set of measures for the settlement of disputes that includes arbitration.

² The Treaty setting up the Court was signed in Cartagena de Indias (Colombia) on 28 May 1979 and came into effect on 19 May 1983, on which date the last Deed of Ratification was deposited, by Venezuela.

3. In the Preamble to this Treaty, the Signatory States declared that the "stability of the Agreement of Cartagena and the rights and obligations arising therefrom should be safeguarded by a jurisdictional agency of the highest level, independent of the Governments of the Member States, with the capacity to declare community law, and settle disputes arising therefrom, interpreting it in a uniform manner."³

On this basis, in addition to the well-known need - as expressed in the same Preamble - to "guarantee strict compliance with the commitments arising directly or indirectly from the Agreement of Cartagena," a Court was set up as the "principal agency" of the Agreement.

The system set up by the Court Treaty covers the functions of control of legality, settlement of disputes and uniform interpretation of the law within the economic integration system of the Andean Group. This is consequently one of the most complete systems yet developed and applied in integration programs involving the Latin American nations. The precision with which it is designed to a large extent responds to the nature of the integration program covered by the Agreement of Cartagena, as well as the type of normative powers conferred on the agencies within its basic structure and the effects of the provisions of both originatory and derived law.

This system was inspired by that of the European Community. The authors of the Preliminary Draft of the Treaty setting up the Court acknowledged that "the characteristics of the organization" of the jurisdictional agency proposed were based on "the experience built up on this matter by the European Communities Court."⁴

4. The nature and scope of the economic integration program postulated by the Agreement of Cartagena, as well as the quality of the spheres of competence and powers attributed to the agencies of the institutional structure of this scheme, meaning the Commission and the Board, constituted the fundamental principals of the decision to set up a system for the settlement of disputes, control of legality and uniform interpretation of the law, under the responsibility of a permanent, independent jurisdictional agency.

Although it does not expressly state this, the Agreement implies that the economic integration process among the Signatory States has as its purpose a final objective of a material order: the establishment of a type of "economic community", which assumes the progressive development of a complex juridical order whose application may prompt an appreciable number of disputes among such States, and at the same time require appropriate surveillance.

Within this framework, the Agreement confers on the Commission - as an intergovernmental agency - important powers to adopt binding norms for the Member States, including through a majority vote, with no requirement for unanimity.⁵ Similarly, it attributes to the Board - as an

³ Similarly, Article 2 of the Court Charter, approved by Decision 184 of the Agreement of Cartagena Commission, defines the Court as "a jurisdictional agency set up to guarantee respect for the law in the application and interpretation of the juridical arrangements of the Agreement.

⁴ A comparative analysis between the European Community Court and the Agreement of Cartagena Court may be found in Zelada Castedo, Alberto, *El control de legalidad, la solución de controversias y la interpretación uniforme del derecho común en el esquema de integración del Grupo Andino*, in Sachica, Carlos and other, "El Tribunal de Justicia del Acuerdo de Cartagena", Buenos Aires: INTAL, 1985.

⁵ According to Article 6 of the Agreement of Cartagena, as amended by the Protocol of Quito, the "Commission is the most senior agency of the Agreement, and as such has the exclusive legislative capacity over the matters falling within its sphere of competence." On the other hand, according to Article 11 of this same Agreement, in order to adopt its decisions, the Commission must generally have "the affirmative vote of two-thirds of the Member -States."

independent or non-governmental organization - powers not only to issue proposals designed to implement the decision-taking and normative process assigned to the Commission, but also to adopt rules that are equally mandatory for the Member States.⁶

5. Both in terms of the Treaty that established it as well as the amendments to the Agreement of Cartagena introduced by the Protocol of Quito,⁷ the Court became a part, as the "principal agency" of the institutional structure of the economic integration scheme of the Andean Group. Article 5 of the Agreement, as amended, stipulates the "principal agencies of the Agreement are: the Commission, the Board, the Court and the Andean Parliament."⁸

II. Jurisdiction and Competence of the Court

6. The jurisdiction of the Court is mandatory for the Member States of the Agreement with regard to the application of the norms of the juridical arrangements thereof. This is stipulated both in Article 23 of the Agreement as well as in Article 33 of the Treaty setting up the Court.

According to the first of these norms, the settlement of disputes that may arise due to the application of the juridical arrangements of the Agreement, "shall be subject to the norms of the Treaty setting up the Court." According to the latter, the Member States of the Agreement are obliged, more accurately, to avoid submitting "any dispute that may arise on the basis of the application of the norms that constitute the juridical arrangements of the Agreement", "to any Court, arbitration system of procedure different from those covered" in the Treaty setting up the jurisdictional organ.

From these provisions, it may be deduced that, in addition to being mandatory for the Signatory States to this Agreement, the jurisdiction of the Court is also exclusive, as recourse to other procedures is expressly banned.

Acceptance of the mandatory jurisdiction of the Court extends automatically to those States which may in the future adhere to the Agreement of Cartagena. As stipulated by Article 36 of the Treaty setting up the Court, adherence to the Agreement necessarily implies adherence to this latter Treaty.⁹

7. With regard to the jurisdiction and spheres of competence of the Court on this issue, it is clear that this extends to cover everything relative to the interpretation and application of the juridical arrangements of the Agreement.

When outlining this scope, Article 1 of the Treaty setting up the Court states that these arrangements include the following sets of norms:

⁶ According to Article 13 of the Agreement, the Board is the "technical agency" thereof, and is obliged to "act solely in function of the interests of the sub-region", enjoying broad-ranging powers to submit "proposals" to the Commission, as well as having decision-taking powers on specific issues linked to the application of the principal instruments of the economic integration scheme, particularly the trade liberalization program and the common customs tariff. Thus, it is endowed with precise powers, under the Treaty setting up the Court, to implement the competence thereof in terms of non-compliance with the norms of the juridical arrangements of the Agreement of Cartagena by the Member States.

⁷ The Protocol of Quito was signed by the Member States of the Agreement of Cartagena on 12 May 1987, and entered into effect on 25 May 1988.

⁸ Similarly, Article 6 of the Treaty setting up the Court defines it as the "principal agency" of the Agreement of Cartagena.

⁹ Article 36 of the Treaty setting up the Court stipulates that it "may not be signed with provisos", and that "the States that adhere to the Agreement of Cartagena must also adhere to this Treaty."

- a) The Agreement of Cartagena, its Protocol and additional Instruments,
- b) The Treaty setting up the Court,
- c) The Decisions of the Commission, and
- d) The Resolutions of the Board.

8. Although it is not expressly stated, the correct interpretation is that this provision contains a true listing of the sources of the law regulating the economic integration process of the Andean Group. This implies that such components constitute both ways of creating law as well as measures for implementing legal norms.

Also implicit, but unmistakable, this important norm establishes a hierarchical order among the various sources of law, locating the Agreement of Cartagena and the Treaty setting up the Court at the base of the normative order of the economic integration system, as conventional instruments of basic law, with the Decisions of the Commission and the Resolutions of the Board ranked in a subordinate position below the former, as unilateral or non-conventional instruments under derived law.

The above-mentioned Article 1 also sets the normative framework within which the competence of the Court should be exercised. The exhaustive listing of the segments of norms within the juridical arrangements of the Agreement seems to exclude the possibility that the Court may have recourse to other sources of law when hearing and judging cases submitted to its jurisdiction, such as general international law and the general principles of law. It also excludes the possibility that the Court may hand down equitable or *ex aequo et bono* decisions.

9. The scope of this norm with regard to elements of which it consists - effectively, the juridical arrangements of the Agreement of Cartagena - have been stipulated by the jurisdictional agency.¹⁰

In one of its first sentences, handed down on a case brought on the basis of the provisions of documents other than those enumerated in the above-mentioned norm, the Court stated:

"... the acts, guidelines, decisions or commitments adopted by the Presidents of the Signatory States of the Agreement of Cartagena, when sitting on the Andean Presidential Council as stipulated in the Charter thereof, are not decisions of the Commission, and nor do they belong to the juridical arrangements set up by the Court Treaty, which was signed by these same Member States."¹¹

10. In order to fulfill the three basic functions assigned to thereto, the Court has the competence to hear cases and hand down sentences in the following cases and procedures:

¹⁰ Ever since it started up its activities in 1984 through until 1995, the Court of the Agreement of Cartagena has heard and handed down decisions in 48 cases. Most of the sentences of the of Court have consisted of pre-judicial interpretation procedures. Others have resulted from annulment cases. No decision has been handed down with regard to cases of non-compliance as no case of this type has been brought by either the Board of the Agreement nor any Signatory State thereto. The full texts of the decisions of the Court may be consulted at the BID/INTAL/TJAC. Jurisprudence of the Court of the Agreement of Cartagena. Buenos Aires. BID/INTAL, 1994. A selection of the concepts contained in the Court decisions is given in ANNEX I of this Report.

¹¹ Case N°. 2-N-92 (27 April 1992).

- a) cases of annulment of the Decisions of the Commission and the Resolutions of the Board of the Agreement,
- b) cases of non-compliance by the Member States with the norms of the juridical arrangements of the Agreement, and
- c) pre-judicial interpretation procedures for the norms that constitute the juridical arrangements of the Agreement.

The nature and direction of these spheres of competence has been corroborated in the jurisprudence of the Court. In one of its decisions, this organ stipulated that its powers are "limited to declaring null and void the illegal acts of the Commission or Board, declaring the non-compliance of Member States that fail to comply with the juridical arrangements of the Agreement of Cartagena, and interpreting Andean community law." ¹²

III. The direct application of community norms and the obligation to comply therewith.

11. In addition to stipulating the various segments of the norms that constitute the juridical arrangements of the Agreement of Cartagena, the Treaty setting up the Court regulates the conditions for direct application thereof, within the sphere of competence of the domestic law of the Member States, and the community norms issued by the Commission and the Board handed down in the exercise of the duties and responsibilities attributed thereto. It also outlines the obligation of these same States to comply with the above-mentioned norms.

In this respect, the Treaty stipulates that "the Decisions are binding on the Member States as from the date on which they are approved by the Commission" and "will be directly applicable in the Member States as from the date of publication thereof in the Official Gazette of the Agreement, unless a later date is stipulated therein." Similarly, it also stipulates that, solely when its "text so provides", the "Decisions shall require incorporation into domestic law through an express act." ¹³

With regard to the Resolutions of the Board, this same Treaty stipulates that they shall "enter into effect on the date and in the manner" established in the Regulations of the Board. ¹⁴

12. Prior to the entry into effect of the Treaty setting up the Court, the Commission of the Agreement, acknowledging the content of the above-mentioned norms, issued an important pronouncement on this issue. On that occasion, the Commission declared the "full validity" of the following concepts:

- 1) "The juridical arrangements of the Agreement of Cartagena have their own identity and autonomy, constituting a common law, and forming part of national juridical arrangements";
- 2) "Within the framework of the competence thereof, the juridical arrangements shall prevail over national norms, with unilateral acts or measures of the Member States opposed thereto not permitted", and

¹² Case N°. 1-84 (8 February 1984).

¹³ Articles 2 and 3 of the Treaty setting up the Court.

¹⁴ Article 4 of the Treaty setting up the Court.

- 3) "Decisions that imply obligations for the Member States enter into effect on the date indicated, or else on the date of the Final Minutes of the respective meeting, in compliance with Article 21 of the Regulations of the Commission".¹⁵

With regard to the direct and immediate application of the Decisions of the Commission, this pronouncement reiterated the norms contained in the Treaty setting up the Court and at the same time made two other important concepts clear: First, that related to the nature of the juridical arrangements of the Agreement, as an autonomous order and as a "common law" integrated into the national juridical arrangements of the Member States, and the second regarding the "prevalence" or "preeminence" or the norms of these arrangements - for issues falling under the sphere of competence thereof - on the norms of the national juridical arrangements.

13. As a corollary of the above rules, the Treaty setting up the Court enshrined the obligation of the Member States of the Agreement of Cartagena to comply with the norms of the juridical arrangements thereof.

According to Article 5 of the Treaty, the Member States "are obliged to adopt the measures necessary to guarantee compliance with the norms that constitute the juridical arrangements of the Agreement of Cartagena." Similarly, "they agree" to "not adopt any measures running counter to these norms, or which in some way would hamper the application thereof.".

14. In certain of its decisions, the Court has stipulated the scope of these norms. It has particularly stressed the preeminence of the juridical arrangements of the Agreement of Cartagena with regard to the juridical arrangements of the Member States, particularly when this involves the application of specific norms of the common arrangements within the sphere thereof.

By stipulating these criteria, the Court has carried out a systematic interpretation of the principles which, in its view, provide support for the nature and scope of the juridical arrangements of the Agreement: first, the principle of the direct applicability of the community law norms as stipulated by Articles 3 and 4 of the Treaty setting up the Court, and second, the principle of the obligation of the Member States to apply the norms of the common arrangements, and to avoid adopting measures that hamper or block the application thereof, as stipulated in the above-mentioned Article 5 of this same Treaty.

In this regard, the Court has emphasized that, "the juridical arrangements of Andean integration prevail in the application thereof over domestic or national norms, being an essential characteristic of Community Law, as a basic pre-requisite for the development of integration."¹⁶

In another decision, stipulating the relationships between the juridical arrangements of the Agreement of Cartagena and the juridical arrangements of the Member States, or more precisely, possible conflicts between the norms of the various normative systems, this same organ stated:

"With regard to the effect of integration norms on national norms, doctrine and jurisprudence state that, in case of conflict, the domestic rule shall be displaced by the community norm, which

¹⁵ Minutes of the XXIX Regular Sessions Period of the Commission (Lima, 19 May - 5 June 1980).

¹⁶ Case N°. 1-INCUM-87 (9 October 1987).

shall be applied preferentially, as the competence in this case corresponds to the community. In other words, the domestic norm becomes inapplicable, to the benefit of the community norm."

"This displacement of the national norm as the outcome of the principle of preferential application is particularly clear when later law - which must take priority over earlier law in accordance with the universal principles of law - is in fact the community law."

"This does not mean exactly that later community law derogates the pre-existing national norm, similar to what takes place at the domestic law level, as they are distinct, autonomous and separate juridical arrangements, which adopt within their specific sphere of competence their own particular ways of creating and annulling law, which are obviously not interchangeable. More accurately, this involved the direct effect of the principle of immediate application and of primacy, which must in all cases be granted to community norms over domestic norms. It may be said that the area formerly occupied by the displaced norms is taken over, as they become inapplicable in so far as they are incompatible with the provisions of community law (preemptum)." 17

15. Due to its nature and scope, this interpretation leads to the conclusion that the norms of both originatory and derived law of the juridical arrangements of the Agreement of Cartagena have the effect of "displacing" the domestic law norms of the Member States on those issues that constitute the material range of action of the common arrangements. This does not imply that these norms have the effect of "derogating" domestic law norms, but simply make them inapplicable, as the act of derogating them corresponds to the measures covered in the national arrangements.

As the Court explains, this involves distinct normative systems that are to a certain point independent, and each of which have their own means for creating and applying their own norms. Despite this, the community arrangements enjoy preferential application with regard to those issues which, under agreements between the Member States of the Agreement of Cartagena, have moved into the scope of validity for these issues.

16. Generously endowed with these concepts, the Court has made both the basis as well as the effects of the stance of the juridical arrangements of the Agreement of Cartagena quite clear, as the normative system with preferential application. It underlined that community juridical arrangements "prevail over domestic law due to the principles of direct applicability and primacy inherent therein." Due to this, "when some precept in domestic legislation runs counter to the juridical arrangements of integration, the Member States should apply the Andean norm in a preferential manner." 18

As a corollary of the criteria outlined above, the Court has also stipulated the structure of the relationships between the common juridical arrangements and the domestic juridical arrangements of the Member States through a definition of the nature of possible future conflicts between these two sets of norms.

"The Court stressed that this involved the confrontation between two essentially distinct juridical arrangements, one national, the other community, whereby it cannot really be called a simple conflict of norms, as this in fact involves a conflict between different normative sources."

17 Case N°. 2-IP-88 (25 May 1988).

18 Case N°. 5-IP-89 (15 October 1989).

This implies that "integration law does not derogate national laws", but rather "merely makes those running counter thereto inapplicable."¹⁹

17. In another of its decisions, the Court also defined the nature and scope of the obligations of the Member States with regard to the application of the norms of the juridical arrangements of the Agreement, which are stipulated in the above-mentioned Article 5 of the Treaty setting up the Court.

According to the jurisdictional organ, under this norm, the Member States "have a double obligation. The first is of a positive nature, to do; and the second, of a negative order, not to do." According to the former, they have the duty of "adopting all types of measures, whether legislative, judicial, executive, administrative or of any other type, which may be called rules, procedures, pre-requisites, decisions, resolutions, agreements, rulings, decisions, sentences or measures, and which guarantee compliance with the Andean set of norms, meaning the obligations and commitments undertaken in virtue of the Treaties as well as those corresponding thereto by means of secondary norms or those arising from these same arrangements." With regard to the latter, they have the duty of "abstaining from all measures which, regardless of the name or form in which they may be adopted, could hamper the application of the Andean juridical arrangements, with this abstention being imperative in character and "inherent in compliance with the matters agreed." Consequently, "they may not approve laws or impose regulations or issue administrative norms which, although not openly running counter to the above-mentioned arrangements, in practice hamper the application thereof."

According to the court, this latter obligation, interpreted to the utmost, and above all in the light of "the principles of direct application and pre-eminence of community norms, may even imply the duty of the Member States to "expressly derogate norms in the domestic juridical arrangements thereof."

For the jurisdictional organ, the obligation stipulated in Article 5 of the Treaty setting up the Court, "is in fact based on the purpose and object of the Agreement of Cartagena", meaning on the "**integration**" to which the Member States are committed, and whose objectives are outlined in Article 1 of this document.²⁰

IV. Cases of annulment

18. The capacity of the Court to exercise control over the legality of the acts of the Commission and the Board is based on its competence to "declare null and void" the Decisions of the former and the Resolutions of the latter. ²¹

The annulment of these acts - in compliance with the provisions of Article 17 of the Treaty setting up the Court - may be declared under the condition that they have been adopted in "violation of the norms that shape" the juridical arrangements of the Agreement, as well as by "misuse of power".

Cases of annulment may be brought by both the Member States as well as the Commission and the Board. The former may only file such cases in relation to Decisions of the Commission that have not been approved by the affirmative vote thereof. ²²

¹⁹ Case N°. 2-IP-90 (20 September 1989).

²⁰ Case N°. 5-IP-89 (15 October 1989).

²¹ Article 17 of the Treaty setting up the Court.

19. Private persons, whether individuals or corporations are also qualified to request annulment of Decisions of the Commission and Resolutions of the Board directly before the Court. This right may be exercised only in the case of challenged Decisions or Resolutions "that are applicable thereto and cause losses or damage." 23

20. The challenge may have the effect that the "Court declares the total or partial annulment of the Decision or Resolution challenged." Under these circumstances, the agency of the Agreement "whose act has been annulled should adopt the provisions required to guarantee effective compliance with the decision" of the Court. 24

However, as stipulated by Article 21 of the Treaty setting up the Court, "bringing a annulment case shall not affect the effectiveness and validity of the norms or standards under dispute."

21. In the development of its jurisprudence, the Court has accurately defined the nature, scope and characteristics of the competence attributed thereto by Article 17 of the Treaty setting up this jurisdictional organ.

According to the Court, this competence empowers it "to examine the decisions of the Commission and the Resolutions of the Board, in order to ascertain if they are formally and substantially adapted to the juridical arrangements" of the Agreement of Cartagena and "consequently resolve, on the basis of the claims and proofs alleged in each case, if they are totally or partially valid, and in this latter case, to regulate the effects of this nullity over time." 25

22. In another important decision, the Court stipulated various aspects of a case of annulment, including that covering the capacity of individual persons to bring such a case. 26

With regard to the scope of this case, the jurisdictional organ has stated:

"This thus does not involve a true public case in defense of legality, which may be brought by any citizen, similar to what occurs in many countries with regard to constitutional control. To the contrary, in this case, it involves a suit which, although its final purpose is "the defense or protection of the law (nomofilaquia, in the words of Calamandrei), the power to bring such a case is expressly reserved for the Member States, the Commission and the Board of the Agreement, and private parties; but with regard to these latter, only should they show that they are duly accredited to bring suit, through compliance with the pre-requisites stipulated in Article 19 mentioned above. 27

"The system adopted by the Andean legislator is thus similar to the extraordinary appeal as regulated in various countries of the sub-region. In fact, although the principal purpose of this appeal is the public interest consisting of the defensive objective law, it may also further private or particular interests; the proof of this latter is consequently a *sine qua non* for the appeal to go forward, similar to what happens with a case of annulment brought by private persons in accordance with the Andean arrangement."

22 Articles 17 and 18 of the Treaty setting up the Court.

23 Article 22 of the Treaty setting up the Court.

24 Article 22 of the Treaty setting up the Court.

25 Case N°. 1-N-85 (10 October 1985).

26 Case N°. 1-N-92 (28 May 1992).

27 Article 19 of the Treaty setting up the Court.

On the other hand, with regard to the capacity of private individuals and corporate legal entities to apply for annulment of decisions of the Commission and resolutions of the Board, and particularly with regard to the requirements for exercising this right, the Court has interpreted the corresponding norms of its constitutive Treaty in the following terms:

"When private parties bring a case of annulment decided in their favor by Andean law, the need then arises that, first of all, they should merely show that they have **interest to act**, which must logically depend on their *legitimatío ad causam*".

"There must be a substantial concrete interest whereby there should be a special case "with regard to a specific material relation" which arose from the norm in question. It is also said that this interest should be current, whereby simple expectations or possible future rights or losses that may come into existence should some unknown fact take place, do not grant or constitute genuine current interests, as they are not objectively ruled by the norm in question".

"In addition to the actual **applicability** of the norm, the individual or corporation intending to bring a case of annulment is required by Article 19 of the Treaty setting up the Court to show that such case is subsequent to loss or damage. This must consequently reflect the direct, specific effects of the application of the norm, and not general, undetermined loss or damage, no matter how important it may be".

23. The norms regulating the spheres of competence of the Court for declaring null and void the acts of the Commission and the Board are not explicit with regard to conformity requirements, either material or formal, with which they should comply to avoid being declared null and void.

Nevertheless, as the normative system of the Agreement is conceived as a true juridical arrangement and is consequently subject to a hierarchical relationship among its various normative segments, this leads to the understanding that norms under derived law, meaning those that emanate from the powers conferred on the Commission and the Board, may not run counter to norms under basic law contained in the Agreement of Cartagena and the Treaty setting up the Court. At the same time, due to the nature of the corresponding agencies, the norms issued by the Board - whose tasks, functions and spheres of competence characterize it as an executive agency - may not run counter to the norms issued by the Commission - whose sphere of competence characterizes it as a legislative agency.

In this matter, the Court has stipulated one of the criteria - that of the "competence" of the organ - to examine and resolve the alleged illegality of the acts of the Commission and Board. In one of its decisions, it stresses that "competence is the first pre-requisite that should be analyzed when attempting to establish the legality of a juridical act, because the lack of competence due to either excess or shortage negates the illegality of the action in question." 28

V. Cases of non-compliance

24. Bringing a case of non-compliance is designed to bring into operation the spheres of competence of the Court that exercise control over the acts of the Signatory States of the Agreement. Due to the basis, scope and characteristics of its origin, this also establishes the

28 Case N°. 1-N-85 (10 October 1985).

competence of this Agency to resolve through jurisdictional means or adjudication the disputes that may occur between the above-mentioned States.

This case may be brought by the Board in its official capacity or at the request of a Member State, when it considers that another Member State "has failed to comply with the obligations arising from the norms that constitute the juridical arrangements" of the Agreement.

Before taking such action, the Board is empowered to forward its comments to the State that it considers non-compliant, issuing a "motivated decision" on receipt of the response thereof. If this decision "confirms non-compliance" and the defendant State persists in this conduct, the Board may request a decision from the Court." 29

The intervention of the Board may also be prompted by the request of a Member State. In this case the Board should also make its views known to the Defendant State and issue a motivated decision. If this confirms non-compliance and the Defendant State persists in this conduct, the Board should request a decision from the Court." 30

25. The powers conferred on the Board to bring suit for non-compliance do not exclude the right of any Member State to appeal directly to the Court. This is possible under the following circumstances: 1) if after its decision of non-compliance has been issued, the Board does not bring a case "within the next two months after the date of its decision", and 2) if the Board does not issue its "decision within the three months after the date of the presentation of the appeal or the decision does not confirm non-compliance". 31

26. It is important to note that a case of non-compliance by a Member State is not necessarily based on the declaration of non-compliance issued by the Board. The right of any State to appeal to the Court due to non-compliance by another with the norms of the juridical arrangements of the Agreement may be exercised, even though such a decision may not have confirmed non-compliance.

Similarly, it is important to note that when the Board is faced with the situation of non-compliance, it proceeds at its own initiative, and is solely empowered to submit the case to the Court. In contrast, when it acts at the request of the Member State, it is obliged to bring a case for non-compliance.

27. Such case may result the Court handing down a decision of non-compliance. Under these circumstances, the "Member State whose conduct has formed the subject of the complaint shall be obliged to adopt the necessary measures to carry out the sentence, within three months after notification thereof."32

Should it fail to comply with this obligation, the Court is empowered to authorize both the Member State adversely affected by the situation of non-compliance to apply sanctions, as well as the other Member States. Based on a prior opinion of the Board, the Court "shall determine the limits within which the plaintiff nation or any other Member State may restrict or suspend, totally or partially, the advantages of the Agreement of Cartagena that benefit the Member State in non-compliance."

29 Article 23 of the Treaty setting up the Court.

30 Article 24 of the Treaty setting up the Court.

31 Article 24 of the Treaty setting up the Court.

32 Article 25 of the Treaty setting up the Court.

28. Authorization to apply sanctions is subject to a summary process regulated by the Charter of the Court. According to this instrument, after a sentence of non-compliance has been handed down and at the termination of the period set by Article 25 of the Treaty setting up the Court for the defendant State to comply with the obligation to implement the measures necessary for the execution thereof, and should it fail to do so, the jurisdictional agency "shall request the opinion of the Board." Having received this opinion, the court shall - "if it so deems fit" - set a date and time for a hearing. Having held this hearing, "the Court shall, in a plenary session, discuss and determine the limits within which the Member Nations may restrict or suspend, totally or partially, the advantages of the Agreement that benefit the Member Nation in non-compliance." These limits "should be sized to the seriousness of the non-compliance." 33

Finally, as established by Article 71 of the Charter of the Court, the "application of measures of restriction or suspension " mentioned above "shall not require the issue of any instrument by the Commission or the Board."

29. The powers of the Court to exercise control over the legality of the acts of the Member States in response to a case of non-compliance derive from the principle of the pre-eminence of the juridical arrangements of the Agreement in relation to the domestic law of the Member States.

The pre-eminence of the basic law contained in conventional norms, or those arising from the Agreement between the States, are based on principles and practices generally accepted as mandatory and that form part of general international law.

The pre-eminence of derived law, meaning the decisions of the Commission and the Resolutions of the Board, are based on two important norms of the Treaty setting up the Court. The first is expressed in Articles 2, 3 and 4 of this instrument, while the latter is expressed in Article 5 thereof.

According to the provisions of the Treaty setting up the Court, the decisions of the Commission "are binding on the Member Nations from the date on which they are approved" and additionally "shall be directly applicable in the Member Nations as from the date of publication thereof in the Official Gazette of the Agreement." In turn, the Resolutions of the Board "shall enter into effect on the date and in the manner established in the Regulations thereof." 34

On the other hand, this same Treaty stipulates that the Member States are first obliged to "adopt the measures necessary to ensure compliance with the norms that constitute the juridical arrangements "of the Agreement, and secondly to "neither adopt nor employ any measure that runs counter to such norms or that in some manner hampers the application thereof." 35

Consequently, the acts of the Member States relative to the issues covered by the juridical arrangements of the Agreement should remain in conformity with the norms thereof, as well as those under basic law and derived law. As a corollary, an act adopted running counter to these norms will give rise to not only conflict with another Member State which may eventually be affected, but also to conflict with the juridical arrangements of the Agreement.

33 Articles 69, 70 and 71 of the Charter of the Court.

34 Articles 2, 3 and 4 of the Treaty setting up the Court.

35 Article 5 of the Treaty setting up the Court.

This makes it clear that the responsibility for bringing a case for non-compliance before the Court is basically in the hands of the Board which, as the executive organ, has - among others - the function of "safeguarding the application of the Agreement and compliance with the decisions of the Commission and its own Resolutions." 36

30. It is thus reasonable to accept that a decision of non-compliance is the appropriate outcome of the exercise of the power of the Court in monitoring the legality of the acts of the States, or declaring the conformity or non-conformity of such acts with the juridical arrangements of the Agreement, in function of the pre-eminence thereof over domestic law and the obligation of the Member States to apply or not to hamper the application of the norms that constitute such arrangements.

31. The duties stipulated by -mentioned Article 5 of the Treaty setting up the Court constitute true duties in terms of conduct, and not only results. They additionally have both a positive and negative sense, so that a situation of non-compliance may occur as much through omission in failing to implement measures to guarantee the application of the norms of the juridical arrangements of the Agreement, as through actions in adopting measures running counter to the above-mentioned norms or that hamper the application thereof.

32. A case of non-compliance may also be brought by individuals both private persons and corporations. This right is expressly acknowledged in Article 27 of the Treaty setting up the Court.

Under this precept, "private persons and corporations shall have the right to have recourse to the competent national Courts, in compliance with the provisions of domestic law, when the Member States fail to comply with the provisions of Article 5", whenever "their rights are adversely affected by such non-compliance."

This norm indicates that that the responsibility for the application by jurisdictional means of the norms that constitute the juridical arrangements of the Agreement of Cartagena correspond not only to the Treaty setting up the Court, but also the lawcourts of the Member States. For this reason this provision has been interpreted as expression the idea that "community jurisdiction" consists of the Court set up by the Treaty and the national courts of the Member States.

33. The nature and scope of a case of non-compliance have prompted certain clarifications in the jurisprudence of the Court.

The jurisdictional organ underlined that a case of non-compliance "is designed to judge the conduct of the Member States regarding compliance with community obligations" and stresses that such cases "may only be brought by the Member States and the Board, but not by private parties." 37

34. With regard to the capacity of these latter to bring cases of non-compliance, the Court noted that "it is not competent to hear cases of non-compliance between private parties" and confirmed that this type of case - as stipulated in Article 127 of its constitutive Treaty - "should be brought before national courts".

According to the jurisdictional organ, "in terms of non-compliance with the obligations arising from the norms that constitute the juridical arrangements of the Agreement of Cartagena, the

36 Article 14 item a) of the Agreement of Cartagena.

37 Case N°. 5-84 (13 June 1984).

compliance of this Court exists only with regard to the cases covered by Articles 23 and 24 of its constitutive Treaty", meaning agreement the request of the Board or a Signatory State to the Agreement of Cartagena, and thus not at the request of individual persons or corporate legal entities, which should bring their cases before the competent national courts, as stipulated quite clearly in the above-mentioned art 27 of the Treaty." 38

VI. Interpretation by pre-judicial means

35. The competence of the Court to issue valid, binding interpretations, by pre-judicial means of the norms of the juridical arrangements of the Agreement of Cartagena, is designed to preserve the unity and coherence thereof. This is based on the assumption that these norms, due to their nature and scope, as well as their full validity within the domestic juridical arrangements of the Member States, may be applied in an individualized manner by the administrative or jurisdictional authorities thereof.

36. The initiative to undertake the pre-judicial interpretation process is assigned to the judicial authorities of the Member States.

According to the provisions of Article 29 of the Treaty setting up the Court, "the national judges hearing a case in which some of the norms constituting the juridical arrangements of the agreement should be applied, may request the interpretation of the Court of such norms, whenever the sentence thereof is susceptible to appeal under domestic law."

Should the court decision not be susceptible to later appeal, the judge in question is obliged to suspend the procedure and request the interpretation of the Court. This request should be handled officially, or through a separate petition.

37. On issuing its decision, the Court "should limit itself to stipulating the contents and scope of the norms of the juridical arrangements" of the Agreement. It consequently may not interpret the contents and scope of national law nor qualify the material facts in the case. 39

The decision handed down by the Court is fully binding on the legal authorities that requested an interpretation by pre-judicial means. Thus, Article 31 of the Treaty setting up the Court stipulates that "the judge hearing the case should adopt the interpretation" thereof.

38. Various criteria have been brought forward in the jurisprudence of the Court with regard to the nature, characteristics and scope of the pre-judicial interpretation procedure.

The establishment thereof, whose principal purpose consists of serving as a means of collaboration between the Court and national courts, has served as a basis for what may be considered the "Andean community jurisdiction constituted by the Court of the Agreement of Cartagena, as well as by national courts, to which the Andean arrangements assign competence to hand down decisions on issues related to this law." 40 According to the Court, "national judges "are the common, natural or common law justices for the application of Andean community law, and that this Court "only has exceptional, specific powers or merely attributed

38 Case N°. I-INCUM-87 (19 October 1987).

39 Article 30 of the Treaty setting up the Court.

40 Case N°. 1-IP-87 (3 December 1987).

competence to interpret integration law by the pre-judicial method, in order to seek indispensable uniformity in the interpretation and application of community law". 41

39. With regard to the elements of the procedure within domestic jurisdiction of the process of applying for an interpretation through pre-judicial means, the Court has stated:

"... by its very nature, pre-judicial consultation is equivalent to an application submitted by a national court to the community court for its cooperation, which is indispensable for the correct application of the norms of integration law, and which can and should be officially submitted, quite logically. But if it is one of the parties to the case that requests the national court judge to forward this consultation, which it has full right to do at any point in the process, under no circumstances whatsoever may this application be submitted to a procedural measure that is not compatible with its nature and purpose ... it would be illogical and lack all juridical basis to apply to such an application the procedural norms regulating the probatory regime, stressing the pre-emptive and precise timing of the terms for decreeing and practicing proof. In contrast, pre-judicial consultation is a pre-requisite for handing down a sentence that may be complied with at any time and cannot in any case be compared to a proof ... the application for pre-judicial application and the request from a party that the national judge should proceed therewith may be made at any stage and level of the case, as what comes under question is an issue of mere law such as the interpretation of the norms of the juridical arrangements of the Agreement of Cartagena. 42

With regard to the effect and scope of a decision handed down as a consequence of a pre-judicial interpretation procedure, the Court has corroborated and outlined the pertinent norms in its constitutive Treaty, in the following terms:

"... the interpretative decision is mandatory for the national judge, who cannot ignore the criteria laid down by this community court in terms of what should be the correct understanding of the norms of integration law".

"... the interpretation established in its decision by the community court rules only on the case put forward for consultation, and as such does not exempt the national judge from the obligation to consult for similar or analogous cases. 43

Finally, with regard to the restrictions imposed on the Court limiting the interpretation of the norms of the juridical arrangements of the Agreement of Cartagena, and not the domestic law norms of the Member States nor the material facts in a case brought before the national courts, the jurisdictional organ has indicated that its function, in this type of procedure, is "solely to interpret community law from the juridical viewpoint". In other words, the Court "is competent only to interpret community norms, without handing down decisions on the facts, and abstaining from interpreting national or domestic law, in order not to intervene in this task, which is the exclusive competence of the national judge."44

41 Case N°. 4-IP-89 (3 May 1990).

42 Case N°. 1-IP-87 (3 December 1987).

43 Case N°. 1-IP-87 (3 December 1987).

44 Case N°. 1-IP-87 (3 December 1987).

40. The various decisions handed down by the Court in pre-judicial interpretation procedures have also served for this organ to manifest its preferences regarding methods of interpretation which, according to the nature and characteristics of the juridical arrangements of the Agreement of Cartagena, would be most appropriate thereto.

First, it has stated its criteria for interpretation of community norms. "This interpretation" the Court has stated, "should be taken to indicate the search for the meaning of a norm in order to stipulate its scope and juridical meaning, a task that is clearly distinct from that of applying the norm to the facts, which is set aside for the national judge." 45

Second, it has made its preference quite clear for functional methods of interpretation, particularly **systematic** and **teleological interpretation** methods. In this regard, it has underlined that:

"With regard to the methods of interpretation that should be used by the Court, the essential characteristics and reality of the new Integration Law should be recalled... This corresponds to giving preference to the methods of interpretation known as **functional**, such as systematic methods and teleological interpretation. The teleological method, which takes on a special connotation in community law as the norm of a process of joint efforts to achieve a common objective, is the most closely adapted to the actual nature of a pre-judicial decision as it takes into account the purpose and end of the norm, meaning in the final analysis the integration process of the Andean Sub-Region, which is the purpose behind the signature of the Agreement of Cartagena". 46

VII. Juridical effects of Court decisions

41. The decisions handed down by the Court are fully binding "as from the day after the reading thereof in a hearing", in accordance with provisions of Article 58 of its Charter. Compliance therewith thus does not "require ratification or *exequatur*" in the Member States. 47

The concrete juridical effects of the decisions differ, depending on whether they are the outcome of a case of annulment, a case of non-compliance or a process requesting interpretation by pre-judicial means.

42. A sentence handed down as the outcome of a case for annulment has a direct effect on the agency of the Agreement of Cartagena whose act has been annulled. Consequently, this agency is obliged to "adopt the provisions required thereof to guarantee effective compliance" therewith. 48

In turn, a sentence handed down based on a suit for non-compliance addresses a defendant State that has "fallen into non-compliance with the obligations arising from the norms that constitute" the juridical arrangements of the Agreement. Should this decision "confirm non-compliance", such State shall "be obliged to adopt the necessary measures" to ensure the

45 Case N°. 1-IP-87 (3 December 1987).

46 Case N°. 1-IP-87 (3 December 1987).

47 Article 32 of the Treaty setting up the Court.

48 According to the above-mentioned Article 22, "when the Court declares the total or partial annulment of the Decision or Resolution challenged, it shall also indicate the effects of this decision in terms of time."

execution thereof. 49 More precisely, the Charter of the Court states that in a sentence of non-compliance this agency shall "stipulate the measures that the corresponding Member State should adopt for the implementation thereof." 50

Finally, a sentence adopted by means of a process of application for interpretation by pre-judicial means is addressed to the Court or judge who requested it. Under these circumstances, as indicated, a judge who requested this interpretation is obliged to adopt it.

43. Only in the case of a decision handed down in a process of request for interpretation by pre-judicial means is the precise scope of the obligation arising therefrom stipulated, for the national judge who submitted this request.

With regard to the effect of the sentences handed down as a consequence of cases of annulment and non-compliance, the pertinent provisions refer simply to the obligation of the agency of the Agreement or the respective State to "adopt the measures required to guarantee effective compliance with the sentence", or "to adopt the measures necessary to implement the sentence".

Although these rules leave it to the discretion of the Agency of the Agreement or the State that is the recipient of the sentences of annulment or non-compliance, it is also clear that both are nevertheless obliged to implement a specific type of behavior.

44. It is thus feasible to interpret that in cases of annulment of a decision of the Commission or a Resolution of the Board, these agencies may select one of the following two paths: 1) Repeal or modify the act challenged and declared null, with general effect, or 2) Declare through another pertinent act the non-applicability of the decision or resolution challenged and declared null to a concrete or individual case. This latter option may be appropriate when it involves a case of annulment brought by a private individual. In contrast, the latter may be appropriate when this involves a case of annulment brought by a State or the Board, against the acts of the Commission, or by the latter against the acts of the former.

Another interpretation is that in the case of a sentence handed down as the outcome of a case of non-compliance, the defendant State is called upon to rectify its conduct including through the repeal of the measure declared counter to the juridical arrangements of the Agreement, or the declaration of the inapplicability thereof. However, this latter action prompts some doubts about the case of annulment, as it is reserved solely for Member States and the Board, meaning it may be understood as being a resource whose effects would necessarily be of a general order.

VIII. Review, amendment, expansion and clarification of Court decisions

45. The norms contained in both the Treaty setting up the Court as well as its Charter, make it quite clear that the decisions handed down thereby are not subject to appeal before any other institutional court. This Court is conceived as a Court of single and final instance.

This is why the powers conferred by other norms of both the Treaty as well as the Charter of the Court, on the Board, the Commission or a Member State to request a "review or revision", "amendment", "expansion", or "clarification" of a sentence or decision, give rise to cases that are heard only by the Court itself.

49 Article 24 of the Treaty setting up the Court.

50 Article 56 of the Charter of the Court.

46. A request for or the actual process of revision or review is applicable only to decisions handed down in a case of non-compliance. In this respect, Article 36 of the Treaty setting up the Court stipulates that "decisions handed down in cases of non-compliance are subject to review by the Court, at the petition of the party involved." This review should be founded solely on "some fact that may have had a decisive effect on the outcome of the case" and shall be well-founded "whenever this fact shall have been unknown on the date of the issue of the decision by whomsoever requests the review thereof." 51

47. Applications for "amendments", "expansion", and "clarification" are in contrast well-founded, in accordance with the terms of the Charter of the Court, for any decision.

Article 59 of this instrument stipulates that "the Court at its own initiative or when petitioned by a party" may amend or expand its decision. A possible amendment thereto is only possible "if the decision contains manifest errors in the wording, or calculation, or obvious inaccuracies, or if it pronounces a topic not covered in the case." in turn, expansion will only be well-founded "when it is not the outcome of any of the points under discussion".

A request for "clarification", in keeping with Article 60 of the Charter of the Court. may be submitted by a Member State, the Commission or the Board, depending on the case. Clarification shall be limited to "points in the decision which are ambiguous, in its opinion." 52

48. Appeals or processes of revision, review, amendment, expansion and clarification of a decision handed down by the Court may not be interpreted as undermining the mandatory nature thereof, nor as hampering their implementation, in the terms stipulated by Article 32 of the Treaty setting up the Court and Article 58 of the its Charter.

Similarly, they may not be interpreted as measures running counter to the rule whereby the decision of the Court is an act handed down in a sole, final instance.

49. With regard to any attempt to appeal for the "reconsideration" of a measure required by the Court, when handing down its decision this organ stipulated the scope of the norms mentioned therein.

On turning down such an appeal, it emphasized that Article 26 of its constitutive Treaty and Articles 65 and 68 of its Charter "only recognize an application for review of decisions handed down in cases of non-compliance when the respective decision is founded on some fact that, having had a decisive influence on the outcome of the case, was unknown on the date of issue of the decision to whomsoever applied for the review thereof". At the same time, it stresses that "a request for reconsideration is also not covered under the presuppositions of amendment, revision, review and clarification of decisions as covered in Articles 59 and 60 of the Charter". 53

In another decision, the Court outlined the exact scope of its decisions in the following terms:

51 Similarly, Article 67 of the Charter of the Court establishes that "only sentences handed down in cases of non-compliance are subject to review."

52 Article 60 of the Charter of the Court.

53 Case N°. 1-84 (22 May 1984).

"An act with the force of a definitive decision may not be revoked nor modified by the Court because neither the Treaty under which it was set up nor the Charter thereof make provision for this procedural possibility".⁵⁴

⁵⁴ Case N°. 5-84 (28 September 1984).

XI. Organization of the Court

50. The Court consists of "five magistrates", appointed by plenipotentiary representatives of the Member States of the Agreement of Cartagena specially accredited for this purpose. 55 These appointments shall be agreed upon "unanimously".

The magistrates thus appointed shall hold office for six years, at the end of which period they may be reelected once only.

Candidates for appointment as magistrates to the Court should be citizens of the Member States of the Agreement, and "enjoy a high moral reputation and comply with the conditions stipulated in their home countries for the exercise of the highest legal functions, or be legal experts of well-known competence." 56

51. In compliance with the norms that explicitly stipulate the concept of the Court as an independent agency, its constitutive Treaty states that "the magistrates shall enjoy full independence in the exercise of their functions". 57 At the same time, it obliges the Governments of the Member States to grant them "all the facilities necessary for full compliance with their functions", including the benefit of the "immunities acknowledged by international custom, and in particular by the Convention of Vienna on diplomatic relations, with regard to the inviolability of its records and official correspondence, as well as in all matters regarding civil and criminal jurisdictions." 58

52. At the request of the Government of a Member State, one or more magistrates of the Court may be removed from office, "only when they have committed a serious fault in the exercise of their functions, covered in the Charter of the Court and in compliance with the procedure established therein." This removal process shall be implemented at a special meeting of the plenipotentiary representatives of the Member States appointed for this purpose, whose decision shall be adopted "unanimously". 59

53. As shown, the magistrates of this Court receive their mandate directly from the Governments of the Member States. In counterpart, they are also directly responsible thereto. The other agencies of the Agreement play no part in their appointment or removal.

The norms regulating the election procedures or appointment of the magistrates, as well as the procedure for the removal thereof from office, constitute another of the means designed to guarantee the independence of the Court from both the Member States as well as the other agencies of the Agreement.

X. Possible reforms of the treaty setting up the Court

54. Experience acquired through the functioning of the Court has fostered an awareness of the convenience of introducing amendments into the Treaty setting it up. Some of the most important initiatives in this regard have arisen within the Court itself.

55 Articles 7 and 8 of the Treaty setting up the Court.

56 Article 7 of the Treaty setting up the Court.

57 Article 7 of the Treaty setting up the Court.

58 Article 13 of the Treaty setting up the Court.

59 Article 11 of the Treaty setting up the Court.

During the VII Meeting of the Andean Presidential Council held in Quito on 5 September 1995, an agreement was reached to implement such amendments. In the Minutes of Quito, adopted at this meeting, the Heads of State of Bolivia, Colombia, Ecuador, Peru and Venezuela expressed their agreement on the need to "strengthen" the Court. To do so, they commissioned the Council of Ministers of Foreign Relations to summon a Meeting of Plenipotentiaries in order to consider a Draft Protocol Modifying the Treaty setting up the Court. 60

55. In 1990, having gathered together the ideas that had arisen on possible modifications of the jurisdictional system for the settlement of disputes, control of legality and uniform interpretation of the common law of the Agreement of Cartagena, a former Court Justice summarized the possible options in view, in the following terms: 1) Suppress the Court "in order to return to the classic systems for controlling disputes which use international public law, or maintain the special system covered in Article 23 of the Agreement of Cartagena";⁶¹ 2) keep the court "as a court of final appeal, in the event that direct agreements or mediation by the Commission should fail; 3) keep the court with the sphere of competence granted thereto by the Treaty setting up the Court, but "not as an agency that functions continuously, but rather on an occasional or sporadic basis, having recourse thereto when disputes arise, and 4) keep the Court as it is, "strengthening it with fresh spheres of competence".⁶²

Having exchanged viewpoints on various occasions, with the participation of both court Justices as well as Government functionaries of the Member States of the Agreement, together with independent specialists, it seems that the last option among these solutions has been selected. This decision was brought before the VII Meeting of the Andean Presidential Council, announcing the decision to maintain the Court as a permanent organ and to also strengthen it.

