International Judicial Observer

NEWS AND COMMENTARY OF INTEREST TO JUDGES AROUND THE WORLD

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Justices, Judges from Across Western Hemisphere Assemble, Create Charter for New Organization of Supreme Courts

Representatives of the supreme courts of 25 countries of the Western Hemisphere met in Washington, D.C., October 23–26, 1995, to discuss issues of common concern and to create a new judicial organization.

On the last day of the conference the delegates to the second Conference of Supreme Courts of the Americas voted to approve a charter for a new "Organization of Supreme Courts of the Americas." The final vote on the charter, after debate on several of its provisions, was 22–0 (with three abstentions).

The new organization will become operational once the charter has been ratified by the national judiciaries of 15 countries. The target date for the necessary number of ratifications is June 1996.

Delegates discussed five issues during the three-day meeting: (1) judicial independence, (2) judicial ethics, (3) due process in the Americas, (4) organization of justice in the Americas in the twenty-first century, and (5) international judicial tribunals and their impact on national courts.

In his welcoming address, Chief Justice of the United States William H. Rehnquist urged the delegates to develop programs on independence of the judiciary and rule of law that would deal with problems at all levels of their respective court systems. He also urged delegates to rely on points of view and expertise from judges at all levels, rather than the views of only the heads of those systems.

Four other U.S. Supreme Court justices participated in the conference. Justice Stephen Breyer presented a paper on judicial independence, and Justice Anthony M. Kennedy delivered a paper on judicial ethics. Justices Sandra Day O'Connor and Antonin Scalia were members of panels responding to two other papers.

Chief Justice Arturo Hoyos of Panama delivered the conference paper on due process in the Americas. Justice Ricardo Calvete Rangel of the Supreme Court of Colombia presented the conference paper on organization of justice in the Americas in the twenty-first century.

Prof. Edward D. Re of St. John's University Law School, former judge of the U.S. Court of International Trade, gave the keynote presentation on international judicial tribunals and their impact on national courts.

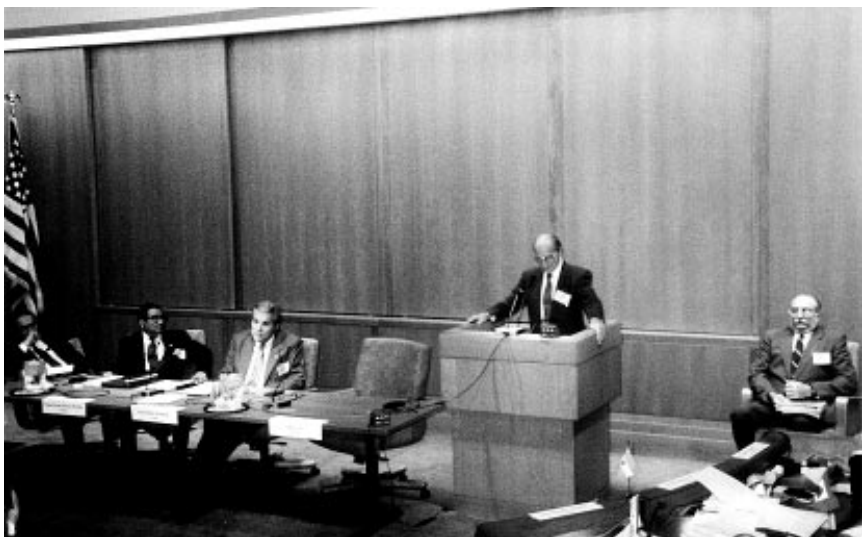
Each paper was followed by comments from panel members and by general discussion among the delegates.

Other major speakers from the United States were Attorney General Janet Reno and Alexander F. Watson, assistant secretary of state for InterAmerican Affairs.

Chief Judge Juan R. Torruella (U.S. 1st Cir.), designated by Chief Justice Rehnquist as the official U.S. delegate to the conference, presided over the plenary sessions.

Delegates to the conference were also given a demonstration of a U.S. criminal trial, which included a jury in a courtroom of the U.S. District Court for the District of Columbia.

Areas of focus for the new organization will be the exchange of information and technical expertise on topics concerning the independence of the judiciary and the rule of law. A permanent secretariat of the organization, which is to be located in Panama, will act as a clearinghouse of information for all member countries.



St. John's University Law School Professor Edward D. Re, former judge of the U.S. Court of International Trade , addresses delegates at the second conference of Chief Justices of the Americas in Washington, D.C., in October. At right is Chief Judge Juan R. Torruella (U.S. 1st Cir.), who presided at the plenary sessions.

