Poomintr Sooksripaisarnkit
Dharmita Prasad *Editors*

Blurry Boundaries of Public and Private International Law

Towards Convergence or Divergent Still?

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Foreword

Joseph Story, the ancestor of modern private international law, not only gave that discipline its new name but also situated it, firmly, as a branch of public law, governed by ideas of sovereignty and resolved by that vague instrument of comity. Public international law eased by mutual deference one might think. And yet, he called the discipline private international law for a reason: for him, conflict of laws could be resolved on the basis of universally understood laws and on genuinely private concerns. Savigny went further and established private international law as an extension of private law, with hardly any role for public international law. And yet, sovereignty concerns and public international law remained strong in other schools, and the history of private international law has always been one of its relation to public international law as well.

Since the nineteenth century, relations between private and public international law have been of incessant concern. Is private international law really a subdiscipline of international law, allocating adjudicatory and legislative competences among independent and sovereign states and negotiating conflicts through comity? Is private international law an extension of domestic (private) law, laying out the outer boundaries of scope, and as such untouched by public international law? Or does it stand, perhaps, in a fruitful tension with public international law, a tension of mutual irritation and inspiration, mutual restriction and empowerment?

Poomintr Sooksripaisarnkit and Dharmita Prasad have brought together an impressively diverse group of scholars to address such questions which are old on the one hand and always in need of new analysis on the other. It is a delight to see the small numbers of scholars from Europe and North America and the great number of scholars from jurisdictions frequently outside of the field's view: India, Turkey, Malawi and many others. The wealth of perspectives is one of the book's qualities. The other is the emphasis on intersectionality as a methodological perspective: public and private are separate and yet entangled. The authors of this book analyse in more detail how separation and entanglement developed over time, how they play out in the practice of harmonised law, how they occur in selected areas of law, what their future is.

Some of the themes in this book will be familiar to many readers who will nonetheless be glad to find them compiled as they are here. Others are new and surprising, demonstrating forcefully that the old topic remains relevant. Others still show ways to the future, suggesting that we will continue to think about the relation between public and private in this area. It is a pleasure to find all these perspectives together in this new book. Story and Savigny must be surprised to find that problems they thought they had overcome are still with us, but they would be pleased to find the richness of thought that these problems still bring out from scholars of our time.

October 2021

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Preface

Public International Law and Private International Law (or Conflict of Laws) are taught in most law schools as separate subjects. Public International Law, we were told, deals with the conduct and the relation between States or between States and international organisations. On the other hand, Private International Law deals with private legal relations between citizens or corporations in two different countries, being international contracts, inter-country marriages, international torts, etc. We were told the term "Private International Law" is a misnomer as in reality it is nothing more than a branch of domestic law dealing with cases involving foreign elements. As part of national law, sources of private international law can be found in domestic sources depending on the legal system, either in statutes or in case laws or in combination of both. On the other hand, sources of public international law are those listed in Article 38 of the Statute of International Court of Justice, namely international conventions, international customary law, general principles of law recognised by civilised nations, judicial decisions and teachings of highly qualified publicists. Disputes between citizens or corporations of different countries are settled in a typical court system, either by a jurisdiction agreement or otherwise, or by other alternative dispute resolution mechanisms, such as arbitration. On the other hand, disputes between States will be resolved through political means and other diplomatic channels, if not through the International Court of Justice (ICJ).

Even so, a trace of history and evolution of public international law and private international law revealed to us that they indeed originated from the same sources. Contemporary practices revealed to us that any clear distinction between them becomes unreal. A good example is in the realm of the international sale of goods which traditionally falls within the ambit of private international law. A steady increase in the number of Member States to the United Nations Convention on Contracts for the International Sale of Goods (Vienna, n1980) ("CISG") is a sign that more countries are adopting the use of public international law materials, namely treaties, to harmonise and solve private international law issues. Indeed, the major parts of the work of international organisations such as the United Nations Commission on International Trade Law (UNCITRAL) or the Hague Conference on Private

International Law (HCCH) are about solving private international law issues via international conventions. On the other hand, in the realm of international investment law which traditionally falls within the public international law space, increasing resort to investment arbitrations by the parties has since brought this field of law in closer interaction with private international law. At the time of working on this book, the global pandemic, namely the COVID-19, still bring challenges to international community and to us all. Different restrictions and preventive measures adopted in different countries bring fresh perspectives and issues on both public international law and private international law.