This intention was demonstrated more clearly in the Draft Protocol Modifying the Treaty setting up the Court, prepared during the course of several meetings held over the past three years between Government representatives of the Member States of the Agreement.⁶³

56. The most substantial amendments proposed in this Draft refer to the sphere of competence of the Court and the capacity of private parties, both individual and corporate, to bring applications for procedures relative to non-compliance before the Board of the Agreement of Cartagena.

With regard to the former, the Draft proposes that the court be assigned the following new sphere of competence:

- 1) Hear and hand down decisions on appeals for "omission or inactivity" brought against the Commission or the Board of the Agreement,

60 Minutes of Quito, signed at the end of the VII Andean Presidential Council Meeting held in Quito on 5 September 1995.

61 Refers to Article 23 of the Agreement of Cartagena, prior to the entry into effect of the reforms introduced by the Protocol of Quito, signed on 1 May 1987. The non-amended wording of the above-mentioned Article 23 stipulates that "the Commission shall be responsible for undertaking procedures, good offices, mediation and conciliation as required when discrepancies arise due to the interpretation or execution of this Agreement or the Decisions of the Commission."

62 SÁCHICA, Luis Carlos. *Derecho Comunitario Andino*. 2. ed. Bogota: Temis, 1990.

63 Treaty setting up the Court of the Agreement of Cartagena (Draft Modificatory Protocol suggested by the Meeting of Plenipotentiaries. Document prepared by the Ministry of Foreign Affairs and Culture, Bolivia).

- 2) To act as an arbitration court under "a compromise clause or arbitration clause contained in a contract, or agreement drawn up under public or private law and signed by any of the principle organs of the Agreement of Cartagena", and in virtue of and "arbitration commitment", "arbitration clause" or "compromisory act" agreed by private persons with regard to contracts signed thereby, and
- 3) To hear and hand down decisions on "labor and administrative cases involving functionaries and employees of the principal organs of the Agreement of Cartagena."⁶⁴

57. With regard to the capacity of private individuals to bring possible future suit for non-compliance, the Draft proposes the inclusion of the following new article in the Treaty setting up the Court:⁶⁵

"Individual persons or corporate legal entities adversely affected in their rights through the non-compliance of a Member State may have recourse to the Board and the court, subject to the procedures covered in Article 24."⁶⁶

The case brought in compliance with the provisions of the above paragraph excludes the possibility of having resource simultaneously to the means covered in Article 27, for the same case."⁶⁷

Approval of this amendment would imply granting private persons - both individuals and corporate legal entities - the right to have recourse to the Board of the Agreement in order to bring suit for non-compliance by the Member States, regarding the norms in the juridical arrangements of the Agreement of Cartagena, and thus to bring into action procedures which could eventually lead to a case of non-compliance brought before the Court. However, in contrast to what takes place with the law of the Member States in terms of bringing this suit directly, should the Board not hand down its decision within the period stipulated or should this decision not be one of non-compliance, the proposed amendment does not grant a similar right to private persons. It should be understood that, as the outcome of actions undertaken thereby, only the Board would be empowered to bring a case of non-compliance.

58. Other proposed modifications refer to various aspects of cases of annulment and non-compliance.

With regard to the norms that regulate the cases of annulment, one of the draft amendments opens up the possibility of invoking the hypothetical illegality before national courts of a Decision

64 Sections Four, Five and Six of the Draft Modificatory Protocol.

65 Article 24 bis of the Draft Modificatory Protocol.

66 Article 24 stipulates that "when a Member States considers that another Member State has failed to comply with the obligations arising from the norms constitute the juridical arrangements of the Agreement of Cartagena, it may bring its complaint before the Board, together with the background to the case, in order to for this body to hand down a motivated decision." It also stipulates that "if the decision should be one of non-compliance and the Defendant Member State persists in the conduct that prompted the complaint, the Board may request a decision from the Court." Should the Board not hand down its decision "within three months after the date of presentation of the complaint", or should "the decision confirm non-compliance", the Plaintiff nation "may have direct recourse to the Court".

67 According to the provisions of Article 27, private persons "shall have the right of recourse to the competent national Courts" when the "Member States fail to comply with the provisions of Article 5" of the Treaty setting up the Court.

of the Commission or a Resolution of the Board when not challenged within the deadlines stipulated by Article 20 of the Treaty setting up the Court.⁶⁸

According to this draft amendment, although the deadline may have expired, "any of the parties in a case brought before the national judges or courts in which a Decision of a Commission or a Resolution of the board is brought under question, may claim the motives covered in Article 17 to request the above-mentioned judicial functionaries to state the inapplicability thereof in the specific case."⁶⁹ Should an application to this end be submitted, the respective national court or judge should consult the Court of the Agreement and suspend the case until it receives a measure handed down thereby, which would be one of "mandatory application" or the decision to be handed down by the national court or judge.⁷⁰

Should this amendment be adopted, it would establish an original procedure designed to declare inapplicability for a specific case of a Decision of the Commission or a Resolution of the Board, by a national court or judge, and in collaboration with the Court of the Agreement, despite the fact that the situation for a challenge thereof through a case of annulment has not been brought within the deadline set by the above-mentioned Article 20 of the Treaty setting up the Court. This procedure would have a certain similarity with the pre-judicial interpretation procedure, particularly with regard to the juridical effects of the "measure" issued by the Court as a consequence of the consultation forwarded thereto by a national court or judge.

59. Another draft amendment on the provisions covering a case of annulment proposes the incorporation of an additional norm to the contents of the current Article 21 of the Treaty setting up the Court, whereby the "bringing of a case of annulment shall not adversely affect the effectiveness or validity of the norm challenged".

This proposed addition states that, notwithstanding this provision, "at the request of the plaintiff, the Court may and with prior guarantees if considered necessary, order the provisional suspension of the execution of the Decision or Resolution put up for annulment, should it cause or might cause irreparable damages or losses to the plaintiff, or where reparation thereof would be difficult."⁷¹

As a case of annulment may also be brought by private persons, both individual and corporate, the possibility of the "provisional suspension of execution" of a challenged act will also be applicable to claims brought thereby.

60. The proposed amendments on the norms that regulate cases of non-compliance refer on the one hand to the possible intervention of the Board of the Agreement - as a "friend of the court" - prior to bringing a case of non-compliance before the Court, and on the other hand to the duties of that organ for carrying out the respective procedures.

In the first case, the draft amendments refers to Article 24 of the Treaty setting up the Court. It proposed the incorporation of a paragraph whose effects will be to modify the procedure

68 Article 20 of the Treaty setting up the Court stipulates that a case of annulment should be brought "within the year following the date of the entry into effect of the Decision of the Commission or the Resolution of the Board" whose validity is challenged.

69 Article 17 of the Treaty setting up the Court stipulates that a case of annulment is valid against Decisions of the Commission and the Resolutions of the Board "handed down in violation of the norms that constitute the juridical arrangements of the Agreement of Cartagena, including misuse of power".

70 Article 20, Paragraph 2, Draft Modificatory Protocol.

71 Article 21, Paragraph 2, Draft Modificatory Protocol.

before the Board brought by a Member State for non-compliance by another Member State. This paragraph stipulates that the Plaintiff State "shall bring the case before the Board with the respective background thereto, in order that it may bring its good offices to bear on the Parties, in order to reach an solution or amendment, as the case may be." Should no satisfactory result be achieved by these means, this same country "may submit its complaint to the Board for the issue thereby of a reasoned decision", prior to bringing a case of non-compliance before the Court.⁷²

This modification would imply that, in the first instance, the complaint brought by a Member State would have the effect of triggering a procedure involving "good offices" brought into play by the Board of the Agreement. Only if this should not produce satisfactory results shall this same State be permitted to submit to the same Board a "complaint" which shall prompt the handing down of a decision, and should this prove the case, the start of a case of non-compliance brought before the Court, by the Board or the Member State interested therein.

61. Finally, another amendment covering the provisions regarding cases of non-compliance is designed to strengthen the duty of the Board to bring the respective case before the Court, should its decision be one of non-compliance. According to Article 23 of the Treaty setting up the Court, in this case, the Board "may request the decision of the Court." The amendment suggests replacing the word "may" by the word "should".⁷³

62. As is clear, should the proposed amendments be adopted, this will to a large extent comply with the suggestion of "strengthening" the court, as stipulated in the Minutes of the VII Meeting of the Andean Presidential Council.

Of particular significance in these possible new norms is the new "appeal for omission or inactivity". This appeal would be well-founded should the Commission of Board "abstain from complying with an action which they are obliged to implement". The corresponding case may be brought before the Court by the "principal organs" of the Agreement and the Member States thereof, as well as by private individuals.⁷⁴

No less important are the norms under which private persons would be empowered with the right to bring complaints before the Board of the Agreement for non-compliance by any of the Member States, thus opening up the possibility of developing the respective procedure that could culminate in bringing a case before the Court. Without acknowledging a genuine *locus standi* in favor of private persons, these new norms would incorporate a legal right that is of singular importance for the protection of the interests thereof.

XI. General comments and conclusions

63. The jurisdictional system for the settlement of disputes, control of legality and uniform interpretation of the law adopted within the process of economic integration under the Agreement of Cartagena, may be interpreted as an indication of the validity of the hypothesis of the interrelationship between the nature and scope of an integration scheme and its corresponding

⁷² Article 24, Draft Modificatory Protocol.

⁷³ Article 21, Paragraph 2, Draft Modificatory Protocol.

⁷⁴ The norm covering this recourse proposed for inclusion in the Treaty setting up the Court states in its final section that "should the Court declare that the abstention or negative is in violation of the juridical arrangements of the Agreement of Cartagena, it shall rule that the defendant organ must comply with the action within the period set for the purpose thereof".

institutional structure, including the means for monitoring the application of norms under law that regulate it.

Several experts in economic integration law see a close link between the scope and depth of the objective or stage of integration postulated within a scheme, and the institutional structure - particularly from the viewpoint of the spheres of competence and powers conferred on the agencies thereof - established for handling or administering it. Similarly, they stress the relationship between the complexity and above all the binding effects of the norms under law that arise as a consequence of the development of a process of this type, and the need to establish finer-tuned measures for monitoring the application of such norms and compliance therewith.

64. These certainly include the links between the quality of the commitments assumed by the Member States within a specific economic integration scheme on the one hand, and the institutional structure thereof as well as the measures for the settlement of disputes on the other.

Nevertheless, the nature and characteristics of the methods for the settlement of disputes seem to have a more direct relationship with the quality of the normative powers conferred on certain agencies - whether intergovernmental or independent - of the corresponding institutional structure, as well as the effect under the aegis of the domestic law of the States of acts arising from the exercise of such powers.

Thus, for example, in accordance with the respective constitutive treaties, both the Council of the European Union as well as the Commission of the Agreement of Cartagena, as legislative agencies, have sufficient power to issue norms under law that can directly affect and even modify the domestic legislations of the Member States. At the same time, within the respective common policies - such as trade policy - they have the power to replace the spheres of competence and powers of the States. Additionally, in certain cases, they are empowered to hand down norms under law even when faced with the opposition of a Member State.

At the same time, the Commission, in the case of the European Union, and the Board, in the case of the Agreement of Cartagena, as independent executive agencies, have the power to adopt norms under law, particularly of an individualized nature, that are binding on the Member States of the organizations and even on other subjects under law.

These factors serve as the basis for the decision to adopt, within these integration systems, jurisdictional procedures regarding control of legality, assigned to permanent, independent Courts.

65. Of no less importance in the adoption of measures, also jurisdictional and designed to exercise control over the acts of the State, particularly the obligations and commitments acquired thereby, is an awareness that the complexity and above all the depth of the objectives of these integration schemes, demand an appropriate balance in terms of the effectiveness of the process of normative development. It is assumed that this effectiveness parallels the need for a solid juridical security for the various subjects covered by the emerging norms of such processes.

In the view of many analysts, this security would be effectively guaranteed only if surveillance of the acts of the States is assigned to an independent jurisdictional agency.

66. Finally, the need to guarantee the coherence and uniform application of law designed to foster the development of these integration schemes, leads to the postulation of the convenience of a valid, mandatory interpretation of the norms of the corresponding juridical arrangements, which is

also assigned to a single agency, whose authority overrides the authority of the agencies within the domestic order of the States.

This need becomes still more patent due to the broad scope of the material and personal validity of such norms and, above all, to their direct and immediate effect on domestic juridical arrangements, giving rise not only to the possibility but to the necessity that they should be applied in an individualized manner by various jurisdictional agencies.

This postulate gives rise to the establishment of procedures for interpretation by the pre-judicial means, which is also the responsibility of an independent jurisdictional agency.

67. Overall, a process targeting the achievement of stages of advanced economic integration, such as a customs union, a common market or an economic community, gives rise to a true new self-sufficient law community from the viewpoint of its formal sources. This consequently prompts the need to contain, within its own sphere of action, all measures and institutional procedures guaranteeing a well-ordered process of creating norms as well as an appropriate and coherent process of interpretation and application thereof.

ANNEX I

SELECTION OF QUOTES TAKEN FROM THE JURISPRUDENCE OF THE COURT OF THE AGREEMENT OF CARTAGENA 1

I. CASE OF NON-COMPLIANCE

Case No. 5-84

(13 June 1984)

"...the case arising therefrom is not a case of non-compliance as regulated in Section II of Chapter II of the Treaty, whose purpose is to judge the conduct of the Member States regarding compliance with community obligations, a case that may only be brought by the Member States and the Board, but not by private individuals, who should, if feeling that their rights and interests are being adversely affected by the non-compliance of a Member States, have recourse to the competence of the national courts, in compliance with the provisions of domestic law, and require compliance thereby with the pertinent precepts of the juridical arrangements of the court of the Agreement of Cartagena.

... this Court is not competent to hear cases of non-compliance between private individuals, which cases should be submitted to the national courts, in compliance with the provisions of Article 27 of the Treaty setting up the Court".

Case No. 1-INCUMP-87

(19 October 1987)

"Apart from these cases, which are clearly attributed to the competence of the Court, this same Treaty establishes in Article 27 thereof that **individual persons or corporate legal entities shall have the right of recourse to the competent national courts, in compliance with the provisions of domestic law, when the Member States fail to comply with the**

¹ The complete text of the decisions handed down by this Court may be consulted at BID/INTAL/TJAC. Jurisprudence of the Law Court of the Agreement of Cartagena. Buenos Aires, 1994.

provisions of Article 5 of the Treaty, in cases where their rights may be adversely affected by such non-compliance".

"An examination of the precepts mentioned above leads to the conclusion that in terms of non-compliance with the obligations arising from the norms that constitute the juridical arrangements of the Agreement of Cartagena, the competence of this Court exists only in the cases of Article 23 and 24 of its constitutive Treaty, meaning at the request of the Board, or a Signatory State of the Agreement of Cartagena, and not at the request of individual persons or corporate legal entities, which should submit their complaints to the competent national courts, as stipulated quite clearly in the above-mentioned Article 27 of the Treaty".

II. CASE OF ANNULMENT

Case No. 1-N-85
(10 October 1985)

"This competence empowers the Court to examine the Decisions of the Commission and the Resolutions of the Board in order to establish if they are formally and substantially in keeping with the juridical arrangements of the Agreement as mentioned above, and consequently to resolve, on the basis of the statements and proofs put forward by each side, whether they are totally or partially valid, and in this latter case to regulate the effects of this annulment over time".

"...Competence is the first aspect that should be analyzed when attempting to establish the legality of a juridical act as lack of competence - through either excess or shortage thereof - flaws the activity in question as illegal".

Case No. 1-N-92
(28 May 1992)

"This is thus not a true **public case** in defense of legality, that maybe brought by any citizen, similar to what occurs in many countries with regard to constitutional controls. To the contrary, in this case it involves a suit which, although its final purpose is " the defense or protection of law" (*nomofilaquia* in the words of Calamandrei), it may only be brought by the Member States, the Commission and the Board of the Agreement, as well as private individuals; but in relation to these latter, only when they are shown to be accredited to act through compliance with the pre-requisites indicated in the above-mentioned Article 19".²

"The system adopted here by the Andean legislator is thus similar to the extraordinary appeal as regulated in some countries of the sub-region. Although the principal purpose of this appeal is the public interest consisting of the defense of objective law, it also furthers private or particular interests: consequently, proof of this is *sine qua non* for proceeding with the appeal, similar to that which occurs with a case of annulment brought by private parties under the Andean arrangements".

"When private parties bring a case of annulment decided in their favor by Andean law, the need then arises that, first of all, they should merely show that they have **interest to act**, which must logically depend on their *legitimatío ad causam*".

² Article 19 of the Treaty setting up the Court.

"There must be a substantial concrete interest whereby there should be a special case "with regard to a specific material relation" which arose from the norm in question. It is also said that this interest should be current, whereby simple expectations or possible future rights or losses that may come into existence should some unknown fact take place, do not grant or constitute genuine current interests, as they are not objectively ruled by the norm in question".

"... the regulatory norm contained in Article 37-c) of the By-law 3 establishes in an imperative and categorical form that the corresponding suit should **necessarily attach proof** that the norm is applicable thereto and would cause damage and loss to the individual or corporation bringing the case".

"...There is no doubt that an individual or corporation bringing a case of annulment falls under the pre-emptive obligation to demonstrate its juridical interest therein, on which will depend its legitimacy to bring suit, attaching to its case proof that the norm considered null 'is applicable thereto and causes damage or loss'".

"... the concrete, actual and *de facto* **applicability** undoubtedly covered by Article 19 of Treaty setting up the Court, should not be confused with its possible future, uncertain or hypothetical application".

"In addition to the actual **applicability** of the norm, the individual or corporation intending to bring a case of annulment is required by Article 19 of the Treaty setting up the Court to show that such case is subsequent **to loss or damage**. This must consequently reflect the direct, specific effects of the application of the norm, and not general, undetermined loss or damage, no matter how important it may be".

III. SAFEGUARD CLAUSES

Case No. 1-N-86
(10 June 1987)

"... the case under examination should be resolved within the normative regulations in effect of the juridical arrangements of the Agreement of Cartagena, which regulates the relationships between the members thereof and the entire integration process of the Andean Pact, which is a manifestation of the joint, shared sovereignty of the Member States, which cannot be ignored nor altered by any of them, far less by their governing bodies".

"It should thus be borne very much in mind that these clauses 4 constitute an extreme remedy that may only be permitted on an exceptional basis as a necessary, although transitory protection for nations committed to the integration process, when faced with serious, unforeseen upheavals. As the circumstances cannot be foreseen, they would presumably lead to an unsustainable situation for the nation affected, with the logical consequence of forced, inevitable non-compliance with the liberation program, or even a clear-cut break with the Agreement itself, which would without doubt seriously affect the integration process that the regulated and controlled use of safeguards is designed to avoid, particularly the greater evil. This means that the above-mentioned clauses protect both private interests and the country affected, as well as the community interests of the larger market, in an apparent paradox".

3 By-laws of the Court.

4 Safeguard Clauses.

"If it is desired that the integration process be realistic and objective, the general principles of public law cannot be forgotten, authorizing each State in case of emergency, to take the necessary measures to handle serious upheavals. However, these exceptional situations should not be allowed to block the integration process, or to interrupt or delay it more than absolutely necessary. The proper conciliation of these interests, meaning those of the country affected and those of integration, should thus constitute the basic criteria for the interpretation and application of the norms of the agreement".

"A first outcome of these general principles is the obvious result that, although the liberation process is automatic and irrevocable, the exceptional dissent that is authorized, to the apparent detriment of this case, cannot in any case be unilateral, automatic nor irrevocable. Much to the contrary, community law has established that the application of such exceptional measures shall always be temporary or transitory, and should comply rigidly with the procedures previously outlined in the pertinent exception laws that are imperative, straight and by definition exclude *ex officio*, unilateral or purely potestative actions that are juridically subject to a restrictive interpretation, as exceptional norms".

"These quotations highlight the imperative need for powers of control over these exceptional, transitory situations authorized by the safeguard clauses, as the lesser evil. This control should naturally be exercised in a manner that constantly seeks to preserve a delicate balance between the common or actual interest of the sub-region as such, and the rights granted by the Agreement to the affected country to protect its economy".

IV. SPHERES OF COMPETENCE OF THE COURT

Case No. 1-84
(8 February 1984)

"As mentioned, the powers of the Court are limited to declaring the nullity of the illegal acts of the Commission or Board, and declaring non-compliance by Member States that participated in the juridical arrangements of the Agreement of Cartagena, and interpreting Andean community law".

V. COMPLIANCE WITH COMMUNITY LAW NORMS

Case No. 5-IP-89
(15 October 1989)

"... in terms of its Article 55 , it has a double obligation. The first is of a positive nature, "to do"; and the second of a negative nature, "not to do". Under the former, the Member States must adopt all types of measures, whether legislative, judicial, executive, administrative or of any other type, called rules, procedures, pre-requisites, decisions, resolutions, agreements, sentences, or other measures that guarantee compliance with the Andean set of norms, meaning the obligations and commitments undertaken by means of the Treaties, as well as those that correspond to the mandate of the secondary norms or those arising from these same arrangements. Should the scope and value of the principles of direct pre-eminent application of community laws be quite clear, the obligation of each country shall also extend to the express derogation of the norms in its domestic juridical arrangements. On the other hand, under the

5 Article 5 of the Treaty setting up the Court.

second obligation, Member States must abstain from any measure that, under whatever name or form adopted, may block the application of the Andean juridical order, an abstention that is imperative and inherent in compliance with the provisions agreed upon, as a basic support for the development of the integration process. Under the second part of the commitment, the Member States may not approve laws, implement regulations, or issue administrative norms that, although not openly contrary to the above-mentioned arrangements, in practice block the application thereof".

"The obligation covered by Article 5 is being interpreted based on the "purpose and end" of the Agreement of Cartagena, this being the "integration" to which the Andean nations are committed and whose objectives are outlined in Article 1 of the Agreement of Cartagena".

"Article 5 of the Treaty that set up this Court obliges the Member States to adopt norms or measures of any type to guarantee compliance of the juridical arrangements of the Agreement of Cartagena, abstaining from implementing or approving any measure or norm under domestic law that is in contradiction to Andean law, because this prevails over domestic law, due to the principles of direct applicability and primacy inherent therein. As a consequence, when some precept in domestic legislation contradicts the juridical arrangements of integration, the Member States should give precedence to application of the Andean norm".

VI. PRE-JUDICIAL INTERPRETATION

Case No. 1-IP-87
(3 December 1987)

"A system of dividing up the work and harmonious cooperation has been established among the national justices commissioned to hand down decisions or apply the norms of integration, which competence is attributed thereto by community law, and thence domestic law, to the facts presented in the corresponding cases, and the Andean judicial organ which is privately responsible for interpreting community norms, without handing down decisions on the facts, and abstaining from interpreting national or domestic law (Article 30 of the Treaty), in order to avoid interfering in a task which falls under the sole competence of national courts. In other terms, Andean community jurisdiction consists of the Court of Justice of the Agreement of Cartagena and the national courts to which the Andean Arrangements attribute competence for handing down decisions on topics related to this law."

"Should pre-judicial consultation prove obligatory, in accordance with Article 29 of the Treaty, the national court should suspend the procedure at the sentence stage, as it cannot decide on the case as it has not received the authorized interpretation of the community norms".

"... by its very nature, pre-judicial consultation is equivalent to an application submitted by a national court to the community court for its cooperation, which is indispensable for the correct application of the norms of integration law, and which can and should be officially submitted, quite logically. But if it is one of the parties to the case that requests the national court judge to forward this consultation, which it has full right to do at any point in the process, under no circumstances whatsoever may this application be submitted to a procedural measure that is not compatible with its nature and purpose... it would be illogical and lack all juridical basis to apply to such an application the procedural norms regulating the probatory regime, stressing the pre-emptive and precise timing of the terms for decreeing and practicing proof. In contrast, pre-judicial consultation is a pre-requisite for handing down a sentence that may be complied with at

any time and cannot in any case be compared to a proof... the application for pre-judicial interpretation and the request from a party that the national judge should proceed therewith may be made at any stage and level of the case, as what comes under question is an issue of mere law such as the interpretation of the norms of the juridical arrangements of the Agreement of Cartagena. Different from this is the solution in domestic legislation for a question of fact in which there is a procedural opportunity for the parties to promote or present them to the national judge".

"... this means that the interpretative decision is mandatory for the national judge, who cannot ignore the criteria laid down by this community court in terms of what should be the correct understanding of the norms of integration law".

"... the interpretation established in its decision by the community court rules only on the case put forward for consultation, and as such does not exempt the national judge from the obligation to consult for similar or analogous cases. However, it should be considered that the actual purpose of the pre-judicial consultation, of showing uniform application of the juridical arrangements of the Agreement of Cartagena in the Member Nations, is obviously completed by the purpose of forming a uniform jurisprudence or doctrine in the Sub-Region".

"The function of this Court, in the types of case covered, is consequently solely to interpret community norms from the juridical viewpoints. This interpretation should be taken to indicate the search for the meaning of a norm in order to stipulate its scope and juridical meaning, a task that is clearly distinct from that of applying the norm to the facts, which is set aside for the national judge as already indicated, within the corresponding spheres thereof".

"... should the community law under consultation have been adopted as a domestic norm in the Member State from which this consultation emanates, the community court does not lose its competence as a consequence thereof, as the norm continues to belong to the juridical arrangements of the Agreement, without being adversely affected by the fact that it is also a national norm."

"With regard to the methods of interpretation that should be used by the Court, the essential characteristics and reality of the new Integration Law should be recalled... This corresponds to giving preference to the methods of interpretation known as "functional" such as systematic methods and teleological interpretation. The teleological method, which takes on a special connotation in community law as the norms of a process of joint efforts to achieve a common objective, is the most closely adapted to the actual nature of a pre-judicial decision as it takes into account the purpose and end of the norm, meaning in the final analysis the integration process of the Andean Sub-Region, which is the purpose behind the signature of the Agreement of Cartagena".

Case No. 4-IP-89
(2 May 1990)

"In accordance with Article 31 of the Treaty setting it up, this Court may not 'interpret the content and scope of national law nor qualify the facts involved in the case'. Additionally, local judges should take into account that they are independent in the interpretation and application of domestic law as common, natural or common law justices in the application of Andean community law, and that this Court only has exceptional, specific powers or merely attributed

competence to interpret integration law by the pre-judicial method, in order to seek indispensable uniformity in the interpretation and application of community law".

"This *sui generis* competence additionally has an eminently practical purpose, as it already complies with a judicial interface or cooperation mechanism, inevitably affecting the decision that must be handed down by the national judge, but only when community law should be applied".

Case No. 3-IP-90
(25 September 1990)

"An application for pre-judicial interpretation, whether submitted officially or individually, may take place at any stage of the process, whenever there is a reason for such, which is the need to apply a community norm, and that the relevant circumstances of the case could define clearly and completely for the purposes of interpretation."

VII. PRE-EMINENCE OF COMMUNITY JURIDICAL ARRANGEMENTS

Case No. 1-INCUMP-87
(19 October 1987)

"... it is necessary to stress that the juridical arrangements of Andean Integration prevail in the application thereof over domestic or national norms, as an essential characteristic of Community Law as a basic pre-requisite for implementing integration."

Case No. 2-IP-88
(25 May 1988)

"With regard to the effect of integration norms or national norms, doctrine and jurisprudence indicate that in case of dispute the internal rule is displaced by community law, which is applicable preferentially, and whose competence in this case corresponds to the community. In other terms, the internal norm becomes non-applicable, to the benefit of the community norm".

"This displacement of the national norm, as a result of the principle of preferential application, is particularly clear when the latter law - which must take precedence over the former in accordance with universal legal principles - is in fact community law."

"This does not actually mean that the latter community law derogates the pre-existing national norm, similar to what occurs at the domestic law level, as they are distinct, autonomous and separate juridical arrangements which adopt, within their own spheres of competence, their own particular ways of creating and abrogating law, which are naturally not interchangeable. More accurately, this involves the direct effect of the principle of immediate application and of the primacy that must be in all cases be granted to community law, over domestic law. It may be said that the area is taken over through the displacement of the norms which formerly occupied it, and which should become non-applicable in so far as they are incompatible with the provisions of community law (*preemptium*). Nevertheless, domestic law may continue in effect although it may be non-applicable, remaining in a state of latency until the community law that displaced it is eventually modified and leaves the area free, should the national law become compatible therewith".

"The actual derogation of an internal norm as being contrary to community law may become indispensable for practical effects, in specific cases. But as this derogation must be decided

upon by domestic rather than community law, integration law in principle merely stipulates the preferential application thereof. Its immediate, direct effect would not be compatible with the condition whereby contrary national norms are expressly derogated by national legislators, as this would depend on national rather than community law".

"The entry into effect thereof thus automatically determines the non-applicability of domestic law contrary to the determination thereof, or which in some way undermines them, and in virtue of the primacy of community law. A possible clash of norms must consequently be resolved without hesitation or reticence in favor of integration law".

"... on occasions, these regulations permit and even demand a later legislative or administrative development by means of the provisions of domestic law. Additionally, Community Law may also require an adaptation of domestic law, in order to ensure the effectiveness thereof, and may even demand some form of adjustment or development at the national level."

"Decision 85, which contains the 'regulation for the application of norms over industrial property'... is a complete juridical regulation with regard to the topics covered thereby, issued by a supranational institution empowered to issue rules at the regional level, which should be applied preferentially over domestic law..." "It thus establishes a common uniform system... with its principal characteristics with regard to community arrangements constituting an autonomous coercive regulation with direct effects, which constitutes a single law for the entire Sub-Region, and which should be applied throughout in a homogeneous manner, thus prevailing in all cases over national law. This thus means that domestic norms prior or posterior to the entry into effect of Decision 85, and which in some way run counter to the common regime or are incompatible therewith, or which transgress, undermine, denaturalize or simply block the full application thereof, shall become non-applicable."

"... in order for pre-existing national legislation to co-exist with community law, with regard to the preferential application thereof to a topic covered thereby, it must rule on topics or issues not totally regulated by the community."

Case No. 2-IP-90
(20 September 1990)

"In topics whose regulations correspond to community law, in accordance with the fundamental or basic norms of integration arrangements, an automatic displacement of competence is produced, which is transferred from the national to the community legislators. The organized community thus invades or occupies the national legislative terrain, due to the issue in question, thus displacing domestic law. The national legislator is thus disqualified from modifying, substituting or derogating the common law in effect in its territory, even under the pretext of reproducing or regulating it, and national judges who are responsible for the application of community laws have the obligation to guarantee full effectiveness of the common norm".

"... this involves comparing essentially different and distinct juridical arrangements - National and Community - whereby this cannot be properly called a simple conflict of norms, as it in fact involves a conflict between different and distinct normative basis. Integration law does not derogate national laws, which are subject to domestic arrangements; it simply makes those that

run counter thereto non-applicable. It obviously does not prevent any norm incompatible with the common law being considered unconstitutional or invalid, within the internal arrangements..."

"... all integration processes are by their very nature gradual or progressive, and consequently the effect of the displacement of domestic law by community law normally takes place in stages, phased in and keeping step with the progress of common regulations."

VIII. TRADE LIBERALIZATION PROGRAM

Case No. 1-IP-90

(18 September 1990)

"The modifications introduced into Article 45 of the Agreement of Cartagena by the Protocol of Quito and codified by the Commission (Decision 236), which consisted of replacing the first item through introduction of the expression "... not including the exceptions and provisions established in this Agreement ...", and establishing that the deadline and modalities would be those indicated therein, as well as eliminating the final paragraph of the above-mentioned Article 45"⁶

"...in the Protocol of Quito, the following expression is introduced as a new normative element: "... not including the exception provisions established in this Agreement ...", referring to the scope of the Liberalization Program. This innovation, which to a certain extent is equivalent to an authentic or authoritative interpretation as it was introduced by the primary legislators into the integration process, which enjoys constitutive power, and is definitive for the settlement of this case..."

"The Liberalization Program in principle refers, as already mentioned, to the 'universality of products', which nevertheless does not mean that certain exceptions have not been granted since the beginning thereof. These exceptions were expanded under the Protocol of Quito, which excluded the 'exception provisions established in these Agreement.' Outstanding among the excluded cases, are those corresponding to the products included in the reserve and exceptions listing covered by Chapter V of the Agreement"

"...the exception scheme covered in the Liberalization Program... logically means that the Member States are not obliged to eliminate charges that affect the products covered by this exclusion regime, nor to maintain them at the same level..."

"This Norm⁷ is obviously applicable to products covered by the Liberalization Program. There is no other way of understanding its presence in the Chapter of the Agreement of Cartagena assigned specifically to regulating this program. But the Norm should also apply - respecting the scope of the Liberalization process, with its exceptions, deadlines and types, which means that it is not applicable to products excluded from this process through the reserve or exceptions list. As seen, the Liberalization Program refers to a relative 'universality' of products, rather than to all products originating in the sub-region".

⁶ (Agreement of Cartagena). Article 45 - "The Liberalization Program shall be automatic and irrevocable and shall include the universality of the products, not including the exception provisions established in this Agreement, in order to achieve full liberalization according to the deadlines and modalities indicated in this Agreement".

⁷ (Agreement of Cartagena) Article 54.- "The Member States shall abstain from modifying the levels of dues and from introducing new restrictions of any type on the import of products originating in the sub-region, in any way that may result in a less favorable situation than that existing at the entry into effect of the Agreement".

"The Member States are free to decide on dues and restrictions covering products on the reserve or exception lists, but the Agreement of Cartagena in no case whatsoever bans them from imposing fresh charges or granting more favorable treatment to such products..."

"... the Norms that constrain such liberalization should be interpreted in a restrictive manner, as an exception to the general rule, following a universally accepted principle of interpretation."

" The ban on 'modifying the level of charges' enshrined in Article 54 of the Agreement of Cartagena regulating the Liberalization Program, and particularly Article 45 *ibidem*. The Member States of the Agreement of Cartagena may consequently increase the 'charges'... falling due on the import of products originating in the sub-region, when such products are excluded from the Liberalization Program... as being included on the reserve or exception list of the Member States."

IX. JURIDICAL ARRANGEMENTS OF THE AGREEMENT OF CARTAGENA

Case No. 2-N-92 (27 April 1992)

"... the acts, guidelines, declarations or commitments adopted by the Presidents of the Member States of the Agreement of Cartagena, when they are sitting on the Andean Council of Presidents as stipulated in the Charter thereof, are not decisions of the Commission, nor do they belong to the above-mentioned juridical arrangements set up by the Treaty of the Court⁸ which was signed by these same Member States".

X. APPEALS

Case No. 1-84 (Measure dated 22 May 1984)

"This act is not subject to any appeal for reconsideration, such as that proposed, nor any other, as it is not included in the legal provisions that regulate the functioning of the Court. Articles 26 of the Treaty and 65 through 68 of the By-laws merely acknowledge the request for a review of decisions handed down in cases of non-compliance, when the respective decision is based on some fact which, having had a decisive influence on the outcome of the case, was unknown on the date of issue of the Decision, to the person requesting review... Nor is an appeal for reconsideration concluded in the Provisions covering the Amendment, review, revision and clarification of decisions covered in Article 59 and 90 of the Statutes."

Case No. 5-84 (Measure dated 28 September 1984)

"An act with the power of a definitive decision may not be revoked or modified by the Court, because neither the Treaty that set it up nor the By-laws thereof establish this procedural possibility."

⁸ Article 1, Treaty setting up the Court.

ANNEX II

REFERENCE DOCUMENTS

1. ANDUEZA, José G. *La aplicación directa del ordenamiento jurídico del Acuerdo de Cartagena*. In "*Integración Latinoamericana*", No. 98. Buenos Aires: INTAL, 1985.
2. ANDUEZA, José G. *La interpretación prejudicial y el Tribunal de Justicia del Acuerdo de Cartagena*. In Sáchica, Luis Carlos and others. *Lawcourt of the Agreement of Cartagena*. Buenos Aires: BID/INTAL, 1985.
3. BID/INTAL - *Lawcourt of the Agreement of Cartagena. Jurisprudence of the Lawcourt of the Agreement of Cartagena*. Buenos Aires: BID/INTAL, 1994.
4. BUENO MARTÍNEZ, Patricio. *Sistemas de solución de conflictos y órganos jurisdiccionales*. Seminar on Economic Integration and Community Law. Santafé de Bogotá, April, 1995.
5. CHAHIN LIZCANO, Guillermo. *El Consejo de Estado de la República de Colombia y el Grupo Andino*. Seminar on Economic Integration and Community Law. Santafé de Bogotá, April, 1995.
6. Moitinho de Almeida, José Carlos. *El modelo comunitario europeo y su influencia en los procesos de integración*. Seminar on Economic Integration and Community Law. Santafé de Bogotá, April, 1995.
7. PACILIO, Ombreta. *La Corte de Justicia de la Comunidad Económica Europea*. Buenos Aires: Depalma, 1989.
8. RUIZ-JARABO, Dámaso. *Sistemas de solución de conflictos y órganos jurisdiccionales de la Unión Europea*. Seminar on Economic Integration and Community Law. Santafé de Bogotá, April, 1995.
9. SÁCHICA, Luis Carlos and others. *El Tribunal de Justicia del Acuerdo de Cartagena*. Buenos Aires: BID/INTAL, 1985.
10. SÁCHICA, Luis Carlos. *La acción de nulidad en el ordenamiento jurídico andino*. En Sáchica, Luis Carlos and others. *The Lawcourt of the Agreement of Cartagena*. Buenos Aires: BID/INTAL, 1985.
11. SÁCHICA, Luis Carlos. *Derecho Comunitario Andino*. 2a. Edition, Bogotá: Temis, 1990.
12. SALAZAR MANRIQUE, Roberto. *Marco general del Derecho Comunitario Andino*. Seminar on Economic Integration and Community Law. Santafé de Bogotá, April, 1995.
13. URIBE RESTREPO, Fernando. *La interpretación prejudicial en el Derecho Andino*. Quito, Lawcourt of the Agreement of Cartagena, 1993.
14. VIDALES OVIEDO, Alfonso. *El Derecho Comunitario en el Pacto Andino. El caso colombiano*. Seminar on Economic Integration and Community Law. Santafé de Bogotá, April, 1995.

15. ZELADA CASTEDO, Alberto. *El control de la legalidad, la solución de controversias y la interpretación uniforme del derecho común en el esquema de integración del Grupo Andino*. In SÁCHICA, Luis Carlos and others. *The Lawcourt of the Agreement of Cartagena*. Buenos Aires: BID/INTAL, 1985.

CJI/SO/II/doc.59/95 rev.1
 23 August 1995
 Original: Spanish

**DATE, AGENDA AND RAPORTEURS
 FOR THE JANUARY 1996 REGULAR SESSIONS PERIOD**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

In conformity with its By-laws, agreed to hold its first 1996 regular sessions period from 29 January through 10 February 1996.

The following Agenda was adopted, on the understanding that the topics will be addressed in the order shown below:

1. Procedures for preparing and approving inter-American juridical instruments under the aegis of the Organization of American States (AG/doc.3269/95)
 Rapporteurs: Drs. Luis Herrera Marcano and Jonathan T.Fried

2. 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)
 Working Group
 Coordinator: Dr. José Luis Siqueiros
 Co-Rapporteurs: Drs. Alberto Zelada Castedo, Philip T.Georges, Miguel Ángel Espeche Gil, Jonathan T.Fried, Mauricio Gutiérrez Castro, and Ramiro Saraiva Guerreiro

 - i. Pact of Cartagena
 - 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 treaties
 - vi. Central American Integration System (CAIS)
 - 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) Most-favored nation principle and its application in the Americas, and other ways of benefiting the less-developed nations (AG/doc.3268/95)

Rapporteurs: Drs. José Luis Siqueiros, Alberto Zelada Castedo and Jonathan T. Fried

- d) The securities market. Benchmark principles considered basic to its regulation in the Hemisphere.
(AG/doc.3131/94 - Item 3)
Rapporteurs: Drs. Seymour J. Rubin , José Luis Siqueiros and Jonathan T.Fried
- e) International juridical effects of insolvency
Rapporteurs: Drs. Seymour J. Rubin, José Luis Siqueiros and Jonathan T.Fried
- 3. Democracy in the Inter-American System
(AG/doc.3131/94 - Item 7)
Rapporteur: Dr. Eduardo Vío Grossi
- 4. 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
- 5. Right to information
(AG/doc.3131/94 - Item 6)
Rapporteur: Dr. Mauricio Gutiérrez Castro
- 6. Environmental law
(AG/doc.3131/94 - Item 8)
Rapporteur: Dr. Galo Leoro F.
- 7. Peaceful settlement of disputes
(AG/doc.2683/91) (AG/doc.2771/91 rev.1)
Rapporteur: Dr. Galo Leoro F.
- 8. International cooperation to repress corruption
(AG/doc.3268/95 - Item 8)
Rapporteur: Dr. Miguel Ángel Espeche Gil
- 9. Inter-American cooperation to cope with terrorism
(AG/doc.3268/95 - Item 9)
Rapporteur: Dr. Miguel Ángel Espeche Gil
- 10. Juridical aspects of foreign debt
Rapporteur: Dr. Miguel Angel Espeche Gil
- 11. Proposal to include a new topic:
National jurisdiction and the personality of juridical entities

Rapporteur: Dr. Jonathan T.Fried

CJI/SO/II/doc.2/96
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**THE PRINCIPLE OF THE MOST FAVORED NATION AND ITS APPLICATION
IN THE AMERICAS, AS WELL AS OTHER MEASURES
BENEFITING THE LESS-DEVELOPED NATIONS**

A first approach to an analysis of these issues

(presented by Dr. José Luis Siqueiros)

PART ONE

**THE GATT AND INTEGRATION / FREE TRADE
AGREEMENTS IN THE HEMISPHERE**

I. Background

1.1 In Resolution N°. AG/doc.3268/95 adopted at the ninth Plenary Session held in Haiti on 9 June 1995, and having analyzed the comments of the Permanent Council on the Annual Report of the Inter-American Juridical Committee, the General Assembly of the Organization of American States decided "... to urge the Committee to include in its studies the consideration of the most-favored nation principle, and the application thereof in the Americas, as well as other ways of benefiting the less developed countries." ¹

1.2. In its Resolution adopted on 19 August 1995 during its second sessions period, Document CJI/SO/II/doc.14/95 (English version), the Committee agreed to include this topic in its Agenda and to carry out an analysis of this issue covering the application of the most-favored nation principle with regard to:

- a) the juridical framework of the multilateral trade regime, in compliance with GATT and the World Trade Organization - WTO; and
- b) the juridical frameworks of the economic integration and free trade agreements signed among the nations of the Hemisphere. ²

This Resolution stipulated that the study in question should pay particular attention to the guidelines contained in a monograph prepared by the Department of International Law and Codification, which falls under the auspices of the Secretariat for Legal Affairs.³ The Committee appointed Drs. José Luis Siqueiros, Alberto Zelada Castedo and Jonathan T. Fried as Rapporteurs, requesting them to prepare and circulate a preliminary outline of this topic before March 1996,⁴ for submission to the consideration of the Inter-American Juridical Committee and the Special Trade Commission of the OAS.

¹ Resolutive Item N°. 3, final section.

² Resolutive Item N°.4, items a) and b) of the above-mentioned document.

³ Document OAS/Gral.CJI/doc.10/95 dated 16 August 1995.

⁴ Date of the Meeting of the American Ministers of Trade in Colombia.

1.3. The document prepared by the Department of Development and Codification of International Law laid down the general guidelines for possible future studies of this topic, suggesting three areas for investigation that it considered as falling under the mandate issued by the General Assembly. These areas basically cover the following hypotheses:

- a) Conflicts or disputes that may arise between Regional Agreements, as the result of the inclusion of the most-favored nation principle in some economic integration or free trade schemes;
- b) Problem of an 'external' nature arising from the most-favored nation principle;
- c) Problem of an 'internal' nature arising from the most-favored nation principle;

Set out below is an analysis of each of these hypotheses.

II. Conflicts or disputes that may arise between Regional Agreements, as the result of the inclusion of the most-favored nation principle in some economic integration or free trade schemes

This possibility is illustrated by the provision contained in Article 44 of the Treaty of Montevideo (1980), which formalized the establishment of the Latin American Integration Association - LAIA, as follows:

"The advantages, favors, licenses, immunities and privileges that the Member States apply to products originating in or destined for any other Member or Non-Member State through decisions or agreements that are not covered in this Treaty or the Pact of Cartagena shall be immediately and unconditionally extended to other Member States thereof."

Mexico is a member of LAIA. In 1993 it signed the North American Free Trade Agreement - NAFTA with the U.S.A. and Canada, which came into effect on 1 January 1994. Under this Treaty, Mexico reciprocally grants certain trade concessions⁵ to the USA and Canada. The granting of such concessions may be interpreted as being covered by the text transcribed above of Article 44 of the Treaty of Montevideo (1980). There is no doubt that Mexico's ten partners in LAIA⁶ interpret it this way, considering themselves as entitled to the privileges and advantages acquired by their associate with regard to the USA and Canada. In counterpart, Mexico invoked the principles of reciprocity and fairness in rights and obligations, and submitted a consultation on this point to the LAIA Committee of Representatives. All this led to the use of the forum of the I Extraordinary Meeting of Council of Ministers of Foreign Affairs of this Association, held in Cartagena de Indias on 13 June 1994, to sign the Interpretative Protocol of Article 44 of the Treaty of Montevideo (1980),⁷ as well as other documents containing various Resolutions closely linked to this Deed: Resolution 43 (I-E) which contains the norms and standards for the transition period until the Interpretative Protocol⁸ enters into effect, and Resolution 44 (I-E) which contains the functions, duties and responsibilities of the Special Group covered in Article 4 of this Protocol, meaning powers of settlement when no consensus is reached between the

⁵ NAFTA includes a most-favored nation clause expressly directed to service-providers favoring any of the three Signatory States as well as any other country that is not a Signatory (Article 1,203). In Chapter XI, each of the Parties agrees to offer investors from the other Parties treatment that is no less favorable than that granted under similar conditions to investors from the other Party or from another country that is not a Signatory. (Article 1,103, § (1) and (2)).

