

# ORGANIZATION OF AMERICAN STATES



INTER-AMERICAN JURIDICAL COMMITTEE

IAJC

59<sup>th</sup> REGULAR SESSION  
July 30 to August 24, 2001  
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## **ANNUAL REPORT OF THE INTER-AMERICAN JURIDICAL COMMITTEE TO THE GENERAL ASSEMBLY**

**2001**



## EXPLANATORY NOTE

Up until 1990, the final records and *Annual reports* of the Inter-American Juridical Committee were published by the OAS General Secretariat as part of the series entitled *Reports and Recommendations*. In 1997, the Secretariat for Legal Affairs resumed publication of those documents, this time under the title *Annual report of the Inter-American Juridical Committee to the General Assembly*.

In keeping with the provisions of the *Manual for classification of OAS official documents*, documents of the Inter-American Juridical Committee appear as part of series 'OEA/Ser.Q,' followed by CJI, the classification for documents produced by the Committee. (See the attached lists of resolutions and documents.)



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## **INTRODUCTION**



Pursuant to articles 91.f of the OAS *Charter* and Article 13 of the Committee's *Statute*, and to the guidelines contained in General Assembly resolutions AG/RES.1452 (XXVII-O/97), AG/RES.1669 (XXIX-O/99), and AG/RES.1735 (XXX-O/00) pertaining to preparation of the annual reports of the Organization's organs, agencies and entities, the Inter-American Juridical Committee has the honor to submit its *Annual report* to the General Assembly of the Organization of American States. This *Annual report* is an account of the Juridical Committee's activities in 2001.

During the period to which this *Annual report* refers, the agenda of the Inter-American Juridical Committee included items such as the following: democracy in the inter-American system; human rights and biomedicine; the Inter-American Specialized Conference on International Private Law (CIDIP); preparations for commemoration of the centennial of the Inter-American Juridical Committee; the juridical dimensions of integration and international trade; competition law in the Americas; application of the 1982 United Nations Convention on the Law of the Sea by the States of this hemisphere; right to information: access to and protection of information and personal data; juridical aspects of hemispheric security; improving the administration of justice in the Americas: access to justice; international abduction of minors by one of their parents; inter-American cooperation against terrorism; study of the inter-American system for promotion and protection of human rights; the possibilities and problems of the Statutes of the International Criminal Court; possible additional measures to supplement the Inter-American Convention against Corruption (Caracas); arms trafficking, based on the decisions made on the subject by the Inter-American Juridical Committee; preparation of a draft inter-American convention against racism and all forms of discrimination and intolerance; and, the draft inter-American convention for the extraterritorial repression of sex crimes against minors. The Committee also approved a report entitled *Observations and comments by the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter* (CJI/doc.76/01), which was submitted to the Chairman of the Organization's Permanent Council with a letter dated August 16, 2001. It is also important to point out that in conjunction with the topic on right to information, the Inter-American Juridical Committee recommended to the Permanent Council that it urge member States to adopt national legislation on the subject that would be in line with the principles set forth in previous Committee reports.

This *Annual report* mainly concerns the progress made in studies on the topics listed above. It is divided into three chapters. The first is about the origin, legal bases and structure of the Inter-American Juridical Committee, and the period covered in the report. The second chapter elaborates on the topics discussed by the Inter-American Juridical Committee at its regular sessions in 2001 and also contains the texts of the resolutions approved at the two sessions, with the specific documents attached. The third and final chapter discusses other activities carried out by the Juridical Committee, other resolutions approved by it, and budgetary matters. Attached to the *Annual report* are annexes with a list of the resolutions approved and documents prepared, an onomastic index and an index by subject to help the reader locate the material in this *Report*.

This *Annual report* was approved by Dr. João Grandino Rodas and Dr. Brynmor T. Pollard, the Chairman and Vice-Chairman, respectively, of the Inter-American Juridical Committee, in accordance with a decision made by the Committee at its regular session held in August 2001 in Rio de Janeiro.

## **CHAPTER I**



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

The oldest predecessor of the Inter-American Juridical Committee is the International Commission of Jurists in Rio de Janeiro, created by the Third International Conference of American States in 1906. Its first meeting was in 1912, although its most important one was held in 1927, when twelve draft conventions in international public law were approved, in addition to the Bustamante Code in the area of international private law.

Later, at the Pan-American Conference in Montevideo in 1933, National Committees on the Codification of International Law were set up, as was the Inter-American Commission of Experts, which held its first meeting in Washington, D.C., in April 1937.

The First Meeting of Ministers of Foreign Affairs of the American Republics was held from September 26 to October 3, 1939. It established the Inter-American Neutrality Committee, which would be in operation for more than two years, until the Third Meeting of Consultation of Ministers of Foreign Affairs held in Rio de Janeiro in 1942, when Resolution XXVI transformed it into the Inter-American Juridical Committee. At that same meeting, it was also decided that the seat of the Juridical Committee would be Rio de Janeiro.

In 1948, the Ninth International Conference of American States, meeting in Bogota, adopted the *Charter of the Organization of American States*. The *Charter* provided for creation of the Inter-American Council of Jurists, composed of one representative from each OAS member State. Its functions were to serve as an advisory body on legal matters and to help develop law in the context of OAS legal matters. Its permanent committee was to be the Inter-American Juridical Committee, consisting of nine jurists from the member States. The members of the Juridical Committee were to have broad technical autonomy to carry out the studies and preparatory work assigned to them by the various OAS organs.

Later, the Third Special Inter-American Conference, meeting in Buenos Aires, Argentina in 1967, approved the *Protocol of amendment to the Charter of the Organization of American States* or the *Protocol of Buenos Aires*. That Protocol eliminated the Inter-American Council of Jurists, whose functions were transferred to the Inter-American Juridical Committee, thus elevating the latter to one of the principal organs of the OAS.

Under Article 99 of the *Charter*, the basic functions of the Inter-American Juridical Committee are as follows:

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

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

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

The Inter-American Juridical Committee is headquartered in Rio de Janeiro, but in special cases it may meet in any other place opportunely selected by it, after consulting with the member State in question. The Juridical Committee is composed of eleven jurists who are nationals of OAS member States and who represent all those states. It enjoys the utmost technical autonomy.

## **2. Period covered by the Annual report of the Inter-American Juridical Committee**

### **A. LVIII regular session**

The Inter-American Juridical Committee held its fifty-eighth regular session from March 12 to 23, 2001 in Ottawa, Canada, in accordance with resolution CJI/RES.15 (LVII-O/00), *Date and venue of the fifty-eighth regular session*.

The session was attended by the following members of the Inter-American Juridical Committee, who are listed in the order of precedence determined by drawing lots at the first meeting, pursuant to Article 28.b of the Juridical Committee's *Rules of Procedure*:

Sergio González Gálvez	Jonathan T. Fried
Kenneth O. Rattray	Gerardo Trejos Salas
Carlos Manuel Vázquez	Eduardo Vío Grossi
João Grandino Rodas (Chairman)	Felipe Paolillo
Orlando Rebagliati	

Dr. Brynmor T. Pollard, the Vice-Chairman, and Dr. Luis Herrera Marcano were unable to attend the session.

The following persons provided technical and administrative support on behalf of the General Secretariat: Drs. Enrique Lagos, Secretary for Legal Affairs (his written statement at the inaugural session is included in an annex to this *Annual report* as CJI/doc.50/01); Jean-Michel Arrighi, Director of the Department of International Law; Manoel Tolomei Moletta and Dante M. Negro, Legal Officers in the Department of International Law.

The Chairman of the Inter-American Juridical Committee extended a special welcome to Dr. Felipe Paolillo, who was elected to a four-year term as new member of the Committee at the Thirtieth OAS General Assembly held in Windsor, Canada in June 2000.

During this session, the Inter-American Juridical Committee considered the following agenda, which was approved by resolution CJI/RES.20 (LVII-O/00)

**CJI/RES.20 (LVII-O/00)**

**AGENDA FOR THE 58<sup>th</sup> REGULAR SESSIONS OF THE  
INTER-AMERICAN JURIDICAL COMMITTEE  
(Ottawa, Canada, March 12-23, 2001)**

**A. Current topics**

1. Juridical aspects of hemispheric security  
Rapporteurs: Drs. Sergio González Gálvez, Luis Marchand Stens and Eduardo Vío Grossi
2. Human rights and biomedicine  
Rapporteur: Dr. Gerardo Trejos Salas
3. Right of information: access to and protection of personal information and data  
Rapporteur: Dr. Jonathan T. Fried
4. Democracy in the Inter-American System  
Rapporteur:

**B. Topics under preparation**

1. Possibilities and problems of the statutes of the International Criminal Court  
Rapporteur: Dr. Sergio González Gálvez
2. Possible additional measures to the Caracas Inter-American Convention against Corruption  
Rapporteurs: Drs. Sergio González Gálvez and Luis Herrera Marcano
3. Trafficking of firearms based on the decisions taken by the Inter-American Juridical Committee on the matter  
Rapporteur: Dr. Sergio González Gálvez
4. Juridical dimension of integration and international trade: competition law in the Americas  
Rapporteurs: Drs. Jonathan T. Fried and João Grandino Rodas
5. Preparation for the celebration of the Inter-American Juridical Committee centennial  
Rapporteur: Dr. Eduardo Vío Grossi

**C. Topics under follow-up**

1. Inter-American cooperation against terrorism  
Rapporteurs: Drs. Luis Marchand Stens and Luis Herrera Marcano
2. Convocation of the Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI)  
Rapporteurs: Drs. Brynmor T. Pollard and João Grandino Rodas
3. Study of the system for the promotion and protection of human rights in the inter-American system  
Rapporteur: Dr. Gerardo Trejos Salas

4. International abduction of minors by one of their parents  
Rapporteur: Dr. João Grandino Rodas
5. Improving the administration of justice in the Americas  
Rapporteurs: Drs. Jonathan T. Fried, Brynmor T. Pollard, Luis Marchand Stens  
and Gerardo Trejos Salas
6. The application of the 1982 United Nations Convention on the Law of the Sea by  
States in the Hemisphere  
Rapporteur: Dr. Orlando R. Rebagliati

This resolution was unanimously adopted during the 19 August 2000 session, in the presence of the following members: Drs. Jonathan T. Fried, Orlando R. Rebagliati, João Grandino Rodas, Brynmor Thornton Pollard, Eduardo Vío Grossi, Gerardo Trejos Salas, Luis Marchand Stens, Sergio González Gálvez and Luis Herrera Marcano.

Pursuant to Article 12 of the *Rules of Procedure* of the Inter-American Juridical Committee, the Chairman of the Committee presented his report on the activities carried out while it was in recess.

At the end of the session, the Inter-American Juridical Committee approved resolution CJI/RES.22 (LVIII-O/01), *Thanks to the Government of Canada*, the text of which is given below:

**CJI/RES.22 (LVIII-O/01)**

**THANKS TO THE GOVERNMENT OF CANADA**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

HAVING ACCEPTED the cordial invitation of the Government of Canada for the Juridical Committee to hold its 58<sup>th</sup> Regular Sessions in Ottawa, Canada from March 12 to 23, 2001;

RECOGNIZING the organizational efforts made by the Government of Canada so that the meeting of the Inter-American Juridical Committee would be a complete success,

RESOLVES:

1. To express its deepest gratitude to the Government and people of Canada for their hospitality.
2. To highlight for particular recognition the meetings with the Canadian Minister of Foreign Affairs and with the Justices of the Supreme Court, and the invitation to attend a sitting of the House of Commons.
3. To mention the opportunity that the Inter-American Juridical Committee had to take part in the round table organized by the Civil Law Section of the Faculty of Law of the University of Ottawa.
4. To transmit this resolution to the Minister of Foreign Affairs as an expression of appreciation to the Government of Canada.

This resolution was unanimously adopted at the session held on 20 March 2001, in the presence of the following members: Drs. Sergio González Gálvez, Kenneth O. Rattray,

Carlos Manuel Vázquez, João Grandino Rodas, Orlando Rebagliati, Jonathan T. Fried, Gerardo Trejos Salas, Eduardo Vío Grossi and Felipe Paolillo.

## **B. LIX regular session**

The Fifty-ninth regular session of the Inter-American Juridical Committee was held July 30 to August 24, 2001, at its headquarters in Rio de Janeiro, in accordance with resolution CJI/RES.29 (LVIII-O/01), *Date and place of the fifty-ninth regular session of the Inter-American Juridical Committee*:

### **CJI/RES.29 (LVIII-O/01)**

#### **DATE AND PLACE OF THE 59<sup>th</sup> REGULAR SESSIONS OF THE INTER-AMERICAN JURIDICAL COMMITTEE**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS article 15 of its Statutes determines that two regular meetings be held annually,

RESOLVES to hold its 59<sup>th</sup> regular sessions at the headquarters of the Inter-American Juridical Committee, in Rio de Janeiro, Brazil, from 30 July to 24 August, 2001.

This resolution was unanimously adopted at the session held on 22 March 2001, in the presence of the following members: Drs. Sergio González Gálvez, Kenneth O. Rattray, Carlos Manuel Vázquez, João Grandino Rodas, Jonathan T. Fried, Gerardo Trejos Salas, Eduardo Vío Grossi and Felipe Paolillo.

The session was attended by the following members of the Inter-American Juridical Committee, who are listed in the order of precedence determined by drawing lots at the first meeting, pursuant to Article 28.b of the Juridical Committee's *Rules of Procedure*:

Sergio González Gálvez	Kenneth O. Rattray
Eduardo Vío Grossi	Carlos Manuel Vázquez
Orlando Rebagliati	Jonathan T. Fried
Brynmor T. Pollard (Vice-Chairman)	João Grandino Rodas (Chairman)
Luis Herrera Marcano	Felipe Paolillo
Gerardo Trejos Salas	

The following persons provided technical and administrative support on behalf of the General Secretariat: Drs Enrique Lagos, Secretary for Legal Affairs; Jean-Michel Arrighi, Director of the Department of International Law; Manoel Tolomei Moletta and Dante M. Negro, Legal Officers in the Department of International Law.

The Chairman of the Inter-American Juridical Committee reported that the Thirty-first regular session of the OAS General Assembly decided to reelect Dr. Luis Herrera Marcano, from Venezuela, and Dr. Kenneth O. Rattray, from Jamaica, to additional four-year terms, and to elect Dr. Ana Elizabeth Villalta Vizcarra, from El Salvador, as new member. These members will begin their new terms of office on January 1, 2002.

At its Fifty-ninth regular session, the Inter-American Juridical Committee considered the following agenda, which was approved by resolution CJI/RES.27 (LVIII-O/01):

**CJI/RES.27 (LVIII-O/01)**

**AGENDA FOR THE  
59<sup>th</sup> REGULAR SESSIONS OF THE  
INTER-AMERICAN JURIDICAL COMMITTEE  
(Rio de Janeiro, Brazil, July 30 to August 24, 2001)**

**A. Current topics**

1. Juridical aspects of hemispheric security  
Rapporteurs: Drs. Sergio González Gálvez and Eduardo Vío Grossi
2. Right to information: access to and protection of personal information and data  
Rapporteur: Dr. Jonathan T. Fried
3. Democracy in the inter-American system  
Rapporteurs: Drs. Eduardo Vío Grossi and Gerardo Trejos Salas

**B. Topics under preparation**

1. Possibilities and problems of the statutes of the International Criminal Court  
Rapporteur: Dr. Sergio González Gálvez
2. Possible additional measures to the Caracas Inter-American Convention against Corruption  
Rapporteurs: Drs. Sergio González Gálvez and Luis Herrera Marcano
3. Trafficking of firearms based on the decisions taken by the Inter-American Juridical Committee on the matter  
Rapporteur: Dr. Sergio González Gálvez
4. Juridical dimension of integration and international trade: competition law in the Americas  
Rapporteurs: Drs. Jonathan T. Fried and João Grandino Rodas
5. Preparation for the celebration of the Inter-American Juridical Committee centennial  
Rapporteur: Dr. Eduardo Vío Grossi

**C. Topics under follow-up**

1. Inter-American cooperation against terrorism  
Rapporteurs: Dr. Luis Herrera Marcano
2. Specialized Inter-American Conference on Private International Law (CIDIP)  
Rapporteurs: Drs. Brynmor T. Pollard, João Grandino Rodas and Carlos Manuel Vázquez
3. Study of the system for the promotion and protection of human rights in the inter-American system  
Rapporteur: Dr. Gerardo Trejos Salas

4. International abduction of minors by one of their parents  
Rapporteur: Dr. João Grandino Rodas
5. Improving the administration of justice in the Americas: access to justice  
Rapporteurs: Drs. Jonathan T. Fried, Brynmor T. Pollard and Gerardo Trejos Salas
6. The application of the 1982 United Nations Convention on the Law of the Sea by States in the Hemisphere  
Rapporteur: Dr. Orlando R. Rebagliati

This resolution was unanimously adopted at the session held on 22 March 2001, in the presence of the following members: Drs. Sergio González Gálvez, Kenneth O. Rattray, Carlos Manuel Vázquez, João Grandino Rodas, Jonathan T. Fried, Gerardo Trejos Salas, Eduardo Vío Grossi and Felipe Paolillo.

Pursuant to Article 12 of the IAJC's *Rules of Procedure*, the Chairman of the Inter-American Juridical Committee reported on the activities carried out while the Committee was in recess.

In the course of this regular session, the Inter-American Juridical Committee approved the agenda for its sixtieth regular session, contained in resolution CJI/RES.36 (LIX-O/01) and entitled *Agenda for the sixtieth regular session of the Inter-American Juridical Committee*. At the same time, it decided to hold the session at its headquarters in Rio de Janeiro from February 25 to March 8, 2002.

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

#### **AGENDA FOR THE 60<sup>th</sup> REGULAR SESSIONS OF THE INTER-AMERICAN JURIDICAL COMMITTEE**

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

#### **A. Current topics**

1. Drafting of an Inter-American Convention against racism and any kind of discrimination and intolerance  
Rapporteur: Dr. Felipe Paolillo
2. Possible additional measures to the Caracas Inter-American Convention against Corruption  
Rapporteur: Dr. Sergio González Gálvez
3. Preparation for the celebration of the Inter-American Juridical Committee centennial  
Rapporteur: Dr. Eduardo Vío Grossi
4. Specialized Inter-American Conference on Private International Law (CIDIP)  
Rapporteurs: Drs. Brynmor T. Pollard, João Grandino Rodas and Carlos Manuel Vázquez

#### **B. Topics under preparation**

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

2. Trafficking of firearms based on the decisions taken by the Inter-American Juridical Committee on the matter  
Rapporteur: Dr. Sergio González Gálvez
3. Juridical dimension of integration and international trade: competition law in the Americas  
Rapporteurs: Drs. Jonathan T. Fried and João Grandino Rodas

**C. Topics under follow-up**

1. Juridical aspects of hemispheric security  
Rapporteurs: Drs. Sergio González Gálvez and Eduardo Vío Grossi
2. Right to information: access to and protection of information and personal data  
Rapporteur: Dr. Jonathan T. Fried
3. Democracy in the inter-American system  
Rapporteur: Dr. Eduardo Vío Grossi
4. Inter-American cooperation against terrorism  
Rapporteur: Dr. Luis Herrera Marcano
5. Study of the system for the promotion and protection of human rights in the inter-American system  
Rapporteur:
6. Abduction of minors by one of their parents  
Rapporteur: Dr. João Grandino Rodas
7. Improving the administration of justice in the Americas: access to justice  
Rapporteurs: Drs. Jonathan T. Fried and Brynmor T. Pollard

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

During the session, the Inter-American Juridical Committee approved resolution CJI/RES.31 (LIX-O/01), *In tribute to Dr. Gerardo Trejos Salas*, a text that expressed recognition to Dr. Trejos for his dedicated and generous participation in all the work and activities carried out by the Committee. Dr. Gerardo Trejos Salas concluded his work with the Inter-American Juridical Committee on December 31, 2001.

**CJI/RES.31 (LIX-O/01)**

**IN TRIBUTE TO DOCTOR GERARDO TREJOS SALAS**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that Dr. Gerardo Trejos Salas ends his office on 31 December 2001 as member of this hemispheric organ;

BEARING IN MIND the valuable legacy that Dr. Trejos Salas has left to International Law while in office;

IN VIEW OF the active role played by Dr. Trejos Salas in the discussion of every theme analyzed during the period when he was performing his duties;

RECALLING the reputation of Dr. Trejos Salas as a professor of the Course on International Law organized annually by this Juridical Committee;

CONSIDERING the outstanding personal qualities of Dr. Trejos Salas, which have facilitated the development of the debates and works of this collegiate body,

RESOLVES:

1. To register its sincere tribute to Dr. Gerardo Trejos Salas for his dedication and generous participation in all work and activities undertaken within the Inter-American Juridical Committee.

2. To express its gratitude to Dr. Gerardo Trejos Salas for his outstanding contribution to the study of the many subjects that appear on the agenda of the Inter-American Juridical Committee, principally with regard to the following themes: the human person in contemporary American International Law, legislative guide on doctor-assisted fertilization, fight against smoking, effects and handling of the theory of forum non conveniens and democracy and International Law.

This resolution was unanimously adopted at the session held on 14 August 2001, in the presence of the following members: Drs. Sergio González Gálvez, Eduardo Vío Grossi, Orlando R. Rebagliati, Brynmor Thornton Pollard, Luis Herrera Marcano, Carlos Manuel Vázquez, Jonathan T. Fried, João Grandino Rodas and Felipe Paolillo.



## CHAPTER II



## **TOPICS DISCUSSED BY THE INTER-AMERICAN JURIDICAL COMMITTEE DURING ITS REGULAR SESSION FOR 2001**

In the course of the year 2001, the Inter-American Juridical Committee held two regular sessions. The first one took place in Ottawa, Canada in March, and the second was in Rio de Janeiro in August. During the two meetings, the Juridical Committee had the following items on its agenda: democracy in the inter-American system; human rights and biomedicine; the Specialized Inter-American Conference on International Private Law (CIDIP); preparations for the commemoration of the centennial of the Inter-American Juridical Committee; the juridical dimensions of integration and international trade; the competition law in the Americas; application of the 1982 United Nations Convention on the Law of the Sea by the States in the hemisphere; right to information: access to and protection of information and personal data; juridical aspects of hemispheric security; improvement of the administration of justice in the Americas: access to justice; international abduction of minors by one of their parents; inter-American cooperation against terrorism; a study of the system for the promotion and protection of human rights in the inter-American sphere; the possibilities and problems of the Statutes of the International Criminal Court; possible additional measures in relation to the Inter-American Convention against Corruption (Caracas); trafficking in arms, based on relevant decisions by the Inter-American Juridical Committee; preparation of a draft inter-American convention against racism and all forms of discrimination and intolerance; and, the draft inter-American convention for the extraterritorial repression of sex crimes against minors. The Inter-American Juridical Committee also adopted a resolution approving the report entitled *Observations and comments of the Inter-American Juridical Committee on the draft Inter-American Democratic Charter* [CJI/RES.32 (LIX-O/01)].

Each of these topics is elaborated on below. The documents on each subject, which were prepared and approved by the Inter-American Juridical Committee, are included.

## 1. Observations and comments by the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter

### Resolutions

CJI/RES.32 (LIX-O/01) *Observations and Comments of the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter*  
Annex: CJI/doc.76/01

### Documents

CJI/doc.61/01 *Preliminary comments on the Inter-American Democratic Charter*  
(presented by Dr. Gerardo Trejos Salas)

CJI/doc.63/01 *Inter-American Democratic Charter: working document*  
(presented by Drs. Orlando Rebagliati and Gerardo Trejos Salas)

CJI/doc.64/01 *Observations on articles 12-14 of the Draft Inter-American Democratic Charter (rev.7)*  
(presented by Dr. Carlos Manuel Vázquez)

CJI/doc.65/01 *Proposed amendments to the Draft Inter-American Democratic Charter*  
(presented by Dr. Brynmor Thornton Pollard)

CJI/doc.66/01 corr.1 *Preliminary reflections on adopting a Democratic Charter in a Special Assembly of the OAS*  
(presented by Dr. Sergio González Gálvez)

CJI/doc.67/01 *General considerations on the Draft Inter-American Democratic Charter*  
(presented by Dr. Eduardo Vío Grossi)

CJI/doc.68/01 *Submission of army and police to civil power: a serious omission in the Draft Inter-American Democratic Charter*  
(presented by Dr. Gerardo Trejos Salas)

CJI/doc.69/01 *Inter-American Democratic Charter (rev.7): observations of the Inter-American Juridical Committee*  
(presented by Dr. Jonathan T. Fried)

CJI/doc.70/01 *International law and democracy*  
(presented by Dr. Gerardo Trejos Salas)

CJI/doc.71/01 *Observations and comments of the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter*  
(presented by Dr. Eduardo Vío Grossi)

CJI/doc.72/01 *Inter-American Democratic Charter (rev.7): draft observations of the Inter-American Juridical Committee*  
(presented by Dr. Jonathan T. Fried)

CJI/doc.75/01 *A serious omission in article 22 of the Draft Inter-American Democratic Charter*  
(presented by Dr. Gerardo Trejos Salas)

CJI/doc.76/01

*Observations and comments of the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter*

Annexes: CJI/RES.I-3/95, CJI/RES.5 (LII/98), CJI/RES.17 (LVII-O/00).

See: CJI/RES.32 (LIX-O/01)

During the recess between the fifty-eighth and fifty-ninth regular sessions of the Inter-American Juridical Committee, the Department of International Law forwarded to the members of the Inter-American Juridical Committee all the relevant information on the draft Inter-American Democratic Charter to be possibly adopted at a special session of the General Assembly scheduled for September 2001 in Lima, Peru. This information included the draft texts, the timetable for the work of the Permanent Council, and a summary of that OAS organ's meetings.

On August 9, 2001, during its fifty-ninth regular session in Rio de Janeiro in August 2001, the Inter-American Juridical Committee received a letter from Ambassador Hernán R. Castro H., the Chairman of the Permanent Council inviting the Inter-American Juridical Committee to support the deliberations of the Council's working group on the democratic charter in any way the Inter-American Juridical Committee deemed appropriate. The members of the Inter-American Juridical Committee emphasized the importance of the decision by the OAS political organs to include the Inter-American Juridical Committee in this process. In response, the Inter-American Juridical Committee passed resolution CJI/RES.32 (LIX-O/01), *Observations and comments of the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter*, in which it approved that report (CJI/doc.76/01). The report was appended to the resolution and forwarded to the Chairman of the Organization's Permanent Council along with a letter dated August 16, 2001.

Various members of the Inter-American Juridical Committee submitted working papers as part of the preparation of this report, including the following documents: CJI/doc.61/01, *Preliminary comments on the Inter-American Democratic Charter*, presented by Dr. Gerardo Trejos Salas; CJI/doc.63/01, *Inter-American Democratic Charter: working document*, presented by Dr. Orlando Rebagliati and Dr. Gerardo Trejos; CJI/doc.64/01, *Observations on articles 12-14 of the draft Inter-American Democratic Charter (rev.7)*, presented by Dr. Carlos Manuel Vázquez; CJI/doc.65/01, *Proposed amendments to the Draft Inter-American Democratic Charter*, presented by Dr. Brynmor Thornton Pollard; CJI/doc.66/01 corr.1, *Preliminary reflections on adopting a Democratic Charter in a special assembly of the OAS*, presented by Dr. Sergio González Gálvez; CJI/doc.67/01, *General considerations on the draft Inter-American Democratic Charter*, presented by Dr. Eduardo Vío Grossi; CJI/doc.68/01, *Submission of army and police to civil power: a serious omission in the Draft Inter-American Democratic Charter*, presented by Dr. Gerardo Trejos Salas; CJI/doc.69/01, *Inter-American Democratic Charter (rev.7): observations of the Inter-American Juridical Committee*, presented by Dr. Jonathan T. Fried; CJI/doc.70/01, *International law and democracy*, presented by Dr. Gerardo Trejos Salas; CJI/doc.71/01, *Observations and comments of the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter*, presented by Dr. Eduardo Vío Grossi; CJI/doc.72/01, *Inter-American Democratic Charter (rev.7): draft observations of the Inter-American Juridical Committee*, presented by Dr. Jonathan T. Fried; and, CJI/doc.75/01, *A serious omission*

*in article 22 of the Draft Inter-American Democratic Charter*, presented by Dr. Gerardo Trejos Salas. Since these documents are preliminary papers, they are not transcribed in this *Annual report*.

You will find below the text of resolution CJI/RES.32 (LIX-O/01), *Observations and comments of the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter*, which is appended to the referenced report:

**CJI/RES.32 (LIX-O/01)**

**OBSERVATIONS AND COMMENTS OF THE  
INTER-AMERICAN JURIDICAL COMMITTEE ON THE  
DRAFT INTER-AMERICAN DEMOCRATIC CHARTER**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

BEARING IN MIND the charter dated August 9, 2001, sent by the President of the Permanent Council to the President of the Inter-American Juridical Committee, in which he invites the Juridical Committee to support the decisions of the working group on the Democratic Charter of the Permanent Council as the Juridical Committee thinks fit;

As empowered pursuant to article 12,c of its Statutes;

HAVING CONSIDERED the report on *Observations and comments of the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter* (CJI/doc.76/01);

RESOLVES:

1. To approve the report on *Observations and comments of the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter* (CJI/doc.76/01), attached hereto.

2. To send this report to the President of the Permanent Council of the Organization of American States.

This resolution was unanimously approved at the session of August 16, 2001, in the presence of the following members: Drs. Sergio González Gálvez, Eduardo Vío Grossi, Orlando R. Rebagliati, Brynmor Thornton Pollard, Luis Herrera Marcano, Gerardo Trejos Salas, Carlos Manuel Vázquez, Jonathan T. Fried, João Grandino Rodas and Felipe Paolillo.

**CJI/doc.76/01**

**OBSERVATIONS AND COMMENTS  
OF THE INTER-AMERICAN JURIDICAL COMMITTEE  
ON THE DRAFT INTER-AMERICAN DEMOCRATIC CHARTER**

**INTRODUCTION**

1. The observations and comments made by the Inter-American Juridical Committee below concerning the document **Draft Inter-American Democratic Charter, rev.7** [Annex to AG/RES.1838 (XXXI-O /01)], drafted by the Permanent Council, are made within the framework of the consultation process established by the Council.

2. These comments are made on the assumption that it would not be opportune to propose alternative texts, given the current status of the drafting process and the urgency

with which, consequent, it was required that observations and comments on the Draft be submitted.

## I. GENERAL CONSIDERATIONS

3. These observations and comments have been drafted on the assumption that the Draft Inter-American Democratic Charter will be adopted as a Resolution of the General Assembly of the Organization of American States (OAS).

4. It has been borne in mind that the purpose of this resolution is to reinforce “OAS instruments for the active defense of representative democracy” (AG/RES.1838 (XXXI-O/01)).

5. The provisions of resolutions of this nature generally have as their purpose the interpretation of treaty provisions, the provision of evidence of the existence of customary norms, the affirmation of general principles of law, or the proclamation of common aspirations, and they may contribute to the progressive development of international law. The provisions of some resolutions of an organ of an international organization may have an obligatory effect within the Organization when the constitutional instrument provides for such.

6. The Inter-American Juridical Committee would like to recall its earlier work on the topic of democracy in the Inter-American system and, in particular, its resolutions CJI/RES.I-3/95, dated 23 March 1995, CJI/RES.5/LII/98, dated 19 March 1998 and CJI/RES.17 (LVII-O/00), dated 19 August 2000, which are attached as annexes hereto.

## II. SPECIFIC OBSERVATIONS ON THE ARTICLES - DRAFT INTER-AMERICAN DEMOCRATIC CHARTER

### Part I - Democracy and the Inter-American System

7. **Article 1:** It is understood that this provision seeks to reflect the political commitment of the American States to democracy and, consequently, it seems unnecessary to enter into an analysis of the different meanings that the word “peoples” may have nor the nature of the aforementioned “right”.

8. **Article 2:** Article 3 (d) of the OAS Charter and subsequent practice of the Member States of the Organization may offer a legal basis to affirm that inter-State relations in the Americas are established between Member States politically organized “on the basis of an effective exercise of representative democracy”. It should also be considered that the intention is that the effective exercise of democracy constitutes a foundation of the Inter-American system. In the light of international law, the point of interest appears to be that representative democracy be effectively exercised. We note in this regard that the draft Inter-American Democratic Charter refers to “representative democracy”, whereas article 3 (d) of the OAS Charter refers to the “effective exercise” of representative democracy.

9. **Article 3:** It is apparent that this article purports to set out an unexhaustive list. This intention should be expressed more clearly. It might also be advisable to specify which human rights and fundamental freedoms are essential elements of democracy.

10. With respect to the term “expression of popular sovereignty”, it would perhaps be appropriate to include a prior provision that expresses that idea in more general or broader terms, that is, that democracy is the exercise of sovereignty or power by the will of the people.<sup>1</sup> In addition, the term “sovereignty of the people” should be used instead of the expression “popular sovereignty”. This sovereignty of the people, which the basis of democracy, requires free and fair elections; the exercise of power in accordance with the rule of law and responsibility of the authorities for their acts; separation of powers, particularly the

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<sup>1</sup> Constitutions of OAS Member States (e.g. Argentina, Bolivia, Brazil, Chile, Honduras, Mexico, Paraguay, etc.)

independence of the Judiciary;<sup>2</sup> freedom of political expression, including the freedom of the press; and control of the armed forces by elected authorities.<sup>3</sup>

11. With respect to the reference to elections, it might be appropriate to add to the adjectives “free” and “fair” others such as “periodic”, “secret”, “by universal suffrage”, “direct” and “egalitarian”, and “controlled by independent authorities with jurisdiction over electoral matters”.<sup>4</sup>

12. With respect to the reference to “pluralist system of political parties and organizations”, it would be more useful to address this topic in a single provision. In any case, what should be guaranteed is the right to form political parties or other organizations of this nature.

13. Additionally, the topic of a “pluralist system of political parties and organizations” may merit more extensive treatment in article 22, in order to cover what is stipulated not only in the latter provision, but also in other international and domestic instruments, as well as some of the relevant aspirations of the States on this matter<sup>5</sup>, for example, regarding whether political parties and organizations should be the subject of legal provisions that address their independence, internal democracy, respect for their minorities, financing, auditing of finances, etc.

14. It would probably be more useful to address the topic of human rights in a single place and not in scattered articles as occurs in the current Draft, which also addresses human rights in articles 7, 8 and 9 (Part II).

15. **Article 4:** This provision addresses some elements that would permit the strengthening of democracy. It should be more clearly stated that this does not necessarily constitute an exhaustive list. These elements appear to relate primarily to governance or a governmental agenda. Further, there should be a clearer separation between the reference to probity and the allusion to poverty, as they are different topics. It would seem useful to address the latter topic in conjunction with article 5 and part of 20 (Part V) and to add to the reference to economic and social development such expressions as “fair” and “equitable”. As mentioned above, freedom of the press should in any event be included in article 3. Also, we suggest that the word “respect” be changed to “promotion”.

16. **Article 5:** This article reflects a provision of the OAS Charter. It might be appropriate to address this topic in part 5 of the draft Inter-American Democratic Charter.

17. **Article 6:** Perhaps it would be advisable to add a paragraph to this article concerning the right of citizens to participate in political processes either individually or through political parties or other organizations of this nature.

18. A better place for this article might be immediately after article 3.

## **Part II - Democracy and Human Rights**

19. **Article 7:** The relation between democracy and human rights is presented in articles 3, 7 and 8 of the draft Inter-American Democratic Charter from different perspectives. Perhaps it would be appropriate to clarify the relationship between these different perspectives.

<sup>2</sup> Declaration of Santiago, Chile, on Representative Democracy, 1959, and national Constitutions.

<sup>3</sup> Article 9 of the OAS Charter, Constitutions of the OAS Member States (e.g.: Argentina, Bolivia, Ecuador), and Declaration of Warsaw, “Towards a Community of Democracies”.

<sup>4</sup> American Convention of Human Rights, American Declaration of Human Rights and Duties, Declaration of Warsaw, “Towards a Community of Democracies”, and in a number of constitutions of the OAS Member States. (e.g. Argentina, Brazil, Bolivia, Ecuador, Honduras, Panama, Peru, Uruguay, etc.)

<sup>5</sup> The Declaration of Warsaw, “Towards a Community of Democracies”, Declaration of Santiago de Chile on Representative Democracy in 1959 and Constitutions of OAS Member States (e.g. Argentina, Brazil, Chile, Mexico).

20. **Article 8:** This article covers the two categories of human rights in a single clause, unlike articles 3 and 4 of the draft, which address them separately. This could give rise to problems of interpretation if not clarified.

21. It should be borne in mind that not every Member State is party to the legal instruments mentioned herein.

22. It should also be understood that the reference to rights embodied in the aforementioned legal instruments incorporates the conditions and limits set out in those instruments.

23. **Article 9:** This article is explicitly limited to civil and political rights. It is worth recalling that article 19 (6) of the Additional Protocol to the American Convention on Human Rights relating to Economic, Social and Cultural Rights grants the right of petition for such rights as those relating to education and trade unions as well.

24. It should also be borne in mind that not every Member State is party to this Convention or has accepted the compulsory jurisdiction of the Inter-American Court of Human Rights.

### **Part III - Mechanisms for Strengthening and Defending Democracy**

25. It should be clarified that no provision in this section should be interpreted as an impediment to the possibility that the OAS organs undertake diplomatic efforts for promoting, preserving, strengthening or re-establishing democracy. In general, it might be useful to explain that there is no intention to restrict any power presently conferred by the OAS Charter or by other legal instruments.

26. It is understood that the purpose of this part of the draft is to establish the role of the Organization in circumstances where there is a threat to the maintenance of democracy or an interruption of the effective exercise of representative democracy. It should be noted that article 9 of the Charter of the Organization and practice under that article demonstrate a continuing commitment to the pursuit of diplomatic efforts to preserve and reestablish representative democracy. It may be advisable to stress that this commitment is preserved throughout section III. The corresponding text could be inserted into article 15.

27. It should be noted that throughout this section different terms are used: "unconstitutional alteration", "unconstitutional interruption" and, as expressed in resolution AG/RES.1080 (XXI-O/91), an "abrupt or irregular interruption". It might be convenient to consider the possibility of standardizing the terminology. In any case, the term "unconstitutional interruption" could be simplified by removing the word "unconstitutional", without changing the meaning of the provision.