Panama agreed to host the next meeting of the organization in early 1997. Under the terms of the proposed charter, Chief Justice Hoyos will act as president pro tempore of the organization through the next meeting.

Other U.S. delegates to the conference were Chief Judge Michael M. Mihm (C.D. Ill.), chair of the Judicial Conference Committee on International Judicial Relations, and Judge Cynthia Hall (9th Cir.), incoming chair of that committee.

Countries represented at the conference were Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Nicaragua, Panama, Paraguay, Peru, Suriname, United States, Uruguay, and Venezuela. One delegate represented the countries of the Eastern Caribbean.

Simultaneous translations at each of the formal sessions were available in English, French, and Spanish. ❑

Charter of the Organization of Supreme Courts of the Americas

(Approved October 26, 1995, Washington, D.C., by delegates to the Conference of Supreme Courts of the Americas. The charter becomes operational upon ratification by the national judiciaries of 15 countries.)

Article I
Name

1.1 This organization shall be known as the Organization of Supreme Courts of the Americas ("Organization").

Article II
Objectives and Goals

2.1 The fundamental objectives of the Organization shall be to promote and strengthen judicial independence and the rule of law among the members, as well as the proper constitutional treatment of the judiciary as a fundamental branch of the State.

2.2 These fundamental objectives may be accomplished through specific activities including: serving as a permanent link between the judicial systems of the Americas, and promoting international judicial cooperation in the hemisphere; supporting judicial education programs; sharing information; promoting regional technical assistance for the administration of justice; studying judicial administration and developing model procedures and administrative structures; promoting efficiency in judicial case management; promoting modernization of court systems through automation and technology; promoting access to justice; promoting the adoption of, and compliance with, judicial ethics standards; and conducting regional or hemispheric meetings on specialized legal topics of interest to members.

Article III
Membership

3.1 National supreme courts of this hemisphere may join this Organization if they affirm their desire to join and to subscribe to the objectives of this Organization.

3.2 Each member of the Organization shall have one vote, except that those countries sharing a common supreme court shall be treated as one member and collectively shall have one vote.

3.3 The chief justice of a member's national supreme court (or a person designated by the chief justice) may participate in the Organization. Although a chief justice may designate more than one person to participate in the Organization on his or her behalf, only one representative per member shall have voice and vote at any one time.

Article IV
Meetings

4.1 The Organization shall hold a plenary meeting at least once every three years, at a time and place to be determined at the preceding meeting. Special meetings may be called upon the vote of 2/3 of the members. Observers may be invited to attend but they shall not have the right to voice or vote.

4.2 At each plenary meeting, a host and planning committee for the next meeting shall be chosen. The planning committee shall include representatives from each of the four hemispheric regions (North America and the Caribbean; Central America; the Andean Pact Countries; and the Southern Cone/Brazil).

Article V
Decisions and Voting

5.1 The Organization exists as a neutral forum

See CHARTER, page 2

British, U.S. Judges and Lawyers Meet, Discuss Shared Judicial, Legal Concerns

by James G. Apple

British–U.S. judicial and legal relations were substantially advanced during the second part of an Anglo-American exchange that concluded at the Federal Judicial Center in Washington, D.C., in early September 1995.

From September 9–15, in Cambridge, Mass., and Washington, justices of the U.S. Supreme Court, federal judges, and noted attorneys from the American College of Trial Lawyers met with judges and lawyers from the United Kingdom to exchange views about cameras in the courtroom, the future of legal education, constitutional law, court-annexed arbitration and mediation, the handling of mass torts, and recent developments in criminal procedure.

Associate Justice of the U.S. Supreme Court Anthony M. Kennedy (left) and Sir Thomas Bingham, Master of the Rolls of the Royal Courts of Justice in Britain, confer during the Anglo-American Exchange in Washington, D.C., in September.

Leading the U.S. delegation was Associate Supreme Court Justice Anthony M. Kennedy. The head of the British delegation was Sir Thomas Bingham, Master of the Rolls of the Royal Courts of Justice. Lord Harry Wolff represented the Law Committee of the House of Lords, and Lord David Hope represented Scotland as part of the British delegation.

Charles B. Renfrew, Esq., president of the American College of Trial Lawyers, headed the four-member U.S. attorney contingent.

Participants in the exchange first convened at the Harvard Law School, where three of the exchange sessions were held. In Washington the participants observed a live mediation session and court proceedings at the Superior Court of the District of Columbia and attended a dinner at the Supreme Court hosted by Chief Justice William H. Rehnquist.

