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RE-EXAMINING THE INTER-AMERICAN CONVENTIONS ON PRIVATE INTERNATIONAL LAW AND THE CIDIP-VII

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

In its 65th Regular Session, held on August 2 – 27, 2004 in Rio de Janeiro, Brazil, the Inter-American Juridical Committee adopted Resolution CJI/RES. 78 (LXV-O/04), by which it approved the agenda for its 66th Regular Session, to be held from February 28 to March 11, 2005. The Committee approved the topic **"Re-examining the Inter-American Conventions on Private International Law," under number 7 of the agenda's "Topics under Consideration,"** as well as the topic entitled **"Seventh Inter-American Specialized Conference on Private International Law" under point 3 of "Topics for Follow-up."** The rapporteurs of both topics are Drs. João Grandino Rodas and Ana Elizabeth Villalta Vizcarra.

Based on the above, this report presents a preliminary progress report on both topics, to be submitted for consideration and initial debate to the Inter-American Juridical Committee in its 66th Regular Session.

In the inter-American system, the juridical framework of private international law is constituted by: conventions, protocols, model laws, legislative guidelines, uniform documents, as well as documents and instruments that regulate relations between individuals within an international context, given that the essence of private international law is to regulate the relations between individuals from different States.

Within the inter-American sphere, the codification of private international law has been one of the States' permanent juridical activities since the final decades of the nineteenth century.

As of 1975, **Inter-American Specialized Conferences on Private International Law** have been the inter-American institutional framework for private international law. Said conferences are convened by the Organization of American States (OAS) every four to six years and are known as CIDIPs (Inter-American Specialized Conferences on Private International Law), which to date have produced 26 international instruments including conventions, protocols, uniform documents and model laws that have contributed substantially to the codification and standardization of the rules of private international law in the Americas.

The **First Inter-American Specialized Conference on Private International Law (CIDIP-I)** was held in Panama City on January 14 - 30, 1975.

This had as antecedents: the mandate given to the Inter-American Juridical Committee by the Inter-American Council of Jurists: to prepare a study on "the possibility of revising, as appropriate, the Bustamante Code (adopted at the Sixth International Conference of American States, held in Havana, Cuba, in 1928, as the single code of private international law), in light of the Montevideo Treaties of 1888-1889 and 1939-1940 (approved in the South American Congresses of Private International Law, held in Montevideo, Uruguay) and the Restatement of the Law of Conflict of Laws, (prepared by the American Law Institute), in order to unify these three codes."

Beginning in 1951, the Inter-American Juridical Committee prepared several reports about the method that could best be used to carry out codification in order to promote standardization of the rules of private international law of the different countries of the Americas. The Committee prepared a comparative study of the Bustamante Code, the Montevideo Treaties and the Restatement of the Law of Conflict of Laws, submitting its report to the governments for consideration. Only the United States and Ecuador sent observations. At this time, the United States considered that it would be impossible to harmonize the Restatement with the Treaties of Montevideo and the Bustamante Code.

The Inter-American Juridical Committee continued with the review upon which it had embarked. In 1959, the Council of Jurists urged the Inter-American Juridical Committee to continue review efforts in order to ensure standardization of the rules of private international law of American nations, attenuating reservations made with respect to the Bustamante Code.

In 1965, the Inter-American Juridical Committee recommended that a Specialized Conference be held to review the preliminary heading prepared by the Committee, entitled "International Civil Law and International Commercial Law," and that the conference use as a working document the Draft Code of Private International Law prepared by Dr. José Joaquín Caicedo Castilla (member of the Inter-American Juridical Committee.)

In Resolution AG/RES. 48 (I-O/71), approved on April 23, 1971, the OAS General Assembly convened the Inter-American Specialized Conference on Private International Law, entrusting the Permanent Council with the preparation of a draft agenda and conference regulations, and entrusting the Inter-American Juridical Committee with the preparation of studies, reports and draft conventions necessary for use in the Conference.