28. **Article 10:** It should be borne in mind that the operation of the mechanism set out in this article requires that the government in question take the initiative, and that the timely and necessary assistance to which the article refers will depend on the agreement reached with this government. Moreover, it is important that this article be considered in relation to the subsequent articles in section III of the draft Inter-American Democratic Charter.

29. **Article 11:** This article, like article 10, uses the phrase "preservation of the democratic system", whereas the OAS Charter and other instruments refer to the "effective exercise of representative democracy". Consideration should be given to whether the latter should replace the former in the draft Inter-American Democratic Charter. It should also be clarified whether government consent is required only for the visits mentioned therein, or also for any other initiatives or efforts. Lastly, it is understood that this article is largely declarative of powers already possessed by OAS organs under the Charter of the Organization and resolution AG/RES.1080 (XXI-O/91).

30. **Articles 12 to 16:** In the current draft, some aspects of articles 12 and onwards appear to contradict the Charter of the Organization, amended by the Protocol of Washington<sup>6</sup>, in three respects.

31. First, there appears to be a contradiction with article 9 of the Charter of the Organization, since the latter provides that the suspension of a Member State may occur in the event of the overthrow by force of a democratically constituted government, while the draft refers to an “unconstitutional interruption”.

32. Second, the Charter of the Organization empowers only the General Assembly to suspend a Member State, whereas the draft also empowers the Meeting of Consultation of Ministers of Foreign Affairs. (It is worth mentioning that, as indicated below, resolution AG/RES.1080 (XXI-O/91) refers to an ad-hoc meeting of Ministers of Foreign Affairs).

33. Third, the draft provides that once the interruption of democracy is recognized, the Member State in question is automatically and immediately suspended, while the Charter of the Organization contemplates prior efforts to re-establish democracy and leaves the suspension of the Member State to the discretion of the Assembly.

34. It might be advisable to clarify the intended nature and effect of the Democratic Charter with regard to these provisions. If these provisions are intended as mere declarations, formulated through a resolution without immediate effect intended to come into legal force through subsequent amendment of the Charter of the OAS, this should be clarified in the text.

35. On the other hand, if these provisions are expected to have immediate legal force, it would be necessary to harmonize them with the Charter of the Organization, as the latter prevails over any decision of one of its organs.

36. With regard to the first of the apparent contradictions, two possible interpretations of Article 9 of the Charter were analyzed by the Inter-American Juridical Committee.

37. The first would interpret Article 9 on the assumption that the overthrow by force of a democratically elected government could only be understood as a reference to the classic *coup d'état* or revolution, by which the legitimately constituted powers of government are replaced.

38. The second would recognize that the relevant text of Article 9 is susceptible to a broader interpretation, and it would maintain that the overthrow by force of a democratically constituted government could encompass any other rupture that violates basic constitutional principles and is so grave and not easily rectifiable through domestic measures as to prevent the government in question from being considered democratically constituted.

39. Under the first interpretation, the contradiction could only be resolved by amending the Charter of the Organization.

40. Under the second interpretation, it would be unnecessary to amend the OAS Charter, provided that the text of the Democratic Charter explicitly states that it is setting forth an interpretation of the OAS Charter, and assuming, of course, that the Democratic Charter is adopted by consensus.

41. With regard to the second apparent contradiction mentioned above, it might be advisable to address it by harmonizing the text of the Democratic Charter with Article 9 of the OAS Charter, bearing in mind that Member State delegations to the General Assembly are

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<sup>6</sup> The following States have deposited instruments of ratification of the Protocol of Washington with the General Secretariat of the OAS: Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Nicaragua, Panama, Paraguay, Peru, St. Vincent and Grenadines, the United States, Uruguay and Venezuela.

usually led by Ministers of Foreign Affairs. The need for a reference to the Meeting of Consultation of Ministers of Foreign Affairs could thus be obviated.

42. With respect to the third apparent contradiction mentioned above, Article 14 as currently drafted appears to contemplate that the sole decision entrusted to the Meeting of Consultation of Ministers of Foreign Affairs or special session of the General Assembly is the purely factual determination of whether an “unconstitutional interruption” has occurred. The second sentence appears to provide that, once that factual determination has been made, the Member State is automatically suspended. The current draft thus appears to dispense with a separate formal decision to suspend the Member State, and it appears to remove any discretion from the General Assembly about whether or not to suspend once the fact of an unconstitutional interruption has been recognized. This would appear to conflict with Article 9.a which contemplates that “the power to suspend shall be exercised only when diplomatic initiatives . . . have been unsuccessful,” as well as with Article 9.b, which contemplates that a specific decision to suspend shall be adopted by a special session of the General Assembly

43. There appear to be two ways to address this problem. If the intent is to provide for only a single vote on the question of suspension, then it should be made clear that the vote must be specifically on the question of whether or not to suspend, not, as the current draft suggests, on whether an unconstitutional interruption has taken place. If, on the other hand, it is the intent to provide for a separate vote specifically on the question of whether there has been an “unconstitutional interruption,” then it should be made clear that suspension does not follow automatically, but instead requires a separate vote of a special session of the General Assembly by an affirmative vote of two-thirds of the Member states. In either case, it might be advisable that the Democratic Charter explicitly recognize the OAS Charter’s requirement that diplomatic initiatives be exhausted before such vote.

44. A number of the provisions in articles 13 and 14 contain procedures different from those established by resolution AG/RES.1080 (XXI-O/91):

A. Resolution AG/RES.1080 (XXI-O/91) provides that the Secretary General shall convoke a meeting of the Permanent Council, while the draft also mentions the State affected or any other Member State. It should be clarified that the request of any Member State would require the approval of the majority of the Member States, pursuant to the Organization’s procedures. It is unclear whether the expression “will request” implies an obligation or authorization.

B. Resolution AG/RES.1080 (XXI-O/91) authorizes the Permanent Council to convoke an *ad hoc* meeting of Ministers of Foreign Affairs. The draft refers to the Meeting of Consultation of Ministers of Foreign Affairs. As the mandate of the Meeting of Consultation refers to matters established in article 61 of the Charter of the Organization, it would seem more appropriate for the draft to refer to an *ad hoc* meeting.

45. With respect to **Article 12**, it appears to be intended simply as an introductory statement for the subsequent articles, which in turn would have an operative character.

46. It seems preferable not to adopt the language in brackets, as the Summit of the Americas process is not submitted to the decisions of the General Assembly. On the other hand, the initial reference to the Quebec Summit seems unobjectionable.

#### **Part IV - Democracy and Missions of Election Observers**

47. **Article 17** and **Article 18**: These articles should be understood to share the purpose of guaranteeing the free and fair nature of the electoral process and appropriate conduct of the electoral institutions. Article 17 seems to require certain guarantees in advance while article 18 reflects the possibility that certain conditions may not exist. On the other hand, it should be considered that, as expressed in resolution CJI/RES.17 (LVII-O/00), dated 19 August 2000,

“it would be useful ...[for the missions to be provided] with generally accepted guidelines concerning principles, regulations, criteria and practices concerning the effective exercise of representative democracy, as related to their functions”.

#### **Part V - Promotion of Democracy**

48. **Articles 19 to 21:** It is understood that these articles are of a programmatic nature and therefore do not require legal comment. However, it is understood that Article 21, in providing that the creation of a democratic culture “requires programs and resources”, does not impose obligations on Member States to provide technical assistance.

49. **Article 22:** Given that the issue is also mentioned in article 3, it might be appropriate to address the topic in a single provision, considering such aspects as financing and guarantees of independence.

Annexes:                   CJI/RES.I-3/95  
                                   - *Justification of vote (Jonathan T. Fried)*  
                                   - *Justified vote (Miguel Ángel Espeche Gil)*  
                                   - *Justified vote (Alberto Zelada Castedo)*  
                                   CJI/RES.5/LII/98  
                                   CJI/RES.17 (LVII-O/00)  
                                   - *Explanation of vote (Eduardo Vío Grossi)*

#### **CJI/RES.I-3/95**

### **DEMOCRACY IN THE INTER-AMERICAN SYSTEM (Resolution adopted at the regular session held on 23 March 1995)**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING:

- a) its 1959 study on the relation between respect for human rights and exercise of democracy (Inter-American Juridical Committee, Recommendations and Reports, Official Documents, v. VI, 1959-1960, Rio de Janeiro – GB, 1961, p. 221 ff.);
- b) the report presented by Drs. Seymour Rubin and Francisco Villagrán-Kramer, rapporteurs for the topic “Study on legitimacy in the Inter-American System and the inter-relationship between the provisions of the OAS Charter on self-determination, non-intervention, representative democracy and protection of human rights” (CJI/SO/II/doc.13/91, rev.2, 13 August 1992. Original; Spanish);
- c) the two preliminary reports presented by Dr. Eduardo Vío Grossi, rapporteur for the theme “Democracy in the Inter-American System” (CJI/SO/II/doc.10/93 and CJI/SO/II/doc.11/94);
- d) the mandate granted to the Juridical Committee by the Commission on Juridical and Political Affairs of the OAS Permanent Council to proceed with the study of the topic “Democracy in the Inter-American System”, ...“insofar as this refers to one of the main pillars of the Inter-American System” (CP/doc.2479/94);
- e) the resolution of the OAS General Assembly at its Twenty-fourth Regular Session (Belém, 1994) “to urge the Inter-American Juridical Committee to continue its studies on Democracy in the Inter-American System, given that this is one of the basic topics of the Organization” [AG/RES.1266 (XXIV-O/94)];

- f) the report presented by Dr. Eduardo Vío Grossi, rapporteur on “Democracy in the Inter-American System” (CJI/SO/II/doc.37/94 rev.1 corr.2, 18 October 1994. Original: Spanish);
- g) the resolution of the Juridical Committee (CJI/RES.II-12/94) relating to the aforementioned report, while on one hand, congratulating the rapporteur and “forwarding the Report in question to the Secretary General together with the summarized minutes of the session in which it was studied in order to make it available to the agencies of the Organization responsible for handling this matter,” and, on the other, proceeding to analyze the theme and request “the rapporteur to keep advised of the development this topic could undergo” by the closing of the session in May 1995; and
- h) the Complementary Report on “Democracy in the Inter-American System” presented by Dr. Eduardo Vío Grossi, rapporteur at the current session (CJI/SO/II/doc.7/95, rev.2, 22 March 1995. Original: Spanish);

BEARING IN MIND the continuing inter-American concern for the effective exercise of representative democracy, a concern visible in the following documents, among others:

- a) Declaration of Principles of Inter-American Solidarity and Cooperation, adopted under Resolution XXVII by the Inter-American Conference on Consolidation of Peace held in Buenos Aires in 1936;
- b) Declaration of Mexico, adopted at the Inter-American Conference on Problems of War and Peace, held in Mexico in 1945;
- c) The resolution called “Defense and Preservation of the Democracy of America” adopted at the same Conference;
- d) Resolution XXXII of the Ninth Inter-American Conference held in Bogota in 1948;
- e) Resolution VII on “The strengthening and effective exercise of democracy” at the Fourth Meeting of Consultation of the Ministers of Foreign Affairs held in Washington, D.C. in 1951; and
- f) The Declaration of Santiago on Representative Democracy agreed at the Fifth Meeting of Consultation of the Ministers of Foreign Affairs held in Santiago in 1959.

IN VIEW OF the provisions of the Charter of the Organization of American States<sup>\*</sup> in:

- a) paragraph 3 of the Preamble, which states that “representative democracy is an indispensable condition for the stability, peace and development of the region”;
- b) paragraph 4 of the same Preamble, which says that “the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man”;
- c) paragraph 2 of article 1, which states that “the Organization of American States has no powers other than those expressly conferred upon it by this Charter, none of whose provisions authorizes it to intervene in matters that are within the internal jurisdiction of the Member States”;

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<sup>\*</sup> Charter of the Organization of American States (OEA/Ser.A/2 (English) rev.3). OAS : Washington, D.C., 1992.

- d) article 2, which states that “the Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes:... to promote and consolidate representative democracy, with due respect for the principle of nonintervention”;
- e) article 3, which proclaims that “the American States reaffirm the following principles: ...“The solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy”;
- f) letter e) of the same provision, which provides that “the American States reaffirm the following principles: “Every State has the right to choose, without external interference, its political, economic and social system and to organize itself in the way best suited to it, and has the duty to abstain from intervening in the affairs of another State”;
- g) article 18, which provides that “No State or group of States has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempt threat against the personality of the State or against its political, economic and cultural elements”;
- h) article 22, which states that “Measures adopted for the maintenance of peace and security, in accordance with existing treaties, do not constitute a violation of the principles set forth in articles 18 and 20”;

RECALLING the interpretation that agencies of the Organization of American States itself have given to the transcribed regulations, especially under:

- a) the aforementioned “Declaration of Santiago” adopted at the Fifth Meeting of Consultation of the Ministers of Foreign Affairs held in Santiago, Chile, in 1959, which expressed that “the existence of anti-democratic regimes constitutes a violation of the principles upon which the Organization of American States is founded ...”, a violation that can only be regarded as an aggression in terms of the Inter-American Treaty of Reciprocal Assistance;
- b) the various resolutions on human rights adopted by the General Assembly of the OAS, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, point out that “Representative democracy is a determinant in the whole system of which the (American) Convention (on Human Rights) is part [for example: AG/RES.510 (X-O/80) of 1980, AG/RES.835 (XVI-O/86) of 1986, AG/RES.837 (XVI-O/86), CIDH, Ten Years of Activities 1979-1981, 1986 Report and the CIDH, Consultative Opinion No. 6, 9 May 1986, Series A, No. 6 and Consultative Opinion No. 8, 30 January 1987, Series A, No. 8];
- c) “The Commitment of Santiago to Democracy and the Renovation of the Inter-American System”, agreed by the Ministers of Foreign Affairs and Heads of Delegations of the American countries on the occasion of the Twenty-first Regular Session of the General Assembly of the OAS held in Santiago, Chile, in 1991, which sets forth “...the firm commitment to the defense and promotion of representative democracy...” and the “decision to adopt a set of effective, opportune and expeditious procedures to ensure the promotion and defense of representative democracy in keeping with the Charter of the OAS”;
- d) “Representative Democracy”, resolution AG/RES.1080 (XXI-O/91) adopted by the General Assembly of the OAS in Santiago, Chile, in 1991 and which instructs the Secretary General “to call for the immediate convocation of a meeting of the

Permanent Council in the event of any occurrences given rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization's member States, in order, within the framework of the Charter, to examine the situation, decide on and convene an *ad hoc* meeting of the Ministers of Foreign Affairs or a special session of the General Assembly, all of which must take place within a ten-day period", occasions which will have "the purpose of looking into the events collectively and adopting any decisions deemed appropriate, in accordance with the Charter and international law ..."; and

- e) "Unit for the Promotion of Democracy", resolution AG/RES.1124 (XXI-O/91) adopted on the same occasion as those herein above and entrusted to set up an agency in support of democracy, particularly through electoral advisors, thus showing the interest of the Inter-American System in the holding of free and genuine elections in the member States that safeguard the right of the citizens to have their freely expressed vote properly counted, a human right implicit in the effective exercise of representative democracy in the Inter-American system;

GIVEN what is stipulated in the amendment of the Charter of the OAS not yet in force, called "The Protocol of Washington", adopted at the Sixteenth Period of Sessions of the General Assembly of the OAS in 1992 and which establishes the sanction suspending the member of the Organization whose democratically constituted government is overthrown by force, a suspension that refers to the exercise of the right to attend sessions of agencies of the OAS but not to obligations to the OAS, which can only be decreed by two thirds of the member States at a special period of sessions of the General Assembly held after diplomatic negotiations that were intended to restore democracy have failed;

BEARING IN MIND inter-American practices regarding democracy, expressed particularly through:

- a) civil missions of the OAS to observe electoral practices in Haiti (1990-1991), El Salvador (1990), Suriname (1990), Paraguay (1990), Peru (1992-1993), etc.;
- b) application of resolution AG/RES.1080 (XXI-O/90), *Representative democracy*, in the cases of Peru in 1992, Guatemala in 1993, and Haiti in 1991; and
- c) "The Declaration of Principles" and "The Plan of Action" adopted at the Summit of the Americas held in Miami, Florida, United States of America, in December 1994, by the Heads of State and Government of the continent, reaffirm the commitment to preserve and strengthen democratic systems and acknowledge the OAS as the principal organization to undertake this task;

AWARE of the fact that the Organization of American States intervened in the case of Haiti, based on:

- a) the transmission of resolutions of the Ad Hoc Meeting of Ministers of Foreign Affairs to the United Nations Organization, appealing to it to consider the spirit and objectives of both organizations, including the return of President Aristide to office, isolation of the *de facto* government of Haiti, suspension of economic, financial and commercial relations with that country, coordination with the UN, and "the possibility and convenience of taking the Haiti situation to the Security Council of the United Nations to achieve the universal application of the trade embargo recommended by the OAS";
- b) the appointment of the same person, Mr. Dante Caputo, as Special Representative in the case of Haiti for both the OAS and UN;

- c) articles 33, 52, 53, 54, 103 and 106 of its Charter, as well as the provisions in Chapter VII of same; and
- d) the continuation of the Haiti situation “threatens international peace and security”;

CONVINCED that the international legal regulations with regard to the effective exercise of representative democracy in the States of the Inter-American System form a specific and special order and, therefore, albeit complementary, different from others with another purpose, such as those referring to human rights and international peace and security;

UNDERSTANDING that the effective exercise of representative democracy constitutes a legally protected interest or value in the Inter-American System; and

WHEN ENFORCING articles 104, 107 and 108 of the Charter of the OAS, 2, 3, 12 and 24 of the Statutes of the Committee, and 32, 5 and 7 of its Rules of Procedure,

DECLARES:

That in accordance with the Charter of the Organization of American States and the resolutions of its agencies, the Organization and its member States make observations on the effective exercise of representative democracy in the following principles and regulations:

- FIRST: Every State in the Inter-American System is obliged to effectively exercise representative democracy in its political organization and system. This obligation exists in relation to the Organization of American States and for the fulfillment thereof, every Inter-American State has the right to select the ways and means deemed appropriate thereby.
- SECOND: The principle of non-intervention and the right of each State in the Inter-American System to choose its political, economic and social system without external intervention, and to organize its structure in the way best suited to it, may not cover a violation of the obligation to effectively exercise representative democracy in said system and organization.
- THIRD: The Organization of American States is empowered to promote and consolidate representative democracy in each and every one of its member States. In particular, through the Ad Hoc Meeting of Ministers of Foreign Affairs or the General Assembly sitting in a special period of sessions, within the framework of the resolution on “Representative Democracy” [AG/RES.1080 (XXI-0/9I)], the Organization is empowered to decide when one of its member States has violated or failed to meet the obligation of effectively exercising representative democracy.
- FOURTH: The abrupt or irregular interruption of the institutional democratic political process or of the legitimate exercise of power by a democratically elected government or the overthrow by force of a democratically established government, in the Inter-American System, constitute failure to meet the obligation of effectively exercising representative democracy.
- FIFTH: The State in the Inter-American System that fails to meet the obligation of effectively exercising representative democracy is obliged to resume the effective exercise thereof. The purpose of the resolutions adopted by the Organization of American States in such an event should ensure the resumption thereof.

## AND RESOLVES:

1. To propose that the respective agencies of the Organization adopt the following measures in view of the progressive effective development of International Law in relation to representative democracy:

- a) To coordinate with other international organizations to undertake studies, seminars, round-tables or other forms of analysis and study of the experiences and viewpoints of the OAS and similar international organizations on the subject of representative democracy; and
- b) To distribute the report CJI/SO/II/doc.37/94 rev.1, corr.2, Complementary Report CJI/SO/II/doc.7/96 rev.2 and the resolution herein to the member States who will forward them to their respective law and political science schools, requesting observations and comments on the progressive development of International Law on the subject of the effective exercise of representative democracy.

2. To continue with the study of the topic, with special attention to the following aspects:

- a) To identify and typify any possible international illegal act against the effective exercise of representative democracy and to study the responsibility deriving therefrom for the State and individuals;
- b) The possible international illegality by actions that distort or intend to distort election results, by both inhibiting freedom of expression of the voters and by affecting the authenticity of the ballot;
- c) The relationship between the effective exercise of representative democracy, peace, international security and human rights;
- d) The legal scope of measures or negotiations that OAS may adopt in view of the resumption of the effective exercise of representative democracy.

3. To submit the resolution herein, on the aforementioned effects, to the General Secretary and Permanent Council.

The resolution herein was adopted unanimously at the session of 23 March 1995, in the presence of the following members: Drs. Ramiro Saraiva Guerreiro, Jonathan T. Fried, Luis Herrera Marcano, Alberto Zelada Castedo, José Luis Siqueiros, Mauricio Gutiérrez Castro, Roberto Alemán, Miguel Ángel Espeche Gil and Eduardo Vío Grossi.

Drs. Jonathan T. Fried, Miguel Ángel Espeche Gil and Alberto Zelada Castedo proffered their justified votes attached hereto.

**JUSTIFICATION OF VOTE**

(presented by Dr. Jonathan T. Fried)

I hereby adhere to the consensus that approves resolution CJI/RES.I-3/95 on "Democracy in the Inter-American System", based on my understanding that the Inter-American Juridical Committee, "Verifying ..." that the Organization of American States and its member States comply with a number of "principles and regulations", did not proffer any opinion or take any decision whether the said practice is adopted as a matter of legal obligation or reflects the necessary *opinio juris* that characterizes the normal rules of international law. Consequently, in my opinion, the Resolution does not represent an analysis

of the international **legal** regulations, if any, that may be applicable and, in any case, does not contain any proper evidence on the subject.

### JUSTIFIED VOTE

(presented by Dr. Miguel Ángel Espeche Gil)

I give my vote to the resolution of the Inter-American Juridical Committee on the effective exercise of representative democracy in the Inter-American System, based on the report by Dr. Eduardo Vío Grossi.

1. The necessary brevity of the provision of the said Resolution sways me to clarify a few points on the historic origin of the topic in the Inter-American System. I would not wish it to be assumed that, in the period prior to the establishment of the OAS and before the “Declaration of principles of Inter-American solidarity and cooperation of resolution XXVII, Inter-American Conference of Consolidation of Peace, Buenos Aires, 1936”, it was possible to legally approve a government system against democracy in the Pan-American System. Since its creation, the Inter-American System, comprising the fundamental core of republics, has been taking for granted that representative democracy is a substantial element of *affectio societatis* of the system itself.

“The idealism, outcome of the peculiar situation of the American republics and of their democratic form of government performed through the setbacks and harsh conditions in which they achieved their independence and which continued for many years as a threat to their security, is an idealism that produced tangible long-lasting results.” (Enrique Gil, “The Evolution of Pan-Americanism”, Buenos Aires, 1933).

Sometimes it is considered that there would be a conceptual incompatibility between the contents of items d) and e) in article 3 of the OAS Charter. The first (item d) requires the internal political organization of the member States on the basis of the effective exercise of representative democracy. The second (item e) establishes that “*Every State has the right to choose, without external interference, its political, economic and social system and to organize itself in the way best suited to it*”...“*subject to the foregoing, the American States shall cooperate fully among themselves, independently of the nature of their political, economic and social systems*”.

That opinion mentions an incompatibility between the requirement of political organization on the basis of representative democracy, and the legal possibility of the States choosing their political systems.

This affirmation would presume that the term “*choose their political system*” could be understood as an authorization to adopt a form of government other than of representative democracy. This consideration has no basis since it ignores the *ratio legis* of the regulation in article 3, adopted in the normative context existing in the Inter-American System in 1948, the year when it was adopted. What the term “*political organization*” alludes to is to the options “*monarchy or republic*”, “*federalism or unitarism*”, “*presidentialism or parliamentarism*”, etc., as forms of organization of the State, but always on the condition of exercising democracy. On this occasion, when it was decided to reformulate the system by creating a regional organization, it was based on the prevailing values of the Inter-American System, in which the representative democratic value was essential.

The very name of the new organization had its *raison d'être* in this study; the form of State was no obstacle to the relevance of the Inter-American System. In fact, while at that time every country in the System had adopted the republican system, the chosen name of the Organization was “*of the American States*” and not “*of the American Republics*” in order to leave room for the possible future admission of Canada, which although it was and still is a constitutional monarchy, has always been an exemplary democracy. In view of this, Canada met the essential requisite for its inclusion in the Inter-American System. This assertion is

reaffirmed by the fact that Caribbean countries, some with a system similar in this aspect to that of Canada, were successively included in the OAS.

2. I consider that the Juridical Committee's latest contribution to development of the topic is a fitting update, which considers and points out aspects that are not only formal but also concern freedom to vote and the authenticity of the ballot count (II, b)), vital for fully exercising representative democracy.

There is a justifiable tendency to consider electoral fraud and practices that distort the ballots as an international violation, such as *coups d'état*, since both are detrimental to the legally protected interest that the Inter-American System seeks to protect through international law, i.e., the effective exercise of representative democracy. The right of citizens that their freely expressed vote is authentically counted and that the genuine basis of the representation of governments thus elected, is an ethical and logical requirement of consistency of representative democracy, an intrinsic value of the Inter-American System.

### **JUSTIFIED VOTE**

(presented by Dr. Alberto Zelada Castedo)

Dr. Alberto Zelada Castedo, Member of the Juridical Committee, when voting in favor of adopting the Resolution hereto, he pointed out that, in his opinion, its spirit and scopes would be better expressed in the following terms:

#### VERIFIES

That, as construed from the pertinent regulations of the Charter of the Organization of American States and resolutions adopted by its agencies, and from the practice adopted by the member States and Organization, the following are the principles and basic regulations governing the preservation and strengthening of representative democracy:

1. The preservation and strengthening of representative democracy in the countries of the Organization are a interest protected by the latter's legal system.
2. The effective exercise of representative democracy is an obligation of the Member States, sanctioned by the legal system of the Organization that may demand it.
3. The obligation of effectively exercising representative democracy does not detract from the right of member States of the Organization to choose, in total independence and based on the principle of nonintervention in internal affairs, the best way suited to them to fulfill said obligation, according to the free will of their peoples.

At the same time, the right of the member States of the Organization to adopt, also on an entirely independent basis, the political, economic and social system considered best suited, does not exclude their obligation to effectively exercise representative democracy.

4. Failure to meet the obligation of effectively exercising representative democracy implies, among other things, acts that have the following effect:

- a) abrupt or irregular interruption in the democratic institutional process or in the legitimate exercise of power by a democratically elected government, and
- b) the overthrowing by force of a democratically constituted government.

5. The Organization is responsible for seeing that the obligation to effectively exercise representative democracy is fulfilled and its duty is to promote its consolidation and strengthening through the relevant collective actions.

The Organization is also responsible for:

- a) establishing, in any circumstance and pursuant to the criteria, principles and regulations of its legal system, the facts that imply failure to meet the obligation of effectively exercising representative democracy in any member State, and
- b) defining and adopting collective actions in order to resume democratic systems, affected by the aforementioned failure, including the imposition of sanctions stated in the Organization's legal system.

### **CJI/RES.5/LII/98**

## **DEMOCRACY IN THE INTER-AMERICAN SYSTEM**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

WHEREAS:

1. The concept of Representative Democracy has already been converted by the Inter-American System into one of the basic components of Inter-American Public International Law as, "in compliance with the Charter of the Organization of American States and the resolutions of its organs, the Organization and its member States observe, the following principles and norms with regard to the effective exercise of Representative Democracy: ONE: Every State in the Inter-American System has the obligation to effectively exercise Representative Democracy in its political organization and system. This obligation exists in relation to the Organization of American States and in order to fulfill it, every Inter-American State has the right to select the ways and means deemed appropriate thereby. TWO: The principle of non-intervention and the right of each State in the Inter-American System to elect its political, economic and social system without external intervention, and to organize its structure in the manner most convenient thereto, may not cover a violation of the obligation to effectively exercise Representative Democracy in such system and organization. THIRD: The Organization of American States is empowered to promote and consolidate Representative Democracy in each and every one of its member States. In particular, through the *Ad Hoc* Meeting of Ministers of Foreign Affairs or the General Assembly sitting in an extraordinary period of sessions, within the framework of the resolution on "Representative Democracy" (AG/RES.1080 (XXI-0/91)), the Organization is empowered to determine when one of its member States has violated or failed to meet the obligation to effectively exercise Representative Democracy. FOUR: The abrupt or irregular interruption of the institutional democratic political process or the legitimate exercise of power by a government that is democratically elected or the overthrow by force of a democratically established government, constitute non-compliance under the Inter-American System with the obligation to effectively exercise Representative Democracy. FIVE: Any State in the Inter-American System that fails to comply with the obligation to effectively exercise Representative Democracy acquires the obligation to re-establish the effective exercise thereof. The resolutions adopted by the Organization of American States in such case should be designed to ensure the re-establishment thereof;

2. In general and with the exclusion of the matters covered in the previous paragraph and those defined in Article 23 of the American Convention on Human Rights, issues linked to election processes and the exercise of Representative Democracy have not yet been covered by the international juridical arrangements, and consequently form part of the reserved domain or internal or exclusive jurisdiction of the State;

3. The new paths for the treatment of this topic, such as for instance the study of the ideas and institutions that form part of Representative Democracy, are matters falling under comparative law;

4. The concept of Representative Democracy and the systems in which it is reflected are undergoing permanent evolution and development, prompting an update of studies focused on this issue;

5. An exhaustive study of the various elements constituting this topic would require a major effort, demanding the use of economic and technical resources that are equally sizable, due to its scope and complexity, and which are not available to the Inter-American Juridical Committee.

RESOLVES:

1. To thank Dr. Eduardo Vío Grossi for the Report presented, entitled *Democracy in the Inter-American System: Follow-Up Report* (OEA/Ser Q CJI/doc.3/98).

2. To place on record the importance of preserving Democracy in the Inter-American System, as a way of complying with one of the principles enshrined in the Charter of the Organization.

3. To note that the juridical aspects of the topic were covered, in accordance with the mission assigned thereto under Resolution AG./doc.3567/97, adopted at its XXVII regular period of sessions, and in keeping with its sphere of competence and the resources available thereto.

4. To place on record that, in its view, there are other aspects of this topic that could be analyzed (such as the party political system, the decision-taking system, election campaign financing and others), but due to the scope and complexity thereof, the funding will be needed to study them exceeds the amounts currently available.

This resolution was adopted unanimously during the regular session held on 19 March 1998, with the following members in attendance: Drs. Eduardo Vío Grossi, Olmedo Sanjur G., Luis Marchand Stens, José Luis Siqueiros, Luis Herrera Marcano, Kenneth O. Rattray, Gerardo Trejos Salas, Brynmor T. Pollard, and João Grandino Rodas.

**CJI/RES.17 (LVII-O/00)**

**DEMOCRACY IN THE INTER-AMERICAN SYSTEM**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

RECALLING that, on the basis of the all the inter-American juridical antecedents that have existed prior to that date concerning Democracy, it was stated in resolution CJI/RES.I-3/95, of 23 March 1995 that

In accordance with the Charter of the Organization of American States and the resolutions of its Organs, the Organization and its Member States have observed the following principles and norms with regard to the effective exercise of representative democracy:

ONE: Every State in the Inter-American System has the obligation to effectively exercise Representative Democracy in its political organization and system. This obligation exists with regard to the Organization of American States, and to comply therewith, every State in the Inter-American System has the right to choose the means and forms that it deems appropriate thereto.

TWO: The principle of non-intervention and the right of each State in the Inter-American System to elect its political, economic and social system with no outside intervention and to organize itself in the manner most convenient thereto may not include any violation of the obligation to effectively exercise Representative Democracy in the above-mentioned system and organization.

THREE: The Organization of American States is competent to promote and consolidate Representative Democracy in each and every one of the Member-States. In particular, the Organization is responsible, through the ad Hoc Meeting of Ministers of Foreign Affairs or the General Assembly sitting in an Extraordinary Sessions period, to decide under the terms of the Resolution on "Representative Democracy" [AG/RES.1080 (XXI-O/91)], whether one of its Member-States has violated or ceased to comply with the obligation to effectively exercise Representative Democracy.

FOUR: The abrupt or irregular interruption of the democratic institutional political process or the legitimate exercise of power by a democratically-constituted government within the Inter-American System shall continue non-compliance with the obligation to effectively exercise Representative Democracy.

FIVE: Any State in the Inter-American System that fails to comply with the obligation to effectively exercise Representative Democracy acquires the obligation to re-establish the effective exercise thereof. The Resolutions that the Organization of American States may adopt under such circumstances should be designed to bring about such re-establishment.

IN VIEW OF THE FACT that the practice observed by the States and the Organization with regard to the Electoral Observation Missions created by resolution [AG/RES.991 (XIX-O/89)], of 18 November 1989, which undertake their work on the invitation or with the consent of the interested States, has made it clear that it would be appropriate to analyze some matters related to their work from the juridical point of view;

CONSIDERING that the Special Mission sent to Peru on that country's invitation, in accordance with resolution [AG/RES.1753 (XXX-O/00)], of 5 June 2000, has the objective, of "exploring, with the Government of Peru and other sectors of the political community, options and recommendations aimed at further strengthening democracy in that country, in particular measures to reform the electoral process, including reform of judicial and constitutional tribunals, as well as strengthening freedom of the press";

CONVINCED that in order for such missions to fulfill their objectives, it would be useful if they had available generally accepted guidance as to the principles, norms, criteria and practices concerning the effective exercise of representative democracy as related to their functions;

CONSIDERING that, in general, the principle of juridical security in inter-American relations makes it advisable to seek a more precise definition of the international principles, norms, criteria and practices concerning the matter within the inter-American context;

HAVING CONSIDERED the document presented at this regular session by the rapporteur of the topic, Dr. Eduardo Vío Grossi, entitled *Democracy in the Inter-American System. Follow-up report: a new methodological approach. Instrument, declaration or inter-American treaty on democracy* (CJI/doc.35/00 rev.1, 17 August 2000);

TAKING INTO ACCOUNT the observations and initiatives formulated by several members during the course of the lengthy consideration of the topic at this regular session,

## RESOLVES:

1. To include as a priority topic on the agenda for the next regular sessions, Democracy in the Inter-American System.

2. To thank Dr. Eduardo Vío Grossi for his important contribution to the study of this topic and to invite him to present to the Juridical Committee a draft on the subject, as mentioned in his report CJI/doc.35/00 rev.1.

3. To invite the members of the Juridical Committee who wish to formulate proposals or initiatives on this question, to send them to the Secretariat for distribution before the next session of the Committee.

4. To request the other agencies of the Organization that are also involved in this issue in the framework of their respective responsibilities, and especially the General Secretariat, through the Secretariat for Legal Affairs and the Unit for the Promotion of Democracy, to lend their collaboration to the Juridical Committee members in preparing their reports or drafts.

This resolution was unanimously adopted during the 19 August 2000 session, in the presence of the following members: Drs. Jonathan T. Fried, Orlando R. Rebagliati, João Grandino Rodas, Brynmor Thornton Pollard, Gerardo Trejos Salas, Luis Marchand Stens, Sergio González Gálvez and Luis Herrera Marcano.

Dr. Eduardo Vío Grossi abstained from voting and presented an explanation of vote, which is attached to this resolution.

**EXPLANATION OF VOTE**

(presented by Dr. Eduardo Vío Grossi)  
Rio de Janeiro, 25 August 2000

I abstain from voting on resolution CJI/RES.17 (LVII-O/00) of 19 August 2000, on *Democracy in the Inter-American System*, in view of the fact that it limits the juridical scope both of the circumstances that gave rise to it and therefore also of the orientation of the work that it consequently determines to undertake.

As a matter of fact, and precisely as stated in document CJI/doc.35/00 rev.1 of 17 August 2000, which bears the title *Democracy in the Inter-American System. Follow-up report: a new methodological approach. Instrument, declaration or inter-American treaty on democracy*, the documents that establish the Electoral Observation Missions and the Special Mission sent to Peru reveal the need to define which international juridical norms with regard to Democracy are to serve as comparison with the pertinent national norms and practices, so that it may be ascertained whether Representative Democracy is indeed exercised in the State under observation.

What this entails, then, is that, based on the prevailing obligation to exercise effectively Representative Democracy in the States of the Inter-American System (an obligation that is clearly declared by the Inter-American Juridical Committee itself in its resolution CJI/RES.I-3/95 of 23 March 1995), an attempt should be made to decide jointly on the content of this inter-American juridical obligation in a solemn juridical document, be this a simple instrument, a declaration or even an inter-American treaty on Democracy. Such a methodological option was proposed in the above-mentioned document CJI/doc.35/00 rev.1 and in Draft Resolution CJI/doc.40/00 of 17 August 2000, both presented by the undersigned and nonetheless limited by the above-mentioned resolution CJI/RES.17 (LVII-O/00) to an individual work by the proponent.

Accordingly, my abstention aims not only to defend the methodological alternative of attempting collectively to draw up as soon as possible a Draft Democratic Pact of the Americas that gathers together the prevailing inter-American juridical norms, principles and practices as regards the contents of the inter-American juridical obligation of effectively exercising Representative Democracy, but also to draw attention to the importance and transcendence of this eminently juridical urgent task as well as the equally juridical result that it might yield.

## 2. Democracy in the Inter-American System

### Resolution

CJI/RES.23 (LVIII-O/01) *Democracy in the Inter-American System.*

### Documents

CJI/doc.47/01 *Democracy and international law*  
(presented by Dr. Gerardo Trejos Salas)

CJI/doc.48/01 *First preliminary report on a draft instrument, declaration, or treaty concerning democracy in the inter-American system*  
(presented by Dr. Eduardo Vío Grossi)

During the fifty-eighth regular session of the Inter-American Juridical Committee in Ottawa in March 2001, Dr. Eduardo Vío Grossi presented a document entitled *First preliminary report on a proposed draft instrument, declaration, or treaty concerning democracy in the inter-American system* (CJI/doc.48/01). This document concluded that there is a basis for initiating an endeavor to use the body of law in effect in the inter-American system as the foundation of a study on the content of an inter-American legal obligation to exercise effectively representative democracy, as a specific, autonomous international legal institution, different from other international legal institutions. This undertaking would include an analysis of what characteristics a State should have in order for it to be regarded as a democratic State, and a determination of the relevant law in this area, and of political intent or will, without mixing these two aspects.

