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## CONSIDERATION ON CODIFICATION AND STANDARDIZATION OF PRIVATE INTERNATIONAL LAW IN THE AMERICAS

(presented by Dr. Ana Elizabeth Villalta Vizcarra)

### I. RESOLUTION OF THE INTER-AMERICAN JURIDICAL COMMITTEE, CJI/RES.99 (LXVII-O/05)

The Inter-American Juridical Committee, during its 67<sup>th</sup> regular session (August 1-19, 2005) in the city of Rio de Janeiro, Brazil, approved Resolution CJI/RES.99 (LXVII-O/05) under the name of *Theme for the 68th regular session of the Inter-American Juridical Committee* (Washington, D.C., March 20-31, 2006), in which the topics under consideration and in progress were adopted for the said regular session of the Inter-American Juridical Committee.

On this matter, in the text, A. Topics under Consideration, number 3, the topic was approved on “Consideration on Codification and Standardization of Private International Law in the Americas”, and its Rapporteurs are Drs. João Grandino Rodas, Antonio Fidel Pérez and Ana Elizabeth Villalta Vizcarra.

In compliance with this Resolution herein, the undersigned as one of the rapporteurs of the topic presents at this 68th regular session of the IAJC the following report:

#### A. Background

In the work of codifying and unifying private international law in the Americas the Organization of American States (OAS) and the Inter-American Juridical Committee (IAJC) gave a valuable contribution toward adopting regulations on conflicts of laws and uniform rules to bring the systems of Civil Law and Common Law closer for unifying private international law.

The progress of this codification work in America is due first and foremost to the international treaties on the matter; first when the Panama Congress was convened by Simon Bolivar in 1824, then the 1878 *Lima Treaty*, which was the first treaty on private international law both on the American continent and in the world, as an outcome of the Lima Congress of 1877-1878 known as “Congress of American Legal Advisors”, and then the *Montevideo Treaties* of 1889-1890, produced by the First Montevideo Congress 1888-1889.

The second stage included the “American International Conferences”, which not only addressed themes on private international law but also topics on political and economic unions, the latter being discussed between 1889 and 1954 in ten American International Conferences. One of the most important on this matter was the “6<sup>th</sup> American International Conference”, in Havana, Cuba, in 1928, which approved the *Bustamante Code* in a joint effort of America to codify private international law, between the guidelines given in the 1878 *Lima Treaty* and those provided in the

*Montevideo Treaties* of 1889-1890.

Later, and with the idea of commemorating the *Montevideo Treaties* of 1889-1890, a second “Montevideo Congress of 1939-1940” was convened, which produced the *Montevideo Treaties* of 1939-1940, updating those of 1889-1890.

In the first stages of developing the codification of private international law of the Americas, the conflictual method for harmonization was predominant. It was also thought convenient to prepare a single code to reconcile the principles established in the *Bustamante Code*, *Montevideo Treaties* and *Restatement of the Law of Conflict of Laws of the United States of America*. This gave rise to the idea of holding a “Specialized Conference on Private International Law”, which would also be responsible for updating the law of conflicts of the Americas in order to adapt it to the modern requirements of private international law in general.

On April 23, 1971, the OAS General Assembly met in San José, Costa Rica, at the recommendation of the Inter-American Juridical Committee (IAJC), and called a Specialized Conference on Private International Law later to be known as CIDIP. The preliminary to this meeting was the “Inter-American Conference on problems of War and Peace” held in Mexico in 1945, when it agreed to reorganize, consolidate and strengthen the inter-American system.

Accordingly, the Organization of American States (OAS) in conjunction with the Inter-American Juridical Committee (IAJC), called Sixth Inter-American Specialized Conferences on Private International Law (CIDIP) in Panama (1975), Montevideo (1979), La Paz (1984), Montevideo (1989), Mexico (1994) and Washington, D.C. (2002); it is now in the process of preparing for the Seventh Specialized Conference on Private International Law.

#### B. The CIDIP Process in the Inter-American System

Since 1975 the inter-American institutional framework of private international law has been the Inter-American Specialized Conferences on Private International Law, which are convened by the Organization of American States (OAS) every four or six years and known as CIDIPs (Inter-American Specialized Conferences on Private International Law). To date they have produced 26 international instruments, as follows: 21 conventions, 2 additional protocols, 2 standard instruments and a model law that contributed substantially to the codification and standardization of the private international law rules in America, as well as their upgrade.<sup>5</sup>

It is necessary for the Organization’s Member States to be more involved in the CIDIP process, particularly in codification and progressive development of the private international law regulations, in which America did pioneering work in many of its institutions. It also produced the *Single Code of Private International Law*, the *Bustamante Code*, approved at the Sixth American International Conference in 1928, and it is necessary to preserve these historic archives of American international law.