⁶ Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Paraguay, Peru, Uruguay and Venezuela.

⁷ Which appears as Annex I of the Final Minutes of the I Meeting (*ALADI/CM/I-E/Ata Final*) dated 13 June 1994.

⁸ Annex II of the Final Minutes. The Interpretative Protocol will enter into effect once the eighth ratification is deposited. By December 1995, only Mexico, Chile, Paraguay and Ecuador had ratified it.

country that requested the negotiations and the nation that requested the temporary suspension of the obligations agreed under Article 44 (presumably Mexico). The Special Group will examine the viewpoints put forward by the countries involved in the negotiation and assess the corresponding compensation. Should no settlement or agreement be reached between the Parties, it shall hand down a final decision. Whether or not the suspension applied for becomes definitive shall depend on the contents of this decision.⁹

III. Problem of an 'external' nature arising from the most-favored nation principle

The wording of Article I of the General Agreement on Trade and Tariffs - GATT (1994)¹⁰ stresses that, with regard to customs tariffs, other import or export levies, including all the rules and formalities linked to import and export activities, and also with regard to all the matters mentioned in Paragraphs 2 and 4 of Article III:

"any advantage, favor, privilege or immunity granted of the Signatory States with regard to any product, originating or destined for any other country, shall immediately and unconditionally be granted to similar products originating in or destined for the territory of the other Parties to the Agreement."

Thus, under the GATT framework, the most-favored nation clause is commonly applicable to all the Signatory States, endowing most-favored nation status with multilateral scope, and extending the effects thereof to the utmost. Concessions granted reciprocally between two or more Signatory States are automatically extended to all other Member States, thus fairly distributing advantages that were originally bi-lateral.

Nevertheless, the multilateral function of the most-favored nation clause is inter-related with other cardinal principles within the framework of the Agreement. Outstanding among these principles, and closely linked with the above-mentioned clause, are those of **non-discrimination, national treatment; and reciprocity**.¹¹

Back in 1947, the creators of GATT were not unaware of the existence of certain trends that were already beginning to appear in regional economic integration and free trade agreements. Thus, Article XXIV of the Agreement establishes exemptions with regard to setting up customs unions and free trade zones which - strictly speaking - are incompatible with the above-mentioned principle of non-discrimination.

In order to temper the rigidity of the most-favored nation principle, a conceptual bridge was drawn up, allowing the preference system implicit in a regional economic integration and free trade scheme to streamline trade between the countries involved therein, and thus avoiding the establishment of trade barriers in these countries blocking other non-involved States.¹²

⁹ Resolution N°. 44 (I-E) forms part of Annex II, containing fifteen Articles, signed on 13 June 1994, together with Resolution N°. 43 (I-E).

¹⁰ The 1994 GATT is juridically different from the 1947 GATT. It is defined in Annex 1A of the Marrakech Agreement setting up the World Trade Organization - WTO, signed on 15 April 1994. The 1994 GATT consists of the General Agreement signed in 1947, plus all the provisions that entered into effect thereunder until the WTO was set up, as well as Understandings indicated in Item c) of Article 1, and the Marrakech Protocol. For a fuller overview of this General Agreement, see Part II of this Report.

¹¹ LAFER Celso. *El GATT, la cláusula de la nación más favorecida y América Latina*, article in the book entitled *Derecho Internacional Económico*, p. 117. Mexico, D.F.: Fondo de Cultura Económica, 1974

¹² SEPÚLVEDA AMOR, Bernardo. *GATT, ALALC y el trato de más favor*, article included in the book mentioned in Footnote 11, p. 138.

Before continuing with an analysis of the exemptions stipulated in Article XXIV of the GATT, we should outline the differences between a "customs union" and a "free trade zone". The main characteristic of the former is the existence of a single territory in terms of customs tariffs, meaning removal at the domestic level of all restrictive trade regulations among the nations involved therein. On the external plane, it is necessary to establish common customs tariffs with regard to third party countries.

The latter, meaning a free trade zone, should be taken as being a group or area of two or more customs unions which have agreed to phase out customs tariffs and other non-tariff barriers in order to streamline trade among the nations involved, with regard to products originating therein.¹³ In brief, the distinction between a customs union and a free trade zone lies in the external consequences produced in the former, and those which are absent from the latter. There is no common tariff in free trade zones, nor any common trade regulations regarding third party countries.¹⁴

It thus becomes quite clear that GATT allows an exception to the most-favored nation principle, in the case of customs unions and free trade zones, or interim agreements preparatory to the establishment of thereof. It is noteworthy that the Signatory States to the General Agreement that also join a Regional Agreement of some sort are not obliged to grant most-favored nation status to third party countries, **unless** the Regional Agreement itself contains a most-favored nation clause. In this case, the Signatory State of the Regional Agreement would be obliged to grant its associates in the scheme any advantage, benefit or privilege already granted to a third party nation.

IV. Problems of an 'internal' nature arising from the most-favored nation principle

In the absence of a Regional Integration Agreement (customs union or free trade zone), any nation that is a member of the 1994 GATT should express its unconditional compliance with the most-favored nation principle laid down in its Article I. Nevertheless as already explained, when a Member State joins such a Regional Agreement, it shall not be obliged to apply the most-favored nation clause with regard to its associates, vis-à-vis third party countries, unless the Regional Agreement in question actually incorporates the most-favored nation principle. It may freely discriminate against its counterparts without including them in the most-favored nation treatment that it may grant to outside countries.

There nevertheless is - or was - another viewpoint. Some sixty years ago, in the inter-American area, the outlook was restrictive for the most-favored nation clause. The Pact of Washington (1934) stipulated that the Senior Signatory States agreed that in their relationships among themselves, they would not invoke the obligations of the most-favored nation clause in order to obtain from the Parties to other multilateral agreements the advantages or benefits enjoyed thereby under such schemes. This Pact referred to multilateral economic agreements of general application, including a trade area "of substantial size"¹⁵, whose effect would be to liberalize and encourage trade or other types of international economic exchange, while open to

¹³ GATT, Article XXIV, 8, item b). It is timely to note that the Treaties or Agreements setting up foreign trade normally expand their objectives. For instance, NAFTA stipulates that the principles involved are those of national treatment, most-favored nation treatment and transparency, covered further on in greater detail in six sections that include fair competition, encouragement of investment, protection of intellectual property, mechanisms for the settlement of disputes, and facilitation of trans-border circulation of goods and services.

¹⁴ See Sepúlveda Amor, *Ibid*, p. 189.

¹⁵ Terminology used by this Pact on the application of the most-favored nation clause, signed in Washington D.C. on 15 July 1934, under the auspices of the Pan-American Union. The English version of this document (OEA/Ser.A/52a (SEPF)) mentions an area "of substantial size".

the participation of other countries. This was to discriminate against those nations "which shall not enjoy the benefits as long as they refuse to assume their obligations."

As is obvious, we are faced here with a self-defense mechanism set up by the countries participating in these multilateral economic agreements. Although this is based on an article in a pact signed under the auspices of the Pan-American Union in 1934, it is also open to signature by all countries in the world, remaining in effect indefinitely.¹⁶

The only exception to the general principle of discrimination consists of bilateral treaties with the most-favored nation clause already incorporated therein, in which case the Signatory State to the Pact may request its counterpart in the bilateral treaty to comply with this clause, provided that this Party actually agrees with its counterpart on the benefits claimed.¹⁷

Before concluding these comments on customs unions and free trade zones, it should be stressed that the 1994 GATT - having agreed on this exemption status - warns that in various cases customs laws and other trade regulations in the Member States that might be applicable to outsider nations may not be increased nor be more restrictive than those in effect prior to the establishment of the economic group.¹⁸

V. Principle of Non-Discrimination

Preferential treatment in terms of trade is basically anathema under GATT. This is why non-discrimination - taken as being equality in trade relations and a way of removing protectionism - constitutes the mainspring of the General Agreement, states Bernardo Sepúlveda.¹⁹

Within this context, the principle of non-discrimination plays a negative role, as a logical corollary of the multilateral function of the most-favored nation clause, meaning that it prevents a country from obtaining more favorable treatment for itself, instead of on a multilateral footing.²⁰

This principle is inserted into the GATT Preamble, which alludes to "the elimination of discriminatory treatment in international trade" as one of the motives behind the General Agreement. As Curzon²¹ says, although it is obvious that each country would like to set up a preferential situation in the markets of its associates, it is still more interested in preventing any other country obtaining this preferential treatment." In these terms, the lack of concessions should affect all the Signatory States equally; obtaining advantages should redound equally to the benefit of all the partners in the club.

The principle of non-discrimination enshrined in Article I - and implicit in the most-favored nation clause - is also included in Article II, §1(a) of the General Agreement. This provision establishes the lists of customs concessions and stipulates that each Signatory State shall grant the others treatment that shall be no less favorable than that covered in the relevant section of the corresponding list attached to the Agreement.

¹⁶ Article III of the Pact. According to this provision, the document enters into effect for each Signatory thereto on the date of signature thereof. Of the American nations, ratification deeds have been deposited only by Cuba and the U.S.A. Another four signed *ad referendum* (Colombia, Guatemala, Nicaragua and Panama) without depositing the ratification. Greece has signed and ratified, while the Belgium-Luxembourg economic union only signed in 1935.

¹⁷ Art II of the Pact.

¹⁸ Article XXIV, § 5, Items a) and b).

¹⁹ *Ibid*, p. 134.

²⁰ PESCATORE Pierre, *La clause de la nation la plus favorisée dans les conventions multilatérales*, Geneva: *Institut de Droit International*, 1968, p.20-22.

²¹ CURZON, G. *Multilateral Commercial Diplomacy: GATT and its impact on national commercial policies and techniques*, London, 1967, p.57

The ban on discrimination is repeated in Article XIII, whose first paragraph states that no restrictions nor prohibitions whatsoever may be imposed by any of the Signatory States, or on the import of any product originating in the territory of any other Signatory States, unless the import of a similar product originating in **all third party countries** is similarly restricted or prohibited.²²

This ban, or non-discrimination, is also found in Article XII covering state-owned trading companies. This stipulates that when these companies conclude selling or buying operations that involve imports or exports, they should act in a manner consistent with the general principles of the Agreement in terms of non-discrimination.

As the principle of non-discrimination is closely linked to that of the most-favored nation, and this later admits as an exception to the mandatory application thereof the establishment of Regional Integration Agreements (customs unions and free trade zones), the question thus arises: can there be discrimination that adversely affects the Signatory State to a specific Regional Agreement, when one of its members signs a preferential treaty with an outsider nation? The reply would be negative if the Regional Agreement (customs union or free trade zone) has a most-favored nation clause incorporated in its charter. Should this not be the case, there is a possibility of breaching the principle of non-discrimination.

VI. The Principle of National Treatment

Another cornerstone of the smooth functioning of this clause is the principle of national treatment, which is designed to even out local and foreign products, a principle enshrined in Article III (1) (2) of the GATT, includes in the Interpretative Notes²³ thereof and referring mainly to the effects of domestic taxation on international trade. This provision stipulates that the Signatory States acknowledge that taxes and other domestic charges imposed on trade within its borders should not be levied on imported or domestic products as a way of providing protection for domestic output. Imported products originating in the territory of the other Party should not be subject to local taxes or other charges of any type whatsoever, at rates higher than those applied to similar products of domestic origin.

This principle of national treatment is also found in Chapter III, Article 301 of NAFTA, stipulating that each of the three Parties thereto shall grant national treatment to trade in the goods of the others. Such national treatment should be granted in compliance with Article III of the GATT, including the Interpretative Notes thereof, as a stipulation that should be expressly incorporated in the Treaty as an integral part thereof. In compliance with NAFTA, this stipulation means that a state or province shall receive treatment that is no less favorable than the most favorable treatment granted by such state or province for any similar goods, direct competitors or substitutes thereof, of the Party that produces them.²⁴

Without adversely affecting the adoption of this principle in such a liberal form (in terms of goods), each of the Parties established exemption measures outlined in the Annex for this Article. These exemptions, which are also applicable to national treatment with regard to

²² Article XXIII (1) also covers products exported from any Signatory State.

²³ See Supplementary Provisions and Notes in Annex I of the General Agreement. *Basic Documents of International Economic Law*, Volume I. CCH International, Chicago, 1990, p. 63-64.

²⁴ This same provision appears in almost identical form in the Free Trade Treaties signed with Colombia and Venezuela (Article 3-03), Costa Rica (Article 3-03), and Bolivia (Article 3-02).

constraints on the import and export of goods, are the "measures" that each Party feels should be kept under its own control.²⁵

National treatment in terms of investments - which includes the establishment, acquisition, expansion, administration, management etc. of investments made by investors from other

Party(ies) involved - is expressly covered in NAFTA²⁶, as well as the G-3 Pact²⁷, the Mexico - Costa Rica Treaty²⁸, and the corresponding Mexico - Bolivia Treaty.²⁹

In addition to the free trade treaties mentioned above, it is worthwhile emphasizing that the inclusion of the national treatment clause appears in various Latin American integration schemes. For instance, Article 46 (taxes, dues and other domestic levies) and Article 48 (capital coming from Member States) of LAIA guarantees treatment that is no less favorable to than that granted to similar local products or capital coming from any other non-member nation. Similarly, the modified wording of the Pact of Cartagena incorporates this clause in its Article 44. A similar stance is noted in Article VII of the General Central American Economic Integration Agreement.

VII. The Principle of Reciprocity

Inherent in the principles mentioned above, i.e. non-discrimination and national treatment, is that of reciprocity, which is contained in the same Preamble to the General Agreement. This establishes that Signatory States desirous of furthering its objectives should do so by means of arrangements that are both mutually and **reciprocally** favorable. This assumption explains why this clause is unconditional in the GATT, introducing a notion of material balance that offsets the purely formal principle of equality. The measurement of reciprocity is not defined in the Agreement. The first six Rounds focused on reciprocal reduction of tariffs, although it must be admitted that this insistence on reciprocity came under heavy fire and prompted criticism from the developing countries regarding the effective functioning of the most-favored nation clause under this Agreement.³⁰

The principle of reciprocity is in factor closely linked to the most-favored nation clause. Although the essence of the former involves giving something in exchange for something else - a *quid pro quo* - the supporters of the most-favored nation concept resisted accepting the fact that acknowledgment and application among the Signatory States to any Agreement incorporating it would necessarily mean giving away something in return for the "favor" extended to them. Its supporters claim that "reciprocity" is based on the mutual guarantee of a privilege. What you grant me now, I will grant you tomorrow when it will also favor an outsider.

²⁵ The amount and variety of exemption measures for national treatment in terms of trade in goods is profuse: to some extent this is due to trade liberalization in each country. It is interesting to note that all the Signatory States to the Treaties mentioned in the previous footnote stress without exception the controls imposed by each of them "on the export of timber of all types"; others cover alcoholic beverages, energy sources, automobile engines, or set out in a more general form the items exempted from national treatment in terms of tariffs.

²⁶ Article 1,102, Items (1), (2), (3) and (4).

²⁷ Article 17-03, Item (1). It is interesting to note that this Treaty excludes most-favored nation treatment from the Article that stipulates the definitions of "company", "investment" and "investor" in a Signatory State (Article 17-01); it also excludes the application thereof to the advantages granted with regard to investments under Treaties set up to avoid double taxation.

²⁸ Article 13-03. This agreement also grants most-favored nation treatment in terms of investment (Article 13-04), although this is **not** applicable with regard to the advantages granted to investors from a third party nation deriving from bilateral investment Treaties, agreements setting up foreign trade zones, customs unions, common markets, economic or monetary unions, or other similar economic integration units.

²⁹ Articles 15-03 and 15-04. The wording of these provisions is identical to that of its parallel clauses in the Mexico - Costa Rica Treaty.

³⁰ DAM, Kenneth W. *The GATT. Law and International Economic Organization*. Chicago: 1970, p. 10-15.

Nevertheless, the principle of reciprocity cannot always be mandatory. As we will see below, it does not always work properly in *vis-à-vis* relationships between the developed nations and the developing countries. The former should not expect reciprocity for commitments acquired through trade negotiations undertaken to reduce or remove tariffs or other trade barriers favoring the latter.³¹

VIII. Other Exceptions to the Most-Favored Nation Principle at the Global and Latin American Levels

8.1. Cross-Border Traffic

Article XXIV, §3 of the 1994 GATT establishes that:

"the provisions of this Agreement shall not be interpreted to prevent: a) the advantages agreed between any Signatory State and its neighbor nations in order to facilitate **cross-border traffic**".

In turn, the Treaty of Montevideo (1980) setting up LAIA stipulates in Article 45:

"The advantages, favors, licenses, immunities and privileges already granted or that may be granted under agreements among Member States or between such and third party nations to facilitate cross-border traffic shall be regulated exclusively by the nations that have signed or shall sign such pacts." ³²

Little or nothing was found in the Protocols, Understandings or Annexes to the General Agreement that could guide our interpretation of this concept and the implementation thereof. Doctrine was more helpful. According to Manuel A. Vieira, cross-border traffic mirrors a particular way of life that has arisen from the physical proximity of neighboring peoples and their separation from the political viewpoint.³³ This Uruguayan writer claims that this situation requires special treatment, whence its exclusion from the most-favored nation clause regime. It has been common practice in trade agreements to exempt neighboring states with specific characteristics from most-favored nation treatment.

The exemption of cross-border traffic should not be confused with areas historically consisting of nations with similar ethnic and cultural backgrounds that warrant special treatment in interational agreements, such as the Nordic, Baltic and Iberian countries, as well as various others.

The exclusion of cross-border traffic - a concept that is not defined in either the GATT or LAIA - arises from the special requirements of cross-border living; due to their very special characteristics, they should not be extended to third party nations. According to Frida M. Pfiertter de Armas, this stance is in principle based on the principle that what is unequal cannot be treated in an egalitarian manner, and that only unequal treatment can result in genuine equality in such cases.³⁴

³¹ Article XXXVI, §8 of the General Agreement.

³² Wording very similar to that of Article 19 of the Treaty setting up the Latin American Free Trade Association - LAFTA. Montevideo, 1960

³³ VIEIRA, Manuel Adolfo. *Anuario Uruguayo del Derecho Internacional*, 1965/1966. Montevideo, 1966, p. 200-201.

³⁴ *La cláusula de la nación más favorecida y la excepción del tráfico fronterizo en el Tratado de Montevideo, Derecho Internacional Económico, op.cit. p. 211.*

Mexico's Confederation of Industrial Chambers - perhaps hinting at some analogy between "cross-border traffic" and the geographical position of neighborhood existing among the three countries which would form NAFTA - addressed the General Secretariat of LAIA, requesting its opinion. The reply was quite clear: Article 45 of the Treaty of Montevideo (1980) makes provision for an exemption in the case stipulated - facilitation of cross-border traffic - between Member States, and between these States and third party nations. Nevertheless, it is not possible from the conceptual viewpoint to compare agreements on a free trade scheme³⁵ whose scope presupposes the total elimination of tariff and non-tariff barriers on all essential reciprocal interchange among two or three countries, in order to facilitate cross-border traffic.³⁶

The opinion handed down by the administration agencies of LAIA was based on the Resolutions approved since 1961 by LAFTA, establishing the guidelines for the Permanent Executive Committee to differentiate between strictly border areas and others claiming specific conditions that would warrant the extension of this exemption treatment thereto.³⁷

Unfortunately, the wording of the Treaty of Montevideo (1980) does not contain a provision similar to Article 49 of the similar instrument that set up LAFTA in 1960, stipulating that the Signatory States thereto should do their utmost, as soon as possible, to "... d) determine what may be considered as cross-border traffic for the purposes of Article 19." Perhaps the LAIA Committee of Representatives, within the broad scope of its duties and responsibilities for putting forward recommendations to the Council and Conference, could lay out the guidelines for a clearer-cut conceptualization of this notion.³⁸ On the other hand, and based on Article 49 of LAIA, the Member States "... may establish supplementary trade policy norms and standards that regulate, among other matters, (...) cross-border traffic."

8.2 Latin American economic integration schemes

As stated by Alberto Zelada Castedo,³⁹ International Economic Law accepts the postulates of the theory of regional economic integration and international trade policy regarding the establishment of preferential economic and trade systems. These are discriminatory, but act as a way of fostering an important objective: an integrated international economy that is free from obstacles.

The exception to the most-favored nation clause is based on the fact that integrationist schemes enshrine a preferential regime that favors the countries aligned therewith, excluding non-participant nations. This preferential treatment is in turn based on reciprocity *inter pares*, whereby its extension to third parties is subject to rigid considerations, or even expressly banned.

This "exclusivity" excludes from this preferential treatment those countries that fall outside the stipulated geographical area, either region or sub-region, and are not even open to compliance by other nations.⁴⁰

³⁵ An obvious reference to NAFTA

³⁶ Memorandum N°. DN-113-90 dated 5 October 1990, giving the reply to this consultation

³⁷ CRUZ MIRAMONTES, Rodolfo. *La Cláusula de la Nación más Favorecida y su adecuación al TLC en el marco de ALADI*. Book entitled *Homenaje a Cesar Sepulveda*, Mexico, D.F., 1995, p. 107.

³⁸ Article 35, Items (k) and (m), LAIA.

³⁹ *Derecho de la Integración Económica Regional*. *Revista Integración Latinoamericana*. BID/INTAL/DP304 N°. 315, p. 166, Buenos Aires, 1989.

⁴⁰ The EEC restricts participation in the Community to **European** nations; in the Treaty of Montevideo (1980), LAIA stipulates that this document is open for signature by the **Latin American** nations. The General Treaty for Central American Economic Integration is restricted to the **Central American** countries. The **CARICOM** Treaty limits participation in the Caribbean Community to the **Caribbean** nations.

These regional or sub-regional schemes may make provision for **partial scope agreements** in which not all the Members of the Association participate, but which are designed to create the conditions necessary to expand the regional integration process through progressive multilateralization. 41 These partial scope agreements may be of various types.

In addition to these partial scope agreements, LAIA Member States may reach agreements of the same type with other non-member countries and economic integration areas **within** Latin America (Andean Pact, SICA, Mercosur etc.). In these agreements, the concessions granted by the participant states are **not** extended to the others, with the exception of countries with lower relative economic development 42 This means that if one or more of the nations participating in these agreements grant to another or others customs privileges or advantages of some other type, this **may** discriminate against the other Members of the Association that are not Signatories thereto, with the exception of countries with lower relative economic development. All this does not adversely affect convergence, meaning facilitating the participation of other Member States in such partial scope agreements.

The LAIA Member States may thus enter into partial scope agreements with other developing countries, or with their respective economic integration areas **outside** Latin America. Under this system, the concessions granted their members are not extensive to others, with the exception of the well-known exemption favoring the less-developed nations. In fact, Chapters in both LAIA 43 and the Pact of Cartagena 44 focus on the possibility of granting preferential - and consequently discriminatory - treatment favoring the Signatory States to these agreements.

The Treaty of Montevideo stipulates that its Signatories should establish favorable conditions fostering the participation in the economic integration process of countries with lower economic development. The principles of non-reciprocity and community cooperation are based on this preferential treatment. Actions favoring these countries are implemented through regional and partial scope agreements. In order to ensure the effectiveness of these agreements, the Member States should formalize negotiated norms and standards linked to: a) the preservation of preferences; b) elimination of non-tariff constraints; and c) the application of safeguard clauses in justified cases.

Sections I and II of Chapter III of LAIA lay down the general bases for implementing programs and other specific types of cooperation, particularly those favoring land-locked nations such as Bolivia and Paraguay. The Pact of Cartagena authorizes the granting of special advantages favoring Bolivia and Ecuador that are not extended to the remaining Member States.

IX. GATT and the Less-Developed Nations

The General Agreement contains four Articles focused on the developing countries: Article XVIII (Part II) and Articles XXXVI, XXXVII and XXXVIII (Part IV).

The first of them - in its final modified 1995 version - grants generous amounts of flexibility to the provisions for supporting the developing countries, granting them special rights with regard to measures affecting the balance of payments and actions safeguarding development. Article XVIII covers two types of under-development: a) nations whose economy offers only low

41 Article 7, corresponding to Section III, Chapter II of the Treaty of Montevideo.

42 Article 25 (a), Chapter IV, LAIA.

43 Chapter III, Articles 15 - 23

44 Chapter XIII of the Agreement, Articles 91-10.

living standards still in the early stages of development; and b) countries that have passed through these early stages and are now undergoing a process of industrialization in order to avoid remaining dependent in terms of raw materials. 45The countries ranked under this first classification may make use of rights to renegotiate customs tariffs, lighten constraints on the structure of their balance of payments, and the establishment of local industries.46 The countries classified under category b) enjoy special prerogatives in setting up new industries. 47

Part IV of the GATT, entitled **Trade and Development**, was added in 1965 through a Protocol of Amendments. Article XXXVI and following set out the principles and objectives covering the situation of the less-developed nations. A writer 48 has described the wording of these Articles as "three lengthy precepts that are merely exhortatory". Nevertheless, one of them 49still contains the non-reciprocity clause which states (verbatim): (8) "The developed Signatory States shall not expect reciprocity for commitments undertaken in trade talks to reduce or remove customs or other trade barriers by less-developed nations".

Paragraph (8) as transcribed above was added later (1965), in order to clarify the concept of "not expect reciprocity". According to this addition, this expression should be interpreted in the sense that in the course of trade talks, the less-developed nations are not obliged to make contributions inconsistent with their specific level of development, or their financial and commercial needs, taking earlier commercial development into account. This modification applies not only to concessions obtained during ordinary trade talks, but also all those included in Articles XVIII, XXVIII and XXXIII. 50

X. Enabling Clause

The most intensive measures fostering favorable treatment for the developing countries were adopted within the context of the Tokyo Round. Most of these measures are contained in the Multilateral Trade Talks Codes. One of these decisions 51 covers differentiated, more favorable treatment, reciprocity and increased participation by the developing countries. This is known as the **Enabling Clause**. Adopted within the framework of the Multilateral Trade Talks, this decision contains nine sections. Due to its importance, we transcribe below the text of the first three sections, and will then comment on the context and significance of the final six sections:

"1. Notwithstanding the provisions of Article 1 of the General Agreement, the Signatory States may grant differentiated, more favorable treatment to the developing countries* without granting such treatment to the other Signatory States.

2. The provisions of § 1 are applicable * to:

45 GATT, Article XVIII, § 4. John H. Jackson. *The World and the Law of GATT*. The Bobbs Merrill Co., New York, 1969, p. 650-651; Edmund McGovern, *International Trade Regulation*, 2nd Edition, London, 1986, p. 273.

46 Article XVIII, Sections A, B and C.

47 Article XVIII, Section D.

48 ABBOT Kenneth W., *Introduction to GATT*, in *Basic Documents of International Economic Law*, CCH International, Volume 1, p. 6.

49 Article XXXVI, § 8.

50 MCGOVERN, Edmund *op.cit.* p. 275.

51 Decision L/4903, dated 28 November 1979

a) the preferential customs treatment granted by developed Signatory States to products originating in the developing countries, in compliance with the General Preference System *;

b) differentiated and more favorable treatment with regard to the provisions of the General Agreement with regard to non-customs measures regulated by the provisions and instruments negotiated multilaterally under the auspices of GATT;

c) regional or general agreements reached between developing Signatory States in order to reduce or eliminate customs tariffs on a mutual basis, and, in compliance with the criteria and conditions that may be set by the **Signatory States**, non-customs measures applicable to products imported within the framework of this two-way trade;

d) special treatment for the less-advanced developing nations within the context of all general or specific measures favoring the developing countries.

3. All differential and more favorable treatment granted under this Clause":

a) shall be intended to facilitate and foster trade among the developing countries and not to raise obstacles or create undue difficulties for trade among the Signatory States;

b) shall not constitute an impediment for the reduction or elimination of customs barriers and other restrictions on trade, through arrangements under the most-favored nation principle;

c) shall, when such treatment is granted by the more developed nations to the developing countries, be conceived and if necessary, modified in terms of ensuring a positive response to the developmental, financial and commercial needs of the developing countries."

The footnotes (*) are interesting: They indicate that the term "**developing countries**" includes developing territories; the Generalized Preferences System shall be applied on a case by case basis, in accordance with the GATT provisions on group actions, except for the provisions in the transcribed clause, which shall be applicable on a non-reciprocal, non-discriminatory basis (IBDD, 185/26).

Paragraph 4 refers to the notifications and consultations supervised by the Signatory States; Paragraph 5 reiterates the principle that reciprocity is not mandatorily required by the developed nations, as already mentioned.⁵² The final four sections stress the needs of countries that are at a very low levels of development, as well as the cooperation of the Signatory States in the examination and application of these principles and their duty to deploy their best efforts on both an individual and collective basis in order to fulfill the objectives of the General Agreement and this Decision.

XI. The Generalized Preferences System

In 1968 UNCTAD II adopted the Generalized Preferences System. Based on this policy, the international community agreed to make the application of the most-favored nation clause more

⁵² See Note 49 above

flexible, in order to allow the developed nations to grant preferential customs tariffs for products originating in the developing world.

However, the Generalized Preferences System as implemented by the industrialized nations showed sharp contrasts, in terms of both the products for which preferential tariffs were granted as well as the countries benefiting therefrom. The policy of the U.S.A. has been notably restrictive, and none of the developed nations acknowledged the legal obligation to grant preferences within a permanent, systematic scheme. UNCTAD revises and adopts conclusions periodically through a special Committee on Preferences. 53

The developed nations that are members of the GATT have shown an ambivalent attitude. In 1971, they requested all Signatory States to approve a ten-year moratorium on the application of the most-favored nation clause in Article I of the By-laws. However, in 1979 they agreed on an enabling clause granting the Generalized Preferences System an anchor in the General Agreement.

The Tokyo Round consolidated the possibilities of Generalized Preferences Schemes acting as a point of support for talks on tariffs. Although many of the developed nations resisted incorporating these schemes in their lists, they did grant various tariff concessions within the context of the Generalized Preferences System without insisting - with the exception of the U.S.A. - on the less-developed nations granting reciprocal favors. Many primary products, such as coffee and tea, are nevertheless still subject to heavy import taxes in the more developed nations.

UNCTAD continues to explore the possibilities of subscribing to a Global System of Trade Preferences, which would grant its members domestic preferences for removing or reducing tariff and non-tariff barriers.

PART II

THE MARRAKECH AGREEMENT AND THE WORLD TRADE ORGANIZATION - WTO

XII. The Conclusion of the Uruguay Round of Multilateral Trade Talks

12.1. On 15 April 1994 in Marrakech, Morocco, the plenipotentiaries of 124 Governments, as well as the representatives of the European Communities, signed the following juridical instruments:

- a) The Final Minutes incorporating the outcome of the Uruguay Round of the Multilateral Trade Talks;
- b) Ministerial Decisions, Declarations and Understandings; and
- c) The Agreement to set up the World Trade Organization - WTO.

The instruments outlined in items (b) and (c) above form an integral part of the Final Minutes.

53 MCGOVERN Edmund, *op.cit.* p. 2.

12.2. The World Trade Organization - WTO was set up under the aegis of the Marrakech Agreement. This constitutes the common institutional framework for the development of trade relations among its Members with regard to matters listed in the agreements and instruments included in Annexes 1, 2 and 3 (called **Multilateral Trade Agreements**). These form an integral part of the Agreement and are binding on all the Signatories thereof.

12.3. The juridical instruments and agreements connected thereto and included under Annex 4 (called **Plurilateral Trade Agreements**) also form part of the Agreement for its Signatories and are binding thereon, but do not impose obligations nor rights on States that have not accepted them.

12.4. **Annex 1** of the Agreement covers the **Multilateral Agreements on Trade in Commodities**. The first (all are contained in **Annex 1A**) is the **General Agreement on Customs Tariffs and Trade - 1994**. Then comes a list of twelve further agreements that we will analyze later. **Annex 1b** contains the **General Agreement on Trade in Services and Annexes**. **Annex 1C** consists of the Agreement on Aspects of Intellectual Property Related to Trade.

Annex 2 of the Agreement is the **Understanding on Norms and Procedures for the Settlement of Disputes**.

Annex 3 of the Agreement is the **Mechanism for the Examination of Trade Policies**.

12.5. **The General Agreement on Tariffs and Trade - 1994 (GATT 1994)** is juridically distinct from the General Agreement on Trade and Tariffs - 1947 (GATT 1947).

GATT 1994 consists of:

- a) the provisions of GATT 1947, rectified, amended or modified up to 31 December 1994;
- b) protocols and certifications regarding customs tariffs; protocols of unconditional compliance; decisions on exemptions under Article XXV of GATT 1947, and other decisions by the Signatory States thereto;
- c) six Understandings regarding the interpretation of various Articles of GATT 1994; and
- d) the Protocol of Marrakech, attached to GATT 1994.

XIII. The most-favored nation clause and other mechanisms favoring the less-developed nations within the framework of GATT 1994 and the WTO

The Marrakech Agreement setting up the World Trade Organization - WTO expressly alludes in its Preamble to the developing countries, particularly the less advanced nations. It acknowledges that it is necessary to make positive efforts in order for them to participate in the upswell in international trade, in keeping with the demands of their economic development.

The various mechanisms analyzed in Part I of this Report, which strengthen the presence of the developing countries in international trade, meaning the principles of the most-favored nation, non-discrimination, reciprocity, and special, differentiated treatment, appear in one form or another in the labyrinth of Decisions, Declarations, Understandings, Agreements both General and Sectorial, and Annexes that constituted the culmination of the Talks on International Trade in April 1994.

13.1. Ministerial Decisions and Declarations

There are 28 Decisions and Declarations which were adopted at the Ministerial Meeting in Marrakech. For the purposes of this Report, we will comment on only two of these Decisions:

- a) **Decision on the measures favoring the less-developed nations;** and the
- b) **Decision on the measures regarding the possible negative effects of the reform program in the less advanced countries and developing nations that are net importers of food products.**

The first of these Decisions (a) resolves that as long as the less-developed nations remain in this category, they should only undertake commitments and make concessions insofar as this is compatible with the needs of each of them in terms of development, finances and trade, or their administrative and institutional capacities.

The Signatory Ministers agreed that, as far as possible, the **most-favored nation concessions** regarding customs and non-customs tariffs agreed during the Uruguay Round for products whose export is of interest to the less-developed nations, could be applied in an autonomous manner, in advance and without phasing-in. The possibility would also be considered of improving Generalized Preference Schemes still further, as well as other schemes for products whose export is of particular interest to the less-developed nations.

In the **Second Decision** (b), the Ministers agreed to establish appropriate mechanisms for guaranteeing that in the trade area, agri-business products would not adversely affect the availability of aid in the form of foodstuffs at adequate levels, in order to continue with the assistance programs under way for fulfilling the nutritional requirements of the developing countries, particularly the less-advanced nations and net importers of food products.

To this end, the Signatory Ministers agreed to adopt a series of measures to establish a level of commitments on this matter during the reform program, including the adoption of guidelines to ensure steady supplies of staples under appropriately favorable conditions, taking into full consideration requests for technical and financial assistance from the less-developed nations in order to upgrade productivity and improve the infrastructure of their agricultural sectors.

13.2. Why the Marrakech Agreement set up the World Trade Organization - WTO

It has been noted ⁵⁴ that the **Multilateral Trade Agreements** included in Annexes 1,2 and 3 form an integral part of the Marrakech Agreement. Within the context and focus of this Agreement, only one mention is made of to **Annex 1**, meaning the **Multilateral Agreements on Trade in Commodities**. As already indicated, this Annex is divided into Annex 1A, 1B and 1C.

13.2.1. In addition to the **1994 General Agreement on Trade and Tariffs (GATT 1994)**, mentioned briefly in Paragraph 12.5, Sub-Title XII above, there are twelve other Agreements in Annex 1A, as follows:

- a) Agreement on Agriculture; (*)
- b) Agreement on the Application of Sanitary and Phyto-Sanitary Measures; (*)
- c) Agreement on Textiles and Apparel;

⁵⁴ See § 12.4 of Sub-Title XII above.

- d) Agreement on Technical Obstacles to Trade; (*)
- e) Agreement on Measures regarding Trade-Related Investments; (*)
- f) Agreement on the Application of Article VI of the 1994 General Agreement on Trade and Tariffs; (*)
- g) Agreement on the Application of Article VII of the General Agreement on Trade and Tariffs - GATT; (*)
- h) Agreement on Pre-Shipment Inspection;
- i) Agreement on Norms of Origin;
- j) Agreement on Procedures for Issuing Import Licenses;
- k) Agreement on Subsidies and Compensatory Measures; (*)
- l) Agreement on Safeguards. (*)

13.2.2. Annex 1B consists of the **Agreement on Trade in Services and annexes** (*)

13.2.3. Annex 1C consists of the **Agreement on Aspects of Intellectual Property related to Trade** (*)

13.3. Provisions contained in the Multilateral Agreements on Trade in Commodities covering the mechanisms that favor the less-developed nations

All the Agreements listed in Items 13.2.1, 13.2.2. and 13.2.3. marked with an asterisk (*) contain Articles that favor the developing countries.

These Articles refer to **special, differentiated treatment** with regard to the commitments undertaken,⁵⁵ as well as special needs in terms of development, finance and trade, ⁵⁶ the skewing of rules and national treatment, as well as quantitative restrictions established in Articles III and XI of the 1994 GATT ⁵⁷, the application of anti-dumping measures,⁵⁸ and safeguard measures. ⁵⁹

The **most-favored nation clause** is included in the **General Agreement on Trade in Services** as part of the general disciplines and obligations of the Member States. ⁶⁰ Article II (1) stipulates that "with regard to all measures covered by this Agreement, each Member shall immediately and unconditionally supply the services and suppliers thereof to any other Member, as treatment that is no less favorable than that meted out for similar services and the suppliers of similar services from any other country." This principle is not completely rigid, as it admits exceptions. However, these are to be listed in the Annex on Exemptions to the Obligations of Article II, ⁶¹ and comply with the conditions listed therein.

⁵⁵ Agreements on Agriculture, Article 10; Agreement on the Application of Sanitary and Phyto-Sanitary Measures, Article 10; Agreement on Technical Obstacles to Trade, Article 12; Agreement on the Application of Article VI of the 1994 General Agreement on Trade and Tariffs, Part III, Article 20; Agreement on the Application of Article VII of the 1994 General Agreement on Trade and Tariffs, Part III, Article 20; Agreement on Subsidies and Compensatory Measures, Part VIII, Article 27 and Annex VII.

⁵⁶ Agreement on Technical Obstacles to Trade, Article 12 (12.2).

⁵⁷ Agreements on Measures in terms of Trade-Related Investments Article 4.

⁵⁸ Agreement on the Application of Article VI of the 1994 GATT, Article 15

⁵⁹ Agreement on Safeguards, Article 9.

⁶⁰ Part II, Article II, 1.2.3. This provision should be interpreted in accordance with the *Reading Guide for the Lists of Specific Commitments and the Exemption Lists of Article II* (most-favored nation clause) of the General Agreement on Trade in Services, Annexes thereof.

⁶¹ See List of Exemptions, Article II (most-favored nation) that functions as an Annex of the General Agreement on Trade in Services.

The Agreement mentioned above also includes the exception of cross-border traffic. Article II, §3 states that nothing prevents a Member conferring or granting advantages on neighboring countries in order to facilitate the interchange of services produced and consumed locally.

In brief, the basic principles of this General Agreement on Trade in Services are: access to markets, national treatment, and most-favored nation treatment. Taking as a reference only the List of Commitments specific to one country and (when applicable) its List of Exemptions to most-favored nation treatment, it is possible to discover to which service sectors the basic principles of this Agreement apply, and under what conditions. 62

In all cases, these commitments and limitations fall under the four types of supply that shape the scope and definition of the General Agreement on Trade in Services: cross-border supply; consumption outside the country; commercial presence, and the presence of individuals.

When a country submits a List of Exemptions from most-favored nation treatment, it will be necessary to proceed with an examination thereof in order to determine to what extent this country is granting preferential treatment, or is discriminating against one or more of its trading partners.

There is a basic principle in the General Agreement on Trade in Services, which consists of **specific commitments**, meaning the obligation to grant access to markets and national treatment to each service activity, applied under the most-favored nation scheme. This means that when commitments are undertaken, the only possible effect of an exemption from most-favored nation treatment is to allow the country to which this is applicable more favorable treatment than that meted out to the other Members. When commitments have **not** been undertaken, however, exemption from such treatment may also result in less favorable treatment.

In the Lists of Exemption in Article II of the Agreement, it is not necessary to enumerate the preferential liberalization measures for trade in services among the States to **economic integration agreements**, such as free trade zones; such preferential treatment is authorized if it complies with the criteria stipulated in Article V of the General Agreement on Trade in Services. 63

Finally, the **Agreement on Aspects of Intellectual Property Rights Related to Trade**, 64 also found in an Article 65 dedicated to **most-favored nation treatment**, which having applied protection of intellectual property, repeats the wording of the most-favored nation clause with its elements of immediacy and unconditionality. Nevertheless all advantages, favors, privileges or immunities **are exempt from this obligation** when granted by a Member which shows that such treatment:

- a) derives from international agreements on juridical assistance;

62 On signature of the Final Minutes of the Uruguay Round on 15 April 1994, 95 Lists of Commitments were presented, as well as 61 Lists of Exemptions to the most-favored nation principle.

63 Article V of the General Agreement on Trade in Services, entitled *Economic Integration*, allows its Members to join an agreement which lifts constraints on trade in services between the Signatories thereof, on condition that such an agreement: a) has substantial sectorial coverage; and b) establishes the absence or elimination of all discrimination among the Parties thereto.

64 Annex 1C.

65 Article 4.

- b) that it is granted in compliance with the provisions of the Berne Convention (1971) and the Rome Convention, which authorize that the treatment granted is not in function of national treatment, but rather the treatment given in another country;
- c) that it refers to the rights of performers, artists and entertainers, record producers and radio and television-broadcasting stations not covered in this Agreement;
- d) that this derives from international agreements covering the protection of intellectual property that entered into effect prior to the setting up of the WTO, whenever this does not constitute arbitrary discrimination against the citizens of other Members.

XIV. Conclusions

14.1 The application of the most-favored nation principle or clause presents analogies within the juridical frameworks of the economic integration schemes covered by Agreements in the Americas, as well as the juridical framework of the multilateral trade scheme of the 1994 GATT and the World Trade Organization.

14.2. The multilateral function of the most-favored nation clause is inter-related with other elements that are cardinal in the economic integration and free trade agreement system, particularly principles covering non-discrimination and reciprocity.

The most-favored nation clause must admit exceptions at both the global level as well as on the Latin American plane, fostering a more integrated economy. This means that concessions granted among themselves by the nations involved in an integrationalist scheme may exclude third party nations from outside the area, with the exception of the economically less-developed nations.

14.4 The principle of national treatment, a cornerstone of the system of multilateral trade talks, is now tending towards greater discernment with regard to the developing countries. These latter are now believers in differentiated, more favorable treatment. The usual trend in multilateral agreements on trade in goods and services sees increasing participation by the developing countries. This is taking place through specific commitments negotiated among the developed nations.

CJI/SO/II/doc.4/96
17 January 1996
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JURIDICAL ASPECTS OF FOREIGN DEBT

(presented by Dr. Miguel Ángel Espeche Gil)

During its August 1995 regular sessions period, and in compliance with its earlier Resolutions adopted in 1993, 1994 and March 1995, the Committee resolved (CJI/RES.II-17/95) to maintain on its Agenda the topic of "Juridical aspects of foreign debt", and to continue with its examination of the program of the initiative of the possible future presentation of a Draft Request for a Consultative Opinion to be submitted to the General Assembly of the United Nations and the International Court of Justice.

The latest developments on this matter are as follows:

1) On 9 August 1995, on the basis of a Draft submitted by its Chairman, Congressman André Franco Montoro, the Foreign Affairs Commission of the Chamber of Deputies of the Federative Republic of Brazil, based on Agreement N. 26 of the XII European Union/Latin America Interparliamentary Conference adopted in Brussels in June this year, unanimously resolved to request the President of the Federative Republic of Brazil, in compliance with the summons of the Parliaments of Latin America and Europe, to take the initiative of presenting to the General Assembly of the United Nations the proposal to request a consultative decision from the Court at The Hague, on the principles of international law that rule on contracts and the execution of foreign debt in the modern world. The bases of this Resolution are given in the document entitled "Justification" attached hereto.

2) The Chairman and the Secretary-General of the Latin American Parliament appointed a Special Committee, chaired by Uruguayan Congressman Juan Adolfo Singer, to take responsibility for keeping in contact with the representatives of the various countries in order to administer the adoption of this United Nations Resolution on the application for a consultative opinion from the Court at The Hague, in compliance with the specific mandate of the XII European Union / Latin America Interparliamentary Conference (June 1995). In order to fulfill this task, the above-mentioned Committee held a series of talks in New York during the sessions of the United Nations General Assembly, backed by the Permanent Missions that supported this proposal.

3) On 26 October, the President of the Latin American Parliament, Senator Humberto Celli, submitted a Note to the Secretary-General of the United Nations, Ambassador Boutros Boutros Ghali, which postulated the inclusion on the Agenda of the LI Sessions Period of the United Nations of the topic entitled "Foreign Debt and International Law - Request for a Consultative Opinion from the International Court of Justice on the Juridical Aspects of Foreign Debt". The President of the Latin American Parliament duly submitted this request, also in compliance with the above-mentioned Agreement N.. 26 of the Interparliamentary Conference in Brussels. This Note mentioned that: "... *the constructive character of this Proposal is that, far from being a gesture of North / South confrontation, it is a serious attempt by means of International Law - whose decade is being celebrated by the United Nations - to find a fair, equitable and long-lasting solution to the indebtedness of the developing countries, which will thus contribute to the well-being of the international economic system.*"

4) Heading a group of seventy Italian legislators, also echoing the above-mentioned XII European Union / Latin America Interparliamentary Conference, Senator Salvatore Cherchi presented a proposal whereby the Senate of the Italian Republic requested its government to take the necessary steps for the General Assembly of the United Nations to take under consideration a Resolution requesting the above-mentioned consultative opinion from the Court.

5) Senator Cesar Delgado Barreto and other Members of Parliament presented a similar Draft to the Peruvian Senate.