Associate Justices Sandra Day O'Connor and Stephen Breyer, Senior District Judge William W Schwarzer (N.D. Cal.), and Chief Judge Barbara B. Crabb (W.D. Wis.) were also members of the U.S. delegation.

The exchange was the ninth in a series that has been conducted over a 30-year period. ❑

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Two-Day Conference Held on Judicial Reform in Western Hemisphere

"Judicial Reform in the Western Hemisphere" was the subject of a two-day conference at the Federal Judicial Center in Washington, D.C., from September 27–29, 1995. Ninety-two judges and legal and other officials from 16 countries participated.

The conference featured workshops on the administration of the judicial system, financing judicial reform, selection and training of court officials, and access to the judicial system.

Chief Judge Loren A. Smith of the U.S. Court of Federal Claims delivered the keynote address on "A Hemispheric Model for Judicial Reform: Free Societies and the Rule of Law."

Special luncheon presentations were made by Jeff Leen, investigative reporter for the *Miami Herald*, on reform of the Dade County, Fla., judicial system, and by Fernando Perez Noriega, chairman of the judiciary committee of the Mexican Chamber of Deputies.

Twenty five of the participants attended a two-and-a-half-day seminar on the U.S. court system prior to the conference.

The chief sponsors of the conference were the Washington based Institute for the Study of the Americas and the Inter-American Development Bank. ❑

CHARTER, from page 1

for the exchange of information and discussion of issues of common interest to the members. The Organization shall not impose any measures or actions on any of the member countries.

5.2 The Organization shall strive to make all decisions by unanimous consent of the members. If a vote is necessary, a decision may be adopted by a majority vote of one-half plus one of the members present at the meeting where the decision is considered, provided that a quorum is present. A quorum shall consist of one-half plus one of the members.

5.3 A 2/3 majority vote of the members shall be required to make decisions regarding the fundamental objectives of the Organization.

5.4 Members who have not paid their dues in the Organization shall not have voice or vote in the Organization.

5.5 A member may choose to abstain from voting on, or may make a reservation to, any decision made by the Organization.

Article VI
Administration

6.1 Administrative support for the Organization shall be furnished by the Secretariat, which shall initially be established in Panama. The Secretariat shall be a permanent repository for Organization records, disseminate information to members, manage Organization finances, coordinate the activities of the Organization, and perform such other tasks as the Organization may direct.

6.2 The chief justice of the country that is hosting the next meeting of the Organization shall be the president pro tempore of the Organization, solely for the purpose of organizing the meeting. The Organization shall have no other officers.

6.3 Without prejudice to the accommodation of the official languages of the members states, the official languages of the Organization shall be Spanish and English.

Article VII
Member Dues and Organizational Finances

7.1 Annual membership dues shall be $2,000 (U.S.) per member, payable to the Secretariat not later than February 1st of each year.

7.2 While certain costs associated with Organization meetings may be paid by the host country at its discretion, in general members shall be responsible for paying the expenses they incur to attend all Organization meetings.

Article VIII
Amendments

8.1 A 2/3 majority vote of the members shall be required to amend this Charter.

8.2 Proposed amendments to this Charter shall be submitted to the members not less than 60 days before the proposed amendment is to be considered.

Article IX
Effective Date

9.1 This Charter shall be effective upon ratification by at least 15 of the members. The ratification shall be deposited with the secretariat by June 1, 1996. ❑

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A note to our readers

The *International Judicial Observer* welcomes comments on articles appearing in it and ideas for topics for future issues. The *Observer* will consider for publication short articles and manuscripts on subjects of interest to judges from the United States, other countries, or international tribunals. Letters, comments, and articles should be submitted to Interjudicial Affairs Office, Federal Judicial Center, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20002-8003.

SECUNDUM LEGEM

International Tribunals and National Courts: The Internationalization of Domestic Adjudication

by Thomas Buergenthal
Professor of Law, George Washington University National Law Center
Former President of InterAmerican Court of Human Rights

(This commentary has been adapted from an essay by Prof. Buergenthal appearing in the German publication Recht Zwischen Umbruch und Bewahrung, Festschrift fur Rudolf Bernhardt, *published in Germany by the Max Planck Institute in 1995.)*

Tribunals, both judicial and quasi-judicial, and the ever-expanding volume of decisions rendered by them are beginning to have a significant impact on decisions of national courts. This is not only true when these courts are called on to interpret treaties. National courts are also looking with increasing frequency to the jurisprudence of international tribunals to avoid interpretations of national legislation that might violate their state's international obligations or to bring domestic laws into conformity with emerging international legal standards.