We must join forces to make the CIDIP codification an ongoing job with a promising future. It must be borne in mind that the CIDIP work contributed towards upgrading the Private International Law regulations in the different American States.

The influence of the CIDIP codification process on the state systems of various OAS member States is remarkable, as follows: the 1989 *Uruguayan Societies Act*, 1998 *Venezuelan Private*

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<sup>5</sup> Maekelt, Tatiana B. de. *El Futuro de la Codificación del Derecho Internacional Privado en América: La Codificación Interamericana desde la Perspectiva de la Codificación estatal de Derecho Internacional Privado*. 2003.

*International Law Act*, for example; as well as reforms in a number of *Civil Codes of the American States*.

On this matter, the CIDIP process should continue to be reinforced as the right road to codification and progressive development of private international law in the inter-American system, promoting and consolidating both its traditional focus on harmonizing a body of regulations (conventions) and the modern focus on harmonizing the *Substantive Act* (Model Act). There should be flexibility in any concrete case and a more traditional focus should be adopted in any particular case.

This significant change was noticed precisely at the 6<sup>th</sup> CIDIP (Washington, D.C. 2002). Two texts were approved that did not respond to the traditional mechanism of the inter-American conventions. One was the *Model Law on Secured Transactions* and the other was a standard document on land transport. Neither of these instruments required ratification by the OAS member States in order to be implemented.

It seemed that the reason for this change was the difficulty of some member States in not being able to ratify some of the conventions produced within the CIDIP because, when they are negotiated in the desire to achieve consensus and conclude the text, they failed to produce a document that met every Party's expectations.

With regard to model laws, many issues of interest to the parties were not discussed since they did not address a concluded product and when not being ratified the States adopted the model law that most suited them for their respective internal legal systems.

The choice of one or other methodology should depend on the subject to be regulated and the situation at the time. In some cases a model law will be used and in others the international convention will be more useful. Nevertheless, the chosen method should be assessed to include that which relates to the jurisdiction regulations, applicable law, cooperation, and so on.

With regard to the focus on adopting model laws, it is necessary to disseminate their benefits in harmonizing the private international law regulations in the Americas, and the way to adopt and implement them in the internal legislation of the States, since not all OAS member States have a model law culture.

Prof. Diego P. Fernandez Arroyo is one of the authors of the *Inter-American Conventions of Private International Law* who has been using it as model laws, even though this was not its purpose, since many of its regulations have been incorporated in the national systems through reforms in civil and procedural codes.<sup>6</sup>

Today the CIDIP contributes toward modernizing the state systems of private international law in America, and toward harmonizing and unifying its regulations, and the South American professors of private international law highlighted it in their *Declaration of Cordoba* dated December 18, 2003, on the future of the CIDIP process, held in the Law and Social Sciences Faculty of the National University of Cordoba, Argentina, and on which they stated the following, for example:

Persuaded by the significant modernizing impact that inter-American conventions and other documents adopted by CIDIP have had on national and subregional private international law systems; Wishing to pursue and improve a

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<sup>6</sup> FERNÁNDEZ ARROYO, Diego P. *Derecho Internacional Privado Interamericano: Evolución y Perspectivas*. 2003.

codification process which has produced clearly positive results, so that it may continue to generate common solutions to current legal problems; Pleased with the past and present efforts pursued by the OAS, through its Department of Legal Affairs (and the entities which preceded it as such) and the Inter-American Juridical Committee, despite budget restrictions; Concerned that the work that needs to be continued in the area of inter-American codification not be affected by these restrictions; Guided by an integrationist spirit, that encompasses all the interests of the OAS member states regarding determination of the topics requiring hemispheric regulation, and the appropriate methodology in each case; Aware of the situation of the member states and subregional integration groups in the hemisphere, within a much more highly inter-related world.<sup>7</sup>

On this matter, some of the most relevant statements are:

That the international codification of private international law on a regional level continues to be necessary from a legal and political standpoint; That the Americas, a pioneering continent in international efforts to harmonize and standardize private international law, has the historic duty to maintain this tradition, by cultivating a constructive dialogue with other codification forums in the world; That the OAS continues to be the appropriate forum to continue developing the process of codification of private international law in the Americas; That, in this regard, a certain permanence and specialization of work on private international law within this regional Organization would be ideal; That, in order for this work to continue exercising its positive influence on national and subregional legal systems in our Hemisphere, it is essential to update its content and its methodology, so that they are adapted to today's circumstances and needs; That to this end, it is important that the thematic agenda for codification reflect the interests of the different countries and integration plans in the Americas in a balanced manner; That, while there are issues of great importance in the area of trade, related to the different trade agreements being developed by countries of the Hemisphere, the exponential increase in international legal relations of private law in the hemisphere also calls for a need to take up issues more closely related to matters of civil and procedural law; That among civil matters, there are various aspects of the protection of persons with insufficient faculties, the economic system of matrimony, and extracontractual liability, among others, that appear *prima facie* as lending themselves to inter-American regulations; That, with regard to procedural matters, the problem of international jurisdiction in matters of private international law and the review of regulations related to the extraterritorial validity of judicial decisions should be given priority on the regional agenda; That, with reference to regulations on international contracting, special attention should be paid to aspects of private international law pertaining to contracts concluded by workers and by consumers; That whatever matters are taken up by the regional entity, the solutions determined should be guided by criteria of reasonability and justice, attention should be paid to their relationship with already existing conventional texts, and, above all, they should be directed to solving the problems currently arising in our countries; That it is vitally important that our governments establish national and multinational working groups

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<sup>7</sup> *Declaration of Cordoba*. December 18, 2003

in charge of maximizing efforts in relation to future CIDIP processes...<sup>8</sup>

The South American professors agreed as far as possible to persuade the authorities of their own countries about the importance of the CIDIP work and how it was of the utmost importance for the Latin American States to play an active and decisive role in the inter-American forum.

This demonstrates the revitalizing boost that the CIDIP process has today, which is confirmed by the considerable increase in ratifications by the American States for the instruments arising from all editions of the CIDIP since 1995, by which the inter-American conventions continue to be a valid benchmark.<sup>9</sup>

There are more than fifty ratification instruments deposited since that date, which confirms yet again that for the OAS member States the inter-American conventions on private international law continue to be a current source in the codification of law in the hemisphere and that the States are increasingly committed to belong and be bound to the CIDIP.

CIDIP is the natural and valid forum for harmonizing, standardizing and codifying private international law in the Americas, since all OAS member States are the CIDIP, equally participating with a right to speak and vote on all themes, such as: theme, preparatory documents, preparing international instruments in specialized conferences. On the other hand, the American States do not all have a relevant participation in the universal forums of codification of the uniform rules of private international law and on some occasions participated as ad-hoc members.

So much so that other codification forums must not be regarded merely as a duplication of efforts but, on the contrary, must be considered from the contributions that they can bring to inter-American codification, as well as preparing standards more suited to the needs of the region.

Although it is certain that the CIDIP in its early stages was a predominantly Latin American forum, Canada participates since 1990 as an OAS member State, and the CARICOM States also, so that Belize has been included in almost all conventions relating to minors.

The integration processes in America led to the need to harmonize and standardize the laws in the corresponding areas, which gave rise to several international instruments in different matters relating to private international law.

In the different integration processes on the American continent, one of them most concerned with legislating about private international law is MERCOSUR, which has become practically an example of subregional codification of private international law, especially in the sphere of international civil procedural law, international jurisdiction, recognition and execution of immigration decisions, as well as relating to procedural immigration and international legal aid, concerning both general and private international law.

The CIDIP process grew more interesting after CIDIP-V, in which the USA also played an important role, hosting a meeting of experts in Tucson, Arizona (November 11-14, 1993) on international hiring. This demonstrates that CIDIP continues to be committed to drafting modern standards of private international law adaptable to the requirements of the OAS member States.

In modernizing the current CIDIP codification process there is a clear tendency on its agenda toward marketing as a product of the peak of the free trade in the region, since most American States have in their databases "Free Trade Treaties". This trend can be confirmed after CIDIP-V

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<sup>8</sup> *Ibid*

<sup>9</sup> FERNÁNDEZ ARROYO, Diego P. *Razones y condiciones para la continuidad de la CIDIP: Reflexiones de Cara a la CIDIP*. 2005.

and reaffirmed in the topics proposed for CIDIP-VII.

