I. SUMMARY

1. On April 8, 2003, Margarita Cecilia Barbería Miranda, a Cuban citizen, married to Mr. Jaime Fernando Rovira Sota, a Chilean national, and permanently resident in Santiago, Chile, with the assistance of her lawyer, Dr. Cristián Adolfo Briceño Echeverría, the Coordinator of the Center for Constitutional Rights of the University of Arts and Social Sciences (hereinafter "the petitioners") submitted a petition to the Inter-American Commission on Human Rights (hereinafter "the Commission") against the Republic of Chile (hereinafter "the State") in which it alleged the violation of "the right to equal protection before the law (Article 24) protected by the American Convention on Human Rights (hereinafter "the American Convention") in violation of the obligations set forth in Article 1(1) "to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion or other opinion, national or social origin, economic status, birth, or any other social condition." In addition, petitioners allege a violation of Article 2 of the American Convention in that the State failed "to adopt (…) such legislative or other measures as may be necessary to give effect to [the] (…) rights and freedoms" set forth in the Convention. Furthermore, the petitioners allege a violation of Articles 2, 3 and 6 of the Additional Protocol to the American Convention in the Area of Economic Social and Cultural Rights, also known as the "Protocol of San Salvador."

2. The petitioners in this case allege violations of the right to equality before the law, the right to equal protection before the law without discrimination and the right to work and to

engage in free economic initiatives. Ms. Barbería married Mr. Rovira Soto in 1985 in Havana, Cuba. When they returned to Chile, she studied law at the National University, Andres Bello, in Santiago Chile and was qualified in all respects to practice law in Chile except for the fact of her Cuban nationality. Article 526 of the Law of Courts ("Código Orgánico de Tribunales") provides that only Chilean nationals are permitted to practice law, without prejudice to the provisions of international treaties in force. The State responded that Ms. Barbería did not exhaust one of the remedies available under Chilean law and that she could have applied for Chilean nationality. The State argues that Ms. Barbería, having studied law in Chile, cannot plead ignorance of the law as regards the requisite of Chilean nationality as a condition for the practice of law. The State requests the Commission to declare the petition inadmissible or in the alternative, to reject it outright for failure to state a claim which implicates the responsibility of the Chilean State.

3. In this report, the Commission analyzes information submitted in accordance with the American Convention and it concludes that the petition complies with the requirements set forth in Article 46 of the American Convention. Consequently, the Commission decides to declare the case admissible, to notify the parties of this decision, and to continue with the analysis of the merits relative to the alleged violations of Articles 1(1), 2, and 24 of the American Convention. Also, the Commission decides to publish the report in its Annual Report.

II. PROCESSING BEFORE THE COMMISSION

4. On May 23, 2003, the Commission transmitted the complaint of Mr. Cristián Briceño Echeverría of ARCIS on behalf of Ms. Margarita Cecilia Barbería Miranda to the Government of Chile and requested that the State provide information on the complaint within a period of two months, pursuant to Article 30 of the Commission's Rules of Procedure. On October 15, 2003, Ms. Barbería (hereinafter "the petitioner") informed the Commission that she intended to revoke the power of representation conferred on Mr. Cristian Briceño since she had now received her law degree and would pursue the matter herself. The State did not respond to the complaint within the time period provided, but submitted its response on November 7, 2003. The State's response was transmitted to the petitioner on November 19, 2003 and any additional information was requested within a period of one month. The petitioner did not respond within the allotted time, but submitted her observations on the State's response on January 5, 2004. The petitioner's observations were transmitted to the State on May 6, 2004 with a request that any further observations be submitted within one month. No further observations on the admissibility of the petition were received.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioner

5. The petitioner, Ms. Margarita Barbería Miranda, of Cuban nationality, arrived in Chile in December 1989, as a result of the mediation of the UN High Commissioner for the Return and was reunited with her husband, a Chilean national, who returned to Chile after having been exiled from the country for political reasons during the military government of General Pinochet. The petitioner has permanent residence in Chile since 1990, and lives with her husband and three minor sons who are also Chilean nationals. In order to better provide for the necessities of her

family, especially her three sons, the petitioner entered the Law School of the National University, Andres Bello. In 1996 she completed her studies and successfully passed the examination to be licensed as a lawyer and satisfactorily fulfilled the requirement of a semester of professional practice in the Corporation of Judicial Assistance in the Preventive Detention Center San Miguel, in Santiago, Chile.