This is a relatively recent development. In the past, domestic courts had a great deal of freedom when passing on issues having international legal implications because they did not have to pay much attention to pronouncements of international tribunals. They could be guided exclusively by the opinions of their own governments, look to their own prior case law, or develop their own views on the subject. They enjoyed that freedom because it was only in the rarest of cases that their decisions could or would be challenged in an international tribunal.

Different Situation Today

The situation is very different today. The change has been produced by two interrelated developments: one has to do with the significant increase in the number of permanent international judicial and quasi-judicial tribunals; the other with the growing number of tribunals that now have jurisdiction to receive complaints filed by individuals. Unlike states, individuals are not subject to the traditional political restraints that have tended to discourage nations from suing each other in international courts, lest such action be deemed an unfriendly act resulting in retaliatory measures.

Today it is much more likely that the decisions of national courts will be subjected to the scrutiny of international tribunals. And while it is true that these tribunals do not ordinarily have jurisdiction to set aside or annul the decisions of national courts, their judgments may result in a finding that the national courts erred in their interpretation of the state's international obligations and that the state must therefore find a way to rectify the situation. Decisions of international tribunals have also received increased public attention in cases involving human rights issues. The national legal and political establishment—judges, lawyers, legislators, and officials of the executive branch—are thus becoming ever more sensitive to the notion that national law and national courts no longer have the last word in determining various issues arising in domestic litigation.

International Tribunal Decisions

With this realization has come the recognition—sooner in some countries than in others—that lawyers and judges need to take decisions of international tribunals into account in their domestic adjudicative processes. As a result, national law journals publish an increasing number of international court decisions; national lawyers and judges find that they have to read them; legal scholars begin to draw on these international sources to assess the soundness of national decisions; and national parliaments are increasingly called on to take international legal developments into account in discharging their legislative functions. The end result of this process is that international case law influences outcomes in domestic litigation with ever greater frequency.

Two recent cases—one decided by the British Privy Council, the other by the Supreme Court of Argentina—provide almost perfect illustrations of the internationalization of domestic adjudication and of the manner in which international law increasingly penetrates and transforms national law.

The British Privy Council Case

A particularly telling example of the growing internationalization of domestic adjudication is the case of *Pratt and Morgan v. The Attorney General for Jamaica*. This was an appeal to the British Privy Council, sitting as the Constitutional Court of Jamaica, from the Court of Appeals of Jamaica, challenging the legality (under section 17 of the Jamaican Constitution) of the death penalty imposed on the two petitioners. The facts in the case are at once simple and shocking. The appellants were convicted of murder in Jamaica in 1979 and sentenced to death. From that date onward they were held on death row—a total of 14 years—until the final appellate judgment in the case on November 2, 1993. The case is replete with examples of serious violations of due process by Jamaican courts during the appellate proceedings and Kafkaesque judicial conduct impeding speedy appeals, all extensively documented in the judgment of the Privy Council. During that time the petitioners received three reprieves from execution. On each of these occasions warrants of execution were read to them and they were placed in the cells adjacent to the gallows, awaiting execution.

The Privy Council ordered their sentences to be commuted to life imprisonment. In doing so, the Lords proclaimed that "in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment'" under section 17(1) of the Jamaican Constitution. The judgment declared this principle to be applicable to other prisoners on death row in Jamaica.

Noteworthy Judgment

What makes the judgment in *Pratt and Morgan* particularly noteworthy is the Privy Council's heavy reliance on decisions of international tribunals to support its conclusion that the delay in the execution of the petitioners amounted to inhuman treatment under the Jamaican Constitution. Petitioners Pratt and Morgan had previously appealed their cases to the Inter-American Commission on Human Rights (IACHR) and to the United Nations Human Rights Committee (UNHRC). They had this right because Jamaica had ratified the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the Optional Protocol to the Covenant.

See SECUNDUM, page 4

Estonia: Leading Central Europe in Judicial Reform

by Hon. Rait Maruste
Chief Justice, National Court of Estonia

The sovereign Republic of Estonia was formed on February 24, 1919. It was occupied and annexed by Soviet Russia in June 1940 and regained its independence on August 20, 1991.

The Estonian independent legal system has been based on three constitutions, two of which were adopted during the first period of independence. The third and presently valid constitution was adopted by referendum on June 28, 1992.

Estonia is a small country on the shores of the Baltic Sea, with a total area of approximately 17,500 square miles and a population of about 1.5 million people. It is bordered by the Gulf of Finland to the north, the Russian Federation to the east, and Latvia to the south.

