

**PROMOTING THE RULE OF LAW AND ECONOMIC DEVELOPMENT  
THROUGH PRIVATE INTERNATIONAL LAW**

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*Summary:* I. The Expanding Scope of Private International Law. II. How Private International Law Contributes to Economic Development. III. How Private International Law Contributes to the Rule of Law. IV. Conclusion.

Public international law and private international law are often considered two separate (if related) fields. According to the generally accepted distinction, the former deals only with relations between sovereign states and international organizations, while the latter concerns transactions and relationships between individuals and private entities. For many academics, only the former is truly *international law*. By distinction, private international law consists largely of *domestic* laws, rules and principles. Private international law is typically defined as the law governing questions arising in transnational situations involving private parties, including in particular such issues as jurisdiction, conflicts of law, and enforcement of judgments.

That distinction is no longer accurate, if it ever was. Public international law increasingly speaks to the rights and obligations of individuals and other non-state entities. At the same time, private international law is no longer a uniquely domestic domain, but has become a proper and active area of international articulation and codification. It covers a vast area, from transnational commercial agreements to child support and family maintenance, from consumer protection to the transportation of goods by sea and the regulation of intermediated securities. Without question, the international community today is broadly involved in formulating truly *international* rules and procedures applicable to private individuals, transactions and relationships. These rules and principles are increasingly formulated in international bodies and interpreted and applied by international tribunals as well as domestic courts and tribunals.

Alex Mills emphasizes these points in his recent book, *The Confluence of Public and Private International Law*.<sup>1</sup> Among other things, Mills considers that the classic distinction between public and private international law obscures the important function of private law in public ordering as well as in regulating private international transactions and disputes. He contends that one should view private international law “not as a series of separate national rules, but as a single international system, functioning through national courts.” From this perspective, Mills contends, private international law is properly considered as reflecting concepts of “justice pluralism” based on principles of tolerance and mutual recognition.

Mills thus approaches the issue from the perspective of a single functional system in which rules of private international law reflect “openness to the

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<sup>1</sup> Alex Mills, *The Confluence of Public and Private Law* (Univ. of Cambridge Press 2009).

legitimacy of foreign norms” and work to promote what he calls “justice pluralism” in a distributed network of international ordering. “[T]he operation of private international law constitutes an international system of global regulatory ordering ... a system of secondary legal norms for the allocation, the ‘mapping,’ of regulatory authority.” On this view, he contends, rules of private international law are not concerned simply with *private rights* but also with *public powers*, especially the allocation of national regulatory authority in a transnational context.

Over the long term, some observers argue, the distinction between public and private will – indeed must – disappear. In *The New Global Law*, for example, Professor Rafael Domingo postulates a different kind of unification between the public and private spheres.<sup>2</sup> The inevitable consequence of globalization, according to Domingo, is the emergence of a new form of “global law” based on the concept of personal dignity rather than the sovereignty of states. This new system will be centered on the person as the primary subject of the cosmopolitan society. It will be based on eight principles of world political morality: the unity of mankind, the immorality of the arbitrary use of force, the limitation of sovereignty by law, impartial justice administered by third parties, good faith, fair dealing, mutual aid and respect for human dignity. As a result of this “cosmopolitan transformation,” the distinction between public and private will become “secondary.”<sup>3</sup>

In Domingo’s conception, a globally-ordered world governed by a “legal system for humanity” (which he terms “anthroparchy”) will necessarily be non-territorial. The nation state and its notions of sovereignty will be replaced by a more complex yet interdependent *communitas* in which the notion of jurisdiction (as it is familiar to us) has little if any application. One can suppose that such a world will have little need of the traditional principles and mechanisms of private international law, yet Domingo appears to reserve a central place for *lex privata*, for he states clearly that “[t]he relationship between public and private is harmonious when it springs forth from the human being.”<sup>4</sup>

In different ways, and to differing degrees, both Domingo and Mills harken back to the origins of private international law in the *ius gentium* concepts of Roman law as well as pre-positivist concepts of “natural law.” One need not subscribe to natural law principles, however, much less to endorse a utopian notion of a fully integrated and harmonious human society, in order to acknowledge the growing functional importance of private international law in an increasingly globalized, interconnected society.

The place of private law in this emergent world is the subject of an important new theoretical work by Professors Calliess and Zumbansen entitled *Rough*

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<sup>2</sup> Rafael Domingo, *The New Global Law* (Cambridge University Press, 2010).

<sup>3</sup> *Id.* at 103

<sup>4</sup> *Id.* at 110.

*Consensus and Running Code: A Theory of Transnational Private Law.*<sup>5</sup> Noting that “law has become distinctly and irreversibly transnational,” the authors endeavor to describe how law functions today in a “dramatically disembedded global institutional environment.”<sup>6</sup> They focus in particular on consumer law and corporate governance to illustrate the de-territorialized regulatory challenges facing the contemporary global legal community. They conclude that the current theoretical framework of social norms theory, soft law and customary international law is inadequate to explain the developing relationship between law and non-law that characterizes current concepts of transnational governance. In place of those concepts, they propose the concept of “rough consensus and running code” to describe the emergence of a “mixed, public-private, dynamic norm-creation process” operating at different levels in a rapidly changing international environment.<sup>7</sup>

By comparison to these theoretical inquiries, the thesis of this article is far more straightforward. It is simply that private international law plays an increasingly important role in the evolving international system and contributes directly and substantially to promoting economic development and the rule of law. More specifically, private international law, the rule of law, and economic development are not three separate endeavors, only tangentially related. To the contrary, each directly supports the other. They are, in other words, properly considered as the three points of a triangle. This is, regrettably, a point sometimes overlooked in the larger debate.

## **I. The Expanding Scope of Private International Law**

The field of “private international law” is sometimes considered arcane, not least because the term itself lacks a universally agreed definition. This is hardly surprising, since it is often given different meanings in different legal cultures or systems. In one conception, sometimes espoused by North American academics, it is narrowly equated with *conflicts of laws* -- that is, the specialized principles and rules of national law used by domestic courts to determine which of several competing laws applies to disputes involving people in different countries or of different nationalities or to transactions which cross international boundaries. In such situations, for instance, courts might need to decide whether to apply the law of the forum, the law of the individual’s nationality, or the law of the site of the

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<sup>5</sup> Gralf-Peter Calliess and Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart 2010).

<sup>6</sup> *Id.* at p. x.

<sup>7</sup> *Id.* at p. 277. Another important effort to describe this phenomenon is Michael Faure and André van der Walt, *Globalization and Private Law: The Way Forward* (Edward Elgar 2010), which addresses the importance of institutional globalization, the rising influence of non-traditional legal sources, and an expansion in the notions of constitutional democracy, all of which pose challenges for issues arising in private legal relationships and mechanisms of dispute settlement, including questions of convergence, divergence, accountability and legitimacy.

transaction or occurrence. Many U.S. practitioners and judges think of “private international law” as referring primarily if not exclusively to these rules by which domestic courts make such choices.

