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JURISDICTION AND CHOICE OF LAW FOR NON-CONTRACTUAL OBLIGATIONS – PART II: SPECIFIC TYPES OF NON-CONTRACTUAL LIABILITY POTENTIALLY SUITABLE FOR TREATMENT IN AN INTER-AMERICAN PRIVATE INTERNATIONAL LAW INSTRUMENT

(presented by Dr. Carlos Manuel Vázquez)

In resolution 815 of May 1, 2002, the Permanent Council instructed the Inter-American Juridical Committee "to examine the documentation on the topic regarding the applicable law and competency of international jurisdiction with respect to extra-contractual civil liability, bearing in mind the guidelines set out in CIDIP-VI/RES.7/02," and "to issue a report on the subject, drawing up recommendations and possible solutions, all of which are to be presented to the Permanent Council as soon as practicable, for its consideration and determination of future steps." The CIDIP resolution referenced by the Permanent Council indicated that the Conference was "in favor of conducting a preliminary study to identify specific areas revealing progressive development of regulation in this field through conflict of law solutions, as well as a comparative analysis of national norms currently in effect."

On the basis of reports prepared by rapporteurs Dra. Ana Elizabeth Villalta Vizcarra and Dr. Carlos Manuel Vázquez, the Committee determined in its 62nd regular session that, because of the breadth of the general topic of "non-contractual liability" and the diversity of obligations encompassed in that category, the conditions for developing an Inter-American instrument harmonizing jurisdiction and choice of law for the entire category did not exist at this time.

In accordance with the CIDIP resolution which the Permanent Council instructed the Committee to bear in mind, this Report seeks to "identify specific areas" within the broad topic of non-contractual obligations "revealing progressive development of regulation in this field through conflict of law solutions." The Report examines the three areas suggested by the delegation of Uruguay in its final report to the CIDIP-VI conference as potentially meriting separate treatment in an Inter-American private international law instrument: transboundary pollution, product liability, and traffic accidents.[1] In addition, because of the great interest in e-commerce expressed by the scholars who responded to the Inter-American Juridical Committee's questionnaire concerning the future of CIDIP, we have also considered whether the area of Internet torts would be a suitable topic for such an instrument.

The Report concludes that the conditions currently exist for the elaboration of an Inter-American private international law instrument in the areas of product liability and traffic accidents. The conditions may also exist with respect to transboundary environmental damage, although that question is significantly more complex, and the answer less certain. Finally, the

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1 *See* Statement of Reasons: Draft Inter-American Convention on Applicable Law and International Competency of Juridiction with respect to Extracontractual Liability, at 17, OEA/Ser.K/XXI.6 CIDIP VI/doc.17/02, Feb. 4, 2002 [hereinafter Statement of Reasons].

conditions do not exist at this time for the elaboration of a private international law instrument regarding Internet torts.

A. TRANSBOUNDARY ENVIRONMENTAL DAMAGE

At CIDIP-VI, Member States agreed on the need for further study of the possibility of pursuing a private international law instrument in the area of "Conflict of Laws on Extra-contractual Liability, with an Emphasis on Competency of Jurisdiction and Applicable Law with Respect to Civil International Liability for Transboundary Pollution."[2] This section will address the latter issue: civil international liability for transboundary pollution. Discussion of this issue will be limited to the liability of private actors because the Member States generally agreed at the February 20002 plenary session of CIDIP-VI Committee III that the topic should exclude state responsibility from its scope.[3] Nevertheless, as Member States taking leadership roles in the CIDIP-VI negotiations on this topic have recognized, there is "significant interplay between the [public] international liability and civil liability systeDr."[4]

Even when limited to private actors, the scope of the topic remains quite broad, encompassing all forms of pollution as well as all scenarios which are transboundary in nature. First, there are many pollutants and many ways pollutants can cause harm to the environment. Generally, pollutants are classified as either nonhazardous, such as industrial waste, sewage and trash, or even in some circumstances genetically modified organisms, or as hazardous materials, such as nuclear waste and biological toxins. These pollutants can cause harm to any number of components of the environment, including air, water, soil, space, ecosystem, and the food supply.

Second, there are many forms of activity which can cause pollution which is transboundary in nature. For example, a party in one country might accidentally cause pollution in that country which spills over into another country or countries. An oil rig might spill oil in the territorial sea of country which washes over into the territorial sea of a neighboring country. In addition, a party located in one country can intentionally cause pollution in another. Such an example might involve acid rain which falls in one country as a result of pollution emitted during the purposeful manufacturing process in another country. Also, a party principally located in one country can transport materials in another country which results in harm to the environment in the latter country. Less common, though still possible, a party from one country could be injured while passing through another country. A tourist could be exposed to sewage on a beach, for example. Finally, pollution that takes place in international territory, such as the high seas or outer space, might also be regarded as "transboundary" pollution, at least if preventive measures could have been taken in national territory to prevent a pollution-causing event which occurs in international territory.

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2 CIDIP-VI/Res. 7/02, Feb. 8, 2002.

3 *See* Report of Rafael Veintimilla, Committee III Rapporteur, Feb. 11, 2002, OAS Doc. No. CIDIP-VI/Com.III/doc.2/02 rev.2 [hereinafter Veintimilla Report]. This limitation may reflect a growing interest in addressing the issue of transboundary pollution through private liability solutions. *Compare* Stockholm Declaration of June 1972 (principles 21 and 22 concerning state responsibility) *with* 1992 Rio Summit Declaration (calling upon states to develop national laws regarding compensation of victims) & Ten Points of Osnabruk of April 1994.

4 Study Prepared by the Uruguayan Delegation to the OAS, Doc. No. CIDIP-VI/doc.5/00, Feb. 7, 2000. In the Committee III negotiations at CIDIP-VI, some Member States called for greater attention to this issue. *See* Veintimilla Report.

The question whether the conditions currently exist for the negotiation of an Inter-American private international law instrument concerning the liability of private parties for transboundary environmental damage is complex for a number of reasons. First, and most obviously, this topic has already been on the CIDIP agenda, and no agreement was reached on the topic in that forum. The advisability of pursuing the topic again in CIDIP-VII obviously depends on the reasons for this topic's lack of success in CIDIP-VI. If the lack of agreement on this topic was the result of an insuperable disagreement among the Member States on the appropriate approach to this topic, then it would appear to be advisable to begin the project of harmonizing jurisdiction and choice of law for non-contractual liability in this Hemisphere with another topic.

The second complexity results from the fact that other international organizations have aspects of this topic on their agenda – most notably the International Law Commission and the Hague Conference. It may be desirable for the OAS to defer its treatment of this topic until after the other organizations have completed their work, because (a) the relevant organizations are global in their scope, and (b) they have been working on this topic for considerably longer than the OAS has. The ILC currently has on its agenda the topic of "International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law." This topic has been on its agenda, in one form or another, since 1978. Although it originally was considering only the liability of states, it has recently decided to expand the scope of the project to consider the liability of private operators as well. The Hague Conference has been considering the elaboration of a private international law instrument for transfrontier environmental damage since 1992. It produced a comprehensive Note on the topic in 2000, but the topic is apparently now in an inactive status on its agenda.

The third complication results from the existence of numerous international instruments addressing liability for transboundary environmental damage in various discrete sectors. Not all states of the Hemisphere are parties to these instruments, but many are. Some of these instruments address questions of jurisdiction and choice of law, but most address the question of substantive liability. This may reflect the international community's preference to approach this topic through harmonization of substantive law rather than through harmonization of jurisdiction and choice of law. Indeed, a preference for the former approach appears to be reflected in the Stockholm Declaration of 16 June 1972[5] and the Rio Declaration on Environment and Development.[6] According to principle 22 of the Stockholm Declaration, "[s]tates shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction of control of such States to areas beyond their jurisdiction." Principle 13 of the Rio Declaration similarly provides that "States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction."

On the other hand, differences in substantive law are likely to persist despite attempts at substantive harmonization, and the need to allocate jurisdiction will necessarily remain.

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5 Report of the United Nations Conference on the Human Environment, Declaration of Principles, Session of June 5-16, 1972, Principle 21, U.N. Doc. A/CONF.48/14, reprinted in 11 I.L.M. 1416, 1420 (1972).

6 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/5/Rev.1, June 14, 1992, *reprinted in* 31 ILM 874 (1992).

Indeed, the ILC's work explicitly contemplates that it will be complemented by regional and bilateral arrangements.[7] In any event, the key questions for the OAS are whether it should pursue an instrument on this topic before the work of the other organizations has been completed or abandoned, and whether it should focus on harmonization of substantive law, harmonization of private international law, or a combination of the two.

This section shall describe, in general terms, the existing international and domestic laws in force in this Hemisphere governing non-contractual liability for environmental damage. It shall then briefly describe the Hemispheric approaches to choice of law and jurisdiction in cases of transboundary environmental damage, as well as the approaches to these questions taken elsewhere in the world. It shall then discuss the work currently being done on this topic by international organizations, including the prior work done on this topic in CIDIP-VI. Conclusions will follow.

1. Substantive Laws Governing Liability for Environmental Damage

To the extent the substantive rules governing civil liability for environmental damage are in harmony – either because the national or subnational laws in the hemisphere coincide or because international conventions have succeeded in harmonizing the law – attempts to harmonize the choice of law rules would be superfluous. This section provides a brief overview of the national and subnational laws governing civil liability for environmental damage in this Hemisphere and the existing international instruments seeking to harmonize such laws. The national laws on this subject diverge in several significant respects. The existing international instruments cover only certain discrete sectors, leaving many types of environmental damage unaddressed; and a significant portion of the states from this Hemisphere are not parties to many of these instruments.

a. National Laws

Common Law. The common law provides for a number of theories of recovery that could apply to environmental damage: public and private nuisance, trespass, negligence, strict liability, the public trust doctrine, and riparian rights. Public and private nuisance doctrine prohibits intentional non-trespassory interference with the use and enjoyment of land.[8] Trespass addresses the intentional *physical* invasion of property, and is often coupled with nuisance in an action for damages or injunctive relief.[9] An action based on negligence can be brought where the harm-doer has a duty of diligence and, in failing to fulfill his duty, departs from the standard of care to which a reasonable person would adhere.[10] Strict liability is based on the famous case of *Rylands v. Fletcher*. The rule developed imposes strict liability for non-natural, large-scale "ultrahazardous" activities that cause injury to neighboring persons or

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7 *See* Commentaries on the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, adopted by International Law Commission at its Fifty-third Session (2001), at 381.

8 *See Civil liability resulting from transfrontier environmental damage: a case for the Hague Conference?*, Preliminary Document No. 8, Note drawn up by Christophe Bernasconi (April 2000) [herinafter 2000 Hague Note], at 16-17.

9 *Id.* at 17.

10 *Id.* at 18.

property. Under the public trust doctrine, the State is the trustee of natural resources in service to the public.[11] Land held in public trust can be transferred to individuals, but burdens of the public trust obligations run with the land.[12] Enforcement of the trust generally must be by the State against the harm-doing individual; it is not clear whether an individual can initiate enforcement proceedings.[13] Riparian rights are held by persons whose land borders waterways; the holders of the rights may bring actions to maintain the waterways in their natural state.[14]

In the United States, the federal government has also enacted a large number of statutes to govern liability for environmental harm. Most of these laws do not address the liability of one private party to another for harm caused to person or property. Two that do address such liability, the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) [15] and the Oil Pollution Act (OPA),[16] address the civil liability of persons responsible for disposal of toxic or dangerous substances, or due to an accidental oil spill. CERCLA is concerned with remedying damage caused to public health and the environment as a result of inadequate storage of toxic waste.[17] To this end, it addresses clean-up of toxic waste sites. It provides for citizen suits, confers on the administrative agency the duty to identify contaminated sites and confers on the President of the United States the authority to "take the necessary safety measures in case of a threat to public health or the environment."[18] The Act is financed by the Superfund, which is fed by taxes levied on petroleum products and dangerous waste.[19] CERCLA imposes a strict liability regime and also provides for joint and several liability; in addition, the defendant can seek third-party indemnification or contribution.[20]

In the wake of the Exxon Valdez incident, the United States decided not to join international efforts to establish a unified system of civil liability for oil pollution. Instead, it enacted the Oil Pollution Act, which sets forth 42 regulations governing oil transport and imposes strict liability on whoever has control of the ship.

Civil Law. Civil law also provides for a number of general bases for recovery applicable to environmental harm: servitudes, fault or delict, strict liability, and neighborhood law. In addition, there are special rules applicable to the environment. The law of servitudes is similar to the theory of riparian rights: owners of land bordering water sources "cannot impede the natural flow of the water or substantially change the quality of the water."[21] Liability based on fault or delict results from the breach of a general duty to act so as not to cause harm to

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11 This theory is not accepted in Canada, but is widely used in the United States.

12 2000 Hague Note at 19.

13 *Id.*

14 *Id.* at 20.

15 42 U.S.C. § 9601 *et seq.* (2003).

16 33 U.S.C. § 2701 *et seq.* (2003).

17 2000 Hague Note at 21-22. The person liable is also responsible for damages inflicted on or harm caused to natural resources or their destruction or loss.

18 *Id.* at 22.

19 *Id.* It is worth noting that the Act has not actually worked that well – the costs are high and the clean up has taken much longer than anticipated.

20 *Id.*

21 *Access to Courts and Administrative Agencies in Transboundary Pollution Matters*, Commission for Environmental Cooperation Background Paper in N. AMER. ENV. L. AND POL'Y, Vol. 4, Spring 2000 [hereinafter CEC Background Paper], at 224.

another.[22] Mexican civil law sets out a regime of strict liability, which similar to that of the common law.[23] The only exculpatory provision in the Mexican law is the fault or "inexcusable" negligence of the victim.[24] Neighborhood law is a no-fault regime in which one must conduct one's affairs in such a way that no injury is done to a neighbor's property.[25]

Special rules on environmental liability in civil law systems include many laws based on strict liability.[26] Some laws make even normal use actionable, if it results in damage.[27] Greece characterizes environmental harm as "infringement on the rights of the personality,"[28] and Italy assesses damages against one who "nonchalantly" violates environmental law.[29] In short, there is a wide range of special rules for environmental liability in civil law regimes.

In both common law and civil law countries, ultrahazardous activities and activities that are likely to cause environmental damage are highly regulated by administrative agencies. Such regulation adds another potential layer of law that might give rise to choice of law issues. For example, in some countries, prior approval of an activity by an administrative agency may produce a degree of immunity from civil liability for injuries suffered.[30] In case of transboundary damage, there may arise the need to determine whether the administratively-conferred immunity should be given effect with respect to injuries suffered elsewhere. As a general matter, the fact that the area of environmental protection is highly regulated in many states, with administrative agencies taking an active role, adds a layer of complexity to the topic of transboundary environmental protection. This topic requires that attention be paid to the relation between public and private domestic law as well as the relation between public and private international law.

b. Treaties Addressing Civil Liability for Environmental Damage

In addition to treaties and other instruments that address the liability of states for transboundary environmental damage in certain sectors,[31] there are a number of treaties that address civil liability for environmental damage in certain sectors. The most prominent treaties regulate civil liability relating to three major pollutants – nuclear waste, spilled oil, and hazardous materials. The 1960 Paris Convention and the 1963 Vienna Convention, which were linked through a Joint Protocol in 1992, regulate nuclear waste.[32] The 1969 Brussels

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22 *Id.*

23 *Id.* at 226.

24 *Id.*

25 2000 Hague Note at 23. The Swiss Civil Code is an example. The basis for liability is "objectively" exceeding one's property rights, although the plaintiff does have to show a causal connection between the damage and the property owner's action. Swiss Civ. Code, arts. 679-684.

26 Most states have strict liability regimes. Russia is an exception, but in Russia, fault is presumed, with the defendant bearing the burden of rebuttal. 2000 Hague Note at 24 n.102. Generally, again, strict liability is accompanied by a limit on the amount of damages a plaintiff can recover. *Id.* at 24.

27 *See*, *e.g., id.* at 24 (discussing Germany).

28 *Id.*

29 *Id.*

30 2000 Hague Note at 41 n.211 (citing Christian Von Bar, Environmental Damage in Private International Law, *Collected Courses of the Hague Academy of International Law*, Vol. 268, at 324).

31 The instruments addressing state liability for environmental injury will not be discussed in this Report.

32 Joint Protocol to the Application of the Vienna Convention and the Paris Convention, Sept. 21, 1988, *reprinted in* 42 NUC. LAW. BULL. 56 (Dec. 1988).

Convention regulate oil spills.[33] The transportation of hazardous materials is governed by a number of treaties, including the Basel Protocol.[34] The principal features of the principal treaties relating to transboundary pollution are described briefly below. Though the substantive legal standards used in these and other treaties vary widely, there are at least four major issues which treaties on transboundary pollution usually address.

(1) *Parties eligible to recover*

Because pollution is often a diffuse phenomenon, affecting many people, one of the most important aspects of pollution liability rules is who is able to directly enforce them. Transboundary pollution can cause injury to the persons or property of many kinds of legal actors, whether natural persons, legal entities, or even the state. Different conventions in this area provide means of recovery to some or all of these legal actors in certain situations. Some treaties also condition the ability of an actor to recover upon the actor having a relationship with a Contracting Party, in which case nationals of non-contracting parties are not covered by the treaty even when injured within the territory of a Contracting Party. By contrast, other treaties bind Contracting Parties to apply the treaty rules without respect to the nationality of the injured party. Still others exclude application of the treaty rules altogether where a foreign party is injured in the same state as the pollution-causing event, in which case national laws generally apply.

(2) *Parties Held Liable and Standard of Liability*

Rules determining who is held liable for transboundary pollution are often based upon one or more of the following basic principles: the "polluter pays principle" under which the costs of environmental harm are internalized by those who cause the harm, and the "precautionary principle" under which cost-effective precautions should be taken to prevent the risk of environmental harm even where there is a lack of scientific certainty as to whether these precautions will be effective or are necessary.[35] Examples of the polluter pays principle are found in oil spill and nuclear damage treaties which assign liability to the "operator" (e.g., company operating a ship which leaks oil or a nuclear plant which emits radioactive waste), while hazardous waste disposal treaties may employ the precautionary principle by assigning liability to the "disposer: (e.g., company which placed waste into transportation containers).

(3) *Recoverable damage*.

Different treaties allow, prohibit, or cap recovery for different kinds of damages. Listed in order from most common to least common, these kinds of damages include loss of life and personal injury, loss or damage to personal property, loss of income or profits, costs of cleanup, costs of subsequent preventive measures, and punitive damages.

(4) Principal Treaties

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[33] Brussels Convention on Civil Liability for Oil Pollution, Nov. 29, 1969, 9 I.L.M. 45. This Convention has been amended by two protocols.

[34] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, UN Doc. EP/IG.80/3, 28 I.L.M. 649 (1999).

[35] Rio Declaration on Environment and Development, U.N. Doc. A/CONF 151/26 (Vol. 1), Aug. 12, 1992 (promoting national implementation of the precautionary principle).