The Inter-American Juridical Committee also considered document CJI/doc.47/01, entitled *Democracy and international law*, presented by Dr. Gerardo Trejos Salas, and it adopted resolution CJI/RES.23 (LVIII-O/01) on *Democracy in the inter-American system*, which provides for Dr. Eduardo Vío Grossi and Dr. Gerardo Trejos Salas to be designated as rapporteurs for that topic. This resolution also sets forth certain criteria for the rapporteurs to follow in developing their work, in addition to the guidelines given by the Third Summit of the Americas, and by the General Assembly and the Permanent Council of the OAS. In addition, it instructs the rapporteurs to work on a draft democratic clause that could be used in various inter-American treaties.

During its thirty-first regular session in San José in June 2001, the General Assembly took note of the decision by the Inter-American Juridical Committee to examine the rules of international law in the Americas which determine that democracy is a right and an obligation, and asked the Committee to draw up a report on the subject, AG/RES.1772 (XXXI-O/01).

You will find below the above-mentioned documents, i.e., resolution CJI/RES.23 (LVIII-O/01), CJI/doc.47/01, *Democracy and international law*, and CJI/doc.48/01, *First preliminary report on a draft instrument, declaration, or treaty concerning democracy in the inter-American system.*

**CJI/RES.23 (LVIII-O/01)****DEMOCRACY IN THE INTER-AMERICAN SYSTEM**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that the Juridical Committee has in recent years dealt continuously with the subject of democracy in the inter-American system, either at its own initiative or with a mandate from the General Assembly of the Organization of American States;

RECALLING that, in particular, the report submitted by Dr. Eduardo Vío Grossi (CJI/SO/II/doc.37/94 rev.1 corr.2 of October 18, 1994, *Democracy in the inter-American system*) properly reflects the main aspects and most relevant points of the legal and political activity of the Organization of American States and its member States with respect to the effective exercise of democracy;

KEEPING IN MIND that, on the basis of the above-mentioned document, the Juridical Committee, in its resolution CJI/RES.I-3/95 of 23 March 1995, noted that, in accordance with the *Charter of the Organization of American States* and the resolutions of its agencies, the Organization and its member States are subject to the following principles and standards with respect to the effective exercise of representative democracy:

ONE: Every State in the inter-American system must effectively exercise representative democracy in its system of government and political organization. This is an obligation to the Organization of American States, and for its fulfillment, every State in the inter-American system has the right to choose the means and forms that it deems appropriate.

TWO: The principle of non-intervention and the right of each State in the inter-American system to choose its own political, economic and social system, without external interference, and to organize itself as it sees fit cannot be used to evade the obligation for the effective exercise of representative democracy in that system and organization.

THREE: The Organization of American States is authorized to promote and consolidate representative democracy in each and every member State. In particular, the Organization, through an *ad hoc* meeting of the Ministers of Foreign Affairs or the General Assembly sitting in special session, may determine, under the resolution on *Representative democracy* [AG/RES.1080 (XXI-O/91)], whether one of its member States has violated or failed to comply with the obligation to effectively exercise representative democracy.

FOUR: The sudden or irregular interruption of the democratic political process and its institutions or of the legitimate exercise of power by a democratically elected government, or the overthrow by force of a democratically constituted government, constitutes, in the inter-American system, non-compliance with the obligation for the effective exercise of representative democracy.

FIVE: Any State in the inter-American system that does not fulfill the obligation for the effective exercise of democracy has a duty to restore this effective exercise. The resolutions that the Organization of American States adopts in such a case must endeavor to bring about such restoration.

CONSIDERING the terms of its resolution CJI/RES.17 (LVII-O/00), *Democracy in the inter-American system*, of 19 August 2000, which:

- a) included the subject on the agenda of the 58<sup>th</sup> regular sessions for priority consideration;
- b) asked Dr. Eduardo Vío Grossi to present a draft on the subject, under the terms of report CJI/doc.35/00 rev.1 of 17 August 2000, entitled *Democracy in the inter-American system. Follow-up report: new methodological approach. Inter-American instrument, declaration or treaty on democracy*;
- c) invited the other members to make proposals or submit initiatives on this subject, and
- d) asked the other agencies of the Organization to concern themselves as well with this issue and to cooperate with the members of the Inter-American Juridical Committee in preparing their reports or drafts;

TAKING INTO ACCOUNT the report presented by Dr. Eduardo Vío Grossi (CJI/doc.48/01, 6 March 2001, *First preliminary report on a draft instrument, declaration or treaty concerning democracy in the inter-American system*), as well as the report presented by Dr. Gerardo Trejos Salas, *Democracy and international law* (CJI/doc.47/01, 6 March 2001);

KEEPING IN MIND that the Draft Agenda of the Third Summit of the Americas, to be held in April 2001 in Quebec, Canada, includes as its first topic "Politics and Democracy" and, under this heading, "Democratic Processes"; and

REALIZING that, at the kind invitation of the Government of Canada, the Juridical Committee is holding its 58<sup>th</sup> regular sessions in Ottawa, as a preliminary to the above-mentioned Summit of Heads of State and Government of the Americas,

RESOLVES:

1. To appoint as rapporteurs on the subject of "Democracy in the Inter-American System" Dr. Eduardo Vío Grossi and Dr. Gerardo Trejos Salas.
2. To include this topic for priority consideration at the 59<sup>th</sup> regular sessions to be held in August 2001 at the seat of the Juridical Committee in Rio de Janeiro, Brazil.
3. To encourage the rapporteurs to continue to work on this topic while keeping the following criteria in mind and in accordance with the dispositions of the Third Summit of the Americas, the General Assembly and the Permanent Council of the Organization:
  - a) the work must ultimately lead to a draft Inter-American Declaration on Democracy that, on the basis of the above statement by the Inter-American Juridical Committee concerning the existence and scope of the inter-American legal obligation for the effective exercise of representative democracy, brings together the international law of the Americas that is specifically applicable to the content of the above mentioned obligation;
  - b) the terms of each clause of this draft declaration must be based on the relevant inter-American legal provisions now in effect;
  - c) in addition, this draft declaration shall include clauses and relevant provisions which, without specifying what the current international law of the Americas is in this field, reflect the common political will or intent of the authorities of the American States empowered to represent said States internationally, with respect to what democracy in the Americas should mean; and

- d) the draft Declaration must therefore be written in terms that permit it to take the form of an inter-American treaty or pact on democracy, to be signed by the States if they so decide.

4. To request the rapporteurs to keep in mind especially the experience of MERCOSUR and the European Union and to submit in the same previous terms a draft democracy clause that could be used, with the appropriate modifications, in various treaties that could be signed in the inter-American context, so that the effective exercise of democracy by the contracting States or parties to said treaties is a point to consider in the drafting, interpretation, application, suspension and even termination of said conventions, as the case may be.

5. To ask the Office of the Secretary General, through the Secretariat for Legal Affairs, to continue to provide as much assistance as possible to the rapporteurs in fulfillment of the mandate given to them.

6. To request as well that the General Secretariat, through the Secretariat for Legal Affairs, to the effect of the agreements adopted by the Third Summit of the Americas on Democracy, urgently transmit this resolution to the General Assembly, the Permanent Council and to the competent entities and authorities concerning the referenced meeting of the Heads of State and Government of the Americas.

This resolution was unanimously adopted at the session held on 20 March 2001, in the presence of the following members: Drs. Sergio González Gálvez, Kenneth O. Rattray, Carlos Manuel Vázquez, João Grandino Rodas, Orlando Rebagliati, Jonathan T. Fried, Gerardo Trejos Salas, Eduardo Vío Grossi and Felipe Paolillo.

#### **CJI/doc.47/01**

#### **DEMOCRACY AND INTERNATIONAL LAW**

(presented by Dr. Gerardo Trejos Salas)

The Council of Europe, true to its Statute, has made the admission of new members conditional on their accepting the principles of “*pluralist and representative democracy*” as ensured by the holding of free elections.

The inter-American system also has a legal requirement for OAS member States to practise democracy.

As Pierre-Marie Dupuy says in his work *Droit international public*, Dalloz, 3<sup>rd</sup> edition, 1995, p. 176-, “it seems that the era marked by the indifference of international law to the internal political system and form of government of States is ending. In the era of peaceful co-existence, these were left to the free choice of each State”.<sup>11</sup>

This is at the regional level. At the global level, however, the same trend to common thinking on human rights is noted, with common adherence to free, pluralistic and democratic choice of government. This is attested, in particular, by recent assistance or intervention operations involving the United Nations or some of its member States (e.g. Cambodia, Somalia and Haiti), often undertaken at the initiative of the Security Council. In particular,

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<sup>1</sup> Further marking his disagreement with United Nations General Assembly Resolution 2625 (Declaration of 1970 on friendly relations and cooperation between States, which says that any State has the inalienable right to choose its political, economic, social and cultural system with no interference from any other State); the Charter of Paris, not a legal text, but politically a very significant one, adopted by the Conference on Security and Cooperation in Europe in November 1990, directly establishes the link between the rule of law (i.e. the State is subject to the law) and respect for fundamental freedoms whose protection is *the first responsibility of governments*.

these operations are intended to permit the holding of free elections in countries undergoing a very serious humanitarian crisis. Prof. Pierre-Marie Dupuy adds that everyone shares the conviction that liberal democracy and the rule of law are the best guarantors of fundamental freedoms; in fact, they would appear to be the marks of a “new international order.”

Some authors have expressed the opinion that international law is about to assert a principle of positive law that would oblige States to base the legitimacy of their internal political systems on compliance with liberal democracy.<sup>2</sup>

We have said that the member States of the Organization of American States are required to practise democracy, but in the inter-American system, no document or international instrument defines what democracy is. Therefore we have proposed that the OAS develop an international declaration or pact defining what is meant by the legal obligation to practise democracy.<sup>3</sup> We have also suggested that the OAS General Assembly entrust the Inter-American Juridical Committee, the advisory body of the OAS on legal affairs, with drafting this declaration or pact.<sup>44</sup>

For greater inter-American legal security and more effective OAS electoral observation missions, it would seem necessary to have a convention or declaration specify the principles that form a minimum standard of democracy in the inter-American system.

We have suggested the following principles of democracy, among others:

Free, secret, fair, genuine, pluralistic and periodic elections;

Multi-party system;

Guarantees of equitable electoral representation for minorities;

Separation of powers;

Subjection of military to civilian authority;

Financial independence of the judicial authority;

Freedom of the press and in general respect for fundamental rights and freedoms;

Active participation of society in public affairs;

As Armando Vargas Araya<sup>55</sup> well observed, the right to diversity of opinion, the practice of tolerance and the alternation of power are the minimum characteristics of a democratic culture. The author adds that free elections in themselves do not constitute democracy, but without periodic free and competitive elections, the government cannot have sufficient legitimacy to carry out profound social reform. Many peoples lack even an appropriate legal framework to resolve electoral issues; others still do not have autonomous institutions that are independent of the three classic branches of government [legislative, executive, judiciary] to hold elections, including the registration of citizens and the issuing of identity cards with the bearer’s photograph, the counting of votes by representatives of the parties, and public reporting of the result of the balloting. In some countries, the executive authority, through the political police, still counts the votes. Without independent electoral organizations, which each have their own unique features, it is difficult to ensure that the will of the people is respected. Such independent institutions can help to ensure that no decision

<sup>2</sup> In this regard, see T. Frank, *The emerging right of democratic governance*, *American Journal of International Law*, v. 86, pp. 46-91, and also the excellent book by Canadian professor Guy S. Goodwing Gill, *Free and fair elections: international law and practice*, published by the Inter-Parliamentary Union, Geneva, Switzerland, 1994.

<sup>3</sup> This idea originally came from Chilean jurist Eduardo Vío Grossi at the 57<sup>th</sup> regular session of the Inter-American Juridical Committee in Rio de Janeiro, August 2000. Faced with the opposition of some members of the Juridical Committee, Dr. Vío Grossi withdrew it, but Dr. Gerardo Trejos and Dr. Luis Herrera Marcano submitted it again in another form, CJI/doc. 42/00, August 18, 2000.

<sup>4</sup> Dr. Gerardo Trejos made this suggestion to the President of Venezuela in a letter on November 9, 2000. In his reply to Dr. Gerardo Trejos on November 30, 2000, President Hugo Chávez Frías said that he had instructed the Minister of Foreign Affairs to ask the International Policy Branch of his department to consider this matter with a view to what is most feasible so that this set of standards would apply not only to Latin America and the Caribbean but also to all countries in a proposal from the Americas to the world for a Universal Declaration of Democracy, similar to the Universal Declaration of Human Rights.

<sup>5</sup> Armando Vargas Araya, *El siglo de Figueres*, Juricentro, San José, Costa Rica, 1993, p. 79.

made by the majority limits the rights of the minority, especially the right to become the majority under fair and equal conditions.

### OPEN DEBATES

Among the basic principles of democracy that we have suggested, we would mention “active participation of civil society in public affairs” but we do not expressly mention “participatory democracy.” The issue is controversial. President Hugo Chávez, in a letter to Dr. Trejos dated November 30, 2000, said with some pride that his government considers participatory democracy to be the model of public life and includes it in the full exercise of the freedom and sovereignty of peoples.

Prof. Eliécer Venegas Segura, however, in a recent hard-hitting book (*Los pobres entre paréntesis*, Juricentro, San José, 2001) attacks participatory democracy in the following terms:

“Politicians, delighting in their near insignificance, dream of involving the whole people in the same situation, so that they would be less so. ‘Participatory democracy’ leads to this. All citizens must take part in the work of government, so that they can be useful *intermediaries* (between individuals and the State). Thus city councillors would have fewer concerns since the problems of each neighborhood would have to be solved by some association like the ones now involved in community development or any others of that kind.

I am concerned that such participatory democracy is really a drain on people’s time (just as the costs of political campaigns are a drain on their purse). If everything intended to achieve the common good is a political task, or part of politics, those who think that people do not work in some *political* associations (the small intermediary groups in which politicians are interested) are betraying their civic duties are mistaken. What is better for society: for a father to spend his free time with his children and thus contribute to their development, or to spend it in a meeting, at best filled with empty political discussion, of one of these groups?

The truth is that, as in Thomas More’s book on Utopia, the inhabitants of that place in wartime used their wealth to hire “foreign mercenaries from all the countries and especially the *zapoletas*” (hardened men, resistant to cold and heavy labor, who did not care about pleasure, were unsuited for agriculture and unskilled in the building and clothing trades, etc.), we too call on these “frightening, savage and fierce” people whom we call “politicians” to take charge of the affairs of government, together with some good hired help. We do this so that we can devote ourselves to more pleasant occupations, and probably more necessary ones.

What is not good is for politicians, on one hand, to raise the flag of participatory democracy and expect us to give up our private life to help them and, on the other, to raise the flag of representative democracy and say that they can do as they like because they are the representatives or delegates of the people, in whom sovereignty resides, and end up doing nothing (or nothing really good”).

### DECLARATION ON CRITERIA FOR FREE AND FAIR ELECTIONS

Unanimously adopted by the Inter-Parliamentary Council  
at its 154<sup>th</sup> session (Paris, 26 March 1994)<sup>1</sup>

### THE INTER-PARLIAMENTARY COUNCIL,

**Reaffirming** the significance of the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* which establish that the authority to

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<sup>1</sup> Of the 129 member Parliaments of the Union, 112 were represented at the Conference where this Declaration was adopted.

govern shall be based on the will of the people as expressed in periodic and genuine elections;

**Acknowledging and endorsing** the fundamental principles relating to periodic free and fair elections that have been recognized by States in universal and regional human rights instruments, including the right of everyone to take part in the government of his or her country directly or indirectly through freely chosen representatives, to vote in such elections by secret ballot, to have an equal opportunity to become a candidate for election, and to put forward his or her political views, individually or in association with others;

**Conscious** of the fact that each State has the sovereign right, in accordance with the will of its people, freely to choose and develop its own political, social, economic and cultural systems without interference by other States in strict conformity with the *United Nations Charter*;

**Wishing** to promote the establishment of democratic, pluralist systems of representative government throughout the world;

**Recognizing** that the establishment and strengthening of democratic processes and institutions is the common responsibility of governments, the electorate and organized political forces, that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of human rights and fundamental freedoms;

**Welcoming** the expanding role of the United Nations, the Inter-Parliamentary Union, regional organizations and parliamentary assemblies, and international and national non-governmental organizations in providing electoral assistance at the request of governments;

**Therefore adopts** the following *Declaration on Free and Fair Elections*, and urges Governments and Parliaments throughout the world to be guided by the principles and standards set out therein:

### **1. Free and fair elections**

In any State the authority of the government can only derive from the will of the people as expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage.

### **2. Voting and election rights**

- (1) Every adult citizen has the right to vote in elections, on a non-discriminatory basis.
- (2) Every adult citizen has the right to access to an effective, impartial and non-discriminatory procedure for the registration of voters.
- (3) No eligible citizen shall be denied the right to vote or disqualified from registration as a voter, otherwise than in accordance with objectively verifiable criteria prescribed by law, and provided that such measures are consistent with the State's obligations under international law.
- (4) Every individual who is denied the right to vote or to be registered as a voter shall be entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively.
- (5) Every voter has the right to equal and effective access to a polling station in order to exercise his or her right to vote.
- (6) Every voter is entitled to exercise his or her right equally with others and to have his or her vote accorded equivalent weight to that of others.
- (7) The right to vote in secret is absolute and shall not be restricted in any manner whatsoever.

### 3. Candidature, party and campaign rights and responsibilities

- (1) Everyone has the right to take part in the government of their country and shall have an equal opportunity to become a candidate for election. The criteria for participation in government shall be determined in accordance with national constitutions and laws and shall not be inconsistent with the State's international obligations.
- (2) Everyone has the right to join, or together with others to establish, a political party or organization for the purpose of competing in an election.
- (3) Everyone individually and together with others has the right:
  - To express political opinions without interference;
  - To seek, receive and impart information and to make an informed choice;
  - To move freely within the country in order to campaign for election;
  - To campaign on an equal basis with other political parties, including the party forming the existing government.
- (4) Every candidate for election and every political party shall have an equal opportunity of access to the media, particularly the mass communications media, in order to put forward their political views.
- (5) The right of candidates to security with respect to their lives and property shall be recognized and protected.
- (6) Every individual and every political party has the right to the protection of the law and to a remedy for violation of political and electoral rights.
- (7) The above rights may only be subject to such restrictions of an exceptional nature which are in accordance with law and reasonably necessary in a democratic society in the interests of national security or public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others and provided they are consistent with States' obligations under international law. Permissible restrictions on candidature, the creation and activity of political parties and campaign rights shall not be applied so as to violate the principle of non-discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- (8) Every individual or political party whose candidature, party or campaign rights are denied or restricted shall be entitled to appeal to a jurisdiction competent to review such decisions and to correct errors promptly and effectively.
- (9) Candidature, party and campaign rights carry responsibilities to the community. In particular, no candidate or political party shall engage in violence.
- (10) Every candidate and political party competing in an election shall respect the rights and freedoms of others.
- (11) Every candidate and political party competing in an election shall accept the outcome of a free and fair election.

### 4. The rights and responsibilities of States

- (1) States should take the necessary legislative steps and other measures, in accordance with their constitutional processes, to guarantee the rights and institutional framework for periodic and genuine, free and fair elections, in accordance with their obligations under international law. In particular, States should:
  - establish an effective, impartial and non-discriminatory procedure for the registration of voters;
  - establish clear criteria for the registration of voters, such as age, citizenship and residence, and ensure that such provisions are applied without distinction of any kind;
  - provide for the formation and free functioning of political parties, possibly regulate the funding of political

- (2) In addition, States should take the necessary policy and institutional steps to ensure the progressive achievement and consolidation of democratic goals, including through the establishment of a neutral, impartial or balanced mechanism for the management of elections. In so doing, they should, among other matters:
  - ensure that those responsible for the various aspects of the election are trained and act impartially, and that coherent voting procedures are established and made known to the voting public;
  - ensure the registration of voters, updating of electoral rolls and balloting procedures, with the assistance of national and international observers as appropriate;
  - encourage parties, candidates and the media to accept and adopt a Code of Conduct to govern the election campaign and the polling period;
  - ensure the integrity of the ballot through appropriate measures to prevent multiple voting or voting by those not entitled thereto;
  - ensure the integrity of the process for counting votes.
- (3) States shall respect and ensure the human rights of all individuals within their territory and subject to their jurisdiction. In time of elections, the State and its organs should therefore ensure:
  - that freedom of movement, assembly, association and expression are respected, particularly in the context of political rallies and meetings;
  - that parties and candidates are free to communicate their views to the electorate, and that they enjoy equality of access to State and public-service media;
  - that the necessary steps are taken to guarantee non-partisan coverage in States and public-service media.
- (4) In order that elections shall be fair, States should take the necessary measures to ensure that parties and candidates enjoy reasonable opportunities to present their electoral platform.
- (5) States should take all necessary and appropriate measures to ensure that the principle of the secret ballot is respected, and that voters are able to cast their ballots freely, without fear or intimidation.
- (6) Furthermore, State authorities should ensure that the ballot is conducted so as to avoid fraud or other illegality, that the security and the integrity of the process is maintained, and that ballot counting is undertaken by trained personnel, subject to monitoring and/or impartial verification.
- (7) States should take the necessary measures to ensure the transparency of the entire electoral process including, for example, through the presence of party agents and duly accredited observers.
- (8) States should take the necessary measures to ensure that parties, candidates and supporters enjoy equal security, and that State authorities take the necessary steps to prevent electoral violence.
- (9) States should ensure that violations of human rights and complaints relating to the electoral process are determined promptly within the timeframe of the electoral process and effectively by an independent and impartial authority, such as an electoral commission or the courts.

CJI/doc.48/01

**FIRST PRELIMINARY REPORT  
ON A DRAFT INSTRUMENT, DECLARATION OR TREATY  
CONCERNING DEMOCRACY IN THE INTER-AMERICAN SYSTEM**  
(presented by Dr. Eduardo Vío Grossi)

**I. INTRODUCTION**

This *First preliminary report on a draft instrument, declaration or treaty concerning democracy in the inter-American system* is intended, in partial fulfillment of resolution CJI/RES.17 (LVII-O/00), to give an account of what the author, with the help of an assistant, has been able to compile on the subject to date.

The material compiled so far has been arranged in three groups: first, inter-American legal provisions that directly and expressly concern democracy as an autonomous institution; second, other bodies of inter-American laws and standards that, while having some relationship with democracy, also include other international juridical institutions; and third, legal texts that concern matters of internal or domestic jurisdiction of the state in question but also appear to be intimately related to democracy.

For practical reasons, this compilation has been made from some formal sources of international law and has distinguished between treaties, law-making resolutions of international organizations and general legal principles. Resolutions of international organizations have included jurisprudence and resolutions, which, at the same time, may express or convey customs and/or general legal principles. Among these principles, considered separately, preference has been given to those that are common to various constitutional documents of countries in the inter-American system and could possibly be considered unilateral legal acts.

Of course, this paper does not claim to cover the whole field. For now, it does not consider legal doctrine and, in the context of resolutions of international organizations, it does not consider the resolutions of the Permanent Council of the Organization of American States. Moreover, at this stage, the compilation has been limited mainly to Latin American countries. Therefore material on the Caribbean States, the United States of America and Canada is lacking. We hope to cover all of them in a coming preliminary report.

This paper does not present conclusions but only indicates the existence of a possible direction in which the conclusions may be found.

Finally, this document in no way prejudices the type of instrument, declaration or treaty in which the Organization of American States or individual member States may eventually reflect these conclusions.

**FIRST GROUP****TEXTS THAT DIRECTLY AND EXPRESSLY REFER TO DEMOCRACY****I. OBLIGATION TO PRACTISE REPRESENTATIVE DEMOCRACY****A) CONVENTIONAL SOURCES****1. *CHARTER OF THE ORGANIZATION OF AMERICAN STATES*****a) Paragraph 3 of the Preamble:**

*"...representative democracy is an indispensable condition for the stability, peace and development of the region;"*

b) Paragraph 4 of the Preamble :

*"...the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man."*

c) Article 2:

*"The Organization of American States, in order to put into practice the principles on which it is founded and to fulfill its regional obligations under the Charter of the United Nations, proclaims the following essential purposes:*

*b) To promote and consolidate representative democracy, with due respect for the principle of non-intervention. . . "*

d) Article 3:

*"The American States reaffirm the following principles: the solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy..."*

## 2. *USHUAIA PROTOCOL ON THE COMMITMENT TO DEMOCRACY IN MERCOSUR, BOLIVIA AND CHILE (1998)*

a) Article 1:

*"The full and effective operation of democratic institutions is an essential condition for the pursuit of the processes of integration between the States parties to this Protocol."* [unofficial translation]

b) Article 3:

*"Any break in the democratic order of any of the States parties to this Protocol will lead to the application of the procedures provided in the following articles."* [unofficial translation]

## B) RESOLUTIONS OF INTERNATIONAL ORGANIZATIONS

### 1. FOURTH MEETING OF MINISTERS OF FOREIGN AFFAIRS, Washington DC, March 26 to April 7, 1951

Resolution on "Strengthening Democracy and Actual Exercise of Democratic Rights", Fourth Meeting of Ministers of Foreign Affairs :

*"The solidarity of republics in the Americas requires "the effective exercise of representative democracy, social justice and respect for and validity of the rights and duties of man" . [unofficial translation]*

### 2. FIFTH CONSULTATIVE MEETING OF MINISTERS OF FOREIGN AFFAIRS, Santiago de Chile, 1959.

Santiago Declaration:

"...

*1. The principle of the rule of law shall be assured by the independence of the authorities and the verification of the legality of the acts of government by the responsible agencies of the State.*

*2. The governments of the republics of the Americas just be freely elected.*

*3. Continuation in power or holding office without a set time limit and with the clear intent of perpetuation is incompatible with the effective exercise of democracy.*

4. *The national governments of the Americas shall maintain a regime of individual freedom and social justice based on respect for fundamental human rights.*

5. *The human rights included in the national legislation of the Americas shall be protected by effective judicial means.*

6. *The systematic use of political proscription is contrary to the American democratic order.*

7. *Freedom of the press, radio and television, and in general freedom of information and expression are essential conditions for the existence of a democratic regime.*

8. *In order to strengthen democratic institutions, the nations of the Americas shall cooperate with one another to the extent that they are able and within their legal jurisdiction to consolidate and develop their economic structure and to obtain just and humane living conditions for the people." [unofficial translation]*

3. GENERAL ASSEMBLY OF THE ORGANIZATION OF AMERICAN STATES  
Santiago de Chile, 1991

a) *Santiago Commitment to Democracy and the Renewal of the Inter-American System*

*"The Ministers of Foreign Affairs and the Heads of Delegation of the member countries of the Organization of American States, representing their democratically elected governments,*

*...*

*Keeping in mind that representative democracy is the form of government of the region and that its effective exercise, consolidation and improvement are shared priorities;*

*DECLARE :*

*Their unfailing commitment to the defence and promotion of representative democracy and human rights in the region, with respect for the principles of free self-determination and non-intervention.*

*...and their decision to give special priority to... (the OAS) agenda... for the following:*

*...*

*b) Strengthen representative democracy as an expression of the legitimate and free manifestation of the will of the people, always within the context of the sovereignty and independence of the member States;..." [unofficial translation]*

b) AG/RES.1080 (XXI-0/91), *Representative democracy:*

*Whereas*

*"...Under the provisions of the Charter, one of the basic purposes of the OAS is to promote and consolidate representative democracy, with due respect for the principle of non-intervention;*

*...the principle, enshrined in the Charter, that the solidarity of the American States and the high aims which it pursues require the political organization of those States to be based on effective exercise of representative democracy must be made operative; ..."*

4. INTER-AMERICAN JURIDICAL COMMITTEE:

Resolution CJI/RES.I-3/95 of March 23, 1995, *Democracy in the Inter-American System:*

**"CONFIRMS**

*Under the Charter of the Organization of American States and the resolutions of its agencies, the Organization and its member States observe the following principles and standards with respect to the effective exercise of representative democracy:*

*ONE: Every State in the inter-American system must effectively exercise representative democracy in its systems of government and political organization. This is an obligation to the Organization of American States, and for its fulfillment, every state in the inter-American system has the right to choose the means and forms that it deems appropriate.*

*TWO: The principle of non-intervention and the right of each State in the inter-American system to choose its own political, economic and social system, without external interference, and to organize itself as it sees fit cannot be used to evade the obligation for the effective exercise of representative democracy in that system and organization.*

*..." [unofficial translation]*

C) GENERAL LEGAL PRINCIPLES COMMON TO CONSTITUTIONAL PROVISIONS OF STATES

1. **BRAZIL:**

Article 1:

*"The Federal Republic of Brazil, formed of the indissoluble union of the states and municipalities and the Federal District, is a democratic country governed by the rule of law and has these fundamental principles:*

- I. Sovereignty*
- II. Citizenship*
- III. Human dignity*
- IV. Social values of work and free initiative*
- V. Political pluralism.*

*All power originates with the people, who exercise it through elected representatives or directly, under the terms of this Constitution." [unofficial translation]*

2. **BOLIVIA:**

Article 1:

*"Bolivia, a free, independent and sovereign country, is a unitary Republican State and adopts as its form of government representative democracy..."*

3. **CHILE:**

Article 4:

*"Chile is a democratic republic." [unofficial translation]*

4. **ECUADOR:**

a) Article 1, paragraph 1:

*"Ecuador is a sovereign, independent, democratic and unitary state. Its government is republican, presidential, elective, representative, and responsible, with alternation of power." [unofficial translation]*

b) Article 27:

*"Education is a primary responsibility of the state ... Education shall be based on principles of nationality, democracy . . ." [unofficial translation]*

5. **GUATEMALA:**

Article 140:

*“State of Guatemala. Guatemala is a free, independent and sovereign stated, so organized as to ensure that its inhabitants enjoy their rights and freedoms. Its system of government is republican, democratic and representative.”* [unofficial translation]

6. **HONDURAS:**

a) Article 1:

*“Honduras is a sovereign State governed by the rule of law, a free, democratic and independent republic that assures its habitants the enjoyment of justice, liberty, culture, and economic and social welfare.”* [unofficial translation]

b) Article 5:

*“The government shall be based on the principle of participatory democracy, from which national cohesion arises; this implies the participation of all political sectors in public administration so as to ensure and strengthen the progress of Honduras on the basis of political stability and national reconciliation.”*

7. **MÉXICO:**

Article 40:

*“It is the will of the Mexican people to constitute a representative, democratic, federal republic composed of states that are free and sovereign in everything concerned with their internal affairs, but united in a federation established according to the principles of this fundamental law.”* [unofficial translation]

7. **PARAGUAY:**

a) Preamble:

*“...reaffirming the principles of a republican, representative, participatory and pluralist democracy . . . “* [unofficial translation]

b) Article 1:

*“The Republic of Paraguay adopts as its form of government representative, participatory and pluralist democracy, based on the recognition of human dignity.”* [unofficial translation]

9. **PERU:**

Article 43, paragraph 1:

*“The Republic of Peru is democratic, social, independent and sovereign.”* [unofficial translation]

10. **URUGUAY:**

Article 82:

*“The Nation adopts as its form of government republic democracy...”* [unofficial translation]

11. **VENEZUELA:**

Article 2:

*“Venezuela is a democratic social State governed by the rule of law and promotes the following as the supreme values of its legal system and conduct: life, liberty, justice, dignity, solidarity, democracy, social responsibility and in general the pre-eminence of human rights, ethics and political pluralism.”* [unofficial translation]

## II. INTERNATIONAL RESPONSIBILITY

### A) CONVENTIONAL SOURCES

#### 1. CHARTER OF THE ORGANIZATION OF AMERICAN STATES

Article 9:

*"A Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established. "*

### B) RESOLUTIONS OF INTERNATIONAL ORGANIZATIONS

#### 1. GENERAL ASSEMBLY OF THE ORGANIZATION OF AMERICAN STATES

AG/RES.1080 (XXI-0/91), "Representative Democracy", OAS General Assembly, June 5, 1991:

**"RESOLVES:**

*1. To instruct the Secretary General to call for the immediate convocation of the Permanent Council in the event of any occurrence giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization's member States, in order, within the framework of the Charter, to examine the situation, decide on and convene an ad hoc meeting of the Ministers of Foreign Affairs, or a special session of the General Assembly, all of which must take place within a ten-day period.;*

*2. To state that the purpose of the ad hoc meeting of Ministers of Foreign Affairs or the special session of the General Assembly shall be to look into the events collectively and adopt any decisions deemed appropriate, in accordance with the Charter and international law;*

*..."*

#### 2. INTER-AMERICAN JURIDICAL COMMITTEE

Resolution CJI/RES.I-3/95 of March 23, 1995, "Democracy in the inter-American system":

**CONFIRMS:**

*Under the Charter of the Organization of American States and the resolutions of its agencies, the Organization and its member States observe the following principles and standards with respect to the effective exercise of representative democracy :*

*..."*

*THREE: The Organization of American States is authorized to promote and consolidate representative democracy in each and every member state. In particular, the Organization, through an ad hoc meeting of the Ministers of Foreign Affairs or the General Assembly sitting in special session, may determine, under the Resolution on "Representative Democracy" [AG/RES.1080 (XXI-0/91)], whether one of its member States has violated or failed to comply with the obligation to effectively exercise representative democracy.*

*FOUR: The sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by a democratically elected government or the overthrow by force of a democratically constituted government constitutes, in the inter-American system, non-compliance with the*

*obligation for the effective exercise of representative democracy.*" [unofficial translation]

## **SECOND GROUP RELATED INTERNATIONAL INSTITUTIONS**

### **I. HUMAN RIGHTS**

#### **A) CONVENTIONAL SOURCES**

##### **1. AMERICAN CONVENTION ON HUMAN RIGHTS**

###### **a) Preamble:**

*"The American States signatory to the present Convention, (...) Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man."*

###### **b) Article 29 (c):**

*No interpretation is allowed "precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government".*

###### **c) Article 32, paragraph 2:**

*"The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society."*

#### **B) RESOLUTIONS OF INTERNATIONAL ORGANIZATIONS**

##### **1. TENTH INTER-AMERICAN CONFERENCE, Caracas, 1954:**

###### **a) Resolution XXVII**

*"Fundamental human rights may be fully exercised only in a regime of representative democracy."* [unofficial translation]

##### **2. INTER-AMERICAN COURT OF HUMAN RIGHTS:**

###### **a) Advisory Opinion on Requiring Journalists to Join an Association (OC-5/85, paragraph 67) :**

*"The just demands of democracy must (...) guide the interpretation of the Convention and, in particular, those provisions that are critically related to the preservation and working of democratic institutions."* [unofficial translation]

###### **b) Sixth Opinion on the Expression "laws" (OC-6/86, paragraph 34):**

*"Representative democracy is the key to the whole system of which the Convention is a part. It is a "principle" reaffirmed by the American States in the Charter of the OAS, the fundamental instrument of the inter-American system. The very regime of the Convention expressly recognizes political rights (art.23), which under Art. 27, cannot be suspended, indicating their great importance in this system."* [unofficial translation]

##### **3. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

###### **Annual Report :**

*"The right to political participation leaves room for a great variety of forms of government, with many constitutional possibilities as to the degree of*

*centralization of government powers or the manner of selection and authority of the agencies responsible for its exercise. Nevertheless, the democratic framework is essential for a political society in which human values can be fully expresses.” [unofficial translation]*

C) GENERAL LEGAL PRINCIPALS COMMON TO VARIOUS NATIONAL CONSTITUTIONS

1. **ARGENTINA:**

Article 86:

*“The Ombudsman... His mission is to defend and protect human rights and the other rights, guarantees and interests under this Constitution and the laws...” [unofficial translation]*

2. **CHILE:**

Article 5, paragraph 2:

*“The exercise of sovereignty is limited by respect for the essential rights that arise from human nature. Government bodies must respect and promote such rights, guaranteed by this Constitution, as well as by international treaties that have been ratified by Chile and are in force.” [unofficial translation]*

3. **ECUADOR:**

Article 2:

*“The primary function of the State is to strengthen national unity, ensure respect for fundamental human rights, and promote the economic, social and cultural progress of its inhabitants.” [unofficial translation]*

4. **GUATEMALA:**

Preamble:

*“We, the representatives of the people of Guatemala... resolved to promote the full enforcement of human rights within a stable, permanent and popularly supported institutional order, where the citizens and their rulers act in full conformity with the law.” [unofficial translation]*

5. **JAMAICA:**

Article 13:

*“...every person in Jamaica is entitled to the fundamental rights and freedoms of the individual, that is to say, has the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others . . .”*

6. **PERU:**

a) Article 1:

*“The defence of the human person and respect for human dignity are the supreme goal of society and the State.” [unofficial translation]*

b) Article 3:

*“The enumeration of the rights in this chapter does not exclude the other rights that the Constitution guarantees, nor others of similar nature or based on human dignity, or the principles of popular sovereignty, the rule of law, democracy and the republican form of government.” [unofficial translation]*

c) Article 44:

*“The primary duties of the State are to defend national sovereignty; guarantee the full operation of human rights... “ [unofficial translation]*

7. **VENEZUELA:**

Article 19:

*“The State shall guarantee to everyone, in accordance with the principle of progressivity and without any discrimination, the enjoyment and irrevocable, indivisible and interdependent exercise of human rights. The public authorities must respect and guarantee said rights . . .”* [unofficial translation]

II. **ELECTIONS**

A) CONVENTIONAL SOURCES

1. *AMERICAN CONVENTION ON HUMAN RIGHTS*

Article 23, paragraph 1:

*“All citizens shall enjoy the following rights and opportunities:*

*(a) to take part in the conduct of public affairs, directly or through freely chosen representatives;*

*(b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and*

*(c) to have access, under general conditions of equality, to the public service of his country.”*

B) RESOLUTIONS OF INTERNATIONAL DE ORGANIZATIONS

1. *AMERICAN DECLARATION ON THE RIGHTS AND DUTIES OF MAN*

Article 20:

*“Every legally qualified person has the right to take part in the government of his country, directly or through his representatives, and to participate in popular elections conducted by secret ballot and that are genuine, periodic and free.”*

2. *INTER-AMERICAN COMMISSION ON HUMAN RIGHTS*

Annual Report 1990-1991:

*“...as historical experience shows, governments chosen by the will of the people as expressed in free elections provide the best guarantee that basic human rights will be observed and protected.”* [unofficial translation]

C) GENERAL LEGAL PRINCIPLES COMMON TO CONSTITUTIONAL PROVISIONS

1. **ARGENTINA:**

Article 37, paragraph 1:

*“This Constitution guarantees the full exercise of political rights, in accordance with the principle of popular sovereignty and of the laws that flow therefrom. Suffrage is universal, equal secret and obligatory.”* [unofficial translation]

2. **BRAZIL:**

Article 14:

*“Popular sovereignty will be exercised by universal direct suffrage expressed in secret ballots, all votes having equal weight, and, under the terms of the law, may take the form of a (I) Plebiscite, (II) Referendum or (III) Popular Initiative.”* [unofficial translation]

3. **BOLIVIA:**  
Article 219:  
*“Suffrage is the basis of the representative democracy system and is universal, direct, equal, individual, secret, free and obligatory; both in electing public officials and in the system of proportional representation.”* [unofficial translation]
4. **CHILE:**  
Article 15, paragraph 1:  
*“In popular elections, suffrages personal, equal and by secret ballot. Furthermore, citizens must vote.”* [unofficial translation]
5. **ECUADOR:**  
Article 33:  
*“The vote is universal, equal, direct, and secret; it is obligatory for those who can read and write and optional for those who are illiterate...”* [unofficial translation]
6. **HONDURAS:**  
Article 44:  
*Suffrage is a right and a public duty.  
The vote is universal, obligatory, equal, direct, free and secret.”*
7. **PANAMA:**
  - a) Article 129:  
*“Suffrage is a right and a duty for all citizens. The vote is free, equal, universal, secret and direct.”* [unofficial translation]
  - b) Article 130:  
*“The authorities shall ensure that the vote is free and fair...”* [unofficial translation]
8. **PERU:**
  - a) Article 31, paragraph 1:  
*“Citizens have the right to participate in public affairs through referendums; legislative initiative; removal or revocation of authorities; and requirement to report. They also have the right to be elected and to freely elect their representatives, in accordance with the conditions and procedures specified in the Constitution or the electoral law.”* [unofficial translation]
  - b) Article 31, paragraph 4:  
*“The vote is personal, equal, free, secret and obligatory up to the age of seventy. It is optional after that age.”* [unofficial translation]
9. **URUGUAY:**  
Article 77, paragraph 2:  
*“Suffrage shall be exercised in the manner specified by law but on the following basis :*  
*1° Compulsory registration in the Civic Registry.  
2° Secret ballot and obligation to vote...”* [unofficial translation]

### III. PEACE

#### A) CONVENTIONAL SOURCES

1. *INTER-AMERICAN RECIPROCAL ASSISTANCE TREATY*  
*Whereas:*

*“That the American regional community affirms as a manifest truth that juridical organization is a necessary prerequisite of security and peace, and that peace is founded on justice and moral order and, consequently, on the international recognition and protection of human rights and freedoms, on the indispensable well-being of the people, and on the effectiveness of democracy for the international realization of justice and security”.*

B) RESOLUTIONS OF INTERNATIONAL ORGANIZATIONS

1. GENERAL ASSEMBLY OF THE ORGANIZATION OF AMERICAN STATES, 1991

*“Santiago Commitment to Democracy and the Renewal of the Inter-American System”:*

*“...representative democracy is essential for the stability, peace and development of the region, ...”* [unofficial translation]

**THIRD GROUP  
RELATED INTERNAL INSTITUTIONS**

I. **MULTI-PARTY SYSTEM**

A) GENERAL LEGAL PRINCIPLES COMMON TO CONSTITUTIONS

1. **ARGENTINA:**

Article 38, paragraphs 1 and 2:

*“Political parties are fundamental institutions of the democratic system. They may be freely created and freely pursue their activities in accordance with this Constitution, which ensures that they are organized and operate democratically, and guarantees the representation of minorities, competition for public office, access to public information and dissemination of their ideas.*

2. **BRAZIL:**

Article 17:

*“Political parties may freely be created, merge, incorporate and disband, provided that they respect national sovereignty, the democratic multi-party system, fundamental human rights...”*

3. **CHILE:**

Article 15, paragraph 6:

*“The Constitution guarantees political pluralism. Parties, movements or other organizations whose objectives, acts or conduct does not respect the basic principles of the democratic constitutional system, or that seek to establish a totalitarian system, as well as those that use violence, or promote or incite it as a means of political action are unconstitutional...”*

4. **MEXICO:**

Article 41, paragraphs 2, 3 and 4:

*“Political parties are public-interest entities; the law shall determine the specific manner of their involvement in the electoral process.*

*The purpose of political parties is to encourage the people to participate in democratic life, to help select the nation’s representatives and, as citizens’ organizations, to enable access to positions of public authority, in accordance with the programs, principles and ideas that they advocate, on the basis of universal, free, secret and direct suffrage.*

*Political parties shall have the continuing right to use the communications media, in the manner prescribed by law.”* [unofficial translation]

## II. REPUBLICAN SYSTEM

### A) GENERAL PRINCIPLES COMMON TO CONSTITUTIONS

#### 1. ARGENTINA:

##### a) Article 1:

*“Argentina adopts as its form of government a federal representative republic, as established in this Constitution.”* [unofficial translation]

##### b) Article 6:

*“The Federal Government acts in the territory of the provinces to ensure that they have a republican form of government, to repel foreign invasions, and at the request of their constituted authorities, to support or reinstate them if they were deposed by sedition or by invasion from another province.”* [unofficial translation]

#### 2. COSTA RICA:

##### Article 9, paragraph 1:

*“The Government of the Republic is popular, representative, and responsible, with alternation of power.”* [unofficial translation]

## III. POWERS OF GOVERNMENT

### A) GENERAL LEGAL PRINCIPLES COMMON TO CONSTITUTIONAL PROVISIONS

#### 1. ARGENTINA:

##### a) Article 22:

*“The people neither deliberate nor govern, except through their representatives and authorities created by this Constitution. Any armed force or gathering of people who arrogate to themselves the rights of the people and petition on their behalf commit the crime of sedition.”* [unofficial translation]

##### b) Article 109:

*“In no case may the President of the nation exercise judicial functions, hear pending cases or reinstate cases that have already been judged.”* [unofficial translation]

#### 2. BOLIVIA:

##### a) Article 2:

*“Sovereignty resided in the people; it is inalienable and imprescriptible; its exercise is delegated to the legislative, executive and judicial authorities. The independence of these authorities and their interrelation is the basis of government. The legislative, executive and judicial functions of public authority may not be combined in the same body.”* [unofficial translation]

##### b) Article 4:

*“The people neither deliberate nor govern except through their representatives and the authorities created by law.”* [unofficial translation]

##### c) Article 30:

*“The public authorities cannot delegate the powers conferred under this Constitution, nor attribute to the executive authority powers other than those expressly granted to it by the Constitution.”* [unofficial translation]

3. **BRAZIL:**  
Article 2:  
*"The powers of the Union, independent and mutually complementary, are the Legislative, the Executive and the Judicial."* [unofficial translation]
4. **COSTA RICA:**  
Article 9, paragraph 2:  
*"The Government (..) Three distinct and mutually independent authorities exercise the powers of government: Legislative, Executive and Judicial. None of these authorities may delegate the duties that are its own. A Supreme Electoral Tribunal, with the rank and independence of a government authority, is independent and exclusively responsible for organizing, directing and overseeing electoral processes and for performing the other duties assigned to it by this Constitution and the laws."* [unofficial translation]
5. **CHILE:**
  - a) Article 5, paragraph 1:  
*"Sovereignty resides essentially in the Nation. It is exercised by the people in plebiscites and periodic elections and also by the authorities established under this Constitution. No group or individual may claim to exercise this sovereignty."* [unofficial translation]
  - b) Article 7, paragraph 2:  
*"No official, person or group may claim, even on the pretext of extraordinary circumstance, any authority or rights other than those expressly conferred on them under the Constitution or by law."* [unofficial translation]
  - c) Article 73, paragraph 1:  
*"The judicial bodies shall be independent in the performance of their duties."* [unofficial translation]
6. **ECUADOR:**
  - a) Article 39, paragraph 2:  
*Every agency of the public authority is accountable and cannot exercise powers other than those specified in this Constitution and other legislation.* [unofficial translation]
  - b) Article 97:  
*"The judicial bodies shall be independent in the performance of their duties."* [unofficial translation]
7. **HONDURAS:**  
Article 4:  
*"It is exercised by three authorities, Legislative, Executive and Judicial, that are complementary, independent and not subordinate one to another."* [unofficial translation]
8. **MEXICO:**  
Article 49:  
*"The Supreme Authority of the Federation is divided, for its exercise, into Legislative, Executive and Judicial functions  
No single person or body may hold two or more of these authorities nor may the Legislative Authority reside in a single individual..."* [unofficial translation]

9. **PARAGUAY:**

Article 3:

*"The Public Authority:**The people exercise public authority by means of the vote.*

*Government is exercised by the Legislative, Executive and Judicial Authorities in a system of separation, balance, coordination and mutual control. None of these authorities may claim for themselves or grant to another authority or to an individual or group extraordinary powers or the total public authority. Dictatorship is outlawed."* [unofficial translation]

10. **PERU:**

Article 43, paragraphs 2 and 3:

*"The State is one and indivisible.*

*The government is unitary, representative and decentralized, and is organized on the principle of separation of powers."* [unofficial translation]

**IV. ARMED FORCES**A) GENERAL LEGAL PRINCIPLES COMMON TO CONSTITUTIONAL PROVISIONS1. **ARGENTINA:**

Article 99:

*"The President of the Nation has the following attributes:**... 12. He is the commander in chief of all the Armed Forces of the nation.*

*...14. The armed forces are at his disposal; he is responsible for their organization and distributes them according to the needs of the Nation."* [unofficial translation]

2. **BOLIVIA:**

a) Article 207:

*"The Armed Forces of the Nation consist of the High Command, the Army, the Air Force and the Navy, whose resources will be determined by the Legislature, at the request of the Executive."* [unofficial translation]

b) Article 210:

*"The Armed Forces of the Nation consist of the High Command, the Army, the Air Force and the Navy, whose resources will be determined by the Legislature, at the request of the Executive."* [unofficial translation]

3. **COSTA RICA:**

Article 12:

*"The army as a permanent institution is proscribed. For the supervision and maintenance of public order, the necessary police forces shall be used.*

*Only by continental agreement or for national defence can military forces be organized; these shall always be subordinate to civilian authority; they cannot deliberate, demonstrate or make public statements, individually or collectively."* [unofficial translation]

4. **CHILE:**

a) Article 32:

*"The President of the Republic has the following special powers:*

*...19. Command the air, sea and land forces, organized them and deploy them according to the requirements of national security;*

*20. In wartime, act as supreme commander of the Armed Forces . . ."*

b) Article 90, paragraph 4:

*“The Armed Forces and Carabineros, as armed bodies, must take orders and not discuss them. The forces reporting to the Ministry of National Defence are professional, hierarchical and disciplined.”* [unofficial translation]

5. **ECUADOR:**

Article 79:

*“The following are powers and duties of the President of the Republic ...*

*ch) Maintain internal order, safeguard the external security of the state and determine national security policy;...*

*g) Exercise supreme authority over the public security force;...*

*j) Call upon the public security force through the appropriate agencies when the security and needs of the public so require;*

*k) Appoint and remove officials of the public security force, subject to the law;*

*l) Take responsibility for war policy . . . “*

6. **GUATEMALA:**

Article 244:

*“Composition, organization and purposes of the Army. The Army of Guatemala is an institution whose purpose is to maintain the independence, sovereignty and honor of Guatemala, its territorial integrity, and internal and external peace and security.*

*It is one and indivisible, essentially professional, apolitical, obedient and not deliberative.*

*It consists of the land, air and sea forces.*

*It is organized hierarchically on the basis of discipline and obedience.”*

## **CONCLUSION**

The material compiled shows that it would be possible to draw up on the basis of current provisions of international law applicable in the Americas a legal document on the meaning of the inter-American juridical obligation for the effective exercise of representative democracy.

This material would consist, on the one hand, of conventional inter-American juridical texts and the international interpretation of them, and on the other hand, of the various national laws showing what the countries unilaterally have understood with respect to the subjects treated in these texts.

Apparently, it would be possible to work in this direction, on the assumption that the obligation of the effective exercise of representative democracy is an autonomous international juridical institution, specific and distinct from other international juridical institutions, such as human rights, elections and peace, including institutions that are basically the subject matter of national legislation such as the multi-party system, the republican form of government, powers of the State, and the armed forces, all of these, however, being closely connected to democracy.

In this regard, the idea is to determine the meaning of democracy as a specific institution, on the understanding that, while it will of course include these other institutions, it will do so in general terms only, and without incorporating all of the components of each one.

### 3. Human rights and biomedicine

During its fifty-seventh regular session in Rio de Janeiro in August 2000, the Inter-American Juridical Committee decided to adopt resolution CJI/RES.18 (LVII-O/00), entitled *Draft legislative guide on assisted fertilization*. In that resolution, it approved the draft and requested the General Secretariat to forward it to member States for their comments or suggestions, to be submitted prior to January 31, 2001. It also included a note of appreciation to Dr. Gerardo Trejos Salas for his important contribution to the study on this topic in the Juridical Committee, and asked him to pursue the study in light of any comments or suggestions made by member States. The resolution and the draft legislative guide are included in the *Annual Report of the Inter-American Juridical Committee* on its activities in 2000.

On September 28, 2000, the Department of International Law submitted the aforesaid draft to member States.

During the fifty-eighth regular session of the Inter-American Juridical Committee in Ottawa in March 2001, Dr. Gerardo Trejos Salas, the rapporteur on the topic, indicated that the subject had been sufficiently discussed. He presented the comments received from the Ecuadorian government on the draft legislative guide on assisted fertilization, to the effect that that country was working on a draft Family Code in the Specialized Standing Committee on Women, Children, Families, and Vulnerable Groups in the National Congress. Dr. Trejos underlined the importance of this initiative, since it would be the first time that a Latin American country would establish a separate family law in a civil code. Finally, he indicated that it was not necessary to adopt a resolution at the present regular session.

The Inter-American Juridical Committee decided to take this item off its agenda at this regular session.

All the same, at the thirty-first regular session of the General Assembly in San José, Costa Rica, in June 2001, the Assembly requested the Inter-American Juridical Committee to continue to study all matters related to human rights and biomedicine, with a view to presenting a report on the status of international law on the subject [AG/RES.1772 (XXXI-O/01)].

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

##### Resolutions

CJI/RES.24 (LVIII-O/01) *Specialized Inter-American Conference on International Private Law*

##### Documents

CJI/doc.74/01 rev.1 *CIDIP-VII and beyond*  
(presented by Drs. Carlos Manuel Vázquez and João Grandino Rodas)

During its fifty-eighth regular session held in Ottawa in March 2001, the Inter-American Juridical Committee adopted resolution CJI/RES.24 (LVIII-O/01), *Specialized Inter-American Conference on Private International Law*, in which it decided to set up a working group made up of Dr. João Grandino Rodas and Dr. Carlos Manuel Vázquez, with a view to presenting a report at the next regular session. The report would propose possible options for furthering the development of international private legal cooperation and relations within the inter-American system. These proposals would then be referred in due time to the relevant organs of the OAS. Moreover, in that resolution, the designated rapporteurs were authorized to request information of any persons or institutions deemed relevant to their efforts to draw up that report, with the support of the General Secretariat.

At that session, with regard to the persons and institutions to consult in conjunction with this report, mention was made of professors specializing in the area, many of whom had already had an opportunity to participate in the Course on International Law and had made specific proposals on issues of international private law during the course. It was also noted that the Joint Meetings with Legal Advisors of Ministries of Foreign Affairs of OAS Member States offered an excellent opportunity to discuss these subjects.

On the paper to be prepared, it was suggested that it should not only meet the needs of the public sector and legal advisors in the Ministries of Foreign Affairs, but that first and foremost it should respond to the requirements of the private sector and commercial governmental sectors. It was also pointed out that the work done by the Inter-American Juridical Committee should reflect the needs of all the countries in the hemisphere, and not just certain regional groups, as has happened previously.

At the thirty-first regular session of the General Assembly (San José, June, 2001), the Assembly asked the Inter-American Juridical Committee to begin consideration of the agenda and themes for furthering the development of international private law in the inter-American system that could be discussed at future CIDIP's, and to submit its proposals at the next Specialized Conference (CIDIP-VI) to be held in Guatemala in November 2001, AG/RES.1772 (XXXI-O/01).

On July 13, 2001, the Department of International Law sent document DDI/doc.07/01, *Replies to the Questionnaire on CIDIP-VI*, to Dr. João Grandino Rodas and Dr. Carlos Manuel Vázquez, the rapporteurs on the topic.

The fifty-ninth regular session of the Inter-American Juridical Committee, held in Rio de Janeiro in August 2001, was attended by Dr. José Luis Siqueiros, a former member and Chairman of the Juridical Committee. He gave a presentation on the subject of the CIDIP's in the Committee.

The Inter-American Juridical Committee also considered document CJI/doc.74/01 rev. 1, *CIDIP-VII and Beyond*, presented by Dr. Carlos Manuel Vázquez and Dr. João Grandino Rodas. In introducing the document, Dr. Vázquez indicated that it had been drafted on the basis of the questionnaire referred to earlier. He said that most of the concerns expressed had to do with the following issues: the fact that so few States had signed and ratified the different inter-American agreements on international private law, although some of those surveyed did not measure the importance of the agreements by that criterion; the possible duplication of effort with other international initiatives, such as UNIDROIT, although some respondents were of the view that regional agreements more easily provided common elements for possible adoption; the approach by CIDIP to efforts to standardize laws by creating model laws; the need for more resources and the possibility of establishing an *ad hoc* secretariat for the CIDIP's in the OAS; and, the relationship between CIDIP and the economic integration process. Dr. Vázquez indicated that the document in question reflected an urgent need to open up the process to nongovernmental groups or entities specializing in the area, and the need to refrain from establishing a specific process of any kind, so that greater flexibility could be exercised in response to the needs felt at any given time. He pointed out that most of the specialists surveyed had said that it was important not to establish a dichotomy between regional and global issues, and he reported that they tended to lean towards producing model laws, although they did recognize the merits of international agreements. Some of the persons surveyed reported that national legislation is determined by domestic needs more than by external pressures or suggested guidelines, and that as a result model laws were very seldom adopted in full, and that it was very difficult to issue model laws that could be inserted in systems as divergent as civil law and common law systems. Finally, Dr. Vázquez reported that all the specialists had stressed the importance of economic and trade matters for future CIDIP's, while some had stated that all aspects of relations among individuals in the broadest sense of the concept should be given consideration.

The rapporteur also suggested that an in-depth study should be devoted to the main theme of CIDIP-VII. He said that the document presented contained a list of possible subjects to be discussed, such as E-commerce.

Some IAJC members suggested that the Committee work on criteria for selecting themes for future CIDIP's. Among others, they referred to regional harmonization in certain areas as part of the progressive development of law, without discarding any theme because it was being analyzed at an international level. Preference should also be given to selection of those topics that most urgently need to be codified, such as issues related to the integration process, trade in goods and services, customs controls, transportation, and the like.

It was also pointed out that there was no contradiction inherent in discussing a topic on a regional level that was also being considered in international spheres. At the

same time, it was said that CIDIP topics often might not be immediately relevant to the political process, and that this is why the necessary steps to further develop them are not taken. It was noted that it is only in response to the political process that CIDIP results can be implemented.

One member of the Inter-American Juridical Committee proposed that CIDIP's serve more as a follow-up mechanism in the following four areas: monitoring of treaties and analysis of the existing pool; achieving regional consensus on the global process and analysis of that process; conflict of laws in the judicial sector of States and an evaluation of the application of rules of conflict; and, teaching private international law.

Finally, the Inter-American Juridical Committee took note of the document presented by the rapporteurs and asked them to pursue it further.

The text of resolution CJI/RES.24 (LVIII-O/01), entitled *Specialized Inter-American Conference on Private International Law*, and of document CJI/doc.74/01 rev. 1, *CIDIP-VII and Beyond*, presented by Dr. Carlos Manuel Vázquez and Dr. João Grandino Rodas, is transcribed below.

**CJI/RES.24 (LVIII-O/01)**

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

THE INTER-AMERICAN JURIDICAL COMMITTEE,

KEEPING IN MIND that the General Assembly, through resolution AG/RES.1393 (XXVI-O/96) resolved to convene the Sixth Specialized Inter-American Conference on Private International Law (CIDIP-VI), and asked the Inter-American Juridical Committee to prepare reports on the subjects approved by the Permanent Council for said conference, and that it considers the conclusions and opinions submitted by the meetings of experts called for that purpose by the Organization;

CONSIDERING that the Sixth Specialized Inter-American Conference on Private International Law (CIDIP-VI) will be held in Guatemala City in November 2001;

CONSIDERING that, at this conference, possible subjects for consideration at a future Specialized Inter-American Conference on Private International Law (CIDIP-VII) may be raised;

TAKING INTO ACCOUNT that the purpose of the Inter-American Juridical Committee, among other things, is the progressive development and codification of international law, as well as the possibility of standardizing legislation if deemed appropriate, in accordance with article 99 of the *Charter of the Organization of American States*;

CONSIDERING that the future development of private international law in the Americas requires a study of the methods, procedures and topics to be considered to ensure the participation of all member States and their different legal systems for the sake of greater cooperation among them,

RESOLVES:

1. To establish a working group consisting of Dr. João Grandino Rodas and Dr. Carlos Manuel Vázquez to submit a report at the next regular sessions of the Inter-American Juridical Committee, proposing possible alternatives for the inter-American system to promote the development of private international juridical relations and cooperation, so that these matters can be raised in due course with the relevant agencies of the Organization.

2. To authorize the designated rapporteurs to request information from those persons and institutions that they wish to consult in preparing the above-mentioned report, with the support of the Office of the Secretary General.

This resolution was unanimously adopted at the session held on 22 March 2001, in the presence of the following members: Drs. Sergio González Gálvez, Kenneth O. Rattray, Carlos Manuel Vázquez, João Grandino Rodas, Jonathan T. Fried, Gerardo Trejos Salas, Eduardo Vío Grossi, and Felipe Paolillo.

**CJI/doc.74/ 01 rev. 1**

**CIDIP-VII AND BEYOND**

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

At the 31<sup>st</sup> Regular Session of the General Assembly held in Costa Rica in June 2001, the General Assembly requested the Inter-American Juridical Committee “to initiate studies for the design of the agenda and topics of the next Inter-American Specialized Conferences on Private International Law (CIDIP) in order to promote the development of private international law in the inter-American system and to present its proposal during the next Specialized Conference (CIDIP-VI) to be held in Guatemala City in November 2001.” (The venue and dates of CIDIP VI have since been changed. It will be held in Washington, D.C. in February of 2002.)

To that end, the Juridical Committee, with the assistance of the Secretariat for Legal Affairs, drafted and distributed a questionnaire soliciting the views of broad spectrum of parties interested in the CIDIP process, including member States, academics, members of the private bar, and officials of other organizations specializing in private international law. The questionnaire posed questions of both a specific and a general nature. The specific questions related to the topics that should be addressed in CIDIP and the process for both choosing topics and for working on the topics after they have been selected. The general questions sought the respondents’ views concerning the approach to private international law harmonization and/or codification best suited to the American region in the 21<sup>st</sup> century. The questionnaire was sent to a large number of recipients in member States, with a request that it be forwarded to other parties who might be interested. The Committee requested responses by the end of July 2001. Despite the short period of time given to the recipients – a little more than a month – a large volume of responses was received. The responses are attached hereto as Appendix I.

This report describes some of the general themes that emerge from the questionnaire responses as well as some of the specific suggestions found in those responses. We also offer some thoughts regarding the topics suggested most often by the respondents as possible subjects of CIDIP-VII.

I. General Themes

The responses expressed a wide range of views about the current state of the CIDIP process and the shape it should take in the future. Some respondents expressed the view

that CIDIP is in a state of crisis.<sup>2</sup> Not all respondents shared this pessimism. Others expressed the view that CIDIP is basically on the right track, and that no major changes were necessary except an increased commitment by the OAS of the resources necessary for the effective execution of its tasks.<sup>3</sup> Nevertheless, for a variety of reasons, we believe that the time is ripe for a thorough, in-depth study of the future of CIDIP and private international law codification or harmonization in this hemisphere. The Inter-American Juridical Committee has, in accordance with the General Assembly's request, "initiated" such a study. For the reasons explained below, we propose that serious consideration should be given to the continuation and deepening of this project through the convening of a group of experts charged with conducting a wide-ranging study of The Role of CIDIP in the Twenty-First Century. We shall first enumerate the reasons why this is a propitious time to embark upon an in-depth study of the CIDIP process, and then we shall offer a few general suggestions about who should conduct the study and how.

#### A. Why Now?

##### 1. Declining Level of Ratifications

The primary concern that has been expressed about the current state of CIDIP relates to the comparatively low level of ratifications of recent CIDIP instruments.<sup>4</sup> Early CIDIP conventions received a significant number of ratifications. For example, two of the early conventions received 17 ratifications, which is impressive by any standard. By contrast, some of the recent conventions have received less than two ratifications.<sup>5</sup> We recognize that the low level of ratifications of recent CIDIP instruments does not necessarily reflect a lack of influence. Some States that have failed to ratify CIDIP instruments have nevertheless used those instruments as models for domestic legislation on the pertinent subject.<sup>6</sup> Nevertheless, the significant drop in ratifications is one sign that the time may be right for a thorough study of the CIDIP process.

##### 2. CIDIP-VI's Shift to Model Laws

The problem of decreasing ratifications may well already have been addressed through a change implemented in CIDIP-VI. In contrast to previous CIDIPs, which have elaborated draft conventions on traditional subjects of private international law, such as jurisdiction, choice of law, and enforcement of judgments, CIDIP-VI has focused on producing model laws on substantive topics of private (commercial) law. CIDIP-VI will consider for adoption a model law on secured financing as well as a model law on draft bill of lading for the carriage of goods by road. Some respondents praised this recent focus on model laws, while other respondents lamented it. Most respondents, however, observed that it was too soon to tell whether this was a positive development. One of the principal challenges to CIDIP is to decide whether it should remain focused on treaties addressing conflict of laws, or whether it should deal in greater depth with particular substantive topics

<sup>2</sup> Response to OAS IJC CIDIP Questionnaire by Eduardo Vescovi of Uruguay, at 1. All responses to the CIDIP Questionnaire shall be hereinafter cited as "Response of . . .".

<sup>3</sup> Response of Harold S. Burman, U.S. Department of State.

<sup>4</sup> See, e.g., Response of Professor Juan Fernando Gamboa Bernante of Colombia and Response of Professors Martha Szeimblum, Eduardo Tellechea Bergman and Cecilia Fresnedo of Uruguay.

<sup>5</sup> The OAS web site ([www.oas.org](http://www.oas.org)) shows the following data for ratification of CIDIP conventions: CIDIP-I – 1975 – Panama: Convention B-33 (14 ratifications), B-34 (9 ratifications), B-35 (17 ratifications), B-36 (17 ratifications), B-37 (15 ratifications), B-37 (15 ratifications), B-38 (16 ratifications); CIDIP II – 1979 – Uruguay: B-39 (8 ratifications), B-40 (8 ratifications), B-41 (10 ratifications), B-42 (7 ratifications), B-43 (12 ratifications), B-44 (6 ratifications), B-45 (10 ratifications), B-46 (13 ratifications); CIDIP III – 1984 – Bolivia: B-48 (4 ratifications), B-49 (3 ratifications), B-50 (1 ratification), B-51 (4 ratifications); CIDIP IV – Uruguay – 1989: B-53 (7 ratifications), B-54 (9 ratifications), B-55 (0 ratification); CIDIP V – Mexico – 1994: B-56 (2 ratifications), B-57 (7 ratifications).

<sup>6</sup> See Response of Professor Diego P. Fernández Arroyo of Spain, at 5 (citing the 1998 Venezuelan legislation on private international law as an example of the influence of CIDIP on domestic laws in Latin American nations).

through the elaboration of model laws. A thorough study of CIDIP after the conclusion of CIDIP-VI will permit a preliminary assessment of this question.

### 3. Duplication of Efforts

Concern has also been expressed regarding the duplication of effort that currently characterizes the field of private international law.<sup>7</sup> At the global level, CIDIP competes with the work of organizations such as UNCITRAL, UNIDROIT, and the Hague Conference. Some respondents lamented the fact that the nations of Latin America tend not to participate in the work of the global organizations, preferring instead to devote their efforts to the CIDIP process.<sup>8</sup> Because resources are limited, many States in the region are understandably selective in their participation in harmonization efforts. One respondent expressed a preference for discontinuing the CIDIP process, thus making it more likely that Latin American States would participate in the global processes. Alternatively, respondents proposed that the CIDIP process devote its efforts to promoting the ratification by American States of the instruments adopted in the global *fora*, or to coordinating the American position for joint presentation at these global *fora*.<sup>9</sup>

### 4. Regionalism vs. Globalism

Duplication of effort is of course something to be avoided.<sup>10</sup> However, the preference of American States to participate in the CIDIP process may reflect their view that this process is more directly responsive to their needs than the global processes, or that they have more of a voice in the regional process.<sup>11</sup> Moreover, as noted by some respondents, regional attention to private international law questions that have already been addressed at the global level is not necessarily “duplication.” Because there are fewer legal systems at the regional level than at the global level, and because the legal systems within any given region are less diverse, it may be possible to tackle a problem in greater depth at the regional level than at the global level. One respondent cites as an example of this phenomenon the work on secured financing being done in the course of CIDIP-VI. According to this respondent, while similar projects undertaken by UNCITRAL and UNIDROIT are “forward-looking and reflect modern trends in commercial finance, both are at the same time more narrow than the draft Inter-American model law which will be considered for . . . adoption at CIDIP-VI.”<sup>12</sup>

The possibility of achieving a more useful, more far-reaching product at the regional level has encouraged the Europeans to address regionally many of the same matters that

<sup>7</sup> See, e.g., Response of Professor Alejandro M. Garro of the U.S. and Response of Szeimblum et al.

<sup>8</sup> See, e.g., Response of Professor Carlos Eduardo Boucault of France, at 4 (asserting that “there is a distancing between countries which adhere to CIDIP and organizations such as UNCITRAL and UNIDROIT.”) (in translation).

<sup>9</sup> See Response of Garro, at 3 (stating that there should be Inter-American “representation” before the global bodies).

<sup>10</sup> Some respondents indicated that duplication of effort is not a problem because competition between regional and global entities engaged in the same activity is more likely to produce a better end product. See, e.g., Response of Gamboa Bernante, at 8. While this may be true in other contexts, however, in the field of harmonization of laws, the production of multiple products is counterproductive. See, e.g., Response of Nathalie Sutter of UNIDROIT, at 1 (stating that “[d]uplication of work should certainly be avoided.”); see also Diego P. Fernández Arroyo, *Derecho Internacional Privado Inter-Americano: Evolución y Perspectivas*, as published in CURSO DE DERECHO INTERNACIONAL DE LA OEA, August 1999, 189, 204 (hereinafter “DIPR”) (citing Mexican and United States reluctance to consider civil liability for cross-border contamination as a CIDIP topic because this subject is already covered by a Hague Conference).

<sup>11</sup> See, e.g., Response of Arroyo, at 4; see also DIPR, at 215 (stating that “Latin American member States tend to view the CIDIP as more ‘theirs’ than any other form of private international law unification . . . All member States in the OAS have voice and vote, while the participation of Latin American countries in other fora, such as The Hague Conference, UNIDROIT and UNCITRAL, is more limited.”) (in translation); Response of Boucault, at 4 (asserting that “there is a distancing between countries which adhere to CIDIP and organizations such as UNCITRAL and UNIDROIT.”) (in translation); Response of Vivian Matteo of Uruguay, at 2 (asserting that “the OAS is in much better position than UNIDROIT to represent the interests of the states, because representatives of member States attend CIDIP conventions.”) (in translation).

<sup>12</sup> Response of Burman, at 4.

have already been addressed globally. It has been suggested that we in the Americas should not be hesitant to do the same.<sup>13</sup> We think that the appropriate relation between CIDIP and the work being done by other regional and global organizations working in the field of private international law is a subject worthy of more systematic study.

#### 5. Increased Economic Integration in the Region

The regional effort to harmonize private international law in Europe has no doubt been spurred by the increasing economic integration of that continent. Numerous commentators have noted that increased economic integration brings with it an increased need for harmonization of private law or other mechanisms for addressing conflicts in regulation.<sup>14</sup> If so, then CIDIP may be more important now than ever. Numerous subregional free trade areas have been established in this hemisphere, including the North America Free Trade Area (NAFTA), Mercosur, the Andean Pact, the Central American Common Market (CACM), the Caribbean Community (Caricom), and the Group of Three. More importantly, the continent has embarked in an ambitious effort to create a hemispheric free trade area, the Free Trade Area of the Americas (FTAA), by the year 2005.

Some respondents expressed the view that the FTAA would make a continuation and even an intensification of the CIDIP process indispensable.<sup>15</sup> At the same time, however, the advent of economic integration in the hemisphere increases the need for a reexamination of the existing approach to the codification and harmonization of private international law. The approach to private international law codification and/or private law harmonization that is most appropriate in the context of a hemispheric free trade area may well be very different from the approach that has prevailed until now.

#### 6. The Need to Formalize CIDIP's Procedures

A number of respondents saw a need for formalization of CIDIP's procedures, beginning with the preparation of preliminary studies and the choice of topics and culminating in the CIDIP conferences themselves. Many respondents proposed that the Inter-American Juridical Committee should play a central role in a more formalized CIDIP process. Others suggested the establishment of a permanent CIDIP secretariat. Numerous respondents expressed the view that the CIDIP process requires a greater commitment of resources. A detailed proposal for formalizing and perhaps institutionalizing the CIDIP process should be a central part of the in-depth study of the future of CIDIP.

For all of the foregoing reasons, we conclude that this is a propitious time for a thorough study of "The Role of CIDIP in the Twenty-First Century." We propose that the conduct of this study be a priority item for CIDIP-VII.

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<sup>13</sup> See Response of Arroyo, at 4 (indicating that participants in CIDIP seem to have a "complex" about addressing regionally matters that have been addressed globally). Cf. Response of Carmen I. Claramount, Foreign Affairs Ministry of Costa Rica, at 3 (calling for CIDIPs to "reinforce and modify" existing global instruments).

<sup>14</sup> See, e.g., Craig L. Jackson, *The Free Trade Agreement of the Americas and Legal Harmonization*, in ASIL NEWSLETTER (1996); Matthew W. Barrier, *Regionalization: the Choice of a New Millenium*, 9 CURRENTS INT'L TRADE L. J. 25 (2000) (stating that "harmonization and approximation of laws is a natural by-product of regional integration."); see also Responses of Professor Adriana Dreyzin of Argentina, Professor Claudia Lima Marques of Brazil, Hermes Navarro del Valle of Costa Rica, Horacio Bernardes Neto of Brazil, Professor Mirta Consuelo García of Argentina, Victor Alvarez de la Torre of Mexico, Arroyo, and Szeimblum et al.

<sup>15</sup> See, e.g., Responses of Dreyzin, Arroyo, and Szumblum et al.

## B. Who Should Conduct the Study and How

The proposed study should be carried out by a small group of experts, ideally consisting of no more than three persons. The members of the working group should be selected by the Inter-American Juridical Committee, and should include jurists broadly representative of the legal traditions of the Americas. This group should perform the study in close collaboration with the Inter-American Juridical Committee. The study, when completed, should be submitted to the Inter-American Juridical Committee, which should in turn review it and transmit it, with suitable comments and recommendations, to the Permanent Council.

The IAJC is the appropriate organ to supervise the conduct of this study because it is the organ charged by the *Charter* with the responsibility “to promote the progressive development and the codification of international law; and to study juridical problems relating to the integration of the developing countries of the Hemisphere and, insofar as may appear desirable, the possibility of attaining uniformity in their legislation.”<sup>16</sup> A substantial majority of those who responded to the questionnaire expressed the view that the Inter-American Juridical Committee should play the central role in determining the topics to be addressed in the CIDIP process, and a large number of respondents believed that the Committee should also play a central role in directing the work on the topics once selected.<sup>17</sup> As numerous respondents noted, however, the Committee will need the assistance of outside experts to conduct this study. The field of private international law codification and private law harmonization has become increasingly specialized in recent years, and the increasing links to economic integration have already been noted. Traditional “specialists” in private international law tend to be generalists. For this reason, it is essential to convene a group of outside experts that unites the breadth and depth of expertise necessary to perform the study.

Designing the study will of course be the first item on the agenda of the group of experts. This is not the place to explore the details of how the project should be carried out. We do recommend, however, that serious consideration be given to the suggestion of one respondent that a series of subregional meetings (*jornadas*) be organized, dedicated to broad-based discussions of the future of CIDIP.<sup>18</sup> It is essential that the study take into account the views of a broad *spectrum* of interested parties. Subregional *jornadas* would provide an appropriate mechanism for a thorough, hemisphere-wide airing and discussion of the question of CIDIP’s future.

## II. Possible Topics for CIDIP-VII

Recipients of the questionnaire were asked their views on which topics they regarded as the most pressing and appropriate for treatment in CIDIP-VII. A large number of topics were proposed. Attached as Appendix II is a list of the topics suggested by respondents to the questionnaire, ranked according to the frequency with which they were cited. The most frequently cited topic was electronic commerce. Other topics frequently cited in the responses include: (a) migration and free flow of persons; (b) arbitration and dispute resolution; (c) consumer protection; and (d) the protection of minors. [Another proposed topic that we think deserves consideration for possible treatment in CIDIP-VII is that of transnational insolvency.] We recommend that topics mentioned above be given priority consideration in CIDIP-VI as possible topics for CIDIP-VII.

With few exceptions, the respondents did not explain their reasons for believing that the topics they proposed were appropriate for treatment through the CIDIP process at this time. This forbearance on the part of the respondents is due, no doubt, to their recognition that the selection of topics for CIDIP-VII will at all events require substantial preparatory work

<sup>16</sup> OAS Charter, art. 99.

<sup>17</sup> See, e.g., Responses of Analia Consolo of Argentina and Mauricio Herdocia Sacasa of the United Nations International Law Commission (UNILC).