Although the period of statehood in Estonia has been comparatively short, European law and jurisdiction have been familiar to Estonians for centuries. Having been in the sphere of influence of Denmark, Sweden, Germany, and tsarist Russia, Estonia has been influenced by the legal cultures of these countries. German influence has been the strongest. Throughout Estonia's history, certain autonomy in community jurisdiction has been retained in the form of peace courts in which the first-level justice was administered by Estonians themselves.

The early years of the first period of independence (1919) saw the introduction of tsarist Russia's legal and judicial system, which was later replaced by a legal and judicial system that corresponded to the traditions of Europe and the League of Nations at the time.

During the Soviet era, the majority of state and corporate organizations, including the independent judicial system, were abolished and replaced by legal structures of the Soviet system. From the judicial point of view this was characterized by the lack of separate powers and the functioning of courts under the rule of the Communist party—the courts operated as an extension of the executive branch. Judges at that time belonged to the civil servants' trade union with bank employees, security service personnel, and some members of the KGB. Communist Party membership was obligatory for judges.

Restoration of Estonian independence in 1991 gave rise to the need for fundamental judicial reform. The Law on Courts and the Law on the Status of Judges, Constitution, and Constitutional Review Court Procedure Act, adopted in 1991, became the legal basis for the reform.

The new political situation provided the impetus for establishing a judicial association to develop a constitutional, democratic judicial system and the rights of the judiciary. Judges of the younger generation assembled on December 18, 1991, in Tartu to officially form the Estonian Association of Judges and adopt a governing charter. Thirty-three judges of the 90 then employed in Estonia became the foundation members of this new voluntary association. By September 1, 1995, there were 197 judges in Estonia, 129 of whom were members of the Association.

Today, administration of justice in the Republic of Estonia is one of the spheres of state activities wherein the reforms have advanced the furthest. A constitutional, three-level court system has been reestablished, consisting of the following:

1. first-instance county and city courts of general jurisdiction, handling civil and criminal cases and administrative courts—a total of 21 ordinary courts and 2 special administrative courts;

2. three second-instance district courts operating as appellate courts; and

3. a National Court as the highest-instance court (court of cassation), which, in addition to handling appeals in civil, criminal and administrative cases, serves also as the constitutional court.

The Estonian bench presently consists of 15 higher (state) justices, 39 appellate or second-instance (district) court judges, 112 judges of ordinary town and county courts of general jurisdiction, and 31 judges of administrative courts of special jurisdiction.

The judges of the first-instance courts usually sit alone, except in special cases prescribed by law when they sit with assessors (lay judges). The courts of the second and third instances act collectively in panels (collegiums) consisting of at least three judges.

The decisions of the first-instance courts are subject to almost unlimited review by second-instance courts. The National Court has the right of discretion to review cases.

A registry office for real estate and a registry office for businesses are the two registers operated by the courts, the entries to which are decided by the judges.

The organizational and financial operations of the first-instance and second-instance courts are governed by the Ministry of Justice. The National Court is completely independent and is not situated in the capital, Tallinn, but in Tartu.

The reforms following Estonia's recent independence have introduced two new elements: administrative court proceedings and constitutional review. The administrative court proceedings allow individuals the right to file a petition against the acts and activities of the executive. This is the main judicial channel for the protection of citizens' fundamental rights and liberties (including human rights). Constitutional review entitles every person to request that a relevant law, legal act, or activity be declared unconstitutional. Judges in each court are entitled to declare unconstitutional any law, legal act, or activity that violates the rights and liberties prescribed in the constitution or is otherwise in contradiction with it.

The Chief Justice of the National Court is appointed by the Riigikogu (parliament) on nomination by the President of the Republic. Justices of the National Court are appointed by the Riigikogu on nomination by the Chief Justice. The judges of first and second instances are appointed by the President of the Republic.

All judges are appointed for life. Practically, a judge serves until he or she reaches retirement age. Judges' salaries are prescribed by law and are tied to the Prime Minister's salary.

The bench is filled by open competition in which every Estonian citizen who has command of the Estonian language, experience in legal work, a good record, appropriate personal qualities, and who has reached the required age can participate. Applications and applicants are examined by a commission consisting solely of judges. Judges may be released from office on their own request for health considerations or can be removed for disciplinary reasons. A motion for removal may be submitted by a disciplinary commission consisting of judges. The disciplinary decision is made by the organization or individual that appointed the judge. Estonian judges have also adopted a code of conduct.

In the course of judicial reform, two-thirds of the judges from the Soviet era have been removed. Thus the present judiciary is young—the average age of judges is about 40—and comparatively inexperienced. But they are capable and willing to learn. Judicial training is organized and conducted by the Judicial Training Centre at the National Court.

