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Regionalism versus Globalism : a View from the Americas

Carlos Manuel Vázquez *

The well-deserved celebration of UNIDROIT's first seventy-five years focused on a topic that is of particular interest to the Organization of American States and to the organ of the OAS to which I belong, the Inter-American Juridical Committee. The topic of the 75th Anniversary Congress – "Worldwide Harmonization of Private Law and Regional Integration" – implicates one of the several dichotomies with which we in the Inter-American system who work on questions of private international law (and international private law) have been grappling in recent years, the problem of regional versus global approaches to the harmonization of private international law (and international private law). In this brief contribution, I shall offer a few comments on this and related dichotomies from the perspective of the Inter-American private international law codification process.

I. – LEGAL HARMONIZATION IN THE AMERICAS : ACHIEVEMENTS AND NEW CHALLENGES

Within the Organization of American States, the elaboration and negotiation of international instruments in the field of private international law, and increasingly in the field of international private law, have occurred within the context of the Inter-American Specialized Conferences on Private International Law, better known by their Spanish acronym, CIDIP.¹ The first CIDIP conference (CIDIP-I) was held in Panama in 1975 and resulted in the adoption of conventions concerning bills of exchange and checks, commercial arbitration, letters rogatory, taking evidence abroad, and the legal regime governing the use of powers of attorney. The most recent CIDIP conference (CIDIP-VI) was held in Washington, D.C., in February 2002, and resulted in the adoption of a *Model Inter-American Law on Secured Transactions* and model *Negotiable and Non-Negotiable Inter-American Uniform Through Bills of Lading for the International Carriage of Goods by Road*. The intervening four CIDIP conferences produced instruments in the following areas: commercial law – including on checks, companies, and contracts; civil procedure – including on enforcement of foreign judgments and arbitral awards, proof of foreign law, taking evidence abroad,

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¹ This stands for *Conferencias Especializadas Interamericanas Sobre Derecho Internacional Privado*.

preventive measures, and general rules of private international law; legal status of persons – including on domicile of natural persons and legal status of juridical persons; and protection of minors – including on adoption, return of children, support and maintenance obligations, and trafficking of minors.

As the CIDIP-VI conference approached, the OAS General Assembly requested the Inter-American Juridical Committee

“to initiate studies for the design of the agenda and topics of the next Inter-American Specialized Conferences on Private International Law (CIDIP) in order to promote the development of private international law in the inter-American system and to present its proposal during the next Specialized Conference (CIDIP-VI) to be held in Guatemala in November 2001.”²

The site of the conference was subsequently moved to Washington, DC, and, due in part to the tragic events in New York and Washington of 11 September 2001, the conference was postponed and eventually took place in February 2002.

The Juridical Committee appointed two of its members as co-rapporteurs of this topic – the then-President of the Committee, João Grandino Rodas (Brazil) and myself. In pursuance of the General Assembly’s mandate, and with the assistance of the OAS Subsecretariat on Legal Affairs, the rapporteurs drafted and distributed a questionnaire soliciting the views of a broad spectrum of parties interested in the CIDIP process, including Member States, academics, members of the private bar, and officials of other organizations specializing in private international law.³ Most of the recipients were from the Americas, but some were from outside the Americas (including most notably representatives of UNIDROIT and UNCITRAL). The questionnaire posed questions of both a specific and a general nature. The specific questions related to the topics that should be addressed in CIDIP and the process for both choosing topics and for working on the topics after they had been selected. The general questions sought the respondents’ views concerning the approach to private international law harmonization and/or codification best suited to the American region in the 21st century. The questionnaire was distributed in June 2001, and the Committee requested responses by the end of July 2001. Despite the short period of time given to the recipients – a little more than a month –, a large number of responses was received, reflecting strong interest among the recipients concerning the future of the CIDIP process.

The responses expressed a wide range of views about the current state of the CIDIP process and the shape it should take in the future. Some respondents expressed

² OAS General Assembly Resolution Adopting the Annual Report of the Inter-American Juridical Committee, AG/RES. 1772 (XXXI-O/01), June 5, 2001.