(i) *The Paris Convention on Third Party Liability in the Field of Nuclear Energy* (*Paris Convention*).[36]

This convention is a regime of strict (or objective) civil liability that applies when a nuclear incident has occurred in the territory of a Contracting State with damages suffered in another Contracting State.[37] It has been supplemented by the *Brussels Convention*, which institutes a "complementary system of indemnifications drawn from public funds in the event of particularly costly damages."[38]

(ii) *The Vienna Convention on Civil Liability for Nuclear Damage* (*Vienna Convention*).[39]

This convention was joined to the *Paris Convention* by a Joint Protocol in 1988; Parties to the Joint Protocol are treated as parties to both treaties.[40] Like the *Paris Convention*, the *Vienna Convention* is a regime of strict liability. Both Conventions channel liability to the operators of the nuclear installation that causes the alleged damage, and both Conventions provide for limitations on recovery.[41]

(iii) *The International Convention on Civil Liability for Oil Pollution Damage*.[42]

This treaty responded to the then-growing concern over oil tanker accidents.[43] It was modified by additional Protocols in 1976, 1984 and 1992, although the 1984 Protocol has not entered into force.[44] Like most other Treaties setting out substantive law, the *Oil Pollution Damage Convention* is a regime of strict civil liability, with a limitation on liability.[45] This

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36 The Convention is in force in most of the countries of Western Europe (Germany, Belgium, Denmark, Spain, Finland, France, Greece, Italy, Norway, Netherlands, Portugal, Sweden, Turkey and the United Kingdom). *See* 2000 Hague Note at 5 n.15. No Western Hemisphere countries are party.

37 *Id.* at 5.

38 *Id.*

39 Ten Western Hemisphere countries are party to this convention: Argentina, Bolivia, Brazil, Chile, Cuba, Mexico, Peru, St. Vincent & Grenadines, Trinidad & Tobago, and Uruguay. Colombia has signed but not become party.

40 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention, Sept. 21, 1988 [hereinafter Joint Protocol], *reprinted in* W.E. Burhemme (ed.), DROIT INTERNATIONAL DE L'ENVIRONNEMENT, TRAITÉS INTERNATIONAUX. Although the Joint Protocol has 20 parties, in the Western Hemisphere only Chile and St. Vincent & Grenadines are party. Argentina has signed but has not become party.

41 2000 Hague Note at 6. In addition to channeling liability to private operators, the Conventions authorize actions against insurers or other persons who have "granted a financial guarantee to the operator." *Id.* The Protocol to Amend the 1968 Vienna Convention on Civil Liability for Nuclear Damage extends the geographical scope of the application of the Vienna Convention to nuclear damage "wherever suffered." 2000 Hague Note at 5 n.17.

42 International Convention on Civil Liability for Oil Pollution Damage (CLC) 1969, *entered into force* June 19, 1975 [hereinafter 1969 CLC Convention]. Twelve countries in the Western Hemisphere are party: Brasil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Nicaragua, Peru, and St. Kitts & Nevis.

43 2000 Hague Note at 7.

44 *Id*. The 1984 Protocol did not enter into force because it was not ratified by at least six states, but was instead superseded by the 1992 Protocol which required ratification by only four states, and is now in force. The following 17 Western Hemisphere countries as parties to the 1992 Protocol, which requires automatic denunciation of the 1969 CLC Convention: Antigua & Barbuda, Argentina, Bahamas, Barbados, Belize, Canada, Chile, Colombia, Dominica, Domnican Republic, El Salvador, Grenada, Jamaica, Mexico, St. Vincent & Grenadines, Trinidad & Tobago, and Uruguay. The 1976 Protocol also entered into force with the following 11 Western Hemisphere countries as parties: Antigua & Barbuda, Bahamas, Barbados, Belize, Canada, Colombia, Costa Rica, El Salvador, Nicaragua, and Peru. *See* Status of IMO Conventions, available at http://www.imo.org; *see also* 2000 Hague Note at 7 n.28.

45 *Id.* at 7. The liability limits were increased by the 1992 Protocol. *Id.*; *see also* 1969 CLC Convention, art. V.

Convention also establishes a fund out of which damages can be paid.[46] In addition, ship owners and oil companies entered into voluntary agreements intended to indemnify victims of pollution.[47]

(iv) *The Geneva Convention on Civil Liability for Damages Caused during Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels* (*CTRD*).[48]

The CTRD Convention is another regime of strict civil liability, also limiting liability.[49] However, the transporter is obliged to carry insurance and is also entitled to third-party indemnification.[50] States may avail themselves of a reservation for the purpose of applying higher limits, or no limit, on liability.[51] The Convention applies to both national and international carriage, but only if the acts causing the injury and the injury itself occurred in a Contracting State.[52]

(v) *The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*.[53]

This treaty addresses liability for injury caused to importing (receiving) States in the transport of hazardous waste. As supplemented by a 1999 Protocol, it establishes a very complex regime of strict liability. It permits States-Parties to impose limits on liability as long as the limits are not below the minimum requirements set out in the Annex to the Convention.[54]

(vi) *The Council of Europe's Convention of 21 June 1993 on Civil Liability for Damage Resulting from Activities Dangerous to the Environment* (*Lugano Convention*).[55]

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46 In addition, the 1969 CLC Convention is ensured by obligatory insurance and provides for the possibility of a direct action against the insurer. The additional Protocols allow for supplementary indemnification for victims who might not be able to identify the polluter or in cases where the polluter is insolvent. 1969 CLC Convention, arts. VII & VIII.

47 Tanker Owners Voluntary Agreement Concerning Liability for Oil Pollution (TOVALOP) and Contract Regarding an Interim Supplement to Tanker Liability for Oil Pollution (CRISTAL), *cited in* 2000 Hague Note at 8 nn.31 & 32.

48 CRTD Convention, Oct. 10, 1985. No Western Hemisphere states are party.

49 *See Uniform Law Review* 1989-1, p. 280/281, *et seq.*, cited in 2000 Hague Note at 9 n. 40. In this case, however, the strict liability is attenuated by an exculpatory clause, which provides that the transporter is exonerated if he proves that "the consignor or any other person failed to meet his obligation to inform him of the dangerous nature of the goods, and that neither he nor his servants or agents knew or ought to have known of their nature." *Id.* at 9 n.41 (internal quotation marks omitted).

50 *Id.* at 9.

51 *Id.*

52 *Id.* at 9-10.

53 The Basel Convention is nearly universal, with 133 state parties, 30 of which are in the Western Hemisphere: Antingua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, Uruguay, and Venezuela. For a list of all parties, see http://www.basel.int/ratif/ratif.html#basel.

54 2000 Hague Note at 10.

55 Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Jun. 21, 1993 [hereinafter Lugano Convention]. The Lugano Convention is not yet in force. It has been signed by Cyprus, Finland, Greece, Iceland, Italy, Liechtenstein, Luxembourg, the Netherlands and Portugal, but only Portugal has ratified it. See http://conventions.coe.int/Treaty/EN/CadreListeTraites.htm.

The Lugano Convention aims primarily to ensure adequate compensation for damages. Because the terms are defined broadly, the substantive scope is considerable.[56] The geographic scope is also rather broad: the Convention applies to incidents "occurring in the territory of a State Party, 'regardless of where the damage is suffered.'"[57] Again, this Convention provides for a regime of strict liability[58] – but also requires every State to ensure that its operators have funds to cover potential liability under the Convention.[59]

c. Conclusions

The national laws in force shows that the laws regulating civil liability from environmental damage differ in many respects. In transboundary cases, therefore, there will frequently be a need to select among the conflicting laws of the affected states. The brief survey of international instruments addressing liability for environmental damage shows that there has been substantial effort to unify the substantive law in various sectors. These efforts have not obviated choice of law problems, however, because the international instruments address the problem only in some sectors, leaving other sectors to national law, and because not all of these instruments have been widely ratified by American states. The conclusion reached by the European Commission about the persistence of conflicts of law in this area applies even more strongly to the Americas:

In spite of this gradual approximation of the substantive law . . . major differences subsist – for example in determining the damage giving rise to compensation, limitation periods, indemnity and insurance rules, the right of associations to bring actions and the amounts of compensation. The question of the applicable law has thus lost none of its importance.[60]

2. Choice of Law

a. Approaches in the Western Hemisphere

Among the nations of the Hemisphere, there are no legal provisions specifically addressing choice of law in the context of transboundary pollution. Accordingly, the courts select the applicable law by applying the choice of law rules that apply generally to torts. Most of the nations of Latin America, as well as Canada and ten states of the United States follow the traditional *lex loci delicti* (place of the wrong) approach. In the context of trans-boundary pollution, however, there is a difference among these states in how the *lex loci delicti* rule is applied. The typical transboundary pollution cases will involve an act performed in state A which causes harm to persons or property in state B. It is debatable, in such cases, whether the *lex loci delicti* is the place where the act was performed (*lex loci actus*) or the place where the

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56 2000 Hague Note at 12.

57 *Id.* at 14. The Lugano Convention provides for the possibility of a reservation, by which states can elect to participate in the Convention only on the basis of reciprocity. No states have applied on this basis. *Id.*

58 Lugano Convention, art. 6. The Convention does not require that the plaintiff establish that the defendant caused the harmful occurrence, although she must demonstrate a "causative link" between her injury and the occurrence. However, there is no presumption of causation. 2000 Hague Note at 13. In addition, the operator may escape liability if he can show that the damage resulted from a "natural phenomenon of an exceptional, inevitable, and irresistible character," or from "pollution at tolerable levels under local relevant circumstances," or from "a dangerous activity taken lawfully in the interests of the person who suffered the damage, whereby it was reasonable toward this person to expose him to the risks of the dangerous activity." Lugano Convention, art. 8, sub-paras. a, d, e.

59 Lugano Convention, art. 12.

60 Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (2003/0168 (COD), July 22, 2003, at 20.

injury was suffered (*lex damni*). In the United States, the states that follow the traditional *lex loci delicti* rule, as articulated in the First Restatement, apply the law of the state in which the injury occurred (*lex damni*).[61] According to the Bustamante Code and the Montevideo Treaties, the applicable law in such cases is the law of the place where the act causing the injury occurred (*lex loci actus*).[62]

Additional disuniformity results from the fact that some states apply rules other than *lex loci delicti*. In the United States, only ten of the sister states currently follow the *lex loci delicti* approach. The most widespread of the other approaches used in the United States is the "most significant relationship" approach of the Second Restatement, which is characterized by its indeterminacy. The Caribbean nations follow the double actionability rule, under which the suit is maintainable only if actionable under the law of the forum and the law of the place where the conduct occurred, although in exceptional cases the courts will apply instead the law of the state with the most significant relationship to the dispute.[63] Mexico applies the *lex fori* unless a treaty or state specifically call for the application of foreign law. [64]

Three other states have adopted versions of what is known as the principle of ubiquity, under which the applicable law is either the law where the acts were performed or the law where the injury was suffered, whichever is more favorable to the victim. The Civil Code of Peru provides, in article 2097, that the law applicable to extracontractual liability shall be the law of the place where the principal acts giving rise to the dispute were performed. However, if the law of the place in which the injury was suffered would hold the defendant liable, but the law of the place of where the acts were performed would not, then the applicable law shall be the former law, provided that the defendant should have foreseen that his acts might produce injury there.[65]

The 1999 Venezuelan codification of private international law adopts an approach similar to Peru's. Under article 32, the *lex damni* applies, but the victim may request the application of the law of the state in which the event causing the damage took place.[66] The Civil Code of Québec provides that "[t]he obligation to make reparation for injury caused to another is governed by the law of the country where the injurious act occurred. However, if the injury appeared in another country, the law of the later country is applicable if the person who committed the injurious act should have forseeen that the damange would occur."[67] If the

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61 *See* RESTATEMENT OF THE LAW OF CONFLICT OF LAWS § 377, illustration 4 (A, in state X, throws out noxious fumes from a chimney which destroy the grass of B in state Y. The place of the wrong is in Y.)

62 Bustamante Code, arts. 167-168. *See* Jose Luis Siqueiros, La Ley Aplicable y Jurisdicción Competente en Casos de Responsabilidad Civil por Contaminación Transfronteriza; Conflict of Laws on Tort Liability, with Emphasis on Jurisdiction and the Law Applicable to International Civil Liability for Transboundary Pollution, OAS/REG/CIDIP-VI/doc.5/00, at 13.

63 *See* Winston Anderson, *Forum Non Conveniens Checkmated? – The Energence of Reatliatory Legislation*, 10 J. TRANSNAT'L L. & POL'Y 183, 207 (2001) (noting the "lack of clarity as to when the exception [to the doule actionability rule] applies").

64 Jorge A. Vargas, *Conflict of Laws in Mexico: The New Rules Introduced by the 1988 Amendments*, 28 INT. LAW. 659, 674-75 (1994).

65 Código Civil del Peru del 24 de julio de 1984, art. 2097.

66 *See* Gonzalo Parra-Aranguren, *The Venezuelan 1998 Act on Private International Law*, XLVI NETHERLANDS INT'L L. REV. 383, 391 (1999).

67 Civil Code of Québec, art. 3126, para. 1.=

plaintiff and defendant have a common domicile, however, the law of the common domcile applies.[68]

b. Approaches Prevailing Elsewhere

(1) lex loci actus

The law applied in most of this Hemisphere – the *lex loci actus* – is also applied by Austria, the Netherlands, Denmark, Finland and Sweden, although some of these states may permit the displacement of that law if another state has a closer connection to the dispute.[69] The international trend, however, has been away from this rule, and for good reason. A rule under which an operator can be held liable only to the extent of the law of the state in which he carries out the activity permits the operator (and the states in which they operate) to externalize the costs of their hazardous activity, to the detriment of neighboring states.

(2) lex damni

Applying the law of the place of the injury seems much more sensible, as it entitles the injured party to precisely the degree of protection afforded him by the state in which he resides. Where the law of the state where the harmful conduct occurred is less protective of the victim, applying the law of that state is problematic for the reason just discussed; applying the *lex damni* is accordingly preferable. Whether the *lex damni* is preferable to the *lex loci actus* when the former is less protective of the victim will be discussed below.

The *lex damni* is the choice of law rule followed by the United Kingdom, Spain, Romania and Turkey,[70] although Turkey permits the displacement of that law if another state has a closer connection to the dispute.[71] Under Japanese law, *lex damni* applies even if the person liable could not have foreseen the damage occurring in that place.[72] France selects the *lex damni* as well. In a recent case, the Court of Cassation in France indicated that, where the injury was suffered in a state other than where the acts causing the injury occurred, it was necessary to apply the law that has the closest connection with the situation in question." The court went on to hold, however, that, in the absence of "exceptional circumstances," the law having the closest connection to the situation will be the law of the state in which the injury occurred.[73]

(3) principle of ubiquity

Under the so-called principle of ubiquity, the applicable law is that which is more favorable to the victim as between the law of the place of the harmful event and the law of the place of injury. Outside the Americas, versions of this principle have been adopted by Switzerland, Germany, Greece, Hungary, Slovakia, the Czech Republic, the former Yugoslavia, Estonia, Tunisia, and Italy.

Switzerland is the only state to have enacted a specific choice of law provision for cases of transboundary pollution. The Swiss law provides that "claims resulting from harmful emissions coming from an immovable property are governed, at the choice of the injured party,

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68 *Id*.
69 *Id.* at 36.
70 *Id.*
71 *Id.* at 36 n.181.
72 *Id.*
73 Court of Cassation of France, Decision of 11 May 1999, *discussed in* 2000 Hague Note at 34-35.

by the law of the State in which the real property is located or by the law of the State in which the result was produced."[74] This law thus differs from the laws of Peru and Venezuela, which do not call on the plaintiff to select the law, but instead instruct the court to apply the law more favorable to the plaintiff. Like Switzerland, Germany calls for the plaintiff to choose the applicable law, giving him the same options.

Calling on the plaintiff to choose the applicable law poses certain potential probleDr. One is what to do if the victim fails to make a choice. This problem is avoided by states, such as Italy and Venezuela, which set forth the applicable law but give the victim the power to request the application of another law.[75] For both states, in the absence of selection by the victim, the law of the place of injury applies. Another potential problem, pointed out by Professor Morse, is that,"[i]f the plaintiff is to make an informed choice, he will have to ascertain all of the details of the potentially relevant laws, a process that is bound to be expensive and difficult. Moreover, the plaintiff's supposition as to the content of the foreign law may not be accepted as accurate by the court."[76] This problem is avoided by states such as Peru, which call upon the judge, rather than the victim, to select the law that favors the victim. However, as pointed out by Professor Morse, even the court may have difficulty in certain cases determining which law is more favorable to the victim: "[W]here both jurisdictions provide for a cause of action, but the respective provisions differ, it may become difficult, if not impossible, to say which is more favorable to the injured party. And what if some of the rules were more favorable and others less so?"[77]

One answer to this last question is that one would apply the more favorable law on each discrete issue – i.e., combine the principle of ubiquity with the principle of depeçage. However, even the defenders of the principle of ubiquity consider it unacceptable to combine it with depeçage:

It seems obvious however that the injured party must subject his or her claim . . . to a single law. Indeed, it would scarcely be in line with the purpose of this provision to permit the injured party to very his or her choice as a function of the claim invoked or according to the legal issue in question. That would obviously bring on very complex and unforeseeable legal situations for the defendant.[78]

In any event, the difficulty of choosing the more favorable law when some provisions are more and others are less favorable will be more of a problem for some variations of the principle of ubiquity than for others. In jurisdictions such as Québec and Peru, the court need select as between two (or more) laws only when the law of the place of injury would hold the defendant liable but the law of the place of the act would not. There would appear to be no occasion for the court to choose between the two laws if both laws would hold the defendant liable, but the laws differ in other respects. For example, if the law of the place of the act would place a lower limit on the extent of recoverable damages than the law of the place of injury, it appears that, under the choice of law rules of Québec and Perú, the law of the place of the act

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74 Switzerland Federal Law on Private International Law, art. 138.
75 2000 Hague Note at 33.
76 C.G.J. Morse, *Choice of Law in Tort: A Comparative Perspective*, 32 AM J. COMP. L. 51, 60 (1984).
77 Morse, op cit., at 59-60.
78 2000 Hague Note at 30.

would apply even though it is less favorable to the plaintiff. By contrast, Germany and Switzerland would permit the plaintiff to choose the law of the place of injury in such a case.[79]

c. Conclusions

The trend of the cases and the scholarly commentary is to disfavor the application of the *lex loci actus*, which is the rule currently applicable in a large part of this Hemisphere. An Inter-American instrument replacing the *lex loci actus* approach with the *lex damni* approach would be a significant advance. Whether the principle of ubiquity is preferable to the rule of *lex damni* is a more complex question. The negotiations for an Inter-American instrument on choice of law for cross-border environmental damage could provide a valuable forum for debating that question. Whether the principle of ubiquity is politically acceptable to the Member States is also an open question – one that would be answered by such a negotiation (or perhaps already has been).

