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## MEMORANDUM

March 18, 2003

TO: Ambassador Paul Durand, Permanent Representative of Canada to the OAS

FROM: William M. Berenson

SUBJECT: Inter-American Defense Board: Legal Options for Adopting the Organization's Stepchild

### I. INTRODUCTION

At its Thirty-second Regular Session, the General Assembly adopted Resolution AG/RES. 1848 (XXXII-O/02), which recognized "that modernization and reform has become a permanent process within the Organization to strengthen its capacity to respond efficiently and effectively to changing mandates and needs." As part of that process, the General Assembly instructed the Permanent Council "to examine the relationship between the OAS and the IADB and make recommendations to the General Assembly and the IADB for modifying the IADB's basic structure and basic instruments to the extent necessary to clarify and obtain consensus on its status with respect to the OAS, in including the principle of civilian oversight and the democratic formation of its authorities."

Resolution AG/RES 1848 originated in the Permanent Council's Joint Working Group on Restructuring and Modernization, which you jointly chaired with Ambassador Esteban Tomic Errazuriz of Chile. As a follow-up to the work of that Group, you have requested an informal legal opinion on the current status of the Inter-American Defense Board ("IADB," "Defense Board," or "Board") and possible options for changing its status within the inter-American System. Our opinion is that the Inter-American Defense Board is an entity within the Inter-American system -- having many of the characteristics of OAS Organs and ultimately subject to the decisions of the OAS General Assembly; however, it has never been "formally" or directly recognized by a resolution of the General Assembly or its institutional predecessors as an organ of the OAS under Article 53 of the Charter. Thus, to the extent analogies to a family may be appropriate, the relationship between the Board and Organization may be characterized as one of stepchild and stepparent. The IADB has yet to be legally adopted into the OAS family.

It is also our opinion that the OAS General Assembly has the authority under Article 54 of the Charter to adopt a resolution designating the IADB as an organ of the Organization -- either as an OAS Specialized Agency under Chapter XVIII and Article 53(h)

of the Charter, under which the relationship between the Board and the OAS would be set out in an Agreement between the two institutions; or as an "entity" of the Organization under the final paragraph of Article 53 of the Charter, for which the relationship would be set out in a Statute approved by the General Assembly.<sup>1</sup> We see no legal advantages of one option over the other; however, for historical reasons, we would opt for designating the Board as a Specialized Organization under Article 53(h) and Chapter XVIII of the Charter.

In what follows below, we set out the reasons for our opinion. In Part II, we briefly review the lack of consensus on the question of the IADB's status and the reasons why the IADB will remain the Organization's institutional stepchild until the General Assembly adopts a clarifying resolution. Part III describes the authority the General Assembly has over the Board (similar to that which a stepparent has over his minor stepchild) and shows that the Board is in fact more intricately tied to the Organization and the General Assembly than many of the officially designated OAS organs. Part IV reviews two options for the formal integration of the Board as an organ of the Organization -- designating the Board a Specialized Organization under Chapter VIII of the Charter; or designating and recreating it an "entity" under the final paragraph of Article 53 of the Charter. We attach draft resolutions for both options.

## II. THE LACK OF CONSENSUS ON THE DEFINITION OF THE CURRENT STATUS OF THE BOARD

The status of the Defense Board within the Organization has been a subject of differing opinions and debate since the Organization's creation in 1948. The differing positions, and the reasons for them, are reflected in a report prepared by the Department of International Law of the Secretariat for Legal Affairs ("SLA") for the Committee on Hemispheric Security ("CHS") on February 29, 2000 ("the 2000 SLA Report").<sup>2</sup>

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<sup>1</sup> Article 53 lists the organs of the Organization. The last paragraph of that Article is an omnibus provision which states: "There may be established, in addition to those provided for in the Charter and in accordance with the provisions thereof, such subsidiary organs, agencies, and other entities as are considered necessary." Examples of the better known entities of the Organization which are considered OAS organs under this provision are the Inter-American Commission Against Drug Abuse ("CICAD"), the Inter-American Telecommunications Commission ("CITEL"); the OAS Administrative Tribunal ("OASAT"), and the Inter-American Human Rights Court. CICAD, CITEL, and OASAT were established by resolutions of the General Assembly. The Court was created under an inter-American Treaty, the Inter-American Human Rights Convention but its Statute was approved by the General Assembly pursuant to the Convention.