³ See OAS Questionnaire on the Future of CIDIP [hereinafter: Questionnaire], prepared by the OAS Subsecretariat for Legal Affairs, June 2001, available at <http://legalminds.lp.findlaw.com/list/intpil/doc00014.doc> (accessed Feb. 3, 2002).

the view that CIDIP was in a state of crisis.⁴ Of particular concern was the fact that the instruments adopted at the most recent CIDIP conferences had received far fewer ratifications than those adopted at the earlier conferences. For example, two of the early conventions received 17 ratifications, which is impressive by any standard.⁵ By contrast, some of the recent conventions have received less than two ratifications.⁶ On the other hand, other respondents expressed the view that CIDIP is basically on the right track, and that no major changes were necessary except an increased commitment by the OAS of the resources necessary for the effective execution of its tasks.⁷ Some respondents suggested that the declining number of ratifications does not necessarily indicate that such instruments have not been influential. Some States that have failed to ratify CIDIP instruments have nevertheless used those instruments as models for domestic legislation on the pertinent subject.⁸

Based on the questionnaire responses and our own observations of the CIDIP process, the Juridical Committee concluded that the CIDIP process was at an important crossroads. We concluded that CIDIP is currently facing several significant dilemmas, and we recommended that the first order of business in preparation for CIDIP-VII should be to consider carefully and attempt to resolve each of these dilemmas.⁹ These issues were discussed at CIDIP-VI, but we continue to wrestle with them as the preparations for CIDIP-VII proceed. What follows is a brief description of these dilemmas and of the tentative views expressed at CIDIP-VI.

⁴ See, e.g., *Response to Questionnaire* by Eduardo VESCOVI, at 1; see also Diego FERNÁNDEZ ARROYO, *The Present and Future of CIDIP*, OEA/Ser.K/XXI.6 CIDIP-VI/doc.18/02, Feb. 5, 2002 (observing that the basic question of whether CIDIP is necessary anymore must be addressed as part of the debate over its future).

⁵ See *Inter-American Convention on International Commercial Arbitration* – B-35, CIDIP-I (1975) & *Inter-American Convention on Letters Rogatory* – B-36, CIDIP-I (1975).

⁶ See *Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments* – B-50, CIDIP-III (1984) (1 ratification) & *Inter-American Convention on Contracts for the International Carriage of Goods by Road* – B-55, CIDIP-IV (1989) (no ratifications). The OAS website (www.oas.org) (accessed June 30, 2001) shows the following data for ratification of other CIDIP conventions: CIDIP-I – 1975 – Panama: Convention B-33 (14 ratifications), B-34 (9 ratifications), B-37 (15 ratifications), B-38 (16 ratifications); CIDIP II – 1979 – Uruguay: B-39 (8 ratifications), B-40 (8 ratifications), B-41 (10 ratifications), B-42 (7 ratifications), B-43 (12 ratifications), B-44 (6 ratifications), B-45 (10 ratifications), B-46 (13 ratifications); CIDIP III – 1984 – Bolivia: B-48 (4 ratifications), B-49 (3 ratifications), B-51 (4 ratifications); CIDIP IV – Uruguay – 1989: B-53 (7 ratifications), B-54 (9 ratifications); CIDIP V – Mexico – 1994: B-56 (2 ratifications), B-57 (7 ratifications).

⁷ See *Responses to Questionnaire*, Question No. 10 (majority of respondents disposed favorably to the role CIDIP is playing in the Hemisphere) & *Responses to Questionnaire*, Question No. 2 (three respondents specifically calling for creation of a permanent CIDIP Secretariat) (on file with author).

⁸ See *Response of FERNÁNDEZ ARROYO*, at 5 (citing the 1998 Venezuelan legislation on private international law as an example of the influence of CIDIP on domestic laws in Latin American nations).