3. Jurisdiction

An Inter-American instrument addressing jurisdiction could have important consequences whether or not the instrument also standardizes choice of law in the Hemisphere. If the instrument does also include choice of law rules, or if it incorporates indeterminate choice of law rules – such as the "most significant relationship approach of the Second Restatement – then the instrument's jurisdictional provisions will indirectly determine the applicable law. If the instrument included relatively determinate choice of law rules, then the plaintiff's choice of forum would not be an indirect way to choose the applicable law, but it would have other important consequences. Since the forum will apply its own procedural rules even if another state's law applies to the substance, the choice of forum will determine the availability of procedural mechanisms such as class actions pretrial discovery or a jury trial or contingency fee arrangements. Additionally, the traditional refusal of states to enforce another state's penal laws or laws that violate its strong public policy usually means that punitive damages will be available only in the courts of a state that provides for such damages.[80] Since punitive damages and the procedural mechanisms noted above are typically available only under the law of the United States, the jurisdictional question will be most consequential when the choice is between a U.S. forum and that of another state.

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[79] The Nordic Convention on the Protection of the Environment, in force between Sweden, Denmark, Norway, and Finland, provides that requests for damages "shall not be judged by rules which are less favorable to the injured party than the rules of … the State in which the activities are being carried out." Thus, if the state's choice of law rule would otherwise require the application of the *lex damni*, the convention would entitle the victim to the application of the *lex loci actus*, if it is more favorable. *Cf.* internal text *supra*. (Denmark, Finland and Sweden generally apply the *lex loci actus*). There are a few additional treaties that provide limited choice of law rules for dicrete types of environmental damage, but they are of limited interest because the rules they adopt are closely linked to the particular goals of the regime set up by the treaties. For a description, see 2000 Hague Note at 49.

[80] In theory, an Inter-American instrument could require the forum state to enforce another state's laws authorizing punitive damages whenever the substantive law of that state applies under the instrument's choice of law provisions. On the other hand, instrument could also expressly exclude the application of another state's choice of law rules. The European Commission's proposed Rome II regulation takes the latter approach by providing in article 24 that "[t]he application of a provision of the law designated by this Regulation which has the effect of causing non-compensatory damages, such as exemplary or punitive damages, to be awarded shall be contrary to Community public policy." Finally, the Inter-American instrument could be silent with respect to punitive damages, thus leaving it to the forum to determine whether to enforce another state's law providing for punitive damages. This last option is likely to lead to the same result as the second.

a. Treaties

A few conventions designate the available fora for the adjudication of disputes concerning certain specific types of crossborder environmental damage. With respect to nuclear incidents, the Paris Convention provides for actions to be brought only in the Contracting State on whose territory the accident occurred.[81] With respect to oil pollution, the *Brussels Convention* limits actions to the territory of the Contracting State(s) in which the damage occurred. The parties excluded the state of the habitual residence of the owner of the vessel as a forum in order to avoid having a suit brought in a jurisdiction that is the territory of a flag of convenience.[82]

The Convention on Civil Liability for Damage caused during the Carriage of Dangerous Goods by Road, Rail and Inland Navigation Vessels (CTRD) provides that a claim for compensation may be brought in the courts of the place where "a) the damage was sustained; b) the incident occurred, c) preventive measures were taken …, or d) the carrier has his habitual residence."[83] The plaintiff's choice of forum will depend in part on where the carrier has established a limitation fund, as required by Article 11 of the Convention; the courts of the State in which the fund is established are *exclusively* competent to determine "all matters relating to apportionment and distribution of the fund."[84]

The Nordic Convention, which applies to all categories of emissions, provides that actions can be brought before a court in the State where the harmful activity occurred – although this limitation is ultimately not that burdensome because the Parties' laws are relatively harmonized.[85] The Lugano Convention, which also applies generally to damage resulting from activities dangerous to the environment, allows an action to be brought where the damage was suffered, where the dangerous activity was conducted, or where the defendant has her habitual residence.[86] It allows claims by organizations as well as individuals,[87] and includes detailed rules concerning access to information, which, inter alia, allow persons who suffered damage to request information "at any time, in so far as … is necessary to establish the existence of a claim for responsibility."[88]

Finally, although not yet adopted and apparently curtailed, it is worth recalling that the latest draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Hague Convention) included a provision would have allowed a tort action to be brought either in the state of the defendant's habitual residence, in the state in which the act or omission causing the injury occurred, or in the state in which the injury arose, unless the

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81 Paris Convention on Third Party Liability in the Field of Nuclear Energy, art. 13. Obviously, this could be either the State where the injury or the harmful act occurred.

82 2000 Hague Note at 48.

83 *Uniform Law Review*, *supra* note 51; 2000 Hague Note at 48. This Convention has not yet entered into force. *Id.* at 48 n.236.

84 *Id.*

85 *Id.* at 49.

86 Lugano Convention, art. 19, para. 1. This Convention has not yet entered into force.

87 2000 Hague Note at 50.

88 Lugano Convention, art. 16, para. 2. The Convention also stipulates the type of information that can be requested and provides for some limitations on access. 2000 Hague Note at 66.

defendant could not have reasonably foreseen that the act or omission could result in an injury of the same nature in that state.[89]

b. National Laws

There are no national jurisdictional provisions in this Hemisphere specifically addressing cases of environmental damage. The applicable rules are therefore those addressing non-contractual liability in general. Among Latin American countries, the general rule is that the suit may be brought in the place of habitual residence of the defendant and, in addition, in the place where the act causing the injury occurred.

The rule prevailing in the United States would permit the suit to be brought in either place and, in addition, in the place where the injury occurred, provided that the defendant could reasonably foresee that his conduct would cause an injury there. Similarly, under Canadian law, a tort suit can typically be brought in the place of the defendant's habitual residence or where the tort was committed or caused an injury, provided that there is a "real and substantial" connection between the defendant and the forum showing that the defendant voluntarily submitted to the risk of litigation in the forum.[90]

The Canadian provinces and some states of the United States, however, recognize an important limitation to jurisdiction in cases involving injury to real property. Under the so-called "local action" rule, actions relating to ownership of real (immovable) property have to be brought in the jurisdiction in which the property is located. In *British South Africa Co. v. Copanhia de Moçambique*,[91] the House of Lords extended the principle to actions *in personam* relating to damages for trespass.[92] As a result of this extension, English courts also declined to enforce foreign judgments relating to *in personam* damage done to property, in which the property is not located in the same jurisdiction as the court.[93] The rule has been severely criticized.[94] In the United Kingdom, it was abolished by the *Civil Jurisdiction and Judgments Act of 1982*, which allows English courts to rule on *in personam* actions relating to land situated outside England.[95] Nonetheless, it continues to be followed by some states of the United States and some provinces of Canada, leading to the dismissal of suits seeking to impose liability for acts performed within the state that causes injury to real property abroad. The Uniform Transboundary Pollution Reciprocal Access Act of 1982 was drafted by the U.S. and Canadian bar associations in order to address this problem. The Act is in force in Ontario, Manitoba, Nova Scotia and Prince Edward Island in Canada, and by Michigan, Montana, Wisconsin, Colorado, Connecticut, New Jersey and Oregon in the United States.[96] States and provinces that have adopted the Act grant access to their courts to persons whose property abroad was damages by acts occurring in the state or province, provided that the state or

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89 Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, arts. 3, 10, available at http://www.hcch.net/e/conventions/draft36e.html.

90 *See* March 2003 report of author (discussing Canadian "real and substantial connection" choice of law approach).

91 [1893] A.C. 602 (H.L.).

92 2000 Hague Note at 50.

93 *Id.* at 50. English courts from the outset (of the rule) refused to enforce judgments *in rem* where the property was not located in the jurisdiction of the court.

94 *See, e.g.,* Welling/Heakes, *Torts and Foreign Immovables Jurisdiction in Conflict of Laws*, (1979-80), 18 UNIV. W. ONT. L.REV. 295.

95 2000 Hague Note at 52.

96 *Id.* at 53 n.261.

province in which the injury was suffered grants reciprocal access to the citizens of the forum.[97]

The Commission for Environmental Cooperation is currently endeavoring to implement Article 10(9) of the North American Agreement on Environmental Cooperation, the environmental side agreement of the NAFTA, under which Mexico, Canada and the United States agreed to consider and develop recommendations for reciprocal access to the courts and administrative agencies of their territories in cases relating to injuries suffered or likely to be suffered due to transboundary pollution. To date, however, they have taken no action on this issue beyond authorizing the secretariat's "Background Paper."[98]

Another quasi-jurisdictional doctrine that has had a significant impact in transnational litigation involving environmental damage has been the doctrine of forum non conveniens. This doctrine, which is recognized in the United States, Canada, and most Caribbean states, permits a court that otherwise possesses jurisdiction to decline to exercise such jurisdiction if it determines that another state has a closer connection with the underlying dispute and would be a significantly more convenient forum. This doctrine has been applied in numerous environmental cases of a transnational nature (to use Ballarino's term[99]) – that is, cases in which both the activity that immediately caused the injury and the injury itself occurred in the same state, but the defendant is a national of, and operated primarily in, another state. In the typical environmental case in which a forum non conveniens dismissal has been sought, the defendant has been a U.S. corporation that conducts operations, either through a branch or a subsidiary, in another state, allegedly causing environmental injury to nationals of that state. The plaintiffs bring suit in the United States, and the U.S. defendant seeks to have the action dismissed on the ground that the state in which the acts and injury occurred are the more appropriate forum. The most famous case of this description dismissed on forum non conveniens grounds was the suit brought against Union Carbide involving the gas leak in Bhopal that killed or injured thousands on people.[100] Numerous similar cases brought by plaintiffs from the Americas have been the subject of forum non conveniens motions, most of which have been successful.[101]

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97 Uniform Transboundary Pollution Reciprocal Access Act, *cited in* 2000 Hague Note at 53 n.261.

98 John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT'L L. 291, 313 n.148 (2002).

99 Tito Ballarino, Questions de droit internationale privé et Dommages Catastrophiques, RECUEIL DES COURS VOL. 220 (1990-I) (distinguishing "transnational" cases from "international" cases; the latter consists of cases in which acts in one state cause injuries in another state).

100 In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986).

101 Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001) (Latin American banana workers brought class action against multinational fruit and chemical companies alleging exposure to toxic substances); Jota v. Texaco, 157 F.3d 153 (2d Cir. 1998) (Ecuador residents brought class action against United States oil company alleging environmental and personal injuries); Ciba-Geigy Ltd. v. Fish Peddler, Inc., 691 So. 2d 1111 (Fla. 4th Dist. Ct. App. 1997) (Ecuadorian shrimp cultivators brought action against United States companies alleging environmental and economic injury) (dismissed on grounds of *forum non conveniens*); Aquinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996) (Ecuador residents brought action against oil company for damages due to oil exploration and extraction activities); Delgado v. Shell Oil, 890 F.Supp. 1324 (S.D. Tex. 1995) (Latin American citizens brought action alleging personal injury against United States chemical manufactures) (dismissed on grounds of *forum non conveniens*); Sequihua v. Texaco, 847 F. Supp. 61 (1994) (Ecuador residents brought action against U.S. corporation alleging air, water and ground contamination) (dismissed on grounds of *forum non conveniens*); Dow Chemical Co. v. Castro Alfaro, 786 S.W.2d 674 (Tex. 1990), cert. denied 498 U.S. 1024 (1991) (Costa Rican employees of fruit company brought personal injury action for damages against United States

The doctrine of forum non conveniens is unknown in civil law countries, where the courts generally lack the discretion to decline to exercise jurisdiction. The dismissal of suits by U.S. courts in transnational environmental cases have been a source of considerable controversy in Latin America.[102] The doctrine has been widely criticized on the ground that it discriminates against foreign litigants and that it constitutes a denial of justice. Indeed, even some judges in the United States have described the doctrine as permitting "connivance to avoid corporate accountability."[103] On the other hand, proponents of such dismissals claim that the plaintiffs seek a US forum in these cases to take advantage of U.S. procedures such as class actions, jury trials, and contingency fee arrangements – mechanisms that, in their view, are properly limited to claimant challenging conduct that causes injury in the forum state.

The doctrine is also beginning to have the effect of distorting other nations' jurisdictional rules. Under U.S. law, a case may be dismissed on forum non conveniens grounds only if the court finds that a more appropriate forum is available elsewhere. To help their citizens avoid dismissal of their U.S. cases on forum non conveniens grounds, some states in the Americas are beginning to revise their jurisdictional laws to deny their courts jurisdiction in cases brought by their citizens in U.S. courts against U.S. nationals and dismissed by U.S. courts on forum non conveniens grounds. Such legislation has been enacted in Costa Rica, Ecuador, Guatemala, Honduras, and Nicaragua.[104] The Environmental Committee of the Latin American Parliament, PARLATINO, introduced a resolution to the Parliament recommending that all Latin American and Caribbean countries adopt this type of legislation.[105] Dominica has enacted a different form of retaliatory law. Because denial of jurisdiction to its nationals would violate its Constitution, its law instead makes the procedural advantages of U.S. litigation

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companies manufacturing pesticides); Cabalceta v. Standard Fruit Co., 667 F. Supp. 833 (S.D. Fla. 1987), aff'd in part and rev'd in part, 883 F.2d 1553 (11th Cir. 1989) (Costa Rican workers brought personal injury action for damages against several chemical companies, including one in the U.S.) (dismissed on grounds of *forum non conveniens*); In re Union Carbide Corp. Gas Plant Disaster, 634 F. Supp. 842 (S.D.N.Y. 1986), aff'd in part and rev'd in part, 809 F.2d 195 (2d Cir. 1987) (attorneys in United States filed suits on behalf of Indian residents injured by industrial accident in India) (dismissed on grounds of *forum non conveniens*); Sibaja v. Dow Chemical Co., 757 F.2d 1215 (11th Cir. 1985), cert. denied, 474 U.S. 948 (1985) (Costa Rican farm workers brought action against United States chemical manufacturers alleging personal injury) (dismissed on grounds of *forum non conveniens*). *See generally* Brooke Clagett, *Forum Non Conveniens In International Environmental Tort Suits: Closing The Doors Of U.S. Courts To Foreign Plaintiffs*, 9 TUL. ENVTL. L.J. 513 (1996).

[102] *See* Proposal for an Inter-American Convention of the Effects and Treatment of the Forum Non Conveniens Theory, presented by Gerardo Trejos Salas, OAS CJI/doc.2/00, March 3, 2000.

[103] Dow Chemical Co. v. Alfaro, 786 S.W.2d 674, 680 (Tex. 1990) (Doggett, J., concurring).

[104] *See* Ley No. 364 – Ley Especial Para la Tramitación de Juicios Promovidos Por Las Personas Afectadas Por El Uso de Pesticidas Fabricados A Base de DBCP, La Gaceta Diario Oficial, Jan. 17, 2001, amending C.P.C. de Nicaragua, art. 621 et seq. (changing laws applicable to certain cases filed in Nicaragua due to barrier posed by U.S. *forum non conveniens* doctrine); Ley No. 55 - Ley Interpretativa de los Artículos 27, 28, 29, y 30 del Código de Procedimiento Civil, para los casos de Competencia Concurrente Internacional, Registro Oficial, Organo del Gobierno del Ecuador, Jan. 30, 1998 (art. 1 providing that Ecuadorian courts lack jurisdiction over a suit "presented" abroad); C.P.C. de Costa Rica, art. 31 ("[i]f there were two or more courts with jurisdiction for one case, it will be tried by the one who heard it first at plaintiff's request"), *cited in* Canales Martinez v. Dow Chemical Co., 219 F.Supp. 2d 719, 728 (E.D. La. 2002); Ley de Defensa de Derechos Procesales de Nacionales y Residentes, Diario de Centro América (Guatemala), June 12, 1997 (art. 2 depriving Guatemalan courts of jurisdiction over cases validly lodged abroad in a court with jursidiction). For further description of these laws, see Lawrence W. Newman, *Latin America and Forum Non Conveniens Dismissals*, NEW YORK LAW JOURNAL, Feb. 4, 1999, at 3.

[105] *See* Anderson, *supra.* at 186.

available in suits brought in Dominica after having been dismissed from U.S. courts on forum non conveniens grounds – advantages such as the availability of class actions. In addition, it provides that, in transnational cases, the courts of Dominica may ward punitive damages, and it specifies that the level of damage awarded shall be comparable to the damages awarded in analogous cases in the country from which the suit was dismissed.[106] In addition, the laws requires as a condition of maintaining the suit in the courts of Dominica that the defendant post a bond in an amount equivalent to 140% of the amount awarded in analogous cases by the courts from which the suit was dismissed.[107] The law also alters the choice of law rule for suits dismissed from another state's courts on forum non conveniens grounds: it provides that, in such suits, the rule of double actionability shall be replaced by the "most significant relationship" test. Finally, the law modifies the substantive standard of liability in such suits; where the law of Dominica applies, the law "imposes strict liability upon any person who manufactures, produces, distributes, or otherwise places any product or substance into the stream of commerce which results in harm or loss."[108]

These laws have so far not had effect of preventing the dismissal of suits from the U.S. courts on forum non conveniens grounds. The U.S. courts have instead dismissed the cases without prejudice to their resumption in U.S. courts if the foreign fora ultimately dismiss the cases for lack of jurisdiction.[109] It remains to be seen whether the U.S. courts will permit the suit to be maintained in the U.S. courts if the foreign forum dismisses the suit pursuant to one of the retaliatory laws.

c. Conclusions

With respect to jurisdiction, an Inter-American instrument in this field could make a valuable contribution by abolishing the Mozambique rule. It would also make a valuable contribution if it resolved the questions surrounding the availability of the forum non conveniens doctrine. On the other hand, finding a mutually acceptable solution to this latter problem may prove difficult. During the negotiations on the Hague Convention on Jurisdiction and Judgments, an early draft of the document would have eliminated the possibility of dismissing cases on forum non conveniens grounds, but this proved unacceptable to the United States, and later drafts permitted such dismissals in "exceptional" circumstances.[110]

4. Related Work of Other International Organizations

(a) International Law Commission

The topic of "International liability for injurious consequences arising out of acts not prohibited by international law" was placed on the ILC's agenda in 1978. The subject was an offshoot of the ILC's work on state responsibility. The decision to treat the subject separately was based on the recognition that environmental damage emanating from a state's territory might give rise to an obligation to repair the damage or pay compensation even if the damage was not the result of a breach by the state of any primary obligation under international law. In the absence of such a breach, state responsibility would not attach, but a "liability" of the

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106 *Id.* at 210-211.

107 *Id.* at 203. Some of the Latin American laws include a similar provision for the posting of a bond. For a defense of such provisions, see Trejos, supra.