The overall aim of this book, as its title indicates, is to contribute to on-going debates whether there is a sufficient merge or convergence of public international law and private international law such that treating them as separate subjects or disciplines becomes unjustifiable. This book adds to such debates in four themes. The first theme examines historical and theoretical considerations of the boundary between public international law and private international law. The second theme looks closer at the rising trend of harmonisation of private international law by public international law instruments and consists of evaluation of processes, problems and effectiveness. In the third theme, some case studies and analysis of intersectionality between public international law and private international law are presented. Finally, the last theme focuses on the future trends in relationship between public international law and private international law.

In working on this book, the editors are proud that this project provides a venue for emerging scholars in both public international law and private international law fields to showcase their research, in addition to chapters contributed to by more established researchers. The editors are also proud of geographical representations in this book with authors based in North America, Asia, Australasia, Europe, etc., which give this book true international flavour.

To this end, the editors would like to thank Springer Nature Pte Ltd., especially Nupoor Singh, who has been supportive throughout the process of production of this book. The editors would also like to thank our friend and also one of the contributors in this book, Dr. Sai Ramani Garimella, who connected us together.

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Dharmita Prasad is an assistant professor at Jindal Global Law School, O.P. Jindal Global University in Sonipat, India. She litigated in criminal and civil matters from 2014 to 2017 at the Delhi High Court and district courts, before transitioning to academics. She is also a certified mediator by The International Centre for Alternative Dispute Resolution, New Delhi. She has a master's degree from the University of Johannesburg, South Africa, in international commercial law and undergraduate

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Chapter 1
Public International Law and Private International Law: Setting Scene of Intersectionality

Poomintr Sooksripaisarnkit and Dharmita Prasad

Abstract While public international law and private international law are taught in most law schools as distinct subjects, in reality, they originated from the same root. Even as of today, any clear distinction between them is unreal and in many instances they overlap. In this chapter, a common historical root is briefly sketched and then some areas of intersectionality as contributions in this book are about to explore will be briefly outlined and highlighted.

Keywords Public international law · Private international law · Intersectionality

1 Introduction

Public international law and Private International Law are taught in most law schools as separate disciplines. Students are often told that that the use of the term 'Private International Law' creates confusion because this discipline which is known in another name as 'conflict of laws' is ultimately "part of the municipal or domestic national law of each country (or law area within a country, in the case of federations) and subject to unilateral changes by its legislature".[1] This is different from public international law which, as Shaw explained:

> Public international law covers relations between states in all their myriad forms, from war to satellites, and regulates the operations of the many international institutions. It may be universal or general, in which case the stipulated rules bind all the states (or practically all depending upon the nature of the rule), or regional, whereby a group of states linked

[1] Davies et al. (2020), para 1.4.

[2] Shaw (2008) p. 2

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geographically or ideologically may recognise special rules applying to them, for example, the practice of diplomatic asylum that has developed to its greatest extent in Latin America.[2]

Since private international law is part of the domestic legal system, its sources follow those of domestic legal systems—being statutes or case laws or a combination of both. Sources of public international law, on the other hand, are as stated in Article 38(1) of the Statute of the International Court of Justice:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
    a. international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
    b. international custom, as evidence of a general practice accepted as law;
    c. the general principles of law recognised by civilised nations;
    d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Yet, the world has witnessed attempts at harmonisation of private international law rules by means of the public international law instruments, primarily international conventions. This was perhaps started in the year 1893 when Michael Carel Asser attempted to arrange an international conference to discuss private international law issues which was subsequently developed into the Hague Conference on Private International Law.[3] Subsequently, international organisations such as the United Nations Commission on International Trade Law (UNCITRAL) also take the roles in facilitating harmonisation of private international law rules through international conventions even though the degree of success has been varied from one instrument to the other. The most bespoke successful story is the 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" (The "New York Convention"), which has 168 State Parties as of the time of writing. On the regional level, the European Union has a complex web of international conventions dealing with both jurisdictional and choice of law issues among the Member States.[4] These represent obvious contemporary examples of intersectionality between public international law and private international law. The purpose of this chapter is to argue any clear-cut distinction between public international law and private international law might not reflect the reality in modern contemporary practices and what has been taught in law schools throughout does not represent the reality. In doing so, it

[3] Vlas (2020), p. 3.