A broader view, increasingly held by practitioners who have been trained in civil law systems, expands the definition to include the provisions of domestic (national) law governing the *exercise of domestic jurisdiction* over people, property and transactions in trans-border situations, as well as the *enforcement of foreign judgments*. Here, the main questions tend to focus on the permissible scope of a given court’s authority to hear disputes involving foreigners and foreign transactions and to recognize and enforce judgments resulting from adjudications in foreign courts. In many countries, these provisions are comprehensively codified.

All three areas – jurisdiction, choice of law, and enforcement of judgments - remain at the heart of most private international law endeavors in one way or another. Private international law conventions, for example, generally aim at coordinating these issues between sovereign states and their differing legal systems. But many experienced transnational practitioners (and perhaps international lawyers more generally) today find even this broader definition increasingly – and misleadingly - restrictive.

When one takes into account the accomplishments and on-going projects of the main international organizations where private international principles and instruments are currently being developed,<sup>8</sup> an even broader definition seems necessary. That more inclusive definition incorporates not only the *procedural mechanisms* for avoiding and overcoming divergent national rules but also the articulation of *substantive principles of law* aimed at promoting the harmonization and even codification of legal rules across different legal systems.

For example, with regard to the first (or procedural) aspect, most international practitioners have had some opportunity to use the mechanisms of *international judicial assistance* for which the Hague Conference on Private International Law (the Hague Conference) is justifiably well-known.<sup>9</sup> Among its most widely

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<sup>8</sup> These include the Hague Conference on Private International Law (the “Hague Conference”), the UN Commission on International Trade Law (“UNCITRAL”), the International Institute for the Unification of Private Law (“UNIDROIT”), and the Organization of American States (OAS). Increasingly, the rules and regulations adopted by the European Union also exert an important influence on the formation and content of private international law throughout the world. See, for example, Ralf Michael, “EU Law as Private International Law,” 2 J. Priv. Int’l L. 485 (2006).

<sup>9</sup> The Hague Conference was established in 1893 and became a permanent institution in 1955. Its objective is to work for the progressive unification of private international law rules, inter alia by finding internationally-agreed approaches to issues such as jurisdiction of the courts, applicable law, and the recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status. Its

adopted instruments are the 1965 Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters<sup>10</sup> and the 1970 Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters.<sup>11</sup> As their titles suggest, these treaties are intended to facilitate service of process and evidentiary discovery in foreign countries through agreed mechanisms of “central authorities.” Even more widely ratified is the 1961 Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents (the “Apostille” Convention),<sup>12</sup> which facilitates the circulation of public documents executed in one State Party to the Convention to be accepted and given effect in another State Party to the Convention.

Within the western hemisphere, counterparts to the first two of these conventions have been adopted by the Organization of American States (the OAS).<sup>13</sup> The 1975 Inter-American Convention on Letters Rogatory<sup>14</sup> and the 1975 Inter-American Convention on the Taking of Evidence Abroad (together with its additional protocol)<sup>15</sup> serve similar functions but are not as widely ratified or consistently applied as their Hague counterparts.

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current membership includes 69 states and the European Union, although many non-member states are parties to one or more of its conventions. Generally, see <http://www.hcch.net>.

<sup>10</sup> The text of the Hague Service Convention, model forms, and additional information can be found at [http://www.hcch.net/index\\_en.php?act=text.display&tid=44](http://www.hcch.net/index_en.php?act=text.display&tid=44).

<sup>11</sup> For the Hague Service Convention, see [http://hcch.e-  
vision.nl/index\\_en.php?act=conventions.text&cid=82](http://hcch.e-<br/>vision.nl/index_en.php?act=conventions.text&cid=82).

<sup>12</sup> For the Hague Apostille Convention, see [http://hcch.e-  
vision.nl/index\\_en.php?act=conventions.text&cid=41](http://hcch.e-<br/>vision.nl/index_en.php?act=conventions.text&cid=41).

<sup>13</sup> The Organization of American States (OAS) is the primary regional organization in the American hemisphere. Within the Secretariat, work on issues of private international law is coordinated by the Department of International Law. The negotiation of new principles and instruments among the member states is conducted primarily through the well-known process of specialized conferences on private international law (Conferencia de Derecho Internacional Privado or “CIDIP”). Generally, see [http://www.oas.org/dil/privateintlaw\\_interamericanconferences.htm](http://www.oas.org/dil/privateintlaw_interamericanconferences.htm). The first CIDIP was held in 1975, and over the years five more conferences have taken place, resulting in some 26 separate instruments (including 20 conventions, 3 protocols, 1 model law and 2 “uniform documents”). These instruments cover various topics and are designed to create an effective legal framework for judicial cooperation between member states and to add legal certainty to cross border transactions in civil, family, commercial and procedural dealings of individuals in the Inter-American context. CIDIP-VII is currently underway, much of its work being conducted electronically.

<sup>14</sup> The text of the 1975 Inter-American Convention on Letters Rogatory is available at <http://www.oas.org/juridico/english/treaties/b-36.html>. Its 1979 Additional Protocol can be found at <http://www.oas.org/juridico/english/treaties/b-46.html>.

available at <http://www.oas.org/juridico/english/treaties/b-37.html>. Its 1984 Additional Protocol can be found at <http://www.oas.org/juridico/english/treaties/b-51.html>.

<sup>15</sup> The text of the 1975 Inter-American Convention on the Taking of Evidence Abroad is available at <http://www.oas.org/juridico/english/treaties/b-37.html>.

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In the field of international commercial arbitration, the United Nations Commission on International Trade Law (UNCITRAL) has long played a leading role.<sup>16</sup> UNCITRAL is a subsidiary body of the General Assembly and the UN's principal legal body in the field of international trade law. It comprises sixty member States elected by the General Assembly and focuses on the modernization and harmonization of rules on international business, most importantly by preparing texts for use by States in modernizing their domestic laws and by commercial parties in negotiating transactions.

Among UNCITRAL's best-known achievements are the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), the 1976 UNCITRAL Arbitration Rules (designed primarily for *ad hoc* or non-institutional arbitrations and revised in 2010), and the 1985 UNCITRAL Model Law on International Commercial Arbitration (amended in 2009).<sup>17</sup> These instruments have long served a vital function in promoting arbitration as an effective dispute settlement mechanism in international trade and commerce.

As important as these procedural mechanisms are – and they are clearly relevant to the promotion of the rule of law and economic development – much more is to be said about the on-going efforts of the PIL community on the second aspect, namely, substantive harmonization and unification. In an increasingly inter-connected world, the harmonization functions of private international law assume ever greater practical importance in promoting trade, commerce and economic development. Official development assistance and other government-to-government programs are of course vital, but at its core the process of globalization is pervasively a result of private activity.<sup>18</sup> It is driven by expanding markets, increasing mobility, quick and reliable financial transactions, and virtually unlimited, instantaneous information exchange through the mass-media and the Internet.