Through Resolution CP/RES. 109 (120/74), dated March 20, 1974, the Permanent Council designated Panama City as the venue of the Conference and presented the following draft agenda:

1. Multinational commercial companies
2. Commercial companies
3. International purchase / sale of goods
4. International bills of exchange, checks and promissory notes
5. International commercial arbitration
6. International maritime transport, with special reference to bills of lading
7. Application of letters rogatory
8. Taking of evidence abroad in civil and commercial affairs
9. Recognition and execution of foreign juridical judgments

10. Legal regime of powers of attorney to be used abroad
11. Action that must be taken in order to develop other topics of private international law

The **Specialized Conference of Panama (CIDIP-I)** initiated the harmonization process of the rules on conflict of laws in the Americas, approving six Inter-American Conventions on International Commerce and Procedural Law.

The following conventions were approved:

The "Inter-American Convention on Letters Rogatory," which entered into effect on January 16, 1976 and has been ratified by 17 States.

The "Inter-American Convention on Conflict of Laws Concerning Bills of Exchange, Promissory Notes and Invoices," which entered into effect on January 16, 1976 and has been ratified by 14 States.

The "Inter-American Convention on Conflict of Laws Concerning Checks," which entered into effect on January 16, 1976 and has been ratified by 9 States.

The "Inter-American Convention on the Taking of Evidence Abroad," which entered into effect on January 16, 1976 and has been ratified by 15 States.

The "Inter-American Convention on International Commercial Arbitration," which entered into effect on June 16, 1976 and has been ratified by 18 States.

The "Inter-American Convention on the Legal Regime of Powers of Attorney to be Used Abroad," which entered into effect on January 16, 1976 and has been ratified by 16 States.

The Conference approved a resolution requesting to the Permanent Council of the OAS that the Inter-American Juridical Committee be entrusted with the prioritized study and preparation of draft conventions on conflict of laws with respect to checks of international circulation and standard law on this same subject.

The **Second Inter-American Specialized Conference on Private International Law (CIDIP-II)** was held in Montevideo, Uruguay from April 23 to May 8, 1979 and was convened by Resolution AG/RES. (V-O/75), approved by the OAS General Assembly on May 19, 1975.

The General Assembly entrusted the Permanent Council and the Inter-American Juridical Committee with the preparation of a draft agenda, regulations and standard studies on the subjects to be discussed. The Permanent Council approved the draft regulations, and the Inter-American Juridical Committee prepared draft conventions. This Conference adopted eight international instruments (seven conventions and one protocol) concerning aspects of international commercial law and international procedural law, as well as general aspects related to the subject.

The following conventions were adopted:

The "Inter-American Convention on Conflicts of Laws Concerning Checks," which entered into effect on June 14, 1980 and has 8 ratifications.

The "Inter-American Convention on Conflicts of Laws Concerning Commercial Companies," which entered into effect on June 14, 1980 and has 8 ratifications.

The "Inter-American Convention on the Domicile of Natural Persons in Private International Law," which entered into effect on June 14, 1980 and has 6 ratifications.

The "Inter-American Convention on Execution of Preventive Measures," which entered into effect on June 14, 1980 and has 7 ratifications.

The "Inter-American Convention on General Rules of Private International Law," which entered into effect on June 10, 1981 and has 10 ratifications.

The "Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards," which entered into effect on June 14, 1980 and has 10 ratifications.

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The "Inter-American Convention on Proof and Information on Foreign Law," which entered into effect on June 14, 1980 and has 12 ratifications.

The "Additional Protocol to the Inter-American Convention on Letters Rogatory," which entered into effect on June 14, 1980 and has 14 ratifications.

The **Third Inter-American Specialized Conference on Private International Law (CIDIP-III)** was held in La Paz, Bolivia from May 15 to 24, 1984. It was convened by Resolution AG/RES. 505 (X-O/80), approved by the OAS General Assembly on November 27, 1980. In this resolution, it was recommended that the Permanent Council prepare a draft agenda and regulations for CIDIP-III, and that the Inter-American Juridical Committee prepare the reports and draft conventions necessary for the conference.