108 Anderson, op cit., at 208.

109 *See* Newman, *supra.*

110 *See* Draft Convention, art. 22 (available at http://www.hcch.net/e/conventions/draft36e.html)

state – understood as a primary obligation of the state to remedy the injury – might arise. Much of the ILC's early work on this topic focused on the conceptual difference between state responsibility and state liability.[111]

The ILC's work on this topic proceeded at a deliberate pace from 1978 until 1996, a period in which seventeen Reports were produced by two Special Rapporteurs.[112] In 1997, the ILC established a Working Group to review its work on the topic since 1978. The Working Group concluded that "the scope and content of the study remained unclear" because of "conceptual and theoretical difficulties" and "the relation of the subject to 'State responsibility.'"[113] The ILC decided, in agreement with the Working Group's recommendation, to treat separately the issues of prevention and liability, and it appointed Dr. Pemmaraju Sreenivasa Rao Special Rapporteur of the topic of "prevention of transboundary damage from extrahazardous activities."[114] The ILC completed its work on this topic at its fifty-third session in 2001, when it adopted a draft preamble and 19 draft articles on prevention of transboundary harm from hazardous activities. The draft articles are conceived as the basis for an international convention, and the ILC accordingly recommended to the General Assembly the elaboration of such a convention.[115] Under the articles, states would be obligated, inter alia, to require operators to obtain prior authorization for activities that pose a risk of causing significant transboundary harm, and to notify and consult with other states that would be affected by such activity.[116]

The ILC resumed its work on the second part of the topic – "international liability for failure to prevent loss from transboundary harm arising out of hazardous activities" – at its 54th session in 2002, with Dr. Rao again serving as Special Rapporteur.[117] The ILC's work so far shows that the remaining part of the project will address the liability of not just states, but also private parties. Early in the process, the Working Group reached agreement of several important points: "First, the innocent victim should not, in principle, be left to bear the loss. Secondly, any regime on allocation of loss must ensure that there are effective incentives for all involved in a hazardous activity to follow best practice in prevention and response. Thirdly, such a regime should cover widely the various relevant actors, in addition to States. These actors include private entities such as operators, insurance companies and pools of industry funds."[118] The Working Group also decided that "[t]he operator, having direct control over the operations, should bear the primary liability in any regime of allocation of loss. The operators share of loss would involve costs that it needs to bear to contain the loss upon its occurrence, as well as the cost of restoration and compensation."[119] The Working Group's report reaching

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111 On this distinction, see generally Daniel Barstow Magraw, *Transboundary Harm: The International Law Commission's Study Of "International Liability,"* 80 AM. J.INT'L.L. 305 (1986).

112 Five reports were produced by Mr. Robert Q. Quentin-Baxter. See Report of the International Law Commission on the Work of its Fifty-fourth Session at 220 (Oct. 2002). After Quentin-Baxter's death in 1985, Mr. Julio Barboza was appointed Special Rapporteur. Barboza produced twelve reports. *See id.* at 221 n.406.

113 *Id.*

114 *Id.*

115 *Id.* at 223.

116 Draft articles on prevention of transboundary harm from hazardous activities, arts. 6-10.

117 *See* Report of the International Law Commission on the Work of its Fifty-fourth Session at 223.

118 *Id.* at 225.

119 *Id.*

these and other conclusions about the allocation of loss as among various private and public actors was considered and adopted by the ILC.[120]

The ILC's work on the topic of international liability for transboundary harm will thus apparently seek to impose certain requirements for national laws regulating the liability of private and public actors for transboundary environmental injuries. The ILC is unlikely to seek to harmonize all aspects of this subject. If its work on prevention is a guide, it is more likely that it will set forth some minimum standards, leaving states free to choose the details of implementation. Thus, even if the ILC succeeds in reaching agreement on draft articles concerning international liability for transboundary environmental damage, and even if the draft articles are later incorporated into a convention that is widely ratified, its work is not likely to eliminate choice of law issues. Nevertheless, its work will affect the extent and nature of the conflicts of law that will exist in the future.

It is also likely that the ILC will itself address certain private international law issues. Among the "additional issues" the Working Group listed for future consideration were "inter-State and intra-State mechanisms for consolidation of claims, . . . the processes for assessment, quantification and settlement of claims, access to the relevant forums and the nature of available remedies."[121] The ILC's past work on this topic suggests what its approach to these issues might look like. The 1996 Report of the Working Group On International Liability For Injurious Consequences Arising Out Of Acts Not Prohibited By International Law includes draft articles prepared by a Working Group operating under the chairmanship of Dr. Barboza. One of the draft articles is of particular relevance. Article 20 provided in relevant part that "[a] State on the territory of which an activity referred to in article 1 is carried out shall not discriminate on the basis of nationality, residence or place of injury in granting to persons who have suffered significant transboundary harm, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief."[122] This provision would appear to invalidate the Mozambique rule discussed above. According to the commentary on this article, "if significant harm is caused in State A as a result of an activity . . . in State B, State B may not bar an action on the grounds that the harm occurred outside its jurisdiction."[123]

Although this article does not directly address choice of law, the commentary suggests that it may do so indirectly: "The rule set forth obliges States to ensure that any person, whatever his nationality or place of residence, who has suffered significant transboundary harm as a result of [hazardous] activities should, regardless of where the harm occurred or might occur, receive the same treatment as that afforded by the State of origin to its nationals in case of domestic harm."[124] This may suggest that the applicable law should be the same as would apply if the harm had occurred entirely within the state's territory. Elsewhere, the commentary states that "[w]hen relief is sought through the courts of the State of origin, it is

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120 *Id.* at 223.

121 *Id.* at 227.

122 1996 Report at 43.

123 *Id.* As a precedent for this article, the Working Group cited the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden of 19 February 1974 and the OECD Recommendation on Implementation of a regime of equal right of access and non-discrimination in relation to transfrontier pollution, both discussed supra. *See* 1996 Report at 44.

124 *Id.*

in accordance with the applicable law of that State."[125] If the reference here is to the substantive law of the state, then it appears that the draft articles contemplate the application of the *lex loci actus*. If the reference is to the whole law of the state, including its choice of law rules, then the draft articles would leave choice of law unaddressed. In any event, the draft articles make it clear that the above rule "is residual" and that "[a]ccordingly, States concerned may agree on the best means of providing relief to persons who have suffered significant harm, for example through a bilateral agreement."[126] Although presumably a regional agreement would similarly be permitted, the OAS may wish to defer its work on such an agreement until the default rules set forth by the ILC have been completed. Under Dr. Rao's leadership, the ILC's work on this topic is likely to proceed more quickly than it did in its first twenty years.

(b) The Hague Conference

The Hague Conference has focused more directly on the private international law aspects of transboundary environmental harm. In 1992, the Permanent Bureau distributed to its Member States a Note providing background and seeking their views as to whether "the law applicable to civil liability for damage to the environment might be a viable topic to be dealt with in a future international convention."[127] The Permanent Bureau's belief that this might be an appropriate topic was based in part on its observation that "most of the international negotiations being carried on with a view to protecting the environment are directed towards problems of a worldwide nature and focus upon the liability of the States from which pollution originates."[128] The need for such a convention, the Bureau noted, "is aggravated by the relative lack of success in dealing with liability for transfrontier pollution at the public international law level.[129] As just discussed, the ILC's more recent work has not focused exclusively on the liability of states, and its work has begun to proceed at a faster pace.

After surveying the existing international law instruments on this topic and the relevant national laws, the Permanent Bureau concluded that "[t]his is essentially an untreated area in the international treaties, preempted only to a limited extent in specific classes of cases by substantive law treaties."[130] Furthermore, "[t]he pattern of cases involving claims of civil liability for environmental damage . . . seem to be identifiable enough to allow clear ideas of appropriate conflicts rules to be developed while there is the advantage that the lack of fixed conflicts rules in treaties and in national law at present leaves a fairly open field for adoption and implementation of unified conflicts rules."[131] On the basis of the Bureau's 1992 Note, the Hague Conference decided to include this item on the agenda for the work programme of the Conference.[132] Although all the delegates believed that this was an important matter that ought to be studied by the Conference, some "considered that the question should not be given priority, both because it is an extremely complex one and touches on political problems of a

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125 *Id.* at 42.
126 *Id.* at 43.
127 Note on the Law Applicable to Civil Liability for Environmental Damage, Preliminary Document No. 9 of May 1992, in Proceedings of the Seventeenth Session, 10 to 29 May 1993, First Part, at 187 [hereinafter 1992 Note].
128 *Id.*
129 *Id.* at 193.
130 *Id.* at 207.
131 *Id.*
132 Final Act of the Seventeenth Session, B, ¶ 3.

sensitive nature and in view of the fact that there are already a large number of international texts on the subject."[133]

In April of 1994, the Hague Conference sponsored a colloquium held at Osnabrück with the title "Towards a Convention on the Private International Law of Environmental Damage," the conclusions of which were described in a 1995 Note by the Permanent Bureau.[134] These conclusions are known as the Ten Points of Osnabrück. The participants were on the whole quite favorably disposed towards the drafting of a private international law convention concerning transboundary environmental harm. In addition, they believed that the convention should address the question of jurisdiction. Indeed, they concluded that "[t]he negotiators of a possible Hague Convention will have to take a broad view and incorporate in their attempt at unification not only the conflicts of laws and jurisdiction, but also certain aspects of procedure as well as the relations with other conventions providing for compensation through compensation funds and – first and foremost – the important problem of insurance."[135] Among the procedural issues that they suggested be addressed in the convention was that of class actions and citizen suits.[136]

At the colloquium, there was quick agreement on the appropriate approach for selecting the applicable law. The participants endorsed the principle of ubiquity, under which the victim would be able to choose between the law of the place where the activity causing the injury occurred or the law of the place where the injury was suffered. [137] In the view of the Permanent Bureau, however, "this rule was perhaps too rapidly accepted" at the colloquium "and was not sufficiently discussed nor its implications assessed in relation to all the conceivable hypotheses of transboundary pollution."[138] The Bureau accordingly recommended that the Conference consider as well the possibility of selecting the *lex loci actus* and the *lex damni*, among other possibilities.[139] In particular, the Bureau seemed to favor the *lex damni* because it "might seem to afford the best protection for the claimant's interests, satisfying his legitimate expectations, and which will frequently be identical with the victim's residence and the place in which his property is located," and because it "seems to correspond to the present-day trend in the substantive law of liability for transboundary pollution."[140] With respect to jurisdiction, the colloquium endorsed a rule giving the victim the choice of bringing suit in the defendant's habitual residence, the place of the dangerous activity, or the place where the damage was suffered.[141]

At the Conference's Eighteenth Session, the Special Commission decided to retain the topic on the Conference's agenda, despite some concerns about "the risk of overlap which might exist between the various conventions in the field" and the "political sensitivity of the

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133 Note on the Law Applicable and on Questions Arising from Conflicts of Jurisdiction in Respect of Civil Liability for Environmental Damage, Preliminary Document No. 3 of April 1995, Proceedings of the Eighteenth Session 30 Sept. to 19 Oct. 1996, Volume I, at 73 [hereinafter 1995 Note].

134 1995 Note.

135 *Id.* at 83.

136 *Id.* at 79.

137 *Id.* at 75.

138 *Id.*

139 *Id.* at 75-77.

140 *Id.* at 77.

141 *Id.*

topic."[142] However, the topic was given third priority among the items on the Conference's agenda, behind the proposed Hague Convention on Jurisdiction and Judgments and the extension of the convention on minors to incapacitated adults.[143] The Special Commission decided that the topic should be the subject of further studies by the Permanent Bureau.

In 2000, the Permanent Bureau released an exhaustive Note titled "Civil Liability resulting from transfrontier environmental damage: a case for the Hague Conference?"[144] This lengthy note included the most thorough discussion yet of the existing instruments and national laws on the subject, as well as an extensive discussion of the possible options. With respect to choice of law, the Note reflects a distinct preference for the principle of ubiquity. It notes that the rule has been adopted by Germany and Italy and a number of other states, including Venezuela and Perú,[145] and that "even authors who are generally hostile to this principle as a general rule . . . favor its application in transfrontier pollution matters."[146] The alternative of *lex loci actus* has the disadvantage of permitting the polluting state to externalize the costs of the harm caused. On the other hand, if the *lex loci actus* is more favorable to the victim than the *lex damni*, the Note asks, "why should the victims in another State not benefit from these same advantageous provisions?"[147] The Note also noted that the principle favoring the injured party also has the advantage of favoring the protection of the environment.[148]

The Permanent Bureau's Note was considered by the Conference's Special Commission in May 2000. While the Commission recognized the importance of the topic, it decided to retain the topic on its agenda "without priority." Several reasons were expressed for this decision. "A number of experts pointed to the problems raised by issues of public international law and indicated that the time was not ripe for a Hague Convention on this topic."[149] Additionally, there was concern abut the risk of overlap which might occur with various existing instruments.[150] Finally, "[a]ttention was drawn to the work previously done by the Council of Europe and the European Union in this domain, and work that might be undertaken by the Organization of American States."[151] It thus appears that the decision of the Hague Conference not to give priority to this topic was based in part on the expectation that the topic would be pursued in the Inter-American context through CIDIP.

(c) Rome II

The European Commission has proposed a regulation that would regulate choice of law for non-contractual liability. In May 2002, it released a draft regulation and sought comments on the draft from interested parties. The draft included a provision specifically addressing liability for transboundary environmental harm. This provision would have designated the lex damni as the applicable law. Extensive comments on the draft were received in September

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142 Conclusions of the Special Commission of June 1995 on General Affairs and Policy of the Conference, Preliminary Document No. 9 of December 1995, Proceedings of the Eighteenth Session, Vol. I, at 109.
143 *Id.* at 119.
144 2000 Hague Note.
145 *Id.* at 33-34.
146 *Id.* at 33.
147 *Id.* at 34.
148 *Id.*
149 Conclusions of the Special Commission of May 2000 on General Affairs and Policy of the Conference. Preliminary document No. 10 of June 2000 for the attention of the Nineteenth Session, at 13.
150 *Id.*
151 *Id.*

2002. With respect to the provision on transboundary environmental harm, the Hague Conference submitted comments that, consistent with its 2000 Note on the subject, defended the principle of ubiquity, without ultimately taking a position on whether it should be adopted.[152] After taking all of the comments into account, the European Commission revised its draft. The revised version was submitted to the European Parliament on July 22, 2003.

The revise version rejects the principle of ubiquity as the general rule for non-contractual liability, adopting instead as the basic rule (article 3) "the law of the place where the direct damage arises or is likely to arise" (*lex damni*).[153] This was "a compromise between the two extreme solutions of applying the law of the place where the event giving rise to the damage occurs and giving the victim the option."[154] The Commission concluded that "giv[ing] the victim the option of choosing the law most favourable to him . . . would go beyond the victim' s legitimate expectations and would reintroduce uncertainty in the law, contrary to the general objective of the proposed Regulation."[155] Nevertheless, in the provision specifically addressing choice of law for transboundary environmental damage (article 7), the Commission opted for the principle of ubiquity. "The uniform rule proposed in Article 7 takes as its primary solution the application of the general rule in Article 3(1), applying the law of the place where the damage is sustained but giving the victim the option of selecting the law of the place where the event giving rise to the damage occurred."

The Commission's principal reason for adopting the principle of ubiquity in this context appears to be based not on the protection of the legitimate expectations of either of the parties, but instead on the European Union's substantive policies regarding the protection of the environment:

> [T]he exclusive connection [in Article 3] to the place where the damage is sustained would . . . mean that a victim in a low-protection country would not enjoy the higher level of protection available in neighbouring countries. Considering the Union' s more general objectives in environmental matters, the point is not only to respect the victim's legitimate interests but also to establish a legislative policy that contributes to raising the general level of environmental protection, especially as the author of the environmental damage, unlike other torts or delicts, generally derives an economic benefit from his harmful activity. Applying exclusively the law of the place where the damage is sustained could give an operator an incentive to establish his facilities at the border so as to discharge toxic substances into a river and enjoy the benefit of the neighbouring country' s laxer rules. This solution would be contrary to the underlying

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152 Hague Conference on Private International Law, Comments on Proposed Regulation of Choice of Law for Non-Contractual Liability. In describing the Hague Conference's position, the European Commission noted that "the Hague Conference has . . . put an international convention on cross-border environmental damage on its work programme, and preparatory work seems to be moving towards a major role for the place where the damage is sustained, though the merits of the principle of favouring the victim are acknowledged." Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations, 2003/0168 (COD), July 22, 2003, at 20.

153 *Id.* at 12.

154 *Id.*

155 *Id.* at 12-13.

philosophy of the European substantive law of the environment and the "polluter pays" principle. [156]

According to the proposal, "[i]t will . . . be for the victim rather than the court to determine the law that is most favourable to him."[157] The Commission elided the potential problems with this procedure discussed above by stating that it is up to each Member State to establish the procedures for making the choice given to the plaintiff.[158]

The Commission also briefly addressed the problem posed by the fact that environmental regulation is highly regulated by public law:

> A further difficulty regarding civil liability for violations of the environment lies in the close link with the public-law rules governing the operator's conduct and the safety rules with which he is required to comply. One of the most frequently asked questions concerns the consequences of an activity that is authorised and legitimate in State A (where, for example, a certain level of toxic emissions is tolerated) but causes damage to be sustained in State B, where it is not authorised (and where the emissions exceed the tolerated level). Under Article 13, the court must then be able to have regard to the fact that the perpetrator has complied with the rules in force in the country in which he is in business.[159]

Proposed article 13 provides that, "whatever the applicable law, in determining liability account shall be taken of the rules of safety and conduct which were in force at the place and time of the event giving rise to the damage." According to the commentary, "[t]aking account of foreign law is not the same thing as applying it: the court will apply only the law that is applicable under the conflict rule, but it must take account of another law as a point of fact, for example when assessing the seriousness of the fault or the author' s good or bad faith for the purposes of the measure of damages."[160]

The European Commission's proposed Rome II regulation must now be considered by the European Economic and Social Commission, and thereafter by the European Parliament.

5. CIDIP-VI

Topic III on the agenda of CIDIP-VI was "Conflict of laws concerning extracontractual liability, with an emphasis on the issue of proper jurisdiction and applicable law with respect to international civil liability for cross-border pollution." Its genesis was the proposal by the delegation of Uruguay to CIDIP-V that the issue "International Civil Liability for Transboundary Pollution: Private International Law Aspects" be included on the agenda of CIDIPVI. In preparation for a Meeting of Experts to discuss the agenda of CIDIP-VI, the Secretariat of Legal Affairs prepared a background document in 1996 examining the possibility of addressing more generally the topic of "Conflict of Laws on Extracontractual Liability," but the document concluded that the "broad topic . . . does not lend itself to ready study in the absence of specific issues."[161] The document went on to consider the narrower

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156 *Id*. at 19-20.
157 *Id.* at 20.
158 *Id.*
159 *Id.*
160 *Id.* at 25.
161 OEA/Ser. K/XXI RE/CIDIP-VI/doc.7/98, at 9.

topic of "Civil International Liability for Crossboundary Pollution." It noted that the issue is complex, in part because it is interrelated with state responsibility, and that "[m]any other international organizations have, or are in the process of working to resolve some of the issues."[162] It concluded that "[t]his may be seen as an indication that the area is still emerging and not ripe for codification," or, per contra, "it may be viewed as an opportunity for participation in the development of international law."[163]

During the Meeting of Experts held in Washington, D.C., in December of 1998, it was agreed that the topic of "Conflicts of laws on tort liability, with emphasis on jurisdiction and the law applicable to international civil liability for Transboundary Pollution" would be included in the agenda of CIDIP-VI, and that Uruguay would be the rapporteur of this topic. On February 7, 2000, a document prepared by Uruguay was distributed in anticipation of the first Meeting of Experts to prepare for CIDIP-VI, which was held in Washington, D.C., one week later (February 14-18).[164] After a brief overview of the work then being done on the topic by other organizations and a brief review of the national laws on the topic, the document proposed a particular approach to both choice of law and jurisdiction.