⁹ *CIDIP-VII and Beyond*, Report Prepared by Inter-American Juridical Committee, Jan. 22, 2002, OEA/Ser.K/XXI.6 CIDIP-VI/doc.10/02.

II. – INTER-AMERICAN HARMONIZATION : DILEMMAS FOR THE FUTURE

(a) *Regionalism v. globalism*

The first and perhaps most important dilemma is precisely the one that UNIDROIT has chosen as the topic of its 75th Anniversary Congress: Regionalism vs. Globalism.¹⁰ This dilemma is closely related to another concern expressed by many of the respondents to the questionnaire: the problem of duplication of efforts in the face of scarce resources.¹¹ There are currently several international organizations pursuing work at the global level that closely parallels the work being pursued in the Inter-American system through the CIDIP process. UNIDROIT, UNCITRAL, and the Hague Conference on Private International Law are the three most prominent such organizations. The view was expressed by some respondents that, in this age of increasing globalization, the problems with which CIDIP has been concerned should be addressed at the global rather than the regional level. Regional harmonization efforts in the field of private law, a few respondents suggested, are at best a waste of time, and at worst a distraction from the important effort to seek global solutions.¹² Some respondents expressed frustration that the nations of Latin America tend not to participate in the work of the global organizations, preferring instead to devote their efforts to the CIDIP process.¹³ Because resources are limited, many States in the region are understandably selective in their participation in harmonization efforts. Some respondents implied that Latin American States would be more likely to participate in the global processes if there were no CIDIP process. Alternatively, it was suggested that regional organizations such as the OAS should focus their efforts in this area on securing the ratification and implementation in the region of the instruments

¹⁰ See *Worldwide Harmonisation of Private Law and Regional Economic Integration*, Program Document Issued at UNIDROIT 75th Anniversary Conference, Sept. 2002 (stating that “[r]egional economic integration as a constitutionalised process with different political objectives and at varying speed is, however, a new phenomenon which adds tensions to and increases the complexity of the work of the private-law formulating Organizations whose tasks are global. This is acutely felt in Europe, but it may soon spread, albeit in different economic and political patterns, to South America and Africa, maybe even to North America and the Asia-Pacific region. In-depth analysis of these developments is a matter of urgency for which UNIDROIT’s world-famous library, its *Uniform Law Review* and other publications as well as its scholarships research program provide a unique arsenal of working tools.”); see also Peter SCHLECHTRIEM, “The sale of goods: do regions matter?”, Presentation delivered at the 75th Anniversary Conference (analyzing tension between global and regional harmonization of the law governing the sale of goods).

¹¹ See *Reponses to Questionnaire*, Question No. 10 (only three of 42 respondents stating that duplication is not a cause for concern in response to a question regarding how to address the issue) (on file with author).

¹² See, e.g., *Response to Questionnaire* by Carmen I. CLARAMOUNT, at 3.

¹³ See, e.g., *Response to Questionnaire* by Carlos EDUARDO BOUCAULT, at 4 (asserting that “there is a distancing between countries which adhere to CIDIP and organizations such as UNCITRAL and UNIDROIT.”) (in translation). It is worth noting that there is significant overlap in membership between the OAS and global organizations such as UNIDROIT. Argentina, Brazil, Canada, Chile, Colombia, Mexico, Nicaragua, Paraguay, the United States, Uruguay and Venezuela are members of both organizations. As a result, nearly one-fifth, or 11 out of 59, of the UNIDROIT member States are also members of the OAS and, conversely, nearly one-third of OAS member States are also members of UNIDROIT.

adopted at the global level¹⁴ or that they devote themselves to coordinating the regional position for joint presentation at the global level.¹⁵

Most of our respondents, however, expressed the view that there continues to be an important independent role for regional organizations in this field.¹⁶ Many opined that the preference of American States to participate in the CIDIP process reflects their view that this process is more directly responsive to their needs than the global processes, or that they have more of a voice in the regional process.¹⁷ Some observed further that regional attention to private international law questions that have already been addressed at the global level is not necessarily duplicative.¹⁸ Because there are fewer legal systems at the regional level than at the global level, and because the legal systems within any given region are less diverse, it is possible to tackle a problem in greater depth at the regional level than at the global level. One respondent cited as an example of this phenomenon the work on secured financing being done in the course of CIDIP-VI, explaining that, while similar projects undertaken by UNCITRAL and UNIDROIT are