The Permanent Council approved the draft regulations, and in its Regular Sessions of 1981, 1982, 1983 and 1984 the Inter-American Juridical Committee prepared the draft conventions.

The following conventions were adopted:

The "Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors," which entered into effect on May 26, 1988 and has 6 ratifications.

The "Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments," which entered into effect on December 24, 2004 and has 2 ratifications.

The "Inter-American Convention on Personality and Capacity of Juridical Persons in Private International Law," which entered into effect on September 8, 1992 and has 4 ratifications.

The "Additional Protocol to the Inter-American Convention on the Taking of Evidence Abroad," which entered into effect on November 28, 1992 and has 4 ratifications.

The **Fourth Inter-American Specialized Conference on Private International Law (CIDIP-IV)** was held in Montevideo, Uruguay from July 9 to 15, 1989. It was convened through Resolution AG/RES. 771 (XV-O/85), approved by the OAS General Assembly on December 9, 1985, and which, among other things, entrusted the Permanent Council with preparation of a draft agenda and regulations for CIDIP-IV and the Inter-American Juridical Committee with preparation of draft conventions and the respective Statement of Reasons necessary for the Fourth Conference.

Through Resolution CP/RES. 486 (717/87), the Permanent Council approved the following draft agenda on October 23, 1987:

1. Abduction and return of children
2. Land transportation
3. International contracting, and
4. Support obligations

The Conference approved three conventions:

The "Inter-American Convention on Contracts for the International Carriage of Goods by Road," which has not yet entered into effect and has no ratifications.

The "Inter-American Convention on the International Return of Children," which entered into effect on November 4, 1994 and has 11 ratifications.

The "Inter-American Convention on Support Obligations," which entered into effect on March 6, 1996 and has 11 ratifications.

Held in Mexico City from March 12 to 19, 1994, the **Fifth Inter-American Specialized Conference on Private International Law** was convened through OAS General Assembly Resolution AG/RES. 1024 (XIX-O/89). The same resolution convened a Meeting of Experts on the topic of international contracts, which took place in Tucson, Arizona (USA) on November 11-14, 1993, and requested that respective documents be prepared by the General Secretariat and that the draft agenda be prepared by the Permanent Council. Through Resolution CP/RES. 588 (911/92), the Permanent Council approved the following draft agenda: law applicable to international contracts; civil and penal aspects of traffic in minors; and juridical aspects of private international law concerning contracts for the transfer of technology. The same resolution requested that the Inter-American Juridical Committee prepare draft conventions and respective studies. For this reason, the Inter-American Juridical Committee presented: a draft for an international convention on "Law Applicable to International Contracts," a study on the "preparation of rules for the regulation of international juridical businesses that so require and of international contracts," and general guidelines related to a "Draft Inter-American Convention on International Traffic in Minors," resulting from a Meeting of Experts on traffic in minors held in Oaxtepec, Morelos, Mexico on October 13-26, 1993, sponsored by Inter-American Children's Institute and the government of Mexico.

Two conventions were approved at this Conference:

The "Inter-American Convention on International Traffic in Minors," which entered into effect on August 15, 1997 and has 11 ratifications.

The "Inter-American Convention on Law Applicable to International Contracts," which entered into effect on December 15, 1996 and has 2 ratifications.

Convened by OAS General Assembly Resolution AG/RES. 1339 (XXIX-O/96), the **Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI)** was held in Washington, D.C. from February 4 to 8, 2002. Preparatory documents for this Conference included the presentation and report of the Inter-American Juridical Committee entitled "CIDIP-VII and Beyond" (CJI/doc.74/01); the document CIDIP-VI/doc.10/02; the report prepared by the Secretariat for Legal Affairs of the OAS General Secretariat, entitled "The History of the CIDIP Process" (CIDIP-VI/doc. 11/02); as well as results from the meetings of delegations of experts for CIDIP-VI.