6) The Latin American Council of Bishops resolved to request the National Bishops' Conferences to take steps to obtain support for this initiative from their respective governments.

7) During October, the President of the Federative Republic of Brazil, Fernando Henrique Cardoso, and the President of the Republic of Venezuela, Rafael Caldera, resolved to order their respective Missions to the United Nations to present the initiative of submitting "Juridical Aspects of Foreign Debt" to the International Court of Justice, a proposal which is under consideration within the Assembly, with discussions having started within the Group of 77. It is thought that this issue will be brought up during the LII Sessions Period.

8) The Advisory Board of the Latin American Parliament has prepared a Draft Explicatory Memorandum as its contribution to a future presentation of the proposal, with the Annexes thereto consisting of Reports published by the European Council for Social Research in Latin America on this issue (see (CJI/SO/II/doc.22/95 and earlier). It also published an update preliminary summary entitled "Foreign Debt under International Law", accompanied by updated statistics.

9) The European Council for Social Research in Latin America has scheduled two working meetings in Madrid/Salamanca and Rome/Sant'Agata dei Goti for June and July-August next, respectively. These meetings will expand the in-depth analysis of the juridical bases of the Draft Explicatory Memorandum of the Latin American Parliament Advisory Council, and will seek to dovetail these bases of the proposal with new interdisciplinary input in order to make the outcome available to governments whose Ministers are handling this matter in the United Nations. It should be stressed that these meetings of the Council for Social Research in Latin America - as was already the case at the seminar in Rome/Sant'Agata dei Goti last May - have already extended invitations to jurists from Islamic nations, where this measure has received a favorable welcome in academic circles.

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INTER-AMERICAN COOPERATION TO CONFRONT TERRORISM

(presented by Dr. Miguel Ángel Espeche Gil)

1. In past decades, the topic of terrorism has occupied the attention of the Committee, and was once again included on its Agenda in August 1994.

On this occasion, the title originally assigned to this topic was "Inter-American Cooperation to Confront International Terrorism". From the 1995 sessions onwards (CJI/RES.II-19/95) this was altered to "Inter-American Cooperation to Confront Terrorism". The Committee felt that the treatment of this issue would focus on the terrorist phenomenon without further stipulations.

The Rapporteur was requested to continue the study of this topic and present a fresh Report.

2. This issue has also been taken under study by the General Assembly (XXV sessions period) and the Committee for Juridical and Political Affairs of the Permanent Council of the OAS, which set up a Working Group on this matter chaired by the Ambassador of Peru to the OAS, Dr. Beatriz Ramacciotti. In this function, the Ambassador participated in a session of the Committee during the August 1995 regular sessions period.

As this topic is under study by various different agencies of the Organization, the focus undertaken by the Committee should take this into account in order to avoid unnecessary overlapping of work.

3. In order to study this topic, it was necessary to work with the back-up documentation prepared by the International Law Development and Codification Department of the Under-Secretariat for Juridical Affairs:

- a) Development of the topic of terrorism within the framework of the OAS (OEA/Ser.G. CP/CAJP-1035/95, 6 September 1995);
- b) Principal juridical efforts at the international level on the topic of terrorism: Systematization of International Conventions in Effect (OEA/Ser.G. CP/CAJP-1039/95, 28 September 1995);
- c) Juridical aspects of terrorism: Input from International Doctrine: A Comparative Study of the major international agreements on this issue, and the development of this topic within the United Nations International Law Commission (OEA/Sec.Gral.CJI/doc.11, 16 January 1996);
- d) Examination of the domestic legislations of the Member-States of the OAS in terms of terrorism (Version I -provisional) (OEA/Sec.Gral. CJI/doc.12, 16 January 1996).

4. On the basis of these documents, and taking into consideration the opinions put forward during the meetings of the Working Group on Terrorism, the International Law Department drafted

a document that is made available to the Rapporteur entitled "Draft Inter-American Convention on the Prevention and Elimination of Terrorism."

This text is divided into 15 articles covering the principal aspects of this topic. It is an advance in the line of conventional treatment of Hemisphere-wide cooperation to combat this scourge which will be analyzed by the Working Group with a view to the Specialized Conference.

Due to the advanced level of consideration of this topic as signified by the above-mentioned Draft, it is suggested that it be handled in the same way as the topic of Corruption, with the Committee analyzing the Draft prepared by the Secretariat and considering the comments made thereon by the Rapporteur, attached as an Annex.

5. The adoption of this methodology in the approach to this topic does not exclude other possibilities of analysis in the quest to find effective measures for combating terrorism in both dissuatory and repressive ways. In his 1994 and 1995 Reports, (CJI/SO/II/doc.47/94 and CJI/SO/II/doc.4/95), the Rapporteur claimed and still claims that the normative framework in effect within the Inter-American System would provide the necessary footing for the adoption of measures that could prove valid responses to the terrorist threat, particularly from the preventive viewpoint.

The Charter of the Organization of American States establishes various norms, the appropriate application of which may provide the backing for effective measures against the threat of terrorism. For example: Chapters I and II and Articles 2 sub-items b), d); 3 Sub-Items b), d) and g); 10, 12, 17, 21, 22, 27 and 28; Article X; Articles 81, 82, 90.

On the other hand, and more specifically, the aspect that is of more concern under IRAT is that application, although, as certainly noted, the circumstance whereby not all the Member-States are signatories of this Treaty would certainly reduce the effectiveness of the measures to be adopted under this juridical framework.

On this aspect, the initial 1994 Report stated that:

"With regard to other actions covered by the classification of terrorism, recent acts of violence have achieved a scope that denotes the use of measures similar to military operations. The episodes that have taken place through the use of explosives have been of a size similar to bombardments in both planning as well as effects, with their lethal outcome extending to the civil populations of the countries affected thereby beyond the assumed target at which their actions are directed. This leads us to wonder if we are not facing what we might call "armed attacks"

If the parameters outlined below are accepted as including the concept of the criminal acts under examination, we would not be that far from the possibility of linking them, together with the juridical and institutional consequences thereof, to those that trigger the functioning of the IRAT provisions, regardless of whether or not this Treaty is invoked. However, in view of the restriction on the pertinence of the IRAT outlined above, this argument is nonetheless valid with regard to the Charter of the Organization of American States.

"This line of analysis leads us to a first approach whereby in order to confront this new threat, it would not be necessary to adopt new juridical

instruments with all the cumbersome process leading up to the signature of a treaty or convention and the later entry into effect thereof".

As there has as yet been no appreciable echo of the proposal to expand this juridical aspect in the treatment of this topic, we will not stress the implementation thereof for the moment.

ANNEX I

DRAFT MODIFICATIONS PROPOSED BY THE RAPPORTEUR TO THE WORDING OF THE DRAFT INTER-AMERICAN CONVENTION FOR THE PREVENTION AND ELIMINATION OF TERRORISM

(prepared by the Secretariat for Legal Affairs
Department of Codification and Development of International Law)

Article I

Objectives and Purposes

The Signatory States to this Convention agree to adopt the necessary measures for the prevention, sanctioning and elimination of terrorism. To this end, they assume the commitment to strengthen international cooperation in order to develop coordinated actions that lead to the achievement of the proposed objectives.

Article 2

Scope of Application of the Convention

For the purposes of this Convention, terrorist acts are considered as being all threats or use of illegal violence, regardless of the motive, means and scope thereof, in order to generate widespread terror or alarm in all or part of the population, and which constitutes a serious hazard to the lives, physical, material or moral integrity or freedom of persons. Among others, the following are considered as terrorist acts:

- a) A serious attack against the life, physical, material or moral integrity or freedom of persons, particularly those enjoying special international protection such as Chiefs of State, Heads of Government, Ministers and Diplomatic Representatives, as well as members of the families thereof;
- b) The use of explosive artifacts of any type whatsoever, such as bombs, grenades, flares, letter-bombs or other objects, and destructive weapons, among others;
- c) Kidnapping and taking of hostages;
- d) The destruction or take-over of control of an aircraft, vessel, or means of mass transportation in movement, and other act constituting a threat to the safety and security thereof;
- e) Acts of violence that threaten the safety and security of airports, ports or terminals of any type that handle air, land or sea traffic;
- f) The illegal use of nuclear materials.

This Convention is also applicable to any attempts, complicity, direct or indirect participation and extortion connected with the acts described in this Article.

An aggravating factor will be taken as being terrorist acts perpetrated or covered by abuse of the diplomatic immunities and privileges enjoyed by the diplomatic representatives and the States.

Article 3

Domestic Measures

Member-States whose domestic legal arrangements do not cover the types of conduct described in the previous Article agree to typify such terrorist acts and establish severe penalties for such. The Member-States shall periodically advise the depository on the laws and regulations adopted for the application of this Convention. The depository shall forward such information to the other Member-States.

Article 4

Extradition Treaties

The acts described in this Convention shall be considered as common crimes that give rise to extradition in all Treaties on this matter signed by the Member-States. Should there be no Treaty, this Convention shall be taken as the juridical basis for proceeding with such extradition.

Article 5

Preparation and Planning of Terrorist Acts that could affect other Member-States

The Member-States agree to adopt all the measures necessary to prevent terrorists from preparing, organizing or planning terrorist acts within their territories that could affect other States and intended for perpetration outside their territory. Should a Member-State have sufficient reason to consider that a crime is being prepared, it should notify all the States that could be affected and provide all information and indications available thereto.

Article 6

Exchange of Information and Other Cooperative Measures

The Member-States agree to exchange all information available thereto and to coordinate the adoption of all types of cooperative measures in order to prevent terrorist acts being committed, as covered by this Convention.

Article 7

Support and Backing for Terrorist Acts

The Member-States agree to adopt all measures necessary for preventing the backing of terrorist acts within their territories through the organization and dissemination of advertising, publicity or propaganda or acts of apology for this crime, as well as other activities by persons, groups and organizations that encourage, instigate, organize or become involved in the

perpetration of such acts. They shall also adopt all measures necessary, without adversely affecting the rights and freedoms covered within their respective legislations, in order to prevent any abuse of information that may foster terrorist actions, and more particularly prompt a widespread state of alarm among the population.

Article 8

Jurisdiction

Once a crime is perpetrated, the Member-States shall be empowered to adopt all measures necessary to exercise their jurisdiction with respect thereto, namely:

- a) The State in whose territory the crime or the effects thereof took place;
- b) The State under whose flag the vessel, aircraft or means of transportation is registered, where the crime took place;
- c) The Member-State of which the victim is either a citizen or permanent resident, or on behalf of which the victim was exercising functions at the time of the crime;
- d) The State of which the alleged offender is a citizen or permanent resident;
- e) The State is obliged to carry out or abstain from some act as a consequence of the crime.

Article 9

Definition of the Alleged Offender

For the purposes of this Convention, the alleged offender is considered to be the person against whom there are sufficient elements of proof to determine on a *prima facie* basis that such person has committed or intends to commit the crimes covered in Article 2.

Article 10

Preliminary Measures

Should the alleged offender be in the territory of or under the protection of a Member-State, whether or not this be empowered to establish its jurisdiction over the offense in terms of Article 8, it shall adopt without delay all the necessary measures at the request of the interested State as required to detain the offender or ensure the appearance thereof and proceed with extradition, if pertinent thereto.

Detention and other preliminary measures should be implemented according to the law of the Member-State in which the alleged offender is found, and shall be maintained only for as long as needed to allow extradition proceedings to be initiated. In compliance with Article 8, this State shall immediately notify the States empowered to exercise jurisdiction of all the measures adopted with regard to the alleged offender and the outcome thereof.

Article 11

Qualification of the Extradition Proceedings

The qualification of the extradition proceedings and State with regard to which this is initiated shall be the sole responsibility of the Member-State under whose jurisdiction or protection the alleged offender is found. This qualification shall be handled by taking into account the criteria stipulated in this Convention. Particular attention shall be paid to the guarantees rendered by the Applicant State with regard to the trial rights of the alleged offender.

Article 12

Extradition Proceedings

For the purposes of extradition:

- a) It shall be considered that the offense is committed not only in the territory of the State in which it actually occurred, but also in the territory of all the States empowered to exercise jurisdiction in compliance with Article 8;
- b) None of the offenses described in this Convention shall be considered as a political offense, political offense connected to a common crime, or an offense inspired by political motivations.

The Recipient State may refuse extradition should it have sufficient reasons to consider that the purpose of the extradition application is to persecute, punish or harm a person for reasons of race, creed, nationality or political opinion, or when this state is empowered to exercise jurisdiction.

When the extradition does not proceed as requested, the Member-State in whose territory or under whose protection the alleged offender is found, this matter should be submitted without exception or unjustified delay to the competent criminal authorities for the processing thereof. They shall reach a decision under the same conditions as those applicable to common crimes of a serious nature, in accordance with their legislation.

The decision to refuse extradition, as well as the final outcome of the criminal case brought shall be advised to the Member-States empowered to exercise jurisdiction over the offense and which have previously established this in accordance with Article 8.

Article 13

Rights of the Alleged Offender

The alleged offender shall enjoy full right of defense and all the guarantees of due process.

Article 14

Cooperation Measures

As soon as a Member-State learns of the commission within its territory of any of the offenses covered by this Convention, it shall:

- a) adopt all the measures necessary to alleviate the situation of the victims thereof;
- b) provide the home country of the victims with all information available regarding the offense and the circumstances thereof;
- c) advise the States with an interest in the commission of the offense of the circumstances of the perpetration thereof and the data available on the identity of the alleged offender, when it has sufficient reason to believe that such a person has fled its territory;
- d) to cooperate as fully as possible with the above-mentioned criminal proceedings, providing the State that effectively exercises jurisdiction with any pertinent proof it may have.

Article 15

Extension and Continuation of Cooperative Measures for the Prevention and Elimination of Terrorism

The depositary shall assume responsibility for organizing a Conference in which all the Member-States will participate, five years after the date on which this Convention comes into effect, in order to review and revise the validity and application thereof, and adapt it as necessary to the circumstances in force at the time. The Member-States may unanimously agree to hold this conference earlier than the date mentioned above.

CJI/SO/II/doc.6/96
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DEMOCRACY IN THE INTER-AMERICAN SYSTEM

ADDITIONAL REPORT

(presented by Dr. Eduardo Vío Grossi)

INTRODUCTION

1. In Resolution CJI/RES.I-3/95 on "Democracy in the Inter-American System", immediately after listing the principles and norms obeyed by the Organization of American States and its Member-States with regard to the effective exercise of Representative Democracy and in compliance with the Charter thereof and the Resolutions adopted by its organs and agencies, it resolves, among other measures, "to continue the study of this topic, with particular emphasis on the following aspects:

- a) Identification and typification of international illegal acts against the effective exercise of Representative Democracy, and the study of the responsibility that may arise therefrom for the State and individuals;
- b) Possible international illegality due to actions that distort or are intended to distort election results, imposing constraints on freedom of expression through the vote, as well as adversely affecting the authenticity of electoral scrutineering;
- c) The relationship between the effective exercise of Representative Democracy, International Security and Peace, and Human Rights; and
- d) The juridical scope of the measures or administrative actions that could be adopted by the OAS with a view to the re-establishment of the effective exercise of Representative Democracy."

2. In compliance with this mandate, this Additional Report seeks to spotlight the guidelines and constraints featured by each of the above-mentioned topics at the current stage of the analysis thereof by the Rapporteur.

3. To this end, and similar to Report CJI/SO/II/doc.37/94 rev.1.corr.2, and Supplementary Report CJI/SO/I/doc.7/94 rev.2, the above-mentioned guidelines and constraints are always formulated on the basis of the formal sources of international law that underpin them, whether Treaties, consuetudinary precedents, general principles of law, unilateral juridical acts or resolutions issued by international organizations and agencies that rule on law.

A. Illicit acts and international responsibility

4. With regard to the first topic listed in Resolution CJI/RES.I-3/95, namely the identification and typification of illicit acts against the effective exercise of representative democracy and the consequent responsibility of the State and individuals, the response would seem to arise from the actual principles and norms listed in this Resolution.

5. Recalling that this Resolution states that "all States in the Inter-American System have the obligation to effectively exercise Representative Democracy in their political

organizations and systems”, it is logical to conclude that, under the aegis of the international juridical institution of responsibility, illicit acts of this type would consist precisely of the violation of this obligation.

6. Bearing in mind on this issue that jurisprudence based on custom has repeatedly acknowledged that illicit acts and the subsequent responsibility for such arise from non-compliance by the State with international obligations (CPJI: decision handed down on 13/09/29, Chorzow Plant; decision handed down on 12/12/34, Oscar Chinn; decision handed down on 14/06/38, Morocco Phosphates; CIJ: decision handed down on 9/04 and 15/12/35, Corfu Straits; decision handed down on 5/05/70, Barcelona Traction), a position also recognized by the United Nations International Law Commission in its Draft on International Responsibility for Illicit Acts.

7. Resolution CJI/RES.I-3/95 is still more explicit. It expressly indicates that “the abrupt or irregular interruption of the international democratic political process or the legitimate exercise of power by a democratically-elected government or the overthrow by force of a democratically-constituted government within the Inter-American System constitute non-compliance with the obligation to effectively exercise representative democracy.”

8. This Resolution thus expressly states that in any of these situations, the obligation to effectively exercise representative democracy would be violated. It may therefore be concluded that in these cases an illicit act would occur.

9. This Resolution certainly does not state that only or solely in such situations does an illicit act occur, whereby other situations may also constitute such. What the Resolution indicates is simply that which the OAS and its Member-States have observed in cases that involve non-compliance with the obligation to effectively exercise representative democracy.

10. Still within the sphere of competence of the juridical Institution of international responsibility, a violation of the obligation to effectively exercise Representative Democracy is, as stated in Resolution CJI/RES.I-3/95, attributed to the State, even though the actual perpetrators of the illicit act are not part thereof or do not act as a government agency.

11. Thus, when this Resolution mentions “the abrupt or irregular interruption of the international democratic political process or the legitimate exercise of power by a democratically-elected government or the overthrow by force of a democratically-constituted government within the Inter-American System constitute non-compliance with the obligation to effectively exercise representative democracy,” it makes no mention of who or what may be causing this interruption or overthrow.

12. However, immediately after, and as another principle or norm listed, this Resolution adds that “the State in the Inter-American System that is in non-compliance with the obligation to effectively exercise representative democracy acquires the obligation to re-establish the effective exercise thereof”. This means that it is actually the State “performs” the illicit act, regardless of who or what actually carries out the acts or omissions that constitute this, and it is the State that is responsible for the reparation thereof.

13. The above-mentioned principle and norm would logically seem to uphold the hypothesis covered in the juridical Institution of international responsibility whereby the State is responsible for the acts or omissions of the insurrectional organization that wins its struggle to take over control of the government (Mixed French-Mexican Commission, 19/10/28, Case G.Pinson) under the principle of continuity of the State, whereby the *de facto* government becomes the actual government and is thus responsible for its own acts.

14. This thus gives rise to the above-mentioned principle and norm stating that non-compliance with the obligation in question constitutes the "interruption" or "overthrow". In contrast, it does not state that an "attempted" interruption or overthrow is an illicit international act, because it is not. As long as the acts or omissions remain in the field of intention and are not successful or finally fail, there is no violation of the obligation to effectively exercise representative democracy.

15. But even under these circumstances these facts do not enter the sphere of international juridical arrangements but rather remain in the internal, domestic or national arrangements, and should they have some link therewith, it is precisely through State law that compliance with the obligation to effectively exercise representative democracy must be guaranteed, adopting all measures permitted by law to prevent and repress attempts to block compliance with this obligation.

16. As already mentioned, as in accordance with the principles and norms listed in Resolution CJI/RES.I-3/95, "the State in the Inter-American System that is in non-compliance with the obligation to effectively exercise representative democracy acquires the obligation to re-establish the effective exercise thereof".

17. As already expressed in the Conclusions of the Report CJI/SO/II/doc.37/94 rev.1.corr.2, "nevertheless, under general international law, the violation of an international obligation implies the appearance of a new obligation, which is to make reparations, as the violation of an obligation regarding democracy engenders within the Inter-American System the obligation to re-establish this same democracy, which is, in such a case, the only type of reparation in compliance with the principal obligation to establish, promote and consolidate the democracy which was violated."

18. Within this order of ideas, in case of violation of the obligation in question, no indemnity or compensation would be due, nor satisfaction as means of reparation.

19. But this should not be interpreted in the sense that the sole type of valid reparation is *restitutio in integrum*, taken as being the re-establishment of the state of affairs that presumably would have existed if the illicit act had not been committed. (CPJI, decision handed down on 13/09/28, Chorzow Plant).

20. In case of violation of the obligation of the States in the Inter-American System to effectively exercise Representative Democracy, inter-American practice would seem to indicate that the re-establishment thereof might not necessarily imply a return to the situation existing at the time when the interruption took place or the democratic government was overthrown. If this were the case, it should be re-established under the exercise of the government in power, which does not normally occur in this manner.

21. To the contrary, inter-American practice seems to indicate that the State that has fallen into non-compliance with the obligation to effectively exercise representative democracy would comply with the obligation to re-establish the effective exercise thereof by setting up a new or democratically-elected government.

22. The relevant point in these cases would thus not be the classic expression *restitutio in integrum*, but rather to set up a democratic government that might well be different from its predecessor. Thence also, what takes place between the interruption or overthrow of the democratic government and the establishment of a new democratic government would also seem to be resolved by the sole circumstance of the existence of this latter. What would be important is that Representative Democracy returns to power and from then on the re-establishment of the

situation as though the illicit act of the interruption or overthrow of the democratic government had never taken place would have no further meaning.

23. Perhaps it is for this same reason that the positive international juridical order does not currently assign any international responsibility to the individuals whose acts or omissions gave rise to the illicit act. No written norm or precedent whatsoever was found that would support the contrary, and those which to some extent could be invoked refer more precisely to violations of human rights.

B. The electoral system and democracy

24. With regard to the second topic covered by Resolution CJI/RES.I-3/95, meaning "possible international illegality due to actions that distort or are intended to distort election results, imposing constraints on freedom of expression through the vote, as well as adversely affecting the authenticity of electoral scrutineering", the Rapporteur was unable to make progress on this issue.

25. This is largely due to a lack of information that would allow the structuring of the formal sources of International Law which might regulate this issue, meaning which would stipulate to what extent the actions in question are regulated by international juridical arrangements, thus ceasing to be a topic falling under the exclusive or domestic jurisdiction of the States.

26. Additionally, the Rapporteur has also to date been unable to discover and analyze cases - if any - that have occurred in practice with regard to the topic under study, and if the OAS or its Member-States have assumed any stance therein that might act as a precedent thereto.

27. It should also be recalled here, as mentioned in CJI/SO/II/doc.37/94.rev.1.corr.2, that the OAS has carried out various observation operations for electoral processes through the Unit for the Promotion of Democracy.

28. From this viewpoint, perhaps what the Organization is doing at the moment is cooperating in helping prevent fraudulent elections, but there are no precedents that allow a principle or norm to be formulated applicable to such a case should it occur.

29. All this thus leads to an obvious conclusion, reached through deduction, that for the Committee, "actions that distort or are intended to distort election results either to hobble freedom of expression through the vote or by affecting the authenticity of election scrutineering" could well constitute yet another case in which the State would fail to comply with its obligation to effectively exercise representative democracy.

31. However, it still remains to determine the circumstances under which this may take place and - given the complexity and specificity of this topic - the study thereof may well require the unstinting support of the Under-Secretariat for Juridical Affairs as well as the Unit for the Promotion of Democracy.

C. Representative Democracy, Peace and International Security, and Human Rights

32. The broad-reaching scope of the third topic which, according to CJI/RES.I-3/95, warrants special emphasis in the further study of representative democracy, meaning with regard to the relationship between the effective exercise thereof, peace and international security, and human rights, becomes quite clear - as indicated by the above-mentioned Resolution - in the "Study of the Relationship between Respect for Human Rights and the Exercise of Democracy" prepared by the Inter-American Juridical Committee in 1959, and the Report presented thereto in

1992 entitled "Study of Legitimacy in the Inter-American System and the Inter-Relationship between the Provisions of the Charter of the OAS on Self-Determination, Non-Intervention, Representative Democracy and the Protection of Human Rights."

33. On the other hand, it should not be forgotten that both the Inter-American Commission on Human Rights as well as the Inter-American Court for Human Rights have referred - as clearly mentioned in Report CJI/SO/II.doc.37/94 rev.1.corr.2 - to the problem of the relationship between democracy and human rights. This Report recalls that the Court stated that "representative democracy is a determining factor throughout the entire system of which the Convention (American, on Human Rights) forms a part " (Consultative Opinion No. 6, dated 09/03/86, Series A, No. 6, 34). This criterion has been shared on many occasions by the Committee, such as in the above-mentioned Report.

34. In this respect, it should also be recalled that the conclusions of the above-mentioned Report state that "... 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."

35. Finally, it should also be recalled that with regard to the relationship between international peace and security and representative democracy, this Report states that " 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."

36. Nevertheless this Report also mentions that recent practice "... 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 Organization."

37. Finally, in addition to having only Haiti as a precedent, the analysis of this aspect of the study of Representative Democracy is also shaped by the study of the universal mechanism for the preservation of international peace and security, which is - in the final instance - clearly political and thus offers a wide margin for the use of non-arbitrary discretion in the qualification of acts that threaten international peace and security as being a breakdown in democracy, as was the sole case of Haiti.

D. Measures or Steps Implemented by the OAS

38. With regard to this final point which, in terms of CJI/RES.I-3/95, warrants special attention in the study of Representative Democracy, it is worthwhile mentioning that "the juridical scope of the measures or steps that could be undertaken by the OAS in order to bring about the re-establishment of the effective exercise of representative democracy", also includes - as noted by the Committee in this Resolution - the obligation of the States in the Inter-American System to effectively exercise Representative Democracy with regard to the OAS.

39. Thus, following the principles and norms that the Committee noted are imposed thereon, as well as its Member-States with regard to the effective exercise of representative

democracy, the Organization not only has the competence to foster and consolidate this condition, but is also empowered to determine "when one of its Member-States has violated or ceased to comply with the obligation to effectively exercise Representative Democracy."

40. Finally, the Committee also stated that one of the principles or norms complied with by the OAS and its Member-States is that "the Resolutions that the Organization of American States may adopt in such a case (non-compliance with the obligation to effectively exercise Representative Democracy) should be designed to re-establish (the exercise thereof)."

41. It would also be useful to recall that Report CJI/SO/II.doc.37/94.rev.1.corr.2 stressed that the OAS "may formally take cognizance of this matter (the oft-mentioned obligation to effectively exercise representative democracy) and adopt Resolutions that shall have their own value or that inherent in the decisions of the cooperation organizations, meaning that in order to be implemented they require the consent of each State. This means that these 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 shall decide to implement on a sovereign basis."

42. This Report added that "in order to adopt this type of Resolution that is non-mandatory or non-binding on the Member-States, the Organization has set up a mechanism", outlined in Resolution 1080 (XXI-0/91).

43. In order to determine the juridical scope of the measures that the OAS may adopt with regard to the re-establishment of the effective exercise of representative democracy, it shall carry out an analysis of the general value of the Resolutions of international cooperation organizations such as the OAS itself, a topic that has already been covered by the doctrine.

E. Other comments

44. In listing the above-mentioned references with regard to the guidelines and constraints on the continuation of the study of the topic of Democracy in the Inter-American System, it should not be forgotten that CJI/RES.I-3/95 also indicates that it was agreed "to propose to the corresponding agencies of the Organization that they should adopt the following measures to foster the effective development of International Law with regard to Representative Democracy:

- A. To coordinate with other international organizations in order to set up studies and organize seminars, round tables and other ways of analyzing and studying the experiences and positions of the OAS and these other international organizations regarding Representative Democracy;
- B. To distribute Report CJI/SO/II/doc.37/94 rev.1 corr.2, Supplementary Report CJI/SO/II/doc.7/9 rev.2 and this Resolution to the Member-States so that they may forward them to their respective law schools and political science departments, requesting their observations and comments on the prospects for the progressive development of International Law in terms of the effective exercise of Representative Democracy;

45. It thus seems prudent to await the decision to be adopted by the agencies of the OAS on this matter, prior to proceeding any further.

46. It would also be useful to follow up on the proposal of the Inter-American Juridical Committee to include in the future Inter-American Convention Against Corruption the so-called

Democratic Clauses, such as those in the Agreement between the European Union and the Mercosur, which are also based on other similar provisions, as both experiences may well be taken as demonstrations of the intentions of the States on this matter, and thus constitute relevant precedents for this issue.

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CJI/SO/II/doc.9/96
5 February 1996
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RIGHT TO INFORMATION

ACCESS TO AND PROTECTION OF PERSONAL INFORMATION AND DATA

(presented by Dr. Mauricio Gutiérrez Castro)

INTRODUCTION

The right to information, as we will see below, is a juridical issue or discipline that is rapidly coming to the fore. The pressures created by modern technological social communications media, with the threat they present to personal - and even State - rights, plus the reality that distance and secrets no longer exist today, has prompted in both jurists and international organizations the urgent need to outline juridical treatment of the information phenomenon.

The press, which is either a good shaper of public opinion or a source of disinformation, depending on the circumstances, has acquired power that is at times superior to that of the State, and acts either for or against it. On the other hand, it can make a person a hero or ruin someone's name, condemning them to a genuine civil death. This mighty institution with its almost magical powers may thus be the basis of a State of Law and a generalized, permanent democracy in the world, or may be an almost diabolical force that destroys prestige, principles, institutions, persons and nations. This prompts the need to act through the law - power is confronted with might - and keep the social communications media under normative controls that allow the existence of well-informed citizens, those who receive complete, true, objective and multi-faceted information, so that they can develop criteria and take their decisions freely. We do not forget that information precedes action. But the contents of a right of information are not exhausted by the contents of the right to information. As we will see, "information" is today a subject of special treatment by jurists, and the right to be informed by the press is only one of its aspects, as it has its own particular characteristics and operates as an individual, political and social law, thanks to its tremendous power as an institutional guarantee of democracy. Thus, together with the right to information (freedom of the press) in all aspects and media, other subjective rights also arise whose direct purpose is "information", meaning in this case the right to access documents, records, files and papers of the Government (transparency of administration).

Problems with special characteristics have been appearing in more modern times, as well as the advantages of information technology. Particularly due to the possibilities opened up by computerized files, records, and data banks, which not only allow the history of each human being to be generally known, but also constitute a risk to the private life thereof, as well as image and other rights of personality. These hazards should be foreseen and avoided through the law, by means of precautionary legislation on this issue. But there is an even more important point that at least the jurists that we have consulted seemed to have forgotten or not noticed, namely: information is power, and in this case, personal data bases could be converted into a danger, becoming perhaps the most powerful tool for manipulating people, opening up all sorts of possibilities, and here we speak not only of something that is possible but in fact probable, due to the existence of a sweeping dictatorship over everyone everywhere, that of man controlled in his very being and circumstances.

Problems of this scope cannot be ignored by an institution as important as the Inter-American Juridical Committee, as we will see below.

CHAPTER I

APPRAISAL OF THE RIGHT TO INFORMATION BY THE INTER-AMERICAN JURIDICAL COMMITTEE

Four phases or stages in the scientific planning of these themes may be distinguished, which in turn have been shaped by the needs or requirements of the moment, the historical time during which they took place and which lead our Institution and its Rapporteurs to lay a certain stress on specific aspects thereof, although a tendency is always noted to treat this in a systematic manner.

PHASE I

The reports of Dr. Juan Materno Vásquez

When drawing up the agenda for its July-August 1979 regular sessions period, the topic of *Freedom of information and expression* was included.

Later, during the January-February 1980 regular sessions period, Dr. Juan Materno Vasquez was appointed Rapporteur for this topic. (1)

To support the Rapporteur, the Department of Codification and Development of International Law of the Juridical Consultancy of the General Secretariat of the OAS prepared a document in December in 1979 entitles *Some aspects on the right to the freedom of expression and information* which carried out an ample study of the precedents to this topic in the international and inter-American field on both rights and freedom, which culminated in Chapter IV thereof, under the title:

“Towards a new international order in information”, which was the core problem of the topic assigned to the Rapporteur and his presentation in this document, allowing us to determine which were the fundamental concerns in the inter-American community, and which have since then shaped the actions of the Inter-American Juridical Committee, its Rapporteur and the Department of Codification and Development. This highly meritorious document states: “The demand for the establishment of a new international order for information and a more balanced circulation of news has been put forward in terms that we would call acute, particularly by third world nations which basically state that:

1) The mass media do not award third world countries an appropriate place, in accordance with their reality and efforts. It seems that there is a conspiracy of silence to avoid giving due importance to events in the third world.

2) The economically-powerful and technologically-advanced nations that have a virtual monopoly over mass media, particularly in the Western countries that house the international press agency head offices, offer an image of worldwide reality that is colored by their own interests, this means that the global press which takes its input from news supplied by the agencies projects a false image of the third world.

3) The free circulation of messages, the invasion of advertising through different communications media (cinema, radio, TV) coming from the rich nations are the means selected by imperialism to accentuate and perpetuate their mastery over the less developed countries.

These three statements which today draw world attention in a special manner, are summarized in the single concept that has been called: imbalance in the circulation of information among third world nations and other countries.

In the second document on this same topic and with the same title: Addendum 1 (Supplementary Documentation of the Development and Codification Department, July 1980), its explanatory note states: "... the Development and Codification Department has continued to compile material which, in its view, could be useful to the Rapporteur and the Committee in its work. This material is given in this Addendum to the preliminary study, and includes the following documents:

a) Report of the Commission on the Freedom of Press produced by the Inter-American Press Society, for the XXXV General Assembly of this entity (Toronto, 1979), which offers data on the state of the exercise of freedom of the press in various American countries;

b) Report of the Commission of Freedom of Expression presented to the XIV Ordinary General Meeting of Inter-American Radio-Broadcasting Association (A.I.R. *Asociación Interamericana de Radiodifusión*), held in Washington D.C. in October 1979; and

c) Comments put forward by the Juridical Consultancy at the request of the office of the Executive Secretary for Education, Science and Culture of the OAS., on the results of the meeting held in Paris (1979) by the Executive Committee of the International Union for the Protection of Literary and Artistic Works (Berne Union) and the Inter-Governmental Committee for the Universal Convention on Authors' Rights (UNESCO), in order to study the "guiding principles" of the Convention regarding the distribution of programs by satellite (Brussels Convention, 1974).

It should be noted that these (initial) comments are mainly designed to draw attention to the repercussions of the "guiding principles" with regard to the "information monopolies" whose existence is incompatible with the Declaration of Principles on Information proclaimed by UNESCO (Paris, 1978)".

There is a third document issued by the Department of Codification and Development of International Law of the Secretariat for Legal Affairs which contains:

a) A copy of the "Declaration of Talloires (signed in March 1981) adopted by independent news organizations on "The new information order"; and

b) A copy of the report of the Director General of the Inter-American Broadcasting Association to the joint meeting of this association with UNESCO held in Quito in August 1981.

As we have already noted, the efforts of this Department are focused principally on the conflict or problem of juridical, political, and ideological confrontation over "The new international information order", as the mandate of the Inter-American Juridical Committee centers this study on the freedom of expression and information. A concern which we find dominant, including in doctrinal studies of that period.

However, there is no technical, systematic and well-ordered effort to prepare a global study on the "Right to Information" as a juridical science and a normative order of autonomous objective

law, or with potential to autonomy that cover the entire juridical regime, systematically making efforts to pinpoint its general principles, its various aspects, and its purposes, and taking into account, which is convenient to emphasize now, the distinctions and differences of the information phenomenon, which is to a large extension conditioned by the various technical media, as well as its subjects, purpose and content, giving place to various objective rights, including freedom of the press. In other words, to quote the General Assembly of the United Nations, in its statement of December 1979, where adopting a resolution that set up an Information Committee, its task was: "To foster the establishment of a global order of information and communication that is more fair and more effective, in order to strengthen peace and international understanding ... based on the free circulation and broader, better-balanced dissemination of information."

The Rapporteur for this theme on the Inter-American Juridical Committee, Dr. Juan Materno Vásquez, presented his report during the 1981 sessions period, submitting *The right to information* to the Inter-American Juridical Committee, thus being assigned the task of first trying to cover the issue of "freedom of expression and information" as a branch of objective law, which includes them. Although in this report Dr. Materno Vásquez necessarily had to comply with the mandate of the Committee with regard to the central topic, both law and custom stress that information, particularly with regard to problems of fair access for State to information in terms of equaling out the levels thereof, the news agencies that provided their own news services to firm up what was called the right to free information. This means developing the topic within the concept of a New International Information Order, more involved with the equality of the States than freedom and equality in the internal order.

However, notwithstanding, the emphasis given to the conceptual positions of the UNESCO is also noteworthy, as well as the words of Mr. Makasiansas, Assistant General Director of UNESCO, during his speech to the XXV session on 10 December 1979, which drew the following conclusions:

The right to information or freedom of information, as viewed by UNESCO, has the characteristics of a Collective Law, as a law of the national States subject to conditions of economic dependence on the developed nations. Within this order of ideas, it should be understood that the manifestations and declarations outlined, in which much stress is laid on "the disinformation suffered by the developing nations through manipulation of the news by international news agencies, against which it is suggested that State control of the information media should be set up".

But later, he brought up the issue of exactly what was understood by the right to information, and emphasized :

That the opposing attitudes of UNESCO and the IPA International Press Association, led to the assumption that, under law information is taken as being not only free access to the sources of information but also the guarantee of this access by the State, which was demanding participation in news-gathering activities.

In addition to establishing the various aspects to the right to information, Dr. Materno Vásquez continues by making a basic distinction which is perhaps the starting point to the right to information, as well as a law of information, which includes the former, by stating: "All the above means that the right to information is broader than the right to free expression. Thus, for example, the National Constitution of Panama stipulates in Article 36:

Everyone may freely express their thoughts in words, in writing or through any other medium, without being subject to prior censorship, but there are legal

responsibilities when through any of these media, the reputation or honor of persons are adversely affected, or the social security or political order are attacked.

But in Article 84, the constitutional doctrine on the right of information (the right to information as stated by this Rapporteur) stipulates, in the following terms:

Article 84: The social communications media are tools of information, education, and recreation, as well as cultural and scientific dissemination. When used for the publication or dissemination of advertising, this should not be contrary to the health, morals, education or cultural formation of society, nor the national conscience. The law will regulate the functioning thereof.

As stated by Rapporteur Materno Vásquez, and in his quotation from the Panamanian Constitution, a methodological different is already apparent, we would even say basic, between the right or freedom of expression of a liberal nature, which is a civil and political right, or the freedom of autonomy, as stated by some authors, which imposes on the State a limitation to respect and in its more modern sense to act in order to allow or guarantee this (situation of liberty), but in all cases this refers to a fundamental right of expression of thought, ideas or opinions. This right, which historically dates back to freedom of conscience and religion that sprang up in reaction to political and religious absolutism, has clear, precise historical precedents that it would be prolix to enumerate. In contrast, Article 2 of the Panamanian Constitution mentioned above refers to the right or freedom of information, the freedom of the press, the right to information, rather than to the right of expression, which is a basic condition thereof, but rather to the right to inform, to investigate, to obtain information, and in turn to be informed with the content of this right not limited only to thought, ideas or opinions, but also to all news, meaning the announcement or dissemination or facts, the dissemination or broadcasting which is handled through what is badly called the social communications media, whose effective control is exercised both at the international and national levels by interest groups. This means that constraints on freedom of expression and information are not and should not always be the same.

This distinction is not based purely on technical, juridical or academic interest, as its practical consequences are of the greatest importance. In fact, and with bad intentions, both concepts have been confused, and the mass media have invoked them to back claimed violations of the “freedom of expression”, which is more appropriate to single people, or groups of persons, which are relatively unprotected and need guarantees and a media to express themselves, when in fact what is intended is to defend man, society and even the State against the disinformation provided by the at times biased national or international “media”, although the national aspects is at times very relative, as these are agencies which at least with regard to the news are often supplied by input from foreign companies.

To end these comments, the first conclusions of the Rapporteur should be noted:

First conclusions

With regard to the matters outlined above, we turn to the first conclusions which acted as a basis for shaping a Draft inter-American convention on the right to information.

One: The right to information has very special characteristics, and should not be covered in the same convention, jointly with freedom of expression and freedom of investigation;

Two: The right to information is a right of the State whose exercise is firmed up in the regulations and control of social communications media.

Three: The powers of the State to regulate and control the social communications media do not imply coercing freedom of expression. It is only exercised as a guarantee for its members to receive true information.

We note here that we do not find the first conclusion of the Rapporteur totally correct, as when systematizing the right to information, the right to investigate, as providing access to the source or to Government documents in order to obtain information, should be included therein.

We reject the second, as the content of the right to information, or right of information, as the author calls it, should be the entire informative juridical phenomenon, within which the right to regulation within the limits established by the constitutions and treaties are only one of the parts. We agree with the third conclusion, with the reservation that this covers legal and legitimate controls, meaning reasonable constraints.

During the January 1982 regular sessions period, the preliminary report was heard, analyzed above. The summary thereof in Act N^o 16 covering the Ordinary Session held on 28 January 1982 of the Inter-American Juridical Committee is interesting. The comments of the members of the Committee were very illustrative, not only in terms of the topic itself, but also its content.

Dr. Rubin stated:

That the topic of the right to information is of the greatest importance and interest, with a wide variety of aspects. The trends noted in UNESCO could lead to restrictions to this right, and this possibility warrants a lengthy study.

The Chairman stated that: "the difference between freedom of information and freedom of expression should be distinguished, both principles arise from a right of the individual and not of the State".

Dr. Vieira stated that: "another topic which should be given consideration is that of excesses of freedom of the press."

Dr. Vásquez stated that:

"The scope of this topic is very vast, and I recall that mention was even made of "terrorism of information", when rumors began to circulate in Mexico, shortly before the Cancun meeting, about a possible devaluation of the peso in this country".

Dr. Ortiz said:

"That freedom of information is a right of the individual". He referred to major financial groups controlling information and the fact that every day many newspaper companies closed down their daily newspapers in view of the huge costs required to publish them."

Dr. Leoro considered that:

"This topic was of the greatest interest. He stated that he highlighted the importance of the purpose of pursuing the right to information "within which we should highlight what should be the sense thereof, which leads to the guideline that

news should be given, from the viewpoint of the national interest. Negative news should not be published about third world countries in particular.”

There was consensus over the topic appearing on the agenda, under the title *Right to information*.

In the July 1982 ordinary sessions period of the Inter-American Juridical Committee, Rapporteur Juan Materno Vásquez presented an expansion of this first document, under the title of *Right to information*, already approved by the Committee, where he focused on the new international information order, and particularly the outcome of the Meeting of Quito and the Declaration of Talloires, which mirror the reaction of the heads of news organizations to UNESCO proposals.

His study of comparative law in the constitutions of the Member-States of the Inter-American system was very interesting, being designed to determine:

- “a) How to enshrine the individual right to freedom of expression in general, and freedom of the press in particular therein;
- b) Whether or not the manner in which these individual rights are enshrined excludes the possibility of regulating information as a right of the State.”

He concludes that: the constitution of Barbados makes a distinction between the right of freedom of expression and the right to receive ideas and information without interference, as does the Constitution of Chile and Panama.

After the analysis of the various constitutions of the American States, he concludes: “The various Constitutions examined lead us to the following conclusions regarding the topic of the right to information.

One: All clearly enshrine the right to free expression of thought, in any way and through the various types of social communications media.

Second: In very few of these Charters is any mention made of the right to information as an autonomous right. Those that do so acknowledge it as right of the individual.

Three: In some of the Constitutions (Panama, Ecuador, Mexico, Chile) an approach is taken to the right to information as a collective right which is exercised principally through the social communications media, which should comply with their cultural function and development of the national consciousness.”

We cannot fail to make some comments on this first stage.

Due to ideological and political conflict, mainly between the USA and the Soviet Union, there was a heavy emotional load involved in the discussion on the freedom of the press, whereby many States, peoples and organizations expressed their truths or half truths, according to the interest of the bloc in which they were aligned, during this East-West conflict. The capitalist groups thus saw the entire intention of UNESCO as implementing effective, fair freedom of the press, a strategy that would favor the interests of the Soviet Union in achieving monopoly of control over global dominion. The Communist bloc and its allies in turn found that the principles of the “free flow

of information” and “free management of the press”, to be an imperialist policy designed to disinform and build up a global information monopoly by the USA.

With the fall of the Berlin wall and the trend towards economic globalization, this discussion has lost its intensity and cooled down. This allows us greater objectivity to study it and offer solutions. There is no doubt that in both positions, which were once irreconcilable, there is some truth, and when we manage to blend these truths, we will reach a fair information order. The problem for Latin America, independent of any ideology, not only subsists, but has even grown worse. Journalist Guillermo Piernes has written a magnificent study of this issue. (2)

We should not forget that globalization is not only economic, but covers almost all activities, including information, but neither should we forget that balloons have only one mouth, and that if they are blown up too far, they explode. We make these comments because we jurists do not work in a vacuum, nor for a vacuum, but on the basis of social, national concrete realities, over which we intend to exercise a positive effect.

PHASE II

Draft Declaration of the Inter-American Juridical Committee on the Right to Information

Dr. Jorge Reinaldo A. Vanossi and Francisco Villagrán-Kramer

Dr. Materno Vásquez was succeeded successfully by Drs. Aja Espil, Ortiz Martin and Reinaldo Vanossi as Rapporteurs for this topic.

During its August 1991 regular sessions period, Dr. Vanossi submitted a preliminary report entitled “Draft Declaration on the Right to Information (CJI/SO/II/doc.4/88 rev.1). The Committee took this text under consideration and decided to charge the Rapporteur, together with Dr. Villagran-Kramer, with the preparation of a new document that would take into account the opinion of the Committee. This document, entitled “*Draft declaration of the Inter-American Juridical Committee on the right to information*” (CJI/SO/II/doc.4/88 rev.2) was presented during the August 1992 sessions period.

The object of the study is called the “Right to information” by the Rapporteurs, which as we see it, is a step backward, ignoring the title of the Right of information already approved by the Committee, which is more general and covers the various aspects of the information phenomenon. On the other hand, we have already stated our marked inclination to call our discipline “Right of Information” which, in addition to being the name most commonly used in the more modern doctrine, includes not only the right to information as a coordinated complex of subjective public rights that include “not only the right to inform but also the right to be informed”, as stipulated by the Portuguese Press Law dated 24 February 1975, which “assumes a highly serious legal intention in the global treatment of the right to information,(3) as well as always being limited to the field of the press, but not covering the other aspect of the information phenomenon, which is subject to juridical regulation.