“forward-looking and reflect modern trends in commercial finance, both are at the same time more narrow than the draft Inter-American model law which will be considered for . . . adoption at CIDIP-VI.”¹⁹

The possibility of achieving a more useful, more far-reaching document at the regional level has encouraged Europeans to address regionally many of the same matters that have already been addressed globally. Some respondents suggested that we in the Americas should not be hesitant to do the same.²⁰ The regional effort to harmonize

¹⁴ Cf. *Response to Questionnaire* by Francisco VILLAGRAN KRAMER, at 7 (suggesting adoption of an Inter-American Protocol to the 2000 Hague Convention on international adoption).

¹⁵ See *Response to Questionnaire* by Alejandro M. GARRO at 3 (stating that there should be Inter-American “representation” before the global bodies).

¹⁶ See *Responses to Questionnaire*, Question No. 11 (22 of 29 responses concluding unequivocally that there is room if not need for future private international lawmaking in the region) (on file with author).

¹⁷ See, e.g., *Response* of FERNÁNDEZ ARROYO, at 4; Diego FERNÁNDEZ ARROYO, “Derecho Internacional Privado Inter-Americano: Evolución y Perspectivas”, in *Curso de Derecho Internacional de la OEA* 189, 215 (Aug. 1999) (stating that “Latin American member States tend to view the CIDIP as more ‘theirs’ than any other form of private international law unification . . . All member States in the OAS have voice and vote, while the participation of Latin American countries in other fora, such as The Hague Conference, UNIDROIT and UNCITRAL, is more limited.”) (in translation); *Response* of BOUCAULT, at 4 (asserting that “there is a distancing between countries which adhere to CIDIP and organizations such as UNCITRAL and UNIDROIT.”) (in translation); *Response to Questionnaire* by Vivian MATTEO, at 2 (asserting that “the OAS is in much better position than UNIDROIT to represent the interests of the States, because representatives of member States attend CIDIP Conventions.”) (in translation).

¹⁸ See *Response to Questionnaire* by Nadia DE ARAUJO, at 4 (stating that there is only duplication of efforts for those countries which are members of both the OAS and the global organization addressing the same issues).

¹⁹ *Response to Questionnaire* by Harold S. BURMAN, US Department of State, at 4.

²⁰ See *Response* of FERNÁNDEZ ARROYO, at 4 (indicating that participants in CIDIP seem to have a “complex” about addressing regionally matters that have been addressed globally). Cf. *Response* of Carmen CLARAMOUNT, at 3 (calling for CIDIPs to “reinforce and modify” existing global instruments).

private international law in Europe has no doubt been spurred by the increasing economic integration of that continent. Numerous commentators have noted that increased economic integration brings with it an increased need for harmonization of private law or other mechanisms for addressing conflicts in regulation.²¹ If so, then CIDIP may be more important now than ever. Numerous subregional free trade areas have been established in this hemisphere, including the North America Free Trade Area (NAFTA), MERCOSUR, the Andean Pact, the Central American Common Market (CACM), the Caribbean Community (CARICOM) and the Group of Three. Moreover, the continent has embarked on an ambitious effort to create a hemispheric free market, the Free Trade Area of the Americas (FTAA), by the year 2005.

The Juridical Committee agreed with the many respondents who noted that the FTAA would make a continuation and even an intensification of the CIDIP process indispensable.²² But, at the same time, the advent of economic integration in the hemisphere increases the need for a reexamination of the existing approach to the codification and harmonization of private international law. The approach to private international law codification and/or private law harmonization that is most appropriate in the context of a hemispheric free trade area may well be very different from the approach that has prevailed until now.