<sup>18</sup> Response of Arroyo, at 1.

by the Secretariat for Legal Affairs and/or outside experts on the topics being considered, including a collection of data concerning the internal laws of the member States on the various topics and the preparation of analyses of prior efforts to address the issue internationally and of the feasibility of successfully addressing the topic in this region. It will also require a determination of the political interest of the member States in addressing the topic through CIDIP. For these reasons, it is impossible to do more at this stage than put forward a number of general topics that seem worthy of further consideration as possible subjects to be addressed in CIDIP-VII. These topics should be discussed at CIDIP-VI, and those that seem most pressing and most appropriate for treatment at a regional level should then be the subject of further preparatory work before being approved definitively as the topics to be treated in CIDIP-VII.

For the purpose of facilitating discussion, we offer a few thoughts on each of the topics listed above:

**Electronic commerce.** E-commerce is of course a very recent phenomenon, made possible by the recent and rapid development of the Internet. The novelty of the subject means that few States have developed regulations specifically for this type of commerce. Most States today regulate e-commerce through regulations developed for more conventional forms of commerce. The first question to be considered is whether e-commerce is a sufficiently different form of commerce that it deserves distinct regulatory treatment. Our respondents' proposal of e-commerce as a topic for CIDIP-VII that they believe this subject does deserve distinct treatment. In the light of the substantial work that has already been done on this topic at both the global and regional levels, we are inclined to agree.

The next question is whether the subject deserves to be treated at the regional level. As noted, few member States have developed regulations dealing specifically with e-commerce. It may well be preferable to allow the member States to experiment with domestic regulation, and to address the subject regionally only after the states have acquired a bit of experience with domestic regulation. On the other hand, because e-commerce is very likely to cross national borders, it seems likely that regional treatment will be desirable sooner or later. It may thus be preferable to address this novel topic internationally before a wide variety of approaches to the subject emerges at the national level. Once States begin to develop their own approaches to the subject, it may become more difficult to reach agreement on a uniform regional approach.

An important related question is whether it will be possible to reach agreement on how to regulate this topic. There are those who take the position that e-commerce should be left unregulated to the extent possible -- that regulation will hinder innovation in this still emerging area. On the other hand, some regulation is unavoidable: fraud and other deceptive practices, for example, cannot be left unregulated. The form and extent of appropriate regulation in this area is of course the key question that would be addressed in the course of the CIDIP process. But if there exists too wide a range of views on appropriate approaches to regulating e-commerce, this may suggest that it is too soon to begin an effort to establish a uniform regional approach to this issue. Even if this were the case, however, it may be possible to agree to prohibit certain approaches to the topic, thus limiting permissible regulation to a narrower range. It may also be possible and desirable to pursue the more modest goal of agreeing on the applicable law and approaches to jurisdiction with respect to disputes involving e-commerce.

Aspects of e-commerce have been addressed at both the global and regional levels. UNCITRAL has a Working Group on E-Commerce, which so far has produced a Model Law on Electronic Commerce (1996)<sup>19</sup> and a Model Law on Electronic Signatures (2001).<sup>20</sup> Legislation based on the UNCITRAL Model Law on Electronic Commerce has been adopted

<sup>19</sup> Available at [www.uncitral.org/english/texts/electom/ml-elecsig-e.pdf](http://www.uncitral.org/english/texts/electom/ml-elecsig-e.pdf).

<sup>20</sup> Available at [www.uncitral.org/english/texts/electcom/ml-elecomm.htm](http://www.uncitral.org/english/texts/electcom/ml-elecomm.htm).

in Australia, Bermuda, Colombia, France, Hong Kong Special Administrative Region of China, Ireland, Philippines, Republic of Korea, Singapore, Slovenia, the States of Jersey (Crown Dependency of the United Kingdom of Great Britain and Northern Ireland) and, within the United States of America, Illinois. Uniform legislation influenced by the Model Law and the principles on which it is based has been prepared in Canada (Uniform Electronic Commerce Act, adopted in 1999 by the Uniform Law Conference of Canada) and in the United States (Uniform Electronic Transactions Act, adopted in 1999 by the National Conference of Commissioners on Uniform State Law) and enacted as law by a number of jurisdictions in those countries. The UNCITRAL Working Group has also produced a “preliminary draft convention on [international] contracts concluded or evidenced by data messages,”<sup>21</sup> and its agenda includes as well (a) the identification and elimination of barriers to e-commerce present in existing treaties, (b) dematerialization of documents of title, (c) and electronic dispute resolution.

At the regional level, the European Union has issued Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the international market, as well as Directive 1999/93/EC of December 13, 1999 on Electronic Signatures.

In the view of the Juridical Committee, this is clearly a topic that deserves priority consideration for treatment at a future CIDIP. We recommend that this topic be the subject of further preparatory work to determine if now is the time to treat it at the inter-American level.

**Consumer Protection.** The topic of consumer protection overlaps significantly with that of e-commerce, but it is in some respects narrower and in some respects broader. It is narrower because not all e-commerce involves consumers. It is broader because there is a need for consumer protection with respect to non-electronic as well as electronic commerce. The need for transnational consumer protection is particularly acute with respect to electronic commerce, however, because “the online environment provides unprecedented opportunities for fraudulent, dishonest or unfair businesses to target consumers from a different jurisdiction and evade enforcement authorities.”<sup>22</sup> Since e-commerce has been suggested as a separate topic, one issue to be considered is whether consumer protection in the field of e-commerce should be addressed as part of the e-commerce topic or the consumer protection topic.

Harmonization of consumer protection rules can be expected to increase transnational commerce in consumer goods. Wide discrepancies in national consumer protection laws can be expected to produce a lack of consumer confidence to participate in cross-border transactions, which in turn deters small and medium-sized businesses from offering their products abroad. It is for this reason that the European Union has given priority to this topic. Even though there exist numerous directives of the European Parliament and Commission relating to various aspects of consumer protection, the Commission has perceived a need for more comprehensive and systematic treatment of the subject. It has accordingly undertaken several studies of the subject, and it has issued a Green Paper on European Union Consumer Protection. The Green Paper is a consultation document that outlines possible options for consumer protection in the EU and seeks comments from interested parties as to the desirability of pursuing the subject and the possible directions for pursuing it. The Green Paper requests that comments be submitted by January 15, 2002.

In the Western Hemisphere, a model law on consumer protection has been drafted by Consumers International’s Regional Office for Latin America.<sup>23</sup> The first version of the model law was issued in 1987, and an updated version in 1994. The model law was drafted “in a

<sup>21</sup> Available at <http://www.uncitral.org/en-index.htm>.

<sup>22</sup> Commission of the European Communities, GREEN PAPER on European Union Consumer Protection (2.10.2001).

<sup>23</sup> Consumers International, “Roads to Consumer Protection,” available at <http://www.consumersinternational.org/rights99/section1.html>

consultation process with experts convoked under the CI umbrella – and not by governments.”<sup>24</sup> According to Consumers International, the model law “has been used for drawing up national legislation in 14 Latin American countries (including Brazil, Argentina, Ecuador, Peru, Mexico, Nicaragua, Costa Rica, and Chile).”<sup>25</sup> Nevertheless, Consumers International believes that additional work is necessary because “these national laws do not necessarily include all the provisions of the model law,” and “[o]ther countries, such as Bolivia, Uruguay and Guatemala, still lack specific consumer protection legislation.”<sup>26</sup> This view accords with that of some of our respondents, who observed that most Latin American countries lack laws protecting consumers in the areas of accidents caused by defective products, injuries suffered by tourists, and marketing fraud.<sup>27</sup>

At the subregional level, there have been attempts to address consumer protection within Mercosur. Consumer Defence Regulations were developed over four years by a technical commission of Mercosur. They were to be signed in December 1997, but they were opposed by consumer groups in Brazil, who believed that the regulations would have weakened consumer protection in that country, and the regulations were not adopted when the Brazilian delegation refused to sign them. The technical commission then abandoned the idea of developing a comprehensive text and instead pursued the harmonization of specific aspects of consumer protection.

**Migration and Free Flow of Persons.** This is a topic that appears to extend well beyond the scope of private international law and into the realm of public international law. Determining who can enter a country’s territory and under what circumstances has traditionally been considered among the most basic attributes of sovereignty. On the other hand, reducing restrictions on immigration and free flow of persons often goes hand in hand with increasing economic integration. The increasing economic integration of the hemisphere may thus warrant a focus on this topic. However, because of the link to the ongoing FTAA negotiations, and because this topic extends well beyond the realm of private international law as traditionally understood, we recommend that the advisability of addressing this topic through CIDIP be considered as part of the broader study of the future of CIDIP proposed in Part I of this report.

**Arbitration and Dispute Resolution.** This topic has of course been addressed at the global level through the New York Convention.<sup>28</sup> In addition UNCITRAL has done much work in this field. The UNCITRAL Arbitration Rules are widely used. UNCITRAL’s Model Law on Commercial Arbitration has been incorporated into the domestic law of numerous states. The UNCITRAL Working Group on Arbitration is studying adherence to the model law. Other priority items listed on its September 20, 2001 agenda include drafting uniform rules on the issues of (1) conciliation, (2) requirement of a written form for the arbitration agreement, (3) enforceability of interim measures of protection, and (4) enforcement of an award that has been set aside in the State of origin.

At the regional level, aspects of this topic have been addressed through Inter-American Convention on International Commercial Arbitration<sup>29</sup> adopted at CIDIP-I now having 17 ratifications, as well as the Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards<sup>30</sup> adopted at CIDIP-II having 10 ratifications.

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<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Response of Lima Marques, at 1.

<sup>28</sup> U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”), Jun. 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

<sup>29</sup> Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 14 I.L.M. 336 (1975).

<sup>30</sup> Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, 18 I.L.M.1224 (1979).

The respondents who explained their interest in this topic appeared interested primarily in dispute settlement related to free trade agreements and/or the resolution of investment disputes between private companies and the state.<sup>31</sup> While further discussion may reveal the need to address this topic now, it may be preferable to defer this topic until the FTAA negotiations are further along.

**Protection of Minors.** At the global level, aspects of this topic have been addressed in the Hague Convention Concerning International Child Abduction,<sup>32</sup> Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Minors,<sup>33</sup> the 1993 Hague Inter-country Adoption Convention, the Hague Maintenance Obligations Conventions and the New York Convention of 10 June 1956 on the Recovery Abroad of Maintenance.

In the Americas, aspects of the topic have been addressed in the Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors<sup>34</sup> adopted at CIDIP-III and now having 4 ratifications; the Inter-American Convention on the International Return of Children<sup>35</sup> adopted at CIDIP-IV and now having 7 ratifications; the Inter-American Convention on Support Obligations<sup>36</sup> adopted at CIDIP-IV and now having 10 ratifications; and the Inter-American Convention on International Traffic in Minors<sup>37</sup> adopted at CIDIP-V and now having 9 ratifications. Respondents who proposed this topic identified family relations, patrimony, custody, and visitation as issues that could be addressed.<sup>38</sup>

## 5. Preparations for the commemoration of the centennial of the Inter-American Juridical Committee

### Resolution

CJI/RES.26 (LVIII-O/01) *Preparing to commemorate the centenary of the Inter-American Juridical Committee*

During its fifty-eighth regular session, held in Ottawa in March 2001, the Inter-American Juridical Committee adopted resolution CJI/RES.26 (LVIII-O/01), *Preparing to commemorate the centenary of the Inter-American Juridical Committee*. At the same time, the Juridical Committee submitted a series of requests to the General Secretariat, including a request to consider the resources to be made available to implement the Commemoration Program presented, and a request for information on the program for celebration of the centennial of The Hague Peace Conferences and the centennial of the United Nations International Law Commission, for reference purposes. It was pointed out that the celebrations were organized around two key themes which were selected for the conferences, and that this model could be followed by the Committee. The text of the resolution is transcribed below.

<sup>31</sup> See, e.g., Response of Professor Francisco Orrego Vicuña of Chile.

<sup>32</sup> Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 19 I.L.M. 1501 (1980).

<sup>33</sup> Oct. 19, 1996, 35 I.L.M. 1391 (1996).

<sup>34</sup> Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, May 24, 1984, 24 I.L.M. 460 (1984).

<sup>35</sup> Inter-American Convention on the International Return of Children, Jul. 15, 1989, 29 I.L.M. 63 (1990).

<sup>36</sup> Inter-American Convention on Support Obligations, Jul. 15, 1989, 29 I.L.M. 73 (1990).

<sup>37</sup> Inter-American Convention on International Traffic in Minors, Mar. 18, 1994, 33 I.L.M. 721 (1994).

<sup>38</sup> Response of Tatiana B. de Maekelt of Venezuela.

**CJI/RES.26 (LVIII-O/01)****PREPARING TO COMMEMORATE THE CENTENARY  
OF THE INTER-AMERICAN JURIDICAL COMMITTEE**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING:

That, as the oldest agency of the inter-American system, having been in continuous existence since 23 August 1906, the Juridical Committee adopted resolution CJI/RES.II-19/96, *Preparation for the centenary of the Inter-American Juridical Committee*, declaring that date its anniversary and instructing the Chair and Vice Chair, with the help of the Secretariat for Legal Affairs of the Organization, to prepare a program proposal for commemorating its centenary in 2006; and

The proposals made during these regular sessions by the rapporteur on this topic, Dr. Eduardo Vío Grossi;

RESOLVES:

1. To carry out the general guidelines of the program to commemorate the centenary of the Inter-American Juridical Committee as indicated below:
  - a) The main thrust of the program must be to establish a process of analysis and reflection, in which the other agencies of the Organization of American States also participate actively, as well as all those institutions involved with international law, be it at the inter-American or global level.
  - b) The objectives of the program will be to analyze:
    - i. the best way to strengthen respect for and development of international law in the inter-American system;
    - ii. the contribution of inter-American law and international law in general;
    - iii. the work of the Inter-American Juridical Committee in relation to the previously mentioned topics.
  - c) The program will have three stages: preparation, implementation and culmination.
  - d) The preparatory stage, which runs from 2001 to 2003, consists of the following steps:
    - i. establish an inter-American network to coordinate studies of international law (known by its Spanish acronym RICEDI) with universities in the hemisphere signing an agreement with the Inter-American Juridical Committee in which they agree to share information of interest, prepare reports on topics on the IAJC's agenda, help present the annual course on international law given by the IAJC, and participate in other events that it organizes;
    - ii. prepare a book to be published for the centenary; and
    - iii. hold a competition to design and produce a commemorative centennial poster for the Inter-American Juridical Committee.
  - e) The implementation stage, in 2004 and 2005, includes the following steps:

- i. hold the first full meeting of RICEDI, at which all members will determine its organization and plan of action, particularly as regards commemorating the centenary of the Inter-American Juridical Committee;
  - ii. hold a joint meeting of the Inter-American Juridical Committee with advisers, counselors or legal directors of the Ministries of Foreign Affairs of Member States of the Organization of American States, and of the other international organizations in the inter-American system, at which to discuss, among other subjects, those mentioned in paragraph b);
  - iii. printing and distribution of the poster described above,
  - iv. visits by representatives of the Inter-American Juridical Committee to explain commemoration plans and issue invitations to the following institutions:
    - International Court of Justice;
    - United Nations International Law Commission;
    - Sixth Committee of the United Nations General Assembly;
    - Afro-Asian Legal Advisory Committee;
    - Inter-American Development Bank (IDB);
    - Latin American Integration Association (ALADI);
    - Latin American Economic System (SELA);
    - Caribbean Community (CARICOM);
    - Southern Common Market (MERCOSUR);
    - Andean Community of Nations (Andean Pact);
    - Inter-American Court of Human Rights;
    - Inter-American Commission on Human Rights;
    - Inter-American Institute of Human Rights, and
    - Americas Center for Justice Studies.
  - v. prepare the declaration of the Inter-American Juridical Committee on the topics indicated in paragraph b).
- f) The final stage, in 2006, will take place in Rio de Janeiro in August of that year and will involve the following steps:
- i. the Course on International Law of the Inter-American Juridical Committee, which on this special occasion will cover the topics mentioned in paragraph b) and will be attended by two students from each OAS member State;
  - ii. the second full meeting of RICEDI;
  - iii. on the same day and at the same time, the joint meeting of advisers, counselors and legal directors of the Ministries of Foreign Affairs of the OAS Member States and of other international organizations in the inter-American system;
  - iv. to the extent possible, the international seminar on the Inter-American Juridical Committee will include the highest authorities of the OAS, Brazil, the State of Rio de Janeiro, the City of Rio de Janeiro and the institutions mentioned in the previous paragraph, along with the advisers, counselors and legal directors of the Ministries of Foreign Affairs of the OAS member States and of the institutions mentioned, representatives of RICEDI members, and teachers and students from the Course on International Law, and
  - v. the Inter-American Juridical Committee will then hold a formal meeting, to which the aforementioned persons will be invited.
- g) In the culmination stage and especially at the event just mentioned:
- i. the commemorative book will be distributed;
  - ii. tribute will be paid to jurists in the hemisphere, including those who have passed away, who, in the opinion of the Inter-American Juridical Committee,

- have made a significant contribution to international law in the Americas; they will be awarded honorary diplomas,
- iii. the Declaration of the Inter-American Juridical Committee on the topics indicated in paragraph b will be signed.

2. The Chair and Vice Chair will be asked to intervene with the appropriate authorities to obtain funding for the program covered in this resolution, and therefore to present at each of the coming regular sessions an increasingly detailed version of the program to commemorate the centenary of the Inter-American Juridical Committee, all in collaboration with the Secretariat for Legal Affairs.

This resolution was unanimously adopted at the session held on 22 March 2001, in the presence of the following members: Drs. Sergio González Gálvez, Kenneth O. Rattray, Carlos Manuel Vázquez, João Grandino Rodas, Jonathan T. Fried, Gerardo Trejos Salas, Eduardo Vío Grossi and Felipe Paolillo.

At the General Assembly's thirty-first regular session in San José, June, 2001, the Inter-American Juridical Committee was asked to prepare a program of activities, publications, and other events for the celebration of its centennial, and to include that program in its next annual report to the General Assembly in 2001. It was further requested that said program include the possibility of drafting a proposed declaration on the role of the Inter-American Juridical Committee in the development of inter-American law, for its timely consideration by the Assembly. Finally, the Assembly requested that, for the year 2006, the Inter-American Juridical Committee make "the contributions of the Inter-American Juridical Committee to the development of international law" the central theme of the course on international law held in August every year in Rio de Janeiro [AG/RES.1773 (XXXI-O/01)].

At its fifty-ninth regular session in August 2001 in Rio de Janeiro, the Inter-American Juridical Committee asked its Chairman to send a letter to former members announcing the upcoming celebration of the Committee's centennial, explaining the Committee's interest in having them participate in the activities organized to celebrate it, and forwarding certain basic IAJC documents to them. It also decided to set up a working group for this purpose, to be composed of Drs. Eduardo Vío Grossi, Orlando Rebagliati and Felipe Paolillo.

## 6. The legal dimensions of integration and international trade: competition law in the Americas

### Document

CJI/doc.78/01 *International regulations on competition*  
(presented by Dr. João Grandino Rodas)

During its fifty-eighth regular session in Ottawa in March 2001, the Inter-American Juridical Committee received a visit from Dominique Burlone and Gwilym Allen, both deputy commissioners of the Office on Competition in the Canadian Ministry of Industry. They indicated that, in view of the variety of the experiences of the countries of the Americas in the international integration process, the contribution that the Inter-American Juridical Committee could make to the process would be to prepare recommendations on how to best meet the challenges presented by competition law, taking into account these factors and new legal developments and initiatives in international forums such as the FTAA, WTO, and others.

At the thirty-first regular session of the General Assembly in San José, Costa Rica, in June 2001, the Inter-American Juridical Committee was asked to continue its work in this area. For the time being, the work would be limited to competition law and the various types of protectionism in the Americas. In this endeavor, the Juridical Committee would conduct a preliminary comparative analysis of the prevailing laws and regulations on competition or protection in member States, so that it could include a document on the subject in its next annual report, taking into account the work already done by the Organization and other international institutions [AG/RES.1772 (XXXI-O/01)].

On May 25, 2001, the Department of International Law sent the members of the Inter-American Juridical Committee document CP/doc.3466/01, *Report of the Permanent Council and CEPCIDI to the General Assembly, in compliance with resolution AG/RES.1720 (XXX-O/00) "Trade and Integration in the Americas"*.

During the fifty-ninth regular session of the Inter-American Juridical Committee, held in August 2001 in Rio de Janeiro, Dr. João Grandino Rodas, the rapporteur on the subject, presented document CJI/doc.78/01, *International regulation on competition law*. The rapporteur stated that the international aspects of this issue could not be disregarded. He indicated that there are various cooperation agreements on the subject, which are of a traditional type, similar to agreements on judicial cooperation. He further reported that there is a series of regional agreements in the European Union and to some extent in MERCOSUR, but none applicable to all the States in that group.

Dr. Grandino Rodas said that in view of the large number of international laws on protection of competition, they should be divided into bilateral cooperation agreements, regional laws, plurilateral laws, and multilateral laws in defense of competition, for the purpose of studying them. The great potential for conflict as a result of extraterritorial application of competition law and the fact that national laws to defend competition have proven incapable of effectively prohibiting and sanctioning international anti-competitive practices are the major reasons why we need international laws like these.

The rapporteur indicated that it would be useful to determine to what extent the Inter-American Juridical Committee could assist in elaborating or standardizing these rules governing competition in the hemisphere, with a view to defining the subject and completing the study by the August 2002 session.

One of the members of the Inter-American Juridical Committee underlined the importance of this issue in the Caribbean. He said that Jamaica is the only country that has legislation on competition, and reported that a meeting was held a short time ago in Antigua and Barbuda to study a preliminary draft on the subject in CARICOM.

Finally, the Inter-American Juridical Committee decided to modify the rapporteur's topic so that it would focus on international rules pertaining to competition law in the hemisphere, including domestic laws of States in the region. The rapporteur asked the General Secretariat to obtain this information so that it could be included in the report. The document to be produced will be for information purposes, and it will be sent by the rapporteurs to the Permanent Council as a basic document, seeking guidance as to what the Juridical Committee's future work in this area should be.

The document presented by the rapporteur, Dr. João Grandino Rodas, is presented below:

**CJI/doc.78/01**

**INTERNATIONAL REGULATIONS ON COMPETITION**

(presented by Dr. João Grandino Rodas)

1. Introduction

In August 2000, the document *Subsidies for a proposal to include the Competition Law as a theme to be studied by the Inter-American Juridical Committee* as presented. The working document herein intends to further the study so far undertaken, focusing on the international aspects of competition and outlining a wide range of international rules on the matter.

Given the large number of international regulations on competition, their analysis will be based on the premise that they may be classified in four major subdivisions: bilateral cooperation agreements, regional regulations, plurilateral regulations and multilateral regulations on competition. In fact, although this international regulation on competition has its own characteristics, the structure, number of anticompetitive practices that it seeks to combat<sup>1</sup> and the purpose of the regulations found in each subdivision tend to be the same<sup>2</sup>.

There are, however, two elements common to all international regulations on competition. They are precisely the reasons that explain the need for such regulations to exist, as follows: 1) the strong possibility of disputes arising from extraterritorial application of the competition law and 2) the current inability of national regulations on competition to

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<sup>1</sup> In general, the laws on competition have three facets: a) the repressive – consists of investigating and punishing practices of abuse of a dominant position and of economic agents forming cartels; b) the preventive, the purpose of which is to guarantee that the competition in the markets will not be prejudiced by corporate merger and acquisition operations, which must be approved by the public authorities responsible for regulating sectors of the economy, such as electricity, telecommunications, petroleum, etc.

<sup>2</sup> The widest variation between these elements will be found, as shown below, in the regional regulations on competition.

effectively prohibit and punish international anticompetitive practices, even when applied extraterritorially.

## 2. Reasons for the need for international regulations on competition

### 2.1. Extraterritorial application of the Competition Law

Extraterritorial application of the Competition Law was the first strategy used to combat international anticompetitive conduct. This strategy, first adopted by the United States of America and later by other industrialized countries, occurs when seeking to apply the domestic antitrust law to acts and agreements that are set up under the jurisdiction of third-party countries<sup>3</sup> but which cause effects on national territory.

One of the first cases ever known of the extraterritorial application of antitrust regulations was in the “Alcoa v. USA” case where, in 1965, the US Supreme Court decided to punish an international cartel created in Switzerland for fixing the aluminum ingot production quotas and which exported only to the US<sup>4</sup>, without any company in the cartel being US-based. Since then, several decisions were given in both the USA and other industrialized countries and even by the antitrust authority of the then European Economic Community<sup>5</sup>, punishing practices originating outside the national territory of the antitrust authority in each case but which caused internal effects on the national territories involved.

Although it has become common practice, extraterritorial application of the competition law, to the extent that it seeks to extend the jurisdiction of the affected country, causes, as mentioned above, serious disputes between the States involved<sup>6</sup>. As J.G. Castel states, there are three main conflicting situations relating to the extraterritorial application of antitrust laws: a) when a State applies its antitrust laws to persons domiciled and acts occurring in the territory of another State; b) when a domestic court seeks to undertake executory proceedings against persons from another State; c) when laws and politics of one State intend to restrain anticompetitive practices permitted or even demanded by the legislation of another State<sup>7</sup>.

Evidence of the existence of such disputes lies in the fact that several countries have created blocking statutes for the specific purpose of preventing their firms from being harmed by extraterritorial application of the competition law of other countries. Through this kind of legislation, economic agents accused of anti-competitive practices were prohibited, under penalty of a fine, from giving information to the State that claims to be affected by the practice. The investigation by the affected State was therefore considerably impaired.

Another kind of legislation created to prevent or diminish extraterritorial application of antitrust regulations were “claw-back statutes”, by which a company punished for international anticompetitive practice could file legal proceedings in its country of origin against the company in another country that had accused it and asked for compensation<sup>8</sup>.

<sup>3</sup> See José Carlos de Magalhães, *A aplicação extraterritorial de leis nacionais*, Revista Forense, v. 283, 1986, p. 89-99.

<sup>4</sup> Cf. José Carlos de Magalhães, *op. cit.*, p. 97. As the author points out, “The objections opposed by Aluminum Limited that it was an agreement signed in Europe between non-American firms and pursuant to the laws of Switzerland, did not persuade the Court, which considered the effects of the agreement in the territory of the United States as sufficient grounds for adopting American jurisdiction to regulate all relations arising from the cartel”. On the basis of this sentence, the expression “effects doctrine” was first used in the sphere of Private International Law.

<sup>5</sup> “The States or economic blocs to which they belong, when their interests are affected, do not hesitate to adopt their own competition regulations, even though the restrictive agreement has not been signed in their territory. This is what happened in the sphere of the Community in the Wood Pulp case”. See Umberto Celli Jr., p. 75.

<sup>6</sup> See, the book by Umberto Celli Jr., *Regras de Concorrência no Direito Internacional Moderno*, Porto Alegre, Livraria do Advogado, 1999, p. 73-4.

<sup>7</sup> See Jean Gabriel Castel, *The Extraterritorial Effects of Antitrust Laws*, in *Recueil de Cours de l’Académie de Droit International*, v. 179 (1983-I), p. 105.

<sup>8</sup> Cf. Castel, *ob. cit.*, p. 82. The United Kingdom, Canada, Australia and France are among the countries that created blocking and claw-back laws.

In addition to the strong possibility of disputes, another consequence from extraterritorial application of the competition law that explains the need for international regulations on the matter is the fact that only countries with a strong economic power can efficiently adopt such a strategy. In fact, only these countries, under the threat of punishment, such as exclusion of undertakings from home markets, succeed in forcing defaulting firms to comply with the international laws<sup>9</sup>. In fact, one of the worst punishments to be imposed on an undertaking that has committed an antitrust practice with effects in the USA (but that does not have enough assets in that country to discourage a repetition of the practice) would, for example, be the impossibility of launching its products on that market in the future. While such a threat must be carefully considered by the accused undertaking, given the damage that interruption in sales could cause to a consumer market the size of the North America, the same would not occur if the penalty were applied by a country with a small market.

## 2.2. Inability to punish international anticompetitive practices by separately applying national regulations

Another explanation for the need for and rise of a number of international regulations on competition is the fact that national antitrust laws, even of developed countries, are very often unable, on their own, to punish and prevent practices, such as cartels and international mergers, with negative effects on the markets.

In the event of international mergers and acquisitions of firms, this constraint is quite clear, as stated in the World Investment Report 2000, published by UNCTAD:

Increasingly however, competition policy can no longer be pursued effectively through national action alone. The very nature of cross-border M&As – indeed the emergence of a global market for firms – puts the phenomenon into the international sphere. This means that competition authorities need to have in place, and to strengthen, cooperation mechanisms among themselves at the bilateral, regional and multilateral levels, in order to respond effectively to M&As and anticompetitive practice of firms that affect their countries. International action is particularly important when dealing with cross-border M&As with global dimensions, especially for smaller countries that lack the resources to mount and enforce such policies on their own. *Op. cit.*, p. 21.

With regard to anticompetitive behavior, principally international cartels, a study by the Competition Legislation and Policy Committee of the OCDE (CLP/OCDE) called “CLP Report on Positive Comity” reached the same conclusion:

The jurisdictional limits on unilateral enforcement greatly increase the need for co-operation. As a result of these limits, individual competition authorities may find it impossible to remedy anticompetitive foreign conduct that is seriously harming their economies. There can also be situations in which no competition authority in any injured country is able on its own to halt or otherwise remedy such conduct<sup>10</sup>.

Some of the challenges to be faced by the national antitrust authorities when punishing international antitrust practices are the following: a) normally the information required to investigate the accusations is only outside national jurisdiction, which especially hinders the filing of administrative and judicial proceedings; b) undertakings possibly considered guilty of anticompetitive practice do not have assets in the State whose market

<sup>9</sup> See Phedon Nicolaidis, *Políticas de competencia en el proceso de integración económica: análisis de las formas y límites de la cooperación*, p. 14. Article published in the annals of the Seminar *Política de Competencia y Integración: opciones y necesidades*, 8-10 September 1997 in Montevideo, Uruguay, in the headquarters of *Centro de Formación para la Integración Regional – CEFIR*.

<sup>10</sup> Report available on <[http://www.oecd.org/daf/clp/CLP\\_reports/positive.pdf](http://www.oecd.org/daf/clp/CLP_reports/positive.pdf)>, page visited on 04Aug01.

was damaged by the practice, which may make the executory proceedings innocuous and ineffective; c) the fact that a number of countries do not recognize antitrust decisions of other countries, given the public order and criminal nature that such laws normally have.

### 3. Cooperation agreements on competition

Of all the strategies for punishing international anticompetitive practices, the cooperation agreements, bilateral as a rule<sup>11</sup>, have been currently the most adopted and disseminated, mainly by the United States<sup>12</sup>.

The in-depth study of such agreements is required not only by the fact that it is often used to punish and prevent international anticompetitive practices, but also by the fact that many of its clauses and instruments are in regional, plurilateral and multilateral regulations on competition.

Indeed, such agreements have clauses and instruments that have already become quite common: notifying activities of a State that may affect important interests of another State (such as when an investigation is begun on a firm in the latter); the promise to take into consideration the interests of the other State when investigation or applying penalties on firms in the country ("traditional comity"); the possibility of making inquiries to settle disputes between laws, policies and national interests of the States involved; coordinated action where there are anticompetitive practices affecting both States; requests for help in investigating when practices occurring in the territory of the defendant State affect the interests of the plaintiff State, including sharing non-confidential information among the relevant antitrust authorities<sup>13</sup>.

An interesting feature of recent cooperation agreements is the fact that they have "positive comity"<sup>14</sup> clauses, which generally read as follows:

If a party believes that anticompetitive practices adopted in the territory of the other party adversely affect its major interests, the former may, after consulting the other party beforehand, request the competition authorities of the other party to start the proper application activities<sup>15</sup>.

Although complying with such clauses is voluntary and that they permit both States involved to use their own national laws in order to punish the same anticompetitive practice, they theoretically have the prerogative of reducing both the extraterritorial application of the antitrust laws and the disputes arising therefrom<sup>16</sup>.

<sup>11</sup> It is interesting to point out that trilateral cooperation agreements for competition were signed between Canada, Australia and New Zealand, and between Denmark, Norway and Iceland, respectively. The structure of these agreements does not differ, however, from that of the classic bilateral cooperation agreements and, consequently, can be studied herein.

<sup>12</sup> The USA has signed eight such bilateral agreements (Australia, Brazil, Canada, European Union, Germany, Israel, Japan and Mexico). Moreover, an important consulting agency to that responsible for the antitrust division of the North American Department of Justice, ICPAC (International Competition Policy Advisory Committee), suggested a more detailed strategy of signing new bilateral cooperation agreements on competition. See the Final Report of ICPAC on <http://www.usdoj.gov/atr/icpac.htm>. Page visited on 06Aug01.

<sup>13</sup> Some agreements, such as those signed between the US and Brazil and Mexico, also foresee the possibility of technical assistance between the antitrust agencies of each State.

<sup>14</sup> The first cooperation agreement to include this clause was signed in 1991 between the USA and EU. It is interesting to point out that the agreement in question, which has already caused close cooperation between the parties, was recently strengthened by another agreement in 1998 that, although it did not apply to mergers and acquisitions of firms, includes a clause on "enhanced positive comity", that is, it is presumed that the competing authorities of a State affected by an anticompetitive practice will suspend or cease their investigation and penalties when their consumers are not directly prejudiced, permitting only the operation of the antitrust authority of the State for which the anticompetitive practice is directed.

<sup>15</sup> See article IV. 2 of the agreement between the governments of the Federative Republic of Brazil and United States of America on the cooperation between their authorities on competition when adopting their competition laws, signed on 10.26.1999.

<sup>16</sup> Alexander Schaub, director of the General Competition Board of the European Commission, says "it represents a commitment on the part of the US and the EU to cooperate with respect to antitrust enforcement rather than seeking to apply their antitrust laws extraterritorially". See article *International co-operation in antitrust matters: making the point in the wake of the Boeing/MDD proceedings*, published in Competition Policy Newsletter, 1998, no. 1, February, Luxembourg, p. 5.

In practice, such clauses will be used basically in cases of “market access”, in other words, when anticompetitive practices occurring in the territory of the defendant State prevent exports by undertakings of the plaintiff State. The clauses on “positive comity”, considering the fact that the defendant State laws are violated to use them, do not however reach the practice of export cartels, acceptable by a large number of jurisdictions and whose punishment is hard to carry out, mainly by States with small economic power<sup>17</sup>.

Also within the bilateral strategies, it is important to emphasize that, despite the little and also voluntary compliance, there are more in-depth cooperation agreements, the principal characteristics of which are the possible exchange of confidential information and use of compulsory proceedings in a State at the request of another in order, for instance, to communicate procedural acts (summons, intimations, etc.), to gather evidence and enforce penalties. These characteristics exist in the 1999 cooperation agreement between Australia and the US (the first signed under the 1994 International Antitrust Assistance Agreement) and in the 1995 agreement between the US and Canada. The latter, in fact, belongs to the class of mutual legal aid agreements, so that it seeks to punish illegal antitrust acts defined as crimes<sup>18</sup>, and that the cooperation required to facilitate the execution of a compensatory action could not be applied through this agreement.

Another important characteristic of these agreements is that they permit the plaintiff State to ask for help from the defendant State itself to investigate behavior that is not considered illegal under the latter’s laws. Thus, in principle, these more in-depth cooperation agreements would permit punishment of export cartels.

Before discussing the regional regulations on competition, it is worth mentioning briefly the interesting solution adopted by Australia and New Zealand, countries that have a close trade relationship, against dumping involving economic agents in their territories. These States changes their respective laws on competition so that they substituted antidumping laws in the trade between both countries.

On the possibility of adopting principles of competition for the trade policy, Prof. Alan Fels, President of the Australian Committee on Competition and the Consumer wrote the following:

There is much to be said for applying the general principles of competition policy to the area of trade policy and for approaching trade policy from the same perspective as competition policy. A development between Australian and New Zealand in this regard has attracted some international interest. This is the replacement of the anti-dumping laws between the two countries with the application of s.46 of the Trade Practices Act and s.36 of the Commerce Act. This means that dumping issues are now treated in the same manner as competition issues, an outcome likely to be more conducive to economic efficiency and favourable consumer outcomes. More generally, there is a discernible trend on the part of leading world economists and key policy makers to try to characterise trade policy as a form of competition policy, as requiring the application of the same principles (and even processes) in the interests of world economic progress. Formulation and implementation of this ambitious approach is a substantial world policy challenge<sup>19</sup>.

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<sup>17</sup> Although the positive comity clauses are able to mitigate disputes regarding extraterritorial application of the competition law, it is important to point out that to date they have only been used in the “Amadeus” case, which, at the request of the US, is still being investigated in the EU. See, in this respect, the aforementioned OCDE report on positive comity.

<sup>18</sup> And normally occurs with the “*hard core cartels*” – market dividing and price fixing practices.

<sup>19</sup> See the author’s article *Trade and Competition in the Asia Pacific Region*, available at <http://www.accc.gov.au/docs/speeches/sp1of95.htm>, page visited on 09Aug01.

#### 4. Regional regulations on competition

The competition regulations created in the sphere of regional integration processes<sup>20</sup> deserve a leading role among the various international regulations on the topic. Some of the economic blocs with such rules are, for instance, the EU, NAFTA, Andean Community of Nations and Mercosur. It is worth mentioning, however, that the content of such rules varies considerably pursuant to the purposes of the process of regional integration. Although in the Treaty that created NAFTA<sup>21</sup> (which intends only to create a free trade zone between its party States) the competition regulations are quite modest, the rules in a resolution signed in the sphere of the Andean Community of Nations<sup>22</sup> (or Andean Group) are more comprehensive and detailed and adopted by supranational organizations created in the scope of that integration process.

However, given the need to concentrate efforts on the study of the main characteristics of such regulations, the paper herein will underscore the rules on competition in the EU and Mercosur.

##### 4.1. Rules on competition in the European Union

The comparison on the Andean Community of Nations and NAFTA could be perfectly applied to the European regional integration process. In fact, the EU, which is the experience of the deepest existing regional integration, has precisely the most operating and solid international regulations<sup>23</sup> ever known<sup>24</sup>.