(We thus lean more towards the name Right to information, slanted towards the technical and scientific autonomy for which reason we adopt, at least for the moment, the definition of Desantes, quoted by Ignacio Bel Mallen. (4) “This is a universal, general, juridical science that, by covering the information phenomena is endowed with a juridical perspective that can arrange

information activities, as well as informative juridical situations and relations and their various elements, at the service of the right to information”).

Regardless of the above, which after all is our position, as there are many authors who also tend towards the name “Right to information”, as a juridical discipline that covers aspects of information other than freedom of the press, the document prepared by Drs. Vanossi and Villagrán-Kramer has the indisputable merit of approaching aspects that are closely linked to information both in its generic sense, as well as the problem of the mass communications media and the freedom of expression. This is the case of the right to private life or intimacy whereby, together with other rights of personality, most frequently clashes with right to information or to be informed. It is possibly this clash of interests and subjective rights that has prompted a more intensive discussion over the harmonization of these rights, particularly since World War II and to an even greater extent the Universal and American Declarations on Human Rights, which in turn have produced and strengthened the development of the right to information. For this vast topic, the work of Dr. Eduardo Novoa Monreal (5) should be quoted, providing a Latin American example.

Although we have already emphasized that Dr. Materno Vásquez was correct in making a distinction between freedom of expression and freedom of information, we omitted to indicate in the study of Phase I that in Addendum 1 of the document entitled *Some aspects on the right of freedom of expression and information* prepared to back up the efforts of Rapporteur Materno Vásquez by the International Law Development and Codification Department, the documentation attached thereto included: “Comments by the Juridical Consultancy at the request of the office of the Executive Secretary for Education, Science and Culture of the OAS on the outcome of the meeting held in Paris (1979) by the Executive Committee of the International Union for Protection of Literary and Artistic Works (Union of Berne), and the Inter-Governmental Committee for the Universal Convention on Authors Rights (UNESCO), in order to study the “guiding principles” of the Convention regarding distribution of programs via satellite (Convention of Brussels 1974). In these studies, at least some aspects of rights and law are found by the author that reflect on the information which is the subject of our topic, as seen under the heading Right to Information.(6)

In the Draft Declaration prepared by Drs. Vanossi and Villagrán-Kramer, the problem is brought forward again without neglecting matters involved with problems of inequality of information among the States, demanding an effort at the global systematization which, starting from the basic conflict between information and personal rights, basically intimacy or private life, also covers the right to information by the press, with the following rights, which in both their our view should be covered as a right to information or of information.

- 1) Right of access to personal documentation, particularly data bases.
- 2) Right to personal information in public records.
- 3) Right to ownership of information.
- 4) Right to dissemination of information.

This right arises from ownership thereof, regarding which we have serious reservations. In fact, the Rapporteurs treat freedom of the press in the sense of disseminating news, facts and opinions, which is studied in the *Right to Information* and more concretely in the right to be informed, always within the field of the press. This error is based on the fact that in entitling this issue Right to information it gives a preponderant value to the right to be informed, which takes

place by means of dissemination through the social communications media, thus forgetting the rights of the source of the thought, idea or news, which also has its own right.

5) Right to Correction (clarification)

In our view, this should also be handled together with freedom of the press, which we place to a limited extent under the Right to information. Within this, the Right to correction should be covered. Although in the Draft declaration, rectification or response is given original treatment, taken possibly from the Constitution of Guatemala, which states that:

In order to avoid self-censorship of the media, a public fund should be set up to underwrite newspaper space required by request for correction. If the space is limited, a press jury should be empowered to decide on the distribution of this space and the merit of effecting the correction in question.

6) Right to information as a tool for opening up society and the market

It may be properly stated that legislation should guarantee the truth and objectivity of information supplied to the public on the origin, nature, composition and purpose of products and services. This means the *Right to Information* of consumers. We include this topic in the Chapter on the *Right to Information* as part of the *Right of Information*, and additionally include *consumer rights* with other rights, as will be seen opportunely.

7) Right to public information

On the bases of the 1966 *Freedom of Information Act* (USA) which enshrines the principle that “information in the hands of the Government belongs to the people”, the Republican Principle is established on the public nature of public acts. In fact, this principle is far more than a right to public knowledge or public functions, as it includes actions that range from government’s obligations to keep the public informed about the acts of Government and the progress of the administration, which is a principle of transparency for strengthening democracy and the representative regime, through to specific subjective rights. Resorting to Comparative Law, Article 105 of the Spanish Constitution states that:

Article 105: The Law will regulate:

- a) Citizen’s hearings, either directly or through organizations and associations acknowledged under law in the procedure of preparing administrative provisions that affect them.
- b) Citizen’s access to administrative archives and records, except when this affects the security and protection of the State, investigation of crimes and personal privacy.
- c) Procedures whereby administrative acts should be produced, guaranteeing a hearing for the interested party, when appropriate.

Since 1958 Spain’s Administrative Procedures Law stipulated, in its Chapter on Information and Documentation “those interested in an administrative procedure shall have the right to know at any time the state of the progress thereof by obtaining timely information from the corresponding offices”, and another of its provisions states that: “interested parties may request

the issue of a certified copy of concrete measures contained in the provision”, and the issue of these copies may not be denied, when “involving agreements of which they have been notified”.

The 1985 Guatemala Constitution seems illustrative to us in this respect, with its Article 30 containing the General Principle of the Public Nature of Administrative Acts, and Article 31 focusing on the Right of Access to State Records and Files.

Article 30: Public Nature of Administrative Acts. All administrative acts are public. Interested parties have the right to obtain at any time information, copies, reproductions and certifications requested and display of the dossiers or files they wish to consult, except when this involves the military or diplomatic issues vital to national security, or data provided by private persons under the seal of confidentiality.

Article 31: Access to State records and files. Anyone has the right to know what is contained in archives, files or any other form of State records about themselves, and the purpose to which this information is used, as well as to correct, rectify and update it. any political affiliation records and files are banned, except those of the electoral authorities and political parties.

The Constitution of the Federative Republic of Brazil has the following norms:

Article 5 XXXII: Everyone has the right to receive from public agencies information in the particular interest thereof, or in the collective or general interest, which will be rendered within the period stipulated under law, on penalty of responsibility, except for information which must be kept secret for the security of society or the State.

XXXIV: Regardless of payment of any fee, everyone is guaranteed: b) obtaining certificates in public records for defense of rights and clarification of situations of personal interest.

PHASE III

Report on the Right to Information by Dr. Juan Bautista Rivarola Paoli

At the end of the mandate of Drs. Vanossi and Villagrán-Kramer, the Committee maintained this topic on its agenda and appointed Dr. Rivarola Paoli as Rapporteur thereof, who presented his Report in August 1993.

The Rapporteur opened his presentation by referring to the various views of the discipline in question, and stated:

In the field of social communication there is no widespread concept of the scope of the issue in question. This is why, prior to entering on this topic, it is vital to make a distinction that could be important between the right “to” information and the right “of” information.

He continues, quoting Jorge Zaffore: “Just as work and the right to work constitute the basis on which the juridical discipline that we call right of work is based, information and the right to information has generated the **Right of information**. In this, we agree with Villalonga, who saw the latter as being built on the former, as the right “of” information seeks to systematize and

organize the various juridical tools and institutions that incorporate and regulate the right “to” information, in conformity with the basic principles thereof”.

From this, we can infer that: “the right of information constitutes a totality structured around one of the essential principles designed to protect the right to information, meaning the right to give, receive and seek information”.

We have already mentioned that in our view, the issue under study, meaning the field of objective law that regulates information should be called the *Right of information*, as did the above mentioned authors Zaffore and Villalonga, although in our opinion its object or content is far broader, as it is not limited to systematizing, incorporating and regulating the right “to” information, as in addition to the right to information, *strictu sensu*, there are other specific rights to be informed or rather to become information, in addition to right “on” information.

Unfortunately, we cannot state if the Rapporteur agrees with this criteria and name, as after the above quote he continues to quote from Miguel Angel Ekmeladjian:

The set of rights and liberties related to the communication of ideas and news has been and has various names in both doctrine and comparative law. They are called: freedom of expression, freedom of the press, freedom of opinion, freedom of speech, etc.

We prefer to group them under the common label of Right to Information, including under this heading everything involved with the right and freedom slanted towards the public communication and expression of ideas and news.

We give the concept of the *Right to information* a generic scope, divided into the right to inform and the right to be informed. These two sectors are sub-divided in turn into: public expression of ideas and public transmission of news”.

We regret that the position of the Rapporteur is not clear, as on the one hand it seems that in the second quote he leans towards the name of Right to Information for the discipline in general, while in fact both authors supplements each other as in the second quote, although Ekmeladjian speaks about the *Right to information*, in defining it and outlining its contents, he limits it to the public communication of ideas and news, meaning what is commonly known as freedom of the press, which is as we have mentioned, a part and possibly the most important area of the *Right of information*.

The report of Dr. Rivarola Paoli is truly a highly meritorious effort that is well thought out. He seems to back development of the name Right to Information, making a study and classification of the content and extent of the press. When covering freedom of expression, he seems to follow the criteria of Dr. Materno Vásquez in distinguishing between freedom of expression and freedom of information, or at least to follow the criteria of the Paraguayan Constitution, whose Article 26 states that:

“Free expression and freedom of the press is guaranteed, as well as dissemination of thought and opinion with no censorship whatsoever, but with the limitations imposed thereon in this Constitution. In consequence, no law may be imposed that blocks or restricts them. There shall be no press crimes, other than common crimes committed by means of the press”.

“Everyone has the right to generate process of disseminate information, as well as to use any legal instrument appropriate for such purposes”.
(Our underlining).

Although the central topic covered by this Rapporteur is the right to information or freedom of the press, he also makes mention of the right to access to personal information, taking as its content the problems and dangerous to human rights caused by technological progress, particularly in the information technology area. He also makes mention of *Habeas Data*, in reproducing the corresponding article from the Paraguayan Constitution, although unfortunately in the Right to Conscientious Objection, which corresponds to freedom of the press, and study focused on the subjects in the informative juridical relationship in fact, this refers to the qualified professional, meaning newspaper reporters.

In the report presented to the Inter-American Juridical Committee, he was innovative in requesting Opinion Polls.

PHASE IV

Appointment of a new rapporteur

Once again, on hearing the Agenda of the Inter-American Juridical Committee, the General Assembly during its XIV Regular Sessions Period (Belém do Pará, 1994), resolved to “recommend the Inter-American Juridical Committee that it should maintain on the Agenda the study of the Right to information (AG./RES/1266 XXIV-01/94)”.

Due to the end of the mandate of Dr. Rivarola Paoli, during its August 1994 sessions period, the Committee appointed Dr. Mauricio Gutiérrez Castro as Rapporteur for this subject.

During the 1995 March sessions period, the Rapporteur presented a verbal report, mentioning the scope of this topic and the various aspects involved in the study thereof, requesting the Juridical Committee to express its opinion on which aspects of the right to information have the greatest importance for the development and codification thereof.

During the 1995 August sessions period, the Rapporteur presented a new verbal report once again stressing the scope and complexity of the *Right of information* and requesting the Committee to stipulate for the study of this topic which aspects are of the greatest relevance for the development and codification thereof. Whereby, during its session held on 17 August, the Committee resolved to firm up the mandate assigned to the Rapporteur, in terms of which the topic of the right to information to be covered is that of “access to and protection of personal data and information”.

CHAPTER II

RIGHT OF INFORMATION

Concept

There is much confusion in the doctrine on the concept, scope and content of the Right of Information. We have already seen this even within the Inter-American Juridical Committee, this was first treated as being *Freedom of expression and information*, and that this situation prevailed in the reports presented as back-up to the Rapporteur by the Department of Codification and Development of International Law of the Legal Affairs of the General Secretariat of the OAS., and that Rapporteur Dr. Juan Materno Vásquez, when presenting his first preliminary report in 1981

entitled it, as requested by the Inter-American Juridical Committee, *The Right to information*, making a first attempt, although limited, to cover *freedom of expression and information* as a field of global objectives law, which includes this, although with a broader-ranging content. We also noted how, during its January 1982 regular sessions period, the Inter-American Juridical Committee agreed that this topic should be noted on its agenda under the title of *Right of information*. This paved the way for covering the phenomenon of information in a more general manner, whose scope we found largely developed in the report by Dr. Vanossi and Villagrán-Kramer, although they called it Draft Declaration of the Inter-American Juridical Committee on the *Right to information*. This report makes major steps forward, as it covers more modern topics including those brought forward by data bases, although in our view the title that they give it of the Right to Information is more restricted in the possibilities of its content and the *Right of information* adopted by the Committee. In turn, Dr. Rivarola Paoli, the Rapporteur for this topic in his report dated August 1993, returned to the title *Right of information* and brings forward the problem of its various forms of acceptance, as in the field of social communications there is no generalized agreement over the scope of this issue and the distinction exists, according to Jorge Zaffore, between the right “to” information and the right “of” information, emphasizing that as the actual task and right to work constitutes “the bases on which the juridical discipline is built up that we know as information on the right to information has generated the Right to Information and that this latter (the *Right of information*), derives from information or *Right to information* and is built on the former, as effectively the right of information seeks to systematize and organizes the various juridical tools that incorporate and regulate the right as for “to” information, in accordance without the basic principles thereof.

From all this we can infer, concludes Zaffore as mentioned by Rapporteur Juan Bautista Rivarola Paoli, that: “the right of information constitutes a totality structured around one of the essential principles to protecting the right to information, meaning the right to give, receive and seek information.

Interpreting this, both Zaffore as well as Villalonga, as mentioned by Rivarola Paoli, suggest an objective Information Law, meaning a set of positive norms that will lead towards the uniformization, incorporation and systematization of the phenomenon of information, and basically the right to information conceived as a set of subjective rights “to” give, receive and seek information.

Along this line of ideas, in the study by Alfonso Fernández-Miranda y Campoamor, entitled: *Freedom of expression and right of information*, (7) when covering the topic of “I. Freedom of Expression to the Right to Information”, states: “This dialectic approach to the problem of shaping thought and its external manifestations has led to a gradual doctrinal replacement of the concept of “freedom of expression” by the “right to information”. This involves a concept that analyses the informative phenomenon as a process. It links the individual with the public, and serves to signify jointly - as Xifra said - not only public access to impartial information that is as complete as possible, but all the classic freedom of expression or that of the press.

At the foot of the page, Alfonso Fernández-Miranda y Campoamor adds the following comment, which we underline: In all cases, the phrase “right to information” here refers to a coordinate complex of subjective public rights, independent of the pretension of methodical and scientific autonomy of a “Law of information” as an objective right.

In turn, Jorge Xifra Heras, in his study on the topic of Information published in the *Nueva Enciclopedia Jurídica Seix. Tomo 12.12* expresses the following: “that this on the other hand shows that the name given thereto is to a large extent conditional on the scope assigned to the object and contents thereof”.

On page 538 of this encyclopedia, Xifra comments:

From another viewpoint, investigations on information are generally centered on the study of the technical media (which we include although improperly with the word Press, in its broadest sense of procedures for written, oral and audio-visual dissemination of information) or, in consideration of the recipients and effects of information activities, topics or a very fecund content that include, among any others, the inexhaustible issue of relationships between information and public opinion” and continues “this is the first stage at which the scope of traditional freedom of press or expression should be located, today replaced by the *right of information*, although each retain their own characteristics, although the former are located on the dissemination side, while the right of information is located on the receptive level.”

Rivero explains very clearly:

Freedom of press is an active freedom, it is seen from the viewpoint of someone who has something to communicate to his peers, allowing him to be one of the multiple agents in the formation of public opinion. This refers to the broadcaster, if we may borrow this word from the radio vocabulary. The *right to information*, in contrast, is taken from the viewpoint of the recipient, it is a passive right; rather than a freedom to do, it is a possibility to receive, endowing man with a type of information credit for use within the community.

Under the approach taken by Xifra to the various subjective rights or laws, it is noted that this leads him to not assign a specific name to our issue, show content is centralized in the problem of information through the social communications media, which is the central, if not the only object so far of the juridical disciplines focused on information.

Thus, he makes a justifiable distinction between traditional freedom of the press or expression of the right of information, which thus appears in the thinking of Xifra as at least a trend towards assigning it a name as an objective right, although further on he limits this or identifies with the right to information, meaning the recipient level of information or the right to be informed, in our concept.

Further on, this same author makes an attempt to outline our right, although limiting it always to information by means of the press. In this respect, he states “The scope of the social group intended to receive the information, compared to the group broadcasting the news fully justifies that in the sphere of doctrine and even at the legislative level, a new expression of the right of information is becoming more generalized, meaning not only the access of the people to impartial information that is as complete as possible (right to information) but also the classic freedom of expression or of the press (the right to inform)”.

This statement by Xifra on the size of the social group that is a recipient of the information compared to the groups broadcasting the new is very important, as it is precisely this centralization of information, and not only of news that is well known to be exercised by the social communications media, news agencies and press agencies, or by the State, its agencies and bureaus: files, records, etc., as well as by private organizations or companies, and data bases, to list just a few examples, which not only legitimate but even imposes the need for a right of information that seeks to balance out these interests not only as a way of protecting human rights as well as democracy, the representative principle and a State of Law. We repeat, that the power of information may be a valuable tool to protect and construct democracy, but misuse thereof may

turn it into a modern Tower of Babel that allows control of humanity by one simple power. It is not in vain that God confounded the languages to prevent man or one man from reaching heaven.

After these diversions, in which we ventured somewhat into the purely juridical field, which we can do to quiet our conscience, we return to the topic. One of the most modern and complete studies among those available to us, entitled "*Derecho de la Información*" by Ignacio Bel Mallen, Loreto Correidora y Alfonso y Pilar Cousido, Editorial Coler, 1992, Madrid, Spain, which we quote below, highlighting what we deem more essential and pertinent, with full freedom on presentation thereof, stressing that:

The content of this work does not cover all the *Right of information*, as either a science, or an arrangement, nor even as a allocation program but - as will be seen through its structure, this first book focuses on what juridical doctrine on information calls the subject. This means it analyzes and studies the universal subject of information, the subject qualified as a professional, and the organized subject of information companies and organizations, more commonly known as the social communications media. All of this falls within the framework of the *Right of information* as a science and as an arrangement, and in the light of basic information law, acknowledged in our Constitution and the principal international texts on Human Rights.

From this, we can draw the following conclusions: the existence of a *Right of information* as a science and an arrangement, and that, now withstanding its scope, the above mentioned work does not cover the entire *Right of information* (almost 500 pages); that the *Right of information* includes the fundamental right to information acknowledged not only constitutionally (international his case, the Spanish Constitution) as well as in the principal international texts on Human Rights.

It indicates as a historical precedent in Spain "In the Constitution and current configuration of the science and allocation of the Right of Information to José Maria Desantes Guanter, the first Spanish University Law Professor of Information.

The first part of this work is entitled ***Derecho de la información y derecho a la información***.

Quoting Desantes, the three meanings are conceptualized which can be extracted from the concatenation of two or more linguistic elements constituting the *Right of information*, in function of which its subjective, objective and teleological sense is adopted.

The objective study presents a juridical discipline: this attempts to carry out a normative approach to information phenomena.

Subjective consideration focuses on information, the object of a subjective right. This right is converted into a limit on the actions or a source right. This thus involves an information discipline that adopts concepts, methods, systems and habits of the science of law.

The teleological approach links the right and the information. The right will make the information effectively achievable, with the perspective of justice.

Thus, as Desantes indicated so frequently, two propositions can qualify a norm as fair or unfair:

1. The law is the outcome of justice.
2. Justice is the outcome of law.

For our purposes, a definition is adopted from Desantes for the law of information. "This is the universal, general, juridical science including all information phenomena which confers a specific juridical perspective thereon able to arrange information activity, juridical information situations and relations and the various elements thereof, into the service of the right to information".

We cannot end without reproducing some comments not on the information law, but on the central object thereof: the right to information.

The right to information of today's democratic societies means that, in terms of participation, the State is obliged to provide information and that information professionals have the right to be informed by the State. Subjective law has thus stated that this is attributed to people as active members of the community (participation) as granted by the arrangements, which implies the possibility of demanding specific behavior from the others, co-actively, and that this has been institutionalized and typified through the arrangements.

This means that the right may simply involve a series of abilities, including investigation and receipt. The main phase of the right is the basic duty of informing and the right to be informed. For Sanches Ferriz, the right to be informed may be treated independently, due to its caliber, qualifying this as superior to public freedoms, as in his view, unless the public freedoms are guaranteed, the right to be informed may in fact demand empowerment.

Final Considerations

When studying the development of this topic within the Inter-American Juridical Committee, we have made various reflections that allow us to approach this topic and endow it with a broad-ranging concept that we call the *Right of information*.

More than one author has drawn attention to the historical background of Human Rights. The juridical norm acts as a reaction to the needs and pressures to which human groups have had to respond. The right is and should be the reaction or organization of the co-active power of the State, faces with concrete historical situations of abuses that it intends to limit, or conflicts of interest that it must harmonize, and even situations that it deems valuable and need definition or clarification. This function, which is not only limiting but also empowering, opens up the possibilities of this right, and has been strengthened above all by the advent of economic, social and cultural rights that establish concrete obligations for the State, which impose thereon the obligation not only to ban but also to take positive actions to achieve social or individual ends that are deemed valuable, and to create structural conditions that allow the true effectiveness of acknowledged human rights.

In the field of free information, this has historically been handled on the basis of freedom of expression, a basic condition for all rights and law, and a genuine acknowledgment of the freedom of equality and human dignity, as the law is concerned with the external life of man, and not with his inner life which is reserved to God and the individual conscience of each person. The true social anthology of man is to act, communicate and exteriorize with his peers, participating therewith, and even - why not - act against them, if they provide justifiable causes for such.

Thus, although freedom of conscience and thought has been historically recognized as reaction to religious intolerance and political absolutism, in fact, their external manifestations - the right to express thoughts and feelings - have been regulated. This in turn was shaped by the measures available to man for expression: First the word, as individual *viva voce* individual communications. "The limits of the city are marked by the range of the voice of the orator" dictated Plato. With the appearance of the Press and freedom-seeking movements under the banner of democracy, firstly in the USA, the problem was not only one of voice, but also of the media, and the contents of this right no longer lay in the individual freedom to express thoughts, ideas and opinions, but rather to have them reproduced, printed and published. This gave rise to the problems of the media and the need to protect them, as well as the need to implement a system of responsibilities. Thus, together with the juridical treatment of the printed word, that of the Press also appeared, giving rise to a system of related norms whose basic purpose was to guarantee freedom of expression and above all freedom of political expression for the issuer, while also ushering in the first measures in the criminal law field to avoid excess and guaranteeing personal honor, morals and customs, as well as the security of the State.

The ban on prior censorship and the sequestration of the press as a tool of punishment belong to this period, although they still remain up-to-date.

From the all the above we can draw the following conclusions: there is a trend towards creating a new branch of public law and consequently its corresponding juridical science, focused on the orderly, systematic global treatment of the phenomenon of information when this is susceptible to juridical regulation, meaning a law of formation, as it includes a series of provisions and principles scattered throughout the corresponding institutions, treaties and laws related to the phenomenon of information. The type of information covered by this juridical field does not include all information, as it first excludes data obtained through direct observation of facts of nature and the acts of man, education and other aspects of the cultural formation of man regulated by other institutions within the juridical arrangements. Within this order of ideas, the type of information that concerns us is that designed to shape opinion and above all that which tends to shape public opinion, whether of specific social groups, or society at large, and even among nations. This also includes, in a manner vital to the news, "the right to the facts", to know "what is going on", which requires special treatment, as this becomes equivalent to reality, and is exercised mainly by the broadcast media, converting them into the judges of reality.

Among the various names given to this new branch of law, we opt for the right of information, as its concept is broader, more expressive and more general, allowing us to include the variety of subjective laws that it covers and the differing realities that it regulates, as well as the third party rights that it protects, for individuals (private life, honor, image etc.) as well as other legal entities such as the State (public order) and society (the social order and common good).

The name or title of the *Right to Information* seems limited to us, as more modern doctrine reserves this for the juridical treatment of information by the information or mass media (Press in its widest sense). Additionally, it seems to refer to subjective specific law rather than a branch of objective law. Even when focused solely on the Press, this name - *Right to Information* - refers more to the generality of the juridical phenomenon surrounding the so-called "media", the subjective right to "be" informed, and whether this name was adopted because the right to be informed is considered as being more relevant than the right to information, thus making a distinction between the right to freedom of expression of the classical and liberal type, due both to its historical "antiquity" as well as to the standpoint that this freedom has been largely centralized on the right of the issuer of the thought, ideas, opinions and we would even say feelings. In a modern sense, this issuer, although remaining a common man, of flesh and blood, grew more

professionalized from the viewpoint of the right to information, becoming above all the spokesperson for news.

The name *Right of information*, although higher and less particularized than the above, we also discard because semantically it gives the impression of a subjective, concrete, determined right, rather than an objective right which globalizes and includes all subjective rights related to the information process.

Finally, although what we call the *Right to Information* continues to be a fundamental part of the juridical treatment of the right of information and information law, its content is thus not limited because, as we will see, it includes other rights and laws that are not exercised or implemented through “the media”. Within them, as we show below, the entire information phenomenon takes on a special relevance where related to information technology and above all the treatment of data by computerized means (data bases), generating an entire new field of risk for human rights due to their capacity not only to inform or disinform, but also to possibilities of manipulation of people, which implies not only a threat to their freedom but also to the actual structure of the democratic system. We should not forget, as stressed by Sauvy, that “well informed men are citizens, while the badly informed are only subjects”.

CHAPTER III

CONTENT AND SCOPE

We now intend to move on to determining the content of the Right of information based on the principle that, in our view and that of other more qualified jurists, that it would be prolix to enumerate, the scope thereof goes far beyond the study of the freedom of expression and the press. This in itself is already a very wide topic that includes, in addition to the freedoms mentioned, other institutions and rights related to the information phenomenon that seem to be taking on increased definition in Constitutions and the internal laws of the State. Additionally, some of them are already the subject of international conventions, such as the European Convention for the Protection of Individuals with regards to Computerized Treatment of Data of a Personal Natures, dated 1981.

In this order of ideas, the letter we received from a member of the Inter-American Juridical Committee, Dr. Jonathan T. Fried, dated 18 November 1994 is illustrative. In it, he kindly responds to our question on the best way of approaching the topic of the *Right of information*, the name under which it appears on the agenda of the Committee. Dr. Fried expressed himself as follows:

The *Right over information* covers a variety of topics. From the most general viewpoint, this topic includes the rules applied to the creation of information (author’s rights) the dissemination thereof (telecommunication and broadcasting). In the modern world, this topic also includes various aspects of laws over the use of computers, such as protection of intellectual property which should be granted to software, data basis and other machine-readable information banks, as well as the set of provisions that regulate the transmission, storage and access of such information (the rules that regulate such international topics are discussed under title of “transborder data flows” in the OECD) Some commentators consider that laws over information also include broader aspects of public regulations, such as the laws covering publicity and advertising (for example laws on misleading advertisements) and labeling (for example the need to require appropriate warnings regarding health safety and security for the consumer).

On our side, we have carried out a first attempt at a more conservative outline of the content of the *Right of information*, on the understanding that this is only an approach that does not in any way intend to exhaust this topic.

We thus feel that *The Right to information* should include at least a doctrinal and scientific aspect such as its normative conceptualization, with the following topics or issues:

Content

1. Right of free expression

We have already stated that, on studying the development of this topic by the Committee, such as the right to freedom of expression of thought has its precedence, first in the so called freedom of conscience, which is a historical product of the struggle against religious intolerance and political absolutism. As democratic aspirations became more firmly achieved and crystallized, and the material media for the reproduction and dissemination of exterior manifestations of thought has become more widely used, the problem of exterior manifestations of thought, opinions and ideas have become linked to the material media for doing so, identifying the freedom of expression of thought with freedom of the press, although we will see that right from the start there has been a trend to establish a certain distance between them.

In its modern sense, the juridical and constitutional treatment of these principles originates in the British colonies that soon developed into the United States.

Thus, attention is drawn to the acknowledgment of freedom of the press by jurisprudential means, in the case of Zengler (1743) who was editor of the New York Weekly Journal, and who was found not guilty of having criticized Governor Crosby; the Declaration of Virginia (1776) which acknowledged freedom of conscience and the press, and above all the First Amendment to the US Constitution (1787) which enshrined ongoing religious freedom of worship, freedom of speech and freedom of the press.

Congress will not approve any law leading to the establishment of any religion nor ban the free exercise of any of them. Neither will it approve any law that limits the freedom of speech and the press, or the right of the people to meet peacefully and request the reparation of any damage thereto.

It is noted that in this constitutional norm, mention is already made of the rights of "freedom of speech and the press" establishing right from the start the basis for a distinction that we today deem modern. They have been interlinked right from the start, as there can be no freedom of the press without freedom of speech or expression, and freedom of expression only acquired its true meaning through the press.

The other possible interpretation is that the term *freedom of speech* refers to the free expression of thought through spoken words, and *freedom of the press* to the exercise of the same freedom through the printed word. But the previous interpretation is not in accordance with the historical interpretation of the authentic documents that form basis for the preparation of the constitutional precept under study. James Madison, who was the driving force behind the Declaration of Virginia and who proposed the draft corresponding to the First Amendment covering freedom of the press in its frankly modern concept "as a guarantee of the democratic system". (The amendment proposed by Madison on 8 June 1789 on freedom of expression and the press was worded as follows: "There shall be no denial nor restriction on the right of the people to express their feelings in words, in writing or through publication: and the right of the press is one of the basic bulwarks that freedom shall be inviolate").

The French Declaration on the Rights of Man and the Citizen (1789) established in Article II: "Free communication of thought and opinions is one of the precious rights of man. All citizens may speak, write and print freely, without adversely affecting their responsibility for this freedom in cases determined by law".

Bringing together the articles of the U.S. Constitution and the French Declaration, the basic outlines of the fundamental principles that shape both rights are clearly profiled. In its liberal conception, the former stipulates: acknowledgment of freedom of expression and/or the press as a sphere of personal autonomy facing the State; a ban on Congress legislating on this issue; the right to expression through any mean; responsibility for the outcome of the illicit or illegitimate exercise of this right. These principles give rise to others that are developed in secondary laws and, to a large extent, in the Latin American constitutionalism which tends towards protection of the press, bans on gag-laws, and the license or pledge which developed in the laws covering the press.

What we wish to indicate so far is that right from the start there has been a germ of differentiation between pure freedom of expression and freedom of the press. If we make a historical leap which is legitimate for our purposes, we find in the Universal Declaration of Human Rights (10 December 1948) in Article 19, declaring: "All individuals have the right to freedom of opinion and expression, and this right includes not being molested because of these opinions ...". In this first part, which is closely linked to the second, freedom of expression or opinion appears clearly (opinion, as this is obvious historically and conceptually in the core of the contents of the provision with regard to the exercise of political rights), and in its second part (as sub-divided by us for the purposes of this presentation) "that of investigating and receiving information and opinion and of disseminating this with no border limitations by any means of expression whatsoever.. This thus shows the constitutional base for the differentiation between freedom of expression of thought (views, ideas, opinions) and the Right to Information (the right to investigate, inform and be informed which is what constitutes the core of freedom of the press in its modern sense, and which has received broad news coverage).

This is no more than the acknowledgment of reality and a process that already existed: the information process whose power became quite clear during World War II, and which has since then had to be normatized in order to guarantee the exercise thereof and regulate it to avoid abuse.

This is converted into Positive Law in the International Civil and Political Rights Pact, dated 1966, in Article 19:

- 1) No one may be persecuted because of their opinions;
- 2) Everyone has the right to freedom of expression; this right includes the right to seek, receive and disseminate information and ideas of all types, without considering borders, whether orally, in writing, or in a printed or artistic manner, or by any other procedure elected thereby;
- 3) The exercise of the right covered in paragraph 2) of this Article involved special duties and responsibilities. Consequently, it may be and is subject to discussion and restrictions that may nevertheless be expressly stipulated in law, and are necessary to:
 - a) Guarantee respect for the rights or reputation of others;
 - b) Protection of national security, public order, public health of public morals".

On the American Continent, the American Declaration of the Rights and Duties of Man (1948) which preceded the Universal Declaration, declared in Chapter I, Rights, Article IV: "Everyone has the right to freedom of investigation, opinion, expression and dissemination of thought, by any means whatsoever".

The American Convention on Human Rights (1969), covers freedom of conscience and religion in Article 12, and Article 13 is entitled **Freedom of thought and expression**.

Article 13: Everyone has the right to freedom of thought and expression. This right includes the freedom to seek, receive and disseminate information and ideas of all types, regardless of borders, whether orally, in writing, or in a printed or artistic manner or by any other means elected thereby.

The above-mentioned articles are, if wished, texts of transmission, because they do not dare to clearly stipulate the difference between these two rights, which occurs at the international level in the Fundamental Law of Bonn, whose Article 5 acknowledged, together with the classic freedom of expression, the right to be informed and freedom of information. Even more clearly, in the 1975 Portuguese Press Law, it clearly expresses that: "The right to information includes the right to inform and the right to be informed".

2. Right to information

We have already shown that, under the denomination Right to information, this basically designates a coordinated complex of subjective public rights, into dependent, interpenetrating and complementary that tend to foster the dissemination of thoughts, ideas, opinions and news by the social communications media, which help shape public opinion.

These rights are in general known as "freedom of the press" and include not only the written press but also any technical means of dissemination thereof.

We also indicated that the title Right to information has been adopted to a large extent by the drafters of treaties, to differentiate it from the right to free expression of thought, in its pure, liberal sense which, as clearly stated by Alfonso Fernández-Miranda y Campoamor in his work as quoted above, is "... a unilateral facet of communication that escapes the dialectic between an individual opinion, public opinion and the communications media with regard to the juridical situation of the issuer of the thought, but is outside the right of the receptor thereof" (pages 493-494).

In view of this, under the *Right to information*, special attention is paid to the right of the recipient subject, which is handled as more relevant, although without neglecting the issue or broadcast thereof, as well as the transit of the information, and where applicable, the right to investigation and access of the source thereof.

Along this line of thinking, the approach taken is that information is integral, although its essential content is not by the right to investigate, disseminate and receive information. This immediately implies the prior recognition of freedom of expression, at the source, for the reporter and for the media, always bearing in mind the difference in content between thought, ideas or opinions, and news, as these latter also have a requirement for truth.

Having recourse to comparative law, the 1978 Spanish Constitution clearly distinguishes in Article 28 between both these types of rights.

Article 20 I: The following rights are acknowledged and protected:

- a) To freely express and disseminate thoughts, ideas and opinions by word, in writing or in any other means of reproduction.
- d) To communicate or receive freely true information by any means of dissemination.

In brief: In its modern sense, the *Right to information* includes: a) The right to free broadcast of thought when exercised through mass media; b) the right or ability to investigate, as exercised by information professionals, meaning journalists; c) the right to disseminate exercised by the communications media; d) the right to receive information.

We have made ample reference to this right earlier. In fact, in our view this is not a subjective right in the strict sense that implies a juridical relationship that imposes a specific obligation, in this case, of an informative nature with this specific person. It is more as we have already indicated, a possibility of receiving, a possibility that could be realized insofar as there is a plurality of information media, which grants us the freedom to elect between different types of media and information, meaning facts, news or opinions. Finally, this is a right for everyone, at the universal level.

This is only the central core to the right for into to which we would add a very legitimate right that is constitutionalized and internationalized: the Right to Rectification. However, the study of this far exceeds the purpose of this work, together with other topics under the *Right to information*, including, as examples, the right of the company or the right to freely establish and administer the combinations media, the study of the subjects of information with particular reference to the qualified subject of the information; the reporter and above all, perhaps the most important, the limits of the power to inform and responsibilities arising therefrom. fundamentally, when adversely affecting peoples' rights, and above all everything around them (honor, private life, reputation, etc.) a topic which we cover in part when commenting on the specific purpose of the study assigned to this Rapporteur: *access to and protection of personal data in files, records and data bases that are public or accessible to the public*.

We will finally like to briefly refer to treatment of the constitutional level of both rights (freedom of expression and freedom of the press in Latin America). In general terms, the Latin American constitutions expressly and indubitably acknowledge without exception the freedom to express and disseminate thought in its classic concept, but there is in addition a trend towards acknowledging, as we have already noted in the international scene, the right to investigation, dissemination and reception of information, as specific rights that are only stipulated through constitutional acknowledgment of the Right to Information and measures protecting the press or newspaper companies, and in some cases reporters, as well as in a generalized manner, acknowledgment of the Right to Rectification.

We quote Article 6 of the Constitution of El Salvador (1983), which states:

Article 6: Everyone may freely express and disseminate their thoughts whenever this does not subvert the public order, nor adversely affect the morals, honor or private life of others. The exercise of this right should not be subject to prior examination, censure, nor caution, but those making use thereof who break the law shall be held responsible for any crimes committed.

In no case whatsoever may the press, its accessories or any other media designed to disseminate thought be arranged as tools of the crime.

Companies that are dedicated to written, broadcast or televised communications, as well as other publishing companies, may not be nationalized or taken over by the State through either expropriation or any other procedure. This ban is applicable to the stockholdings or shares held by the owners thereof.

These companies may not establish different tariffs or make any type of discrimination due to the political or religious character of what is published.

The right of response is acknowledged as a protection of the rights and fundamental guarantees of the individual person.

Public spectacles may be subject to censorship, in compliance with the law.

Article 19, item 4 of the Constitution of Ecuador (1984) stipulates:

Article 19: Without adversely affecting the other rights needed for the full, moral and material development arising from nature of the person, the State guarantees:

4) The right to freedom of opinion and expression of thought by any social communications media, without adversely affecting responsibilities under law.

Anyone affected by inaccurate statements or slurs on their honor by publication in the press or through other media shall have the right to rectification thereof, free of charge.

Article 6 of the Mexican Constitution (1917) states:

Article 6: The manifestation of ideas shall not be subject to any judicial or administrative inquiry, except in case of attack on morals, the rights of third parties, causing of any crime, or upset to the public order; the right to information shall be guaranteed by the State.

The political Constitution of Venezuela (1983), states in Article 16:

Everyone has the right to express their thoughts, either verbally or in writing and to use any means of dissemination for this purpose, with no prior censorship thereof, but shall be subject to penalties in compliance with the law, for expressions that constitute crimes.

Anonymity is not permitted, nor is war propaganda, matters that offend public morals, nor any other that is designed to encourage disobedience with the law, without this limiting analysis and criticism of legal precepts.

The 1967 Bolivian political Constitution states:

Article 7: Everyone has the following basic rights, in accordance with the laws regulating the exercise thereof:

b) To freely issue their ideas and opinions through any means of dissemination whatsoever.

In Chapter III of the Chilean Constitution (1980) on constitutional rights and duties, Article 19 states: The constitution guarantees everyone:

12) The freedom to issue opinions and inform, with no prior censorship, in any way whatsoever and by any means, without adversely affecting the responsibility for offenses and abuses committed in the exercise of these freedoms, in compliance with the law, which should be of a qualified quorum.

In no case whatsoever may the law establish a statement over the social communications media. All individual or corporate persons insulted or unfairly mentioned by one of the media

shall have the right to declaration or rectification thereof, free of charge, under the conditions determined by law, through the communications media on which this information was publicized.

All individual or corporate persons shall have the right to defend, publish and maintain daily newspapers, magazines and periodicals under the conditions indicated by law.

The State, universities and other persons or entities as determined by law may establish, transfer and maintain TV stations.

A National Radio and Television Council, which shall be independent with its own juridical identity, is responsible for monitoring the smooth functioning of these communications media. A qualified quorum law shall indicate the organization, functions and other duties and responsibilities of this Council.

The law will establish a censorship system for the showing and publication of cinematographic productions, and shall set the general norms regulating public expression of other artistic activities.

The Argentine political Constitution (1994) states clearly in article 14:

All the citizens of the nation shall enjoy the following rights, in compliance with the laws that regulate the exercise thereof: ... publishing their ideas in the press without prior censorship.

Attention is drawn to the fact that the drafters of the Argentine Constitution maintained the laconic, limited constitutional expression of this right, particularly if we take into account the current innovative nature of its postulates in Chapter II, New Rights and Guarantees. Article 42 effectively acknowledges the right over information held by consumers, in the following terms:

Article 42: Consumers and the users of goods and services have the right with regard to consumption and protection of their health, security and economic interest, to adequate, true information, and freedom of selection as well as conditions of fair, decent treatment.

Additionally, in Article 43 it states:

... Any person may bring a suit to learn the data thereon and its purpose in public and private records and data banks, designed to provide information and reports, and in case of inaccuracy or discrimination, may demand the suppression, rectification, confidentiality or updating thereof. This may not affect the confidentiality of the sources of information of newspapers.

This latter part of the article, guaranteeing the confidentiality of sources of information for newspapers is an expansion of the treatment of rights related to freedom of the press. Regarding access to personal data, we will comment on this when covering this topic.

Brazilian Constitution (1988).

There is no doubt that the Brazilian Constitution stands out among the Latin American nations for its treatment of the topic of the Right to information, or, if preferred, social communications and the press, in the most modern, complete and systematic manner, possibly following the innovative trend in Europe on this issue shown by the 1975 Portuguese Constitution and its corresponding Press Law, on which we have commented earlier.

The Brazilian Constitution states, among many other matters, that the normative development of this topic is broad-ranging and integral, dividing it into different rights covering the free expression of thought. In its Item II on *Fundamental rights and guarantees*, Chapter I. *Individual and collective rights and duties*, Article 5, item IV, states:

There shall be free expression of thought, with anonymity forbidden”, while its item V continues, “the right of reply is guaranteed, proportional to the provocation; additionally damages for moral or material losses, or loss of image”. In item XIV of Article 5, it states: “that everyone is guaranteed access to information, safeguarding the access of sources where necessary for the exercise of the profession.

But the Brazilian Constituent Assembly went far further in its understanding of the importance of information as a political and social phenomenon, and the need for its full juridical constitutionalization as required faced with the manifestation of power such as the press, and diverting its Chapter V on *Social Communications* of its Section VII *on the social order* which we reproduce below:

Chapter V - Social Communication

Article 220: The expression of thought, creation, expression and formation in any manner or vehicle shall not suffer any restriction, in compliance with the provisions of this Constitution.

1° The law shall not contain any provision that could constitute any blockage to full freedom of newspaper information in any other communications media, in compliance with the provisions of Article V, IV, V, X, XII and XIV.

2° All censorship is banned of a political, ideological and artistic nature.

3° The Federal law shall:

- I. Regulate public spectacles and amusements, with the Government being responsible for advising the nature, and age limits recommended for such, as well as the places and times when presentation thereof would be inappropriate.
- II. To establish the legal measures that guarantee individuals and the family the possibility of defending themselves against radio and TV programs or programming that runs counter to the provisions of Article 221, as well as advertising for products, practices and services that may be harmful to health and the environment.

4° Advertising for tobacco, alcoholic beverages, pesticides, medications and treatment shall be subject to legal restrictions in terms of item II of the previous paragraph, and shall contain whenever necessary a warning of the adverse effects arising from the use thereof.

5° The communications media may not constitute a monopoly or oligopoly, either directly or indirectly.

6° Publication in the printed media does not need any Government licenses.

Article 221: Reproduction and programming of radio and television stations shall comply with the following principles:

- I. preference for educational, artistic, cultural and informative purposes;
- II. promotion of national and regional culture, and encouragement of independent production that makes the dissemination thereof possible;
- III. regionalization of cultural, artistic and newspaper output, in accordance with the percentages established under law;
- IV. respect for the ethical and social values of the individual and the family.

Article 222: The ownership of publishing companies, as well as sound broadcasting and sound and image broadcasting is reserved for Brazilians, or citizens naturalized over ten years previously, who shall be responsible for the administration and intellectual orientation thereof.

10 The participation of corporate legal entities in the registered corporate capital of newspaper and radio companies is banned, except for political parties and companies whose capital is held solely and normatively by Brazilians.

20 The holding covered in the previous paragraph shall only be handled through non-voting capital, and shall not exceed 30% of the registered corporate capital.

Article 223: The Executive shall be responsible for granting and renewing licenses and permission and authorization for radio and television broadcasting, in compliance with the principle of the complementarity of the private, public and State systems.

101 The National Congress shall examine the act within the period stipulated by Article 64, items 2 and 4, as from receipt of the relevant communication.

201 Non-renovation of the license or permission shall depend on approval of at least two fifths of the Congress, when a nominal vote.

301 Renovation of the authorization or license prior to expiry of the period shall depend on judicial decision.

40 The license or permission period shall be ten years for radio stations and fifteen years for television stations.

Article 224: For the purposes of the provisions in this Chapter, the National Congress shall set up the Social Communications Council in due form of law as an auxiliary body.

3. The right to be informed about public or government acts

Just like in human life, the private is the general and the public the exception, with regard to the Government and its acts, its publicity should be the rule and secrecy the exception.

In stating this, we are not recalling a historical fact, but rather stating a principle inherent in democracy, the Republican regime, respect for Human Rights, and the Constitutional Democratic State of Law.

Although this has historically not been so, efforts have been made to following these precepts.

Traditionally, this topic has been covered under Administrative Law, and although a “Generic Information Law” has been recognized, this has focused more on the purposes and objectives of the administration, rather than on concrete acts, being more similar to education than access to the act, the source or the news itself. Turning to Spanish law, which predates that of Latin America, the Administrative Procedures Law dated 17 July 1958 established that:

“In all ministerial departments, autonomous agencies or large civil service units, the public shall be advised of the purposes, competence and functioning of its various branches and services through information offices, publications illustrating the procedures, diagrams of procedures, organization charts, information on the location of offices, working hours, and any other appropriate measures.

As seen, more than actual information, this article stipulates an entire range of “administrative anatomy and physiology” and when recognizing the right to be informed, it was specific, linked far more closely to procedural guarantees than compliance with the principle of administrative public information. An example of the former is Article 62 of this law.

Article 62: Those interested in any administrative procedure shall have the right to know the situation thereof and progress at any time, receiving up-to-date information from the corresponding offices.

A similar situation is found in the field of law cases, which we merely mention.