For choice of law, proposed the adoption of the following approach:

a. To maintain the traditional solution of lex loci actus (the law of the State in which the conduct causing the harm has occurred).

b. To give the plaintiff (the victim) the option of choosing between the lex loci and the law of the State affected by the harm, if the harm is manifested in a State other than that in which the polluting activity occurred.

c. If the polluter and the victim have their domicile, usual place of residence, or commercial establishment in a single State, to designate the law of such State as the applicable law.

d. To incorporate a provision on the ambit and scope of the applicable law, which would implicitly contain the international elements of the case.[165]

Although the language quote above indicates that the victim is to choose the applicable, a footnote explains that in fact the judge would be "in charge of weighing the option[s], [and] would choose the law most favorable to the victim."[166] Another footnote explains why the rapporteur rejected the requirement found in the law of Québec and Switzerland, under which the *lex damni* can be applied only if the perpetrator could have foreseen that his conduct would produce harm there. According to the footnote, "[t]his condition appears to limit the rights of the victim to have his law applied . . . . Furthermore, this 'possibility of foreseeing' would not be consistent with the negligence with which the polluter presumably acted."[167] The proposal would thus have given to the plaintiff a wider and less constrained choice than the existing national laws discussed in the document.

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162 *Id.* at 22.

163 *Id.*

164 Conflict Of Laws On Tort Liability, With Emphasis On Jurisdiction And The Law Applicable To International Civil Liability For Transboundary Pollution, OEA/Ser.K/XXI REG/CIDIP-VI/doc.5/00, Feb. 7, 2000.

165 *Id.* at 20.

166 *Id.* at 20 n.34. As a precedent for this approach, the document cites the Inter-American Convention on Support Obligations (Montevideo 1889). *See id.*

167 *Id.* at 20 n.35.

With respect to jurisdiction, the document noted that national laws have approved the institution of proceedings in the state of the respondent's domicile, the state where the act causing the injury were performed, and the state where the injury was suffered. The document then goes on to propose the following rule:

Actions for civil liability shall be subject, at the plaintiff's option, to the jurisdiction of the State:

a. in which the polluting activity was performed;

b. in which the harm was suffered;

c. in which the plaintiff or respondent has his domicile, usual place of residence, or commercial establishment."[168]

Here, too, the proposed solution was more favorable to the victim than the existing national laws discussed in the document. In this case, the proposal went beyond existing solutions by providing for jurisdiction in the state of the plaintiff's domicile or usual place of business. If the plaintiff was injured in that state, then the provision produces the same result as a provision calling for jurisdiction in the state where the harm was suffered. But the document makes it clear in a footnote that the state of the plaintiff's domicile would have jurisdiction even if the harm was suffered elsewhere.[169] The footnote defended this solution on the ground that it "makes it easier for the victim to sue."[170] As a precedent, the document cites the Uruguayan-Argentine Convention on Liability for Traffic Accidents and the Mercosur San Luis Protocol.[171] The footnote also cited an article by Didier Opertti Badan stating that, "in the face of a denial of justice for the victims in the responsible State, it [sh]ould be possible to recur to the jurisdiction of the victim's domicile or place of residence."[172] This suggests that the jurisdiction of the state of the plaintiff's domicile was intended to be a fall-back that would become available only if the courts of the other states declined jurisdiction. However, the proposal was not stated in such terDr.

Finally, it appears that the proposed convention was intended to prohibit states-parties to decline jurisdiction if they possessed it under the terms of the convention. Specifically, a footnote indicated that dismissal of actions on forum non conveniens grounds would not be permitted.[173] Additionally although the Mozambique is not specifically mentioned, the proposal would appear to eliminate that rule for the states that current follow it.

The Meeting of Experts took place from February 14-18, 2000, and most of it focused on the other two Topics on the agenda of CIDIP-VI.[174] On the penultimate day of the meeting, Uruguay presented a document titled Bases for an Inter-American Convention on Applicable

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168 *Id.* at 21.

169 *Id.* at 21 n.41.

170 *Id.*

171 *Id*. It is worth noting, however, that these instruments involve neighboring states; the same solution may not be appropriate where the state of the plaintiff's domicile may be far away from where the activity and the injury occurred.

172 *Id.* (citing Didier Opertti Badan, Derecho Internacional Privado y Medio Ambiente (La contaminación transfronteriza y el derecho internacional privado), *in* MEDIO AMBIENTE Y DESARROLLO 150 (Montevideo 1992).

173 *Id.* at 44.

174 *See* Diego P. Fernández Arroyo, La CIDIP VI: ¿Cambio de Paradigma en la Codificación Interamericana de Derecho Internacional Privado?, at 469.

Law and Competency of International Jurisdiction with respect to Civil Liability for Transboundary Pollution,[175] setting forth a draft convention on the topic. It consisted of six articles, with one article addressing "competent jurisdiction" and one addressing "applicable law." Article 4 on competent jurisdiction set forth the rule described above, giving the plaintiff the option of bringing suit in the state where the harmful events took place, where the injury was suffered, or where the plaintiff or the defendant were domiciled or had their habitual place of residence or their business.[176] Article 5 on applicable law would give the plaintiff the option of choosing the applicable law, but the plaintiff's options were now expanded to include not just the law of the State in which the pollution originated or in which the injury was suffered, but also the state in which he is domiciled or has his habitual place of residence or business.[177] No explanation was given for allowing the plaintiff to sue in states that may have little or no connection to either the injury or the events giving rise to the claim. A footnote indicates that "[c]onsideration could be given" to assigning to the judge the task of choosing the law most favorable to the victim.[178]

The Draft Convention was discussed at the Meeting of Experts on February 17, but the records of that meeting do not reveal the substance of the discussion.[179] It was decided that a drafting committee would be formed and that Uruguay would chair it.[180] Member States were asked to advise the members of the drafting group of any judicial rulings or verdicts concerning "verified instances of transboundary pollution."[181] Member States were also invited to send their comments on the documents presented to the General Secretariat for forwarding to the other Members. Finally, it was decided that a meeting of the working group would be held "toward the end of 2000 . . . to prepare the final version of the convention," if the necessary resources were available.[182] (It appears that the contemplated working group meeting never took place.)

On October 4, 2000, the Permanent Council distributed to the Member States for their comments a document prepared by Uruguay consisting of a cover letter and an accompanying "Preliminary Draft Inter-American Convention on Applicable Law and Proper International Jurisdiction in Matters of Civil Liability for Cross-Border Pollution."[183] The draft convention again consisted of six articles, with one article addressing "proper jurisdiction" and one article addressing "applicable law." Article 4 on jurisdiction was the same in substance as the draft presented in February. Article 5 on applicable law modifies the February draft by omitting the language that would have allowed the plaintiff to choose the law of his own domicile. The cover letter notes that allowing the plaintiff to choose between the law of the place of the harmful act and the law of the place of injury "is established in many sources of law," including "*inter alia*, German private international law, the laws of Switzerland, Slovakia, Greece,

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175 OEA/Ser.K/XXI REG/CIDIP-VI/INF.4/00 corr. 1
176 *Id.* at 2.
177 *Id.*
178 *Id.* at 2 n.2.
179 Report of the Meeting of Governmental Experts to Prepare for the Sixth Inter-American Specializd Conference on Private International Law (CIDIP-VI), OAS/REG/CIDIP-VI/doc.6/00 corr. 2, Mar. 14, 2000.
180 *Id.* at 11.
181 *Id.*
182 *Id.* at 12.
183 OEA/Ser. G CP/CAJP-1688/00.

Hungary, the Czech Republic, and former Yugoslavia, and the recent codifications of private international law of Estonia, Tunisia, Venezuela, and Italy."[184]

The only comments received were from Colombia, which stated that, under Colombian law, most procedural rules were matters of public order that could not be determined by the parties. [185] However, it noted that there were exceptions to this principle. The memorandum proposed the drafting of a set of articles allowing the plaintiff to select the forum, but proposed deleting article 5 concerning applicable law. It expressed the view that, if the plaintiff were permitted to choose the forum, then a separate article purporting to allow him to select the applicable law would be unnecessary, as his choice of forum "will be accompanied by the law to be applied in the event of a claim for damages suffered as a result of transboundary pollution." It is unclear whether the memorandum was assuming that the forum would be applying its own substantive law, or its own choice of law rules. In any event, Colombia appears to have had a strong objection to a provision under which the applicable law would be determined by one of the parties.

On February 4, 2002, the day the CIDIP conference began, Uruguay suddenly shifted its focus. It presented a document proposing a convention that would address jurisdiction and choice of law for the broad topic of non-contractual liability, rather than just for disputes concerning transboundary pollution. In explaining its shift, the Uruguayan delegation stated that, "although it is perfectly understandable that because of their specific natures, some matters require special, independent regulations (e.g., manufacturers' liability for their products, crossborder pollution, road accidents, etc.), it would seem important to regulate extracontractual liability in general, as a broad category, which would allow legal practitioners to evaluate, within it, the infinite range of legal relations that arise in the real world every day and that it would be impossible for lawmakers to address individually."[186] This broader project, the delegation stated, "has a higher priority" than the regulation of specific narrower categories.[187]

In the light of Uruguay's last-minute shift, it is no surprise that no agreement was reached on this topic at CIDIP VI. Given that the proposal was not made until after the start of the Conference and had not been the subject of any prior discussions among the Member States, the proposal for a convention to regulate jurisdiction and choice of law in the broad area of extracontractual liability did not stand a chance of success.

More important for present purposes is whether the proposal of a narrower convention concerning jurisdiction and choice of law for transboundary pollution would have succeeded. Professor Fernandez Arroyo has suggested that Uruguay's late shift of course was attributable to "the manifest opposition of certain states, from the outset, to the development of the topic of transboundary pollution at the Inter-American level."[188] The Canadian delegation, in

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184 *Id.* The letter does not mention that some of these laws permit the choice of the law of the place of injury only if the perpetrator could have foreseen that his conduct would cause injury there, a provision purposely omitted from the draft.

185 Position of the Legal Office of the Ministry of Foreign Affairs on the Preliminary Draft Inter-American Convention on Applicable Law and Competency of International Jurisdiction in Cases of Civil Liability for Transboundary Pollution (presented by the delegation of Colombia, CP/CAJP-1836/01, Oct. 22, 2001.

186 Statement of Reasons at 16-17.

187 *Id.* at 17.

188 Fernández Arroyo, *supra*, at 477. If so, then, as Fernández Arroyo observes, its strategy was sure to fail. If the delegations were opposed to the development of the narrow topic of transboundary pollution at the regional level,

particular, expressed the view at CIDIP-VI that this topic should be addressed at the global rather than the regional level.[189] If there were significant objections to this project of this nature, then there would appear to be little hope for success if the project were resurrected now.

On the other hand, Professor Fernández Arroyo has also expressed the view that the lack of success of this topic may have been a result of the failure of Uruguay to flesh out the topic sufficiently prior to the Conference. In the view of Fernández Arroyo, the lack of adequate preparatory work sealed the fate of the proposal. He notes that the proposal for an Inter-American instrument on transboundary pollution excited the greatest interest among the participants at the initial Meeting of Experts in 1998. Uruguay failed to transform this rhetorical interest in protection of the environment into a willingness by Member States to develop the technical-juridical aspects of the topic.[190] The comments of the delegations of the United States and Canada in the Third Committee suggest that their opposition to the proposal was attributable in large part to the lack of adequate preparatory work.[191] If this was the reason for the failure of this topic at CIDIP-VI, the topic would not necessarily meet the same fate at CIDIP-VII.

Finally, it is possible that the opposition to the Uruguayan proposal was attributable in part to the content of the draft convention proposed by Uruguay. The proposal adopted an approach that was more favorable to the plaintiff than virtually all of the existing national laws. The idea of selecting the law that is more favorable to the victim is an unorthodox one, particularly in this Hemisphere.[192] The documents presented by Uruguay noted that the approach had been adopted in a number of countries, largely in Europe, but they did not explain why this approach was preferable to the *lex damni* approach. While it seems reasonable to afford the victim the protection provided by his own law, some Member States may have questioned why the victim should be entitled to claim the protection of a law other than the one of the state in which he is domiciled and his injured property is located. From the victim's perspective, it might be regarded as fortuitous that the event causing his injury had its origins in a different state; to give him the benefit of the law of the defendant's domicile, if that happens to be more beneficial, might thus be regarded as a windfall. Additionally, some states may have perceived the proposed rule as giving one side of the litigation an unfair advantage. And at least one state (Colombia) had concerns that the proposal contravened traditional principles under which procedural matters are for the court, not the parties to decide. There may well be convincing answers to these questions, but there was little opportunity to air these concerns, much less to debate them. Moreover, to the extent the argument for giving the victim the benefit of that law is based the desire to select the law most beneficial to the environment, the solution seems based on substantive policy relating to environmental law rather than concerns having strictly to do with private international law. If it were thought desirable to choose a choice of law rule by reference to substantive environmental law policies, perhaps a greater participation by specialists in environmental law would appear to be appropriate.

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then they would be unlikely to be more amenable to the development of a broader topic that includes transboundary pollution. *Id.*

189 Report of the Rapporteur of Committee III, CIDIP-VI/Comm.III/doc.2/02 rev.3 at 2.

190 Fernández Arroyo, *supra*, at 479.

191 Report of the Rapporteur of Committee III, at 1-2.

192 *See* quotations from Professors Symeonides and Riemann, *infra*.

A second aspect of Uruguay's proposal that was likely perceived as controversial was its prohibition of forum non conveniens dismissals. This topic is highly contested in this Hemisphere. The solution proposed by Uruguay would have been welcomed in much of the Hemisphere, but it was undoubtedly regarded as highly problematic in other parts of the Hemisphere. At the Hague Conference a compromise was reached on this issue. The CIDIP proposal would have completely eliminated the doctrine, with the only discussion of the issue appearing in a footnote.

6. Conclusions

It is most likely that the failure of the topic at CIDIP-VI was the result of a combination of concerns about the substance of the proposal, concerns about treating the topic at the regional rather than the global level and about the complexity of the topic, and the lack of adequate preparatory work. There may well have been convincing responses to the Member States' substantive concerns, but the Member States were not provided a forum in which to air these concerns, much less to debate them. It is possible that, with sufficient preparatory work, agreement could be reached on an Inter-American private international law instrument in the area of transboundary environmental damage having a content somewhat different from the one proposed in CIDIP-VI. It may even be possible, although less likely, that, with a great deal more preparatory work, agreement could be reached on the instrument that was proposed at CIDIP-VI.

In the end, the Member States are in a better position to judge the reasons for the failure of the topic at CIDIP VI. Leaving that question aside, it would appear that the topic of transboundary environmental damage is a complex and problematic topic with which to begin an Inter-American attempt to harmonize jurisdiction and choice of law in the field of non-contractual liability. The complications derive from the fact that there are numerous instruments addressing substantive aspects of the topic, and the complex relation between the public and private international law aspects and the public and private domestic law aspects of the topic. aspects of the topic. The fact that the ILC is considering aspects of this topic may suggest as well that the topic is unripe. On the other hand, the Hague Conference has deferred its consideration of the topic in part because the OAS may be taking it up. The complex set of international instruments that address various aspects of the substantive law in this field will inevitably leave differences among the substantive laws of the Members States on a number of issues, differences that will continue to give rise to problems of private international law. If the political sensitivity of the topic were not deemed too great, another attempt to address this topic would not be out of the question, provided sufficient resources are available to conduct the necessary preparatory work.

B. PRODUCT LIABILITY

Uruguay's final proposal to CIDIP-VI listed "manufacturers' liability for their products" among the categories of non-contractual liability that merited separate treatment.[193] When the Juridical Committee distributed its 2001 Questionnaire seeking proposals for possible topics for CIDIP VII, two prominent scholars of private international law – Professors Tatiana B. de Maekelt of Venezuela and Arturo Díaz Bravo of Mexico – likewise proposed the topic of liability for defective and injurious products.[194] Several other prominent professors have also

[193] Statement of Reasons, supra, at 16.

[194] *See* Responses to CIDIP-VII Questionnaire by Tatiana B. de Maekelt & Arturo Díaz Bravo.

deemed the topic of products liability an appropriate topic for private international law development, proposing special choice of law rules for the topic. Dean Symeonides has written that "[p]roducts liability conflicts are usually so much more complex than generic tort conflicts that they raise the question of whether a special set of choice-of-law rules might be necessary."[195] By offering his own set of special choice of law rules for this topic, he – and many others – have answered that question in the affirmative.

The Hague Conference has also answered that question in the affirmative. The Hague Conference embarked on the project of harmonizing choice of law for products liability cases at the global level in the early 1970s. The result was the Hague Convention on the Law Applicable to Products Liability (Hague Convention). [196] Although this convention has been in force for more than 25 years, it has been ratified by only one in five members of the Hague Conference, and has not been signed by any Member State in more than a decade.[197] More importantly, it has never been signed by any state in the Western Hemisphere.[198] The decision by the Hague Conference to tackle the topic of choice of law for products liability at the global level supports the conclusion that the topic is important enough to warrant the effort to negotiate an international instrument, and also indicates that the topic is reasonably manageable. The failure of the Hague Convention to attract ratifications in this Hemisphere, however, may suggest that a fresh look at this subject at the regional level may be appropriate.[199]

Despite the complexity of the subject matter, the topic of product liability appears to be an appropriate one with which to begin the process of harmonizing jurisdiction and choice of law in the Hemisphere in the area of non-contractual liability. First, numerous scholars have reached the conclusion that this field requires special choice of law rules. Second, the substantive laws in this area are fairly well-developed, and there are important differences in the laws on this subject among the nations of the Hemisphere, thus making it necessary in transnational cases for the court to select among potentially divergent laws. Third, special choice of law rules for product liability cases have already been adopted in a number of jurisdictions, and numerous additional proposals have been advanced by scholars. These may serve as models for an Inter-American instrument. Moreover, attempts to harmonize choice of law in this area have already been attempted by global and regional organizations. These attempts can serve as models, or as lessons in what to avoid.