To promote cooperation, Estonian judges have joined their colleagues in Latvia and Lithuania to form the Association of Judges of the Baltic States, which meets on a regular basis. ❑

The new office building housing the National Court of Estonia in Tartu. The building also contains the quarters of the new judicial training center.

The justices of the National Court of Estonia in their new building in Tartu. The National Court and other courts in a three-level system were reestablished after Estonia regained its independence in August 1991.

European Justices Meet in Washington to Discuss Common Issues, Problems

by James G. Apple

Justices from supreme courts and constitutional courts of 36 European countries met in Washington, D.C., November 13–15, 1995, for the third international conference involving "courts of ultimate appeal" of central and eastern Europe and the new independent states.

Also attending the conference were judges and representatives of the European Court of Human Rights, the European Commission of Human Rights, the Parliamentary Assembly of the Council of Europe, the United Nations Center for Human Rights, and the countries of Albania, China, Ethiopia, Germany, Italy, Slovakia, and the United States.

The theme for the conference was "Basic Rights in Conflict."

Four justices of the U.S. Supreme Court participated in the conference as speakers or panelists: Sandra Day O'Connor, Ruth Bader Ginsburg, Antonin Scalia, and Stephen Breyer.

Justice Andris Gulans, chairman of the Supreme Court of Latvia, said that the conference provided "a chance to analyze the past and foresee what is in the future. This [opportunity] is very supportive for a country like mine which is in the process of change."

Justice Stasys Staciokas, of the Constitutional Court of Lithuania, observed that he was able to "discuss major legal problems in detail" with many colleagues from other countries. "The most important session for me," he said, "was the one on enforcement of court decisions."

Justice Staciokas also noted that the judiciaries of the new emerging democracies had to deal with the fact that judicial decisions were made primarily by the executive branch under the old system. "This is a delicate problem for us," he said.

He was particularly impressed with the participation in the conference of so many justices from the U.S. Supreme Court, which he said offered a chance for the participants "to see into the legal soul of America."

The conference was divided into a series of six panels: (1) "transitional justice—the old regime issue in the new democracies"; (2) "protecting political speech and defining libel"; (3) "court financing and judicial independence"; (4) "independent judiciary and independent media in the new democracies"; (5) "enforcing judicial decisions"; and (6) "judicial protection of human rights."

Following the presentation of a paper on each subject and comments by a group of panelists, the sessions were open for discussion and comment by the participants.

Forty-seven justices and judges from 32 countries, the Council of Europe, and the European Commission on Human Rights presented papers, responded to papers as panelists, or offered comments from the floor during the six plenary sessions.

The conference was primarily sponsored by the Washington-based Center for Democracy. The president of the center, Prof. Allen Weinstein, moderated the conference with Frederick P. Furth, Esq., of the Furth Family Foundation, one of the conference underwriters. ARD/Checchi Rule of Law Consortium also provided financing for the conference.

The conference was held at the Georgetown University Law Center and included simultaneous interpretations in English, French, and Russian.

Two previous conferences involving justices and judges from ultimate courts of appeal, both sponsored by the Center for Democracy, were held in Strasbourg, France, in 1993 and 1994. ❑

World Trade Organization (WTO) Oversees Global Free Trade

WTO Succeeds GATT as Primary Trade Forum

by Judith Hippler Bello
Sidley & Austin
Washington, D.C.

Last year another abbreviation was added to the alphabet soup of international organizations: the World Trade Organization, or WTO. Based in Geneva, the WTO succeeds the General Agreement on Tariffs and Trade (GATT) as the forum for pursuing free and fair trade around the world.

The WTO entered into force on January 1, 1995; GATT was established in 1947. While the WTO is generally broader and more detailed than the GATT, one of the most important differences is the dramatically improved WTO rules for settling trade disputes.

The WTO is the centerpiece of U.S. trade policy. In trade matters, the United States also acts plurilaterally (e.g., North American Free Trade Agreement), bilaterally (e.g., with Japan and China), and unilaterally (e.g., through sanctions on imports). However, trade opportunities and problems in a global economy are normally multilateral. Customers, suppliers, subcontractors, financiers, joint venture partners, and service suppliers are scattered around the globe. The United States needs a strong multilateral institution to promote trade liberalization and trade on fair terms to compete internationally in the twenty-first century.

The WTO fills that need. It provides a forum for discussions of all trade-related issues. Councils on goods, services, and intellectual property meet regularly, capped by ministerial conferences every two years. Moreover, the WTO presumably will be the forum for another eventual round of trade negotiations on the new trade issues: investment, competition policy, environment, and labor.