A central goal of private international law efforts is to facilitate this activity by removing legal obstacles through greater harmonization and unification of the relevant legal norms and principles. These efforts provide the parties to cross-

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<sup>16</sup> The United Nations Commission on International Trade Law (UNCITRAL) was established in 1966 to serve as the primary legal body of the UN in the field of international trade law. Comprising sixty member States elected by the General Assembly for six year terms, the Commission functions primarily through six working groups. The Working Groups do the substantive preparatory work on specific topics: procurement, international arbitration and conciliation, transport law, electronic commerce, insolvency and security interests. Generally, see <http://www.uncitral.org>.

<sup>17</sup> These and other UNCITRAL texts are available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts.html](http://www.uncitral.org/uncitral/en/uncitral_texts.html).

<sup>18</sup> On the importance of private development assistance generally, see Symposium, "The Role of Private Assistance in International Development," 42 N.Y.U. J. Int'l L. & Pol. 1091 (2010).

border transactions a much greater degree of legal clarity, certainty and predictability in their civil and commercial dealings. In turn, they contribute directly to economic progress and prosperity in developing countries, especially those lacking the legal and transactional infrastructure necessary to participate fully and efficiently in the modern global economy.

Put differently, states with little or no experience in private international law matters, and those which lack the necessary legal infrastructure to participate actively and effectively in the globalized economy, tend to be severely disadvantaged in international trade, investment and capital markets. One of the purposes of the private international law project is to assist them in gaining the knowledge and experience needed to overcome this deficiency. In this sense, private international law broadly conceived is an important – even essential - tool of international economic development and progress.

The main theme of this paper is simply that in both of these dimensions – along the facilitative and procedural axis as well as along the substantive or harmonizing axis – the continuing efforts of the PIL community to elaborate principles and mechanisms directly contribute to promoting both the rule of law and economic development. This proposition is easily substantiated by even brief descriptions of some of the important efforts underway in the Hague Conference, UNIDROIT, UNCITRAL and the OAS. In different ways, each reflects the commitment of private international law to principles of cooperation, coordination, and consistency.

## **II. How Private International Law Contributes to Economic Development**

In clarifying and harmonizing the rules and principles that apply to transnational civil and commercial dealings, and by enhancing party autonomy in ordinary commercial contracts, private international law facilitates the successful conclusion of commercial transactions and the avoidance (as well as prompt and efficient resolution) of disputes arising thereunder. By reducing or removing legal obstacles to the flow of international trade, especially those affecting the developing countries, it contributes directly to economic development. Consider, for instance, the following somewhat diverse but illustrative examples.

### *1. Principles of International Commercial Law*

Differences in the domestic laws of various trading partners clearly complicate the conclusion of trans-border contractual arrangements. Harmonization of substantive commercial law principles obviously assists contracting parties in reaching agreement on the terms of their deals as well as in the resolution of disputes arising thereunder.

Most international commercial and transactional lawyers in the United States, for example, are familiar with the Convention on the International Sale of Goods and Services (“CISG”), adopted by UNICITRAL in 1980 and now ratified by

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seventy-six UN member states including the United States.<sup>19</sup> As a self-executing treaty, the CISG is the law throughout the United States with respect to contracts that fall within its scope, displacing state law to the extent of any inconsistency.<sup>20</sup>

The International Institute for the Unification of Private Law (UNIDROIT) has long been a leader in the effort to harmonize commercial law.<sup>21</sup> UNIDROIT's stated purpose is to study needs and methods for modernizing, harmonizing and coordinating private and in particular commercial law as between States and groups of States. To this end, in 2004 UNIDROIT adopted two sets of non-binding principles: one entitled the Principles of International Commercial Contracts (updated in 2010) and other entitled the Principles of Transnational Civil Procedure (done in co-operation with the American Law Institute).<sup>22</sup>

While neither is binding (in the sense of a treaty or domestic law), each has gained normative legitimacy and may be described as a form of "soft law." In particular, the Principles of International Commercial Contracts are increasingly adopted by parties to trans-border commercial dealings and often referred to by tribunals in international commercial arbitration.<sup>23</sup>

## 2. *Choice of Law in International Contracts*

A different approach towards facilitating commercial agreements is to focus on choice of law rules rather than the substantive principles themselves. Within the OAS, for example, the latter approach is reflected in the 1994 Inter-American Convention on the Law Applicable to International Contracts (the so-called "Mexico City Convention"), which prescribes choice of law rules for international contracts between parties whose habitual residences or establishments are in different States Parties (or contracts with "objective ties" with more than one State Party). The Convention expressly privileges party autonomy by requiring no

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<sup>19</sup> For the text of the 1980 CISG Convention, the current list of States Parties, and UNCITRAL's Digest of Case Law under that convention, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/sale\\_goods/1980CISG.html](http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html).

<sup>20</sup> Decisions applying the CISG may be found at <http://www.globalsaleslaw.org/index.cfm?pageID=28>.

<sup>21</sup> UNIDROIT's membership consists of 63 States representing a wide range of different legal, economic and political systems as well as different cultural backgrounds. The most recent additions were the Kingdom of Saudi Arabia and the Republic of Indonesia. Generally, see <http://www.unidroit.org>.

<sup>22</sup> The 2010 edition of UNIDROIT's Principles of International Commercial Contracts was approved in May 2011 and has recently been published by UNIDROIT in a stand-alone volume. The ALI/UNIDROIT Principles of Transnational Civil Procedure were published in 2006 by Cambridge University Press. The texts of both sets of the Principles are available at <http://www.unidroit.org/english/principles/main.htm>.

<sup>23</sup> See, generally, Michael Joachim Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, 3d ed. 2009.

nexus between the chosen law and the parties, subject of course to certain exceptions. When the parties have not selected the applicable law, or if their selection proves ineffective, the Convention provides that the contract will be governed by the law of the State with which it has the closest ties.<sup>24</sup>

For its part, the Hague Conference recently established a Working Group on Choice of Law in International Contracts. The goal of this Working Group, which consists of various national experts from the fields of conflict of laws, substantive commercial law, and international arbitration law, is to consider developing a non-binding instrument designed to promote party autonomy in international commercial contracts.<sup>25</sup> The inclusive structure of this group also illustrates another important feature of contemporary private international law efforts – the practice of including in the deliberations a range of objective views and experiences by gaining the participation of experts in the substantive issues together with those likely to be most affected by the outcome. The aim is typically to find widely acceptable ways of resolving the issues under study, while avoiding politicization or political conflict between different states.

### 3. *Electronic Commerce*

Increasingly, international commercial transactions are carried out through electronic data interchange and other means of communication, commonly referred to as "electronic commerce." These involve the use of alternatives to paper-based methods of communication and storage of information. Unfortunately, domestic legislatures have on the whole been slow to adapt to these technological innovations, and inconsistencies between national legislation have hindered transacting parties.