When they were created<sup>25</sup>, these regulations involved major innovations for the competition area. One of them –perhaps the most important– was that of substituting the trade regulations within the common market, so that compensatory laws and trade safeguards between the EU Party States ceased to be adopted – which reinforces the idea

<sup>20</sup> All regulations relating to the American continent may be found in the *Inventory of the Competition Policy Agreements, Treaties and Other Arrangements Existing in the Western Hemisphere*. Compilation by the OAS Trade Unit to the Competition Policy Working Group of FTAA and contained in the document FTAA.ngcp/inf/03/Rev.1, dated January 22, 2001. Available on [http://www.alca-ftaa.oas.org/publications/ng\\_come.asp](http://www.alca-ftaa.oas.org/publications/ng_come.asp). Page visited on 08/13/2001. This document has identified that regional regulations in the hemisphere may be found “in Chapter XV of the North America Free Trade Agreement (NAFTA), in the 1991 Decision 285 of the Andean Community, in the 1996 Protocol on the Protection of Competition of the Common Market of the Southern Cone (MERCOSUR), in Protocol No. 8 of the Caribbean Community and Common Market (CARICOM), in Chapter XVI of the Treaty on Free Trade of the Group of Three between the Republic of Colombia, the United Mexican States and the Republic of Venezuela (G-3)”. Such regulations may also be found in the following diplomas: “in Chapter of the Canada-Chile Free Trade Agreement, in Chapter XIV of the Free Trade Agreement between Mexico and Chile, in the Economic Complementarity Agreement No.22 between Bolivia and Chile, in Chapter XV of the Free Trade Agreement between the Central American Common Market (CACM) and Chile, in Chapter IV of the Free Trade and Preferential Exchange Agreement between Panama and each of the member countries of the Central American Common Market (CACM), in Chapter XV of the Free Trade Agreement between the CACM and the Dominican Republic, in Section IV of the Free Trade Agreement between the European Union and Mexico”.

<sup>21</sup> The NAFTA regulations in question, in articles 1501 to 1504 of the main Treaty (signed on 12/17/1992 and enforced on 1/1/1994), seek only to ensure that the Party States will apply their own laws on competition and that their antitrust agencies will cooperate to effectively apply these laws. With regard to the topic on interaction between trade and competition policies, article 1504 provides for the creation of a “Working Group on Trade and Competition, comprising representatives of each Party, to report, and to make recommendations on further work as appropriate, to the Commission within five years of the date of entry into force of this Agreement on relevant issues concerning the relationship between competition laws and policies and trade in the free trade area”.

<sup>22</sup> The Andean Group was created under the Cartagena Agreement on 05.26.1969 and includes Bolivia, Colombia, Ecuador, Peru and Venezuela. The main provisions on competition are found in Decision no. 285, “Norms for Prevention or Correction of Distortions in Competition Caused by Practices that Restrict Free Competition of March 21, 1991”. Its provisions, already prevailing and put into practice constantly, are quite similar to the Protocol on Competition of Mercosur, that will be analyzed below. The main difference between the two norms is the fact that the Andean regulations are put into practice by a supranational agent. The Mercosur regulations, if applied, will be by intergovernmental organizations in which the vetoing power may be used by any Party State.

<sup>23</sup> These regulations are considered international precisely because they apply to cases involving two or more EU Party States.

<sup>24</sup> For an in-depth study of such characteristics, see the work by Valentine Korah *An Introductory Guide to Competition Law and Practice*, Sixth Edition, 1997, Hart Publishing, London.

<sup>25</sup> The regulations on competition that were applied pursuant to the Treaty of the European Community on Coal and Steel, were effectively disseminated after being included in the Treaty of Rome, which created the EEC. See Umberto Celli Jr., *op. cit.*, p. 51.

of interpenetration between the various home markets. Another major innovation was when this legislation also prohibited state aids which had the prerogative of distorting competition within the former EEC.

A point of interest in the document herein however is the content of articles 85 and 86 of the Treaty of Rome<sup>26</sup>, because of its importance for the European regional integration process and for that fact that it inspired numerous other competition regulations – including the Brazilian and the Mercosur Protocol on Competition.

The caption of these articles reads as follows:

Article 85. 1. The following shall be prohibited as incompatible with the common market; all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which...

Article 86. Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between member States.

In addition to the fact that said articles have, like the rest of the community legislation, a “direct effect” and superiority over the internal rights of the Party States<sup>27</sup>, one of their essential aspects is what became known as the “*inter-state trade clause*”, that is, the understanding that the application of the community laws – and not national laws – only in the event of susceptibility<sup>28</sup> of affecting the trade between the EU Member States through an anticompetitive practice.

In fact, as Richard Whish emphasized when quoting from the decision of the TJCE Court of Justice in the Hugin case, “[t]he inter-state trade clause is therefore of central importance in EEC competition law, since it defines ‘the boundary between the areas covered by Community law and the law of the Member States’<sup>29</sup>. Affecting the trade between the Member States thus establishes the sphere of action of the European Commission in punishing and preventing anticompetitive practices through its General Competition Board.

The study of the European Commission’s role in the competition area is, then, essential for understanding the success of European integration<sup>30</sup>. As its nature is of a supranational body, independence and jurisdiction throughout the territory of the economic

<sup>26</sup> Since the enforcement of the Treaty of Amsterdam, articles 85 and 86 of the Treaty of Rome have been re numbered to 81 and 82, respectively. However, bearing in mind that most of the legislative, jurisprudence and doctrinaire material is prior to this alteration, the numbering established in the Treaty of Rome will be used.

<sup>27</sup> The main characteristics of Community Law were established in two important sentences of the European Community Court of Justice. In the Van Gend case in Loos, the Court of Justice decided that the community regulations have a direct effect, that is, create rights and obligations for Member States and private parties. In the Costa v. ENEL case, however, the Community Law was considered superior in relation to the legal structures of its Member States.

<sup>28</sup> In fact, in the work *Common Market Law of Competition*, Bellamy & Child point out that “it is not necessary to establish that the agreement or conduct has in fact affected trade between Member States; it is enough to show that it is capable of having an effect. A sufficient degree of probability must be demonstrated and the Commission must clearly set forth how it is envisaged trade could be affected. A speculative or a contrived possibility is not enough, but a potential effect is sufficient” (Fourth Edition, edited by Vivian Rose, London, Sweet & Maxwell, 1993, p. 114).

<sup>29</sup> See “Competition Law”, Butterworths, London, Third Edition, 1993, p. 215.

<sup>30</sup> In fact, as Richard Whish says, “[i]n EEC law generally, one of the prime aims of the Commission and Court is to ensure that goods and services can be sold throughout the Community, unimpeded by obstacles to trade imposed by Member States or erected by private undertakings. In particular, the Community authority will endeavour to ensure national markets do not become impregnable to ‘parallel imports’ from other Member States: a producer of widgets can agree to sell his products only to distributor X in France, but he cannot go further and agree to ensure that no-one else will ever import his widgets into France. This would be to confer absolute territorial protection on X, meaning that he would face no intra-brand competition from parallel goods at all. Only in the rarest of circumstances would this be permitted”. *Op. cit.*, p. 46.

bloc, the European Commission does not undergo the same restraints to applying the community legislation on competition that antitrust authorities of the Party States would have to confront when applying their domestic laws<sup>31</sup>. Thus, in addition to causing less possibility of dispute in jurisdiction between the Party States, the role of the European Commission is then really effective in punishing and preventing anticompetitive practices occurring in EU territory and in more than one of its Member States<sup>32</sup>. This effectiveness in defending competition that permitted the interpenetration of the home markets and the existence of a true European common market.

#### 4.2. Regulations on competition in Mercosur

The Treaty of Asuncion, benchmark treaty, which on 03.26.1991, provided on the creation of the South Common Market, also established in its article 4 that “the Parties States will condemn their respective national policies to draft common regulations on trade competition”.

Based on this provision, the Protocol on Competition in the Mercosur was established, in the Brazilian city of Fortaleza<sup>33</sup> on 12.17.1996. This Protocol was drafted on the basis of the “General Lines of Harmonization” contained in the annex to the Decision no. 21/94 of the Common Market Council and comprises the Annex to Decision no. 18/96 of the Common Market Council.

The main article of the Protocol establishes both its sphere of application and the practices that it intends to penalize:

Art. 4. Infringement of the regulations herein, regardless of blame, are individual or concerted acts, demonstrated in any way whatsoever the purpose or effect of which is to limit, restrain, falsify or distort competition or access to the market or that are an abuse of a dominant position in the relevant market of goods or services in the scope of Mercosur and that affect trade between the Parties States (underlined)<sup>34</sup>.

The Protocol provides for the existence of an inter-government body – the Committee on Competition – consisting of four Parties States in the process of integration and submitted to the Mercosur Trade Commission, which would have to put to a referendum, through a Board of Directors, the recommendations issued by the former Committee.

Other important articles in the Protocol are as follows:

Art. 7 The Parties States will adopt, for the purpose of including in the Mercosur regulations and within two years, common regulations for the control of acts and agreements, expressed in any way whatsoever, that may restrain or in any way prejudice free competition or result in domination in the relevant regional market of goods and services, including those that result in an economic concentration, in order to prevent its possible anticompetitive effects in the Mercosur.

<sup>31</sup> It is important to point out, however, that the European Commission will only act when the anticompetitive practice has a “substantial effect” on intra-community trade. This criterion, expressed in the decision of the “*Volk v. Vervaecke*” case (Proceeding 5/69), was confirmed several times, as in the “*Béguelin*” case, when it was decided, to define the Commission’s responsibility, that “*the agreement must affect trade between Member States and the free play of competition to an appreciable extent*”. For an analysis of these guidelines, see Bellamy & Child, *op. cit.*, p. 118-125.

<sup>32</sup> It is never too late to highlight that, according to the European Commission, “[t]he competition rules are only concerned with agreements or conduct which may affect ‘trade between Member States’. Anticompetitive conduct which is purely national in scope may be controlled under the competition laws of individual Member States. Agreements which do not have an appreciable effect on either competition, or trade between Member States, fall outside the scope of Article 85 n(1) and are not prohibited (the de minimist doctrine)”. See *Dealing with the Commission: notifications, complaints, inspections and fact-finding powers under Articles 85 and 86 of the EEC Treaty*, Brussels, 1998. p. 7.

<sup>33</sup> Hence the Protocol is also known as “Protocol of Fortaleza”.

<sup>34</sup> The Protocol lists as an example in its article 6 a series of anticompetitive practices to be combated.

Art. 32. The Member States agree within two years from the enforcement hereof and for the purpose of inclusion hereto, to draft common regulations and mechanisms that control the State aid that may restrict, restrain, falsify or distort competition and may affect trade between Member States.

For this purpose, advances will be taken into consideration relating to the theme of public policies that distort competition and the WTO-related regulations.

It should be stressed, however, that the Committee on Competition stated in the Protocol could not yet be constituted to apply the Protocol since the diploma was only internalized by Paraguay and Brazil. Thus, although, theoretically, it was possible to call upon article 33 of the Protocol<sup>35</sup> to defend its enforcement for Brazil and Paraguay, the Committee on Competition – the essential body for applying the Protocol – is prevented from operating with the presence of the four Parties States<sup>36</sup>.

It is, lastly, pointing out that, as the Protocol of Fortaleza is not applicable as yet, the Mercosur legislator has endeavored, under article 1 of the Treaty of Asuncion, to continue to “coordinate macroeconomic and sectoral policies (...) in order to ensure proper competitive conditions between the Parties States” (art. 1).

This effort, with regard to competition, has been made as Decision no. 28/00 of the Common Market Council, which in its article 2, states the following:

Art. 2 – Investigations of dumping by a Party State regarding the imports from another Party State will be made pursuant to the national laws by 31 December 2000, in which time the Parties States will analyze the regulations and conditions in which the theme will be regulated in MERCOSUR.

##### 5. Plurilateral regulations

There are also regulations of a voluntary compliance<sup>37</sup> on a Competition Policy signed under the aegis of the Organization for Cooperation and Economic Development<sup>38</sup>. In addition to having voluntary compliance, such regulations, as one of the "considering" clauses of the 1995 Recommendation on the interaction between Trade and Competition makes it clear, they do not limit the right of any Member State to apply its antitrust legislation extraterritorially:

Considering moreover that closer co-operation between Member countries in the form of notification, exchange of information, co-ordination of action, consultation and conciliation, on a fully voluntary basis, should be encouraged, it being understood that such co-operation should not, in any way, be construed to affect the legal positions of Member countries with regard to questions of sovereignty, and in particular, the extra-territorial application of laws concerning anticompetitive practices, as may arise”.

<sup>35</sup> That article states that the Protocol “will prevail thirty days after filing the second ratification instrument, with regard to the first two member States that ratify it and, in the case of the other signatories, on the thirtieth day after the filing of the respective ratifying instrument”.

<sup>36</sup> It is worth recalling that article 37 of Protocol of Ouro Preto, a document considered – together with the Treaty of Asuncion – as a law originating from Mercosur, states that “The decisions of the Mercosur organs will be agreed and in the presence of all member States”. The exception to this rule is precisely that relating to the decision making of the Arbitration Court stated by the Protocol of Brasilia and may be used also as stated by the Protocol of Fortaleza.

<sup>37</sup> Due to the absence of obligatoriness, sanctions and dispute settlement mechanisms with binding decisions, such recommendations are considered “*soft law*”.

<sup>38</sup> Such regulations are considered plurilateral because access to the organization under which they were signed is restricted to slightly more than 30 countries.

These recommendations were inspired on cooperation agreements signed between OCDE member States. The main OCDE recommendations on a Competition Policy are that of 1998 on “*hard core cartels*”<sup>39</sup> and of 1995 on the interaction between trade and policy of competition<sup>40</sup>, summarized below for an important study of UNCTAD:

The 1995 OECD recommendation (which replaces a long series of instruments recommending progressively closer cooperation) provides for notification, consultations, the exchange of non-confidential and confidential information (subject to safeguards), the coordination of investigations, investigatory assistance, traditional and positive comity, consultations and a conciliation mechanism to resolve disputes. The 1998 recommendation encourages cooperation and comity specifically in respect of enforcement against hard-core cartels, and provides for transparency and periodic reviews relating to exempted cartels<sup>41</sup>.

Although they have no obligatory enforcement, the OCDE recommendations play a major role in suggesting standard-regulations to facilitate harmonization between the legislation of its member States and which also permit that non-OCDE member countries are inspired by them to create their own competition laws. This is the case of Brazil, which used an OCDE recommendation to create Resolution no. 15 of CADE, on notification of Acts of Economic Concentration.

#### 6. Multilateral regulations

Two organizations have multilateral regulations on competition – UNCTAD and WTO.

UNCTAD (UN Conference on Trade and Development) created in 1980 the *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*<sup>42</sup>. This document is also considered a “soft law” and has the same characteristics as the OCDE recommendations.

The main differences between the *RBP Set*, as it was known, and the OCDE regulations is that, as it had been created within the multilateral institution of UNCTAD, it may possibly, in principle, be adopted by a larger number of countries; another difference between such regulations is that, as happens with the other laws created in UNCTAD, there is an emphasis on the need to help developing countries to create and apply the competition laws.

This last difference is clear, for instance, in the article on the possibility of consulting between countries affected by international anticompetitive practices:

4. Consultations: (a) where a State, particularly of a developing country, believes that a consultation with another State or States is appropriate in regard to an issue concerning control of restrictive business practices, it may request a consultation with those States with a view to finding a mutually acceptable solution. When a consultation is to be held, the States involved may request the Secretary-General of Unctad to provide mutually agreed conference facilities for such a consultation.

Although its has the benefit of being able to be used by a larger number of countries – which, in principle, cuts the costs of its use in relation to other regulations – the *RBP Set* has not been generally applied.

<sup>39</sup> The instrument may be found on page [http://www.usdoj.gov/atr/public/international/docs/hard\\_core.htm](http://www.usdoj.gov/atr/public/international/docs/hard_core.htm), visited on 02Apr2001

<sup>40</sup> This is the *Revised Recommendation of the Council Concerning Co-operation Between Member Countries on Anticompetitive Practices Affecting International Trade*, 27 July 1995. It is document C(95)130/End of the OCDE.

<sup>41</sup> UNCTAD, *Experience Gained so far*, p. 13

<sup>42</sup> See the instrument on page <http://www.unctad.org/en/subsites/cpolicy/docs/CPSet/cpset.htm>, visited on 02Apr2001.

Agreements today applied by the World Trade Organization (WTO) also have few regulations that may be interpreted as applicable to competition. To date, however, such application has only referred to typical cases of international trade, for which reason many countries have suggested including specific regulations on competition in a round of multilateral trade negotiations.

Such few regulations on anticompetitive practices exist in the sphere both of GATT<sup>43</sup> itself with regard to the latest agreements known by the acronyms GATS (General Agreement on Trade in Services), TRIPS (Agreement on Trade-related aspects of Intellectual Property Rights) e TRIMS (Agreement on Trade-related Investment Measures)<sup>44</sup>. As highlighted, none of these regulations, however, explicitly refer to competition (and to the methods and terminology related to it), nor will go beyond recommending that the countries where undertakings involved in anticompetitive practice attempt to settle their disputes by direct and voluntary negotiations<sup>45</sup>.

## 7. Current discussions on competition

There are several regulations on competition, and it could not be otherwise, being negotiated at the moment. The work herein will concentrate on the discussion to create the following regulations on competition: those that may arise within the process that aims to create a free trade agreement between the EU and Mercosur, those negotiated in the process that may establish FTAA, those that may be treated in a future Round of Multilateral Negotiations in the World Trade Organization and, lastly, those suggested by the US that would be a “global competition initiative”.

### 7.1. Mercosur- European Union

The two economic blocs have a Framework Agreement dated 12.15.1995 on the possibility of creating, among other aims, a free trade zone between them. This is, in fact, the first negotiation for integration between economic blocs (the agreement mentions an “Interregional Association”).

One of the themes on cooperation is precisely the competition policy<sup>46</sup>, which is no surprise given the importance of the matter in experiences of regional integration. In fact, the Treaty states, in its article 11, item 2, line “c” that one of the ways to increase cooperation between the blocs will be “to identify and eliminate obstacles against industrial cooperation between the Parties by measures that encourage respect for laws on competition and promote their adaptation to market requirements, bearing in mind the participation and concerted efforts between the operators”.

The theme of competition is still addressed in the sphere of the Mercosur-European Union Biregional Negotiations Committee (CNB). At the last meeting of this Committee, 2-6

<sup>43</sup> Among such regulations, for example, is Article II, paragraph 4, which refers to national monopolies: “*If any contracting party establishes, maintains or authorises, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule*”.

<sup>44</sup> See the OCDE document entitled *Competition Elements in International Trade Agreements: A Post-Uruguay Round Overview of WTO Agreements*, available on [http://www.oecd.org/daf/clp/trade\\_competition/wto01.pdf](http://www.oecd.org/daf/clp/trade_competition/wto01.pdf), visited on 08.12.01.

<sup>45</sup> See Sanoussi Bilal & Marcelo Olarreaga, *Is there a need for an International Competition Policy Agreement?*, p. 10”, available on [http://eipa-nl.com/public/public\\_publications/current-books/WorkingPapers/98w02.pdf](http://eipa-nl.com/public/public_publications/current-books/WorkingPapers/98w02.pdf), page visited on 08.18.01. As the authors highlight, “[m]ost authors agree that there exist several holes and loopholes in existing WTO rules concerning private anticompetitive behaviour. Take the following examples. First, the recent Boeing-McDonnell Douglas merger was clearly out of reach of WTO rules and the application of extra-territoriality clauses may lead to a trade war without an international dispute settlement mechanism. The second-best nature of anti-dumping duties provide a second example”.

<sup>46</sup> Article 5, item 3 of the Treaty states that “3. In particular, this cooperation will mainly affect the following spheres: a) access to the market, free trade, customs barriers and non-custom barriers), and trade regulations such as restrictive practices of competition, regulations of origin, safeguards, customs and special regulations, among others” (underlined).

July, in Montevideo, Uruguay, the parties agreed on the following draft joint text on cooperation for competition:

The Parties shall offer mutual technical assistance to benefit from their respective experiences and strengthen the implementation of their laws and policies on competition.

The technical cooperation on competition will include the following activities:

- a. training of official employees of MERCOSUR and agencies on competition of its Member States in order to expand their professional skills;
- b. support to Mercosur institutions and its Member States;
- c. seminars and studies of laws and policies on competition to facilitate a program of information and practice exchange;

The methods for institutional cooperation are found in Annex XXX of the Agreement and complement what has been previously mentioned”.

Moreover, it is worth mentioning that negotiations continue in the CNB regarding the inclusion of interregional regulations on competition in the Treaty that will establish the free trade zone between the two economic blocs.

## 7.2. FTAA

The negotiation process to create the Free Trade Area of the Americas (FTAA) also foresees the need to discuss regulations on competition for the hemisphere.

At a Ministerial Meeting in San José, Costa Rica, the general purpose was established for the FTAA Negotiating Group on Competition to “[g]uarantee that the benefits from the FTAA free trade process are not prejudiced by anticompetitive business practices”. The same Negotiating Group now also has the following specific purposes:

To advance towards establishing a national, regional or sub-regional legal and institutional cover, that prohibits anticompetitive business practices.

To develop mechanisms that facilitate and promote development of competition policies and guarantee the compliance of regulations relating to free competition between the countries in the hemisphere and within each”.

The work for developing regulations and mechanisms on a competition policy continues to be undertaken within the Negotiating Group that also currently is devoted to implementing the mandate granted by the Ministerial Declaration of Buenos Aires, dated 7 April 2001:

We instruct the Negotiating Group on Competition Policy to intensify efforts to settle the four questions for research in the Later Work Proposal of the Tripartite Committee on the Study of a Policy on Competition in Smaller Economies and in Economies without Competition (FTAA.ngcp/w/56/Cor.1), according to an agreed working methodology.

We instructed the Negotiation Group on Competition Policy to identify, based on the Antidumping Study and Regional Trade Agreements (document FTAA.ngcp/inf/17/Cor.2), relevant aspects that deserve further consideration by the Trade Negotiations Committee, and to submit their results to the Trade Negotiations Committee by 1 April 2002.

### 7.3 Global Competition Initiative

Attention should also be given to the global competition initiative suggested last year by the US government through the head of the Antitrust Division of the Department of Justice.

This proposal, announced on 14 September 2000 at the Conference in commemoration of the ten years of community legislation on merger and acquisition control, part of the premise that the existing international organizations are not apt to address regulations on competition. It was then proposed that work begin on collecting data to create an international forum for the specific purpose of seeking cooperation between national authorities on competition and which operates in the manner, transcribed below, suggested by the aforementioned International Competition Policy Advisory Committee:

As the Advisory Committee envisions it, the Global Competition Initiative should be inclusive in its membership, open to developed and developing nations, and comprehensive, or at least open to the possibility of breadth, in its coverage of issue areas; it should also allow room for the private sector, NGOs and other interested parties to play a role. The Initiative might take the form of a set of intergovernmental consultations akin to the meetings of the senior economics ministers of the Group of Seven nations, known as the G-7, but with less formality and perhaps more frequency of meetings. Annual or semi-annual meetings as part of the Global Competition Initiative could be devoted to opportunities for antitrust officials to exchange views and experiences on anticartel enforcement, merger review, enforcement cooperation, analytical tools, technical assistance and other issues related to antitrust enforcement. The G-7 is an attractive model in that it demonstrates that countries can create mechanisms to exchange views and attempt to develop consensus on economic issues without investing in a permanent staff (although support from international organizations and governments would be necessary). This concept is not intended to create a new and extensive bureaucracy. Instead, its central ambition is to permit interested nations to start a process that can build over time.

The main scope of this new international forum would then be to encourage dialogue between national agencies on competition and other interested parties in order to produce more converging laws and analyses on competition based on a competitive culture. The ICPAC report also suggests that future discussions in the forum could be on the following proposals:

- Multilateralize and deepen positive comity;
- Agree upon the consensus disciplines identified in Chapter 2 regarding best practices for merger control laws and develop consensus principles akin to the recent OECD recommendation on hard-core cartels; consider and develop disciplines to define actions of governments; for example in areas with negative spillover potential such as export cartels, which require broader international cooperation and consultation;
- Consider and review the scope of governmental exemptions and immunities that insulate markets from competition around the world;
- Consider approaches to multinational merger control that aim to rationalize systems for antitrust merger notification and review;
- Consider frontier subjects that are quintessentially global such as e-commerce, which will create new challenges for policymakers around the world;
- Undertake collaborative analysis of issues such as global cartels; and market blocking private and government restraints; and

Possibly undertake some dispute mediation and even technical assistance services.

#### 7.4 WTO

Lastly, it is worth mentioning that an extremely important discussion on competition is underway in the World Trade Organization that, since 1996, after the Ministerial Declaration of Singapore, created the Working Group on the Interaction between Trade and Competition Policy. In fact, paragraph 20 of this Declaration<sup>47</sup>, issued on 13 December 1996, states the following:

20. Having regard to the existing WTO provisions on matters related to investment and competition policy and the built-in agenda in these areas, including under the TRIMs Agreement, and on the understanding that the work undertaken shall not prejudice whether negotiations will be initiated in the future, we also agree to:

establish a working group to examine the relationship between trade and investment; and

establish a working group to study issues raised by Members relating to the interaction between trade and competition policy, including anticompetitive practices, in order to identify any areas that may merit further consideration in the WTO framework<sup>48</sup>.

Today, the Working Group has been endeavoring to free itself from the tasks requested by the WTO General Council in December 1998, in the following terms:

The General Council decides that the Working Group on the Interaction between Trade and Competition Policy shall continue the educative work that it has been undertaking pursuant to paragraph 20 of the Singapore Ministerial Declaration. In the light of the limited number of meetings that the Group will be able to hold in 1999, the Working Group, while continuing at each meeting to base its work on the study of issues raised by Members relating to the interaction between trade and competition policy, including anticompetitive practices, would benefit from a focused discussion on: (i) the relevance of fundamental WTO principles of national treatment, transparency, and most-favoured-nation treatment to competition policy and vice versa; (ii) approaches to promoting cooperation and communication among Members, including in the field of technical cooperation; and (iii) the contribution of competition policy to achieving the objectives of the WTO, including the promotion of international trade. The Working Group will continue to ensure that the development dimension and the relationship with investment are fully taken into account. It is understood that this decision is without prejudice to any future decision that might be taken by the General Council, including in the context of its existing work programme<sup>49</sup>.

<sup>47</sup> The declaration is the document WT/MIN(96)/DEC.

<sup>48</sup> The same paragraph 20 also states that "These groups shall draw upon each other's work if necessary and also draw upon and be without prejudice to the work in UNCTAD and other appropriate intergovernmental fora. As regards UNCTAD, we welcome the work under way as provided for in the Midrand Declaration and the contribution it can make to the understanding of issues. In the conduct of the work of the working groups, we encourage cooperation with the above organizations to make the best use of available resources and to ensure that the development dimension is taken fully into account. The General Council will keep the work of each body under review, and will determine after two years how the work of each body should proceed. It is clearly understood that future negotiations, if any, regarding multilateral disciplines in these areas, will take place only after an explicit consensus decision is taken among WTO Members regarding such negotiations".

<sup>49</sup> See, in this sense, document WT/GC/M/32, p. 52.

The Working Group, as seen from the 2000 Report on its activities<sup>50</sup>, has already undertaken widespread studies on competition and the convenience or not of including specific regulations on the matter in the WTO scope, and has not yet reached any conclusion on the subject.

The theme will return to the WTO agenda in October this year when, at the Doha Ministerial Meeting in Qatar, will decide whether it will or will not launch a new Round of Multilateral Negotiations.

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<sup>50</sup> This is document WT/WGTCP/4, dated 30 November 2000.

## 7. Application of the 1982 United Nations Convention on the Law of the Sea by the States of the hemisphere

### Resolution

CJI/RES.28 (LVIII-O/01) *Application of the 1982 United Nations Convention on the Law of the Sea by the States of the Hemisphere*

During the fifty-eighth regular session of the Inter-American Juridical Committee in March 2001 in Ottawa, Dr. Orlando R. Rebagliati, the rapporteur on this subject, said that it would be best to wait for the comments and reactions of member States and political organs of the OAS to the document drafted on the subject by the Inter-American Juridical Committee (CJI/doc.48/99 rev.3), entitled *Review of the rights and duties of States under the 1982 United Nations Convention on the Law of the Sea: an informal guide*. In any event, it would be appropriate to reappraise follow-up work on the subject or to leave it pending so that other items on the agenda could be properly addressed.

The Inter-American Juridical Committee adopted resolution CJI/RES.28 (LVIII-O/01), *Application of the 1982 United Nations Convention on the law of the sea by the States of the hemisphere*, in which it noted with satisfaction the widespread distribution of the document *Review of the rights and duties of States under the 1982 United Nations Convention on the Law of the Sea*, and reiterated to the General Assembly and the Permanent Council of the Organization that it was prepared to pursue its work on the specific topics indicated by them, such as settlement of disputes, the *1995 Agreement on application of the Convention on Conservation and Ordering of Transzonal Fish Populations and Highly Migratory Fish Populations*, and the *Agreement on Application of Part XI of the Convention on Sea Beds Located Outside National Jurisdiction*.

The text of the resolution is transcribed below.

### CJI/RES.28 (LVIII-O/01)

#### APPLICATION OF THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA BY THE STATES IN THE HEMISPHERE

THE INTER-AMERICAN JURIDICAL COMMITTEE,

RECALLING resolution CJI/RES.4 (LVI-O/00), *Application of the United Nations Convention on the Law of the Sea by the States in the hemisphere*, adopted at its 56<sup>th</sup> regular sessions, and

HAVING CONSIDERED resolution AG/RES.1704 (XXX-O/00) adopted by the General Assembly of the Organization of American States at its 30<sup>th</sup> regular sessions, in particular paragraph 7 thereof,

RESOLVES:

1. To note with pleasure the wide distribution of the *Study on the rights and duties of States in accordance with the 1982 United Nations Convention on the Law of the Sea*, as

provided by the previously mentioned resolutions of the Inter-American Juridical Committee and of the General Assembly.

2. To repeat to the General Assembly and to the Permanent Council of the Organization that the Juridical Committee is prepared to continue its work thereon, on specific topics that they might indicate such as dispute resolution, the 1995 Agreement on the application of the Convention to conservation and management of straddling fish stocks and highly migratory fish stocks, populations, and the Agreement on the application of Part XI of the Convention concerning the seabed situated beyond national jurisdiction.

This resolution was unanimously adopted at the session held on 20 March 2001, in the presence of the following members: Drs. Sergio González Gálvez, Kenneth O. Rattray, Carlos Manuel Vázquez, João Grandino Rodas, Orlando Rebagliati, Jonathan T. Fried, Gerardo Trejos Salas, Eduardo Vío Grossi and Felipe Paolillo.

## 8. Right to information: access to and protection of information and personal data

### Resolution

CJI/RES.33 (LIX-O/01) *Right to information: access to and protection of information and personal data*

During the fifty-eighth regular session of the Inter-American Juridical Committee in Ottawa in March 2001, the Department of International Law presented the following documents for the use of the Inter-American Juridical Committee: DDI/doc.02/01, *Unofficial translation of Law 25326: Law on Protection of Personal Data, Argentina, in effect on November 2, 2000*; DDI/doc.03/01: *Unofficial translation of Criminal Code, Articles 153-157 bis, Argentina*; DDI/doc.04/01: *Right to information: access to and protection of information and personal data* (summary of the information contained in document CJI/doc.45/99, dated 16 August 1999); and DDI/doc.05/01: *Right to information: access to and protection of information and personal data* (summary of information contained in CJI/doc.25/00 rev.1, 9 August 2000).

In the course of its fifty-ninth regular session, held in Rio de Janeiro in August 2001, the Inter-American Juridical Committee adopted resolution CJI/RES.33 (LIX-O/01), *Right to information: access to and protection of information and personal data*, with the abstention of Dr. Carlos Manuel Vázquez. In that resolution, the Inter-American Juridical Committee reaffirmed its agreement with the general principles set forth in previous reports drafted by the rapporteur on the topic, Dr. Jonathan T. Fried, and resolved to review the possibility of undertaking additional work on the subject during the current regular session. Finally, it recommended to the Permanent Council that it urge member States to adopt national laws on the subject that would be consistent with the principles contained in the pertinent reports. At the same time, Dr. Jonathan T. Fried asked the General Secretariat to forward the reports approved on the subject at previous sessions to the authorities directly involved in the different OAS member States.

The text of this resolution is transcribed below:

#### **CJI/RES.33 (LIX-O/01)**

#### **RIGHT TO INFORMATION: ACCESS TO AND PROTECTION OF INFORMATION AND PERSONAL DATA**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

REITERATING its view that, in democratic societies, the right to privacy entails the need to protect personal information and data from unauthorized use or disclosure, and the accountability of government to its citizens to provide the public with access to information in the possession or control of the government;

RECOGNIZING THAT effective guarantees for access to and protection of personal information and data depend in the first instance on the adoption and implementation of comprehensive norms and legal procedures in domestic law;

NOTING that developments in technology suggest the need to ensure that domestic laws and procedures are adequate to provide access to and protection of data in electronic form, whether in the possession or control of governments or private entities;

RECALLING that despite its repeated requests, few member States have submitted information on existing domestic laws and procedures regarding access to and protection of personal information and data;

HAVING CONSIDERED the oral report made by the rapporteur, Dr. Jonathan T. Fried, and the documents submitted by the Department of International Law (DDI/doc.04/01 and DDI/doc.05/01);

AND WHEREAS the basic principles that should be respected in the law of member States relating to access to and protection of personal information and data were set out in document CJI/doc.45/99, titled *Right to information: access to and protection of information and personal data* and approved by the Committee for transmission to the appropriate organs of the organization and through them to member States,

RESOLVES:

1. To thank Dr. Jonathan T. Fried for his oral report and for his very thorough analysis of the topic presented in his previous reports, titled *Right to information: access to and protection of information and personal data* (CJI/doc.45/99) and *Right to information: access to and protection of information and personal data in electronic form* (CJI/doc.25/00 rev.1).

2. To reaffirm its agreement with the general principles set out in these reports, reflecting the importance of the protection of personal information and data from unauthorized use or disclosure, and the accountability of government to its citizens to provide the public with access to information in the possession or control of the government.

3. Given the limited information submitted to it by member States on existing domestic laws and procedures concerning access to and protection of personal information and data, to review at its next session the appropriateness of further work on this subject.

4. To recommend that the Permanent Council favourably consider urging member States to adopt internal legislation in this area consistent with the principles set out in previous reports.

This resolution was adopted at the session held on 16 August 2001, in the presence of the following members: Drs. Sergio González Gálvez, Eduardo Vío Grossi, Orlando Ruben Rebagliati, Brynmor T. Pollard, Luis Herrera Marcano, Gerardo Trejos Salas, Jonathan T. Fried, João Grandino Rodas and Felipe Paolillo.

Dr. Carlos Manuel Vázquez abstained from voting.

## 9. Juridical aspects of hemispheric security

### Resolution

CJI/RES.30 (LVIII-O/01) *Juridical aspects of hemispheric security*

During its fifty-seventh regular session in Rio de Janeiro, August 2000, the Inter-American Juridical Committee adopted resolution CJI/RES.16 (LVII-O/00), *Juridical aspects of hemispheric security*, with the abstention of Dr. Eduardo Vío Grossi. In that resolution, the General Secretariat was asked to forward a questionnaire on the subject to OAS member States and, based on the replies received to the questionnaire, to give priority to drawing up legal criteria for a definition of hemispheric security. On September 18, 2000, the International Law Department transmitted said questionnaire to the OAS member States.

By the time of its fifty-eighth regular session in Ottawa, March 2001, the Inter-American Juridical Committee had received replies to the questionnaire from the governments of Argentina and Ecuador. The members of the Committee agreed that it was of the utmost importance to obtain replies to the questionnaire from the other member States.

In the course of that session, Dr. Sergio González Gálvez, the rapporteur on the topic, recalled that the reason why the Inter-American Juridical Committee had decided to include this item on its agenda was that for a long time, the Committee on Hemispheric Security of the Permanent Council had not made progress on the issue because of the absence of an adequate definition of the concept. He said that as co-rapporteur, he had no problems with limiting the topic to certain specific aspects already mentioned by other members of the Inter-American Juridical Committee at previous sessions.

Dr. Sergio González Gálvez went on to say that in addition to the work to be done and the work referred to in documents presented previously by rapporteurs, it was important for the Inter-American Juridical Committee to identify current risks to regional security, in view of the fact that many inter-American legal instruments were now irrelevant, in light of the present international situation.

Dr. Eduardo Vío Grossi, the rapporteur on the topic, said that before beginning a study on the matter, there were four questions that should be resolved first, as follows: what is the status of current law in this area; what does hemispheric security involve *per se*, and what are the issues that are indirectly related to it; what is the desired outcome of the current process, i.e., the gradual development of law or a recognition of the current status of the matter; and, what is the institutional context, or in other words, should the new work be developed in the OAS, TIAR, or in other institutions?

One member of the Inter-American Juridical Committee referred to an urgent need to define the topic to be studied, since the way the topic is currently presented in the Inter-American Juridical Committee is too wide. It was suggested that the Committee

include in the extensive range of possible issues the subject of humanitarian intervention and the use of force.

The Inter-American Juridical Committee finally adopted resolution CJI/RES.30 (LVIII-O/01), *Juridical aspects of hemispheric security*, which provides as follows: to give priority on the agenda of its fifty-ninth regular session to an item on hemispheric security; to suggest to the rapporteurs that in the reports presented at that session, they endeavor to address the following issues, bearing in mind any decisions made on the matter by the Third Summit of the Americas and the OAS General Assembly: the scope of concepts of security and legitimate collective defense, pursuant to the OAS Charter, TIAR, the Bogota Pact, and evolving international laws applicable to the subject; and, a new concept of hemispheric security that responds to the wishes of member States and to the challenges facing the community of nations of the Americas. It further requested the General Secretariat to ask member States once again to respond to the questionnaire referred to in resolution CJI/RES.16/00 (LVII-O/00).

At the thirty-first regular session of the General Assembly in San José, Costa Rica, in June 2001, the Assembly requested that the Inter-American Juridical Committee collaborate with the Permanent Council's Committee on Hemispheric Security whenever asked to do so [AG/RES.1772 (XXXI-O/01)].