<sup>2</sup> "The Organization of American States and the Inter-American Defense Board," CP/CHS-264/00, rev. 1. The 2000 SLA Document straddles the question of the Board's status. The introduction (p.1) describes the Board as "part of a group of institutions that form the Inter-American system" rather than as an organ of the OAS. But later on, in discussing options for taking action with respect to the Board's relationship to the OAS, it suggests that the Board is an "entity" of the Organization and therefore one of its organs. Specifically, it states:

The following options for the institutional relationship between the Organization of American States and the Inter-American Defense Board have been

A. Support for the Position that the Board is an OAS Organ

The 2000 SLA Report includes, *inter alia.*, a comprehensive study (the "1978 DLA Report") prepared by the then Department of Legal Affairs, the institutional predecessor of the current Secretariat for Legal Affairs. The 1978 DLA Report concluded that the Defense Board is an "entity" of the Organization under the last paragraph of Article 53 of the Charter.<sup>3</sup> The authors of the DLA Report based that conclusion on the strong operational and legal linkages between the Board and the OAS which have become cemented in place over the last fifty-five years. They include the fact that the IADB is financed in part by the OAS Budget pursuant to a the Ninth International Conference of American States, the same meeting of the Member States that created the OAS in 1948; the fact that several OAS organs, including the Meeting of Consultation of Foreign Ministers, the General Assembly, and the OAS Permanent Council have charged the Board with certain functions and activities over the years for accomplishing Charter mandates and other policy objectives established by the General Assembly; the fact that the OAS General Secretariat owns the building which serves as the IADB headquarters; the fact that also in accordance to a resolution of the Ninth International Conference of American States, the Board serves as the secretariat to the Advisory Defense Committee, an organ established under Article 44 of the 1948 Charter "to advise the Organ of Consultation on problems of military cooperation that may arise in connection with the application of existing special treaties on collective security; and the fact that the OAS General Assembly has the authority to dissolve the Board under Resolution XXXIV of that same Conference.

Those same linkages lead F.V. Garcia Armador, the most recognized legal expert on the structure of the Organization before his death in the 1990s, to reach the same conclusion. In his treatise, Sistema Americano, he stated the following:

Desde el punto de vista institucional, el hecho de que no fueran incorporados algunos mecanismos o entidades, tales como la Junta Interamericana de Defensa y la Comisión Interamericana de Paz. Son apenas excepciones que fueron superándose en la práctica por la participación de ambas en las actuaciones de órganos de la Organización. Desde este punto de vista, en rigor, únicamente cabe considerar – pero a partir de 1959 – como parte del Sistema Interamericano y no de la Organización, al Banco Interamericano de Desarrollo.<sup>4</sup>

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explored: To maintain the status quo considering the Board to be an entity of the Organization that provides technical assistance and advisory services "of a technical military nature which in no case may have an operational nature."

<sup>3</sup> Department of Legal Affairs, Status of the Inter-American Defense Board Vis-à-vis the Organization of American States, CP/doc.856/78.

<sup>4</sup> F.V. García Armador, Sistema Americano, a través de tratados, convenciones y otros documentos, Vol. 1, Asuntos Jurídicos Políticos (Subsecretaría de Asuntos Políticos, Washington, D.C. 1981), at p. 72.

B. Support for the Position that the Board is not an OAS Organ

The 2000 SLA Document also includes a 1993 Report of CHS on the subject and the Rapporteur's Report for that Committee prepared by the then Permanent Representative of Uruguay to the OAS and present Foreign Minister of that member state, Dr. Didier Opertti. Both reports reference the strong historical and legal linkages between the OAS and the Board, but both stop short of concluding that the Board is an OAS organ and allude to the need for further clarification by the General Assembly before that conclusion can be sustained.