Nevertheless, the commercial topic has been addressed right from the start of the CIDIP, since at the First Inter-American Specialized Conference on Private International Law, CIDIP-I (Panama 1975) the *Inter-American Convention on International Trade Arbitration*, for example, was approved, which currently has 18 ratifying States.

An effective participation of the Latin American countries - “first players” – in the CIDIP process, of Canada in 1990 with CIDIP-V, Belize included in the inter-American conventions relating to minors and with the USA’s strong interest in CIDIP VI, to achieve a balanced agenda of topics that reflects the priorities of all States in the inter-American system, but in turn it must not be a loaded agenda that is unable to carry out its mission; the task of effectively including all CARICOM member States in the CIDIP process is also still pending.

Currently there is a change in methodology in this modernization with regard to drafting international instruments in the CIDIP process, since there is favoritism in using model laws and not the conventional system. Given this situation it is convenient to maintain adequate flexibility in each concrete case and adopt the most appropriate focus in each particular context to harmonize Civil Law with Common Law.

It is necessary for this work of codification in the CIDIP process to become an ongoing activity with suitable infrastructure in order to be able to have a permanent office in the Organization of American States (OAS), which permits continued harmony in the work of the different groups participating in the CIDIP process.

## II. CONCLUSIONS

On the American continent since the beginning there has been a distinct trend towards international codification of private international law, especially based on regional solidarity, in the need to assure its independence and own development.

This codifying drive has been developing since the *Lima Treaty* in 1878, *Montevideo Treaties* of 1889-1890 and 1939-1940, and the 1928 *Bustamante Code*, to the current codifying process of CIDIP, which began in 1975 in Panama, with a new consistent methodology in formulating conventions on specific previously identified topics, namely, partial and progressive codification.

In the early stages, the process of codification of private international law in the Americas is eminently conflictual through the preparation of merely attributive regulations that determined the applicable law. Later, closer inter-American relations and socioeconomic changes made it necessary to update the conflicts of law on the American continent and renew the same private international law, to be in accordance with both regional and universal realities and advances. The Inter-American Specialized Conferences de Private International Law (CIDIP) originated in this framework to form the new stage in codification and progressive development of private international law in the inter-American system, which has been in existence for more than thirty years.

It is necessary for CIDIP to continue to contribute toward the progressive development and codification of private international law, with a relative redefinition of its objectives, so that the Organization’s member States make good use of the CIDIP work and must actively participate in drafting its texts.

Accordingly, the leading role of CIDIP is undeniable in developing, harmonizing and codifying private international law in the inter-American system.

It is exactly at this new stage of codification of private international law in the inter-American system where there is the need for all those involved to do their utmost together to make the work at this stage of codification ongoing and therefore lead the codifying process to a promising future. One main reason is because with globalization and integration processes, the solutions are now required for international problems, because we must have international instruments to meet the current requirements.

This integration process in the different subregions of the organization caused marked interest in trade on the agenda of the latest CIDIPs, since trade requires greater legal security in its transactions.

This new stage in the codifying process made the experts seriously reflect on the matter. This is why the Inter-American Juridical Committee addressed the situation with the document *CIDIP VII and successive stages*, which in turn gave the results of a survey to the experts on private international law who gave their opinion on the matter. Likewise, the South American professors of private international law consider this situation in their 2003 *Cordoba Declaration*, in which they discuss the future of the CIDIP process.

Progress in the integration process, and free trade treaties coming into effect, force us to be ready with the proper legal framework in which the private international law regulations will play a leading role, which is why further emphasis should be given to the current efforts to obtain closer unification with more harmonious solutions in an increasingly interdependent and globalized world.

The CIDIP continues firm in its mission to draft modern private international law regulations suitable for the requirements of the member States in the inter-American system, since the American legal unification corresponds to common interests that require a certain historic social conjuncture.

This future in the development of the CIDIP, as mentioned, can be successful and promising if it has the decisive and unconditional support of all sectors involved in codification of private international law in the Americas, participating actively and seriously in the preparatory work for the forthcoming CIDIP-VII. This is the only way in which those involved in the private international law of the continent will succeed in surmounting and overcoming those setbacks and challenges to classify and standardize the regulations of private international law in the Americas.

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