Resolution CJI/RES.30 (LVIII-O/01) is transcribed below:

**CJI/RES.30 (LVIII-O/01)**

**JURIDICAL ASPECTS OF HEMISPHERIC SECURITY**

THE INTER-AMERICAN JURÍDICAL COMMITTEE,

RECALLING:

That the agenda of its 54<sup>th</sup> regular sessions (Rio de Janeiro, January 1999) included the topics of "hemispheric security" and "the Charter of the Organization of American States: limitations and possibilities"; and

That at its 55<sup>th</sup> regular sessions (Rio de Janeiro, August 1999), the Juridical Committee decided to combine both topics into one under the heading "legal aspects of hemispheric security";

KEEPING IN MIND the reports of the rapporteurs as indicated below:

- *Towards a new concept of hemispheric security*, presented by Dr. Sergio González Gálvez (CJI/doc.19/99);

- *Draft agreement. The Charter of the Organization of American States: limitations and possibilities*, presented by Dr. Eduardo Vío Grossi (CJI/doc.20/99);

- *Hemispheric security: considerations on the current situation of the inter-American security system and confidence-building measures*", presented by Dr. Luis Marchand Stens (CJI/doc.26/99 rev.1 corr.1);

- *Towards a new concept of security in the hemisphere: security schemes in the American continent after the cold war*, presented by Dr. Sergio González Gálvez (CJI/doc.35/99);

- *The Charter of the Organization of American States, hemispheric security, universalism and regionalism: points to develop in relation to these three themes*, presented by Dr. Sergio González Gálvez (CJI/doc.46/99);

- *Juridical aspects on hemispheric security. Second preliminary report on the Charter of the Organization of American States: concepts*, presented by Dr. Eduardo Vío Grossi (CJI/doc.9/00);

- *Initial thoughts on the problems arising from the marginalization of the Inter-American Treaty on Reciprocal Assistance (TIAR), the viability of a new instrument to preserve peace in the hemisphere, and the process surrounding the new concept of security*, presented by Dr. Luis Marchand Stens (CJI/doc.4/00 corr.1); and

- *Towards a new concept of hemispheric security*, presented by Dr. Sergio González Gálvez (CJI/doc.11/00 rev.1);

WHEREAS:

In its resolution *Juridical aspects of hemispheric security* [CJI/RES.3 (LVI-O/00)], the Juridical Committee decided to continue to study this topic and to give it the highest priority, given its importance in the joint effort to strengthen the inter-American system;

In its resolution *Juridical aspects of hemispheric security* [CJI/RES.16 (LVII-O/00)], the Juridical Committee asked member States of the Organization to complete a questionnaire for developing legal criteria for a definition of hemispheric security that can meet the challenges of the 21<sup>st</sup> century; and

The 30<sup>th</sup> General Assembly of the OAS (Windsor, June 2000), in resolution AG/RES.1704 (XXX-O/00), asked the Inter-American Juridical Committee to continue its consideration of this subject, focusing its analysis on the current status of the *OAS Charter*, the *Inter-American Treaty on Reciprocal Assistance (TIAR)*, and the *American Treaty on Pacific Settlement (Pact of Bogota)*;

REALIZING that hemispheric security is continually considered by the principal political organs of the Organization of American States and especially by the Hemispheric Security Committee of the Permanent Council of the Organization;

SINCE the subject of hemispheric security *per se* involves complex political and legal aspects and their relationship to current law and what in this regard should be changed, which is obviously difficult for the essential consensus on this matter between member States of the Organization of American States must first be achieved;

NOTING the decision of the Organization of American States to convene a special conference on security, at a date to be determined, at which conference the review of all matters related to the future of the hemispheric security system in the Americas should be concluded;

REALIZING that in the documents being prepared for consideration at the Third Summit of the Americas to be held next April in Quebec, Canada, hemispheric security is an important topic; and

CONSIDERING that its 58<sup>th</sup> regular sessions are being held in Ottawa, Canada, as a prelude to the above-mentioned meeting of the Heads of State and Government of the Americas,

RESOLVES:

1. To include matters related to hemispheric security as a priority on the agenda of its 59<sup>th</sup> regular sessions, to be held at its headquarters in Rio de Janeiro, Brazil, in August 2001;
2. To suggest to the current rapporteurs on this topic, Dr. Sergio González Gálvez and Dr. Eduardo Vío Grossi, that in their reports to the 59<sup>th</sup> regular sessions, they cover the following topics, taking into account what the Third Summit of the Americas and the General Assembly of the OAS may have decided on these matters:
  - a. the scope of the concepts of security and legitimate collective defense, in accordance with the *Charter of the Organization of American States*, the *Inter-American Treaty on Reciprocal Assistance (TIAR)*, the *American Treaty on Pacific Settlement (Pact of Bogota)*, and the development of international law applicable to this area;
  - b. a new concept of hemispheric security that responds to the desires of the member States and the challenges facing the American community of nations.
3. To ask the Office of the Secretary General to request again that the member States answer the questionnaire to which resolution CJI//RES.16 (LVII-O/00) refers.
4. To ask the Office of the Secretary General, through the Secretariat for Legal Affairs, with special regard to the effects of agreements that may be adopted at the next Summit of Heads of State, to forward this resolution urgently to the Permanent Council and to the agencies and persons responsible for preparing the Third Summit of the Americas.

This resolution was unanimously adopted at the session held on 22 March 2001, in the presence of the following members: Drs. Sergio González Gálvez, Kenneth O. Rattray, Carlos Manuel Vázquez, João Grandino Rodas, Jonathan T. Fried, Gerardo Trejos Salas, Eduardo Vío Grossi and Felipe Paolillo.

## **10. Improving the administration of justice in the Americas: access to justice**

During the fifty-eighth regular session of the Inter-American Juridical Committee, held in Ottawa in March 2001, Dr. Jonathan T. Fried, the rapporteur on the topic, gave a brief presentation of what he had done. He highlighted the importance of an independent judiciary, and said that there had not been any reaction on the part of the political organs of the Organization. He also reported that the Center for Justice Studies of the Americas had not responded to the offer of cooperation extended by the Juridical Committee.

The Secretary for Legal Affairs suggested that, at the next regular session of the Inter-American Juridical Committee, it request the General Secretariat once again to advise the Permanent Council of its wish to have an item on access to justice and the independence of the Judiciary included on the agenda of the next Meeting of Justice Ministers of Justice, in addition to any report that the Juridical Committee may deem appropriate to present. He pointed out that even though the agenda for the meeting of Ministers of Justice may already have been determined, that does not mean that the Inter-American Juridical Committee could not make such a proposal.

The Inter-American Juridical Committee decided to keep the item on its agenda and to discuss it at its next regular session, with all the rapporteurs present. In addition, it decided to invite the President of the Center for Justice Studies of the Americas to attend that session, at the expense of the Center. At the same time, it agreed to add the phrase "access to justice" to the title of the item.

On April 30, 2001, the President of the Inter-American Juridical Committee, Dr. João Grandino Rodas, sent a letter to Dr. Mónica Nagel Berger, Chairmadam of the Center for Justice Studies of the Americas containing the invitation in question.

At the thirty-first regular session of the General Assembly in San José, Costa Rica, in June 2001, the Assembly asked the Inter-American Juridical Committee to pursue its research into various aspects related to improvement of the administration of justice in the Americas. For the time being, it is to focus its efforts on the issue of access to justice by individuals, and, in so doing, to maintain the necessary coordination and maximum cooperation possible with other organs, agencies, and entities of the Organization that are working in this area, and especially with the Center for Justice Studies of the Americas, which is headquartered in Santiago, Chile [AG/RES.1772 (XXXI-O/01)].

At its fifty-ninth regular session in Rio de Janeiro in August 2001, the Inter-American Juridical Committee received a visit from Dr. Juan Enrique Vargas, Executive Director of the Justice Studies Center of the Americas. Among other things, the Chairman of the Juridical Committee offered to send a letter to the Center inviting it to send a representative to teach at the next International Law Course, as part of a more extensive cooperation arrangement that, in his view, would be appropriate to establish between the Committee and the Center.

## 11. International abduction of minors by one of their parents

### Resolution

CJI/RES.25 (LVIII-O/01) *International abduction of children by one of their parents*

At the fifty-eighth regular session of the Inter-American Juridical Committee in Ottawa, March 2001, the Chairman of the Inter-American Juridical Committee and rapporteur on the topic, Dr. João Grandino Rodas, reported on the history of this problem.

The Inter-American Juridical Committee adopted resolution CJI/RES.25 (LVIII-O/01), *International abduction of children by one of their parents*, while thanking the Inter-American Children's Institute for the paper on international abduction of minors sent to the Juridical Committee. It decided to postpone further work on the subject until it received specific information on the case on which it is consulting with the Institute or more specific guidelines or further requests from the OAS General Assembly.

On March 19, 2001, the Chairman of the Inter-American Juridical Committee, Dr. João Grandino Rodas, sent a letter to Dr. Alejandro Bonasso, Director General of the Inter-American Children's Institute, to thank him for sending the aforesaid document.

At the thirty-first regular session of the General Assembly in San José, Costa Rica, in June 2001, the Assembly requested the Permanent Council to invite the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, and the IAJC to give legal and technical assistance and support, in accordance with their respective fields of competence, to the efforts to organize and conduct the Meeting of Government Experts [AG/RES.1835 (XXXI-O/01)].

At its fifty-ninth regular session in Rio de Janeiro in August 2001, the Inter-American Juridical Committee took note of the Meeting of Government Experts, as specified in General Assembly resolution AG/RES.1835 (XXXI-O/01), and referring to its own resolution CJI/RES.25 (LVIII-O/01), expressed its willingness to provide the legal assistance contemplated by the General Assembly if requested by it to do so. It further decided to leave this matter on its agenda as an item for follow-up action.

**CJI/RES.25 (LVIII-O/01)**

### **INTERNATIONAL ABDUCTION OF CHILDREN BY ONE OF THEIR PARENTS**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

RECALLING that the General Assembly of the OAS, at its 29<sup>th</sup> regular sessions held in Guatemala in June 1999, through resolution AG/RES.1691 (XXIX-O/99), asked the Inter-American Juridical Committee to issue an opinion, as requested in resolution CD/RES.10 (73-R/98), adopted by the Board of the Inter-American Children's Institute at its 73<sup>rd</sup> regular sessions;

KEEPING IN MIND that the Inter-American Juridical Committee asked the Inter-American Children's Institute for information on the national legislation of OAS member States in this field, as well as for more detailed information on the particular case that motivated this effort and the specific aspects that in its opinion should be studied by the Inter-American Juridical Committee;

NOTING the letter of October 4, 2000 from the Director of the Inter-American Children's Institute that included as an attachment a monograph by this Institute on general aspects of this topic;

REALIZING that until now no specific information has been received on the particular case that was the subject of consultation by the Inter-American Children's Institute; and

ALSO AWARE of the documents prepared by the General Secretariat in support of the work of the Inter-American Juridical Committee, especially those referring to inter-American treaties on this subject and their status with respect to signature and ratification;

RESOLVES:

1. To express again its deepest concern about the international abduction of children by one of their parents.
2. To thank the Inter-American Children's Institute for the document on the international abduction of children that it sent to the Inter-American Juridical Committee, this document being a valuable contribution to the consideration of general aspects of the issue;
3. To suspend consideration of the topic in the Inter-American Juridical Committee until more specific instructions are received from, or further consultations are held with, the General Assembly of the OAS, the Permanent Council of the Organization or the Inter-American Children's Institute.

This resolution was unanimously adopted at the session held on 20 March 2001, in the presence of the following members: Drs. Sergio González Gálvez, Kenneth O. Rattray, Carlos Manuel Vázquez, João Grandino Rodas, Jonathan T. Fried, Gerardo Trejos Salas, Eduardo Vío Grossi and Felipe Paolillo.

## **12. Inter-American cooperation against terrorism**

The Inter-American Juridical Committee did not take up this matter at either its fifty-eighth or its fifty-ninth sessions.

## **13. Study on the inter-American system for the promotion and protection of human rights**

The Inter-American Juridical Committee did not take up this matter at either its fifty-eighth or its fifty-ninth regular sessions, held in Ottawa, Canada, in March 2001 and in Rio de Janeiro, Brazil, in August 2001, respectively.

At the thirty-first regular session of the General Assembly in San José, Costa Rica, in June 2001, the Assembly requested that the Inter-American Juridical Committee contribute to the work being done by the Committee on Juridical and Political Affairs in relation to the dialogue on the inter-American system for the protection and promotion of human rights, at the request of that Committee [AG/RES.1828 (XXXI-O/01)].

## **14. Possibilities and problems of the Statutes of the International Criminal Court**

At the fifty-eighth regular session of the Inter-American Juridical Committee in Ottawa in March 2001, the Department of International Law distributed to Committee members for their information a document entitled *The first five sessions of the UN Preparatory Commission for the International Law Criminal Court*, by Christopher Keith Hall, which was extracted from the *American Journal of International Law*. Dr. Sergio González Gálvez also gave members of the Inter-American Juridical Committee a book he wrote entitled: *La Corte Penal Internacional, el uso de las armas convencionales en caso de conflicto armado y la injerencia con fines humanitarios: tres temas básicos de Derecho Internacional Humanitario* [*The International Criminal Court, use of convention weapons in the case of armed conflict, and interference in internal affairs for humanitarian purposes: three basic subjects of International Humanitarian Law*].

The rapporteur on the theme, Dr. Sergio González Gálvez, spoke on the imbalance in the Statutes of the International Criminal Court in the area of war crimes, since the Statutes include reference to a “grandfather clause,” which opens up the possibility for a state ratifying that legal instrument to waive application of that chapter for a period of seven years. At the same time, he reported that the scope of the definition of noninternational armed conflicts, as it appears in Geneva Protocol II, had been modified to make it more vague, based on a decision made by the Tribunal for the former Yugoslavia. He referred in general terms to a number of the problems appearing in the document presented in August 2000, *The International Criminal Court* (CJI/doc.21/00).

One of the members of the Inter-American Juridical Committee expressed his concern over the approach to the subject in the Committee, especially since it was a topic within the field of competence of the United Nations. He said that he had not received any indications by political authorities of OAS member states that they were dissatisfied with

the level or the process of discussions currently taking place in the United Nations, and that there was actually no need to start a parallel initiative. Finally, he indicated that before the Juridical Committee invests any effort into studying issues such as interference by the Security Council in the affairs of the International Criminal Court, it should focus on ensuring that the same principles of independence are applied to the internal systems of OAS member states, and especially in the context of efforts to improve the administration of justice.

Another member commented on the relationship between the Security Council and the International Criminal Court, and more specifically on action the Council might take for an indeterminate period of time to block the punishment of a person who has been sentenced, as a kind of amnesty, something that is condemned by the United Nations Commission on Human Rights.

It was also pointed out that the Statutes are part of a dynamic process, in that they have already been ratified by about 20 States, and have received a large number of signatures, and that this was a fact that could not be ignored. Moreover, the Preparatory Committee has already approved the elements defining crimes and adopted the Court's *Rules of Procedure*. It was suggested that the Inter-American Juridical Committee might devote time to studying some of the issues that the Preparatory Committee had not yet taken up, so that it could make a contribution and be involved in a timely manner. An effort of this sort would help promote the universality of the Statutes, by identifying the difficulties confronting the States that have decided not to sign it and giving them alternative solutions.

Another member of the Juridical Committee stressed the importance of the subject, which has a significant impact on the hemisphere. Although the Statutes may not coincide with the interests of the States of the Americas, he said that no State should serve as a haven for those that commit serious violations of international law. This, in his view, is the consideration that should lead us to join forces to identify the obstacles preventing the States of this hemisphere from being parties to the Statutes. One of the most important problems is the influence of the Security Council over the International Criminal Court, which is something very difficult to understand, in view of the fact that national laws do not allow political authorities to interfere in justice systems. The Inter-American Juridical Committee might be able to help in finding a solution to these problems.

In general terms, the Inter-American Juridical Committee needs to determine how the existence of the Court will affect inter-American law and relations, and how the inter-American system could contribute to this universal process.

The rapporteur on the theme voiced his disagreement on various opinions issued by members of the Inter-American Juridical Committee during the session. He said that he was not seeking to amend the Statutes, but that he saw serious obstacles to their future application. The Inter-American Juridical Committee might focus on anticipating these problems and on endeavoring to find a solution to them.

The Chairman of the Inter-American Juridical Committee suggested that the topic remain on the agenda and that the issues identified at this session be taken up at the next one.

At the thirty-first regular session of the General Assembly in San José, Costa Rica, in June 2001, the Assembly requested that the Inter-American Juridical Committee include on the agenda of the next Joint Meeting with Legal Advisors of Ministries of Foreign Affairs of OAS Member States items related to a study of mechanisms to deal with and prevent the serious, recurrent violations of international humanitarian law and international human rights law, as well as a study of the role that the International Criminal Court would play in this process [AG/RES.1770 (XXXI-O/01)].

During the fifty-ninth regular session of the Inter-American Juridical Committee in Rio de Janeiro, Brazil, in August 2001, the Committee decided to take note of the work done on the subject and the reports presented on it by Dr. Sergio González Gálvez. In view of the mandate it received in General Assembly resolution AG/RES.1770 (XXXI-O/01), and of the fact that the Committee believes that it can make an important contribution to some issues related to the validity of the Statutes of the International Criminal Court, the Juridical Committee decided to keep the topic on its agenda and asked the rapporteur to draft a basic document to be presented at the next Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of OAS Member States.

#### **15. Possible additional measures to supplement the Inter-American Convention against Corruption (Caracas)**

During the fifty-eighth regular session of the Inter-American Juridical Committee in Ottawa, Canada, in March 2001, Dr. Sergio González Gálvez, the rapporteur on the subject, made an oral presentation of the list of topics on which the Juridical Committee could focus its work as a follow-up to the *Inter-American convention against corruption*. This list included the following matters: comparative studies on laws in member States; a study of matters that could lead to preparation of model laws; the problem of laundering of assets or proceeds from corruption; corporate responsibility (participation by companies in acts of corruption); introduction of a mechanism for multilateral monitoring to promote or assess implementation of the Convention; and, contributions of proceeds of corruption to election campaigns, among others.

A member of the Inter-American Juridical Committee proposed that a study be conducted on the international liability of States on the matter of corruption. He explained that in this effort, those States that had ratified the Convention would have to be distinguished from those that had not; and a determination would then be made as to whether or not the latter States had an international obligation on another basis.

The Secretary for Legal Affairs indicated that important achievements had been realized to date in implementing the provisions of the Inter-American Convention against Corruption on a national scale. There have also been substantive developments on a subregional and regional level, mainly through the Inter-American Program for Cooperation to Combat Corruption. He also said that within the various bodies of the

OAS, technical cooperation activities have been developed, and that there has been a rich exchange of information and experiences. He gave as an example the work the General Secretariat has been doing to hold seminars in this area and the work that has also been produced in this area by CICAD. He indicated that activities in this area had recently included initiatives to encourage the participation of private enterprise and civil society organizations to promote transparency in public management.

The Chairman of the Inter-American Juridical Committee proposed that the Committee continue to study this problem at its next regular session.

#### **16. Trafficking in arms on the basis of decisions by the Inter-American Juridical Committee on the subject**

During the IAJC's fifty-eighth regular session in Ottawa, Canada, in March 2001, Dr. Sergio González Gálvez, the rapporteur on this subject, proposed that the Inter-American Juridical Committee update the *Draft inter-American convention to prohibit the use of certain weapons and warfare methods*, prepared by the Committee in 1985. In addition, he requested the General Secretariat draw up a report on the fate of that draft OAS convention, as well as a list of the conventions in force on the subject and the work being done in this regard in the United Nations. Based on that information, a decision could be made as to whether or not to pursue a study on the issue.

#### **17. Preparation of a Draft inter-American convention against racism and all forms of discrimination and intolerance**

At the thirty-first regular session of the General Assembly in San José, Costa Rica, in June 2001, it requested the Inter-American Juridical Committee to contribute to the work of the Permanent Council by drafting a document of evaluation on the following: the provisions of international legal instruments on the subject; the replies by member States to the questionnaire on *Preparation of a draft inter-American convention against racism and all forms of discrimination and intolerance* (CP/CAJP-1687/00 rev.1); the declarations and recommendations emanating from the World Conference Against Racism, Racial Discrimination, Xenophobia, and Related Forms of Intolerance, held in South Africa in 2001, and those issued by the Regional Conference of the Americas in preparation for that World Conference, which was held in Chile in 2000; and, any contributions by other organs of the inter-American system and civil society [AG/RES.1774 (XXXI-O/01)].

During the fifty-ninth regular session of the Inter-American Juridical Committee in Rio de Janeiro, Brazil, in August 2001, the Department of International Law presented document DDI/doc.06/01, *Preparation of a draft inter-American convention against racism and all forms of discrimination and intolerance: study of the problem in the inter-American system and in other international systems*. At that same session, Dr. Felipe Paolillo was elected to serve as rapporteur for that topic.

## 18. Draft inter-American convention for the extraterritorial repression of sexual crimes committed against minors

### Document

CJI/doc.46/00 *Inter-American draft convention on extraterritorial repression of sexual crimes committed against minors: proposals to be submitted to the CIDIP-VI for consideration*  
(presented by Dr. Gerardo Trejos Salas)

During the fifty-eighth regular session of the Inter-American Juridical Committee (Ottawa, Canada, March 2001), Dr. Gerardo Trejos Salas introduced the document entitled *Inter-American draft convention on extraterritorial repression of sexual crimes committed against minors: proposal to be submitted to the CIDIP-VI for consideration* (CJI/doc.46/00). It also asked the Juridical Committee to include the item on its agenda. He said that the importance of the subject lies in the fact that it opens up the possibility of prosecuting individuals who commit these crimes regardless of whether or not it is a crime in the country in which the act takes place. Dr. Trejos indicated that the objective of a convention on this subject would be precisely to make sexual crimes against minors extraterritorial. He pointed out that the way these crimes are usually prosecuted is by extradition, and that the purpose of the Convention is to avoid that process, which always seems to be long and very complicated. He went on to explain that the new French Criminal Code contains a similar provision. He referred to how serious this problem has become in some places, such as Brazil, Dominican Republic and the city of Miami, and he suggested that the attention of the officials participating in the next Summit of the Americas should be drawn to the problem, which could easily be considered under the topic of human safety.

The Chairman of the Inter-American Juridical Committee proposed that this item be included on the Committee's agenda, and that it not be confined to a study of extraterritoriality, but that it also cover a study of extradition procedures. Some members, recognizing the serious problem posed by the violation of minors on an international scale, said that the issue should be formulated differently, to obtain an idea of the preliminary status of the problem. They pointed out that it is important to know to what extent the national legislation of countries is sufficient to deal with the problem, before trying to find an international solution to it, and to analyze to what extent extradition treaties have been useful in this area. They also insisted on the need to have more information on the subject from other institutions and organizations involved in this area, such as the Inter-American Children's Institute, the Inter-American Commission on Women, the Center for Justice Studies of the Americas, the Inter-American Human Rights Institute, and the United Nations Commission on Children's Rights, among others. It was suggested that consultations be initiated with organizations in the inter-American system.

Following the discussions, Dr. Gerardo Trejos decided to request that the item be taken off the agenda of the Inter-American Juridical Committee. The document presented in the Committee is transcribed below:

**CJI/doc.46/00****INTER-AMERICAN DRAFT CONVENTION ON  
EXTRATERRITORIAL REPRESSION OF SEXUAL CRIMES  
COMMITTED AGAINST MINORS:  
PROPOSAL TO BE SUBMITTED TO THE CIDIP-VI  
FOR CONSIDERATION**

It is well known that prostitution of children has reached mass proportions and is growing rapidly in all countries of the world. Furthermore, distinction can be made between the rates in poor or wealthy nations in this respect.

Our countries have not escaped from this problem that has been increasing exponentially with the growth of inbound tourist trade that comes into our countries seeking the company of under age children to satisfy their most lewd desires. This is the reason why, for example, it is estimated that from a total of almost one million tourists that have come to Costa Rica, approximately ten thousand are adults who wanted to establish intimate contact with minors.

Although Costa Rica does not have a precise figure for the number of sexually exploited children, the Miami Herald published it reaches the disgraceful number of approximately 2,000 children, and pointed out that the largest pockets are found in San Jose, Puntarenas, Quepos, Santa Cruz, Liberia, Golfito, Limón and the Cartago Center locations.

Furthermore, several studies mirror the existence of large organizations participating in this trade, at least five of them, operating as facilitators to establish contact with those offering these services to the so called "sexual tourist", in which taxi drivers, pimps, the police, hotels, Internet sites and even relatives of the victims are involved in.

These are the main reasons why the international communications media has classified Costa Rica and other countries in the continent as a "sexual destination", and pointed out with what ease the tourists can be serviced by boys and girls performing this activity.

Notwithstanding the above, Costa Rica is not the only victim of the scourge of child sexual exploitation. This is an evil that is spreading around the world. According to the Miami Herald, for example, there are approximately 130,000 sexually exploited children in Rio de Janeiro and some 70,000 in Santo Domingo.

On October 29 last, writer Mario Vargas Llosa wrote an article for the Costa Rican newspaper *La Nacion*, describing how Amnon Chemouil, a 48 years old Parisian who travels to Thailand on holidays discovered the pleasures of pedophilia with the help of Victor Michael, from Switzerland. It was thanks to him that Chemouil got in touch with a woman who offers the services of her niece, a little girl who is only eleven years old.

Everything Amnon Chemouil did with the little girl was filmed by Victor Michael's camera, who is not only a pedophile but also a voyeur. A short time afterwards, he had a problem with the police in his country and this video was found while they were searching his home.

Victor Michael disclosed the identity of the main actor in the film, thus giving the Swiss police sufficient reason to forward a dossier to the French police. In turn, after carefully studying it they sent it to the judge with the jurisdiction to start a criminal trial.

Amnon Chemouil was arrested years later and taken to a Parisian court, as he had violated the 1994 French Penal Code by committing a sexual violation against a minor, as

the French Penal Law applies to all crimes committed by French citizens either on French soil or abroad. Furthermore, a law approved on June 17, 1998 authorizes the courts to judge all “sexual aggressions committed abroad”. This case established a legal precedent, as this was the first time someone was arraigned for a sexual criminal tourism case.

We believe that the Inter-American System must take conclusive action, to supply the necessary tools to ensure that prompt judgment is passed on people involved in this type of crimes.

Based on the above, we propose that the Inter-American Juridical Committee should prepare an Inter-American Convention to repress extraterritorial sexual crimes against minors. The draft convention should, in its most substantial aspects, provide the necessary means to file a criminal lawsuit for punishable acts committed abroad and, in this case, apply the national law whenever a national or common resident is the suspected author of a sexual crime whose victim is an under age child, even though the sexual crime under discussion is not punishable in accordance with the juridical system in force in the location where the crime was committed.

ANNEX

**ARTICLE WRITTEN BY WRITER MARIO VARGAS LLOSA  
PUBLISHED IN THE COSTA RICAN NEWSPAPER  
LA NACIÓN ON SUNDAY, OCTOBER 29, 2000.**

“Using the French public transportation services like his superiors and working colleagues, in 1992 Paris-born Amnon Chemouil, a 48 years old bachelor discovered the enchantment of Thailand. Not those related to its wild tropical landscape, or to its old civilization and its Buddhist temples, but those linked to easy and cheap sex, one of the flourishing industries in that country. In the beach resort of Pataya not far from Bangkok, he was able to make love with very young prostitutes, for whom he had always felt a special desire. He then decided to spend his vacations in that exotic paradise, where he returned in 1993 and 1994.

On his third trip, he met another sexual tourist in a bar in Pataya, Victor Michael a Swiss national, another enthusiastic fan of youthful sexual partners or, to be more precise, of children, especially males. Initiated by his new and vastly experienced friend in the pleasures of pedophilia, Amnon Chemouil consented. Victor took care of everything: he found a madam and rented a hotel room. The woman showed up at the rendezvous with an eleven-year-old niece and started reciting the wide-ranging variety of services the child could offer the customers, indicating their respective prices. Amnon chose fellatio, at an extremely reasonable price: the equivalent of barely 125 francs.

Although the child whimpered a bit at the start because she wanted to look at the television instead of working, the Parisian was so pleased that in addition to paying the price agree with the aunt, he gave the child a 25 francs tip. A handheld camera belonging to Victor Michael who, in addition to being a pedophile, was also a voyeur, was used to film everything that happened in the hotel room in Pataya. Shortly after he returned to Paris and to his sensible work as a civil servant working for RATP, Amnon received a copy of that video mailed by his friend Michael from Switzerland as a remembrance of an exciting prank. The Parisian included it in his collection of pornographic films of which he had almost one hundred.

The Example of France

Due to his weakness for childhood, he had some problems with the Swiss police, far less tolerant than that of Thailand in matters related to sex (Ah! The ancestral spirits of Calvin and Rousseau!!). Among other delicacies, while searching his home they found the

video documenting Amnon Chemouil's ejaculations (three, it seems) in that small hotel lying on the magnificent beach of Pataya. Under interrogation, the filmmaker mentioned the circumstances under which that documentary has been shot and the identity of its hero. The Swiss policemen drafted a dossier and sent it to the French Police. After examining it carefully, the latter placed it in the hands of a judge to file a lawsuit.

I must stop for a minute and open a parenthesis in my story, to express my admiration for French justice. Many things are wrong in France and deserve to be criticized – and I do so, sometimes, but there is one that works very well, and I refer to justice, a pillar of democracy and maximum guarantee of social relationships as well as the operating conditions of its institutions. French courts and judges act with a degree of independence and courage that are an example for all other democracies. Their action has served to bring to light innumerable cases of corruption at the highest economic, administrative and political levels, in order to place on the bench of the accused – and, if need be, put behind bars – people who due to their wealth or influence would be untouchable in other societies. Either in issues related to human rights, racial and sexual discrimination, or subversion and terrorism, justice is efficient and fast-moving in France to intervene, and is strong to correct the mistakes that allow the citizen to feel the rare and pervasive belief that in its own world and despite the fear they live in, there is at least one public institution – the judge -, that exists not to harm him but to service him.

#### Sexual punishment without borders

This was certainly not the impression the surprised Amnon Chemouil had when, years after the episode lived in Thailand, he found himself detained and facing a Parisian court judging him for violating the 1994 Penal Code by committing a sexual violation of a minor. The French penal law is applicable to any crime committed by a French national “inside or outside” the Republic, and an Act approved on June 17, 1998 authorizes the courts to judge “sexual aggressions committed abroad”, even though the acts the accused is said to have performed are not considered as crimes in the country where they were committed.

The judgment of Amnon Chemouil by the Superior Court of Paris attracted considerable attention, as it was establishing a legal precedent. This was the first time the Courts were openly discussing a case of criminal “sexual tourism”. Several organizations, both national and international, that fight against the sexual exploitation of children had become civil parties in the trial, among them UNICEF, ECPAT (*End Child Prostitution in Asian Tourism*) and several NGOs, including one from Thailand that seven years later, made an effort to find in Bangkok the aunt of the little girl of this story. Now a young 18 year-old girl, she came to Paris to make a sworn statement in private before the judges, who were also allowed to see the copy of the video made by Victor Michael that had been found while searching his home. The accused, who in the eight months spent in prison before the trial, stated he had experienced a true psychic cataclysm, admitted having committed the acts he was accused of, begged his victim to forgive him and demanded the Court to punish him. The sentence handed down was seven years in prison instead of the ten demanded by the Prosecutor.

#### Struggle against sexual tourism

Many conclusions can be reached with this story. The first one is, that if France's example is followed, it is quite probable that this type of crimes will not be committed under the umbrella of this practice on a daily basis by thousands of people from countries such as Spain, Germany and the U.K., Italy, United States and the Nordic countries which, due to their high lifestyles figure among those that practice “sexual tourism” in Third World countries. Especially as regard the sexual exploitation of children, their rates may drop and some criminal offenders may be punished. The precedent established by France is impeccable: a modern democracy cannot accept that, beyond its national borders, its citizens will be exempted from legal responsibility and may happily commit crimes because

the foreign country does not have legal norms prohibiting that crime or, if they do, they are not obeyed or have long been forgotten by all. I ignore the legal approach Thailand has regarding sexual crimes. But I am quite positive that in Cuba, another “sexual paradise” on this planet for tourists with foreign hard currency, there is a very precise legislation that prohibits the prostitution of children. (I will never forget how nauseated I felt while traveling by air, when the man next to me, a businessman from Morocco told me he intended taking his son to Cuba that summer to deflower those delicious mulatto girls, so young, so cheap and “so clean”).

It cannot be denied that due to hunger, the urgent need for foreign currency, wide-ranging corruption and lack of efficiency of their institutions, the prostitution of children flourishes in many Third World countries in a spectacular manner under the indifference (or with the open connivance) of the authorities. All of this is undoubtedly true. On the other hand, according to information published on this matter by UNICEF and ECPAT as a result of this trial, the problem is acquiring growingly massive proportions. All of the above should represent an incentive to urge the governments of the developed democracies to follow the example of France, making a contribution towards the struggle against the sexual industrialization of girls and boys in poor countries, legally persecuting their citizens with the full power of the law whenever they practiced the type of tourism Victor Michael and Amnon Chemouil enjoyed. We cannot forget that it is people like them who are responsible for the existence of this ignominious market.

#### Globalization against national sovereignty

We shouldn't build up too many hopes, because the poverty and misery that lie behind the prostitution of children in the underdeveloped countries is an almost insurmountable obstacle for its eradication, or at least drastic reduction. I recommend any of you who are interested in finding out the dramatic levels this situation may reach, to read a small book published in 1963 by two U.S. authors: Allen Ginsberg and William S. Burroughs, entitled *The Yage Letters*. These were letters written in the 1950's from Lima by two cities lying in the Peruvian jungle, Tingo Maria and Pucallpa, telling each other their sexual experiences and knowledge on hallucinating drugs acquired and used in the country of the Incas.

I remember how flabbergasted I felt with these texts, showing a face of Lima I had not even suspected could exist: that of the small pimps living in the La Victoria and El Porvenir neighborhoods, who could just as easily work as shoeshine boys, beggars or prostitutes for enthusiastic followers such as the above mentioned *beatniks*. One of them, I believe it was Ginsberg, praised the sexual dexterity of these small boys from Lima, although he lamented they were covered in lice.

However, perhaps... the most important conclusion of the recent trial held in Paris is that it shows a positive face of this new black beast fabricated by the irredent enemies of modernity: globalization. If the borders had not lost some of their scope and, had not started to disappear in many ways, Amnon Chemouil could never have faced the court that judged and condemned him. It is also undoubtedly true that he could have gone back to enjoy many other pleasant holidays in Pataya, enjoying the comfortable prices and the large variety of opportunities that offer Thailand's girls and boys to tourists with foreign hard currency. It is thanks to this rigid concept, that of a straightjacket, upheld by national sovereignty, that it is changing into a wider and deeper entity that encompasses all the different prisms of humanity, that made French legislators decide to extend the jurisdiction of their laws and codes to this globalized society of our times, thus setting a legal precedent and an example, such as the one that occurred, not in the realm of sexual crimes, but among the crimes committed against humanity, with General Pinochet in Spain and England. It is true that he managed to avoid facing the court and answering for the crimes he committed, but this did not happen because of a failure of the part of the English judges who fulfilled their duty, but to the ugly political cover-up the English government agreed to participate in by returning the former dictator to Chile for “health reasons”.

Notwithstanding the above, another precedent was thus established, which since then makes all tyrants and satraps in power shudder in fear. Globalization does not only mean creating world markets and transnational companies; it is also a planetary interdependence that may allow justice and democratic values to expand to those regions where barbarism and impunity still reign in cases related to sexual and political crimes”.



## CHAPTER III



## OTHER ACTIVITIES

### Activities Carried Out by the Inter-American Juridical Committee in 2000

#### A. Presentation of the Annual Report of the Inter-American Juridical Committee

Dr. Brynmor T. Pollard, Vice-Chairman of the Inter-American Juridical Committee and its representative to the thirty-first regular session of the OAS General Assembly (San José, Costa Rica, June 2001), presented document CJI/doc.62/01, entitled *Address by Dr. Brynmor Thornton Pollard, Vice-Chairman of the Inter-American Juridical Committee, to the General Committee of the General Assembly of the OAS at its thirty-first regular session (San José, Costa Rica, June 4, 2001)*. Dr. Pollard indicated that he was accompanied by Dr. Gerardo Trejos Salas on the occasion. Throughout his presentation, he called the attention of the delegates present to the themes of human rights and biomedicine, and the international abduction of minors by one of their parents. He also took the opportunity to pay tribute to the memory of Dr. Keith Highet, a former member and Chairman of the Inter-American Juridical Committee, who had passed away in the course of the past year.

#### B. Course on International Law

During its fifty-seventh regular session (Rio de Janeiro, Brazil, August 2000), the Inter-American Juridical Committee adopted resolution CJI/RES.21 LVII-O/00), *Course on International Law*, according to which the main theme of the Twenty-Eighth Course on International Law will be “The Human Being in Contemporary International Law.”

Based on that resolution, the Inter-American Juridical Committee and the Department of International Law of the Secretariat for Legal Affairs organized the Twenty-Eighth Course on International Law, to be held from July 30 to August 24, 2001. Twenty-six professors from various countries of the Americas and Europe, 30 fellows from the OAS, selected from over 100 candidates, and 6 students who would defray their own costs would participate in it.

On July 30, 2001, as part of the fifty-ninth regular session of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, August 2001), the Twenty-Eighth Course on International Law was inaugurated at the Centro Empresarial Rio, in the presence of the following: the members of the Inter-American Juridical Committee; various invited officials; representatives of the General Secretariat; and, the fellows and participants attending the course. At the inaugural session, tribute was paid to the memory of Dr. Keith Highet, a former member and Chairman of the Inter-American Juridical Committee.

The Course program was as follows:

**First Week**

Monday, July 30

10:00

Inauguration.