One often-useful approach to the challenges of legislative modernization is through formulation of proposed "model laws" at the international level, which can be adopted by the national legislatures of diverse countries on the basis that they represent agreed international standards. This was the approach followed by UNCITRAL in the field of electronic commerce. In 1996, it adopted a model law intended to facilitate the use of electronic commerce on a basis acceptable to States with different legal, social and economic systems.<sup>26</sup> In 2001, it adopted a

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<sup>24</sup> For the text of the Convention see <http://www.oas.org/juridico/english/treaties/b-56.html>. In substance its rules are not dissimilar to those recently adopted by the European Union in its "Rome I Regulations" or to the proposed revisions to UCC 1-301. To date, only Mexico and Venezuela are parties to the Convention. Bolivia, Brazil and Uruguay have signed but not yet ratified.

<sup>25</sup> Information on the Working Group's efforts is available at [http://www.hcch.net/index\\_en.php?act=text.display&tid=49](http://www.hcch.net/index_en.php?act=text.display&tid=49).

<sup>26</sup> See [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/1996Model.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model.html). Within the United States, 47 states and the District of Columbia have adopted the 1996

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second model law, aimed at legitimizing the use of electronic messaging and identification by making “electronic signatures” the functional equivalent of handwritten signatures.<sup>27</sup>

Treaties can serve the same modernizing function as model laws but by comparison do so by imposing legally binding obligations on states parties requiring them to conform their laws to the treaty requirements. For instance, in 2005, UNCITRAL adopted the UN Convention on the Use of Electronic Communications in International Contracts.<sup>28</sup> The central premise of the Convention (like the earlier Model Law) is “functional equivalency,” so that information in electronic (data message) form will not be denied legal effect, validity or enforceability solely on the grounds of its electronic nature. To date, eighteen countries have signed this treaty, including Russia and China. The United States currently has it under active consideration for ratification.

#### 4. *Secured Interests*

Access to adequate and affordable credit is unquestionably an essential element in economic development, and in the case of private trade and commercial transactions, access to secured credit is frequently a *sine qua non*. Modern transactional regimes must balance and effectively protect the interests of all participants, including the grantors of security rights, the secured and unsecured creditors, retention-of-title sellers and financial lessors, privileged creditors and even the insolvency representative in the grantor’s insolvency.

Among the first international instruments to address these issues was the 2001 UN Convention on the Assignment of Receivables in International Trade.<sup>29</sup> The purpose of the Convention, prepared and agreed to within UNCITRAL, is to promote the development of international trade by facilitating the financing of receivables at affordable rates. It offers a comprehensive approach to the rules governing the transfer by agreement of all or part of or an undivided interest in the assignor’s contractual right to payment of a monetary sum (the “receivable”) from a third person (“the debtor”). It applies to assignments of international

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Model Law and a parallel federal law (the Electronic Signatures and Global E-commerce Act) that defers to the uniform state law to the extent a state has adopted it.

<sup>27</sup> The text of the UNCITRAL Model Law on Electronic Signatures is available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2001Model\\_signatures.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_signatures.html).

<sup>28</sup> UN Doc. A/RES/51/162 (Jan. 30, 1997). The text of the 2005 Convention is available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005Convention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html).

<sup>29</sup> The text of the Receivables Convention and related information is available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/payments/2001Convention\\_receivables.html](http://www.uncitral.org/uncitral/en/uncitral_texts/payments/2001Convention_receivables.html). To date, only Liberia has ratified this convention; Luxembourg, Madagascar and the United States have signed.

receivables, and to international assignments of receivables, if at the time of conclusion of the contract of assignment the assignor is located in a State Party (in some circumstances it may also apply to subsequent assignments). However, the Convention has not been widely accepted.

Considering that the international community might be more inclined to address these issues at the domestic level (rather than through a binding treaty), UNCITRAL subsequently turned its attention to preparation of a Legislative Guide on Secured Transactions, which was adopted in 2007.<sup>30</sup> The purpose of this “soft law” instrument is to assist States in developing a modern and efficient legal regime for security interests in goods involved in commercial activities, including inventory. It is premised on the fact that by attracting credit from domestic and foreign lenders, such a regime promotes the development and growth of domestic businesses (in particular small and medium-sized enterprises) and generally increases trade.

In 2010, UNCITRAL adopted a Supplement to its Legislative Guide on Secured Rights in Intellectual Property,<sup>31</sup> intended to make credit more available and at a lower cost to intellectual property owners and other intellectual property rights holders, thus enhancing the value of intellectual property rights as security for credit. The Supplement seeks to help States adjust their laws to avoid inconsistencies between secured financing law and the law relating to intellectual property, without interfering with fundamental policies of law relating to intellectual property.

##### *5. Registering Security Interests in Mobile Equipment*

Along similar lines, the international community has been working for a number of years to harmonize the mechanisms for registering ownership and security interests. Registration is a central feature of the priority structure of the law applicable to security interests in most types of collateral, and the primary role of a registry is to provide for public disclosure of security interests. Widely differing approaches in national laws towards security and title reservation rights can drastically inhibit the extension of finance and can be especially harmful to trade with and investment in developing countries. Standardization promotes competition, provides greater certainty and transparency for transacting parties, reduces transaction costs, and makes credit cheaper – all essential elements in the development process.

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<sup>30</sup> UNCITRAL’s Legislative Guide on Secured Interests, together with related information, is available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/payments/Guide\\_securedtrans.html](http://www.uncitral.org/uncitral/en/uncitral_texts/payments/Guide_securedtrans.html).

<sup>31</sup> For the text of the Supplement on Security Interests in Intellectual Property, see [http://www.uncitral.org/pdf/english/texts/security-lg/e/10-57126\\_final\\_jan\\_2011.pdf](http://www.uncitral.org/pdf/english/texts/security-lg/e/10-57126_final_jan_2011.pdf).

A key private international law instrument in this effort is UNIDROIT's 2001 Convention on International Interests in Mobile Equipment (often referred to as the Capetown Convention).<sup>32</sup> As the title indicates, its focus is on secured interests in easily identifiable, high-value mobile equipment which can readily move across national boundaries. Among other things, the Convention provides for the creation of a recognized international security interest sufficient to protect the interests of the creditors. It establishes the means for the electronic registration of those interests, in order to provide notice to third parties and thus to enable creditors to preserve their priority against subsequently registered interests, any unregistered interests, and potentially the debtor's insolvency administrator.

This Convention also identifies a range of remedies for creditors in the event of default as well as a means of obtaining speedy interim relief pending final determination of its claim on the merits. The objective is to give potential creditors greater confidence in their decision to grant credit, to enhance the credit rating of equipment receivables, and to reduce borrowing costs to the advantage of all interested parties. The Convention entered into force in 2006, and to date 41 states have ratified or acceded, and 16 others have signed but not yet become parties.