(b) *Private international law v. substantive harmonization*

The second important dilemma facing CIDIP is closely related to the first. CIDIP is currently suffering from an identity crisis: it does not know whether it wants to be the regional Hague Conference or the regional UNIDROIT or UNCITRAL. In other words, it is not certain whether it should focus on developing instruments addressing traditional topics of private international law, such as jurisdiction, choice of law and enforcement of judgments, which is currently the approach of the Hague Conference, or should instead pursue the harmonization of substantive law, which is the approach pursued by UNIDROIT and UNCITRAL. The CIDIP conferences were initially conceived as the regional Hague Conference. The very name of the conferences – *Conferencias Especializadas Interamericanas Sobre Derecho Internacional Privado* – indicates that their intended focus was private international law.²³ The first five CIDIP conferences took a classic private international law approach. In CIDIP-VI, on the other hand, two of the three topics on the agenda sought to harmonize substantive law, and only one took a

²¹ See, e.g., Craig L. JACKSON, "The Free Trade Agreement of the Americas and Legal Harmonization", in *ASIL Newsletter*, 1996; Matthew W. BARRIER, "Regionalization: the Choice of a New Millenium", 9 *Currents, International Trade Law Journal*, 2000, 25 (stating that "harmonization and approximation of laws is a natural by-product of regional integration."); see also *Responses to Questionnaire* by Adriana DREYZIN DE KLOR, Claudia LIMA MARQUES, Diego FERNÁNDEZ ARROYO, Hermes NAVARRO DEL VALLE, Horacio BERNARDES NETO, Martha SZEIMBLUM, Mirta CONSUELO GARCÍA and Victor ALVAREZ DE LA TORRE.

²² See *CIDIP-VII and Beyond*, *supra* note 9.

²³ See *supra* text accompanying note 1.

classic private international law approach.²⁴ Perhaps more importantly, the only topics that resulted in the adoption of instruments were the two that sought to harmonize substantive law.

Whether a shift from classic private international law approaches to the harmonization of substantive private law should be resisted or accelerated was the subject of spirited discussion at a plenary session of CIDIP-VI. Conference president Dr Didier OPERTTI BADAN (Uruguay) gave an impassioned defense of the traditional private international law approach. Other interlocutors, however, noted an increasing focus worldwide on private law harmonization, and suggested that the CIDIP process would be more likely to achieve useful results if it similarly focused on the harmonization of private law. The explanation for this important shift in worldwide focus is not altogether clear.²⁵ Perhaps it reflects the perception that private international law approaches have already been adopted where they might potentially be useful. Or perhaps it reflects the view that private international law approaches do not offer the needed degree of certainty and predictability in international commercial relations in this age of increasing economic integration.²⁶

There was no formal resolution of this issue at CIDIP-VI. There did appear to be a general sense among the participants, however, that both approaches remained potentially useful and that CIDIP should remain open to both. Several interlocutors expressed the view that a classic private international law approach might be the most appropriate for some topics, while, for other topics, it would be more useful to focus on harmonization of substantive law. For the moment, therefore, it appears that CIDIP will be both the regional Hague Conference and the regional UNIDROIT. The preparations for CIDIP-VII will provide some indication of the standards that will be applied in determining which approach to pursue when.

²⁴ The three topics approved by the OAS General Assembly for consideration at CIDIP-VI were: "I. Standardized commercial documentation for international transportation, with special reference to the 1989 *Inter-American Convention on Contracts for the International Carriage of Goods by Road*, with the possible incorporation of an additional protocol on bills of lading. II. International loan contracts of a private nature, in particular the uniformity and harmonization of secured transactions law. III. Conflict of laws on extracontractual liability, with an emphasis on competency of jurisdiction and applicable law with respect to civil international liability for transboundary pollution." OAS General Assembly Resolution on CIDIP-VI, June 7, 1999, AG/RES 1613 (XXIX-O/99).