Its procedures for resolving disputes among member states will most help or hinder the fledgling institution in demonstrating its effectiveness. The old rules of the GATT were seriously flawed, both procedurally and substantively. Improvements in GATT dispute-resolution procedures were approved by the member states and implemented in 1989, reducing delays and expediting rulings. However, a single member, including even the losing party, could still block adoption of a ruling by a panel of experts. There were no procedures for appealing a ruling and no effective systems for monitoring compliance with a ruling or increasing pressure on a government for such compliance.

The new WTO dispute-settlement procedures redress these shortcomings, insofar as is possible for an international organization whose members are sovereign governments. Any dispute about the level of trade benefits that may be withdrawn is also subject to arbitration. In short, a nation can disregard its obligations, but it pays a price.

The United States is the chief champion of the rule of law internationally, and it was the chief architect of these new, more legalistic rules. The major U.S. statutory trade remedy directed at opening foreign markets and protecting intellectual property—section 301 of the Trade Act of 1974—is designed to promote harmony between domestic law and the international obligations of the United States. In any section 301 case that involves a trade agreement, the U.S. Trade Representative is required to invoke the WTO dispute-settlement procedures.

The U.S.-initiated improvements are a boon to plaintiffs, but a bane to defendants. In recent years the United States has been both plaintiff and defendant. Yet no one benefits more from more effective and expeditious dispute-settlement procedures than the United States, the world's leading exporter.

The bottom line in the WTO is this: a sovereign nation has the power to disregard its obligations if it wishes. But if it does so under the improved rules there is an adverse consequence, a penalty to be paid for its breach. ❑

New Appellate Body Established for Trade Disputes

by Judith Hippler Bello

The fledgling World Trade Organization (WTO) is poised to enhance further its credibility and capacity for resolving trade disputes among its members. The expected breakthrough is the establishment of a full-time "Appellate Body" to review decisions of panels of experts in WTO dispute-settlement cases.

After protracted disagreement, the WTO has agreed tentatively on the seven members for the new review tribunal: former Congressman James Bacchus of the United States, Claus-Dieter Ehlermann of Germany and the European Community, Mitsuo Matsushita of Japan, Said El-Naggar of Egypt, Julio Latarte Muro of Uruguay, Christopher Beeby of New Zealand, and Florentine Feliciano of the Philippines. However, the European Community (EC) continues to block final approval of the Appellate Body because it wants two European members on the tribunal.

If the EC withdraws its objection, three of these "judges" will serve for two years and four will serve for four years. Thereafter all terms will be four years, with the possibility of one reappointment.

Under the General Agreement on Tariffs and Trade (GATT), a party to a dispute could delay the establishment of a panel of experts to consider the dispute and delay any panel proceedings. The losing party alone could block adoption of a panel report adverse to it. Even if a panel report were adopted, the GATT contracting parties did not regularly scrutinize the actions of the losing party to conform with its obligations.

Under today's WTO rules, compact deadlines are clearly established and consent is required to block adoption of a panel report. The membership regularly scrutinizes actions of a party that receives an adverse ruling to make sure that it complies with a panel report. Mandatory and expedited arbitration is available to break any deadlocks regarding a "reasonable period of time" for compliance and the level of any compensation or withdrawal of concessions. Finally, for the first time, members will have the opportunity to appeal a panel report to a higher authority.

Only parties to a dispute, not third parties, may appeal a panel report. Three of the seven judges, serving in rotation, will serve on a panel to hear an appeal. The Appellate Body panel will examine only issues of law covered in the panel report and legal interpretations developed by the panel. The time period for the entire appellate proceeding is generally 60 days and in no case more than 90 days.

Appellate Body proceedings are confidential, and the opinions expressed in Appellate Body reports by individuals serving on the Appellate Body are anonymous. The Appellate Body panel may uphold, modify, or reverse the legal finding and conclusions of the panel report being appealed.

Ex parte communications with the appellate body on any matter under its consideration are prohibited. Written submissions to the Appellate Body are treated as confidential but are made available to the parties to the dispute. A member may disclose its own submission to the public but may not disclose another member's confidential submission without authorization from that member. However, a member is required, upon request, to provide a nonconfidential summary of the information contained in its written submission that could be disclosed to the public.

Like the underlying panel report, an Appellate Body report is automatically adopted by the WTO Dispute Settlement Body unless the members, by consensus, decide otherwise.