A protocol to the Capetown Convention (adopted at the same time as the Convention itself) addresses the particular issues related to security interests in aircraft equipment. As of the end of 2010, it has been ratified by 35 states and signed by 16 others.<sup>33</sup> A second protocol was concluded in 2007 covering the financing of railroad rolling stock (such as engines, freight cars, and passenger cars).<sup>34</sup> Work is currently proceeding on a possible third protocol addressed to space-based assets.<sup>35</sup> In time, UNIDROIT expects to turn to a fourth protocol covering mobile agricultural, construction and mining equipment.<sup>36</sup> Clearly, the Capetown system promises to have a significantly beneficial impact on the prospects for financing many types of commercial dealings.

#### 6. *Electronic Registration of Security Interests*

The OAS has also been active in the field of secured interests. In 2002, as part of its CIDIP VI efforts, it adopted a Model Inter-American Law on Secured

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<sup>32</sup> Information about the 2001 Cape Town Convention, including its text, can be found at <http://www.unidroit.org/english/conventions/mobile-equipment/depositaryfunction/main.htm#NR2>.

<sup>33</sup> See <http://www.unidroit.org/english/conventions/mobile-equipment/aircraftprotocol.pdf>.

<sup>34</sup> For the "Luxembourg" protocol on railroad rolling stock, including its text, see <http://www.unidroit.org/english/conventions/mobile-equipment/railprotocol.pdf>.

<sup>35</sup> On the space-based assets protocol, see <http://www.unidroit.org/english/workprogramme/study072/spaceprotocol/main.htm>.

<sup>36</sup> Regarding UNIDROIT's future program, see <http://www.unidroit.org/english/workprogramme/main.htm>.

Interests, aimed at regulating security interests and securing the performance of any obligations in movable property.<sup>37</sup> States adopting the Model Law undertake to create a “unitary and uniform registration system applicable to all existing movable property security devices in the local legal framework.”<sup>38</sup>

To supplement the Model Law, proposed Model Registry Regulations were approved by CIDIP-VII in October 2009. These regulations provide solutions to questions concerning registration and uniformity, and are intended for use in both civil law and common law systems in a cohesive implementation of the Model Law.<sup>39</sup> The intent is to reduce the cost of loans, to assist small and medium sized businesses, and to facilitate international commerce throughout the hemisphere.

### 7. *Intermediated Securities*

Promoting capital formation and enhancing the stability of national financial markets unquestionably contributes to trade and investment in developing countries. Here again, private international efforts have sought to clarify and modernize the relevant law.

In modern securities markets, the traditional concept of custody or deposit of physical certificates evidencing the holder’s interests has become outmoded. The typical investor today never has actual custody of a physical certificate, but instead “holds” securities through a chain of intermediaries that are ultimately connected to the central securities depository. When transactions occur, the securities themselves are not in fact physically moved; instead, their creation and transfer take place electronically, through entries to the accounts concerned. For purposes of efficiency, operational certainty and speed, a system of holding-through-intermediaries has been developed. In many countries, however, domestic law has lagged behind these developments, creating uncertainty and unnecessary risk with respect to trans-border transactions.

In 2006, the Hague Conference took an important step towards addressing these problems by adopting a Convention on the Law Applicable to Certain Rights in respect of Securities Held with an Intermediary.<sup>40</sup> As the title suggests, that treaty was aimed at harmonizing the choice of law rules regarding securities held by an intermediary within the territories of States Parties. It did not address issues of substantive law.

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<sup>37</sup> The text of the 2002 OAS Model law can be found at [http://www.oas.org/DIL/CIDIP-VI-securedtransactions\\_Eng.htm](http://www.oas.org/DIL/CIDIP-VI-securedtransactions_Eng.htm).

<sup>38</sup> Art.1 of the Model Law. Title IV of the Model Law (arts. 35-46) provides for a Registry to be called the Registry of Movable Property Security Interests.

<sup>39</sup> For the model registry regulations, see [http://www.oas.org/DIL/CIDIP-VII\\_doc\\_3-09\\_rev3\\_model\\_regulations.pdf](http://www.oas.org/DIL/CIDIP-VII_doc_3-09_rev3_model_regulations.pdf).

<sup>40</sup> The 2002 Hague Securities Convention is available at [http://hcch.e-vision.nl/index\\_en.php?act=conventions.text&cid=72](http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=72). To date, only Switzerland has ratified this Convention; the United States and Mauritius have signed.

By comparison, a new UNIDROIT Convention on Substantive Rules for Intermediated Securities, adopted in 2009, is intended to harmonize the substantive rules governing the holding, transfer and collateralization of securities in contemporary financial markets. The treaty describes the rights resulting from the credit of securities to an account, details different methods for transferring securities and establishing security and other limited interests in those securities, and clarifies the rules regarding the irrevocability of instructions to make book entries and the finality of the resulting book entries. The Convention also establishes a regime for loss allocation and defines the legal relationship between collateral providers and collateral takers where securities are provided as collateral.<sup>41</sup>

#### 8. *Transportation of Goods by Sea*

It has long been recognized that the international legal framework governing the international carriage of goods by sea, which extends back over 80 years, lacks uniformity and has failed to adapt to modern transport practices such as containerization, door-to-door transport contracts and the use of electronic transport documents. This outmoded legal system imposes significant costs (direct and indirect) on international commerce.

In 2008 UNCITRAL completed several years of intense negotiations by agreeing on a new treaty to replace the antiquated rules contained in such earlier agreements as the Hague, Hague-Visby, and Hamburg Rules.<sup>42</sup> The new U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea was opened for signature following a formal signing ceremony in Rotterdam in the fall of 2009 (and thus was quickly denominated the “Rotterdam Rules”).<sup>43</sup> To date, twenty three States (including the United States) have signed the treaty; on January 19, 2011, Spain became the first to ratify.<sup>44</sup>

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<sup>41</sup> For information on the UNIDROIT securities convention, including text, status and background, see <http://www.unidroit.org/english/conventions/2009intermediatedsecurities/main.htm>. To date, only Bangladesh has signed it.

<sup>42</sup> Formally, the “Hague Rules” are found in the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (done at Brussels on August 2, 1924). The “Hague Visby Rules” refer to the 1968 protocol to the 1924 Convention. For the text of both, see <http://www.admiraltylaw.com/statutes/hague.html>. The “Hamburg Rules” are found in the United Nations Convention on the Carriage of Goods by Sea (done at Hamburg on March 31, 1978). The 1978 Convention is available at <http://www.jus.uio.no/lm/un.sea.carriage.hamburg.rules.1978/doc.html>.

<sup>43</sup> Generally, see <http://www.rotterdamrules2009.com/cms/index.php>.

<sup>44</sup> For the status of signatures (and eventually ratifications) of the 2009 Convention, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/transport\\_goods/rotterdam\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html). The United States is currently considering ratification. The Convention will enter into

The Convention is intended to provide both shippers and carriers with a modernized, balanced and universal regime to support the operation of maritime contracts of carriage including those involving other modes of transport (such as road or rail). In scope, it covers the entire contract of carriage, including: liability and obligations of the carrier, obligations of the shipper to the carrier, transport documents and electronic transport records, delivery of the goods, rights of the controlling party and transfer of rights, limits of liability, and provisions regarding the time for suit to be filed, jurisdiction, and dispute resolution mechanisms.