6. When the petitioner presented her qualifications to the Department of Titles of the Supreme Court of Chile, in order to be sworn in as a lawyer, the plenary of the Chilean Supreme Court, by means of prosecutor's opinion Nº 194 of May 7, 2001, issued by the Substitute Prosecutor of the Supreme Court, Mr. Carlos Meneses Pizarro, and the resolution issued by the Supreme Court on May 10, 2001, the petitioner was not permitted to be sworn in on purely legal grounds. Article 526 of the Law of Courts provides that "only Chilean nationals are permitted to practice law, without prejudice to the provisions of international treaties in force".

7. The petitioner claims that she has exhausted all available domestic remedies in Chile to no avail, given the fact that the Chilean Constitution and law expressly provide that only Chilean nationals may practice law in Chile, and she is a Cuban national.

8. In particular, the petitioner states that she has exhausted the following judicial remedies:

a) Writ of Protection: filed on May 25, 2001 before the Santiago Appeal Court, against the Supreme Court judgment issued in the administrative hearings, on "oath", as having violated the right of equality before the law, freedom from arbitrary discrimination, and right to work, guaranteed in Nos. 2 and 16 of the Chilean Constitution. The appeal was declared inadmissible on the grounds that "the writs are not in keeping with the inherent purposes of the action undertaken, since there is an intention to use this constitutional action as a means of review of a decision taken by the Supreme Court, in plenary, in the exercise of its powers."

b) Extraordinary Writ of Reinstatement: filed on March 27, 2001 before the Supreme Court, in the autos administrativos on "oath", adducing new grounds and, in the same autos, lodging additionally before the Supreme Court, under Article 181 of the Code of Civil Procedure, a writ of unconstitutionality, as provided in Article 80 of the Constitution. This motion, which sought discontinuation, as unconstitutional, of the application in the dossier of Articles 526 and 521 (the latter referring to the former) of the Organic Code of Tribunals, was ruled inadmissible by a decision of the plenary of the Supreme Court, since "(…) there is no pending matter in which any inapplicability might have effect."

c) Writ of Economic Protection: filed on September 24, 2002 before the Santiago Appeal Court, and declared inadmissible, the higher court taking the view that "the matter contained in the writ, in view of its nature, is not amenable to a cautionary measure of economic protection, since by means of it a judgment of the Supreme Court issued in the exercise of its exclusive functions, conferred by the Constitution and the Law of Courts, is being impugned, and it cannot therefore be proceeded with."

9. The petitioner alleges that the law and actions of the Chilean State, which prohibit her from practicing law violate her rights to equality before the law and protection against arbitrary discrimination in that nationality is not a sufficient reason to discriminate against an individual, as regards her right to earn a living and her right to undertake economic initiatives. She bases her

argument on the right to equality before the law, set forth in Article 24 of the American Convention, and the right to work, set forth in Article 6 of the "Protocol of San Salvador."

10. Concerning the rights enshrined in the Protocol of San Salvador, the petitioner refers to Article 1, which lays down the duty of the States Parties to take steps, both domestically and through international cooperation, to gradually give full effect to these rights. In addition, the petitioner invokes Article 3 of the Protocol, which stipulates that the States Parties shall undertake to ensure the enjoyment of the rights enshrined in it, without discrimination of any kind, on the basis of race, color, sex, language, religion, political or any other opinions, national or social origins, economic status, birth or any other social condition.

11. The petitioner invokes, in addition, Articles 1(1) and 2 of the American Convention, and alleges non-compliance with the duties imposed by them on States Parties to respect the rights and freedoms enshrined in it, to ensure their full and free enjoyment and to adopt, in accordance with their constitutional procedures and the provisions of the Convention, the legislative or other measures necessary to give effect to these rights and freedoms.

B. Position of the State

12. In its reply, dated November 6, 2003, the State maintained that the petitioner had not exhausted her available domestic remedies.

13. The State contends that the application should be declared inadmissible, since one of the means of relief provided in Chilean law, to wit, the writ of reinstatement linked with the protection writ filed on May 25, 2001, has not been exhausted. The State's opinion is that pursuant to the provisions of No. 2 sub-paragraph 2 of the decision of all branches of the Supreme Court on Proceedings concerning Writs of Protection, any judgment of an Appeal Court that declares an application or action of this kind inadmissible, is subject to review, and, in the State's view, the petitioner filed no application for review.