Through Resolution AG/RES. 1472 (XXVII-O/97), the OAS General Assembly instructed the Permanent Council to continue its study on the topics of CIDIP-VI.

Through Resolution CP/RES. 744 (1185/99), the Permanent Council approved the draft agenda, which was subsequently ratified by the General Assembly as follows:

- I. Standardized commercial documentation for international transportation, with special reference to the 1989 Inter-American Convention on Contracts for the International Carriage of Goods by Road, with the possible incorporation of an additional protocol on bills of lading.
- II. International loan contracts of a private nature, in particular the uniformity and harmonization of international laws governing transactions secured with movable property, commercial, and financial guarantees.
- III. Conflict of laws on extracontractual liability, with an emphasis on competency of jurisdiction and applicable law with respect to civil international liability for transboundary pollution

CIDIP-VI approved the following international instruments:

- Model Inter-American Law on Secured Transactions
- Inter-American Uniform Through Bill of Lading for the International Carriage of Goods by Road – Negotiable
- Inter-American Uniform Through Bill of Lading for the International Carriage of Goods by Road – Non-Negotiable

With respect to point III of the approved agenda, the Conference did not reach agreement about any instrument. Instead, it adopted a resolution requesting further studies by the Inter-American Juridical Committee with respect to the topic of extracontractual liability in cases of cross-border contamination, including the examination of documents and precedents, the preparation of a report, and, if approved, the preparation of a draft international instrument to be presented to a group of experts and subsequently submitted for consideration to the General Assembly in 2003.

The Inter-American Juridical Committee designated Dr. Carlos Manuel Vázquez and Dr. Ana Elizabeth Villalta Vizcarra as rapporteurs of this report. They presented their respective reports in the 61st, 62nd and 63rd Regular Sessions of the Inter-American Juridical Committee, concluding their final report in the 63rd Regular Session.

The Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII)

Through Resolution AG/RES. 1923 (XX(III-O/03), entitled "Preparations for the Seventh Inter-American Specialized Conference on Private International Law," approved on June 10, 2003, the OAS General Assembly resolved, among other things: to convene the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII), to instruct the Permanent Council, with assistance from the General Secretariat, to carry out preliminary consultations with respect to the dates and possible venue for CIDIP-VII and to create mechanisms that facilitate consultations with Member States with respect to the draft agenda and regulations for the Conference; and to instruct the Inter-American Juridical Committee to continue presenting its comments and observations with respect to the agenda proposed for CIDIP-VII.

In this respect, Inter-American Juridical Committee document CJI/doc. 89/02 entitled "Sixth Inter-American Specialized Conference on Private International Law (CIDIP-VI)," presented by Dr. Carlos Manuel Vázquez and Dr. João Grandino Rodas, refers to three topics mentioned in the Inter-American Juridical Committee report regarding the themes of CIDIP-VII: electronic commerce, transnational insolvency, and migration and the free movement of persons.

Through Resolution AG/RES. 2033 (XXXIV-O/04) entitled "Inter-American Specialized Conferences on Private International Law," approved on June 8, 2004, the OAS General Assembly resolved, among other issues, the following: to urge those Member States that had not yet done so to present proposals and observations with respect to the possible agenda of CIDIP-VII; to request that the Permanent Council, with collaboration from the General Secretariat, study the topics proposed by Member States, as well as the topics' viability and inclusion on the agenda of CIDIP-VII; to entrust the Permanent Council to continue its consultations about the possible venue and date for the Seventh Inter-American Specialized Conference on Private International Law; and to request that the Inter-American Juridical Committee contribute to preparatory efforts for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) once the Permanent Council approves the agenda for said Conference.

To date, member States have presented the following topics:

Peru: 1) Transportation: multimodal approach (land, air, sea); 2) Electronic commerce: investment values; 3) Electronic commerce: electronic commercial registries.