This new treaty, if widely adhered to, could bring significant benefits for trade with developing countries, many of which are currently party to the 1976 Hamburg Rules.

#### *9. Public Procurement*

Yet another area of UNCITRAL's work with particular significance to economic development concerns public procurement and infrastructure development.

Efforts continue, for example, to revise UNCITRAL's 1994 Model Law on Procurement of Goods, Construction and Services.<sup>45</sup> In most states, government procurement constitutes a large portion of public expenditure. Fair, objective and efficient rules and procedures foster integrity, confidence and transparency. They also promote economy, efficiency and competition and thus lead to increased economic development. The lack of such rules and procedures invites fraud, waste and corruption. The Model Law offers states with disparate legal, social and economic systems a set of 'state of the art' legislative provisions as a means of enhancing their existing procurement laws (or formulating such laws where none currently exist).

Sustainable economic development depends, among other things, on creating a receptive environment that encourages private investment in infrastructure while safeguarding the legitimate public interests of the developing country in question. Viable public-private partnerships require a legislative framework that guarantees transparency, fairness and long-term sustainability, removes undesirable restrictions on private sector participation, and provides effective procedures for the award of privately financed infrastructure projects as well as the resolution of the inevitable disputes which arise thereunder. Recognizing these principles, UNCITRAL adopted in 2002 a Legislative Guide on Privately Financed Infrastructure Projects, intended to assist in the

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force on the first day of the month following the expiration of one year after the date of deposit of the twentieth instrument of ratification, acceptance, approval or accession.

<sup>45</sup> Regarding a description of UNCITRAL's work on procurement of goods and services, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html).

establishment of such a legal framework.<sup>46</sup> The Guide was supplemented in 2003 by Model Legislative Provisions drafted to assist domestic legislative bodies in the establishment of the necessary legal framework.<sup>47</sup>

*10. Cross-border Business Insolvency Law*

By the same token, the contemporary international legal system must provide effective mechanisms for cross-border cooperation in insolvency proceedings where debtors have assets, subsidiaries or inter-linked corporate entities in more than one state. Those mechanisms must also ensure the coordination of collective proceedings and the efficient supervision and administration of the assets, including provisions for multiple parallel insolvency proceedings when they arise. The absence of such laws in many countries has contributed to the economic difficulties recently encountered by many business and trading entities.

UNCITRAL has actively supported the promotion of legal concepts necessary for reorganization and refinance to be available as a means to retain operation of failed businesses. Here, one may point to its 1997 Model Law on Cross-Border Insolvency, followed by its 2004 Legislative Guide on Insolvency Law.<sup>48</sup> The Guide is intended to be used as a reference by national authorities and legislative bodies in preparing new laws and regulations or reviewing the adequacy of existing laws and regulations.

More recently, in 2009, the Commission adopted a Practice Guide on Cross-Border Insolvency Cooperation. Based upon collected experience and practice, this Guide illustrates how to facilitate the resolution of issues and conflicts arising in cross-border insolvency cases through cross-border cooperation, in particular the use of various international agreements. It also includes summaries of the cases in which the cross-border agreements that form the basis of the analysis were used.<sup>49</sup>

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<sup>46</sup> For the 2000 Legislative Guide, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/2001Guide\\_PFI.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2001Guide_PFI.html).

<sup>47</sup> The Model Legislative Provisions can be retrieved at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/procurement\\_infrastructure/2003Model\\_PFI.html](http://www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2003Model_PFI.html).

<sup>48</sup> For the 1997 Model Law on Cross-Border Insolvency, as well as UNCITRAL's 2004 Legislative Guide and its 2009 Practice Guide on Cross-Border Insolvency Cooperation, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html).

<sup>49</sup> For information on UNCITRAL's 2009 Practice Guide, and its more recent Legislative Guide on Insolvency Law: Part Three: Treatment of enterprise groups in insolvency, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency.html).

### III. How Private International Law Contributes to the Rule of Law

International efforts to promote and develop the “rule of law” generally aim at institutional and capacity-building. The ultimate objective is to establish a system that guarantees that, in their dealings with the government and each other, individuals and other entities enjoy liberty, justice and the protection of fair and impartial laws and procedures. The concept of “rule of law” is premised on governmental integrity, accountability, legitimacy and transparency. It works to ensure that governmental authority is exercised in accordance with clear, objective, and publicly disclosed laws. Those laws must be adopted and enforced through established procedures and in compliance with internationally recognized standards. One universally accepted standard is an independent and impartial judiciary, but alternative dispute settlement mechanisms, including (but not necessarily limited to) arbitration, may also contribute effectively to the protection of personal and property rights.

The focus of these efforts is typically at the domestic level, to improve the situation in a given country where the attributes of an effective “rule of law” have been lacking or circumscribed. The international dimension often receives less attention. The preceding discussion demonstrates, however, how private international law contributes not only to economic development but also to the strengthening of the rule of law at the intra- and inter-state levels.

For one example, one need only consider UNCITRAL’s contributions to international commercial arbitration through the 1958 UN Convention on the Recognition and Enforcement of Arbitral Awards,<sup>50</sup> the 1976 UNCITRAL Arbitration Rules,<sup>51</sup> and the 1985 Model Law on International Commercial Arbitration<sup>52</sup> – all of which are foundational instruments governing the process of settling transnational commercial disputes through arbitration rather than domestic court litigation.

#### *1. Consumer Protection*

Another current example of the contributions of private international law to “rule of law” institution building is provided by the on-going negotiations within the OAS on improving consumer protection within the hemisphere. In 2003, when

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<sup>50</sup> The text of the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (frequently referred to as the New York Convention) is available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html).

<sup>51</sup> The 1976 Arbitration Rules and information about the continuing efforts to modernize them are available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html).

<sup>52</sup> The 1980 Model Law was revised and updated in 2006. Both texts can be found at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html).

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CIDIP-VII was convened by the OAS General Assembly, states agreed to focus *inter alia* on the topic of consumer protection, and in particular on means of facilitating the effective resolution of disputes in cross-border consumer transactions.<sup>53</sup> The goal, of course, is to provide consumers with effective, economical and expeditious alternatives to traditional forms of litigation in their domestic courts, while at the same time facilitating cross-border trade and lowering transaction costs.<sup>54</sup>

Since then, an OAS Working Group has been considering several possible approaches. One, put forward by Brazil, Argentina and Paraguay, proposed a new multilateral Convention on Consumer Protection and Choice of Law. Alternatively, Canada offered a draft Model Law on Jurisdiction and Choice of Law for consumer contracts. For its part, the United States promoted a Model Law on Consumer Dispute Settlement and Redress which would, among other things, establish an expeditious, low-cost and “user friendly” procedure for resolving “small claims” in cross-border consumer contracts as an alternative to litigation in domestic courts.