14. The State also indicated that the petitioner had a second recourse available to her. The Chilean legal order enables her to request from the corresponding administrative authority the granting of Chilean nationality. Prior to petitioning the Inter-American Commission, the petitioner did not exhaust one of the available remedies under domestic law, generally accepted by the principles of international law, in requesting the administrative authority, in this specific case, the Chief of the Department of Aliens and Migration of the Ministry of the Interior, to grant her Chilean nationality.

15. The State points out that requirements for the acquisition of Chilean nationality by Certificate of Nationalization are contained in Supreme Decree Nº 5142 of 1960, and that the petitioner is in a position to fulfill them. They are:

- Permanent resident status in Chile
- At least five years' continuous residence in the territory of the Republic;
- To have reached the age of 21;

• Renunciation of original nationality, in cases where there is no possibility of double nationality under the terms of an International Treaty or of the Convention on the Exercise of Liberal Professions.

In this regard, the State points out that the Department of Aliens' Affairs and Migration of the Chilean Ministry of the Interior had stated that Mrs. Margarita Barbería Miranda was the holder of a Definitive Permanent Residence Permit granted by Unconditional Resolution Nº 67 of January 17, 1992, and that she had taken no steps leading to an application for Chilean nationality.

16. Article 523 of the Law of Courts sets out the requirements for the practice of law, and Article 526 states that "only Chileans may practice the profession of law, without prejudice to any provisions of international treaties in force". The expression "international treaties in force", the State explains, does not refer to human rights treaties ratified by Chile, but to international treaties dealing specifically with double nationality and to conventions on the exercise of liberal professions, which exempt persons seeking certification as lawyers, and who belong to States Parties to these treaties, from the Chilean nationality requirement, and authorizes them to practice. The State contends that there is no international instrument of this kind that covers the petitioner's case, and that she cannot therefore invoke this exemption in her favor.

17. As regards the alleged rights to work and to free economic initiative, the State replied that neither of those rights is guaranteed by the American Convention on Human Rights. In addition, the alleged violations of rights set forth in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador" cannot be attributed to the responsibility of the Chilean State since this Protocol has not been ratified by Chile. The only reference to economic, social and cultural rights set forth in the American Convention, the State concluded, is in Article 26, and the rights alluded to in that provision are linked to the right to development and do not cover the allegations presented.

18. As regards the alleged violation of the right to equality before the law, set forth in Article 24 of the American Convention, the State maintains that Articles 523 and 526 of the Law of Courts, that provide that only Chileans may practice law in Chile, are derived from Article 19 Nº 16 of the Chilean Constitution which guarantees the right to freedom to work. This constitutional provision prohibits discrimination which is not based on an individual's personal capacity or suitability, without prejudice to the fact that the law may require Chilean nationality or age limits in certain cases.

19. In addition, the State alleged that "no one may plead ignorance of the law once the law has entered into force," and that the petitioner as a Chilean law student must have been aware of the law that limited the exercise of the legal profession to Chilean nationals. Lastly, the State argues the responsibility of the law school, the University Adolfo Ibanez, which permitted her to register for courses knowing full well that she was an alien and would not be permitted to practice law in Chile unless she changed her nationality.

20. In conclusion, the State requested that the Commission declare the petition inadmissible or reject it outright in recognition of the fact that the alleged violations of fundamental rights are

not imputable to the State of Chile and consequently do not implicate Chile's international responsibility.

IV. ANALYSIS OF ADMISSIBILITY

A. Competence of the Commission ratione materiae, ratione personae, ratione temporis, and ratione loci

21. The Commission has competence ratione materiae, in that the petitioner alleges violations of Articles 1, 2 and 24 of the American Convention, however, the Commission rejects the allegations made with regard to purported violations of the Protocol of San Salvador in light of the fact that the respondent State has not become a party to this instrument.

22. Under Article 44 of the American Convention, the petitioner is authorized to lodge a complaint with the Commission. In the instant case, the alleged victim is an individual whose rights Chile has undertaken to guarantee and respect. As regards the State, the Commission notes that Chile has been a party to the American Convention since August 21, 1990, the date on which the instrument of ratification was deposited. The Commission, therefore, has competence ratione personae to examine the complaint.

23. The Commission is also competent ratione temporis since the obligation to respect and ensure the rights protected by the American Convention was already binding upon the State at the time the events alleged in the petition occurred.

24. The parties have no doubts or disagreements about the fact that the incidents described in the petition took place in Chilean territory. Thus, the competence ratione loci of the Commission is clear.