²⁵ Cf. Diego FERNÁNDEZ ARROYO, *La CIDIP VI: ¿Cambio de Paradigma en la Codificación Interamericana de Derecho Internacional Privado?* (commenting on the related though distinct phenomenon of the "privatization" of CIDIP, which refers to the increasing dependence of the CIDIP process on private sponsorship of preparatory studies and conferences, which results in an increasing focus on topics of interest to such private sponsors) (unpublished manuscript on file with author).

²⁶ See, e.g., Fráncò FERRARI, "Uniform Application and Interest Rates Under the 1980 Vienna Sales Convention", 24 *Georgia Journal of International & Comparative Law*, 1995, 467, 469 (observing that in the area of international commercial law "more recently, there appears to be a tendency favoring the uniform substantive rules over the uniform conflict-of-law rules."); see also Peter WINSHIP, *Private International Law and the UN Sales Convention*, 21 *Cornell International Law Journal*, 1988, 487 (observing that "[w]hen the substantive legal rules themselves are made uniform . . . the business is assured further that courts will apply the same legal rules no matter where the parties litigate the dispute.").

(c) *Conventions v. model laws*

A third dilemma facing CIDIP is sometimes thought to be linked directly to the choice between private international law and private law harmonization, but in my view it is quite independent. I am referring to the dilemma concerning the type of instrument to be negotiated. Traditionally, the CIDIP Conferences have resulted in the adoption of draft Conventions.²⁷ In CIDIP-VI, however, two of the three agenda items concerned proposed model laws, and, as noted, only these two resulted in the adoption of any instrument. Because the model law approach was chosen for the two agenda items seeking to harmonize substantive law, the issue of convention versus model law has been linked in the minds of some observers of CIDIP to the issue of private international law versus harmonization of substantive law. There does not appear to be a necessary correlation between the two issues, however. It is possible to have a convention seeking to harmonize substantive law,²⁸ and it is possible to have a model law concerning jurisdiction or choice of law or enforcement of judgments.²⁹ It is true that the model law approach has tended to predominate where harmonization of substantive law has been pursued, whereas conventions have predominated in the field of private international law. The explanation for this phenomenon remains unclear and should be studied. Such an investigation may conclude that the reasons for the increasing popularity of model laws apply equally to attempts to harmonize private international law issues. If so, then perhaps CIDIP should seek to adopt model laws even if it continues to pursue private international law solutions to regional private law problems.

III. – CONCLUSION

The foregoing discussion of three of the dilemmas confronting CIDIP demonstrates that there is an important need for closer links between global organizations such as UNIDROIT and regional organizations such as the OAS. Not only is coordination important to avoid unnecessary duplication of efforts, but, more importantly, joint efforts are necessary to develop criteria for determining when a regional approach is more appropriate than a global approach. We in the OAS look forward to cooperating closely with UNIDROIT in these efforts during its second 75 years and thereafter.



²⁷ In the first five conferences, CIDIP-I through CIDIP-V, the parties adopted 21 Conventions and 2 Protocols, but no model laws.

²⁸ See, e.g., “United Nations Convention on Contracts for the International Sale of Goods (CISG)”, 19 *International Legal Materials*, 1980, 671 (harmonizing national rules of contract law); *International Convention on Travel Contracts (CCV)*, 9 *International Legal Materials*, 1970, 669 (UNIDROIT Convention harmonizing substantive law on travel-related contracts).

²⁹ See, e.g., “UNCITRAL Model Law on International Commercial Arbitration”, 24 *International Legal Materials*, 1985, 1302 (providing in Art. 17 rules regarding concurrent jurisdiction and in Art. 36(1)(a)(i) a second-level conflict of laws rule); G. HAZARD, R. STÜRNER, M. TARUFFO and A. GIDI, *Draft Principles and Rules of Transnational Civil Procedure*, UNIDROIT Study LXXVI, Doc. 2002 (joint project of ALI and UNIDROIT Working Group to draft procedural rules that a country could adopt to govern transnational commercial disputes), available at <http://www.unidroit.org/english/procedure/study/76-07-e.pdf> (accessed Feb. 10, 2003).