In general, at least in Latin America, following the Iberian and French tradition, the concept has prevailed of public administration being something secret, almost esoteric, which its functionaries have an obligation to safeguard.

In its modern sense, this principle of publicity for civil service acts is closely linked to the historical fact of the expansion of the press, and its strengthening as a power, together with the citizen’s demands for news. It appeared and spread in the USA, as indicated by Gladys B. Aleman in the document that she was kind enough to prepare and forward us, as quoted below:

Public rights of access to the files of the US Government is broad-ranging in scope. Over the past three decades, a precise juridical definition of this has been achieved. In the late 1960s and early 1970s, the US Congress promulgated and amended various laws regulating public access to Government files, documents and meetings, in response to the uproar in the press and among the public prompted by the Vietnam and the Watergate scandal.

The Congress issued separate laws covering public access to:

- 1) Files and documents of the Executive branch;
- 2) Agencies of the Executive Branch;
- 3) Meeting of these agencies;
- 4) The Federal consultative committee on Files and Documents.

The most important Federal law is the Freedom of Information Act (FOIA). In order to safeguard individual rights, Congress also issued the Federal Privacy Act in 1974, which limits individual access to Government archives and files on his own person, as well as control over public distribution of these documents, correction or amendments of this information and competence to

sue the Federal Government Agency that fails to comply with the norms stipulated for this purpose.

In promulgating this legislation on freedom of information, Congress attempted to find a fair balance between the Government's need for confidentiality and the need for information among the public and the press. Congress also understood that permitting inspection of Government files and archives is a way of promoting democracy, allowing the public to exercise control over the Executive Branch, and to a lesser extent the Legislative Branch.

Dr. Jonathan T. Fried, a member of the Committee, has outlined the major limitations of treatment of this problem, by referring to the most pertinent points in the study commissioned.

Dr. Fried stated:

Although within the context of the OAS. I firmly believe that the General Assembly and the Permanent Council consider that the most pertinent topics to study by the Inter-American Juridical Committee are: a) law regulating access to information in the hands of the Government; and b) the law that protects the privacy of personal data held by the Government. It is obvious that these objectives are to a certain extent opposed.

On the one hand, citizens in a democratic society should have the right to ensure that the elected Government is rendering accounts to the electorate, and on the other hand to request access to Government information in such a manner as to be informed about the activities thereof. In Canada, the Access to Information Act established the legislative regime whereby people obtain documents held by the Government. This law is administered by the Information Commission of Canada, the equivalent United States system is based on the Freedom of Information Act.

In turn, citizens also have the right to expect that personal information offered to the Government shall be handled with discretion and will be protected against release. Information such as income tax declarations, applications for Government loans, job documents and similar information in the hands of any Government agency should be properly protected against both public revelation as well as access by non-authorized persons. In Canada, the Private Information Protection Act established a legislative regime to protect the rights of people and their privacy. This law is administered by the Canadian Information Protection Commission.

This right to be informed developed pressures from the press for access to these sources which, at least in Europe, by the Spanish drafters as being linked to the freedom to receive news, when covering the Right to Information or, in more popular terms, freedom of the press. Alfonso Fernandez Miranda y Campoamor comments:

Finally, under the right to receive news, and directly linked to the right of investigation, of particular interest is the right of the public to be informed of the acts and opinions of its governors. It has already been said that this involves one of the main stays of the democratic system. In this order of ideas, stress should be given to the principle of the public nature of the plenary sessions of the Parliamentary Chambers and judicial activity. (8)

With regard to the Spanish Constitution, this same author considers that:

In Article 105, the Constitution guarantees the principle of the public nature of the functioning of the administration, in three cases: citizens hearings for procedures preparing

administrative provisions that affect them, a hearing of the interested party in the procedure producing an administrative act (hearings that guarantee the principle of participation and well as a certain margin of publicity) and above all, citizen's access to administrative records and archives, except when this affects the security in the sense of the State, as well as the investigation of crimes, and personal privacy. (9)

Similarly, Ignacio Bel Mallen, Loreto Correidora and Alfonso y Pilar Cousido cover this right to be informed as falling under the right to investigate, which generally corresponds to news reporters or qualified subjects.

Looking at this right in more detail, it also appears in the legislation of the USA and Canada, as well as in Latin American constitutions, covered not under the universal right to receive information, but rather as a concrete, specific, subjective public right to have direct access to Government files, documents and meetings, and in this case to obtain reproductions of such documents. It should be noted that in the strict sense of a right to information, the vital factor is to have access to documents and reproductions thereof solely for information, and in this case for the person seeking the information to obtain it, whereby the probatory value thereof and their legal effect shall be regulated by laws on this issue.

It is noted that throughout the entire development of this topic of the public nature of the Government administration, or in a more ample form, the public nature of the civil service or the Government, we have spoken about the right to be informed, and not the right to information or to obtain information, because as in these latter cases, the person receives the information as a passive subject, in exchange for the right of access to the records, archives, papers and documents in the hands of the Government, or requesting reproductions thereof, implying the concrete exercise by a person of the use of the right of application, in order to have access to a State archive, record, documents or reproduction, as well as the exercise thereof depending on an action by a citizen designed to obtain concrete information, as a subjective public right exercised through the general right of application, or through a concrete right of application established in the Constitutional Law of a specific country.

The Latin American constitutions that have incorporated this right in their Charter of Basic Rights have done so generally in a global manner, although at times distinctions are made between the right of access to direct information and the right to obtain reproductions.

In Article 5, item XXXIII the Brazilian Constitution stipulates:

Everyone has the right to receive information of personal interest thereto from Government agencies, or information of collective or general interest, which shall be handled within the periods assigned thereto under law, under penalty of responsibility, except in cases where secrecy is vital for the security of society and the State.

Item XXXIV of this same article stipulates:

Everyone is guaranteed:

- a) The right of petition;
- b) The right to obtain certificates from public offices for the defense of rights and clarifications of situations of personal interest.

The Guatemalan Constitution stipulates in Article 30:

Public nature of administrative Acts. All acts of a civil service are public. Interested parties have the right to obtain at any time information, copies, reproduction and certificates as requested, and the display of procedures which they may wish to consult, unless this involves military or diplomatic affairs related to national security, or data handled by private persons under seal of confidentiality.

The Colombian Constitution states:

Article 14: All persons have the right of access to public documents, except in cases established under law.

The Constitution of Paraguay states:

Article 28: The Right to obtain information. The right of persons is acknowledged to receive truthful, responsible and fair information.

Public sources of information are free to everyone. The law will regulate the manner, periods and sanctions corresponding thereto, in order to make this right effective.

4. Right of access to personal information

Although this right may at times be confused with that outlined above, it is different, and they are handled separately in various constitutions. First, this is a right to obtain information in the sense that it depends on an act or action, but not by any citizen as in the hypothesis studied previously, but rather by the person to whom the data belongs or which they refer. This data, which are not any type of information, are personal data covering the applicant, and to this end this involves not only the right to obtain information, but also that the interested party has the right to obtain information because he has rights over the information that refers to his person, and which to a certain extent belongs thereto. With regard to the contents thereof, this is not limited to knowledge of the data, because as we have seen previously, it also involves corrective actions in order to maintain the accuracy thereof, and also suppression in order to maintain privacy.

This right, and its relationship with information technology form the core of this study, which has been adequately outlined.

5. Proprietary rights over information

We have already mentioned the fact that Dr. Jonathan T. Fried indicates in his letter that the right over information covers a variety of topics;

It also covers the rules applicable to the creation of information (author's rights) and dissemination thereof (telecommunications and broadcasting). In the modern sense, this topic also includes various aspects of the laws covering the use of computers, such as protection of intellectual property which should be extended to software and computer programs.

In this order of ideas, we limit ourselves to reproducing the pertinent excerpt from the Brazilian Constitution:

Article 5 XXVIII: In terms of law, the following are guaranteed:

- a) Protection for individual participation in collective works and reproduction of the human image and voice, including sporting activities;
- b) The right of the creators, the interpreters and the respective union and associated representations for supervising the economic use of works created or in which they participate.

6. Consumer rights to information

In his letter, Dr. Fried also states:

Some commentators consider that the laws on information also include broader aspects of public regulations, such as the laws on publicity (for example, laws against misleading advertisements), as well as labeling (for example the need to impose appropriate warning regarding the health and safety of the consumer).

Article 5 of the Brazilian Constitution stipulates in item XXXII:

The State shall undertake the protection of a consumer in terms of the law.

This is more clearly expressed in the Argentine Constitution (1994), in Chapter Two *New Rights and Guarantees*, which stipulates in Article 42:

Consumers and users of goods and services have the right, with regard to consumption, to protection of their health, security and economic interest, as well as accurate, true information, freedom of selection and fair, decent conditions of treatment”.

FOOTNOTES

1) This information is taken from the document entitled:

“Some Aspects of the Right to Freedom of Expression and Information”, Addendum 1. Supplementary documentation prepared by the International Law Development and Codification Department of the Juridical Consultancy Office of the General Secretariat of the Organization of American States (July 1980).

The annotated agenda of the Inter-American Juridical Committee for the March 1995 regular sessions period prepared by the International Law Development and Codification Department and the Under-Secretariat for Juridical Affairs of the Organization of American States stipulates in item iv: Right of information: “When establishing the agenda for its January 1980 regular sessions period, the topic of freedom of expression and information was introduced, with Dr. Francisco Orrego Vicuña being appointed Rapporteur, replaced during the next sessions period by Dr. Juan Materno Vásquez.

- 2) PIERNES, Guillermo. *Comunicação e desinformação na América Latina*, Brasilia: UNB, 1990.
- 3) HERNANDEZ MIRANDA Y CAMPOAMO. *Libertad de Expresión y Derecho de la Información* p. 496.
- 4) BEL MALLEEN, Ignacio, CORREIDORA, Loreto y COUSIDO, Alfonso y Pilar. *Derecho de la Información. Sujetos Medios*. [s.1.] : Coler, 1992.
- 5) NOVOA MONREAL, Eduardo. *Derecho a la vida privada y libertad de información, un conflicto de derechos*. 3. ed. Mexico : Siglo Veintiuno, [n.d.]
- 6) The Spanish Constitution of 1918 acknowledges and guarantees in Article 20:
- a) To freely express and disseminate thoughts;
 - b) Literary, artistic, scientific and technical production and creation;
 - c) Academic freedom;
 - d) Parliamentary control and regulation of the communications media dependent on the State or any public agency.
- 7) HERNANDEZ MIRANDA Y CAMPOAMOR. *Libertad de expresión y derecho de la información*. *Derecho Publico* magazine, Spain, vol.2 p. 496.
- 8) Op.cit. p. 512.
- 9) Op. cit p. 513.

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JURIDICAL DIMENSION OF INTEGRATION AND INTERNATIONAL TRADE

The most-favored nation clause in economic integration
 treaties signed by the Latin American countries *

(Presented by Dr. Alberto Zelada Castedo)

Summary

I. Introduction. II. The MFNC in the Treaty of Montevideo - 1960 (LAFTA). III. The MFNC in the Treaty of Montevideo - 1980 (LAIA). IV. The MFNC in the Treaty of Asuncion (MERCOSUR). V. The MFNC in the Agreement of Cartagena (Andean Group). VI. The Central American exception clause (CACM). VII. Effects of the MFNC in talks focused on setting up a hemisphere-wide free trade system.

I. Introduction

1. The use of the most-favored nation clause in trade treaties by the Latin American States dates back to the second half of the XIX century.

From around 1830 onwards, there are several bilateral trade treaties signed by these States both among themselves as well as with States from other regions, particularly Europe and the USA, in which this clause is incorporated, in both its conditional and unconditional forms. 1

2. Regarding the signature of this type of treaty, during the past century a doctrine arose that postulated the non-extension of the obligations imposed by this clause on the advantages or benefits granted by the States in Latin America to the States in the same region. 2

This doctrine was expressed in the "Bello clause" - known as such in honor of its author, the distinguished Venezuelan jurist Andres Bello - which was incorporated particularly by Chile between 1830 and 1850 in trade treaties signed with States outside Latin America. 3

Although the "Bello doctrine" was gradually abandoned by Chile and other States in the region by the 1870s, it served as inspiration for the practice followed by these same States after 1960, meaning after the signature of the Treaty of Montevideo that set up the Latin American Free Trade Association (LAFTA), and incorporated in new trade treaties signed by countries outside Latin America, the rule whereby the corresponding most-favored nation clause would not give the beneficiary states the right to demand the same treatment as that accorded by the grantor State to other states under a "Free Trade Zone" treaty, or a "Customs Union" treaty. 4

The "Bello doctrine" thus inspired the practice adopted by the Latin American nations of incorporating the "Central American exception clause" in trade treaties signed by States

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belonging to other regions and in which a most-favored nation clause was included. According to this clause, the Central American states stipulated that commitments undertaken through this latter would not be extended to the advantages or preferences granted thereby to other Central American States.

This practice lasted through to the time when the Central American Common Market (CACM) and the commitment to implement it was formalized in the General Central American Economic Integration Treaty signed on 13 December 1960.

3. With regard to the regulation of reciprocal economic and trade relations, the South American countries and Latin America as a whole maintained the practice of incorporating the most-favored nation clause in the many bilateral trade agreements signed among themselves.

More recently, from 1960 onwards when the Treaty of Montevideo was signed setting up the Latin American Free Trade Association (LAFTA), an appreciably large group of States in this region - totaling eleven - adopted the practice of incorporating this clause in multilateral treaties. 5 The practice of incorporating the clause in bilateral treaties thus fell into disuse, at least among the LAFTA Member States.

4. Today, all multilateral economic integration through free trade treaties in effect among the South American nations - meaning the Treaty of Montevideo - 1980 which set up the Latin American Integration Association (LAIA), the Agreement of Cartagena that ushered in the economic integration program of the Andean Group, and the Treaty of Asuncion that set up the Southern Cone Common Market (MERCOSUR) all include the most-favored nation clause.

In turn, the General Treaty on Central American Economic Integration, the constitutional document setting up the Central American Common Market (CACM) incorporated the "Central American exception clause", some of the purposes of which are to some extent similar to the purposes of the most-favored nation clause. 6

II. The MFNC in the Treaty of Montevideo - 1960 (LAFTA)

5. A reference and some comments on the most-favored nation clause in the Treaty of Montevideo 1960 that set up LAFTA are both pertinent and useful in order to understand the intentions of an appreciably large group of South American States in the use thereof in multilateral agreements and treaties. Similarly, it is also appropriate to consider the changes in the scope of this clause implied by the signature of the Treaty of Montevideo 1980, which set up the Latin American Integration Association (LAIA), replacing the Latin American Foreign Trade Association (LAFTA).

The most-favored nation clause was incorporated into the Treaty of Montevideo 1960 through Article 18, worded in the following terms:

Any advantage, favor, exemption or privilege applied by a Signatory State to a product originating in or destined for any other country shall be immediately and unconditionally extended to any other similar product originating in or destined for the territory of the other Signatory States.

This wording is very similar to the text of the most-favored nation clause contained in Article 1 of the General Agreement on Trade and Tariffs (GATT) dated 1947. 7

It is possible to conjecture that this similarity is largely due to the fact that, if the idea was to endow this clause with the same scope of the clause of Article 1 of the GATT of 1947, it would be difficult to word it very differently, and second, that the Free Trade Zone system set up by the Treaty of Montevideo signed in 1960 was in many aspects conceived in order to shape it as closely as possible to the provisions of Article XXIV of this same GATT of 1947.

7. The expression "any other country" implies that the rule established by the Article transcribed was applicable to the most favored nation treatment deriving both from possible agreements among the Member States of LAIA as well as from possible agreements between such States and third States that are not members of the Association.

This is why it may consequently be claimed that the purpose of the Signatory States to this Treaty was to guarantee the preservation of the principle of non-discrimination both "within the system" and "outside the system". 8

8. Despite this, the Treaty itself stipulates certain exceptions to the application of the clause. Two of these are of outstanding importance: one covering agreements signed between the LAFTA Member States to streamline transborder traffic, and the other based on the purpose of allowing adoption of preferential treatment favoring countries qualified as enjoying lower relative economic development.

The first of these exceptions is regulated by Article 19 of the Treaty in the following terms:

Exempted from the most-favored nation treatment covered in Article 18 are the advantages, favors, exemptions, immunities and privileges already granted or under agreement between the Signatory States or the Signatory States and other nations in order to streamline transborder traffic.

The second exception, contained implicitly in the norms of Article 32 of the Treaty, arises from the adoption of a system of special treatment favoring countries with lower relative economic development. 9 According to this, the LAFTA Member States were authorized to grant these countries customs advantages or preferences "non-extensive" to the other Member States. In other terms, the less developed countries enjoyed the benefit of special trade treatment that was consequently discriminatory. 10

This exception served as a basis for negotiation between the States benefiting from this and the other Member States of the Association of the non-extensive advantage lists. These formalized the granting of preferential customs treatment to States with lower relative economic development, not extensive to the other Member States of the Association.

9. For some commentators, although the most-favored nation clause of Article 18 of the Treaty of Montevideo 1960 contains the generic expression any other country it should not be taken as the basis for juridical justification of the multilateral stance of the trade liberalization program ushered in by this Treaty, and developed, among other tools, through negotiation and adoption of the national lists of customs benefits. These lists correspond to each Member State of the Association, and contain preferential customs rates granted by each of them in general to the other Member States.

According to this viewpoint, the multilateral scope of these lists arises from their very nature as tools of the policy slanted towards establishing the "free trade zone" postulated by the Treaty. The negotiation thereof or, which is the same thing, the development of the "trade

liberalization program" was guided or found a juridical basis in another principle stipulated in the Treaty: the principle of reciprocity. 11

10. Similarly, according to this thesis, the authorization stipulated in Article 32 of the Treaty for granting countries with a lower relative economic development more advantageous commercial treatment that is consequently discriminatory, may nevertheless not be interpreted in a strict sense as an exception to the application of the most-favored nation clause. In their opinion, the basis of this authorization should likewise be found in the principle of reciprocity.12

11. This reasoning served as basis for explaining or providing a juridical backing for the decisions adopted by the LAFTA agencies whereby the Member States were authorized to negotiate and sign new "agreements" through which it was possible to apply new discriminatory trade treatments.

After the entry into effect of the Treaty of Montevideo 1960, the competent agencies of LAFTA stipulated the pertinent provisions authorizing signature by the Member States of industrial complementation agreements and the sub-regional agreements. Two or more Member States of the Association may participate in these agreements, and are authorized to agree therein on reciprocal customs preferences or advantages, with no obligation to extend them to other non-participant States.

The industrial complementation agreements were designed to speed up the reduction and elimination of obstacles to trade by specific industrial sectors. In contrast, the sub-regional agreements could be focused on the trade flows as a whole among the participant States, in order to implement a faster and broader-ranging trade liberalization program than the trade liberalization program established by the Treaty of Montevideo 1960. 13

12. Briefly, apart from being automatic and unconditional from the point of view of its application, the most-favored nation clause in the Treaty of Montevideo 1960 reflects, at least at the time when it was signed, the intention of guaranteeing full implementation of the principle of non-discrimination both "within" LAFTA as well as "outside" it.

This same Treaty authorized two exceptions to the application of this clause:

- 1) Agreements to streamline transborder traffic; and
- 2) Non-extensive customs advantages or concessions favoring countries of lower relative economic development.

Later, by decision of the competent organs of LAFTA, the possibility of applying discriminatory trade treatment between the Member States expanded due to the norms regulating negotiation and signature of two new instruments:

- 1) The industrial complementation agreements, and
- 2) The sub-regional agreements

13. Obligations arising under the most-favored nation clause of Article 18 were not altered or made more flexible with regard to the possible advantages, preferences, privileges, immunities, etc. granted by the Member States of LAFTA in favor of non-Member States.

14. In the Treaty of Montevideo 1960, the obligation to grant most-favored nation treatment was not limited to trade in goods. Through another norm, the Signatory States were empowered to grant this same treatment similarly to "capital". In this respect, Article 20 of the Treaty stipulated:

Capital coming from the zone shall enjoy within the territory of each Signatory State treatment that is no less favorable than that granted to capital coming from any other country.

The generic expression any other country, similar to the case of Article 18 of the Treaty, leads to the understanding that intention was to avoid discrimination both among the Signatory States as well as with regard to non-LAFTA Member States.

III. The MFNC in the Treaty of Montevideo - 1980 (LAIA).

15. The best-known difference between the Treaty of Montevideo 1960 and the Treaty of Montevideo 1980 is expressed in the replacement of the purpose of establishing a "free trade zone" postulated by the former by the more diffuse and less precise purpose of establishing an "area of economic preferences", postulated by the latter. This important element obviously shaped various substantive norms in the new Treaty, including the nature and scope of the most-favored nation clause incorporated therein.

Different to the economic integration scheme ushered in by the Treaty of Montevideo 1960 which was based on the establishment of a "free trade zone" system applicable to "trade" between the Signatory States, or meaning the application in a preferential manner of multilateral instruments such as "national lists" and the "common list" of preferential custom dues, the economic integration scheme set up by the Treaty of Montevideo 1980 is slanted towards preferential use of bilateral or "partial scope" negotiation instruments for forging ahead with the process of reducing and eliminating obstacles and restrictions on trade among the Signatory States.

1. Article 44 of the Treaty of Montevideo 1980

16. Despite setting up a more broadly-disseminated economic integration model, the Treaty of Montevideo 1980 includes the most-favored nation clause in Article 44, in the following terms:

The advantages, favors, exemptions, immunities and privileges that the Member States apply to products originating in or destined for any other Member State or non-Member State under decisions or agreements that are not covered in this Treaty or in the Agreement of Cartagena shall be immediately and unconditionally extended to the other Member States. 14

17. It may be inferred from this text that the application of the clause shall be "immediate" and "unconditional" only when this involves granting between the Member States as well as between a Member State and a non-Member State, the advantages, exemptions, privileges etc. through "decisions" or "agreements" not covered in the Treaty. 15

Consequently the possibility of applying discriminatory trade treatment either in favor of the Signatory State to the Treaty and even in favor of certain States that are not LAIA members is authorized whenever formalized through any of the instruments covered in the Treaty.

18. There are two measures through which it is permitted to grant preferential and discriminatory trade treatment favoring the LAIA Member States:

- 1) the Agreement of Cartagena and
- 2) the partial scope agreements.

19. The non-extensive nature of the preferences or trade treatment established under the Agreement of Cartagena had already been enshrined in the "sub-regional agreements" system adopted under the sphere of competence of LAFTA. In contrast, the "partial scope agreements", as a new measure for the application of discriminatory treatment among the Member States of LAIA, constitute a real innovation in the Treaty of Montevideo 1980.

The "partial scope agreements" are expressly covered and defined in the Treaty of Montevideo 1980, which initially implies that this instrument is limited to the application of the most-favored nation clause.

20. As outlined by the Treaty, the partial scope agreements are "those which are not signed by all countries and members". According to these same provisions, "the rights and obligations established in partial scope agreements shall only be effective for the Member States that sign or adhere to them". 16

Negotiation and signature of these agreements are subject to the pre-requisites and procedures stipulated by the respective norms of the juridical arrangements of the Association. Without adversely affecting their application solely in favor of the States that sign them, they should be open to signature by any LAIA Member State and should include clauses that stipulate their "convergence" or "progressive multilateralization".

21. The other limit on the application of the clause refers to the "partial scope agreements" that the Member States of the Association negotiate and sign with a non-Member State in Latin America or a "developing nation".

As stipulated in the Treaty of Montevideo 1980, "the Member States may enter into a partial scope agreements with other countries and economic integration areas in Latin America", as well as with "other developing nations or respective areas of economic integration outside Latin America". The "concessions" granted under these agreements "shall not be extensive" to the other LAIA Member States, with the exception of "countries of lower relative economic development" that are members thereof. 17

22. This makes it clear that the "immediate" and "unconditional" application of the clause in Article 44 of the Treaty of Montevideo 1980 shall be valid only under the following three hypotheses:

- 1) When this involves the advantages, favors, exemptions, etc. agreed between the LAIA Member States under "agreements" not covered in the Treaty, meaning under agreements that are not the Agreement of Cartagena nor "partial scope agreements",
- 2) When this involves the advantages, favors, exemptions, etc. granted by a LAIA Member State in favor of a State that is not a member of the Association which belongs to Latin America or which is a developing country, under "agreements"

not covered in the Treaty, meaning in agreements that are not "partial scope agreements" , in the terms stipulated in this instrument, and

- 3) When involving the advantages, favors, exemptions, etc. granted by LAIA Member State to a State that is not a member of the Association and which is not in Latin America and is not a developing country, regardless of the "agreement" or other means for granting such advantages.

23. It is quite clear that the most-favored nation clause in Article 18 of the Treaty of Montevideo 1960 was more rigid or demanding, particularly with regard to the application thereof to the possible advantages granted to non-Member States, that the most-favored nation clause in Article 44 of Treaty of Montevideo 1980. 18

Although there is no doubt that over time, and under the auspices of LAFTA, the application of this clause became more flexible through the adoption of special systems for industrial complementation agreements and sub-regional agreements, it is not less obvious that the pertinent norms were more rigid and demanding than the norms that regulate negotiation of signature of partial scope agreements under the juridical arrangements of LAIA.

According to the norms adopted by LAFTA, both the industrial complementation agreements as well as the sub-regional agreements were subject to a process of "declaration of compatibility" by the Permanent Executive Committee of the Association, prior to their entry into effect, 19 which issued its decision through an affirmative vote of two thirds of the Member States, and with no negative vote. In contrast, the provisions of the juridical arrangements of LAIA covering "partial scope agreements" require a "declaration of compatibility" process solely for agreements signed between Member States and non-Member States that are developing nations outside Latin America.

24. Similar to the juridical arrangements of LAFTA, the Treaty of Montevideo 1980 excludes the application of the most-favored nation clause to agreements between the LAIA Member States and between these and non-Member States designed to streamline "transborder traffic". 20 This exception is stipulated in Article 45 of the Treaty, in the following terms:

The advantages, favors, exemptions, immunities and privileges already granted or which may be granted under agreements between Member States as between these and third nations in order to streamline transborder traffic shall come into effect solely for the signatory nations thereof.

25. The Treaty of Montevideo 1980 also includes a most-favored nation clause applicable to the treatment granted to "capital". On this issue, Article 48 of this instrument stipulates:

Capitals coming from the Member States of the Association shall enjoy treatment within the territory of the other Member States that is not less favorable to that granted to capital coming from any other non-Member State, without adversely affecting the provisions of agreements that may be signed on this matter by the Member States, in the terms of this Treaty.

Article 20 of the Treaty of Montevideo 1960, with regard to this same issue, and when establishing the obligation to grant "capital coming from the zone" - meaning the territory of the Signatory States - treatment that is "no less favorable" than that granted to the "capital coming from any other country" makes no difference between capital coming from the Member States and capital coming from other States that were not members of LAFTA.

In contrast, Article 48 of the Treaty of Montevideo 1980 stipulates the duty of applying to "capital coming" from the LAIA Member States "treatment that is no less favorable" than that granted to "capital coming from any other non-Member State". This implies that this obligation does not extend to the treatment granted under agreements between the Member States of the Association to capital coming therefrom.

This seems to be the most correct interpretation of the expression "without adversely affecting the provisions of the agreements that may be signed on this matter by the Member States", contained in the above-mentioned Article 48. This rule seems to leave open the possibility that the Member States may agree among themselves on more favorable treatment for capital coming from the territory of one or the other of them, without the obligation to extend such treatment to capital coming from the other Member States.

2. The Interpretative Protocol of Article 44 of the Treaty of Montevideo 1980

26. The obligation to extend to the other LAIA Member States, under the application of the most-favored nation clause, the advantages granted by any other them through agreements not covered in the Treaty of Montevideo 1980 in favor of another Member State or non-Member State, has been made more flexible through the Interpretative Protocol of Article 44 of the Treaty, signed on 13 June 1984.

This Protocol reiterates the provisions of the above-mentioned Article 44, although with a different wording, stipulating that "the Member States that granted advantages, favors, exemptions, immunities or privileges to products originating or destined for any other Member or non-Member nation under decisions or agreements that are not covered in the Treaty of the Agreement of Cartagena, shall extend such treatment immediately and unconditionally to the other Member States of the Association. 21

At the same time, it stipulates that, without adversely affecting the above, Member States which are party to "agreements" not covered in the Treaty of Montevideo 1980 and through which they "grant advantages, favors, exemptions, immunities or privileges to products originating or destined for any other member of non-member country" may "request the Committee of Representatives to temporarily suspend the obligations established in Article 44 of the Treaty of Montevideo 1980". 22

27. Although this provision does not derogate the most-favored nation clause, it nevertheless introduces an important possible constraint on the application thereof. According to the Protocol, the duty imposed by Article 44 remains fully effective in principle, when covering a more favorable treatment or advantages granted under agreements not covered in the Treaty, both between Member States as well as between a Member State and a non-Member State. However, this obligation may be suspended "temporarily" through a decision of the Committee of Representatives of the Association.

This authorization is subject to compliance with a number of pre-requisites and procedures.

28. According to the norms of the Protocol, a Member State that applies for this authorization shall, on submission thereof, "undertake the commitment" to carry out "bilateral" talks with the "other" Member States with regards to the following matters: 23

- 1) Maintenance of the "concessions" granted to these States at a "general level that is no less favorable for trade than that which results from the agreements reached

under the framework of the Treaty of Montevideo 1980, and in existence prior to the entry into effect of the agreements", not covered in this instrument.

- 2) The application in favor of States that have complied with the "obligation to eliminate non-customs restrictions under the framework of the Association" of "more favorable treatment granted to an outside country in matters of non-customs restrictions", and
- 3) The adoption for States that so request, "norms of origin" should the "system of origin stipulated in the agreement" not covered in the Treaty of Montevideo 1980 "contain general or specific more favorable treatments" than those in effect within the framework of this instrument.

Talks on the first of these topics should be "requested in a soundly-based manner by the Member State that feels it is adversely affected, in order to receive compensation that is basically equivalent to the loss in trade". 24

29. "definitive suspension" which the Protocol stipulates shall extend for a period of five years, renewable for another five years, may be granted by the Committee of Representatives under the following two circumstances:

- a) should bilateral talks between the "plaintiff" State and the other Member States conclude with "satisfactory results" 25, and
- b) should no Member State other than the "plaintiff" State manifest its "intention of requesting talks" 26

Should "a country request talks", the Committee may authorize the "suspension" of compliance with the obligations of Article 44 of the Treaty in a "conditional manner" and for "a period of five years". Once these talks are concluded, the Committee may authorize the suspension "definitively". 27

30. In order to provide a solution to the differences or disputes arising between a Member State and the "plaintiff" State over the "compensation" to be granted to this latter, the Protocol establishes a system based on arbitration assigned to a Special Group, appointment of which shall be the responsibility of the Committee of Representatives of the Association. In this regard, it stipulates that "should the outcome of negotiations be considered insufficient by the adversely affected nation", the Committee shall appoint the members of a Special Group, which shall be assigned the task of "determining if the compensation offered is sufficient". 28

31. As the entry into effect of the Protocol is subject to ratification thereof by the Signatory States, on the same date as the approval and signature thereof, at the Meeting of the Council of Ministers of the Association, Resolution 43 (I-E) which establishes a provisional normative system on this matter that is applicable until the entry into effect of the Protocol. Similarly, Resolution 44 (I-E) was approved, regulating procedures for the settlement of disputes, particularly the functioning of the Special Group set up by the Protocol.

32. According to the background data, the negotiation and signature of the Interpretative Protocol shall comply with the interests or needs of each of the Member States of LAIA for negotiating and signing trade agreements with States that are not members of the Association. However, as seen, authorization to not apply, temporarily, the obligations imposed by the most-favored nation clause of Article 44 of the Treaty of Montevideo 1980 refers both to the

advantages granted to Member States as well as to non-Member States, in both cases under "agreements not covered" in the Treaty.

33. Due to this, some commentators feel that, rather than interpreting the meaning and scope of the norm set out in Article 44, the Protocol indirectly introduces a true amendment.

Similarly, these same commentators bring up some doubts over the legality of Resolution 43 (I-E) of the Council of Ministers of the Association, as the Treaty of Montevideo 1980 stipulates that amendments thereto may only be introduced through Protocols.

In contrast, other analysts consider that the solution adopted through the Protocol is a good "practical solution" which is well adjusted to law, and that at the same time offers the Member States an appropriate response to their needs to expand their trade relationship options.

However, it must be acknowledged that, with regard to the characteristics of the norms contained in both the Protocol as well as Resolution 43 (I-E) of the Council of Ministers, that the solution found reflects a difficult transaction between Member States that urged strict compliance with the provisions of Article 44 of the Treaty of Montevideo 1980 and others that supported the convenience of increased flexibility thereof, in order to usher in new trade relationship options.

IV. The MFNC in the Treaty of Asuncion (MERCOSUR).

34. Norms covering the most-favored nation treatment in the Treaty of Asuncion that set up the Southern Cone Common Market (MERCOSUR) form part of a set of rules covering trade relationships of the Member States of this scheme with non-Member States, which need not necessarily be members of the Latin American Integration Association (LAIA).

This Treaty consequently does not include a most-favored nation clause, conceived and worded in classic terms, but does contain provisions whose effects are practically identical to those of the clause.

35. Under the arrangement of the provisions of the Treaty, the Signatory States thereto are committed "to coordinate their positions in foreign trade talks that take place during the transition period" 29 set up to enhance the common market, postulated as a target of the corresponding economic integration program.

Under this commitment, these States, as stipulated by the Treaty, should:

- 1) Avoid "adversely affecting the interests of the Signatory States in trade talks held among them",
- 2) Avoid "adversely affecting the interests of the other Signatory States or the objectives of the Common Market in agreements signed with other Member States of the Latin American Integration Association",
- 3) Organize consultations among themselves whenever "they negotiate broad-ranging schemes for reducing customs barriers that would lead to the formation of free trade zones with other countries in the Latin American Integration Association", and

- 4) "Automatically extend to the other Member States any favor, exemption, immunity or privilege granted to a product originating in or destined for countries that are not members of the Latin American Free Trade Association".

36. As may be seen, these norms differentiate the situation of talks and agreements between a MERCOSUR member-nation and a non-member nation thereof, which may nevertheless be a member of LAIA, from the situation of talks and agreements between a MERCOSUR member nation and the State that is not a member of either MERCOSUR or LAIA.

Strictly speaking, only the norm covering this latter situation has effects that are identical to those of a most-favored nation clause. This clearly imposes the obligation on any Member State to extend this favor to the other Member State automatically, as well as any more favorable advantages that it may have granted or may grant to a State that is not a member of either the MERCOSUR nor LAIA.

With regard to possible "agreements" with States that are members of LAIA, the duties of a MERCOSUR Member State are limited to "not adversely affecting the interests" of the other Member States nor "the objectives of the Common Market", as well as "holding consultations" when this involves agreements through which "broad-ranging schemes for reducing custom barriers that would lead to the formation of free trade zones" are adopted.

37. This consequently leads to the interpretation that both the MERCOSUR Member States and the members of LAIA are allied with the other Member States thereof under the most-favored nation clause of Art. 44 of the Treaty of Montevideo 1980.

Very different is the situation of the more favorable advantages granted by a MERCOSUR Member State to a State that is not a member of LAIA. In this case, these advantages should be extended automatically to the other Member States.

38. This obligation has the same scope as that arising from the most-favored nation clause of Article 44 of the Treaty of Montevideo 1980.

However, if it is accepted that, by its very nature, this norm is a general norm, although the norm stipulated in item d) of Article 9 of the Treaty of Asuncion is a special or particular norm, this latter would be of preferential application. Consequently, limitation or exceptions on the application of the most-favored nation clause of the Treaty of Montevideo 1980 - including those incorporated in the Interpretative Protocol of Article 44 - would not be applicable to the obligation agreed upon between the MERCOSUR Member States under item d) of Article 8 of the Treaty of Asuncion.

This means that - with regard to more favorable advantages granted to a nation that is not a member of LAIA - the Mercosur Member States are obliged to apply the provisions of this latter provision in a preferential manner.

39. This relationship between the provisions of Treaty of Montevideo and the Treaty of Asuncion on this same topic offers an interesting case for interpretation.

In this regard, it should be recalled that within the juridical arrangements of LAIA, the Treaty of Asunción is considered as a "partial scope treaty". As a consequence, it may be interpreted as an agreement that is subordinate to the Treaty of Montevideo 1980, and regulated by the LAIA normative system.

Among other factors, this assumption leads to the consideration that the norms of the Treaty of Montevideo are general norms for the Mercosur nations, while the norms of the Treaty of Asuncion are special or particular.

40. The incorporation into the Treaty of Asuncion of norms whose effect is similar to a most-favored nation clause was undoubtedly in response to the need to preserve the objectives of the Mercosur economic integration program during the "transition period" stipulated by this document, namely during the period prior to the full implementation of the "customs union" postulated as one of the core objectives of this program.

Once this target has been achieved, which essentially implies the loss of the specific competence of each Member State in terms of trade policy, and particularly the administration of rights or duties on the import of goods, these norms will become progressively less relevant. When adopting a common "customs tariff", any negotiation on customs advantages with countries that are not MERCOSUR members will be subject to new rules, and quite probably will fall under the sphere of competence of some common agency other than the Member States.

V. The MFNC in the Agreement of Cartagena (Andean Group)

41. In its original wording, the Agreement of Cartagena did not include a most-favored nation clause. This was incorporated later, as a consequence of the amendment introduced into the agreement by the Protocol of Quito, signed on 12 May 1987. 31

In this manner, the clause constitutes Article 114 of the Agreement, with the following wording:

"Any advantage, favor, exemption, immunity or privilege applied by a Member State to a product originating in or destined for any other country shall be immediately and unconditionally extended to any other similar product originating in or destined for the territory of the other Signatory States.

42. As shown, the wording of this provision is adjusted to the classic model which is based on Article I of the GATT, and which has been adopted in other multilateral treaties signed by the Latin American nations, such as Treaty of Montevideo 1960 and the Treaty of Montevideo 1980.

This basically stipulates the obligation of every Member State of the Agreement to extend to the other Member States immediately and unconditionally all more favorable treatment in terms of the trade in goods as granted to any State that is not a Member of the Agreement.

In contrast to provisions on most-favored nation treatment contained in the juridical arrangements of the MERCOSUR, this clause is general in application, meaning that it does not distinguish between more favorable treatment granted to States that are not Members of the Agreement but are Members of LAIA, and States that are not Members of this latter Association.

43. The general scope of this clause has prompted some queries regarding the interpretation of its true meaning in the light of this same clause as stipulated in Article 44 of the Treaty of Montevideo 1980, of which all the Member States of the Agreement of Cartagena are signatories, and taking into consideration that this comes into effect and is applicable within the framework of the juridical arrangements of LAIA.

According to the norm established in the above-mentioned Article 44, it is not mandatory to extend more favorable treatment when this has been granted under agreements covered in the Treaty of Montevideo 1980, or through the "partial scope agreements", and particularly the Agreement of Cartagena. The clause given in Article 114 thereof, in contrast, may be interpreted as being less flexible than that of Article 44. Due to the general wording thereof, it may be understood as a norm that shapes the ability of the Member States of the agreement to grant more favorable advantages, including to LAIA Member States.

44. On the basis of generally accepted legal principles, of which the special norm is the preferential application, various commentators have claimed that the apparent conflict between the norm in Article 44 of the Treaty of Montevideo 1980 and Article 114 of the Agreement of Cartagena is resolved in favor of this latter, when referring to reciprocal relationships between the Member States of the Agreement.

According to this reasoning, this leads to the interpretation that the clause established in Article 114 obliges one Member State of the agreement to automatically and unconditionally extend to the other Member States all more favorable treatment granted to LAIA Member States, even if this has been granted through "agreements covered" in the Treaty of Montevideo 1980. Consequently, there would be no difference, for the application of the clause, between the more favorable treatment granted to a State that is not a Member of the Agreement but a member of LAIA, and that granted to a State that is not a member of either the agreement nor of LAIA.

45. This rule, interpreted in this manner, has however not prevented the Member States of the Agreement from maintaining or negotiating "partial scope agreements" according to the terms of the juridical arrangements of LAIA with States that are members of the Association.

These agreements have prompted consultations and procedures designed to adapt them to the commitment undertaken through the Agreement of Cartagena, applying the provisions of Article 68 of this instrument. According to this norm, the Member States of the agreement have the duty of "not altering the dues established in various stages of the Common Customs Tariff". They are thus obliged to "submit the necessary consultation to the Commission prior to undertaking commitments of a tariff nature with countries outside the sub-region".

In the final instance, the Commission of the Agreement is responsible for handing down a pronouncement "on such consultations", as well as setting "the terms to which the customs tariff commitments should be subject". 32

46. The incorporation of a most-favored nation clause in the Agreement of Cartagena prior to the signature of the Protocol of Quito prompted a debate on the need and pertinence of a decision of this type.

In the opinion of some analysts, the non-incorporation of this clause into the original text of the Agreement would respond to the interpretation on the nature and scope of the economic integration program covered thereby. As this is a program slanted towards the adoption of a "common external tariff" or, in other words, the complete implementation of a "customs union", it was not necessary to include a most-favored nation clause, as this naturally pre-supposes that the States involved therein will maintain their autonomy for formulating and implementing trade policy, or more specifically for negotiating lower customs tariffs with other countries. The establishment of a "customs union", in contrast, implies transferring these powers to the community of States or to an agency of this community that is distinct therefrom, as well as applying a "common trade policy" in this manner. 33

This line of reasoning finds backing in the pertinent norms of the agreement covering the program setting up a "customs union", which made provision for the adoption of a "minimum common external tariff" as the first stage in this program. Compliance with this commitment implied placing conditions on the capacity of the Member States of the Agreement to negotiate lower tariffs with non-Member States. These constraints became quite clear in the duty stipulated in Article 68 of the Agreement to "not unilaterally alter the dues and duties established in the various stages of the Common External Tariff".

The supporters of this idea feel that the situation would be very different if the economic integration program of the Agreement of Cartagena was established - as was the case of the Treaty of Montevideo 1960 - as an objective instrument for setting up a "free trade zone". In this case, with the participant States preserving their autonomy in the formulation and execution of trade policy, and particularly in the administration of tariffs policy, it would be necessary to adopt a most-favored nation clause as a way of avoiding discrimination. 34

47. Other commentators claim that, despite the nature and scope of the commitments of the program to establish a "customs union", it was necessary to regulate in a more accurate manner the commitment to avoid discriminatory trade treatment, adversely affecting the Member States of the Agreement. This is the reason why at least two Member States - Bolivia and Ecuador as being countries enjoying lower relative economic development - were exempted from adopting the minimum common external tariff.

Consequently, reasons of a practical order arising both from the exemption granted to Bolivia and Ecuador as well as from the delay in adopting the "common external tariff" led to the inclusion of a most-favored nation clause in the Agreement.

48. Overall, this line of thinking took preference, and led to the approval through the Protocol of Quito of the two following important amendments to the Agreement:

- 1) The inclusion of Article 114 that outlines the most-favored nation clause, and
- 2) The inclusion of a second paragraph of Article 68 that empowers the Commission of the Agreement with competence to issue pronouncements on the consultations between the Member States prior to "undertaking commitment of a tariff nature with countries outside the sub-region" and for setting the "terms to which such commitments should be subject".

It is clear that there is a close relationship between these two norms, due both to their purposes as well as to the intention to the Member States of the Agreement reflected therein.

49. Based on the adoption of the "common external tariff" through Decision 370 of the Commission of the Agreement of Cartagena approved on 26 July 1988, the most-favored nation clause of Article 114 became irrelevant.

Both currently and in future, possible future negotiations on lower or preferential tariffs involving any of the Member States of the Agreement are regulated and shall be subject to the procedures and the conditions established by the above-mentioned Decision 370. According to its norms, both the Commission as well as the Board of the Agreement shall exercise important spheres of competence with regard to entry into effect of the "common external tariffs".

As an intergovernmental agency, the Commission has the power, as emphasized, to "set the terms to which" possible future commitment of a tariff nature with non-Member States "should be subject" which are designed for negotiation and acquisition by the Member States.

The Board has, among others, the prerogative of authorizing any of the Member States to implement "deferment" in the application of some of the rights established in the "common external tariff" as well as to temporarily lower such dues for causes that are expressly stipulated in the above-mentioned Decision 370 of the Commission.

VI. The Central American exception clause (CACM).

50. Multilateral economic integration treaties signed by the Central American nations do not incorporate the most-favored nation clause.

In particular, this is not included in the General Treaty on Central American Economic Integration, considered as the instrument setting up the Central American Common Market. 35 It is possible that the omission of a clause of this type is due to the fact that under this Treaty the Signatory States thereto agree to set up a common market among themselves, and to fully implement a "free trade zone" during an earlier stage, and to adopt a "uniform tariff". After all, this latter instrument implies the establishment of a "customs union". 36

51. With regard to certain obligations among the Member States of the CACM, with regard to their trade relations with non-Member States, the General treaty formalizes the commitment to apply the "Central American Exception Clause". Thus, under this Treaty, a practice that has been applied by these States for some time acquire the quality of a conventional commitment.

The Central American Exception Clause is a norm that the Central American States have agreed to incorporate in all trade treaties with States that do not belong to the Central American region, which includes among its provisions the most-favored nation clause. Due to the first of these clauses, the application of this latter shall not extend to preferences or more favorable trade treatment agreed between the Central American States.

Worded differently, under the Central American Exception Clause it is understood that any State benefiting from a most-favored nation clause agreed with the Central American State shall not have the right to invoke this in order to extend more favorable commercial advantages granted thereto by a State, in favor of other Central American States.

52. This commitment by the CACM Member States is formalized in a general treaty for Central American Economic Integration, in the following terms:

The Signatory States agree to not sign unilaterally with non-Central American nations new treaties that affect the principles of Central American economic integration. Thus, they agree to maintain the "Central American exception clause" in trade treaties signed on the basis of the most-favored nation with countries that are not Signatory States thereto. 37

It is clear that the objective sought by this commitment, or rather through the incorporation of the Central American Exception Clause in the trade treaties with nations outside the Central American region, consists in avoiding the extension thereto, under the application of the most-favored nation clause, of more favorable trade treatment arising from the application of the economic integration program postulated by the General Treaty, and which aims as its final target at the establishment of a "common market".