Several factors support the position that the Board is not an OAS Organ but is rather an entity within the inter-American system closely linked to the OAS by a commonly approved budget, common parentage (the International Conferences of the Americas), and shared objectives and missions. First and foremost is the legislative history of the Charter, which indicates that the Member States made a conscious decision not to include the Board as an OAS organ. In that regard, the 1978 DLA Report explains:

When the old Governing Board of the Pan American Union was preparing the Project of the Organic Pact of the Inter-American System that was the basis of the Charter of Bogotá, in accordance with Resolution IX of the 1945 Conference in Mexico city, the Board included the Inter-American Defense Board among the organs of the Council of the OAS, under the name of Inter-American Defense Council

There was opposition at the Bogotá Conference to the Board's being included among the organs of the Council; some delegations asserted that the creation in the Charter of a Council of this sort assumed a permanent need for a discordant note in its purposes of peace and moreover, would make it difficult for any changes to be made in the future, or to put an end to the Board's work. It was argued that the specific nature of the activities and background of this body was not appropriate to the nature of the Council of the Organization, and as a result of this opposition, the Board was not included in the provisions of the Bogotá Charter.<sup>5</sup>

Moreover, the Board does not formally qualify as a Specialized Organization under Article 53 of Chapter XVIII of the Charter because it was never designated as such by the OAS General Assembly (or its predecessor, the OAS Council) as required under Article 125 of the Charter. Nor does the Board technically qualify as an OAS "entity" under the last paragraph of Article 53 of the Charter. That paragraph refers to "subsidiary organs, agencies, and entities" that are "established in addition to those provided for in the Charter and in accordance with the provisions thereof." The Board was not established "in accordance with the provisions thereof [ie., of the Charter]" because it was created in

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<sup>5</sup> 1978 DLA Report, p. 7.

1942,<sup>6</sup> six years before the adoption of the Charter and nine years prior to its entry into force.

C. Need for A General Assembly Resolution Clarifying Board Status

The different conclusions articulated in 1978 DLA Report on one hand, and the 1993 Rapporteur's Report, on the other, reflect the lack of consensus on the question of the IADB's status.<sup>7</sup> Nonetheless, both Reports agree that there are significant historical and legal linkages between the two institutions; that there has never been a Resolution by the General Assembly or its predecessor organs designating the Board an OAS Organ<sup>8</sup>; and that there is a need for additional action by General Assembly to clarify the legal relationship of the Board with the Organization.<sup>9</sup> We agree. Until that relationship is clearly defined, the IADB is likely to remain the institutional stepchild of the Organization.

### III. THE CURRENT RELATIONSHIP OF THE BOARD TO THE OAS GENERAL ASSEMBLY

For practical purposes, the dispute over whether the Defense Board is an OAS organ is largely academic. Whether the Board is categorized as an organ will not significantly change its relationship to the OAS. The Board is already substantially under the General Assembly's control – even more so than many of the organs and entities and types of organs expressly referenced in the Charter. That control is based in the

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<sup>6</sup> "First Meeting of the Inter-American Defense Board," in Bulletin of the Pan American Union, Vol. LXXVI, No. 6 (June 1942), p. 337.

<sup>7</sup> (Emphasis added).

<sup>8</sup> Where the two sides diverge is over the significance of the absence of such a legal designation. The DLA and Garcia Armador take the position that the lack of the formal legal instrument designating the Board an organ is not determinative because it has all the other characteristics of an organ. Those that are reluctant to categorize the Board as an organ maintain that without that formal designation, it cannot be one.

<sup>9</sup> Thus, as a result of the broad exercise on "Strengthening the OAS" which the Permanent Council Undertook in the late 1980s and early 1990s, the General Assembly in 1993 adopted resolution AG/RES. 1240 (XXIII-O/93) which resolved:

a. To reiterate the need to define the legal-institutional relationship between the Inter-American Defense Board and the Organization of American States and take a decision thereon at the twenty-fourth regular session of the General Assembly. [and]

b. To urge the Permanent Council to conclude, with the necessary advisory services, the studies, reports, and projects needed to decide, under the Charter and other instruments of the inter-American system, on the options for legal –institutional linkage, and the competence and functioning of the Inter-American Defense Board."