El Salvador: 1) Standardization of university degrees: free professional exercise; 2) Extracontractual civil liability: road accidents; Extracontractual civil liability: products; Extracontractual civil liability: environmental contamination.

Brazil: 1) Electronic commerce; 2) Transnational commercial insolvency; 3) Transnational movement: migratory flow of persons; 4) Consumer protection: Inter-American Convention on Consumer Protection in the Americas.

Mexico: 1) Electronic commerce: juridical aspects on the use of electronic media; consumer protection; 2) Transnational movement: migratory flow of persons; 3) Protection of minors.

Canada: 1) Electronic commerce: jurisdictional aspects regarding consumer protection.

Uruguay: 1) International jurisdiction; 2) Extracontractual civil liability: environmental contamination; 3) Electronic commerce: jurisdiction with respect to transnational Internet transactions between businesses and consumers.

United States: 1) Electronic commerce: investment values; 2) Electronic commerce: electronic commercial registries.

Chile: 1) Electronic commerce: investment values; 2) Electronic commerce: electronic commercial registries.

The preparatory stage of the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) continues. A draft agenda must be approved in order to set the date and venue for the holding of the Conference.

OAS General Assembly Resolutions AG/RES. 1923 (XXXIII-O/03) and AG/RES. 2033 (XXXIV-O/04), respectively, instruct the Inter-American Juridical Committee to continue presenting its comments and observations with respect to the agenda proposed for CIDIP-VII and to contribute to preparatory efforts for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) once the Permanent Council approves the agenda for said Conference.

As of 1975, Inter-American Specialized Conferences (CIDIPs) have been the mechanism used by the inter-American system. These Conferences have produced 26 international instruments on different aspects related to juridical and judicial cooperation between States, promoting security in civil, family, commercial and procedural relations.

A total of 23 international conventions were produced in the First, Second, Third, Fourth and Fifth Inter-American Specialized Conference on Private International Law, and three international instruments

were produced in CIDIP-VI. Of the 23 conventions, only the "Inter-American Convention on Contracts for the International Carriage of Goods by Road" is not in effect.

Although 22 Inter-American Conventions produced in the CIDIPs are in effect within the system, it is important to emphasize that, as of CIDIP-IV, the number of ratifications by Member States has decreased, as has the number of States participating in the Conferences. This is of great concern for the process of progressive codification of private international law, as well as for the harmonization of rules of private law in the Americas.

In this sense, it is necessary to ensure greater involvement in the CIDIP process, particularly in the progressive codification and development of the rules of private international law. In this area, inter-American law has played a pioneering role through many of its institutions, especially having produced the single code on private international law: the Bustamante Code, approved at the Sixth International Conference of American States in 1928. It is necessary to preserve this historical wealth of international law in the Americas, an effort in which the Inter-American Juridical Committee has played a direct and effective part.

For this reason, the CIDIP process must continue to be strengthened as the appropriate path toward progressive codification and development of private international law in the Americas. Efforts must be made to promote and strengthen both the traditional approach of this process, focusing on the preparation of a set of rules, and its modern approach, striving for the harmonization of substantive law. There must be flexibility in each specific case, adopting the approach most appropriate for each particular context.

With respect to the approach focusing on the adoption of model laws, it is necessary to disseminate the benefits that such laws represent for harmonization of the rules of private international law in the Americas, along with the ways in which they can be adopted and implemented in the internal legislation of States. Not all member States of the OAS have the juridical culture of model laws but rather follow the traditional approach of adopting Conventions and then ratifying or approving them in domestic legislation, thus converting them into part of the State's body of laws. For this reason, during preparatory efforts for the Seventh Inter-American Specialized Conference on Private International Law (CIDIP-VII) a commission should be established to analyze why the rate of ratification of inter-American conventions on private international law is decreasing and why there is no legislative application of model laws. This may result in the need to publicize the advantages that achieving effective codification and progressive development of the rules of private international law within the inter-American system would have for the juridical security of relations between individuals from member States of the Organization of American States (OAS) and for juridical and judicial cooperation.