53. The obligation not to grant tariff advantages to non-members States, or at least to do so in accordance with certain requirements, is expressed more clearly in the norms of the General Treaty covering the adoption of the "uniform Central American tariff, as well as the Agreement

on the Central American Customs and Tariffs System. 38 To this end, Article IX of the Treaty stipulates:

"The Governments of the Signatory States shall not grant exemptions nor reductions in customs dues on imports from outside Central America for articles produced in the Signatory States under appropriate conditions".

On the other hand, according to the provisions of the Agreement on the Central American Customs and Tariff System, the "Central American import tariff" is the instrument that defines:

- 1) the nomenclature for the official classification of merchandise that may be imported into the territory of the Signatory States", and
- 2) "customs tariffs on imports". 39

According to Article 17 of this same Agreement, "all imports of merchandise into the customs territory of any of the Signatory States hereto is subject to payment of customs dues established" under the Central American import tariff. At the same time, according to the provisions of Article 21 of this same instrument, "The Signatory States hereto shall not grant immunities or exemptions from import dues".

Only the Central American Economic Council - one of the inter-Government agencies in the institutional structure of the CACM - is empowered to "agree on modifications in the import tariff rates". In adopting decisions of this type, the Council shall comply with the "conditions and criteria" established in the Agreement and shall be guided by the purpose of "achieving the objectives of the Agreement" and particularly:

- 1) Fostering productive activities,
- 2) Protecting the consumer, and
- 3) Furthering the implementation of foreign trade policy of the Signatory States

54. Basically, the adoption of the "Central American import tariff" system implies the adoption of what is called the "common external tariff" in other economic integration systems such as the Andean Group and the MERCOSUR. This consequently involved the basic instrument of the program for the full implementation of a "customs union" among the Member States of the CACM.

55. In brief, the CACM Member States are bound by two types of commitments in their trade relations with non-Member States, as follows:

- 1) The commitment to incorporate the "Central American exception clause" in trade treaties with States that are not members of the CACM, and which contain the most-favored nation clause, and
- 2) The commitment to comply with regard to any modifications of import tariffs with the regulations laid down by the Agreement on the Central American Customs and Tariffs System.

This latter commitment may well be considered as the basis for the application by the CACM Member States of a common trade policy and the development as a corollary of joint trade talk procedures with States that are not CACM members.

VII. Effects of the MFNC in talks focused on setting up a hemisphere-wide free trade system.

56. It is very probable that among the efforts under way designed to encourage future talks leading to the adoption of a free trade zone that is hemisphere-wide in scope and which could well consist of a "free trade zone" or some other form of free trade agreement should focus at an appropriate moment on the possible effects of such talks on commitments undertaken by various States in Latin America, due to the most-favored nation clause incorporated into the economic integration treaties signed thereby.

57. Similar to the national treatment clause - which is also incorporated in these treaties - the use of this clause makes it quite clear that the juridical arrangements for regional economic integration in which the countries of Latin America participate are in keeping with the nature of this type of juridical arrangements.

All juridical arrangements intended to regulate a regional economic integration program are discriminatory, as they enshrine different juridical situations for their members and non-participants. At the same time, from the viewpoint of the juridical situation of the former, all regulatory integration systems must necessarily have the purpose of evening this out, avoiding discriminatory treatment among the States involved.

The theory of regional economic integration bases its analysis on this vital assumption. Thus, for instance, the conceptualization of Fritz Machlup is vital to this end:

"Whenever it is less than worldwide, integration implies both discrimination and non-discrimination. Regional integration, for example, requires non-discrimination among products and factors coming from (or going to) countries within the region, but discrimination against products or factors coming from (or going to) countries outside the region." 40

58. Talks furthering an economic integration project among all the States in the hemisphere imply, for the Latin American nations that are members of economic integration treaties, entering into talks with "third party States", to which the rules in the corresponding most-favored nation clause would be applicable. This situation arises for States that signed the Treaty of Montevideo 1980, the Treaty of Asuncion, the Agreement of Cartagena, and the General Treaty on Central American Economic Integration.

59. For LAIA Member States which are also members of the MERCOSUR and the Andean Group Economic Integration program, obligations regarding the granting of advantages or more favored treatment in terms of trade to non-Member States arises from these most-favored nation clauses incorporated in two juridical arrangements: the juridical arrangements of the Treaty of Montevideo 1980 and the juridical arrangements of the Treaty of Asuncion and the Agreement of Cartagena respectively. For these States, the rules or criteria for interpretation of the scope of the corresponding obligations are vital, in function of the inter-relationship between the norms on this issue, of these two juridical arrangements.

Very different from this situation is that of States which are at the moment bound only by the most-favored nation clause contained in the juridical arrangements in the Treaty of Montevideo 1980. 41

Due to the corresponding most-favored nation clauses, the former have a certain type of obligation with regard to the other LAIA Member States, and other types of obligation with regard to the MERCOSUR Member States, or those of the Andean Group. These latter, in contrast, are only bound, with regard to the other Member States of the Association, by the most-favored nation clause of Article 44 of the Treaty of Montevideo 1980.

60. On the other hand, as one of the principal objectives of the corresponding economic integration program consists of establishing a "customs union", the Member States of the MERCOSUR and the Andean Group, are subject to compliance with the norms covering the "external tariff" which they have agreed to adopt or which they have adopted, with regard to trade talks with third nations.

A similar situation arises with the CACM Member States, who are subject to mandatory compliance with the provisions covering approval and regulation of the "uniform Central American tariff", with regard to talks with third nations.

61. There is an assumption, or at least the hypothesis has arisen whereby the inclusion of the most-favored nation clause in economic integration treaties signed between the nations of Latin America, or more properly the application of the obligations arising from this clause, has prompted the appearance of "conflicts" among the various "regional agreements" covering trade or economic integration.

At first glance, this assumption or hypothesis does not seem very plausible. Strictly speaking, it is more reasonable to admit the need for compliance with the obligations imposed by the corresponding most-favored nation clauses could cause the respective States some difficulties when undertaking trade talks with third nations.

It could be assumed that, for instance, certain difficulties for some of the LAIA Member States led to the negotiation and later signature of the Interpretative Protocol of Article 44 of the Treaty of Montevideo 1980, in order to "flexibilize" the obligations established thereby.

62. However, it is difficult to anticipate the direction and scope of these difficulties, without knowing the concrete target sought in future negotiations designed to set up a free trade system that is hemisphere-wide in scope, nor the procedure to be used in such talks.

Nevertheless, whether they are considered as difficulties or as assumptions needed in all talks with third nations outside the respective juridical arrangements for regional economic integration, it must be acknowledged that they arise for some States in the commitment based on the most-favored nation clause, while for other States both these commitments as well as those related to the establishment of a customs union or the adoption of a common external tariff.

63. With regard to the process of adopting a hemisphere-wide free trade system, there have been hints of the possibility of adopting one of the following three strategies to launch the corresponding talks:

- 1) The progressive inclusion of various States in Latin America in the current North American Free Trade Treaty (NAFTA), through talks undertaken individually thereby,
- 2) The progressive inclusion of groups of States in Latin America belonging to various economic integration programs of a sub-regional scope as covered by the current North American Free Trade Treaty (NAFTA), through collective talks therewith, and

3) Negotiation and signature by all countries in the hemisphere of a new free trade treaty.

It is clear that the obligations arising from the most-favored nation clause incorporated into the economic integration treaty signed by the Latin American nations, or the rules on the establishment of "customs unions", will tend to have different effects depending on which of these strategies is followed.

64. For States which are bound by a most-favored nation clause incorporated into the economic integration treaty of which they are a Signatory and which are in addition committed to further a program leading to the establishment of a customs union, it is probable that a "collective talks" procedure would be the preferred option. The option of undertaking individual talks would firstly imply the duty of being bound by the norms covering the common external tariff and second the need to undertake consultations with the other Member States of the respective economic integration treaty, or to apply the pertinent procedures through the common competent agency to administer or at least to monitor compliance with the common external tariff.

Any of these options could be influenced or slanted according to the stage or phase of the establishment of a customs union or the adoption of a common external tariff.

65. Very different consequences arise from commitments such as those stipulated among the CACM States, through the "Central American Exception Clause". The obligation created by this norm will lead these States to urge the inclusion of this clause in a possible future hemisphere-wide free trade treaty, should this treaty contain the most-favored nation clause.

66. Apart from consideration of the effects on the respective States of commitments arising from a most-favored nation clause, studies designed to outline a strategy to undertake the process leading to the establishment of a hemisphere-wide free trade system must not neglect to examine whether or not it would be convenient to include a most-favored nation clause in the treaty formalizing this system. 42

The urgent need for discussion and reflection of this matter arises from the realization that the project to be adopted will almost certainly be one of free trade zone that is hemisphere-wide in scope. This naturally leads to the assumption that the participant States would maintain their autonomy in the administration of trade and tariff policies, which would make it necessary to regulate the conditions under which they could grant advantages or benefits to third States.

NOTES

1. The Draft Articles on the Most-Favored Nation Clause prepared by the United Nations International Law Commission differentiate in detail with clear-cut definitions between the concepts of the "most-favored nation clause" and "most-favored nation treatment". Article 4 of the Draft Articles gives the following definition of the most-favored nation clause: "The most-favored nation clause is a treaty provision whereby a State assumes the obligation with regard to another State to grant it most-favored nation treatment in an agreed sphere of relations." In turn, Article 5 gives the following definition of most-favored nation treatment: "Most-favored nation treatment is the treatment granted by the grantor State to the beneficiary State, or to persons or things in a specific relation to this State, that is no less favorable than that granted by the State to a third party State, or to persons or things that have this same relation with the third party State." See the Report of the International Law Commission on the work carried out during its XXX Period of Sessions (8 May - 28 July 1978).

2. The content of the "Bello Doctrine" is contained in the Message dated 1 June 1983 addressed to the Congress of Chile by its President, Mr. Joaquin Prieto, in the following terms: "In the Trade Treaties that this Republic has signed with foreign powers, it has been suggested that we reserve the right to grant special favors to the fellow-Republics. This would be the sole exception to the principle of impartiality that we wish to observe with everyone." See ORREGO VICUÑA, Francisco, *Estudio sobre la cláusula Bello e la crisis de la solidaridad latinoamericano en el Siglo XIX*. In Orrego Vicuña, Francisco (Editor) "*Derecho Internacional Económico*". Mexico D.F., *Fondo de Cultura Económica*, 1974.

3. As an example of the "Bello clause", the stipulation contained in the Treaty of Peace, Friendship, Trade and Navigation signed by Chile and the U.S.A. on 16 May 1832 is particularly noteworthy. Having enshrined most-favored nation treatment, Article 2 of this instrument then establishes: "It is fully understood that the relations and conventions that currently exist or that could be celebrated in future between the Republic of Chile and the Republic of Bolivia, the Central American Federation, the Republic of Colombia, the Republic of Peru or the United Provinces of Rio del Plata constitute exceptions to this Article." See ORREGO VICUÑA, Francisco, *Estudio sobre la cláusula Bello e la crisis de la solidaridad latinoamericano en el Siglo XIX*. In Orrego Vicuña, Francisco (Editor) "*Derecho Internacional Económico*". Mexico D.F., *Fondo de Cultura Económica*, 1974.

4. MORALES PAUL, Isidro. *La cláusula de la nación más favorecida y la evolución de relaciones comerciales interlatinoamericanas hasta 1950*. In Orrego Vicuña, Francisco (Editor) "*Derecho Internacional Económico*". Mexico D.F., *Fondo de Cultura Económica*, 1974.

5. The Treaty of Montevideo that set up LAFTA was signed on 18 February 1960. The following Latin American States joined LAFTA: Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Mexico, Paraguay, Peru and Uruguay.

6. The Treaty of Montevideo 1980 was signed on 12 August 1980 by the same Signatory States as those that supported the Treaty of Montevideo that set up LAFTA, meaning Argentina, Bolivia, Brazil, Colombia, Chile, Ecuador, Mexico, Paraguay, Peru and Uruguay. b) The Agreement of Cartagena was signed on 26 May 1969 by Bolivia, Colombia, Chile, Ecuador, and Peru. Later, in 1972 and 1973, Chile withdrew from the Agreement and Venezuela joined it. The economic integration program ushered in by this Agreement currently includes the following States: Bolivia, Colombia, Ecuador, Peru and Venezuela. c) The Treaty of Asuncion was signed on 26 March 1991 by Argentina, Brazil, Paraguay and Uruguay. d) the General Central American Economic Integration Treaty was signed on 13 December 1960. The Central American Common Market currently has the following Member States: Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua.

7. The most-favored nation clause is outlined in Article I of the 1947 GATT in the following terms: "In terms of customs rights and charges of any type of dues imposed on imports or exports, or with regard thereto, which burden international fund transfers made to pay for imports or exports, with regard to the methods of demanding such rights and dues, as well as in all regulations and formalities covering imports and exports, and in all issues covered by Paragraphs 2 and 4 of Article III, any advantage, favor, privilege or immunity granted by one Party to a Contract on a product originating in another country or destined for such shall be immediately granted and unconditionally granted for all similar products originating in the territories of all the other Parties to the Contract or destined for such."

8. The United Nations International Law Commission, as expressed in one of its Reports, examined the "relationship and interaction between the most-favored nation clause on the one

hand, and the principle of non-discrimination on the other. "In doing so, it acknowledged that "the rule of non-discrimination is a general rule that is a consequence of the equality of the States." In the view of the Commission, "the most-favored nation clause may be considered as a tool or means of fostering the equality of the States or non-discrimination." See the Report of the International Law Commission on the work carried out during its XXX Period of Sessions (8 May - 28 July 1978).

9. In principle, Bolivia, Ecuador and Paraguay were considered as being the countries with the lowest relative economic development, benefiting fully from the system agreed in favor of this type of country. Due to the express provision approved by the Council of Ministers of Foreign Affairs of LAFTA, Uruguay also achieved treatment as a nation with low relative economic development, but only for the purposes of granting "non-extensive" customs benefits in its favor.

10. There is a certain similarity between this exception and the exception granted under the "empowerment clause" enshrined by the Decision dated 28 November 1979 adopted by the Signatory States to the GATT. According to this provision, "notwithstanding the provisions of Article I of the General Agreement, the Signatory States may grant differentiated and more favorable treatment to the developing nations, without granting such treatment to other Signatory States." This rule is applicable to the following situations, among others: a) "the preferential customs treatment granted by the developed Signatory States to products originating in the developing nations in compliance with the Generalized Preferences System" and b) "the regional or general agreements concluded between the developing Signatory States in order to reduce or eliminate customs dues on a mutual basis and, in conformity with the criteria or conditions that may be set up by the Signatory States, non-customs measures applicable to products imported under the framework of their two-way trade." See LAVIÑA, Félix, *Organización del comercio internacional*. Buenos Aires: Depalma, 1993.

11. PEÑA, Félix, *La cláusula de la nación más favorecida en el sistema jurídico de la Asociación Latinoamericana de Libre Comercio*. In Orrego Vicuña, Francisco (Editor) "*Derecho Internacional Económico*". Mexico D.F., *Fondo de Cultura Económica*, 1974.

12. PAOLILLO, Felipe H. *La cláusula de la nación más favorecida y los países menos desarrollados de la ALAC*. In Orrego Vicuña, Francisco (Editor) "*Derecho Internacional Económico*". Mexico D.F., *Fondo de Cultura Económica*, 1974.

13. Within the framework of these rules and in accordance with therewith, more than thirty industrial complementation agreements have been signed among the LAFTA Member States; similarly, the Agreement of Cartagena was signed - as a sub-regional agreement - which launched the economic integration program of the Andean Group.

14. Article 44 of the Treaty of Montevideo 1980.

15. ORÍA, Jorge. *La cláusula de la nación más favorecida en el Tratado de Montevideo 1980*. In "*Integración Latinoamericana*, N°s 62-63, Buenos Aires: IDB/INTAL, 1981.

16. Article 7 of the Treaty of Montevideo 1980 and Article 2 of Resolution 2 of the LAIA Council of Ministers.

17. Articles 25 and 27 of the Treaty of Montevideo 1980. For the purposes of the application of these and other rules, Bolivia, Ecuador and Paraguay are considered as being countries of "lower relative economic development".

18. BARROS CHARLÍN, Raimundo. *Nuevas dimensiones de la cláusula de la nación más favorecida*. In "*Integración Latinoamericana*, N°. 58, Buenos Aires: IDB/INTAL, 1981.

19. The Permanent Executive Committee was one of the inter-government agencies in the institutional structure of LAFTA, whose members consisted of Plenipotentiary Representatives of the Member States.

20. The practice of excepting agreements designed to streamline transborder traffic flows from the application of the most-favored nation clause has been accepted in its codification tasks by the United Nations International Law Commission. Article 25 of the Draft Articles in the material prepared by the Commission states: "1. A beneficiary State that is not a neighboring State shall not have the right under the most-favored nation clause to the treatment which the grantor State confers on a third party neighboring State in order to streamline transborder traffic flows. 2. The neighboring beneficiary State shall have the right under the most-favored nation clause to treatment that is no less favorable than that which the grantor State confers on a third party neighboring State in order to streamline transborder traffic flows only if the purpose of the clause is to streamline transborder traffic flows." According to the Commission, "practice shows that in general, trade treaties between countries that do not have common borders exclude from the scope of the most-favored nation clause the advantages granted to neighboring States in order to streamline transborder traffic flows."

21. Article 1 of the Interpretative Protocol.

22. Article 2 of the Interpretative Protocol.

23. Article 3 of the Interpretative Protocol.

24. Article 3, item a) of the Interpretative Protocol.

25. Article 4 of the Interpretative Protocol.

26. Article 5, item a) of the Interpretative Protocol.

27. Article 5, item b) of the Interpretative Protocol.

28. Article 4 Paragraph 2 of the Interpretative Protocol.

29. Article 8 of the Treaty of Asuncion.

30. Article 8, items a), b), c) and d) of the Treaty of Asuncion.

31. The Protocol of Quito entered into effect on 15 May 1988.

32. Article 68, Paragraph 2 of the Agreement of Cartagena, according to the wording incorporated by the Protocol of Quito

33. In support of this viewpoint, mention was made, for instance, of the Treaty of Rome which set up the European Economic Community based on the prior fine-tuning of a "customs union", and which does not contain a most-favored nation clause.

34. ZELADA CASTEDO, Alberto. *El principio de no discriminación y la regla del "standstill" en el Acuerdo de Cartagena*. In "Integración Latinoamericana, N°. 90, Buenos Aires: IDB/INTAL, 1981.
35. VILLAGRÁN-KRAMER, Francisco. *La cláusula de la nación más favorecida en el marco legal del Mercado Común Centroamericano*. In "La integración económica centroamericana, Mexico D.F., Fondo de Cultura Económica, 1975.
36. VILLAGRÁN-KRAMER, Francisco. *La cláusula de la nación más favorecida en los esquemas de integración económica centroamericana*. In Orrego Vicuña, Francisco (Editor) "Derecho Internacional Económico". Mexico D.F., Fondo de Cultura Económica, 1974.
37. Article XXV of the Central American General Economic Integration Treaty.
38. The Agreement on the Central American Customs System was signed on 14 December 1984.
39. Article 13 of the Agreement on the Central American Customs System.
40. MACHLUP, Fritz. A history of thought on economic integration. New York: Columbia University Press, 1977.
41. For the moment, these two States are Mexico and Chile. Although the former is a member of the multilateral economic integration system known as the Group of Three, together with Colombia and Venezuela, its situation does not change, as the Free Trade Treaty of this Group does not contain a most-favored nation clause applicable to trade in goods.
42. Although the North American Free Trade Treaty - NAFTA clearly states that the basic objective of the respective economic integration scheme is the establishment of a "free trade zone", it does not include a wide-ranging most-favored nation clause that makes reference to trade in goods. The obligation to extend "most-favored nation treatment" is mentioned only with regard to trade in services and investments. See VÁZQUEZ PANDO, Fernando A.: ORTIZ AHLF, Loreta. *Aspectos jurídicos del Tratado de Libre Comercio e América del Norte*. Bogota: Themis, 1994.

REFERENCE DOCUMENTS

- ALADI/ General. International Seminar. *La dimensión jurídica de la integración*. Montevideo: ALADI Secretariat, 1993.
- CASELLA, Paulo Borba. *Comunidade Européia e seu ordenamento jurídico*. São Paulo: LTR, 1994.
- CASTELIS, Adolfo. *La CNMF en las relaciones comerciales desarrollo-subdesarrollo*. Paris: RI, 1974.
- Strategic Studies Center. *Entendiendo el TLC*. Mexico, D.F.: Economic Consulting Fund, 1994.
- International Studies Center, Peru. *El sistema internacional en sus textos*. Lima: CEPEI, 1990.

COLLINS, Susan M. (ed.). *The New Gatt. Implications for the United States*. Washington, D.C.: The Brookings Institution, 1994.

United Nations International Law Commission. *Cláusula de la nación más favorecida*. Report of the Commission to the General Assembly on its work during the XXX period of sessions. In: *Yearbook of the International Law Commission 1978*, v. II, Part 2, (A/CN.4/SERA/1978/Add 12 (Part. 2)). New York: UN, 1978.

THEZ DE VELASCO, Manuel. *Instituciones de Derecho Internacional Público*. 7. ed. Madrid: Tecnos, 1990.

Digest of International Law. Most-Favored-Nation Clause. Washington, D.C.: Dept. of State, [n.d.].

HALPERIN, Marcelo (comp.). *Instrumentos básicos de integración económica en América Latina y el Caribe*. Buenos Aires: BID/INTAL, 1994.

HERDERGEN, Matthias. *Derecho Económico Internacional*. Bogotá: DIKE, 1994.

SEIDL-HOHENVELDERN, I.. *International Economic Law*. C.C. of The Hague Academy of International Law. t. 198, 1986.

Inter-American Institute for International Juridical Studies. *Derecho Comunitario Centroamericano*. San José, Costa Rica, 1968.

LAVIÑA, Félix. *Organización del comercio internacional*. Buenos Aires: Depalma, 1993.

MELLO, Celso de Albuquerque. *Direito Internacional Económico*. Rio de Janeiro: Renovar, 1993.

MORALES PAUL, Isidro. *La CNMF y la evolución de las relaciones comerciales interlatino-americanas*. In: Orrego Vicuna, Francisco (comp.). *Derecho Internacional Económico*. México, D.F.: Fondo de Cultura Económica, 1974.

MUNS, Joaquín. *Organismos económicos internacionales: documentos constitutivos*. Madrid: Confederación Española de Cajas de Ahorros, 1977.

ORREGO VICUÑA, Francisco. *Estudio sobre la Cláusula Bello y la crisis de la solidaridad latinoamericana*. In: ORREGO VICUÑA, Francisco (comp.) *Derecho Internacional Económico*. México: D.F.: Fondo de Cultura Económica, 1974.

ORREGO VICUÑA, Francisco (comp.). *Derecho Internacional Económico*. Mexico, D.F.: Fondo de Cultura Económica, 1974.

PAOLILLO, Felipe. *La CNMF y los países menos desarrollados en la ALALC y en el Pacto Andino*. In: ORREGO VICUÑA, Francisco (comp.). *Derecho Internacional Económico*. México, D.F.: Fondo de Cultura Económica, 1974.

PEÑA, Félix. *La CNMF en el sistema jurídico de la Asociación Latinoamericana de Libre Comercio*. In: ORREGO VICUÑA, Francisco (comp.). *Derecho Internacional Económico*. Mexico, D.F.: Fondo de Cultura Económica, 1974.

PFIRTER DE ARMAS, Frida M. *La CNMF y la excepción del tráfico fronterizo*. In: ORREGO VICUÑA, Francisco (comp.). *Derecho Internacional Económico*. México, D.F.: Fondo de Cultura Económica, 1974.

SCHOTT, Jeffrey J. *The Uruguay Round: an assessment*. Washington, D.C.: Institute for International Economics, 1994.

SEPULVEDA AMOR, Bernardo. *GATT, ALALC y el trato de más favor*. In: ORREGO VICUÑA, Francisco (comp.). *Derecho Internacional Económico*. México, D.F.: Fondo de Cultura Económica, 1974.

TUGORES Q., Juan. *Economía internacional e integración económica*. Madrid: McGraw Hill, 1993.

USTOR, E. *International Law Commission: the most-favored-nation clause*. In: *Journal of World Trade Law*, v. 11, n. 5. Geneva, 1977.

USTOR, E. *The MFN Customs Union Exceptions*. In: *Journal of World Trade Law*, v. 15, n. 5, Geneva, 1981.

VASQUES PANDO, Fernando A. - ORTIZ Ahlf, Loreta. *Aspectos jurídicos del Tratado de Libre Comercio de América del Norte*. Bogotá: Themis, 1994.

VILLAGRAN-KRAMER, Francisco. *La cláusula de la nación mas favorecida en el marco legal del Mercado Común Centroamericano*. IN: LIZANO, E. *La integración económica centroamericana*. Mexico, D.F.: Fondo de Cultura Económica, 1975.

_____. *La CNMF en los esquemas de integración económica centroamericana*. In: ORREGO VICUÑA, Francisco (comp.). *Derecho Internacional Económico*. Mexico, D.F.: Fondo de Cultura Económica, 1974.

ZELADA CASTEDO, Alberto. *Cuestiones jurídicas e institucionales en el desarrollo de las relaciones externas del Grupo Andino*. In: *Integración Latinoamericana*, n. 92. Buenos Aires: BID/INTAL, 1984.

_____. *Derecho de la Integración Económica Regional*. Buenos Aires: BID/INTAL, 1989.

_____. *El principio de no discriminación y la regla del "standstill" en el Acuerdo de Cartagena*. In: *Integración Latinoamericana*, n. 90. Buenos Aires: BID/INTAL, 1984.

_____. *Convergencia y multilateralismo en la ALADI*. In: *Estudios sobre integración económica y cooperación regional en el Cono Sur*. Santiago, Chile: International Studies Institute Instituto: University of Chile, 1985.

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**THE CONTRIBUTION FROM THE
 INTER-AMERICAN JURIDICAL COMMITTEE ON THE
 DEVELOPMENT OF PRIVATE INTERNATIONAL LAW**

(Analysis and comments on the document entitled
 "The law in a new inter-American order"
 by the Secretary General of the OAS) ¹

(presented by Dr. José Luis Siqueiros)

1. Background. 2. Contributions of the Inter-American System to the development of international law. A brief historical overview. 2. Contributions of the Inter-American System to the development of international law. A brief historical overview. 3. Dissemination and acceptance of the Inter American Conventions. 4. The application of Inter-American law. 5. Cooperation with other fora and institutions. Regional and universal levels. 6.General Outlines of Inter-American Codification. 6. 1 Universalism and regionalism. 6.2 Latin American law and common law. 6.3 Gradual and progressive codification. 6.4 Harmonizing conflicting rules with substantive legal norms. 6.5 The incorporation of private international law in internal jurisprudence and legislation. 7. CIDIPs: the mainstay of the codification process. 8. The Agenda of CIDIP-VI. 8.1 The recommendations of CIDIP-V. 8.2 Guidelines suggested by the General Secretariat for the preparation of juridical instruments. 8.3 The importance of not interrupting the codification process. 8.4 Selection of topics for the Agenda.

1. Background

During its first sessions period of the current year (February 1996) the Committee officially received the document entitled "The Law in a New Inter-American Order", prepared by the Secretary General of the Organization, a document presented earlier to the Permanent Council of the OAS for its consideration.

In a Resolution approved on 9 February last, (CJI/RES. I-7/96), this consultative body agreed to include an analysis of this important document in the Agenda for its next sessions period, for the formulation of observations and comments as warranted thereby From each of its members.

The work under discussion is at one and the same time a diagnosis and a proposal. Among other matters, it outlines the role played by the Organization in the development of international law, both public and private, as well as its contribution to strengthening national legislations. It stresses that the OAS is the natural context for the development of international law in the American Hemisphere, a situation which it underlines as "offering it a major competitive advantage, as the only forum for all the States on the Continent, either developed or developing, to meet under fair and equal conditions for discussions seeking solutions to their common problems, strengthening their solidarity."²

¹ 1 Report submitted for the consideration of the Inter-American Juridical Committee during its second sessions period (August 1996).

² "The law in a new inter-American *order*". Working document. Office of the Secretary General, Washington, D.C. February.

This premise spotlights the massive potential of the OAS for fostering the development of juridical instruments. Without adversely affecting other topics which demand tremendous effort and creativeness, focused on the consolidation of democracy and in-depth expansion of the political reforms which underpin it, the juridical Agenda of the OAS nevertheless offers a vast range of issues falling under the sphere of competence of highly diverse agencies. Notwithstanding, from the standpoint of the legal expert, this Agenda tends to underline the contribution of the Inter-American System to the development of International Law. Dating back to the origins of Pan-Americanism, this input falls into two principal categories: public international law and private international law. Progressive development and the gradual codification of international law, as well as the juridical problems inherent in the integration process of the developing nations of the Hemisphere, coincide with the basic purposes of the Inter-American Juridical Committee.

These targets, as quite correctly indicated by the Secretary General, should be paced to the establishment and implementation of a set of institutions at the regional level which serve as a framework for permanent meetings and discussions among the Member States. In other words, the institutionally of the Inter-American System.

Due to the factors outlined above, and after a collective process of consideration and analysis, a definition for the various parameters, better defined and more concrete, can be reached. These basic guidelines should materialize into a topical objective Within a basic scheme that could be called an "Agenda" which will cover the targets that should shape the priorities assigned by the OAS in its juridical conception of the new Inter-American order.

The Secretary General has divided this Juridical Agenda into twelve topics listed below:

1. Strengthening democracy;
2. Security within the Hemisphere;
3. Protection and promotion of human rights;
4. Combating the drug trade;
5. Elimination of the threat of terrorism;
6. Confronting corruption;
7. Money-laundering;
8. Economic integration and free trade;
9. Environmental protection;
10. Social development;
11. Telecommunications; and
12. Development of private international law.

From a more traditional methodological standpoint, it is too soon to state that the first eleven topics correspond solely to the classical branch of public international law. Purely as an illustration, economic integration, free trade, and telecommunications are areas which must necessarily fall under private law, particularly commercial law. *This is why listing the "development of private international law" as an autonomous field separate from the first eleven topics does not seem a particularly orthodox ratione materiae, the more so in view of Chapter II of the document under analysis. As indicated in this study, "it is important to stress that the close links that exist today between public international law and private international law hamper any attempt at strict classification."³ This same document also states that, "private international law is the tool which has regulated relationships between our societies, streamlining the reciprocal flow of people, goods and services, fostering integration and combating illegal activities that do not*

³ *Ibid*, p. 15.

respect national borders".⁴

This is the viewpoint from which this Report intends to highlight the importance of progressive development and the codification of private law within the context of the new Inter-American juridical order. There is no doubt that other contributions from the Inter-American Juridical Committee will enrich the Agenda of this area, which the Secretary General describes as the "Juridical Agenda of the OAS". This Rapporteur will nevertheless put forward various ideas in the field which has been his specialty for many years, and which may help spur the renewed efforts of the Organization to present itself as the ideal scenario in the juridical development of the Hemisphere.

2. Contributions of the Inter-American System to the development of international law. A brief historical overview.

The contribution of the American Continent (the Western Hemisphere) to the development of international law is an indisputable fact that is fully accepted by universal doctrine.

The genesis of the codificatory process dates back to the Congress of Panama in 1826⁵. The idea of completing the codification of specific topics under international law was found in various proposals and meetings which took place in various Latin American countries throughout the XIX century. The Congress of **American Juridical Experts warrants** special mention, which took place in Lima in 1877, attended by representatives from Argentina, Bolivia, Chile, Cuba, ⁶ Ecuador and Peru. The U.S.A. was invited, but did not appear, claiming that its federal organization reserved competence on specific issues for the federated states, which prevented its Executive from participating in this type of Congress.⁷ The Congress of Lima prepared a Treaty to establish uniform rules for private international law in sixty articles, covering a wide range of issues. It was ratified only by Peru.

As a reaction against the principle of nationality enshrined in the Treaty of Lima, the governments of Uruguay and Argentina undertook a joint initiative, largely at the instigation of Dr. Gonzalo Ramírez, at that time the Minister for Uruguay in Buenos Aires, to summon a new South American Congress. This took place in the Uruguayan capital, and resulted in Treaties of Montevideo negotiated in 1888-89. Argentina, Bolivia, Brazil, Chile, Paraguay, Peru and Uruguay were all represented.

This Congress sanctioned eight Treaties⁸ and an Additional Protocol.⁹ These instruments were ratified by Argentina, Bolivia, Paraguay and Uruguay. The following countries adhered to them: Colombia (partially), Ecuador, France, Spain, Belgium, Italy, Austria, Germany and Hungary.

Celebrating the 50th anniversary of the I South American Congress, the two governments

⁴ *Ibid*, p. 62.

⁵ This Congress adopted a Treaty of Union, League and Confederation, which clearly established the territorial validity of the laws of each of the Member States, and in an additional provision stressed the need to codify international law.

⁶ The presence of Cuba at this event is of interest, as it had not yet won its political independence.

⁷ The U.S.A. continued to use this argument for almost a century, in order to back its refusal to participate in congresses or conferences approving the codification of international law. U.S. State Department policy was modified when this country joined the Hague Conference (1964).

⁸ Treaties on International Civil Law, International Commercial Law, International Criminal Law, International Trial Law, Literary and Artistic Property, Trademarks and Brand names, the Exercise of Liberal Professions, and Patents of Invention.

⁹ The Protocol focuses on regulating the application of foreign law.

which organized its forerunner arranged a Second meeting. This took place again in **Montevideo in 1939-1940**, in two stages. The first welcomed delegates from, the countries represented in 1889, with the exception of Brazil. The second included the same States, as well as Brazil and Colombia. In 1939, three Treaties were signed, with five more¹⁰ signed in 1940,¹¹ as well as an Additional Protocol with the same purpose as its predecessor. The efforts of 1939-1940 generally repeated the previous texts, with very few significant differences. Argentina, Paraguay and Uruguay ratified all of them, while the others merely signed.

We now outline the efforts of the Inter-American agencies, highlighting the contribution of the Pan-American Conferences to the development and gradual progressive codification of international law towards the end of the XX century. A Continent-wide process began to spread, prompted by the U.S.A., of a scope wider than that covered by the South American Congresses of Montevideo.¹² The government of this country undertook the task of playing the role of a protagonist on the Continent, attempting to shape the relationships among the American States. This new direction in diplomatic, commercial and economic relations prompted an about-turn in the viewpoint held until then by the Latin American Codification Movement, whose cultural and juridical influence had been drawn solely from Europe.

The geographical horizon also expanded, to include Mexico and the Nations of Central America, in addition to the USA. The idea began to spread of an International American Law, with its own principles and characteristics. Although this idea generally referred to the codification of public international law, there was a similar trend in the field of private international law. Nevertheless, it should be stressed that this nascent International American Law involved identifying keynote issues distinctive to America and with well-founded norms to regulate them. At the I Pan-American Conference held in Washington D.C. (1889-1890) a recommendation was sanctioned suggesting to all governments represented that they should give serious thought to the convenience of expressing unconditional compliance with to the Treaties of Montevideo (1889) or should issue a justified refusal to do so.

At the II Conference (Mexico, 1901-1902) it was agreed to set up a Commission charged with drafting a Private International Law Code and a Public International Law Code. However, the Commission failed to bring its task to a felicitous conclusion.

The establishment of the International Board of Juridical Experts was the most outstanding achievement of the III Conference held in Rio de Janeiro in 1906. This Board was assigned the task of preparing the two Codes still uncompleted. However, differences in criteria between Brazilian and Argentine jurists frustrated this attempt. Neither did the IV Conference (Buenos Aires - 1910) make any progress in this task.

The V Conference (Santiago, Chile - 1923) reorganized the International Board, and renamed it the "Commission". It was assigned the task of preparing this codification at the Continental level, a task which finally firmed up as a draft prepared principally by Dr. Antonio Sánchez de Bustamante y Sirvén, who worked closely with American International Law Institute. This was called the Bustamante Code, in honor of its author, a tool that was accepted by the Commission and submitted to the VI Pan-American Conference (Havana - 1928).

¹⁰ Treaties on Political Asylum and Sanctuary, Intellectual Property, and a Convention on the Exercise of Liberal Professions.

¹¹ Treaties on International Civil Law, International Onshore Commercial Law, International Commercial Shipping Law, International Criminal Law and International Trial Law.

¹² "FERNANDEZ ARROYO, Thego P. "La codificación del Derecho Internacional Privado en América Latina", Beramar: Madrid, 1994, p. 123.

The VI Conference approved the Bustamante Code, a broadly comprehensive work with 437 articles on this area, constituting a benchmark of the utmost importance in the history of inter-American codification. However, the compromise solution adopted by the Code for reconciling the principles of nationality and domicile (personal law) ushered in as a consequence so many declarations and reservations by the Signatory States at the time of signature and ratification, that it was left virtually inoperative. Nevertheless, this Code is still in effect in a good number of Latin American nations.

The VII and VIII Pan-American Conferences (held in Montevideo, 1933 and Lima, 1938), continued to focus on this topic, but leaning towards a new trend, i.e. the unification of private law, meaning its material normativity, leaving conflictive codification aside. Changes took place from the operational viewpoint. The organization which began as a Board and later changed to a Commission was then transformed into the International Conference of American Legal Experts. Additionally, the Consultation Meetings of the Ministers of Foreign Affairs set up the *Inter-American Neutrality* Committee. From 1942 onwards, this was called the Inter-American Juridical Committee, with its seat in Rio de Janeiro, establishing its functions, which included the “development and coordination of the codification of International Law, without adversely affecting the spheres of competence of existing bodies.”

The IX Conference, held in Bogotá in 1948, set up the Organization of American States, (OAS), with a permanent agency structure. The Inter-American Juridical Committee was maintained among them, although as a Permanent Commission of the Inter-American Council of Legal Experts, a link which lasted through to 1970, when this latter organization ceased to exist. From 1949 onwards, the Inter-American Juridical Committee began to produce praiseworthy scientific work¹³ and this same year a plan was adopted for the development and codification of public international law and private international law.

Unfortunately, commissioned by the *Inter-American Council of Legal Experts* which was still in existence, the Inter-American Juridical Committee became involved in a difficult and relatively unproductive task: **Revision of the Bustamante Code in the light of the Treaties of Montevideo and other Norms of the Restatement of the Law of Conflicts of Laws**, this latter prepared by the American Law Institute of the U.S.A. The Inter-American Juridical Committee dedicated almost two decades to fulfilling this assignment, despite the reiterated North American stance that it had no interest in these efforts targeting harmonization, and the lack of political will on the part of other Latin American governments.

By the mid-1960s, a new direction was given to the codification strategy for private international law. In what was to be its last meeting (San Salvador - 1965), the Inter-American Council of Legal Experts recommended the organization to call a Specialized Conference and sound out the opinions of the member governments on the topics that should be covered during this, event.

The countries consulted replied almost unanimously, stating that the Conference should focus on concrete issues. Most of them also showed a preference for an Agenda including matters involving Commercial Law.

The first Specialized Inter-American Conference on Private International Law (CIDIP) took

¹³ 13 There is an abundant bibliography on the prolific scientific work of the Juridical Committee. As the most authoritative sources, see, “Report and Recommendations of the Inter-American Juridical Committee” t. I – XXII, Secretary General of the OAS. Washington D.C. and “The Contribution of the Inter-American Juridical Committee of the OAS in the *Development and Codification of International Law*” by Renato Ribeiro, Secretary of this Organization for over thirty years (CJI/SO/I/doc.26/93).

place in Panama City in January 1975. It was attended by delegates from twenty Member States of the Organization, and the observers included a representative from Canada.¹⁴ Notwithstanding its limited duration, CIDIP-I proved fruitful, approving six important conventions.¹⁵

The Second Specialized Conference (CIDIP-II) was also organized by the General Assembly, taking place in Montevideo, Uruguay, in April and May 1979. It was attended by representatives from twenty countries, and it may be stated that the academic level of the delegations was higher than that noted during the previous CIDIP. It worked at a rapid pace, and the outcome of its discussions and decisions resulted in the approval of the wording of eight Conventions.¹⁶

The CIDIP-III was held in La Paz, Bolivia in May 1984. Perhaps due to a series of postponements in its scheduled date and problems inherent in organizational tasks, this Conference drew a relatively smaller number of participants, with eighteen delegations from the Hemisphere, in addition to a large group of observers. With the technical support of the Under-Secretariat for Legal Affairs of the OAS and the unstinting efforts of the participants, four highly important instruments were approved.¹⁷

The IV Specialized Conference (CIDIP-IV) was held in July 1989 in Montevideo, Uruguay, attended by representatives from nineteen Member States of the OAS, as well as permanent observers (States) and others from international organizations and agencies. As a result of the efforts of the two Commissions set up, three Conventions were¹⁸ were signed.

The V Specialized Inter-American Conference on Private international law (CIDIP-V) was held in March 1994 in Mexico City, with delegates from nineteen OAS Member States as well as permanent observers from this Organization, and other international agencies and associations. Following in the footsteps of previous CIDIPs, the Conference reduced the number of topics on its Agenda, and approved only two Inter-American instruments.¹⁹ During its closing Plenary Session, it agreed in a specific Resolution to postpone the third topic for later study, which consisted of the principal aspects of private international law regarding technology transfer contracts.²⁰ Before closing, the V Specialized Conference resolved to request a General Assembly of the OAS to call the CIDIP-VI.²¹ This Resolution recommended the General Assembly, on the basis of the pertinent stuthes, to include eight specific issues in the Agenda of

¹⁴ It is interesting to note that although Canada is not yet a member of the OAS, since 1975 it has been expressing its wish that all Conventions approved by this Conference should include the "Federal Clause" within their General Provisions, which allows the Signatory States with two or more territorial units ruled by different juridical systems to declare whether or not the Convention shall apply to all its territorial units, or only one or more of them.

¹⁵ The Inter-American Conventions on the Conflict of Laws Regarding Letters of Exchange, Promissory Notes and Invoices; Conflicts of Laws Regarding Cheeses; International Commercial Arbitration, Letters Rogatory; Receipt of Proof Abroad, and the Legal Regime for Powers to be used abroad.

¹⁶ Inter-American Conventions on the Fixtra4ccritorial Effectiveness of Foreign Arbitration Decisions and Reports-, Compliance with Precautionary Measures; Proof and Information on Foreign Law, Conflict of Laws regarding Cheeses; Conflicts of Laws regarding Companies; Domicile of Individuals under Private international law-, General Norms of Private international law, and an Additional Protocol to the Convention on Requisitorial or Rogatory Letters.

¹⁷ Inter-American Conventions on Conflicts of Laws regarding the Adoption of Minors-, Personality and Capacity of Corporate Legal Entities under Private international law, Competence in the International Sphere regarding the Extra4erritorial Effectiveness of Foreign Court Decisions; and an Additional Protocol to the Convention on Receipt of Proof Abroad.

¹⁸ Inter-American Conventions on International Return of Minors; Nutritional Obligations; and International Road Cargo Transportation.

¹⁹ Inter-American Conventions on International Contract Law and International Traffic in Minors.

²⁰ OAS/Ser.K/XX1.5/CIDIP-V- doc. 35/94 rev. 1.

²¹ CIDIP-V/RES.8 (94).

the next Conference.²²

The balance of the five CIDIPs may be viewed in quantitative and qualitative terms. For the former, the figure is impressive: 23 instruments, including Conventions and Protocols. Outstanding among them are the areas of international legal cooperation, commercial law, and protection of minors. With regard to the qualitative assessment, doctrine is not unanimous. Nevertheless, and accepting in advance that the Conventions have not yet received the desirable number of ratifications or accessions, it may be stated that the codification movement has been positive and that "progressive development" of this discipline has been reflected in its gradual incorporation into legislation across the Continent.²³

3. Dissemination and acceptance of the Inter-American Conventions

As quite correctly stated by the Office of the Secretary General of the OAS,²⁴ once an inter-American norm has been approved, the Organization has frequently dissociated itself from following up, limiting its actions to the function of a mere depository of signatures and ratifications. The dissemination of approved instruments should presuppose greater emphasis on the publication and distribution of their texts, as well as updated knowledge of the status of their effectiveness²⁵ through courses, seminars, and meetings at universities, law schools, training sessions for judges and magistrates, and even using the large-scale dissemination offered by Internet.

Many lawyers who invoke the existence of a convention favoring the interests of their clients during the course of a case are surprised when the judicial authority is obviously unaware of the existence of the instrument (even when it has been already promulgated and published in an Official Gazette). The lack or difficulty of access to comprehensive collections of treaties in effect, as well as knowledge and application thereof by judges, has to some extent undermined their effectiveness, despite the fact that in almost all countries these international instruments take constitutional supremacy over domestic law.

It is only when these international instruments are incorporated as part of domestic law or constitute part of the civil law, procedural law or commercial law codes, that the jurisdictional body becomes aware of the existence of the international norm. Modern information technology (hard disks, CD-ROMs, and link-ups to data-bases) may help disseminate convention law. Its citation and application in national jurisprudence will constitute an appreciable step forward.

4. The application of Inter-American law

The study prepared by the Secretary General did not neglect the problem offered by the expansion of the scope of international law - and inter-American law in particular - regulating activities which were formerly considered as covered exclusively by internal law.²⁶ This juxtaposition, which fosters the convergence of both orders, is making way for apparent

²² The matters suggested and the decision on the Agenda of CIDIP-VI are examined in item 8 below.

²³ These concepts are covered in greater detail in a different part of this Report. See also "*Contribución de la CIDIP-I, II y III al desarrollo del Derecho Internacional Privado*" (conclusions), XIII Course on International Law, CJI 1996, by J. L. Siqueiros.

²⁴ "The Law in a new inter-American order ..." p.12, 62-64.

²⁵ "It is fair to acknowledge that the Under Secretariat of Legal Affairs of the OAS prepares periodically (every six months) a Report covering the Conventions and Protocols approved by the CIDIPs, indicating their entry into effect ratifications, signatures and adhesions. Unfortunately, this Report is not distributed on a general basis, and is virtually restricted to in-house consumption.

²⁶ "The Law in a new inter-American order" p. 73.

dichotomies, and the task of national judges includes examination and knowing how to apply the pertinent clauses in conventions in effect, as well as handing down decisions on the interpretation, harmonization and prevalence between the two juridical orders.