B. Other requirements for admissibility

1. Exhaustion of domestic remedies

25. The State alleges that domestic remedies have not been exhausted. The Department of Titles of the Supreme Court for the obligatory oath which would enable an individual to practice law in Chile, by means of a resolution dated May 10, 2001, denied Ms. Barbería the possibility of taking the oath, basing itself on Article 526 of the Law of Courts which provides that "only Chileans will be permitted to practice the profession of law, without prejudice to international treaties in force."

26. The petitioner filed a Writ of Protection on May 25, 2001 before the Court of Appeals in Santiago against the Supreme Court's resolution, on the basis that the resolution violated her right to equality before the law, the right not to be discriminated against arbitrarily and the right to work, guaranteed by the Chilean Constitution. The writ was declared inadmissible because the petitions presented do not conflate with the purposes of the action undertaken, given that this constitutional action is intended to constitute a fourth instance of what has been decided by the plenary of the Supreme Court in the exercise of its functions.

27. On March 27, 2002, the petitioner filed an extraordinary "Writ of Reinstatement" invoking new antecedents and in accordance with Article 181 of the Code of Civil Procedure. In these proceedings the petitioner also presented a "Writ of Inapplicability due to Unconstitutionality" which is provided for under Article 80 of the Chilean Constitution before the Supreme Court.[FN2] This writ sought to prevent the application of Articles 526 and 521 of the Law of Courts, because of their unconstitutionality, to the administrative file, and was declared inadmissible by a decision of the plenary of the Supreme Court, because no action was pending in which an eventual inapplication [of these Articles] would have effect.

[FN2] Article 80 of the Chilean Constitution stipulates that "the Supreme Court, on its own initiative or on an application, in matters of which it is seized, or which may be submitted to it in an appeal lodged in any action in progress in another court, may declare inapplicable to these cases any state of the proceedings, and the Court may order suspension of the proceedings."

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28. On September 24, 2002, the petitioner filed a "Writ of Economic Protection" before the Court of Appeal. This writ was declared inadmissible because the Court considered that "the matter contained in the writ, in view of its nature, is not amenable to a cautionary measure of economic protection, since by means of it a judgment of the Supreme Court issued in the exercise of its exclusive functions, conferred by the Constitution and the Law of Courts, is being impugned, and it cannot therefore be proceeded with".

29. The State, in its response dated November 7, 2003, noted that according to the Rules of Procedure of the Supreme Court regarding the processing of writs of protection, any writ of protection declared inadmissible by the Court of Appeals is susceptible to reinstatement. In this regard, the State noted that the petitioner, despite the fact that the Court of Appeals declared her writ of protection inadmissible, by means of resolution dated May 30, 2001, did not file a writ of reinstatement.[FN3]

[FN3] The response of the State of November 7, 2003 indicates that "In this regard, it appears from the background submitted with the complaint that the petitioner filed no writ of protection against Supreme Court Judgment of May 30, 2001 of the Santiago Appeal Court declaring admissible (sic) the writ of protection Nº 2771/2001."

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30. The petitioner, in her observations on the State's response, noted that she did file a writ of reinstatement before the Supreme Court on March 27, 2002 at 12:18 hours, according to the stamp of the Secretary of the Court, and that at 12:35 she filed a "writ of inapplicability due to unconstitutionality." The Supreme Court, on April 12, 2002, dismissed the writ of reinstatement.

31. The petitioner alleges that the State has not complied with the requirement of proving both the adequacy and effectiveness of the domestic remedy it claims must be exhausted. For the Commission to determine whether domestic remedies have been exhausted requires that the State

alleging non-exhaustion prove that the domestic remedy remains to be exhausted and that it is capable of producing the result for which it was designed.[FN4] In the instant case, the State has not produced evidence to prove that any available remedy is capable of producing the result sought in this case.

[FN4] I/A Court H.R., Velásquez Rodriguez Case, Judgment of July 29, 1988, paras. 59, 60 and 66.

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32. The State further alleges that the petitioner has not exhausted the additional remedy of naturalization, despite the fact that she complies with the necessary requisites. The petitioner replies that she is proud of her Cuban nationality and heritage and has no interest in renouncing it and acquiring Chilean nationality. She further points out that many Chilean lawyers were permitted to practice law in Cuba without the requirement of having to change their nationality and that Chile should accord Cubans reciprocity. The petitioner notes further that in 1991, the Chilean State adopted Law No. 19.074 which authorized persons who had obtained their degrees abroad to practice their professions in Chile. The purpose of the law was to facilitate the reinsertion into Chilean society of Chileans who suffered exile during the military dictatorship. Article two of this law gave the spouse of the returning Chilean, irrespective of the spouse's nationality, the possibility of revalidating his or her professional degree in Chile, which had been acquired abroad. The petitioner points out that as a result, some Cubans were granted the right to practice a liberal profession without the necessity of renouncing their nationality.