Finally, Europe's experience with the Rome II proposal suggests that an effort to harmonize jurisdiction and choice of law in product liability cases is likely to attract the interest of numerous sectors of society,[200] including manufacturers and trial lawyers, who may well be

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195 Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677, 749 (1992).

196 Hague Convention No. 22 on the Law Applicable to Products Liability, opened for signature Oct. 2, 1973, 11 I.L.M. 1283 (1972).

197 *See* The Hague Conventions: Signatures, Ratifications, and Accessions in the Member States of the Organization of American States as of December 19, 2002 [hereinafter Hemispheric Status of Hague Conventions], available at http://hcch.net/e/status/stat22e.html.

198 *See id.*

199 On the other hand, it may indicate that the Member States do not perceive a problem with the existing state of private international law on this subject.

200 When the European Commission sought comments on its draft Rome II regulation in May 2002, a large number of the comments received concerned the provision relating to product liability, most of them from affected businesses and bar groups.

willing to defray the cost of meetings of experts and the other studies that are so important to reaching a successful outcome.[201] For all of these reasons, the time appears to be ripe to pursue an Inter-American instrument concerning products liability through the CIDIP process.

1. Substantive Law

Transnational products liability consists of the legal responsibility of a party based in one country for injuries caused to a party in another country by a product whose relevant components were at some time in the first party's control. Although parties other than consumers may recover, the typical products liability action is brought by or on behalf of an injured consumer.

The national laws in the Hemisphere governing product liability differ in important respects. The differences relate primarily to three major areas of product liability law – the legal standards governing liability, who can be subject to liability, and the measure of damages.[202]

(a) *Noncontractual theories of recovery*.

Common theories of liability available in the Hemisphere include strict liability, negligence, and failure to warn. Depending on the jurisdiction, one or more of these theories is available:

(i) *Strict liability vs. Negligence*

Under the strict liability standard, liability does not depend upon fault. Regardless of negligence or due care, liability arises "to one with whom [a party] is not in privity of contract, who suffers physical harm caused by the chattel."[203] Jurisdictions in the Hemisphere split on whether the strict liability standard applies to products liability actions brought by the consumer. U.S. jurisdictions provide for use of the strict liability standard. The standard has also recently been adopted in such Latin American jurisdictions as Brazil,[204] Argentina,[205] and Uruguay.[206] Yet a number of civil law jurisdictions, such as Chile, Venezuela, and Mexico, continue to use the negligence-like standard of *hecho ilícito* in products liability actions.[207] Nor does Canada generally impose strict liability on

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201 *See* Fernández Arroyo, op.cit., at 482-484 (commenting on the "privatization" of CIDIP). Of course, the capture of the CIDIP process by interest groups favoring one side or another of a controversy should be avoided. However, the funding of groups of experts by sources representing a broad range of interests is less problematic, and may be necessary in the light of budgetary constraints.

202 National laws concerning product liability differ in other respects as well, such as the rules concerning the availability of class actions, discovery, juries, and defenses such as the state of the art, compliance with law, and unfit use.

203 WILLIAM PROSSER, TORTS 712 (10th ed.). For an overview of U.S. law of products liability, see Joachim Zekoll, *Liability for Defective Products and Services*, 50 AM. J. COMP. L. 121 (2002).

204 Brazilian Law 8.078/90.

205 Argentine Law 24.240/93.

206 Law 17.250/00.

207 *See* The Globalization of Products Liability Actions, Printed Materials and Audio Presentation by the Lex Mundi Toxic Tort & Products Liability Committee, Feb. 2001 Symposium (citing decline of the concept of *hecho ilicito* in Latin American products liability laws).

product manufacturers.[208] Therefore, unlike with other issues such as punitive damages discussed below, the split on this issue is not primarily between common law and civil law countries. (Even in the United States, however, a negligence standard applies if the action is brought by an injured bystander, as opposed to a consumer.)

(ii) *Failure to warn*

U.S. law also imposes liability for failure to warn users of pertinent product features and risks. Some civil law jurisdictions, such as Uruguay and Brazil, also require labels which provide relevant warnings. [209] Other nations of the Hemisphere do not recognize this theory of recovery.

(iii) *Other theories under U.S. law*

In addition to the above theories, U.S. law provides for liability for defective products using theories of implied warranty of merchantability, implied warranty of fitness for a particular purpose, express warranty, misrepresentation, and intentional torts.

(b) *Parties Subject to Noncontractual Liability*

As a general rule, in most all jurisdictions in the Hemisphere any private party can be liable for negligence or commission of an *hecho ilícito.* The law is rather uniform in this respect. The law diverges, however, as to who can be held strictly liable. Under U.S. law, any "commercial seller or distributor" of a product are subject to strict liability for injuries caused by the product.[210] Accordingly, U.S. law provides that the ultimate seller and any one or more of the parties in the chain of distribution, including the original manufacturer, can be held strictly liable for injuries caused by a product. By contrast, in Canada and in many Latin American jurisdictions no parties in the supply chain are subject to strict liability. Only recently have some Latin American jurisdictions, such as Brazil[211] and Uruguay,[212] adopted an approach similar to that in the United States under which a party can be held liable even when the party has no direct contact or contract with the injured person.

(c) *Recoverable Damages*

Another area in which the laws of the Hemisphere diverge is damages. Laws relating to punitive and compensatory damages are quite varied.

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208 Robert F. Hungerford & Rupert M. Shore, *1997 Damages: A Catalyst for Jurisdictional Disputes in Aviation Accidents*, 62 J. AIR L. & COM. 1037, 1038 (1997). *But see* Eric C. Rose, *International Contractual Developments in Products Liability*, 371 PLI/Lit 175, 181 (1989) (observing that elements of strict liability are found in a number of Canadian court decisions).

209 Uruguay Law No. 17.250/00; 1990 Brazilian Consumer Defense Code, arts. 12-17 (including requirements relating to sufficiency and adequacy of information on risks and proper uses), *cited in* Pinheiro Neto Advogados, DOING BUSINESS IN BRAZIL, Vol. I, § 25.129 (2003).

210 RESTATEMENT (THIRD) OF THE LAW OF TORTS – PRODUCTS LIABILITY § 1 (1998) ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.")

211 1990 Brazilian Consumer Defense Code.

212 Uruguay Law No. 17.250/00 (holding supplier, manufacturer, and importer primarily liable; exculpating retailer and distributor except where the supplier, manufacturer, or importer cannot be found or the injury was caused by mishandling by the distributor or merchant).

(i) *Punitive damages*

Common law jurisdictions tend to allow punitive damages, with some limitations. For example, U.S. law allows punitive damages where a defendant has acted maliciously and with reckless disregard for the injured party. Punitive damage awards in the United States are subject to some limitations, whether under the laws of a majority of states or the federal Constitution, which places Due Process limitations on grossly excessive punitive damage awards.[213] Like the United States, Canada allows punitive damages and has not adopted any federal legislation capping these damages. However, punitive damages are reportedly rare in Canada, in part because of judicial restraint.[214] By comparison, most civil law jurisdictions do not allow punitive damages.[215]

(ii) *Compensatory damages*

There are a number of ways in which jurisdictions in the Hemisphere conceive of recoverable compensatory damages. These include injury to the person, injury to property, and purely economic loss. First, there does not appear to be any jurisdiction in the Hemisphere that does not provide for recovery for personal injury caused by a defective product. This category of injury often includes pain and suffering (*daño moral*). In addition, most jurisdictions in the Hemisphere provide for recovery of damage to property caused by a product. U.S. law also provides that, in actions based upon breach of warranty, the injured party can seek damages for purely economic loss (e.g., lost earnings or profits). A claim for lost profits (*lucro cesante*) is also available in most Latin American countries. While all three of these categories of compensatory damages are therefore available in some form in many common and civil law jurisdictions in the Hemisphere, the typical amount of recovery in each of these categories for a given injury can vary widely among jurisdictions.

2. Choice of Law

Despite the complex and unique issues which often arise in products liability actions, very few jurisdictions in the Hemisphere use a specific approach to choice of law in this area. Though courts in these jurisdictions doubtless tailor their general approaches when faced with product liability cases, Québec and Louisiana are the only jurisdictions to have enacted legislation abrogating the general approach to choice of law for issues of noncontractual liability in favor of a specific approach for certain products liability actions.

Most common law jurisdictions in the Hemisphere, including those in the United States and Canada, apply standard choice of law approaches in products liability actions. U.S. courts

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213 BMW of North America, Inc. v. Gore, 517 U.S. 559 (1998).

214 Trebilcock, *The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis*, 24 SAN DIEGO L. REV. 929 (1987), cited by Ralph A. Winter, *The Liability Crisis and the Dynamics of Competitive Insurance Markets*, 5 YALE J. REG. 455 (1988).

215 *Cf.* Model Inter-American Law on Secured Transactions and Commentaries, 18 ARIZ. J. INT'L & COMP. L. 605, 653 (2001) (noting that in Latin America plaintiff debtors "generally will not be entitled to punitive damages").

tend to apply the general choice of law approach used in tort cases in the state where the court sits, whether the Restatement approach, *lex loci delicti*, or other approaches described earlier.[216] This is even true for Louisiana.[217] *Depeçage* is also used by some U.S. courts to account for the unique nature of products liability actions. For example, courts may select U.S. law to govern the issue of liability and foreign law to govern the issue of damages. As in the United States, choice of law for products liability actions in Canadian common law provinces are largely subject to the standard choice of law approach used in each jurisdiction.

Similarly, most civil law countries in the Hemisphere determine the law applicable to transnational products liability actions according to the choice of law approach used for noncontractual liability generally. Most civil law states follow lex loci delicti, although Mexico follows lex fori, and Venezuela and Perú have adopted the principle of ubiquity. The only civil law jurisdictions to have adopted a specific rule for product liability cases are civil-law jurisdictions in predominantly common-law countries: Québec and Louisiana. The Québec rule only displaces the general rule when determining the law applicable to manufacturers. The Québec Civil Code provides that the law applicable to the liability of the manufacturer of a movable good can be chosen by the victim, between the law of place of the manufacturer's domicile or the place where the product was acquired.[218]

The relevant provision of Louisiana's choice-of-law statute provides that "[d]elictual and quasi-delictual liability for injury caused by a product, as well as damages, whether compensatory, special, or punitive, are governed by the law of this state: (1) when the injury was sustained in this state by a person domiciled or residing in this state; or (2) when the product was manufactured, produced, or acquired in this state and caused the injury either in this state or in another state to a person domiciled in this state," except where "neither the product that caused the injury nor any of the defendant's products of the same type were made available in this state through ordinary commercial channels."[219] Where the conditions specified in the section are not satisfied, the applicable law is to be determined by Louisiana's general choice of law rules for non-contractual liability.

3. Jurisdiction

In transnational products liability actions, most states in the Hemisphere appear to apply the approaches taken to jurisdiction for non-contractual liability generally. For example, the United States determines jurisdiction in products liability actions by applying the general jurisdictional norms, as interpreted in this specific area of the law. While the foreseeability element typical in U.S. long-arm statutes can be applied without great difficulty, the second requirement – the Constitutional Due Process requirement – usually gives rise to more complex analysis. In the 1987 *Asahi Metals* case, a plurality of the Court announced that, under the Due Process clause, courts only have jurisdiction over nonresident defendants in products liability actions if the defendant took certain actions purposefully to avail themselves of the

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216 *See, e.g.,* Sanchez v. Brownsville Sports Center, Inc., 51 S.W. 3d 643, 668 (Tex. Ct. App. 2001) (applying Restatement approach under Sections 6 and 145 to products liability action, resulting in application of forum law to accident in Mexico caused by ATV originally sold in Texas forum); Land v. Yamaha Motor Corp., U.S.A., 272 F.3d 514 (7th Cir. 2001) (applying *lex loci delicti* to products liability action, resulting in application of Indiana SOL to accident in Indiana caused by watercraft introduced into stream of commerce in Japan).

217 Marchesani v. Pellerin-Minor Corp., 269 F.3d 481 (5th Cir. 2001) (applying Louisiana Civil Code comparative impairment approach for torts to products liability action).

218 Civil Code of Québec, art. 3128.

219 La. Civ. Code Ann. art. 3545 (West 1992).

forum state's laws.[220] This approach requires more than just placement of a product into the stream of commerce which eventually flows into the forum state. Under this view, more positive action is required, such as designing the product for use in the forum, advertising in the forum, or selling the product to a distributor whose distribution network is known to include the forum.[221] Because the view was not announced by a majority of the Court, however, lower courts since *Asahi* have not uniformly applied this approach.[222]

Canadian common law jurisdictions also use their general approach to jurisdiction in products liability actions. For a little more than a decade, common law provinces in Canada have been using a "real and substantial connection" test under which courts take jurisdiction only over foreign defendants who show a real and substantial connection to the forum state, as guided by notions of "order and fairness."[223] The Supreme Court of Canada subsequently applied this standard in *Hunt v. T&N PLC*, a domestic products liability action.[224] In cases involving defendants located in foreign countries, Canadian courts also apply the doctrine of comity in the personal jurisdiction analysis.[225]

As with the United States and Canada, most Latin American jurisdictions also apply their general approaches to jurisdiction over transnational noncontractual liability. Neither the Bustamante Code nor the Treaties of Montevideo provide special jurisdictional rules for products liability. The general rule is that the suit may be brought in the place of habitual residence of the defendant and, in addition, in the place where the act causing the injury occurred. The lack of a specific approach in these instruments can be at least partially explained by looking to the time period when the instruments were enacted. When these treaties were concluded, widespread industrialization had not yet occurred throughout the Hemisphere and liability for injuries caused by products was not the common issue it is today. Given the advent of regional trade integration since the negotiation of these instruments, the time may have come to revisit the issue at the regional level.

The Rule of Mozambique would not be applicable in product liability cases. The forum non conveniens doctrine, however, is sometimes applied to dismiss transnational product liability cases brought in the U.S. courts,[226] although the issue arises less frequently in such cases than in cases involving transboundary environmental damage. An attempt to harmonize jurisdiction in the area of product liability could thus provide an opportunity to address this issue in a context in which it would have less of an impact. Alternatively, if the issue turned out to be intractable, it could be left unaddressed in an instrument focusing on product liability.

4. Prior Attempts to Harmonize Choice of Law and Jurisdiction in This Field

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220 Asahi Metal Indus. Co. v. Sup. Ct. of Cal., 480 U.S. 102 (1987).

221 *Id.*

222 Another question the Supreme Court has yet to resolve is whether a defendant's targeting of the U.S. market as a whole is sufficient to give rise to personal jurisdiction in all states. A number of lower court decisions have found foreign defendants' national contacts to give rise to such nationwide jurisdiction. *See* Alan J. Lazarus, *Jurisdiction, Venue, and Service of Process Issues in Litigation Involving a Foreign Party*, 31 TORT & INS. L.J. 29, 45 (1995) (reviewing cases comprising circuit split on this issue).

223 Morguard Invs. Ltd., [1990] 3 S.C.R. at 1091 (announcing real and substantial connection test).

224 Hunt v. T&N PLC, [1993] 4 S.C.R. 289, 313 (Can.).

225 *See id.* (La Forest, J., discussing how the 'real and substantial connection' standard should be applied in international context).

226 See, e.g., Merrell Dow Pharmaceuticals v. Thompson, 478 U.S. 804 (1986).

a. Choice of Law

(i) *Hague Convention on the Law Applicable to Product Liability*

The Hague Conference has produced the only multilateral treaty relating to choice of law in a transnational products liability action. The Hague Convention on the Law Applicable to Products Liability (Hague Convention) has been in force for more than 25 years. However, the Hague Convention has been ratified by only one in five members of the Hague Conference, has never been signed by any Member State in the Western Hemisphere,[227] and has not been signed by any Member State in more than a decade.[228]

The Hague Convention governs all persons in the chain of preparation or distribution but does not govern the party who sold or leased the injurious product to the consumer.[229] The choice-of-law principles contained in the Hague Convention are set forth in a series of complex interlocking rules. Under these rules, the law of the habitual residence of the victim applies whenever the victim was injured in that jurisdiction, or when that jurisdiction is also home to the defendant's principal place of business or was the jurisdiction place where the product was acquired.[230] Otherwise, the law of the place of the injury applies, provided this was also the place where the product was purchased or the defendant has its principal place of business.[231] Neither of these choice of law rules applies, however, if the defendant "could not reasonably have foreseen that the product or [its] own products of the same type would be made available in that [s]tate through commercial channels."[232] Finally, where these two rules do not apply, the victim is permitted to choose the applicable law from among the law of the place of the injury or the defendant's principal place of business.[233]

The approach of the Hague Convention does not mirror any particular national approach, but rather combines a number of approaches. The application of the *lex loci deliciti commissi* is made subject to other "connecting factors." In accordance with the British "proper law" approach, the Convention requires at least two relevant contacts in the same state to regard that state as the one having the most significant relation with dispute such that its law must be applied. The approach bears a close resemblance to the approach of the Second Restatement of the Conflict of Laws in the United States, which should not be surprising, as the Chief Reporter of that Restatement, Professor Willis L.M. Reese, was also the Rapporteur of the Hague Convention.

Among commentators, the critical appraisal of the Hague Convention has been mixed. Some scholars regard the Hague Convention as a valuable contribution to international law. Others deem the Hague Convention a failure and argue for its revision.[234] Its provisions "have been criticized as kaleidoscopic and as deviating too much from the usual tort conflicts

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227 *See* Hemispheric Status of Hague Conventions.
228 *See id.*
229 Hague Convention, arts. 1 and 3(4),
230 *Id.* arts .4 and 5.
231 *Id.* art. 4.
232 *Id.* art. 7.
233 *Id.* art. 6.
234 *See, e.g.,* Russel J. Weintraub, *Methods for Resolving Conflict-of-Laws Problems in Mass Tort Litigation*, 1989 ILL. L. REV. 129, 156 (1989) (describing the Convention as a "good example" of how treaties can be used to unify choice of law relating to mass torts); Willis L.M. Reese, *Further Comments on the Hague Convention on the Law Applicable to Products Liability*, 8 GA. J. INT'L & COMPL. L. 311 (1978).

rules."[235] If the topic of product liability is selected as a topic for a possible private international law instrument in the Americas, it will be necessary to study in greater depth the reasons for the failure of the Convention to attract parties, especially in the Americas. The reason may have to do with the particular provisions in contains. In particular, the provision permitting the plaintiff to choose the law most favorable to his case may have struck many states as heterodox. As Professor Symeonides has written:

The notion of letting the plaintiff choose the applicable law under certain circumstances was first advanced by the 1972 Hague Products Liability Convention. . . . As appealing as it might be to the conflicts expert, this idea sounds quite heretical to the uninitiated. This is why it has little or no chance of being accepted by the majority of state legislatures.[236]

Although Professor Reimann notes that Germany and Italy, as well as Estonia and Hungary, allow the plaintiff to select the most favorable law in certain circumstances,[237] he describes this as a "peculiar pro-recovery twist."[238] His use of an exclamation point when describing the provision of German law containing this plaintiff-favoring aspect[239] indicates that he believes his readers would find it surprising. Thus, even though the Hague Convention permits the plaintiff to choose the applicable law only in very limited circumstances, it is possible that many potential adherents to the convention could not bring themselves to adopt such an approach. If this is indeed the reason the Convention has not attracted more adherents, it is a problem that can be easily avoided.