Tuesday, July 31

9:00 - 11:00

Jorge Reinaldo Vanossi, former chairman of the Inter-American Juridical Committee. *The Constitutional Law of Peace*

11:00 - 1:00

Marcelo G. Kohen, international law professor, Institute of International Studies, Geneva. *The individual and territorial disputes – I*

3:00 - 5:00

Ana Piaggi. Judge of the National Chamber of Commerce, Commercial Law professor at the University of Buenos Aires. *One aspect of protection of persons: defense of competition and the consumer*

Wednesday, August 1

9:00 - 11:00

Jorge Reinaldo Vanossi. *The person as a subject of international law*

11:00 - 1:00

Marcelo G. Kohen. *The individual and territorial disputes – II*

3:00 - 5:00

Hervé Ascensio, Professor at the University of Paris XIII. *Obligations of States in the area of protecting human rights – I*

Thursday, August 2

9:00 - 11:00

Marcelo G. Kohen. *The individual and territorial disputes – III*

11:00 - 1:00

José Luis Siqueiros, former chairman of the Inter-American Juridical Committee. *The individual and international private arbitration – I*

3:00 - 5:00

Hervé Ascensio. *Obligations of States in the area of protecting human rights – II*

Friday, August 3

9:00 - 11:00

Hervé Ascensio. *Obligations of States in the area of protecting human rights – III*

11:00 - 1:00

José Luis Siqueiros. *The individual and international private arbitration – II***Second Week**

Monday, August 6

9:00 - 11:00

Claudio Grossman, Chairman of the Inter-American Commission on Human Rights and Dean of the Law School, American University. *The inter-American human rights system and protection of freedom of expression – I*

3:00-5:00

Orlando Rebagliati, member of the Inter-American Juridical Committee. *The International Criminal Court and its future establishment – I*

Tuesday, August 7

9:00 - 11:00

Nádia de Araújo, professor of international private law, Pontifícia Universidade Católica do Rio de Janeiro. *Private individuals and international private law – I*

11:00 - 1:00

Orlando Rebagliati. *The International Criminal Court and its future establishment – II*

3:00 - 5:00

Felipe Paolillo, member of the Inter-American Juridical Committee. *Access by the individual and other nonstate subjects to international courts and other institutions*

Wednesday, August 8

9:00 - 11:00

Claudio Grossman. *The inter-American human rights system and protection of freedom of expression – II*

11:00 - 1:00

Antônio Augusto Cançado Trindade, Chairman of the Inter-American Court of Human Rights. *Access by the individual to international justice in the inter-American system – I*

3:00 - 5:00

Manuel Ventura, Secretary of the Inter-American Court of Human Rights. *The Inter-American Court of Human Rights: on the path to a permanent tribunal – I*

Thursday, August 9

9:00 - 11:00 Antônio Augusto Cançado Trindade. *Access by the individual to international justice in the inter-American system – II*

11:00 - 1:00 Manuel Ventura. *The Inter-American Court of Human Rights: on the path to a permanent tribunal – I.*”

3:00 - 5:00 Gerardo Trejos, member of the Inter-American Juridical Committee. *The status of the embryo in international law*

Friday, August 10

9:00 - 11:00 Claudio Grossman. *The inter-American human rights system and protection of freedom of expression – III*

11:00 - 1:00 Nádia de Araújo. *The individual and international private law – II*

### **Third Week**

Monday, August 13

9:00 - 11:00 Eduardo Vío Grossi, member of the Inter-American Juridical Committee. *The theory of international responsibility with specific reference to persons or individuals*

11:00 - 1:00 Sergio González Gálvez, member of the Inter-American Juridical Committee. *Consular protection in international jurisprudence*

3:00 – 5:00 Elizabeth Spehar, Executive Coordinator, Unit for the Promotion of Democracy, OAS. *The private individual as a subject of development of democracy – I*

Tuesday, August 14

9:00 - 11:00 Carlos Manuel Vázquez, member of the Inter-American Juridical Committee. *The relationship between international trade and human rights – I*

11:00 - 1:00 Heraldo Muñoz Valenzuela, Deputy Secretary of Foreign Affairs, Chile. *The right to democracy in the Americas*

3:00 – 5:00 Elizabeth Spehar. *The private individual as a subject of development of democracy – II*

Wednesday, August 15

9:00 - 11:00 Luis Ignacio Savid Bas, professor of international public law, Universidad Nacional de Córdoba. *Subjective evolution of international law. Character of the private individual – I*

11:00 - 1:00 Mauricio Herdocia, member of the United Nations International Law Commission. *The place of the individual in the current work of the International Law Commission. The Latin American contribution – I*

3:00 – 5:00 Luis Ignacio Savid Bas. *Subjective evolution of international law. Character of the private individual – II*

Thursday, August 16

9:00 - 11:00 Mauricio Herdocia. *The place of the individual in the current work of the International Law Commission. The Latin American contribution – I*

11:00 - 1:00 Tarciso Dal Maso, legal consultant for the office of the International Committee of the Red Cross in Brazil. *Protection for individuals through international humanitarian law*

3:00 - 5:00 Silvia Backes, representative of the International Committee of the Red Cross. *The role and work of the International Committee of the Red Cross in protecting individuals during times of armed conflict*

Friday, August 17

9:00 - 11:00 Luis Ignacio Savid Bas. *Subjective evolution of international law. Character of the private individual – III*

**Fourth Week**

Monday, August 20

3:00 – 5:00

Ximena Fuentes, professor, School of Law at University of Talca and University of Chile. *The role of the individual in the process of creating the rules of international law – I*

Tuesday, August 21

9:00 - 11:00

Rosario Huesa Vinaixa, professor of international public law, University of the Balearic Islands. *The individual as the recipient of international criminal law – I*

11:00 - 1:00

Ximena Fuentes. *The role of the individual in the process of creating the rules of international law – II*

Wednesday, August 22

9:00 - 11:00

Rosario Huesa Vinaixa. *The individual as the object of international criminal law – II*

11:00 - 1:00

Jean-Michel Arrighi, Director, Department of International Law, OAS. *Problems of the inter-American system*

3:00 – 5:00

João Clemente Baena Soares, former Secretary-General of the OAS and a member of the United Nations International Law Commission. *International law and the reality of power*

Thursday, August 23

9:00 - 11:00

Rosario Huesa Vinaixa. *The individual as the object of international criminal law – III*

11:00 - 1:00

Luigi Einaudi, Assistant Secretary General, Organization of American States. *Human rights policy in the United States government*

Friday, August 24

10:00

Closing session

Luigi Einaudi, Assistant Secretary General, OAS.

João Clemente Baena Soares, former Secretary General of the OAS and member of the United Nations International Law Commission.

During its fifty-ninth regular session in Rio de Janeiro, Brazil, in August 2001, the Inter-American Juridical Committee adopted the following resolutions: CJI/RES.34 (LIX-O/01), *Twenty-Ninth Course on International Law*, in which it was determined that the course would take place August 5-30, 2002 and would be based on the central theme of “Natural resources, energy, the environment, and international law;” and CJI/RES.35 (LIX-O/01), *Request for additional financial resources for the Course on International Law*, in which the Secretary General was asked to take the necessary steps so that the relevant OAS organs would allocate to the Inter-American Juridical Committee the resources it needs to provide simultaneous interpretation for its international law courses. The text of these two resolutions appears below.

**CJI/RES.34 (LIX-O/01)****TWENTY-NINTH COURSE ON INTERNATIONAL LAW**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

CONSIDERING that in 2002 the twenty-ninth Course on International Law, which it organizes annually in conjunction with the General Secretariat of the Organization of the American States, will be held in the city of Rio de Janeiro;

CONSIDERING the need for the Course on International Law to concentrate on a central topic that focuses attention on a matter of current international importance and is also flexible enough to attract teachers and students with different interests in public and private international law,

RESOLVES to establish that the 29<sup>th</sup> Course on International Law is to be held from August 5 to 30, 2002, and have the central topic of "Natural resources, energy and the environment and international law".

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

**CJI/RES.35 (LIX-O/01)****REQUEST OF ADDITIONAL FINANCIAL RESOURCES  
FOR THE COURSE ON INTERNATIONAL LAW**

THE INTER-AMERICAN JURIDICAL COMMITTEE,

NOTING with satisfaction the acknowledgement by the member States of the Organization of American States of the importance of the conduct of the Course on International Law under the auspices of the Juridical Committee;

CONSIDERING the increasing level of participation in the Course on International Law by nationals of the English-speaking Caribbean States;

TAKING ACCOUNT OF representations made annually by participants in the Course on International Law from the English-speaking Caribbean States that they are at a disadvantage because of the lack of adequate facilities for simultaneous translation;

CONVINCED that the participation of the nationals of the English-speaking Caribbean States will be significantly enhanced if adequate financial resources were made available in order to provide the aforementioned facilities for simultaneous translation,

RESOLVES to request the Secretary General to use his best endeavors so that the appropriate organs of the Organization allocate adequate resources to the Inter-American Juridical Committee for the provision of facilities for simultaneous translation in the conduct of the Courses on International Law.

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

As for publications of the International Law Course, the Director of the International Law Department announced that the volume for the Course in 2000 was published in June 2001.

**C. Fifth Joint Meeting with Legal Advisors of the Ministries of Foreign Affairs of the OAS Member States**

At the fifty-eighth regular session of the Inter-American Juridical Committee (Ottawa, Canada, March 2001), it decided that the Fifth Joint Meeting with Legal Advisors of Ministries of Foreign Affairs of the OAS Member States would take place in August 2003.

During its fifty-ninth regular session (Rio de Janeiro, Brazil, August 2001), the Inter-American Juridical Committee decided to invite the legal advisors of the Ministries of Foreign Affairs of Brazil, Canada, Colombia, and Mexico, who attended the Fourth Joint Meeting, to the Sixtieth Session of the Inter-American Juridical Committee, to be held in February-March 2002, so that they could help organize the next Joint Meeting. The letter of invitation was signed by the President of the Juridical Committee and sent on October 2, 2001.

**D. Relations and forms of cooperation with other inter-American agencies and with similar international or regional organizations**

- Participation of the Inter-American Juridical Committee as an observer in various organizations and conferences.

The following members of the Inter-American Juridical Committee participated in various international organizations and forums as observers in 2001:

Dr. Gerardo Trejos Salas: Conference of Governmental Specialists on National Application of International Humanitarian Law and Related Inter-American Conventions, held in San José, Costa Rica, March 6-8, 2001, and sponsored by the Canadian government, the Costa Rican government, the OAS, and the International Committee of the Red Cross.

Dr. João Grandino Rodas: Presentation of the *Annual Report of the Inter-American Juridical Committee* on its activities in 2000 at a meeting of the Permanent Council's Committee on Juridical and Political Affairs in March 2001.

Dr. Gerardo Trejos Salas: Fifty-Third Session of the International Law Commission of the United Nations, which took place in Geneva in May 2001.

Drs. Brynmor T. Pollard and Gerardo Trejos: OAS General Assembly, held in San José, Costa Rica, in June 2001. See document CJI/doc.62/01, *Address by Dr. Brynmor Thornton Pollard, Vice-Chairman of the Inter-American Juridical Committee, to the General Committee of the Thirty-First Regular Session of the General Assembly of the OAS (San José, Costa Rica, June 4, 2001)*.

Dr. Eduardo Vío Grossi: OAS Special Assembly, held in Lima, Peru, September 10 and 11, 2001.

Drs. João Grandino Rodas and Carlos Manuel Vázquez: Sixth Specialized Inter-American Conference on International Private Law (CIDIP-VI), held in Washington, D.C., December 3-7, 2001.

The text of the written report on the participation of Dr. Brynmor T. Pollard in the OAS General Assembly in San José, Costa Rica, is transcribed below:

**CJI/doc.62/01**

**ADDRESS BY DR. BRYNMOR THORNTON POLLARD, VICE-CHAIRMAN  
OF THE INTER-AMERICAN JURIDICAL COMMITTEE,  
TO THE GENERAL COMMITTEE OF THE XXXI REGULAR SESSION  
OF THE GENERAL ASSEMBLY OF THE OAS  
(San José, Costa Rica, 4 June 2001)**

Mr. Chairman, Distinguished Delegates,

I take this opportunity to extend to you, Mr. Chairman, congratulations on your election to chair these proceedings. In the unavoidable absence of the Chairman of the Inter-American Judicial Committee, Dr. João Grandino Rodas, who has requested me to express his regrets for not being here today, I am pleased on behalf of the Juridical Committee to present to the General Committee a brief summary of the recent activities of the Inter-American Juridical Committee as reflected in the Committee's *Annual Report to the General Assembly* for 2000 (OEA/Ser.Q/VI.31 CJI/doc.45/00 dated 25 August 2000).

Our late Chairman, Keith Highet, presided over the 56<sup>th</sup> regular session of the Juridical Committee in March, 2000 in Washington. The Committee experienced deep loss when he died before the Committee's 57<sup>th</sup> regular session convened in Rio de Janeiro in August 2000. He was succeeded by Dr. João Grandino Rodas. I wish to acknowledge the dynamic leadership which Keith Highet gave to the Juridical Committee and his sterling contribution to the work of the Committee.

The work of the Juridical Committee is in the main responsive to the priorities established by member States of the Organization and by the organs and other bodies of the Organization. Since the last submission to the General Assembly, the Committee, at its regular session in August 2000, deliberated on a number of topics including, in particular:

- a) right to information: access to and protection of information and personal data;
- b) improving the administration of justice in the Americas: access to justice;
- c) application of the 1982 United Nations Convention on the Law of the Sea by the States in the Hemisphere;
- d) preparation of a report on human rights and bio-medicine or on the protection of the human body;
- e) juridical aspects of hemispheric security;
- f) juridical dimension of integration and international trade: competition law in the Americas;
- g) international abduction of minors by one of their parents;
- h) democracy in the inter-American system.

With regard to "the right to information", the General Assembly of the Organization, by resolution AG/RES.1395 (XXVI-0/96), had requested the Inter-American Juridical Committee to give special attention to matters concerning access to information and the protection of

personal data. The Juridical Committee considered that it was desirable to ascertain the extent to which national legislation in member States had addressed the issue as the Juridical Committee considered it to be a pre-requisite, in order to determine whether efforts should be directed towards formulating a preliminary draft of an Inter-American Convention on the subject in comparison with the Strasbourg Convention on the Protection of Persons in respect of the Treatment of Electronic Data of a Personal Character.

The Juridical Committee, through the Secretariat for Legal Affairs of the Organization, requested member States to furnish information and data, in particular, existing or proposed national legislation, as well as rules and policies governing access to personal information and its protection. At its 57<sup>th</sup> regular session in Rio de Janeiro, August 2000, the Juridical Committee resolved to reiterate its request for information from member States through the Secretariat for Legal Affairs. The Juridical Committee also requested the rapporteur, with the assistance of the Secretariat for Legal Affairs, to prepare a summary of applicable principles and considerations relevant to national laws and regulations in this field. The Committee also decided that in the light of additional responses received from member States and the abovementioned summary to be prepared, consideration will be given to options for further work on this subject to be undertaken, including the possibility of developing basic principles and guidelines or recommendations for developing likely international instruments in this field.

Arising out of its continuing consideration of the topic concerning improving the administration of justice in the Americas, the Juridical Committee, during its 57<sup>th</sup> regular session, welcomed the establishment of the Justice Studies Center of the Americas as an important entity of the Organization expected to play a significant role in the continuing process of reforming and modernising the justice systems of member States of the Organization. The Juridical Committee accordingly pledged its cooperation and support for the work of the Center in whatever manner considered appropriate to enable the Center to fulfill its mandate.

The Juridical Committee also resolved to continue its consideration of the increasingly important issue of access to justice in member States and working in collaboration with the Center in this endeavour.

With regard to the application of the United Nations Convention on the Law of the Sea by member States of the Hemisphere, the Juridical Committee, having considered the document entitled *Review of the rights and duties of States under the 1982 United Nations Law of the Sea Convention: an informal guide* prepared by the late Dr. Keith Highet and Ambassador Orlando R. Rebagliati as co-rapporteurs, resolved to approve the document and to transmit it to governmental divisions of member States responsible for implementing the Convention and to other professional bodies and scholars. The Juridical Committee also decided to keep the subject on its agenda and to undertake the preparation of further reports on the matter, having due regard to the comments received from member States and the Committee on Juridical and Political Affairs of the Permanent Council of the Organization.

With respect to the preparation of a report on human rights and bio-medicine or on the protection of the human body, the rapporteur for this subject –Dr. Gerardo Trejos Salas, of Costa Rica–prepared and presented to the Juridical Committee a draft legislative guide (a model law) on assisted fertilisation for which he was highly commended on the research undertaken. As a result, the Juridical Committee decided to transmit the document to the Director General of the Pan-American Health Organization (PAHO) with a request for information and views on the scientific, medical and technical factors which needed to be considered, as well as any other information or observation that PAHO might consider relevant with respect to the matter.

When the Juridical Committee's *Annual Report* for 2000 was presented to the Permanent Council by the Chair of the Committee in May 2001, the Council proposed that

the study undertaken should be extended to ascertain the status of international law and the principal trends in this area. The Permanent Council proposed that the study should include the 1997 European Convention on Human Rights and Biomedicine which establishes the primacy of human beings over science and is supplemented by the 1998 Protocol on cloning.

At its 56<sup>th</sup> regular session held in Washington D.C. in March 2000, during a Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of OAS Member States, there was an exchange of views on a new concept of security in the Hemisphere presented by some members of the Committee – México, Peru and Chile. Also presented and taken into consideration was a Canadian submission entitled *Human security: safety for people in a changing world*, which advocates that State security and human security are mutually supportive - a secure world cannot be attained, unless the people are secure. The other contributions on this subject raise the question of the future of hemispheric security in the context of wider global responsibilities. The Permanent Council, in considering this topic in the Committee's *Annual Report* for 2000 requested the Juridical Committee to continue to contribute to the work of the Permanent Council's Committee on Hemispheric Security.

At its 56<sup>th</sup> regular period of sessions held in Washington D.C. in March 2000, the Juridical Committee noted and welcomed the constructive results of the Meeting of Trade Ministers of the Americas held in Toronto, Canada, on November 1 to 4, 1999. Noting the failure of the Third Ministerial Conference of the World Trade Organization to reach agreement on the launching of a new round of multilateral trade negotiations and reaffirming the positive contribution of liberalisation of trade and investment to development and economic growth throughout the Americas and the importance of strengthening the rule of law in international trade relations, the Juridical Committee decided (i) to continue its analysis of the juridical dimensions of integration and international trade in the light of international and regional developments and (ii) to strengthen its co-operation with and support to the Trade Unit of the General Secretariat of the Organization regarding those matters and to request the Secretariat for Legal Affairs to undertake consultations on the ways and means of doing so. The Permanent Council requested the Juridical Committee to pursue its studies on the subject of the legal dimensions of integration and of trade and to conduct a comparative preliminary analysis of existing laws on competition or protectionism in member States for inclusion in the next annual report of the Juridical Committee, paying due regard to similar efforts in other international institutions.

The international abduction of children by one of their parents also engaged the attention of the Juridical Committee. The Committee at its 56<sup>th</sup> period of sessions in March 2000 resolved to add its voice to the grave concern expressed by the General Assembly over the existence of cases of international abduction of minors by one of their parents. The Juridical Committee had under consideration the report by Gabriela Arias Uriburu on the situation of her three minor children abducted by their father from their residence in Guatemala City, Republic of Guatemala and taken eventually to the Kingdom of Jordan.

I was heartened by the intervention this morning of the distinguished representative of Argentina with reference to the application of the Hague Convention on the Abduction of Minors by one of their parents. It is evident, Mr. Chairman, that the Juridical Committee must keep this topic on its agenda for attention.

The Juridical Committee at its 57<sup>th</sup> regular session decided to include "Democracy in the Inter-American System" as a priority topic on its agenda for the next regular sessions commending the rapporteur, Dr. Eduardo Vío Grossi, for his important contribution to the topic. The Committee also resolved to invite members of the Committee to submit proposals on the matter to the Secretariat for distribution before the next regular session of the Juridical Committee. The Committee also decided to request other agencies of the Organization involved in this topic to collaborate in this exercise with the Juridical Committee through the Secretariat for Legal Affairs and the Unit for the Promotion of Democracy.

### The Course on International Law

The Juridical Committee resolved that the XXVII Course on International Law for 2000 should have as its central theme "Regionalism and Universalism". The Juridical Committee decided that the core theme for the course in July-August 2001 should be "The human being in contemporary international law: the importance of the course on international law in the diffusion of knowledge of the inter-American system of international law, as well as the necessity to achieve a wider and more equitable participation of students in the Course was recognised. The Juridical Committee further resolved that the General Assembly consider the possibility of granting further budgetary support for the course and to exhort member States to sponsor the participation of their nationals in the Course through direct financing.

### The Fourth Joint Meeting with Legal Advisors

The Fourth Joint Meeting with the Legal Advisors of the Ministries of Foreign Affairs of Member States of the OAS was held in Washington D.C. in March 2000, the theme being an analysis of the inter-American juridical agenda. There was general agreement on the usefulness of the joint meetings and several delegations at the meeting of the Permanent Council expressed the desire for an increase in the covering of such meetings.

The Permanent Council welcomed the decision of the Juridical Committee to hold the 58<sup>th</sup> regular meeting in Ottawa, Canada in March 2001, on the invitation of the Government of Canada and recommended that future regular meetings of the Committee be convened in other member States, in accordance with article 105 of the OAS Charter, in order to give wider publicity to aid increased awareness of the work of the Juridical Committee mindful, however, of the principle that the funding of such meetings must be met from the Juridical Committee's regular budget.

The Permanent Council in considering the *Annual Report of the IAJC* for 2000 reiterated the necessity for the Committee to establish closer rapport with the political bodies of the Organization, especially the Council's Committee on Juridical and Political Affairs and issued a call for the Chairman of the Juridical Committee and the rapporteurs of the various topics on the Committee's agenda to meet with the Council's Committee whenever a request is made.

### The Centennial of the Inter-American Juridical Committee

The Juridical Committee has adopted proposals for the commemoration of the centennial of its Committee in 2006. In presenting the *Annual Report of the Juridical Committee* to the Committee on Juridical and Political Affairs, the Chairman of the Juridical Committee outlined proposals for the observance of the centennial of the Committee. The Committee on Juridical and Political Affairs supported proposals for the observance of the centennial as disclosed in the presentation to the Committee by the Chairman of the Juridical Committee.

### Relationship with other Institutions

In furtherance of its commitment to forge collaborative relationships with other international bodies with like objectives, the Juridical Committee was represented by one of its members at the session of the International Law Commission in Geneva on 28 July 2000. A presentation on the work of the Committee was made by the representative of the Committee from which there was a fruitful exchange of ideas with members of the Commission, with expressions of the desirability of deepening collaboration between the two bodies.

Members of the Juridical Committee, led by the Chairman, participated in *the XVII Seminário Roma-Brasília*, held in Brasília during the period 24 to 26 August 2000 at the

invitation of the organising body for the seminar, members of the Committee made presentations on the work of the Juridical Committee and inter-acted with the organisers of the seminar and the participants.

Thank you.

- Visits made by the Inter-American Juridical Committee

The Inter-American Juridical Committee made the following visits in the course of 2001:

Law School, University of Ottawa, to participate in a Round Table on “Current Legal Issues in the Americas.”

Reception offered by Mr. John Manley, Minister of Foreign Affairs of Canada.

Dinner offered by Mr. David Kilgour, State Secretary of Canada for Latin America and Africa.

Canadian Parliament (question and answer period).

Supreme Court of Canada (round table with the justices).

Reception at the Brazilian Embassy in Canada.

- Visits received by the Inter-American Juridical Committee:

The Inter-American Juridical Committee received the following visits in 2001:

Ambassador Luigi Einaudi, Assistant Secretary General of the OAS.

Ambassador João Clemente Baena Soares, former OAS Secretary General and a member of the UN International Law Commission.

Claudio Grossman, Chairman of the Inter-American Commission on Human Rights.

Antônio Augusto Cançado Trindade, Chairman of the Inter-American Court of Human Rights.

Manuel Ventura, Secretary of the Inter-American Court of Human Rights.

Michael Leir, Legal Advisor of the Department of Foreign Affairs of Canada. His statement is appended (CJI/doc.49/01).

Heraldo Muñoz Valenzuela, Deputy Secretary for Foreign Affairs, Chile.

Michael Brock, Director of the Latin American Division, in Canada.

Sergio Verdugo, Minister-Advisor and Consul General of Chile in Rio de Janeiro.

Mauricio Herdocia, a member of the International Law Commission of the United Nations.

Juan Enrique Vargas, Executive Director of the Center for Justice Studies of the Americas.

Jorge Reinaldo Vanossi, former member and chairman of the Inter-American Juridical Committee.

José Luis Siqueiros, former member and chairman of the Inter-American Juridical Committee.

Mario Tomellin, Dean of the University of Latin America and the Caribbean (ULAC).

Ana Piaggi, Judge of the National Chamber of Commerce, Commercial Law professor and professor of the Course on International Law.

Marcelo Kohen, international law professor, Institute of International Studies, Geneva, professor of the Course on International Law.

Hervé Ascensio, Professor at the University of Paris XIII, professor of the Course on International Law.

## **ANNEXES**



## ANNEX A

### List of resolutions and decisions adopted by the Inter-American Juridical Committee

- CJI/RES.20 (LVII-O/00) *Agenda for the 58<sup>th</sup> regular sessions of the Inter-American Juridical Committee (Ottawa, Canada, March 12-23, 2001)*
- CJI/RES.22 (LVIII-O/01) *Thanks to the Government of Canada*
- CJI/RES.23 (LVIII-O/01) *Democracy in the Inter-American System*
- CJI/RES.24 (LVIII-O/01) *Specialized Inter-American Conference on International Private Law*
- CJI/RES.25 (LVIII-O/01) *International abduction of children by one of their parents*
- CJI/RES.26 (LVIII-O/01) *Preparing to commemorate the centenary of the Inter-American Juridical Committee*
- CJI/RES.27 (LVIII-O/01) *Agenda for the 59<sup>th</sup> regular sessions of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, July 30 to August 24, 2001)*
- CJI/RES.28 (LVIII-O/01) *Application of the 1982 United Nations Convention on the law of the sea by the States in the hemisphere*
- CJI/RES.29 (LVIII-O/01) *Date and place of the 59<sup>th</sup> regular sessions of the Inter-American Juridical Committee*
- CJI/RES.30 (LVIII-O/01) *Juridical aspects of hemispheric security*
- CJI/RES.31 (LIX-O/01) *In tribute to doctor Gerardo Trejos Salas*
- CJI/RES.32 (LIX-O/01) *Observations and comments of the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter*  
*Annexes: CJI/doc.76/01 Observations and comments of the Inter-American Juridical Committee on the Draft Inter-American Democratic Charter*  
                   CJI/RES.1-3/95 - *Democracy in the inter-American system*  
                   CJI/RES.5/LII/98 - *Democracy in the inter-American system*  
                   CJI/RES.17 (LVII-O/00) *Democracy in the inter-American system*
- CJI/RES.33 (LIX-O/01) *Right to information: access to and protection of information and personal data*
- CJI/RES.34 (LIX-O/01) *Twenty-ninth Course on International Law*
- CJI/RES.35 (LIX-O/01) *Request of additional financial resources for the course on international law*
- CJI/RES.36 (LIX-O/01) *Agenda for the 60<sup>th</sup> regular sessions of the Inter-American Juridical Committee (Rio de Janeiro, Brazil, February 25 to March 8, 2002)*

**ANNEX B**  
**List of Documents Included in this Annual Report**

- CJI/doc.46/00 *Inter-American Draft Convention on extraterritorial repression of sexual crimes committed against minors: proposal to be submitted to the CIDIP-VI for consideration*
- CJI/doc.47/01 *Democracy and international law*  
(presented by Dr. Gerardo Trejos Salas)
- CJI/doc.48/01 *First preliminary report on a proposed draft instrument, declaration, or treaty democracy in the inter-American system*  
(presented by Dr. Eduardo Vío Grossi)
- CJI/doc.62/01 *Address by Dr. Brynmor Thornton Pollard, Vice-Chairman of the Inter-American Juridical Committee to the General Committee of the XXXI Regular Session of the General Assembly of the OAS (San José, Costa Rica, 4 June 2001)*
- CJI/doc.74/01 rev.1 *CIDIP-VII and beyond*  
(presented by Drs. Carlos Manuel Vázquez and João Grandino Rodas)
- CJI/doc.76/01 *Observations and comments of the Inter-Juridical Committee on the Draft Inter-American Democratic Charter*  
*Annexes: CJI/RES.I-3/95 - Democracy in the inter-American system*  
*CJI/RES.5/LII/98 - Democracy in the inter-American system*  
*CJI/RES.17 (LVII-O/00) - Democracy in the inter-American system*  
See: CJI/RES.32 (LIX-O/01)
- CJI/doc.78/01 *International regulations on competition*  
(presented by Dr. João Grandino Rodas)

## ANNEX C

### Other Documents

- CJI/doc.49/01      Address by Michael R. Leir, Legal Advisor of the Department of Foreign Affairs and International Trade of Canada  
(12 March 2001, Ottawa)
- CJI/doc.50/01      Address by Dr. Enrique Lagos, Assistant Secretary for Legal Affairs of the Organization of American States, at the opening of the 58<sup>th</sup> regular sessions of the Inter-American Juridical Committee  
(12 March 2001, Ottawa)

#### CJI/doc.49/01

**ADDRESS BY MICHAEL R. LEIR,  
LEGAL ADVISOR OF THE DEPARTMENT OF FOREIGN AFFAIRS AND  
INTERNATIONAL TRADE OF CANADA  
TO THE INTER-AMERICAN JURIDICAL COMMITTEE  
(March 12, 2001 – Ottawa)**

Mr. Chairman, distinguished members of the Inter-American Juridical Committee,

On behalf of the Government of Canada, it is my pleasure to participate in this opening ceremony and welcome you to Ottawa for the 58<sup>th</sup> regular session of the Inter-American Juridical Committee. I trust that you will find your stay in Ottawa both productive and enjoyable.

Quand on sait l'importance que le Canada attache au fonctionnement d'un système judiciaire indépendant –condition indispensable à une démocratie efficace–, on comprendra qu'un des premiers organes élus auquel il s'est intéressé au moment de son adhésion à l'OEA a été le Comité juridique interaméricain.

Consequently, we were very pleased when OAS member States first elected Jonathan T. Fried to the Juridical Committee in 1992. Through his work on issues such as the administration of justice, access to information and international trade, to name only a few, we believe Canada is making an important contribution to this Juridical Committee. On a personal note, Dr. Fried unfortunately will not be able to join you until later in the week.

Let me turn now to the Inter-American Juridical Committee. As the chief advisory body to the OAS on juridical matters and through its promotion of the progressive development and codification of international law in the hemisphere, the Juridical Committee has been instrumental in strengthening democracy and good governance in the region.

En voyant l'ordre du jour de cette session, on comprend que les sujets actuels auxquels le Comité juridique s'intéresse et les documents en voie de préparation sont centrés sur des questions cruciales pour la consolidation du gouvernement démocratique dans les Amériques. J'aimerais attirer particulièrement votre attention sur les points suivants, qui constituent d'ailleurs les priorités du Canada en matière de politique étrangère dans l'hémisphère:

## **Corruption**

We were very pleased to see that the Inter-American Juridical Committee has included "Possible Additional Measures to the Inter-American Convention Against Corruption" as a topic under preparation. We are all well aware that corruption, by undermining democracy, distorting economies and reducing the ability of governments to deliver basic services to their citizens, can constitute a major threat to peace and stability in the Americas.

The adoption of the Convention in Caracas in March, 1996 was a landmark achievement. Canada was pleased to ratify the Convention last year and looks forward to meeting with States Parties later this month to begin consideration of the draft follow-up mechanism that has been developed by the OAS to ensure effective implementation of the Convention. The Juridical Committee's review of this important document is eagerly anticipated.

## **Hemispheric Security**

Canada has taken an active role in promoting hemispheric security as a focus of the OAS. The OAS Committee on Hemispheric Security has approved an ambitious work plan for 2000-2001, focussing on important issues such as small arms and light weapons, confidence-and-security-building measures and the hemispheric security review.

Canada would like to see work on the hemispheric security review consider ways in which security requirements have changed. There is now agreement among the countries of the hemisphere that "security" today involves more than classic military/defence issues and now includes issues affecting human security, such as terrorism, narcotrafficking, landmines, human rights and small arms and light weapons. It is therefore necessary that we work together to reshape the various institutions of hemispheric security into a flexible system that can deal with the varied and changing nature of security issues. The Inter-American Juridical Committee has an important role to play in this substantial task.

## **Human Rights**

The promotion and protection of human rights is enshrined in the *OAS Charter* as one of the central tenets of the Organization. It is also a central pillar of Canada's foreign policy. Over the last few years, Canada has been an active participant in discussions on reform of the inter-American human rights system and in increasing commitment to international humanitarian law.

Indeed I have just returned from San José where with the OAS and the International Committee of the Red Cross, Canada and Costa Rica co-hosted the first meeting of intergovernmental experts on international humanitarian law and related OAS conventions. The session brought together 105 experts from 28 countries.

We believe reform will result in institution building, and in a focus on practical means to strengthen national systems of human rights protection. I am therefore pleased to see that the *Study of the system for the promotion and protection of human rights in the inter-America system* is back on the Juridical Committee agenda after a one year hiatus.

## **Administration of Justice**

The effective administration of justice is a cornerstone of effective democracy and of social and economic development. As such, the work of the Juridical Committee on the threats to judicial independence and the impediments to effective protection of judges and lawyers in the exercise of their functions is of critical importance.

In this vein, the recently established Justice Studies Centre of the Americas in Santiago, Chile has an important role to play in facilitating the modernization of justice systems and institutions throughout the hemisphere. We applaud the Centre's intention to rely heavily on new information technologies and the internet in accomplishing its mandate. Indeed, Canada is firmly convinced that the use of these new technologies will prove to be an invaluable tool to share the benefits of our collective knowledge. This is why Canada has made connectivity one of the important initiatives that we will put forward at the Third Summit of the Americas in Quebec City next month. I would hope that the IAJC and the Justice Studies Centre will be able to work together closely on issues of shared interest.

Le peu de temps dont je dispose me limite à aborder seulement un petit nombre de sujets. Il est en effet très difficile de couvrir en quelques minutes toutes les questions sur lesquelles le Comité juridique se penchera au cours des deux prochaines semaines.

In closing, I would like to encourage you in your work given its important contribution to building and strengthening the Inter-American system and the commitment of all our countries to the rule of law. I wish you all a pleasant, rewarding stay in Ottawa.

Thank you.

**CJI/doc.50/01**

**ADDRESS BY DR. ENRIQUE LAGOS,  
ASSISTANT SECRETARY FOR LEGAL AFFAIRS  
OF THE ORGANIZATION OF AMERICAN STATES,  
AT THE OPENING OF THE 58<sup>th</sup> REGULAR SESSIONS  
OF THE INTER-AMERICAN JURIDICAL COMMITTEE  
(Ottawa, March 12, 2001)**

As we all know, the Juridical Committee has a vast and important agenda; I would like to call attention to some aspects of this agenda and to make a few brief remarks.

This agenda, like that of the whole OAS, that is, of each and every organ and entity, is now permeated by the characteristics of the new international and inter-American scene, and in particular by what is called "globalization".

In any case, what we see in the multilateral environment is a more dynamic, more flexible political and legal vision that can more broadly harmonize national interests with the values shared by the hemispheric community, including not only governments, but increasingly civil society and private enterprise.

We could say that in the Americas we now have a more active multilateralism and broader international cooperation. One sign of this is the Summit of the Americas process and the redimensioning of the regional and hemispheric integration processes, including such efforts as CARICOM, the Central American Integration Pact, MERCOSUR, the Andean Community and the negotiations for the Free Trade Area of the Americas (FTAA).

In the case of the Juridical Committee, some of the subjects dealt with or in preparation are fully consistent with the priorities of the current OAS agenda, which these days largely originate from the summit mandates.

Democracy

For example, we can mention the subject of "democracy in the inter-American system." This topic, i.e. the strengthening, defence, effective exercise and consolidation of democracy, is of course the top political priority of the OAS, given the virtual consensus on the primacy of this political system as the best guarantee of fundamental human rights and

freedoms, and of building a stable, more integrated and economically developed hemisphere that is at peace.

The preparatory documents of the Quebec Summit also reaffirm first of all the need to strengthen democracy in accordance with the concept of human welfare and human security, indicating the need for a working commitment from all public and private participants in the inter-American system.

#### Human Rights

It is interesting to note that in this concept of democracy, individual welfare and protection from violence and discrimination have become the primary concerns and the key reference point in international affairs.

Along this line, the agenda of the Juridical Committee includes the study of the promotion and protection of human rights in the inter-American context, although the most recent sessions did not consider this topic.

Together with the themes of democracy, governance and the rule of law, a great deal of effort is being concentrated on aspects related to human rights and fundamental freedoms, as well as indigenous peoples, migrant workers and their families, the status of women and gender equity, the rights and problems of children and youth, freedom of opinion and expression, and so on.

In this area, we should also mention the mandates from the most recent General Assembly to consider a possible pan-American convention against racism and all forms of discrimination and intolerance.

#### Modernization of systems of justice

Another subject very closely related to those mentioned above and an integral part of the rule of law is the improvement of the administration of justice and the modernization of systems of justice in general.

The Juridical Committee has prepared many papers and recommendations on this topic. The resolutions of the General Assembly and conclusions of Meetings of the Ministers of Justice have highlighted various aspects of the administration of justice in countries that have served as a guide and model for advancing different plans and projects.

As we all know, this subject was discussed at the previous summits of the Americas, and at the Third Summit in Quebec, support will continue to be given to the Meetings of Ministers of Justice and Attorneys General and the implementation of their conclusions and recommendations; support will also be given to the work of the Justice Centre of the Americas.

#### Combating corruption

Another priority is the fight against corruption, in view of the consensus that this scourge seriously affects democratic institutions, weakens the economic systems and exacerbates the plight of the most disadvantaged.

In this field, the OAS has shown that it is a suitable forum for developing international agreements as well as legislative proposals for the benefit of all member States.

Having already completed an important task with regard to developing the inter-American convention against corruption and model legislation, the Juridical Committee now

has on its agenda the consideration of possible additional measures for the inter-American convention against corruption.

We also appreciate that the Quebec Summit will consider this topic and support various legal standards and existing mechanisms to move forward more effectively in this struggle, including increased participation of private enterprise and civil society organizations through initiatives that promote transparency in public affairs, accountability of public officials, probity and civic ethics.

#### Trade and integration

The legal dimension of regional integration and international trade is another high priority for all countries in the region. The Juridical Committee has prepared several documents on this subject, in particular, on the legal aspects of competition policies in the Americas. We think that the Committee could give new content and impetus to this topic in the future.

#### Closing words

As has been said many times, it is more important for us than ever that the Juridical Committee work on issues consistent with the OAS agenda, and for this, the Office of the General Secretariat is fully prepared to support the Committee's work with its assistance and services.

All this is not to detract from the Juridical Committee's ability to exercise its own initiative to the fullest extent in support of other priority issues, such as hemispheric security, and to issue statements giving direction to the progressive development and codification of international law.



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