33. The Commission considers that the State's allegation that the petitioner has not exhausted all her domestic remedies because she has not sought to change her nationality, is to invoke an inappropriate remedy, since the right of an alien to practice law in Chile is precisely what the petitioner is alleging in her petition. The Commission trusts that the parties will further brief the issue of Law No. 19.074 during the merits stage of the proceedings and will provide further information with regard to the number of persons, if any, who were authorized to practice law without having to acquire Chilean nationality. The Commission would also be interested in knowing how many aliens, if any, continue to practice law in Chile, and how their exemption is reconciled with Article 526 of the Law of Courts. The Commission considers that domestic remedies have been exhausted in this case pursuant to the requirements stipulated in Article 46(1)(a) of the American Convention.

2. Timeliness of the Petition

34. Article 46(1)(b) of the Convention states that a petition must be lodged within a period of six months from the date on which the petitioner is notified of the final judgment exhausting domestic remedies. The petitioner lodged the case with the Commission on April 8, 2003. The petitioner's writ of economic protection was decided by the Supreme Court of Chile on October 9, 2002, within the six months period required by the American Convention. The State did not argue a failure of compliance with the six months rule since it would have contradicted its argument that domestic remedies had not been exhausted. The Commission considers that the

petition was presented within the six-months time period stipulated in Article 46(1)(b) of the American Convention.

3. Duplication of proceedings and international res judicata

35. The Commission understands that the substance of the petition is not pending in any other international proceeding for settlement, and that it is not substantially the same as any petition previously studied by the Commission or other international body. Hence, the requirements set forth in Articles 46(1)(c) and 47(d) of the Convention have also been met.

4. Characterization of the alleged facts

36. The State argues that international responsibility cannot be attributed to Chile for acts which do not constitute violations of the American Convention on Human Rights. Specifically the State alleges that the rights to work and to free economic initiative are not guaranteed by the American Convention on Human Rights. In addition, the alleged violations of rights set forth in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador" cannot be attributed to the responsibility of the Chilean State since this Protocol has not been ratified by Chile. The only reference to economic, social and cultural rights set forth in the American Convention, the State concluded, is in Article 26, but the Commission does not need to consider this argument since the petitioner does not allege a violation of Article 26 in her complaint. The Commission agrees with the position of the Chilean State as regards the allegations concerning the right to work and the right to free economic initiative and rejects them for failure to characterize violations of the American Convention on Human Rights.

37. The State also alleges the responsibility on the part of the law school, the University Adolfo Ibanez, which it maintains permitted Ms. Barbería to register for courses knowing full well that she was an alien and would not be permitted to practice law in Chile unless she changed her nationality. The petitioner responds that she attended the National University Andres Bello (a private university) and not the University Adolfo Ibanez (also a private university), and that the university only grants the academic title, whereas it is the State, by means of the Supreme Court, that grants the authorization to practice law. Consequently, only the State is responsible for any possible violation of the Convention. The Commission concurs with the petitioner's position that only an issue of State responsibility is in question in this case.

38. The petitioner bases her argument on the right to equality before the law set forth in Article 24 of the American Convention in connection with the non-discrimination clause set forth in Article 1(1). The Commission notes that the Chilean Constitution reserves certain jobs to Chilean nationals and that Chilean law reserves the right to practice law exclusively to Chilean nationals. The Commission considers that the petitioner's claims merit strict scrutiny and describe a situation that could tend to establish a violation of the rights protected by Articles 1, 2 and 24 of the American Convention.

V. CONCLUSION

39. Based on the above legal and factual considerations, the Commission concludes that the case at hand satisfies the admissibility requirements set forth in Article 46 of the American Convention and, without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare this case admissible with respect to Articles 1, 2 and 24 of the American Convention.
2. To transmit this report to the petitioner and to the State.
3. To continue with its analysis of the merits of the case.
4. To publish this report and to include it in the Commission's Annual Report to the General Assembly of the OAS.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C. on the 13th day of October, 2004. (Signed): Clare K. Roberts, First Vice-President; Susana Villarán, Second Vice-President; Commissioners Evelio Fernández Arévalos, Paulo Sergio Pinheiro, Freddy Gutierrez Trejo and Florentín Meléndez.