In any event, the Hague Convention should still be carefully studied before commencing any work in this area. Although it represents a rare instance where common and civil law countries were able to conclude a treaty containing uniform standards governing choice of law for products liability,[240] it has also for some reason not been accepted in this Hemisphere. Any work on the topic at the regional level would have to be done with an awareness of why no OAS Member States have become party to the Hague Convention.

(ii) European Initiatives

One reason for the failure of the Hague Convention to attract many European adherents since it was adopted in 1973 may be fact that the Europeans have been pursuing the harmonization of the substantive law of product liability since the mid-1970's. "At least within Europe, the need for unification of conflicts rules in this area has diminished because of the harmonization of substantive product liability law."[241]

In 1977, the Member States of the Council of Europe signed the European Convention on Products Liability in Regard to Personal Injury or Death, known as the Strasbourg

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235 Matthias Reimann, *Codifying Torts Conflicts: The 1999 German Legislation in Comparative Perspective*, 60 LA. L. REV. 1297, 1311 (2000) (citing GERHARD KEGEL, INTERNATIONALES PRIVATRECHT 558 (7th ed. 1995) and opining that the criticisms "are well-taken").

236 Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 TUL. L. REV. 677, 755 n.324 (1992).

237 *See* Riemann, *supra*., at 1307 n.52. *See also supra* text accompanying note 202 (describing Québec law); *infra* text accompanying note 234 (desribing Swiss statute).

238 *Id*. at 1300.

239 *Id.*

240 *See* Report by Ana Elizabeth Villalta, Aug. 2002, *supra*.

241 Riemann, *supra*., at 1311.

Convention.[242] In article 3, the contracting parties agree to recognize strict liability of manufacturers for defective products causing death or personal injuries, although, according to article 4, the compensation may be reduced if the injured party was contributorily negligent. Article 12 provides that the Convention "shall not affect any rights which a person suffering damage may have according to the ordinary rules of contractual or extracontractual liability." Thus, the states-parties may continue to apply their laws of product liability, so long as they recognize the minimum level of liability provided for in the Convention. This convention has never entered into force, but its principal provisions were incorporated into a Directive of the European Council of 1985, which likewise provides for the strict liability of manufacturers for defective products and allows Member States to impose more stringent rules of liability on manufacturers.[243]

Because the Directive permits Member States to deviate from the Directive's provisions by imposing more stringent rules of liability, choice of law issues are not entirely irrelevant on that Hemisphere. The proposed Rome II regulation would, if adopted, include a specific provision for product liability.[244] In the Commission's view, the choice of law rule for product liability must "respect the parties' legitimate expectations, [but also] reflect also the wide scatter of possible connecting factors (producer's headquarters, place of manufacture, place of first marketing, place of acquisition by the victim, victim' s habitual residence), accentuated by the development of international trade, tourism and the mobility of persons and goods in the Union."[245] The Commission considered the basic rule of *lex damni* to be inappropriate in the product liability context because the place of the injury could in many cases be fortuitous and "unrelated to the real situation."[246] In its view, 'the large-scale mobility of consumer goods means that the connection to the place where the damage is sustained no longer meets the need for certainty in the law or for protection of the victim."[247] The Commission also rejected the approach of the Hague Convention as unnecessarily complex. Because insurers are very often involved in product liability cases, and consequently the rate of out-of-court settlements is very high, a simple and predictable rule is necessary.[248] The Commission selected the following rule:

Without prejudice to Article 3(2) and (3), the law applicable to a non-contractual obligation arising out of damage or a risk of damage caused by a defective product shall be that of the country in which the person sustaining the damage is habitually resident, unless the person claimed to be liable can show that the product was marketed in that country without his consent, in which case the applicable law shall be that of the country in which the person claimed to be liable is habitually resident.[249]

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242 European Treaty Series No. 91, Jan. 27, 1977.

243 Council Directive of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Prodicts (85/374/EEC).

244 Proposed Rome II regulation, supra, at 14.

245 *Id*.

246 *Id.* at 13-14. It gave the example of "a German tourist buying French-made goods in the Rome airport to take to an African country, where they explode and cause him to sustain damage." *Id.* at 14 n.25.

247 *Id.* at

248 *Id.*

249 Proposed Rome II regulation, art. 4. Rule 3(2) provides that, if the plaintiff and defendant have a common domicile, the law of that state applies. Rule 3(3) provides that, in exceptional cases, the law of another state shall apply "where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with" that state.

One question that should be considered before initiating an effort at harmonization in the commercial sphere is whether to harmonize the substantive law or instead the rules concerning jurisdiction and choice of law. The European experience shows that this issue does not necessarily present just a binary choice. We in the Americas could elect to pursue both. Although efforts to harmonize substantive law do not necessarily obviate the choice of law problem, they may well reduce the occasions to choose among discrepant laws. Although, in Europe, the attempts to harmonize substantive law in the field of product liability and the attempts to harmonize choice of law have been pursued in different fora at different times, there is nothing to prevent us in the Americas from pursuing both at the same time. Indeed, the CIDIP process has been an innovator in this respect, having produced a hybrid instrument concerning the choice of law for contractual liability.[250] Similarly, the OAS may wish to pursue a hybrid instrument concerning product liability – one that seeks to harmonize substantive law to some extent and goes on to address the questions of jurisdiction and choice of law, which will remain important because residual differences in the substantive law will inevitably remain.

(b) *Jurisdiction*

The issue of jurisdiction in products liability actions has not been addressed either at the regional or the global level. Negotiations at the Hague Conference's Jurisdiction and Judgments Project did not produce any provisions specifically addressing jurisdiction in transnational products liability actions. We are informed, however, that the points of contention that ultimately led to the failure to reach agreement on a convention generally regulating jurisdiction in civil and commercial matters did not have to do with cases concerning product liability.

At the subregional level, MERCOSUR has adopted an instrument relating to jurisdictional norms applicable in transnational products liability actions.[251] The MERCOSUR Santa Maria Protocol on International Jurisdiction over Matters of Consumer Relations grants jurisdiction to the courts in the consumer's domicile for actions brought by the consumer against the supplier. In addition, if the consumer consents or other exceptional circumstances apply, jurisdiction will also lie in the place where the defendant delivers the goods or in the defendant's domicile.[252]

5. Other Possible Models

In addition to the statutes and international instruments described above, an Inter-American attempt to harmonize choice of law and jurisdiction in this field should consider as possible models the Swiss statute establishing special choice of law rules of product liability, as well as the proposals that have advanced by scholars in this area.

Article 135(1) of the Swiss Statute on Private International Law of 1987 provides that "[c]laims based on a defect in, or a defective description of, a product are governed, at the choice of the injured party, (a) by the law of the state in which the tortfeasor has his place of

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250 *See* Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 AM. J. COMP. L. 195, 206 (1997).

251 *Cf.* Jason Farber, *NAFTA and Personal Jurisdiction: A Look at the Requirements for Obtaining Personal Jurisdiction in the Three Signatory Nations*, 19 LOY. L.A. INT'L & COMP. L.J. 449, 465-66 (1997) (noting that NAFTA only touches indirectly on the issue of personal jurisdiction).

252 Protocolo de Santa Maria Sobre Jurisdicão Internacional em Materia de Relacões de Consumo, Mercosul/CMC/Dec. No. 10/96, arts. 4-5, available at http://www.mrecic.gov.ar/comercio/mercosur/normativa/decision/1996/dec1096.htm.

business or, in the absence thereof, his habitual residence, or (b) by the law of the state in which the product was acquired, unless the tortfeasor proves that the product has been marketed in that state without its consent."[253]

Professor Cavers has offered a solution to the choice of law issue in product liability cases, according to which

> (a) the claimant should be entitled to the protection of the liability laws of the State where the defective product was produced (or where its defective design was approved.
>
> (b) If, however, the claimant considers the liability laws of that State (i) less protective than the laws of the claimant's habitual residence where either he had acquired the product or it had caused harm or (ii) less protective than the laws of the State where the claimant had acquired the product and it had caused harm, then the claimant should be entitled to base his claim on whichever of those two States' liability laws would be applicable to his case.[254]

Professor Kozyris has proposed a choice of law rule for product liability cases under which the applicable law would be "the state of intended use of the product at the time of delivery to the original acquirer."[255]

In 1990, Professor Russell Weintraub published a proposed choice of law framework for international products liability actions.[256] This proposal, which Professor Weintraub continued to advocate as recently as four years ago, calls for a bright-line rule intended to discourage forum shopping by reducing the importance of party autonomy in the choice of law consideration:

> To determine liability and the measure of compensatory and punitive damages for injuries caused by a product, apply the law of the injured person's habitual residence, whether this law is more or less favorable to the injured person than the law of other countries that have contacts with the defendant and the product, except:
>
> 1. The injured person is not entitled to the favorable law of her habitual residence if the defendant could not reasonably have foreseen that the product or the defendant's products of the same type would be available there through commercial channels.
>
> 2. Law of a country that is not the injured person's habitual residence, but is where the defendant has acted and is favorable to the injured person, should be applied when this is desirable to punish and deter the defendant's outrageous conduct.[257]

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253 1988 BB I 5, 1988 FF I 5, art. 135(1) (Switz.).

254 David F. Cavers, *The Proper Law of Producer's Liability*, 26 INT'L L. Q. 703, 728 (1977).

255 P. John Kozyris, *Choice of Law for Product Liability: Whither Ohio?*, 48 OHIO ST. L.J. 377, 383 (1987).

256 Russell J. Weintraub, *A Proposed Choice-of-Law Standard for International Products Liability Disputes*, 16 BROOK. J. INT'L L. 225 (1990).

257 Weintraub, *Choice of Law for Products Liability: Demagnetizing the United States Forum*, 52 Ark. L. Rev. 157, 164 (1999), citing Weintraub, Proposal, *id.*.

A decade later, Dean Symeon Symeonides offered an approach according great weight to the choice of the plaintiff:

> § 5. Products Liability
>
> 1. Victim's choice. Liability and damages for injury caused by a product are governed by the law of the state chosen by the injured party, provided that that state has any two of the following contacts: (a) place of injury; (b) domicile of the injured party; (c) domicile of the defendant; (d) place of manufacture of the product; or (e) place of acquisition of the product. [For the purposes of this choice, contacts situated in different states whose law on the particular issue is substantially identical shall be treated as if situated in the same state.]

Although all of these proposals revolve around the same sorts of contacts, they provide for different choices of law in particular circumstances. To illustrate the differences, it is useful to consider how they would apply to a particularly problematic, if unusual, set of facts: A person domiciled in state *A* is injured in state *B* by a product he purchased in state *C,* which was manufactured in state *D* by a manufacturer having its principal place of business in state *E.* The Hague Convention on the Law Applicable to Products Liability would allow the plaintiff to choose between the laws of either state *B* or *E.*[258] The Swiss conflicts statute would let the plaintiff choose between states *C* and *E.*[259] Under Professor Cavers' proposal, the law of state *D* would apply.[260] Professor Kozyris would apply the law of state *C* as the state of the "original delivery" and presumed "intended use" of the product.[261] Professor Weintraub would apply the law of state *A,* unless the product was not available there through ordinary commercial channels.[262] Finally, Dean Symeonides would allow the plaintiff to choose the law of any of the above states, as long as at least one of the other states has the same law.[263] In summary, the results would be as follows: Hague, *B* or *E;* Swiss, *C* or *E;* Cavers, *D;* Kozyris, *C;* and Weintraub, *A*; Symeonides, *A, B, C, D,* or *E*, if one other states' laws is the same.

6. Conclusions

Although the commentators are not in agreement about the best approach to employ in complex cases, the question has been the subject of intense study for decades and it is unlikely that further study would produce a scholarly consensus. Thus, the time may well be ripe for discussion of the issue in an Inter-American forum and the selection of one approach or another solution from among the rich array found in the national laws, international instruments (or drafts thereof), and scholarly proposals.

C. TRAFFIC ACCIDENTS

A third subcategory of non-contractual liability that is often mentioned as a candidate for separate treatment in a private international law instrument consists of disputes stemming from traffic accidents.[264] As with product liability, a choice of law convention on this topic elaborated by the Hague Conference – the Hague Convention on the Law Applicable to Traffic

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258 Hague Convention, art. 6.
259 *See supra* (discussion of Swiss statute).
260 *See supra* (discussion of Professor Cavers' proposal).
261 *See supra* (discussion of Professor Kozyris' proposal).
262 *See supra* (discussion of Professor Weintraub's proposal).
263 *See supra* (discussion of Dean Symeonides' proposal).
264 *See* Statement of Reasons, at 17.

Accidents – is already in force. However, as with the product liability convention, no states from the Western Hemisphere are parties to this convention. The time may thus be ripe for an Inter-American attempt to harmonize jurisdiction and choice of law on this subject. On the other hand, the apparent lack of interest in this convention in the Western Hemisphere may indicate that the Member States do not perceive a problem with the existing state of the law. Bilateral and subregional instruments addressing this topic already exist in this Hemisphere. Since disputes involving traffic accidents are most likely to arise among neighboring states, it may be that this topic is most appropriately handled at the subregional level.

1. Substantive Law

The areas of substantive law that tend to produce conflicts in litigation involving traffic accidents include the laws concerning loss of consortium and wrongful death, the application of guest statutes, limitations on damages and the availability of punitive damages.[265] Perhaps in the future the failure to adhere to provisions mandating the use of seatbelts will prove to be an important choice-of-law issue, at least insofar as it relates to mitigation of damages and/or liability for accident injuries.[266] In addition, recovery based on joint and several liability (probably applicable only in multi-vehicle accidents) may implicate conflicts of law.[267]

Unlike transboundary pollution disputes, in traffic accident cases, the place of the acts causing the injury is likely to be the same as the place where the injury was suffered. Thus, the *lex loci actus* and the *lex damni* will usually be the same. The "international" elements of the dispute will usually result from the fact that either the plaintiff or the defendant, or both, will be nationals of states other than the where the accident occurred.

2. Choice of Law

a. National Approaches in the Americas

(i) Lex loci delicti

Lex loci delicti is the most widely followed approach to choice-of-law in the Western Hemisphere. It is followed by all countries in Latin America except Venezuela, Peru, Mexico, and the states of Mercosur. It is also followed by ten states in the United States, and all provinces in Canada except Québec and the Yukon Province. In states that follow the *lex loci delicti* approach, the applicable law will be that of the state where the accident occurred.

Venezuela, Perú, and Québec have adopted the principle of ubiquity, which in the case of traffic accidents is likely to produce the same result as *lex loci delicti*. Québec, however, supplements the principle with a provision specifying that, if the tortfeasor and the victims are from the same state, the law of that state applies. The Yukon Province adopted the *Uniform Conflict of Laws (Traffic Accidents) Act*,[268] based on the *Hague Convention on the Law Applicable to Traffic Accidents*, discussed below.

(ii). The "Most Significant Relationship" Approach and Interest Analysis

Twenty-one states in the United States and Puerto Rico follow the "most significant relationship approach of the Restatement (Second) of Conflict of Laws. Puerto Rico's law,

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265 Fanselow v. Rice, 213 F.Supp.2d 1077 (D.Neb. 2002).
266 *See* Noble v. Moore, 2002 WL 17665 (Con. Super. 2002).
267 *See* Erny v. Estate of Merola, 792 A.2d 1208 (N.J. 2002).
268 1970 Proc. of Unif. L. Conf. 263.

although a civil code, is the functional equivalent of this approach.[269] In addition, three states apply the closely related "significant contacts" test, five apply Leflar's "better law" approach, three apply interest analysis, and six states apply various combinations of the above.[270] Although all of these approaches tend to be highly indeterminate, they do consistently yield one specific result: when the plaintiff and the defendant share a common domicile, the law of the state of the common domicile applies. This was the result in the case that initiated the choice of law revolution in the United States, Babcock v. Jackson, which was itself a traffic accident case.[271] While the choice of law revolution in the Untied States has received mixed reviews, the Babcock v. Jackson solution for common domicile cases has been universally praised[272] and is now entrenched in the United States.[273] This solution has also been expressly incorporated into Québec's private international law statute,[274] and has been adopted by the international instruments described below.

(iii) Double-Actionability

Most of the states in the Caribbean Commonwealth follow the double actionability approach, while permitting the application of the law with the "most significant relationship" to the dispute in exceptional cases.[275]

(iv) *Lex Fori*

The *lex fori* approach is followed by three states of the United States. Mexico applies *lex fori* as well, unless a statute or treaty specifically calls for the application of foreign law.

b. International Instruments Choice of Law for Traffic Accidents in the Americas

The *Convention on Emerging Civil Liability for Traffic Accidents* (between Uruguay and Argentina) provides that traffic accidents will be regulated by "the internal law of the Member State in whose territory the accident occurs."[276] However, where the persons affected are all domiciled in another Member State, the law of that Member State applies.[277]

The MERCOSUR *San Luis Protocol on Emerging Civil Liability for Road Accidents* (in force between MERCOSUR Member States) provides for both choice of law and jurisdictional rules governing traffic accidents. Like the Convention between Uruguay and Argentina, the *San Luis Protocol* starts with the law of the state in whose territory the accident occurs, but selects the law of another state only if all affected persons share a common domicile in that state.[278]

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269 *See* 2000 Hague Note, at 36-37.

270 *See generally* Symeon C. Symeonides, *Choice of Law in the American Courts in 2002: Sixteenth Annual Survey*, 51 AM. J. COMP. L. 1 (2003) [hereinafter Symeonides, 2002 Survey].

271 191 N.E.2d 279 (N.Y. 1963).

272 *See* Harold L. Korn, *The Choice of Law Revolution: A Critique*, 83 COLUM. L. REV. 772, 788-89 (1983) (common domicile solution is the "only unqualified success" and "most enduring contribution" of choice of law revolution in the United States).

273 *See* Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (and a Proposal for Tort Conflicts)*, 75 IND. L. J. 438, 459 (2000).

274 *See supra* (discussion of Quebec Civil Code provisions).