These proposals represent markedly different approaches to resolving the problem faced by individual consumers who purchase goods or services transnationally.<sup>55</sup> Whichever approach is ultimately endorsed (the Canadian proposal was recently withdrawn), it will only be effective to the degree that it actually contributes to the orderly and expeditious resolution of cross-border consumer disputes for individuals within the Americas.

## 2. Access to Information

A key component in any system characterized by the rule of law is guaranteeing citizens access to government information. In a democracy, such access is considered an indispensable political right, because it is essential to the electorate’s ability to make informed decisions. It works to ensure government accountability and responsiveness to public needs. It also serves to protect

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<sup>53</sup> Article 39 of the OAS Charter recognizes “the close interdependence between foreign trade and economic and social development” and calls upon member States to work towards “economic and social development” through “orderly marketing procedures that avoid the disruption of markets, and other measures designed to promote the expansion of markets and to obtain dependable incomes for producers, adequate and dependable supplies for consumers, and stable prices that are both remunerative to producers and fair to consumers.” See [http://www.oas.org/dil/treaties\\_A-41\\_Charter\\_of\\_the\\_Organization\\_of\\_American\\_States.htm#ch5](http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm#ch5).

<sup>54</sup> For general information on this effort, see [http://www.oas.org/dil/department\\_special\\_legal\\_programs\\_consumer\\_protection.htm](http://www.oas.org/dil/department_special_legal_programs_consumer_protection.htm).

<sup>55</sup> Information on these various proposals is available at [http://www.oas.org/dil/CIDIP-VII\\_topics\\_cidip\\_vii\\_consumerprotection\\_introduction.htm](http://www.oas.org/dil/CIDIP-VII_topics_cidip_vii_consumerprotection_introduction.htm).

individual rights. Lack of access undermines trust, fosters inefficiency and invites corruption.

Here again, the OAS is making an important contribution to rule of law promotion within the hemisphere. The Inter-American Democratic Charter recognizes that transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy.<sup>56</sup> In 2009, the OAS General Assembly directed the preparation of a draft Model Law on Access to Information, together with an implementation guide, for the consideration of member states. The final versions of both documents were completed in the spring of 2010 and have recently been approved by the OAS's Committee on Juridical and Political Affairs.<sup>57</sup>

### 3. *Choice of Forum in Commercial Contracts*

As indicated at the outset of this discussion, a trio of issues lie at the core of many, perhaps most, private international law issues: the jurisdiction of courts, the choice of law, and the enforceability of judicial judgments. Despite their centrality, these topics remain among the most difficult.

To date, for example, the international community has been unable to reach general agreement about (i) the permissible bases of domestic court jurisdiction over civil and commercial cases involving foreign parties or transactions, (ii) a unified approach to choice of law issues in cross-border transactions, or (iii) the specific grounds on which foreign judicial judgments will be recognized or enforced in domestic courts. For a number of years, negotiations on a multilateral treaty covering these areas were conducted at the Hague Conference, but they ultimately failed.<sup>58</sup> Thus, at the global level, there is still no "civil litigation" analogue to the United Nations Convention on the Recognition and Enforcement

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<sup>56</sup> See [http://www.oas.org/charter/docs/resolution1\\_en\\_p4.htm](http://www.oas.org/charter/docs/resolution1_en_p4.htm) for the text of the Inter-American Democratic Charter. In the Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs. Judgment of September 19, 2006, Series C No. 151, at para. 86, the Inter-American Court of Human Rights noted that, in accordance with art. 13 of the American Convention on Human Rights, "the State's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately." The English text of the judgment is available at <http://www.corteidh.or.cr/casos.cfm?idCaso=245>.

<sup>57</sup> For information on the Model Law on Access to Information and accompanying legislative guide, see [http://www.oas.org/dil/access\\_to\\_information\\_model\\_law\\_final.htm](http://www.oas.org/dil/access_to_information_model_law_final.htm).

<sup>58</sup> For background information on the proposed jurisdiction and judgments convention, see R. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, available for download at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1412669](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1412669).

of Arbitral Awards (the “New York Convention”)<sup>59</sup> or its OAS counter-part, the Inter-American Convention on International Commercial Arbitration.<sup>60</sup>

But from the failed negotiations in The Hague over a possible multilateral “jurisdiction and judgments” treaty arose a new and ultimately successful proposal for a convention addressed specifically to contractual “choice of court” clauses in international civil and commercial contracts. The Hague Conference on Private International Law adopted this new Convention on Choice of Court Agreements in June 2005, and it is now open for signature and ratification.<sup>61</sup>

The Choice of Court Agreements Convention addresses a gap in the current fabric of international commercial dispute settlement by providing that States Parties must recognize and give effect to “exclusive choice of court agreements” (in U.S. parlance, these are sometimes called “forum selection clauses”). Such clauses are often employed when contracting parties do not wish to utilize non-judicial mechanisms such as arbitration. Obviously, they will agree to litigate in a specific court or judicial system only if they have assurance that the chosen jurisdiction will in fact hear the case and that the resulting judgment will be recognized and enforced in other countries.

Thus, the new Convention sets forth three basic rules to be applied in all States Party with respect to choice of court agreements falling within its scope: (i) the court chosen by the contracting parties has (and must exercise) jurisdiction to decide a covered dispute, (ii) courts *not* chosen by the parties do *not* have jurisdiction and must suspend or dismiss proceedings if brought, and (iii) a judgment from a chosen court rendered in accordance with such an agreement must be recognized and enforced in the courts of other States party to the Convention. By its terms, the Convention applies only to *exclusive* choice of court clauses, but States Parties have the option (by taking a declaration) of permitting

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<sup>59</sup> For the text and other information about the UN Convention on the Recognition and Enforcement of Arbitral Awards, see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html).

<sup>60</sup> Inter-American Convention on International Commercial Arbitration (the “Panama Convention”), available at <http://www.oas.org/juridico/english/treaties/b-35.html>. Of course, within the OAS system, a few States are party to the 1979 Inter-American Convention on the Extraterritorial Validity of Foreign Judgments and Arbitral Awards as well as the 1984 Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments. See <http://www.oas.org/juridico/english/treaties/b-50.html>.

<sup>61</sup> The text of the Hague Convention on Choice of Court Agreements is available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=98](http://www.hcch.net/index_en.php?act=conventions.text&cid=98). An important background (explanatory) resource is the 2007 Explanatory Report by Trevor Hartley & Masato Doguchi, which can be found at [http://www.hcch.net/index\\_en.php?act=conventions.publications&dtid=3&cid=98](http://www.hcch.net/index_en.php?act=conventions.publications&dtid=3&cid=98). Thus far, only Mexico has ratified the Convention (on September 26, 2007), although both the United States and the European Community have signed. See [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=98](http://www.hcch.net/index_en.php?act=conventions.status&cid=98).

their courts to recognize and enforce judgments of courts of other States party designated in *non-exclusive* choice of court agreements.