To date there have been no WTO panel reports, and therefore no appeals. But the significance of the Appellate Body is clear: Its establishment is one of many indications that WTO members appreciate that the rules cannot be credible and effective unless disputes about their application can be resolved fairly and expeditiously. The Appellate Body is part of the overarching WTO design to engender more confidence in the underlying rules through a better system for resolving disputes about their application. ❑

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By quoting extensively from the findings of the UNHRC and to a lesser extent from that of the IACHR, and by emphasizing that the decisions of these quasi-judicial bodies, while not legally binding, are entitled to be "afforded weight and respect," the Privy Council appeared to be relying on these findings to support and justify its own conclusion about how the Jamaican Constitution should be interpreted. The Privy Council would have had no other reason to refer to the decisions of these institutions unless it wished to demonstrate and emphasize that its interpretation of the Jamaican Constitution in the context of the specific facts before it was consistent with the international obligations Jamaica had assumed by ratifying the Covenant and the American Convention. Without saying so, the Privy Council makes quite clear that, where it can be, the Jamaican Constitution should be interpreted so as not to violate these treaties.

Even more interesting is the Privy Council's reliance on the judgment of the European Court of Human Rights in the now famous case of *Soering v. United Kingdom*. The Court held that the extradition to the United States of a German national held in the United Kingdom would violate article 3 of the European Convention of Human Rights, which provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." This decision was based on the European Court's conclusion that the petitioner who was charged with the crime of murder in the state of Virginia, where the death penalty could be imposed, would be subject to the "death row phenomenon." The lengthy delays pending execution associated with that practice was in that case considered by the European Court to be incompatible with the provisions of article 3 of the Convention.

Argentine Supreme Court Decision

Another case, this one decided by the Supreme Court of Argentina in 1992, provides a further example of the impact that international court decisions and treaties can have on domestic adjudication. *Ekmekdjian v. Sofovich* arose out of the plaintiff's claim that he was unlawfully denied the right of reply in connection with a television program that he alleged to be morally offensive and damaging to him. The claim was based on article 14 of the American Convention on Human Rights, a treaty ratified by Argentina in 1984. The defendant argued that this provision was non-self-executing and that it had therefore not created a directly enforceable right of reply in Argentina. The Argentine Supreme Court had held this opinion in a case it decided in 1988, and this was what the lower court held in the instant case in dismissing it.

The Supreme Court not only reversed the lower court, it also expressly overruled its earlier decision on the subject and held that the American Convention on Human Rights had created in Argentina a directly enforceable right of reply. The main focus of the decision in this case was article 14(1) of the American Convention, which reads as follows: "Anyone injured by inaccurate or offensive statements . . . disseminated to the public in general by a legally regulated medium of communication has the right to reply or to make correction using the same communications outlet, under such conditions as the law may establish." The Supreme Court held in the instant case that the Convention had conferred a directly enforceable right of reply on individuals, that Argentina was required to give effect to that right, and that its courts had the power to do so.

The Supreme Court reached this conclusion in reliance on an advisory opinion of the IACHR. In that case the IACHR made the following finding regarding the meaning and scope of article 14(1): "That Article 14(1) of the Convention recognizes an internationally enforceable right to reply or to make a correction which, under Article 1(1) [of the Convention], the States Parties have the obligation to respect and to ensure the free and full exercise thereof to all persons subject to their jurisdiction."

Some Concluding Observations

We have a long way to go before a majority or even a substantial minority of the world's domestic judges fully emulate the practices reflected in the above two opinions. It cannot be doubted, however, that there is a trend in that direction, stimulated by a variety of factors that have led to a greater interdependence of the community of nations and to an increased internationalization of many aspects of daily life once deemed to be purely national in scope and concern. These developments cannot but contribute to the internationalization of domestic litigation despite the traditional conservatism of lawyers and judges.

The following three elements, among others, are likely to hasten the process of internationalization: (1) the existence of international tribunals with jurisdiction to deal with complaints by states and individuals alleging violations of international legal obligations; (2) the recognition by domestic courts—this will not always come easy or without some political pressure—that we live in a world in which the routine interaction between national and international tribunals is in the national interest because it promotes the rule of law; and (3) the existence of domestic legal institutions that permit and facilitate this interaction. Concerning this last consideration, it is clear that some countries may well have to modify their constitutional law and take whatever legislative or judicial measures may be required to accomplish this result. The fact that some of them have already done so would suggest that they deemed the perceived benefits from such steps to outweigh the risks to their "national sovereignty." That concept has itself undergone dramatic changes in recent decades and can today no longer provide a credible basis to justify opposition to the internationalization of domestic litigation. ❑