National jurisprudence is not uniform regarding the conflict between an international norm and an internal norm. To a large extent this will depend in each case on the higher hierarchical relationship between these orders in national constitutions, meaning whether the internal law post-dates the Convention, if the international law affects the interest of the provinces or territorial units which have a diverse normativity etc. Nevertheless, two relevant instruments, one universal and the other regional, may cast light on this delicate question.

The first is the Convention of Vienna on Treaty Law, dated 23 May 1969.²⁷ The second is the **Inter-American Convention on General Norms of Private international law**, drawn up in Montevideo in 1979.²⁸ In Article 27, the Convention of Vienna states that a Party may not evoke the provisions of its internal law as justification for non-compliance with a treaty, the foregoing without prejudice to the provisions of Article 46.²⁹

The Inter-American Convention establishes in Article 1 that “the determination, of the juridical norms applicable to replete situations linked to foreign law shall be subject to provisions established in the Convention and other international conventions signed or which may be signed in future on a bilateral or multilateral basis by the States that are Parties thereto. In default of international norms, the Signatory State shall apply the rules of conflict under their internal law”.³⁰

It would seem from a reading of these texts that there is a clear-cut hierarchy favoring international law. However, this issue is more complex. As already shown, it will depend on the Constitution and the basic laws of each country. National Jurisprudence will stipulate the order to be followed regarding the arguments of the monist and dualist schools.³¹

5. Cooperation with other for a and institutions. Regional and universal levels

The working document under study for comments contains a very accurate statement. On page 64 it notes that “*just as the development of inter-American international law within the framework of the OAS has been followed with attention in other for a and in other regions, this (inter-american private international law) is in turn enriched through knowledge of the norms and practices taking place in the universal field, or in other Continents*”.

The progressive development and codification of International law (public and private) is not an area reserved for the Inter-American System. This task is shared by the United Nations Organization and various regional agencies, including the OAS. It is as vital to adopt a strategy of inter-relationship among the various fora, avoiding unnecessary duplication and harmonizing this common task.

²⁷ United Nations Treaty Series, No. 18232.

²⁸ OAS Series on Treaties No. 54, p. 1.

²⁹ This provision establishes as an exception that violation of the competence of a Signatory State to sign a treaty has been made manifest and affects a fundamental norm of its internal law.

³⁰ THUS, D.P. Fernandez Arroyo – states “the modern process of international codification of American private international law has moved expressly and decidedly towards a monist concept that tends to justify ist efforts to some extent”. See op. cit., p. 258.

³¹ See GOLDSCHMIDT, W. “Normas generales de la Cidip-II; hacia una teoría general del derecho internacional privado interamericano”. Anuario Jurídico Interamericano, 1979, p. 151.

Since 1945, Article 13, Paragraph 1 (a) of the U.N. Charter has included among the duties and responsibilities of the General Assembly that “fostering the progressive development of international law and codification thereof”. The distinction between “progressive development” and “codification” was covered in Article 15 of the By-Laws of the International Law Commission, with the former expression being reserved for the preparation of draft agreements on matters lacking regulation or sufficiently developed practice, while the latter refers to the formulation and systematization of norms on issues where there is already ample practice thereof within the States, as well as precedents and doctrines.³²

Nevertheless, this distinction became invalid in the efforts of the International Law Commission. The Inter-American Juridical Committee also realized this, when complying with the purpose assigned thereto by the Charter of the OAS³³ confirming the impossibility or practical intranscendence of establishing differences between these expressions.³⁴ In fact, from 1975 onwards, “partial and progressive codification” was mentioned, in contrast to an already obsolete “global and omni-comprehensive codification”. Codification is currently progressive because it is being handled on an issue by issue basis and is being shaped to the changing needs of reality.

In addition to work on “progressive development and codification” as already noted, other universal fora such as the Hague Conference on Private international law (Hague Conference), the United Nations Commission for International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT), and the International Chamber of Commerce (ICC) to mention only the most important, have been implementing similar mandates in their By-laws. We thus note that “progressive unification”³⁵ “harmonization and coordination of private law”³⁶ and “harmonization and unification of international trade law”³⁷ are among the primary purposes of these institutions.

On this basis, the task under consideration being implemented by the OAS should be strengthened through links of cooperation and reciprocal osmosis with these multilateral fora. Additionally, at the regional level, this should also take place with other schemes such as the Council of Europe and the Afro-Asian Juridical Committee. Additionally, it should not be forgotten that there are other agencies within the OAS with responsibilities in juridical matters that could channel the implementation of their activities to dovetail with those of the Inter-American Juridical Committee, including CICAD, ICC and the Inter-American Commission on Human Rights, to mention only a few.

Summing up, it is necessary to establish coordination and set priorities. Duplication of effort must be avoided, as well as compliance with objectives through focusing on issues with distinctive characteristics that are specific to the region.

6. General Outlines of Inter-American Codification

6.1 Universalism and regionalism

³² See Resolution 174 (III) of the General Assembly, below.

³³ Article 104 of the Charter currently in effect. Article 67 of the Charter approved in 1948 in Bogota indicated among the functions of the Inter-American Juridical Committee the development and codification of international public and private law. When the Charter was re-worded by the Protocol of Buenos Aires in 1967, the allusion to “public and private” was eliminated, copying the wording of Article 13.1 (a) of the U.N. Charter.

³⁴ The “Report on the Plan for the development and codification...” prepared by the Inter-American Juridical Committee and submitted to the first meeting of the Inter-American Council of Legal Experts, Washington D.C., 1949. (Doc. CJI-3, see below, G. Parra Aranguren “La Revisión del Código Bustamante”, Caracas, 1992, p. 240-241.

³⁵ The Hague Conference Statutes Article 1.

³⁶ UNIDROIT, Multilateral Statutes, Article 1.

³⁷ Resolution 2205 (XXI) of the General Assembly of the United Nations setting up UNCITRAL.

Despite the fact that the drive towards "globalization" is almost commonplace in socio-economic terminology, on the juridical scene it nevertheless dashes with universalist-regionalist dialectic. In view of this dichotomy, should we accept the doctrine that favors "particularly differentiated cultures" resulting in distinct regulations for specific environments? Should a universal convention law be sought or should regional regulations be admitted for certain issues? What areas of juridical conduct are impregnated with an American particularism and thus warrant codification at the regional level? All these questions are neither peculiar nor exclusive to the Western Hemisphere; they are also being questioned and discussed on other Continents.³⁸

The fact that some American countries from part of various universal fbra that have been mentioned, and that their governments may have ratified or adhered to instruments of universal scope concluded under the aegis thereof, has not prevented the same OAS Member States from discussing and signing other conventions on these same issues, within the framework of the CIDIPs.³⁹ In turn, duplication of ratifications on the same issue creates confusion over the priority of application for two or more instruments regulating an identical area, which may prove conducive to conflicting clauses for resolving possible clashes between the application of one or the other instruments, or to reservations when ratifying or adhering to the later instrument.⁴⁰ Summing up, it is not easy to carry out a diagnosis of this dialectic, nor to prescribe treatment. Nevertheless, it would certainly be advisable that each issue liable to be included on the future Regional Codification Agenda should be rigorously examined within the context of its extra-continental regulations. Should this issue be covered by norms of a universal character to which most or a good number of the American nations are signatories, it would be preferable fbr the Specialized Conference not to include them on its Agenda, merely recommending to governments which are not signatories that they should consider the convenience of ratifying or adhering to such instruments.⁴¹

6.2 Latin American law and common law

One of the problems hampering the codification of Inter-American private international law is the convergence between Latin American law, meaning law based on the Roman-German tradition (which includes all the Spanish-speaking nations and Brazil) and Anglo-American law, which is rooted in common law, and prevails in Canada (with the exception of Quebec Province), the U.S.A. and most of the Caribbean nations which form part of the Commonwealth.⁴²

There can be little speculation about Canada. It is a recent member of the OAS, and took part only in CIDIP-V. Its inclusion in these tasks of unification and harmonization at the

³⁸ The universification of certain instruments of international law has not prevented this issue being regulated at the bilateral and regional level as well. As concrete examples, we have the areas of commercial arbitration, nutritional obligations, illegal transportation of minors, judicial cooperation, successions, the exercise of liberal professions, and many others.

³⁹ This duplication is paradoxical to some extent. Some countries which signed the Inter-American Conventions on Nutritional Obligations and International Return of Minors, both concluded at the CIDIP-IV (1989) have not yet ratified them. In contrast, they have adhered to the United Nations and The Hague conventions on the same issue. Brazil ratified the convention on International Trade Arbitration signed in Panama (1975) but did not adhere to the Convention of New York (1958) on Acknowledgment and Executions of Foreign Arbitration Decisions.

⁴⁰ See, for instance, the reservation made by the government of the U.S.A. on ratifying the Convention of Panama on International Trade Arbitration, stipulating in which cases its courts would apply the Convention of New York, and when the Inter-American Convention would be used.

⁴¹ As has been the case with no less than six resolutions approved in the Plenary Sessions of CIDIPs IV and V, regarding conventions of a universal scope adopted wider the auspices of UNCITRAL, UNIDROIT and the Hague Conference.

⁴² In the thirteen Caribbean nations with the exception of Haiti and Suriname, U.K. legislation is preserved, at least for private law.

Continental level will be a positive factor, due to its "dual culture". With regard to the Caribbean nations, little or nothing can be expected.⁴³

Thus, juridical bi-polarity has centered on the conceptualization found in the U.S.A. and Latin America. In addition to the traditional reluctance of the U.S.A. to join the task of codification of direct law, claiming constitutional obstacles arising from its federal structure, problems which it was unable to overcome until the 1970s, its participation has caused deep-rooted problems, at times due to the lack of equivalence of institutions for matters of regulation,⁴⁴ in others the use of different procedures,⁴⁵ and to the large extent to the lack of linguistic facilities.⁴⁶

Notwithstanding, these problems, and given the major role of the U.S.A. in the OAS, and to a lesser extent but still very important, Canadian participation, the private international law codification movement within the Inter-American System cannot be conceived without the interaction of *common law* with Latin America's so-called "civil law". Regardless of whether or not the instruments were adopted by the CIDIPs, and whether or not they had been ratified by the U.S.A. and Canada, the experts, the staff of the Secretariat for Legal Affairs and the diplomatic delegates to the Conferences should have recourse to the ingenuity, imagination and reciprocal information of the two systems, in order to find points of convergence between them, seeking conciliatory solutions. This contemporization will be beneficial to the harmony of convention law.

6.3 Gradual and progressive codification.

In the Working Document prepared by the Secretary General covered by these comments, it is noted that the Organization has abandoned the globalist perspective in the codification process for this discipline, moving into a second stage (since 1975) that has encouraged sectorial codification.⁴⁷

In other words, the omni-comprehensive concept that began with the Treaties of Montevideo and culminated in the Bustamante Code has been shelved, in order to adopt a technique focused on specific *topics* whose analyses should warrant inter-governmental consensus in the light of the current context. Said in different words, to follow this sectorial-type methodology underscored with notions of Inter-American cooperation and prior consultation among the Member States.

It would also be advisable to reduce the number of topics under consideration at the CIDIPs as far as possible - perhaps two at most.

6.4 Harmonizing conflicting rules with substantive legal norms

It is not currently heterodox, fostering better codification of private international law, to

⁴³ Only Trinidad and Tobago (CIDIPs-I, II and IV) and Jamaica (CIDIP-I-I) have participated in the Conferences. None of the thirteen Caribbean nations has signed even one of the approved texts.

⁴⁴ During the negotiations on the Convention on International Traffic in Minors, at both the Meeting of Experts in Oaxtepec, Mexico (1993) as well as the Specialized Conference in Mexico City (1994) there was heavy opposition from the U.S. delegates to including criminal aspects in the wording of the instrument - as they felt that criminal sanctions were not part of private international law.

⁴⁵ In illustration, the problem is recalled brought up in both the Convention on Receipt of Proof Abroad (1979) as well as during negotiations over the protocol to this instrument (1994) regarding "pre-trial discovery of documents.

⁴⁶ All the draft conventions have been worded in Spanish. When the final version was up for approval in the Plenary, there were serious problems with regard to whether the English version corresponded faithfully to the original. However, the same may be said with regard to the French and Portuguese texts.

⁴⁷ *The Law in a new inter-American order...*, p. 21.

match and harmonize conflicting rules with substantive. Although these tasks are separate in traditional methodology, various conventions produced by the CIDIPs⁴⁸ contained typical uniform law norms, in addition to the rules of conflict. This also opens up a wide range of possibilities among the various juridical mechanisms - model laws, juridical guidelines, uniform laws - which have already been tried out successfully in other multilateral fora, such as UNCITRAL.⁴⁹

6.5 The incorporation of private international law in internal jurisprudence and legislation.

Without adversely affecting the constitutional mechanism that each State establishes to ratify or adhere to convention law, namely approval by Parliament (Senate), or by means of implementation through a law issued by Congress, it is quite certain that the international instrument, once approved, is incorporated into domestic law. This means that it has an impact on the national legislation of the countries in the American region, as well as the jurisprudence of their courts. In the final instance, it also affects the day life of individuals.⁵⁰

This comment is particularly valid for countries with codified law. Updating the various statutes in civil, commercial and procedural matters depends on the actions of their legislatures for their amendment. The incorporation of international law modernizes normatively and the criteria of the courts. Obsolete provisions which may still be contained in codes vanish when the principles approved in conventions are adopted, through either the introduction of new laws which incorporate them, or by means of the decisions handed down by the justices or magistrates who interpret them.⁵¹

7. CIDIPs: the mainstay of the codification process

As defined in Article 127 of the OAS Charter, the Specialized Conferences are "*Inter-governmental meetings covering special technical issues or to developing specific aspects of Inter American cooperation*". In compliance with Article 128, the Agenda and regulations of the Specialized Conferences will be prepared by the corresponding Councils (in this specific case, by the Permanent Council), and submitted to the consideration of the Member States.

Within the historical context which has been outlined, and according to the parameters sketched out in the previous section, we believe that the codification process for this discipline will continue under the framework of the Specialized Conferences. Furthermore, we venture to think that this is the sole feasible option. Nevertheless, following the best course, forthcoming juridical output will tend to be more selective, planning, assessment and consensus will be required by governments, and it will be necessary to modify the operating mechanisms of the CIDIPs in order to ensure an acceptable level of excellence.

8. The Agenda of CIDIP-VI

8.1 The recommendations of CIDIP-V

⁴⁸ Conventions on the Legal Regime for Powers to be used Abroad, International Commercial Arbitration, and Requisitionary or Rogatory Letters.

⁴⁹ In the document prepared by the Department for the Development and Codification of International Law, of the Secretariat for Legal Affairs, (OAS) C/JYdoc.7/95 dated 16 August 1995, the definition of "juridical instruments" includes model laws.

⁵⁰ The Law in a new Inter-american order... ", p. 62.

⁵¹ As a purely illustrative point, Mexican law (Civil Code, Federal Civil Procedures Code, Commerce Code, among others) has been decisively influenced and updated as a consequence of Mexico's ratification and adherence to various CIDIP conventions.

During the last CIDIP held in Mexico City in 1994, when the Plenary Assembly was requested to call the next Conference,⁵² it was recommended to the General Assembly that, on the basis of the pertinent studies, the following topics should be included in its Agenda:

- a) Commercial representation and mandate.
- b) Conflicts of law on matters of extra-contractual liability (torts) (limited to a specific area).
- c) Uniform trade documentation for free trade.
- d) International bankruptcies.
- e) Problems under private international law regarding international private law contracts
- f) International liability for trans-border pollution. Aspects of private international law.
- g) International protection for minors under private international law: parental powers, custody, visitation and filiation.
- h) Uniformity and harmonization of international financial and commercial guarantee systems.⁵³

8.2 Guidelines suggested by the General Secretariat for the preparation of juridical instruments.

Before offering comments on the relevance and suitability of the topics listed in the previous paragraph, we feel it prudent to mention an interesting working document prepared by the International Law Development and Codification Department of the Secretariat for Legal Affairs of the OAS,⁵⁴ a document which was submitted to the Inter-American Juridical Committee for review, revision and comments and the Committee will submit its Report to the Permanent Council in a timely manner, and this latter institution shall inform the General Assembly in this respect. The General Assembly instructed the Secretary General to formulate the above-mentioned guidelines to enlighten it in regard to the process followed by the organization in the preparation and adoption of such Inter-American juridical instruments.⁵⁵

The document in question sets out Draft Guidelines in Part III thereof, but stresses that these should be used as guides rather than as a rigid procedure. In brief, the "guidelines" suggest that the procedure for preparing juridical instruments should include: a) an initial proposal by any Member State on some specific issue; b) support for this proposal by two other Member States; c) preliminary assessment of the proposed topic; d) that the Permanent Council should agree with the conclusions of the preliminary assessment; e) that the Secretariat for Legal Affairs should coordinate the preparatory process, including consultations and questionnaires forwarded to the Member States; f) the culmination of this preparatory process, including the Preliminary Draft of the instrument will be assigned to a "Working Committee"⁵⁶ g) the Preliminary Draft concluded by the above-mentioned Commission will be distributed to the

⁵² On the date of this Report, no date has as yet been set for the Conference, nor have any bids been received from governments offering to host this event.

⁵³ CIDIP-V/RES.8 (94).

⁵⁴ "Guidelines for the Preparation of Inter-American Juridical Instruments: Study of Precedents" document mentioned in Note 48 above.

⁵⁵ Resolution adopted by the General Assembly on 9 June 1995. OEA/Ser.P.AG/doc. 3269/95.

⁵⁶ This Working Committee shall include the Inter-American Juridical Committee as one of its member organizations.

Member States for analysis and comment; h) a Final Draft will be drawn up in the four official languages; i) this Draft will be submitted for consideration to the Diplomatic Conference, which shall decide on the approval and adoption thereof.

The assessment mentioned in item (c) shall be undertaken by one or more of the fora listed, and which include the various agencies of the OAS.⁵⁷ The preliminary assessment shall determine whether or not the proposed topic is truly necessary within the Inter-American framework, a decision which will take various considerations into account, some of which have already been covered in the course of this Report.⁵⁸ An aspect of overwhelming importance in this assessment will be the level of backing shown by the Member States for the Draft.⁵⁹

Summing up, this Rapporteur feels that the proposed guidelines are based on substantive procedural considerations which are slanted towards obtaining a selective and realistic preparation for Inter-American convention law. Many of its traits are solid, but cannot be applied in a rigid manner.

This Rapporteur feels that the document under comment does not assign the necessary importance to the Inter-American Juridical Committee. It merely includes it (among many other agencies) for appraisal and preparatory work. In my view the Inter-American Juridical Committee should be the most important consultative agency in the preparation of Inter-American juridical instruments.

8.3 The importance of not interrupting the codification process

In view of the guidelines outlined in the document issued by the General Secretariat, and another study prepared by the International Law Development and Codification Department in October 1995,⁶⁰ it was concluded "that it would be appropriate to postpone the selection of the list of items for the Agenda of CIDIP-VI, until time has been an opportunity to consider the results of the initiative (meaning the guidelines sketched out by the international Law and Development and Codification Department) together with the recommendations put forward by the Inter-American Juridical Committee to the Permanent Council regarding this draft. In the meantime, start could be made on preparing certain preliminary studies."⁶¹

The Rapporteur does not agree with that view. Without adversely affecting the recommendation that this may submit to the Permanent Council regarding the draft "guideline" and the indisputable excellence of many of them, it should be stressed that the codification process of Inter-American private international law, underway since 1975, already has its own dynamics. The CIDIPs have been held regularly every four or five years, following a procedure that complies with the Charter of the Organization. It is obvious that these procedure could be fine-tuned, and that in view of the background and results obtained during the five conferences; already held, the next could well a greater level of excellence; simply "postponing" this meeting indefinitely and undertaking only "various preliminary studies" would mean terminating a process that has already become institutionalized.

⁵⁷ One of them being the Inter-American Juridical Committee.

⁵⁸ For example, the existence of other bilateral or multilateral instruments on the same issue, the plans and Agendas of other fora for covering such a topic in the near future; the "Americanness" of the topic, as an issue that is characteristic of or specific to the Continent.

⁵⁹ This "level of backing" is a somewhat subjective and random element that is not foreseeable.

⁶⁰ "Selection of Agenda for the Sixth Inter-American Conference on Private International Law. (CIDIP-VI). A preliminary Background Study", a document not yet classified and available only in English.

⁶¹ "Selection, *ibid.*, p.5.

We agree with the Permanent Council, that its Commission on Juridical and Political Affairs should carry out a detailed assessment of the topics for the next Agenda, hearing the views of the Member States; additionally, we agree that these topics should be reduced in quantitative terms, to perhaps two at most, and that they should be selected in a qualitative manner, following the parameters suggested in order to determine whether or not the topic put forward is suitable, within the inter American convention framework. This assessment could take place through questionnaires and consultations that would be answered by the Member States, and whose replies would indicate the desirability of codifying the issue and the possibility of achieving satisfactory concrete results. In other words, the technical criteria would be associated with the political will of the States.

Once the topics have been selected, the Secretariat for Legal Affairs, as it has done on earlier occasions, would commission the preparation of Technical Studies from specialists on these issues, and would organize Meeting of Experts to examine the Drafts prepared by the Member States; Ad Hoc committees; would be set up to draft the approved preliminary texts in the official languages, which would be circulated with sufficient advance notice prior to the Conference. At the CIDIP meeting, the Member States would be encouraged to ensure that their delegations include national specialist on the topic under discussion, and the host nation would be requested to ensure that the Conference lasts at least six business days.⁶²

The organization and dynamics of the Specialized Conference are correctly outlined in the regulations prepared by the Permanent Council, and with small adaptations have proved suitable for the CIDIPs. With regard to the dissemination and acceptance of the conventions which may be approved, we refer back to the comments in Section 3 of this study.

8.4 Selection of topics for the Agenda

The document covered by this analysis and comments indicates that the Draft Agenda for CIDIP clearly reflects the strong inclination of the States to cover issues directly linked to commercial law, international trade and international economic law; it adds that this trend will shift future CIDIPs away from the exclusive study of topics linked to the settlement of conflicts of laws, in order to move towards a normative exercise that is closer to the harmonization and unification of laws at regional level.⁶³

We feel that the statement of the General Secretariat is correct. The "gradual and progressive development" of international law, as noted in item 6.4 of this Report, also involves the codification of conflicts, together with uniform law norms. Furthermore, among the tasks assigned by the Charter to the *Inter-American Juridical Committee* is "the possibility of making their legislations uniform (for the countries on the Continent) to the extent that seems convenient."⁶⁴

This mission has already been attempted in various Latin American fora. Starting from a listing of common elements, the result of a shared heritage, ambitious works are being prepared on various branches of the law, both public and private. Among them are drafts which have been produced within the Latin American area, under the name of "Type Law" or "Type Code" and which cover issues as dissimilar as Civil Procedural Law,⁶⁵ Criminal Procedural Law,⁶⁶ Tax

⁶² The CIDIPs have a high cost, which is shared proportionally between the OAS and the host nation. The main expenditures involved are the high cost of interpreters and translators, administrative support staff, security, stationery, photocopies, transportation and others.

⁶³ "The law in a new inter-American order....", p. 63.

⁶⁴ Article 104 of the Charter of the OAS.

⁶⁵ "Código-Tipo y Reforma del proceso en América Latina". R. O. Berenzione p. 29-30; Proyecto Civil Modelo para

Law,⁶⁷ Aviation Law,⁶⁸ " Arbitration,⁶⁹ Securities,⁷⁰ and Companies.⁷¹ Unfortunately, none of these initiatives has crystallized in practice. Another aspect that the OAS should foster is the study of the normative structure issued under the various regional and sub-regional integration schemes (LAIA, NEERCOSUR, ANDEAN PACT, NAFTA, SICA, CARICOM). The purpose of this study would be to gradually implement harmonization of national legislations, applicable to trade relations which are firming up through integration processes. Matters such as subsidies, investments, intellectual property, government procurement, rules of origin, quality control, antidumping and others should gradually be harmonized.⁷² Although these tasks do not necessarily transcend the sphere of influence of the CIDEPS, they nevertheless have an indirect influence on some of the *topics* proposed.⁷³

In brief, a balance should be drawn up of the scientific baggage that has accumulated over more than two decades of inter-American codification of private international law. With the experience acquired, the future can be planned on more solid and realistic bases. One of the most important effects of this process is perhaps not the direct application of the agreements signed under its aegis, but rather the indirect "homogenization" produced as a reaction in internal legislations throughout the region. Many of them reflect the influence of the criteria established with the regulation of private foreign trade at the inter-American level, which to some extent implies a "modernizing" effect by means of the conventions.⁷⁴

In the view of a German author who has studied this process in depth, this codification drive is "a model and a benchmark which guarantees its ongoing development and modernization, and perhaps a certain harmonization in a not too distant future".⁷⁵

This Rapporteur, who has personally lived through the vicissitudes and results of *the five* earlier CIDIPs, believes that this process - like any other human endeavor - can be perfected in the future, and thus achieve even higher levels of excellence.

Iberoamérica. Historia; *Antecedentes, Exposición de Motivos*, Instituto Iberoamericano. General Secretariat, Montevideo 1998.

⁶⁶ See Fairén Guillén "Notas sobre el proyectado Código de Proceso Penal *Modelo* para Iberoamérica". Bo. Mexico de Der. Comp. v.. XXIV n. 70, 1991, p. 97-169.

⁶⁷ "Reforma tributaria para América Latina, Modelo de Código Tributario", Washington D.C., 1967.

⁶⁸ "El Proyecto de Código Aeronáutico Latinoamericano", Ega; Studies in Honor of Prof. Enrique Aztiria, Buenos Aires, 1966, p. 168-297 and "Códigos y Leyes de Aviación Civil Iberoamérica", by MALPELLI LÓPEZ, E., Madrid, 1970.

⁶⁹ CABANAS RODRÍGUEZ, M. "La Ley-Tipo de Arbitraje para Iberoamérica", Buenos Aires, 1967.

⁷⁰ "Proyecto de Legislación uniforme para Latinoamérica de títulos valores" Buenos Aires, 1967.

⁷¹ See document OEA/Ser.I.VI.1.,CN-94 (1968) entitled "Armonización de las legislaciones de los países latinoamericanos sobre sociedades", covering the problem of international companies.

⁷² "The law in a new inter-American order ...", p. 53.

⁷³ Some of the topics suggested by the Plenary Assembly of CIDIP-V for CIDIP-VI were put forward by U.S. delegates in view of problems requiring harmonization within the framework of NAFTA (see items a, c, e, and h) of the Agenda, section 8.1 above.

⁷⁴ FERNÁNDEZ ARROYO, D. P. "La Codificación del derecho...", op.cit. p. 180. In the view of this Spanish author, the influence of the CIDIPs on national private international law has been more visible in Argentina, Peru, Mexico, Uruguay, Paraguay and Venezuela.

⁷⁵ SAMTLEBEN, Jurgen "Los *resullados* de la labor codificadora de la CIDIP desde la perspectiva europea", Madrid, 1993, p. 302.

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**INFORME DEL OBSERVADOR DEL
COMITÉ JURÍDICO INTERAMERICANO DE LA OEA,
EMBAJADOR MIGUEL ÁNGEL ESPECHE GIL,
ANTE LA COMISIÓN DE DERECHO INTERNACIONAL
DE LA ORGANIZACIÓN DE LAS NACIONES UNIDAS**

Señor Presidente y señores miembros de la Comisión de Derecho Internacional:

En mi carácter de Observador del Comité Jurídico Interamericano de Rio de Janeiro, tengo el honor de presentarme ante esta Comisión y en su nombre exponerles la relación de sus principales trabajos a partir del período de sesiones de agosto de 1995.

Existe ya una tradición de cooperación que vincula al órgano de asesoramiento jurídico de la Organización de los Estados Americanos con la Comisión de Derecho Internacional de las Naciones Unidas. Como es de conocimiento de esta Comisión, el Comité Jurídico Interamericano viene efectuando aportes significativos a la codificación y al desarrollo progresivo del derecho internacional, labor que lleva a cabo desde 1906 y desde 1948 con su actual denominación.

Los trabajos del Comité durante el año último, realizados a continuación de lo reseñado en este mismo ámbito en junio del año pasado por el Embajador Vío Grossi, abarcan una amplia gama temática. Muestra de ello es el volumen que tengo la satisfacción de poner a disposición de la Comisión, con los trabajos referidos a los sistemas de solución de controversias en el ámbito de los esquemas de integración que se están desarrollando en el Continente, titulado "Estudio de los Métodos de Solución de Controversias en los Sistemas de Integración y Libre Comercio del Hemisferio", editado en Buenos Aires por la Universidad Argentina de la Empresa.

Las principales resoluciones adoptadas en las sesiones que tuvieron lugar en el mes de agosto, en las que el Comité tuvo la satisfacción de recibir al Representante de esta Comisión, Embajador Calero Rodrigues, fueron las siguientes:

- Derecho de información: acceso y protección de la información y datos personales;
- Incremento efectivo de la reglamentación bursátil en el Hemisferio;
- Efectos jurídicos internacionales de la insolvencia;
- Perfeccionamiento de la administración de Justicia en las Américas;
- Cooperación internacional para reprimir la corrupción en países americanos.

Esta última cuestión ocupó gran parte del período de sesiones dando como resultado el Informe del Comité en el que formuló observaciones a un anteproyecto de Convención Interamericana contra la Corrupción, inicialmente basado en un proyecto presentado por la Misión Permanente de Venezuela.

Las observaciones y el articulado alternativo redactado por el Comité sirvieron de fundamento a la adopción, el pasado mes de marzo, de una Convención Interamericana que fue firmada en la ciudad de Caracas. Este nuevo instrumento internacional constituye un avance significativo en la cooperación para la prevención y represión de los ilícitos englobados bajo el título "Corrupción". Establece una tipificación adecuada de los actos que vulneran el bien tutelado de la probidad y la ética cívicas en la función pública. Innova al establecer la

obligatoriedad para los Estados Partes de prohibir y castigar *"el ofrecimiento u otorgamiento, por parte de sus ciudadanos, personas que tengan residencia habitual en su territorio y empresas domiciliadas en el mismo, a funcionarios pbdlicos de otros Estados, directa o indirectamente, de cualquier objeto de valor pecuniario u otros beneficios como dádivas, favores, promesas o ventajas a cambio de la realización u omisión, por esos funcionarios, de cualquier acto en el ejercicio de sus funciones públicas relacionado con una transacción de naturaleza económica o comercial"*.

Esta norma bajo el título de "Soborno transnacional" abre perspectivas para el castigo efectivo de esos ilícitos en el ámbito hemisférico y tuvo como antecedente inmediato la legislación, pionera en ese campo, que rige en los Estados Unidos de América. Otra novedad es la obligatoriedad, para los Estados Partes, de tipificar el delito de enriquecimiento ilícito en sus respectivas legislaciones si no estuviere aún incriminada y la de asistencia y cooperación para la recuperación de bienes malhabidos.

El régimen de extradición sortea dificultades que parezcan insalvables para quienes consideraban que esas normas podrán comprometer la vigencia del Derecho de Asilo en las Américas. El instituto del Asilo, tan arraigado en el Sistema Interamericano, no ha sido afectado, pero éste tampoco podrá servir de escudo para quienes, habiendo cometido actos de corrupción, pretentheren eludir la acción de la justicia.

Cabe destacar que la Convención dispone que los Estados Parte requeridos no podrán negarse a proporcionar asistencia invocando el secreto bancario. Como contrapartida, los Estados Parte requerientes se comprometen a no usar las informaciones protegidas por el sigilo bancario con fines distintos del proceso que motivó el requerimiento, salvo que contaren con la autorización del Estado Parte requerido.

Pongo de resalto, asimismo, la norma del artículo 17, que establece que el hecho de que los bienes provenientes de actos de corrupción hubieren sido destinados a finalidades políticas o la alegación de que fueron utilizados con motivaciones o finalidades políticas, no serán suficientes, por sí solos, para considerarlos como delito político o como delito común vinculado a un delito político.

Todas estas son innovaciones necesarias para una más acabada cooperación interamericana en esta materia.

El ejercicio efectivo de la Democracia Representativa, como elemento fundamental de la *affectio societatis* del sistema interamericano, viene mereciendo preferente atención del Comité. Es ya derecho positivo vigente la obligatoriedad para los Estados Miembros de defender ese ejercicio efectivo y el deber internacional de restaurarlo si fuere vulnerado. En este sentido cabe destacar que en la resolución sobre esta materia el Comité resolvió analizar *"La posible ilicitud internacional de las acciones que distorsionen o pretendan distorsionar los resultados electorales, tanto por coartar la libertad de expresión del sufragio como por afectar la autenticidad del escrutinio electoral"*. La inclusión de este tópico obedece a las propuestas doctrinarias esbozadas en el sentido de que no sólo los golpes de Estado típicos de triste memoria vulneran el bien jurídico tutelado de la democracia representativa sino que también lo atacan el fraude electoral y los actos que afectan la libertad del sufragio. El derecho de los ciudadanos a que su voto, libremente expresado, sea auténticamente escrutado, y que éste constituya la base genuina de la representación de los gobiernos así elegidos, es una exigencia de coherencia, ética y lógica de la democracia representativa, valor intrínseco del Sistema Interamericano.

El Comité también tomó conocimiento de un informe acerca de los aspectos jurídicos de la deuda externa y de la propuesta de llevar el tema a la Corte Internacional de Justicia mediante un pedido de opinión consultiva a ser eventualmente formulado por la Asamblea General de las Naciones Unidas. Esa iniciativa está basada en los trabajos realizados por el Consejo Europeo de Investigaciones Sociales de América Latina (CEISAL), el Consejo Consultivo del Parlamento Latinoamericano, y las exhortaciones de la XII Conferencia Interparlamentaria Unión Europea-América Latina y otras entidades. La propuesta comenzó a ser considerada en el ámbito del Grupo de los 77 de la AGNU durante el período de sesiones de 1995.

El ya tradicional Curso de Derecho Internacional de Rio de Janeiro que el Comité organiza junto con la Subsecretaría Jurídica de la OEA se llevó a cabo con éxito el año pasado. Para este XXII Curso fueron mayores las exigencias en materia de formación jurídica de los aspirantes, lo que redundó en un mejor aprovechamiento de las enseñanzas impartidas y en los resultados de los trabajos efectuados por los cursantes. El Curso XXII, integrado por 38 estudiantes fue dictado por profesores universitarios, diplomáticos, miembros del Comité, asesores de la Subsecretaría Jurídica de la OEA. En esa oportunidad tuvo el privilegio de contar con dos distinguidos miembros de la CDI: los Embajadores Calero Rodrigues y Vargas Carreño.

Las exposiciones versaron sobre: la solución de controversias en los procesos regionales Panamericanos de integración, la protección internacional de los derechos humanos, aspectos jurídicos de la deuda externa, el ejercicio efectivo de la democracia en el Sistema Interamericano, el sistema jurídico de la Unión Europea, el desarrollo del derecho internacional en la OEA, la intervención humanitaria, los privilegios e inmunidades de las organizaciones internacionales, la aplicación del derecho internacional por los órdenes jurídicos internos, el derecho del mar, la cooperación para combatir el terrorismo, la responsabilidad internacional de los Estados y la Organización Mundial del Comercio.

Es interesante destacar la participación activa de los estudiantes en dos grupos de trabajo: uno, sobre los medios de solución de controversias y su aplicación a los procesos regionales de integración económica y, otro, sobre el Sistema Interamericano de protección de los derechos humanos.

Con relación a los futuros Cursos de Derecho Internacional, el Comité acordó la adopción, cada año, de un tema central a fin de evitar que el excesivo número de tópicos pueda impedir su adecuado aprovechamiento y profundización. Para el XXIII Curso, que se realizará en el próximo mes de agosto, el tema central será: "La Justicia y el Derecho Internacional". Se dispuso difundir, con la debida anticipación, la información sobre los cursos entre el mayor número posible de facultades de Derecho de todos los países de América.

En la sesión de enero-febrero el Comité debatió también sobre los siguientes tópicos:

1. Procedimientos para elaborar y aprobar instrumentos jurídicos interamericanos en el ámbito de la Organización de los Estados Americanos.
2. Dimensión jurídica de la integración y del comercio internacional. Métodos de solución de controversias en los esquemas regionales y subregionales de integración y libre comercio.
3. Perfeccionamiento de la administración de Justicia en las Américas. Protección y garantías para jueces y abogados en el ejercicio de sus funciones.
4. Derecho ambiental.
5. Solución pacífica de las controversias.
6. Cooperación interamericana para enfrentar al terrorismo.

7. Propuesta para incluir un nuevo tema sobre: jurisdicción nacional y personalidad de las personas jurídicas.

Varios nuevos asuntos han sido incluidos en la agenda del Comité: el examen en función del texto del Estatuto, de los criterios aplicados para la composición de la Corte Internacional de Justicia; el cumplimiento de las obligaciones establecidas por la Convención de las Naciones Unidas sobre el Derecho del Mar, la jurisdicción estatal y personalidad de las personas jurídicas. Además ha recibido el requerimiento de la Asamblea General de la OEA para que "examine, concluya y presente de manera prioritaria su opinión sobre la validez, conforme con el derecho internacional de la ley Helms-Burton" de los Estados Unidos.

La grave cuestión del terrorismo fue incorporada a la agenda del Comité en 1994. Se prepararon varios informes acerca de la cooperación interamericana para combatir y prevenir ese flagelo. El tema ha adquirido particular importancia para el Sistema Interamericano. El pasado mes de abril se realizó en Lima una Conferencia especializada en la que se formularon diversas estrategias contenidas en la Declaración de Lima para prevenir, combatir y eliminar el Terrorismo. En dicho documento se establece que el marco global para combatir al Terrorismo es la vigencia del derecho internacional, el pleno respeto a los derechos humanos y libertades fundamentales, la soberanía de los Estados y el principio de no intervención. Los actos terroristas serán considerados delitos comunes graves y se estudiará, a la luz de la evaluación de los instrumentos internacionales existentes, la necesidad y conveniencia de una nueva convención interamericana sobre terrorismo.

Otra actividad en la que el Comité se halla empezado es la realización de reuniones conjuntas con los asesores jurídicos de los Ministerios de Relaciones Exteriores de los Estados Miembros de la OEA. Durante los días 3 y 4 de agosto de 1995 se llevó a cabo la segunda de esas reuniones en el Palacio Itamaraty, de la que resultó un fructífero intercambio de información y experiencias entre los órganos asesores en materia de derecho internacional de los Estados Miembros y el de la OEA. Cabe destacar que el Comité, gracias al ofrecimiento del gobierno brasileiro, tendrá su sede próximamente instalada en un anexo del Palacio Itamaraty.

Señor Presidente: el Comité Jurídico Interamericano enfrenta una etapa de trabajo singularmente activa en la que abordará la consideración de un documento de la Secretaría General titulado: *El derecho en un nuevo orden interamericano*. Es auspicioso comprobar que la Década del Derecho Internacional, proclamada por las Naciones Unidas, transcurre en las Américas en un marco de renovado interés por la temática jurídica; se advierte una saludable revalorización del derecho internacional como cimiento de la convivencia y para conducir las soluciones de los conflictos. Ese interés se ve reflejado además en el considerable número de candidaturas que fueron presentadas por los Estados Miembros de la OEA para la provisión de las vacantes que se producen en la composición del Comité.

Como bien lo señaló aquí el año pasado mi colega en el Comité, el Embajador Vío Grossi, *"el desafío para el CJI parece no ser su función codificadora sino el de llegar a ser un eficiente y oportuno colaborador de los legisladores internacionales de los Estados Americanos cuando estos actúan a través de la OEA, y ese reto implicará prever y sugerir creativas y oportunas soluciones a novedosos y angustiantes problemas. Es decir, la tarea más significativa será hoy la de colaborar en la creación del derecho internacional y no sólo la de dar cuenta de cómo él ha surgido"*.

Deseo finalmente reiterar a la Comisión de Derecho Internacional que el Comité Jurídico Interamericano aprecia la fructífera relación establecida entre ambas instituciones y que la presencia periódica de uno de los miembros de la Comisión en las sesiones de Rio de Janeiro,

le permite una puesta al día de las tendencias, problemas y logros en el perfeccionamiento del derecho internacional en el ámbito mundial y son un aporte insoslayable para sus trabajos. En las sesiones de agosto tuvimos el honor de contar con la presencia del distinguido miembro de la CDI, doctor John de Saram.

La importancia de esta vinculación ha sido puesta de manifiesto en la reciente Asamblea General de la OEA en la que se aprobó la Declaración de Panamá, cuyo numeral 11 expresa:

"Su convencimiento de que es necesario reforzar los vínculos de coordinación y de cooperación de la OEA con otras organizaciones internacionales en el campo de la codificación y del desarrollo del derecho internacional, en especial con los de las Naciones Unidas."

Muchas gracias.

CJI/SO/I/doc.49/96
8 August 1996
Original: Spanish

**DATE, AGENDA AND RAPORTEURS
FOR THE AUGUST 1996 REGULAR SESSIONS PERIOD**

(Revision of Resolution CJI/RES.I-8/96)

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS:

Article 30 of its By-laws stipulates that at the end of each regular sessions period, the Agenda and Date should be agreed for the next regular period of sessions;

That in the document entitled *The law in a new inter-American order*, the Secretary General suggested that this Organ carry out a critical examination of the topics that are currently on its Agenda and propose to the next General Assembly the removal of some mandates and the reformulation or incorporation of others;

As stated in Resolution CJI/RES.I-7/96, this critical examination will be carried out during the next regular sessions period;

It nevertheless seems convenient to carry out this suggestion as far as possible and where applicable;

RESOLVES:

One: To hold its second 1996 regular sessions period from 5 - 30 August 1996.

Two: To remove from its Agenda, as the corresponding purposes thereof have been achieved, the following topics:

- a) Methods for the settlement of disputes in regional and sub-regional integration and free trade schemes;
- b) Facilitation of international activities by individual persons and corporations;
- c) Environmental law; and
- d) Juridical aspects of foreign debt

Three: to reword the topic of *Right to Information*, which shall now be called: *Right to Information: access and protection of information and personal data*.

Four: To include the following topics at its own initiative:

- a) Examination of the composition of the International Court of Justice, in the light of the provisions of Article 9 of its Statutes (CJI/SO/I/doc.22/96).
Rapporteur: Dr. Keith Highet; and
- b) Compliance with certain obligations established by the United Nations Convention on Law of the Sea (CJI/SO/I/doc.23/96).
Rapporteur: Dr. Keith Highet.

Five: To approve the following Agenda in accordance with the scheme set out below:

I. NEW TOPICS

A. INCLUDED AT THE INITIATIVE OF ANOTHER ORGAN

- 1. Freedom of trade and investment in the Hemisphere (AG/doc.3375/96)
- 2. Procedures for preparing and approving Inter-American juridical instruments under the auspices of the Organization of American States (AG/doc.3269/95)
Rapporteurs: Drs. Luis Herrera Marcano and Jonathan T.Fried
- 3. Draft Inter-American Convention for the elimination of all forms of discrimination due to disability. (AG/doc.3380/96)
- 4. Convocation for the VI Specialized Inter-American Conference on Private International Law - CIDIP-VI (AG/doc.3403/95)

B. INCLUDED AT ITS OWN INITIATIVE

- 5. Analysis and commentary on the working document entitled *The Law in a New Inter-American Order*, presented by the Secretary General.
(CJI/RES.I-7/96)
- 6. Examination of the composition of the International Court of Justice, in the light of the provisions of Article 9 of its Statutes
(CJI/SO/I/doc.22/96).
Rapporteur: Dr. Keith Highet
- 7. Compliance with the obligations established by the United Nations Convention on Law of the Sea
(CJI/SO/I/doc.23/96).
Rapporteur: Dr. Keith Highet.

II. TOPICS ON WHICH PRELIMINARY OR PARTIAL REPORTS HAVE ALREADY BEEN PREPARED

- A. INCLUDED AT THE INITIATIVE OF ANOTHER ORGAN
8. Peaceful settlement of disputes. [AG/RES.54 (I-O/71)]
Rapporteurs: Drs. Galo Leoro Franco, Keith Highet and Alberto Zelada Castedo
 9. Juridical dimension of integration and international trade. [AG/RES.944(XVIII-O/88)]
 - a) most-favored nation principle and its application in the Americas, and other ways of benefiting the less-developed nations
AG/RES.1328 (XXV-O/95)
Rapporteurs: Drs. José Luis Siqueiros, Alberto Zelada Castedo and Jonathan T. Fried
 - b) The securities market. Benchmark principles considered basic to its regulation in the Hemisphere. (CJI/RES.II-2/91)
Rapporteurs: Drs. José Luis Siqueiros and Jonathan T. Fried, with the collaboration of Dr. Seymour J. Rubin,
- B. INCLUDED AT ITS OWN INITIATIVE
10. Improvement of the administration of Justice in the Americas. (CJI/RES.I-2/985)
 - a) Appointment of magistrates and court employees. Protection and guarantees for judges and lawyers in the exercise of their functions (CJI/RES.II-17/93)
Rapporteur: Dr. Jonathan T. Fried.
 11. Democracy in the Inter-American System (CJI/SO/II/doc.10/93)
Rapporteur: Dr. Eduardo Vío Grossi
 12. The right to information: access to and protection of personal data and information (January 1980)
Rapporteur: Dr. Mauricio Gutiérrez Castro
 13. International cooperation to repress corruption in the American nations (CJI/SO/II/doc.2/92)
Rapporteurs: Drs. Eduardo Vío Grossi and Luis Herrera Marcano and Luis Herrera Marcano
 14. Inter-American cooperation to confront terrorism (August 1994)
Rapporteur: Dr. Miguel Angel Espeche Gil

III . TOPICS ON WHICH NO REPORTS HAVE BEEN PREPARED**A. INCLUDED AT THE INITIATIVE OF ANOTHER ORGAN**

Nothing pending.

B. INCLUDED AT ITS OWN INITIATIVE**15. Juridical dimension of integration and international trade
[AG/RES.944(XVIII-O/88)]****a) International juridical effects of insolvency (CJI/RES.II-13/93)**

Rapporteurs: Drs. José Luis Siqueiros and Jonathan T.Fried, with the collaboration of Dr. Seymour J. Rubin,

16. Improvement of the administration of justice in the America (CJI/RES.I-2/85)**a) Facilitation of access to the courts. Simplification of judicial procedures
(CJI/RES.II-17/93).**

Rapporteur: To be appointed, with the collaboration of Dr. Seymour J.Rubin