The potential benefits of the Convention for private parties of qualifying transnational contracts are significant. Resting on the principle of party autonomy, it will ensure that the dispute settlement arrangements agreed to by those private contracting parties are honored in the case of domestic court litigation in much the same way as agreements to arbitrate are respected and given effect, thereby promoting certainty and predictability in international trade. Moreover, it will enhance the enforceability of the resulting judgments in the courts of other States parties, helping to redress the “lack of reciprocity” problem which arises when foreign judgments are given more favorable consideration in some national courts than the judgments of those courts receive in foreign courts.

#### 4. *International Family Law*

The rule of law is arguably most important at those junctures where the interests and activities of the state intersect with those of the individual. Few such intersections are more sensitive than those involving families. In a world characterized by rapidly increasing transnational contacts and mobility, international family law has begun to emerge as a field of specialization in its own right. Here again, one finds private international law working to bridge gaps, reduce conflicts and provide orderly and efficient mechanisms of dispute resolution.

The Hague Conference has long been at the center of these efforts. It has, for instance, promulgated a number of important multilateral instruments aimed at the protection of children and other family members. Two of these, both widely ratified, constitute the cornerstones of the still-emerging international regime of child protection: the 1980 Hague Convention on the Civil Aspects of International Child Abduction<sup>62</sup> and the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.<sup>63</sup> The former works to prevent (or undo) the removal of a child by one parent from the country of its habitual

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<sup>62</sup> For the text of the 1980 Abduction Convention and related information, including the Guide to Good Practice, see [http://hcch.e-  
vision.nl/index\\_en.php?act=conventions.text&cid=24](http://hcch.e-<br/>vision.nl/index_en.php?act=conventions.text&cid=24). As of mid 2009, the Convention had 81 States Party. Within the OAS, the relevant treaty is the 1989 Inter-American Convention on the International Return of Children, the text of which can be found at <http://www.oas.org/juridico/english/treaties/b-53.html>.

<sup>63</sup> The Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, along with the 2008 Guide to Good Practice (Implementation and Operation), can be found at [http://hcch.e-  
vision.nl/index\\_en.php?act=conventions.text&cid=69](http://hcch.e-<br/>vision.nl/index_en.php?act=conventions.text&cid=69). As of mid 2009, the Convention had 77 States Party. The relevant OAS treaty is the Inter-American Convention on Conflict of Laws Concerning the Adoption of Minors, available at <http://www.oas.org/juridico/english/treaties/b-48.html>.

residence in violation of the other parent's custodial rights, and the other serves to regularize the process of transnational adoptions, protecting the legitimate interests of all concerned. The United States is a party to both, and both are applied and respected in practice.<sup>64</sup>

In an increasingly globalized world, families frequently span continents. So do family disputes and dissolutions. How are trans-border maintenance and support arrangements to be handled in such cases? Some countries address this issue primarily through bilateral agreements providing for reciprocal recognition and enforcement of support orders in defined circumstances. The United States, for example, is party to more than 20 such agreements with other countries.<sup>65</sup> Within the OAS, the 1989 Inter-American Convention on Support Obligations has twelve States parties.<sup>66</sup> But until recently, a global approach has been lacking.

In November 2007, the Hague Conference adopted a new multilateral instrument, the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.<sup>67</sup> As in other family law agreements, the basic principle is one of reciprocity: a decision on child maintenance and support made in one State Party must be recognized and enforced in other States Party if the first state's jurisdiction was based on one of the accepted grounds enumerated in the Convention. In the United States, courts generally do recognize and enforce foreign child support obligations as a matter of comity, even though U.S. orders may not be given comparable treatment in the originating country. The Convention would regularize this imbalance among all States that adhere to it and will in general work in favor of the children in question. The United States has signed the Convention and is actively pursuing ratification.

While far from a complete description of the growing list of international family law agreements and projects (others include protection of the elderly, recognition of same sex unions, and protection of international migrants), the foregoing serves to illustrate the many ways in which private international works to promote rule of law objectives directly as well as in tandem with economic development.

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<sup>64</sup> For information on U.S. practices under both conventions, including the authority of the U.S. Central Authority, consult the U.S. Department of State website, <http://www.travel.state.gov>.

<sup>65</sup> Information about U.S. arrangements for child support and maintenance, including bilateral treaties, can be found at [http://travel.state.gov/law/family\\_issues/support\\_issues/support\\_issues\\_582.html](http://travel.state.gov/law/family_issues/support_issues/support_issues_582.html).

<sup>66</sup> Text available at <http://www.oas.org/juridico/english/treaties/b-54.html>.

<sup>67</sup> The text of the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (November 23, 2007) along with related documents can be retrieved at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=131](http://www.hcch.net/index_en.php?act=conventions.text&cid=131). For the companion Protocol on the Law Applicable to Maintenance Obligations, see [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=133](http://www.hcch.net/index_en.php?act=conventions.text&cid=133).

#### **IV. Conclusion**

The aim of this short article has been to substantiate the proposition that the principles, instruments and mechanisms of private international law, as reflected in its different endeavors, contribute directly to the trans-border flow of trade, capital, people and ideas, the effective settlement of disputes, the well-being of families and children, and therefore to global economic development and the rule of law. By focusing primarily on the relationship between international and domestic law, private international law adds an essential element to efforts to promote economic progress and the legitimacy of the law internationally as well as domestically. Private international law plays a critical role in helping to ensure that the law can adapt and respond effectively to the changing needs and structure of the international community.

It also suggests that the field of private international law – viewed comprehensively – has several important characteristics. First, the subject matters it covers are diverse, as different as family law, dispute settlement, assets financing, international trade, and consumer protection. Second, they generally involve both substance and procedure, melding questions of conflicts of law, jurisdiction and enforcement of judgments with dispositive principles and rules which speak to the merits of the subjects they treat. Third, in working towards the goals of coordination, unification and harmonization, the international community employs a range of different modalities: formally binding conventions and protocols, non-binding model laws and rules, hortatory principles and legislative guidance and “best practices” - depending on which might be considered most likely to achieve the objective most effectively in light of the circumstances. Fourth, this work takes place in a range of institutional and multilateral forums, rather than simply in national courts or legislatures. This structure permits the active and productive involvement of a wide range of interested parties and other stakeholders, from governments and government agencies to international organizations, non-governmental organizations and relevant elements of the private sector.

Today, private international law is a central, indeed critical field for any international law practitioner, one of growing relevance and importance. In many respects, it represents the future development of transnational legal mechanisms and principles. Wrongly viewed as a rather musty set of doctrinal principles rooted in 19<sup>th</sup> Century European jurisprudence, it is in fact a dynamic and rapidly evolving field of direct relevance to sophisticated lawyers working in a broad spectrum of international and transnational contexts.