275 Chaplin v. Boys, [1971] App. Cas. 356.

276 Convention of Emerging Civil Liability for Road Accidents between Uruguay and Argentina, art. 2,

277 *Id.*

278 Protocolo De San Luis En Materia De Responsabilidad Civil Emergente De Accidentes De Transito Entre Los Estados Partes Del MERCOSUR, Mercosur/CMC/Dec.No. 1/96, art. 3.

c. Approaches Outside the Western Hemisphere

Outside the Western Hemisphere, there is a discernable trend toward adopting the common-domicile exception to the *lex loci delicti* rule that originated in this Hemisphere. The Swiss Federal Act of Private International Law of 1987 provides that "[w]hen a tortfeasor and the injured party have their habitual residence [at the time the tort was committed] in the same state, claims in tort are governed by the law of such state."[279] German law similarly provides that, "[I]f the tortfeasor and the victim, at the time the tort was committed, had their habitual residence in the same state, the law of this state applies."[280] Numerous other states recognize an exception to the lex loci delicti in cases in which their citizens commit torts abroad against co-citizens.[281]

The draft convention proposed by the groupe europeen de droit internationale provides generally that a non-contractual obligation shall be governed by the law of the country with which it is most closely connected. It goes on to provide that "[w]hen the author of the damage or injury and the person who suffers damage or injury are habitually resident in the same country at the time of the harmful event, it shall be presumed that the obligation is most closely connected with that country."[282] The proposed Rome II regulation proposed by the European Commission provides that the applicable law is generally the *lex loci delicti*, but it specifies that, "[w]here the person claimed to be liable and the person sustaining damage have their habitual residence in the same country when the damage occurs, the non-contractual obligation shall be governed by the law of that country."[283] None of the extensive comments received by the Commission concerning this proposal objected to this provision.

The *Hague Convention on the Law Applicable to Traffic Accidents*, which has been adopted in the Western Hemisphere only in the Yukon Province,[284] also begins with the law of the place where the accident occurred.[285] Article 4 then sets out exceptions to this general rule, which call for the application of the law of the state of registration of the vehicle in the following circumstances:

(a) Where only one vehicle is involved in the accident and it is registered in a State other than that where the accident occurred, the internal law of the State of registration is applicable to determine liability

– towards the driver, owner or any other person having control of or an interest in the vehicle, irrespective of their habitual residence,

– towards a victim who is a passenger and whose habitual residence is in a State other than that where the accident occurred,

– towards a victim who is outside the vehicle at the place of the accident and whose habitual residence is in the State of registration.

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279 Art. 133(1) (reproduced in 37 AM. J. COMP. L. 193 (1989)).

280 Introductory Act to the BGB (Civil Code), art. 40(2).

281 *See generally* Kurt Siehr, *Conflict of Laws, Comparative Law and Civil Law: Revolution and Evolution in Conflicts Law*, 60 LA. L. REV. 1353, 1354 (2000).

282 *See* 7 EUR. REV. OF PRIV. L. 45, 47 (1999).

283 Proposal for Rome II, art. 3, cl. 2.

284 See *supra* –(discussion of Yukon statute in March 2003 report of rapporteur).

285 Hague Convention on the Law Applicable to Traffic Accidents, art. 3.

Where there are two or more victims the applicable law is determined separately for each of them.

(b) Where two or more vehicles are involved in the accident, the provisions of a) are applicable only if all the vehicles are registered in the same State.

(c) Where one or more persons outside the vehicle or vehicles at the place of the accident are involved in the accident and may be liable, the provisions of a) and b) are applicable only if all these persons have their habitual residence in the State of registration. The same is true even though these persons are also victims of the accident.[286]

This set of exceptions will produce the same result as the common domicile exception to *lex loci delicti* embodied in the San Luis Protocol and the Québec statute when all affected parties are domiciled in the state of registration of the vehicle, which will usually be the case. In other respects, the exception to *lex loci delicti* embodied in the Hague Convention is broader than that of the San Luis Protocol and the Québec statute, as it would call for the application of the law of the state of registration even when that state is not the state of domicile or habitual resident of the victim or the person having control over the vehicle.

3. Jurisdiction

The San Luis Protocol establishes that a suit may be maintained in the courts of the site of the accident, the domicile of the defendant, and the domicile of the plaintiff.[287] Otherwise, there is no law in the Americas specifically addressing jurisdiction in international traffic accident cases. The analysis would therefore be the same as that set forth in Section A, above, except that the Rule of Mozambique would not be applicable, and *forum non conveniens* would typically not be relevant to traffic accident cases.

4. Conclusions

The circumstances appear to be propitious to pursue an Inter-American instrument addressing choice of law in traffic accident cases. There appears to be substantial acceptance among states and scholars of the common domicile exception to the *lex loci delicti rule*. An Inter-American instrument adopting that exception would produce a welcome change in the laws of the many states in the Hemisphere that still do not recognize this exception, including some that have recently codified their private international law rules (such as Perú and Venezuela), as well as those that adhere to *lex fori* (including Mexico and some states of the United States). The absence of ratifications of the Hague Convention in this Hemisphere may be a result of the fact that its exception to the *lex loci delicti* rule is significantly broader than a common-domicile exception.

An agreement to unify rules of jurisdiction would likely be easier to achieve for traffic accidents than for transboundary pollution or product liability, primarily because forum non conveniens is not implicated in traffic accident cases. Moreover, the principle points of controversy that ultimately led to the failure of the Hague Convention on Jurisdiction and Judgments involved business torts. These controversies should not hamper the negotiations on an Inter-American instrument relating to traffic accidents.

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[286] *Id.*, art. 4

[287] MERCOSUR San Luis Protocol, art. 7.

For the foregoing reasons, the negotiation of an Inter-American instrument on jurisdiction and choice of law for cases involving traffic accidents would be manageable exercise that could produce significant advances in private international law in this Hemisphere. Because there are fewer complications for this topic than for the topics considered above, it may be preferable to begin the project of unifying the Hemisphere's private international law rules for non-contractual liability with traffic accidents. On the other hand, this may be a subject that is better handled at the subregional level, as has already been done in the Southern Cone. The Member States' interest in this topic will have to be verified by the political organs of the OAS.

D. INTERNET TORTS

The responses received by the Inter-American Juridical Committee to the questionnaire we distributed seeking proposals for topics for CIDIP-VII disclosed a significant interest in pursuing an Inter-American instrument concerning some aspect of electronic commerce.[288] In the light of this interest, we have considered the possibility of pursuing an Inter-American instrument concerning jurisdiction and choice of law with respect to Internet torts. The term "Internet tort" (or cybertort) will be used in this section to refer to noncontractual liability for acts committed in cyberspace. The term thus does not refer to a distinct category of non-contractual liability. Rather, the category consists of a variety of traditional torts that are perpetrated in a new context: the Internet. States have not generally recognized new causes of action for wrongs committed over the Internet. They have merely adapted the existing causes of action to take account of this new medium through which wrongful conduct may be channeled.

Noncontractual disputes generally arise three forms of activity which take place over the Internet (i.e., in cyberspace): operation of web pages, transmission of e-mails and other electronic files, and posting of messages on electronic bulletin boards or newsgroups.[289] The breadth of conduct carried out by these three means which can give rise to noncontractual liability under U.S. law is quite broad. Among the most common noncontractual causes of action available to recover for injuries caused by Internet conduct are the following:

a) Deceptive trade practices (consumer protection) such as false advertising (e.g., through Internet yellow pages as well as certain methods of inducing airline/hotel/car rental reservations);

b) Violation of licensing regulations (e.g., selling prescription drugs without a license in violation of state pharmacist licensing laws);

c) Defamation (e.g., publishing defamatory statements by e-mail, Internet bulletin boards, in downloaded files, or in print or television media broadcast online);

d) Invasion of privacy (e.g., collecting personal information using cookies, etc.);

e) Fraud and conversion (e.g., using another's credit card online or withdrawing money from a bank account without authorization);

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288 CIDIP-VII and Beyond, Report of the IJC, CIDIP-VI/doc.10/02.

289 *See* Herbert Kronke, *Applicable Law in Torts and Contracts in Cyberspace*, in Katharina Boele-Woelki & Catherine Kessedjian eds., INTERNET – WHICH COURT DECIDES? WHICH LAW APPLIES? 65-87 (1998) (identifying the following groups of actors on the Internet: publishers, broadcasters, re-broadcasters, librarians/bookstores/news-stands, re-transmitters, space owners, and common carriers).

f) Trespass to chattels (e.g., cyber piracy – commandeering or hacking into web site of another);

g) Negligence or nuisance (e.g., spreading of a computer virus which destroys intellectual property or damages personal property; providing links to web pages which cause injuries[290])

h) Intentional infliction of emotional distress (e.g., certain defamatory remarks).

i) Anti-competitive practices including anti-trust violations (e.g., cross-border mergers and acquisitions)

j) Infringement of intellectual property rights, such as

- trademark infringement and dilution (e.g., cybersquatting – registering domain name using trademark of another)
- copyright violation (e.g., online sales of copyrighted material by someone other than the copyrightholder without consent – see, e.g., Napster)
- patent infringement (e.g., wrongfully facilitating downloads of a patented product such as software); breaches of corporate duties (e.g., insider trading using online brokerage accounts)

k) Violation of securities laws (e.g., selling securities over the Internet without a license or in violation of federal disclosure and anti-fraud laws, promoting Internet gambling as a violation of federal securities laws or possibly anti-gambling laws).

This enumeration of the legal obligations encompassed in the term "cybertorts" illustrates the first difficulty of tackling this subject in an Inter-American instrument. The topics are nearly as diverse as those encompassed by in the entire category of "non-contractual obligations," rendering it nearly as difficult to tackle as the general category.

This problem is exacerbated by the fact that the torts in the list include some that raise particularly sensitive issues for some Member States. For example, actions for defamation raise important issues regarding freedom of speech, which in the United States is protected by the federal Constitution. The United States might thus have difficulty agreeing to recognize the jurisdiction of other states to impose liability for defamation over the Internet in circumstances where the conduct would be protected by the federal Constitution.

A third difficulty stems from the novelty of the medium. The Internet is a comparatively recent phenomenon, and states are just beginning to experiment with regulations of cyberspace. There are as yet pronounced differences of view concerning the types and extent of regulation that is appropriate in cyberspace. Some constituencies favor leaving the Internet relatively unregulated, relying on technical innovations to address potential problems, while others advocate a more active role for state regulation.

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290 "Link liability" also arises from the law of agency and principles of vicarious liability. In addition, although transferring of software products online is a form of Internet activity, this activity will be discussed further in the section on products liability because the approaches to jurisdiction in products liability cases is more likely to be applied to injuries caused by software defects, even though the liability arises from Internet activity.

A fourth difficulty is one that affects in particular the effort to regulate jurisdiction and choice of law. Cyberspace poses particularly severe challenges for private international law, because the norms in this field have traditionally been closely tied to notions of territoriality. Cyberspace is a completely new dimension, difficult to situate within traditional conceptions of territory. Rules that turn on where conduct causing the injury occurred or where the injury was suffered are difficult to apply when the simple click on a computer located in a state that may be entirely unknown produces injury to potentially numerous people situated in diverse parts of the globe. Scholars are in the midst of an intense debate about whether traditional private international law approaches are well-suited to the Internet, and, if not, what alternative approaches are appropriate.[291]

The courts are no closer to reaching a consensus on the appropriate way to address private international law issues with respect to claims arising from conduct on the Internet. With respect to jurisdiction, for example, some courts in the United States have considered "the use of electronic mail ... by a party in another state" to be sufficient basis on which to uphold personal jurisdiction in that forum.[292] The courts in the United States have also found jurisdiction to exist in a distant forum where the defendant had published defamatory statements on an Internet bulletin board and the statements were received in that forum.[293] Australia's courts have similarly upheld jurisdiction in Australia based on the receipt in Australia of communications posted on the Internet in New Jersey.[294] But the courts in Canada have refused to recognize judgments rendered under such circumstances, noting that "[I]t would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to Internet could be achieved, a person who posts fair comment on a bulletin board could be haled before the courts of each of those countries where access to this bulletin board could be obtained."[295] Similarly, the Court of Appeal for Ontario has held that a business owner could not maintain an action against the owner of passive website with a similar name that mistakenly directed users to the first owner's site.[296]

The novelty of the Internet might have been viewed by some as an opportunity to establish uniform rules of substance or of jurisdiction and choice of law before the states become too attached to divergent solutions. Indeed, the borderless nature of the Internet demands harmonized solutions to legal probleDr. It is thus understandable that there are a great

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291 *See, e.g.,* Matthew R. Burnstein, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 VAND. J. TRANSNAT'L L. 75 (1996); Christopher P. Beall, *The Scientological Defenestration of Choice-of-Law Doctrines for Publication Torts on the Internet*, 15 J. MARSHALL J. COMP. & INFO. L. 361, 362 (1997); William Patry, Choice of Law and International Copyright, 48 AM. J. COMP. L. 383; Jennifer M. Driscoll, *It's a Small World After All: Conflict of Laws and Copyright Infringement on the Information Superhighway*, 20 U. PA. J. INT'L ECON. L. 939; Daniel P. Schafer, *Canada's Approach to Jurisdiction Over Cybertorts: Braintech v. Kostiuk*, 23 FORDHAM INT'L L.J. 1186 (2000); Charles H. Fleischer, *Will the Internet Abrogate Territorial Limits on Personal Jurisdiction?*, 33 TORT & INS. L.J. 107 (1997); Tapio Puurunen, *The Judicial Jurisdiction of States Over International Business-to-Consumer Electronic Commerce from the Perspective of Legal Certainty*, 8 U.C. DAVIS J. INT'L L. & POL'Y 133, 212 (2002); Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 BERKELEY TECH. L. J. 1345 (2001).

292 *See*, *e.g.*, Hall v. LaRonde, 66 Cal.Rptr.2d 399, 400 (Cal. Ct. App. 1997), in which the court held that e-mail and telephone communications satisfied the "minimum contacts" requirement for personal jurisdiction.

293 *See* Blake v. Continental Airlines, Inc., 751 A.2d 538 (N.J. 2000).

294 *See* Dow Jones & Co., Inc. v. Gutnick, [2002] H.C.A. 56.

295 Briantech v. Kostiuk, 1999 B.C.D. Civ. J. LEXIS 2020, *32 (quoted in Schafer, supra, at 1186).

296 *See* Pro-C Ltd. v. Computer City, Inc., 55 O.R. (3d) 577. The basis for plaintiff's suit was that the misdirection created an influx of hits that overwhelmed its system, ultimately causing its business to fail.

number of projects in course seeking to establish uniform laws to govern various aspects of e-commerce.[297] CIDIP-VII is very likely to include one or more topics relating to e-commerce. But these topics will likely involve the harmonization of substantive law.

The efforts that have been undertaken so far seeking to address private international law aspects of e-commerce make it clear that the nations of the world are not yet ready to agree on a uniform solution to these probleDr. Indeed, it appears that the challenges posed by the Internet are almost single-handedly responsible for defeating the decade-long efforts of the Hague Conference to elaborate a Convention on Jurisdiction and Enforcement of Judgments.[298] As a result of these difficulties, the Hague Conference has abandoned its ambitious attempt to set forth uniform principles for jurisdiction and enforcement of judgments in civil or commercial matters and replaced it with a far more limited attempt to establish uniform rules for recognizing choice of forum clauses.[299]

For the foregoing reasons, we conclude that it is premature to undertake an effort to harmonize private international law concerning Internet torts in this Americas.

E. CONCLUSIONS

The foregoing analysis supports the following conclusions regarding the suitability of the topics discussed for treatment at this time in an Inter-American instrument regulating jurisdiction and choice of law:

The topic of non-contractual civil liability for harm resulting from traffic accidents is ripe for treatment in an Inter-American instrument. Such an instrument would make a valuable contribution by adopting the common domicile exception to the rule of lex loci delicti. Although there is already a Hague Convention on choice of law on this topic, the convention has not been ratified by any nation of the Western Hemisphere. Because the topic does not implicate the controversial doctrine of forum non conveniens, and because the subject matter is not very complex, this topic would probably produce the smoothest negotiation of the possible categories of non-contractual liability. The principal question is whether the nations of the Hemisphere regard the problems in this area as worthy of attention at the regional level, or instead regard the topic as more suitable for treatment at the subregional level.

The topic of product liability is somewhat more complex, but also ripe for treatment in an Inter-American instrument. There are significant differences in the laws of the Hemisphere regarding the substantive laws of product liability, and choice of law frequently arise because of the increasingly globalized market for such products. Here, too, there is a Hague Convention addressing choice of law, but, again, no nations in the Western Hemisphere are parties.

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297 Most concern substantive law, although a few concern private international law. See WIPO Group of Consultants on the Private International Law Aspects of the Protection of Works and Objects of Related Rights Transmitted through Global Digital Networks, Geneva, Dec. 1998, available at http:// www.wipo.org/eng/meetings/1998/gcpic/index.htm.; see also WIPO Forum on Private International Law and Intellectual Property, Geneva, Jan. 2001, available at http://www.wipo.org/pil- forum/en/documents/index.htm.

298 *See generally* Avril D. Haines, *Why Is It So Difficult to Construct an International Legal Framework for E-Commerce? The Draft Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters: A Case Study*, 3 EUR. BUS. ORG. L. REV. 139 (2002).

299 *See* Report On The Work Of The Informal Working Group On The Judgments Project, In Particular On The Preliminary Text Achieved At Its Third Meeting – 25-28 March 2003, prepared by Andrea Schulz, First Secretary, Preliminary Document No 22 of June 2003.

Numerous distinct solutions to the choice of law problem in product liability cases, but, broadly speaking, most of them share the "grouping of contacts" approach. The particular solutions that have been adopted or proposed in this Hemisphere and elsewhere would produce somewhat different results in highly complex cases, but it is unlikely that further academic work would disclose that one of these solutions is necessarily superior to the others. The time is thus ripe for an Inter-American negotiation to select one or another of the approaches. With respect to jurisdiction, a negotiation in the context of product liability claims could provide an opportunity to address the controversial topic of forum non conveniens. But, because forum non conveniens dismissals are less frequent in product liability cases than in environmental damage cases, the topic could be left out of the negotiations if agreement proves elusive.

The suitability of the topic of transboundary environmental damage presents a more difficult question. Significant challenges are posed by the existence of numerous international instruments governing substantive liability in various sectors, some of which also address jurisdiction and choice of law. Additional challenges are presented by the complex interrelationship between private and public law in this area, both domestic law and international law. Other international bodies are currently addressing the topic, most notably the International Law Commission and the Hague Conference, although the latter' work on the topic is currently without priority. With respect to choice of law, the negotiations are likely to require a possibly intense debate between proponents of the *lex damni* and proponent of the rule of ubiquity. With respect to jurisdiction, the issue of forum non conveniens is likely to prove difficult to resolve. Whether agreement on solutions to the private international law issues raised by this topic is likely to be achieved is a question on which the political bodies may have well-grounded views in the light of the fact that this topic was considered during CIDIP-VI. In any event, success on this topic will require extensive preparatory work, which should ideally include expert in environmental law as well as experts in private international law. The topic should therefore be selected only if the political bodies are ready to commit the necessary resources for the carrying out of the needed work.

The topic of Internet torts is not suitable for treatment in an Inter-American private international law instrument at this time because the phenomenon is too new and insufficient consensus exists on the proper approach to the private international law questions that arise. The topic proved to be the undoing of the Hague Convention on Jurisdiction and Judgments and it would is likely to reach a similar end if considered in the Inter-American context.[300]

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