[4] For examples, the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast); Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I); Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II); Council Regulation (EU) No. 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation.

will start by tracing a common historical root of public international law and private international law until their purported distinction as separate legal disciplines. Afterwards, it will explore some areas of intersectionality as contributors in this chapter have outlined.

2 From Common Historical Root to the Breaking Point

While the term 'international law' was coined only in the nineteenth century by Jeremy Bentham,[5] a body of law known originally as the 'law of nations' existed long before that. Nevertheless, any attempt at re-constructing the origin of international law is bound to meet with failure. As Walker warned, doing so would be insurmountable as the task is equal to digging up "the legal history of all civilised people".[6] Moreover, by sifting through historical evidence, one would only find "a seething mass of inconsistent precedents and contradictory dicta…"[7] Nevertheless, modern international law could be traced back to the Peace of Westphalia in 1648.[8] This was negotiated after religious wars across Europe, known as "The Thirty Years War". Negotiations took place at both the Catholic town of Münster and the Protestant town of Osnabrück.[9] As a consequence of this, the influence of the Holy Roman Empire was substantially declined with the Netherlands and Switzerland became detached from it and it also lost Alsace to France.[10] The Catholic Church also faced challenges with the Protestants gained more recognition.[11] Spain also saw the decline with the Netherlands and became independent.[12] The Peace of Westphalia gave rise to independent nations.[13] However, it would not be entirely precise to attribute developments of modern international law to the Peace of Westphalia alone. Rather, it came just at the right time that theories of sovereignty gained more traction. These thoughts "underlined the supreme power of the sovereign and led to notions of the sovereignty of states".[14] These theories were propounded primarily by Jean Bodin and Thomas Hobbes.[15] Bodin in his publication in 1576 explained sovereignty as "the absolute and perpetual power over the people, unrestrained by human law".[16] Hobbes in his publications in 1642 and 1651 started with the belief that by nature

[5] Walker (1899), p. 1.
[6] Ibid., 30.
[7] Ibid.
[8] Boas (2012), p. 8.
[9] Nussbaum (1947), p. 86.
[10] Ibid., 86–87.
[11] Ibid., 87.
[12] Ibid.
[13] Boas (2012), p. 9.
[14] Shaw (2008), p. 16.
[15] Ibid.
[16] Nussbaum (1947), p. 56.

human beings are full of conflict as they crave ever-increasing powers.[17] However, with the instinct of "self-preservation and defence", human beings came together to "obligate themselves to obey a sovereign…"[18] This, a state was organised through the social contract.[19] Under this line of thought, each State is independent of the other and each is "to exercise an exclusive jurisdiction within definite territorial limits".[20] As such, the system of the then law of nations evolved in a more vivid manner to deal with relations between these independent States. This notion reached its peak in the work of Jeremy Bentham.[21] In *An Introduction to the Principles of Morals and Legislation,* he wrote:

> Now as to any transactions which may take place between individuals who are subjects of different states, these are regulated by internal laws, and decided upon by the internal tribunals, of the one or the other of those states: the case is the same where the sovereign of the one has any immediate transactions with a private member of the other … There remain, then, the mutual transactions between sovereigns as such, for the subject of that breach of jurisprudence which may be properly and exclusively termed international.[22]

This clear distinction was carried along to the work of Joseph Story in 1834[23] and the work of Dicey.[24]

With independent developments, private international law has developed into a discipline consisting of its own complex theories and methodologies such that Prosser, in 1953, rendered his classic observation that this branch of law known as private international law is "a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorise about mysterious matters in a strange and incomprehensible jargon".[25] Yet, private international law is narrow in scope. Those said eccentric professors in fact work on only three mysterious matters, namely:

- *jurisdiction:* whether the local court—or "forum"—has the power to hear and determine the case, nor whether the contacts the case has with another state or country limit or otherwise restrain the forum court's power or willingness to decide the case;
- *recognition and enforcement of foreign judgments:* where the case has proceeded to judgment in the other state or country, whether that judgment can be recognised or enforced in the forum; and
- *choice of law*: even if the forum court has—and will—exercise the jurisdiction to decide the case, whether it will decide the case in accordance with the law of

[17] Ibid., 112.
[18] Ibid.
[19] Ibid.
[20] Walker (1899), p. 148.
[21] Mills (2006), p. 23.
[22] Bowring (1843), p. 149. The first edition of the book was published in 1789.
[23] Mills (2006), p. 27.
[24] Ibid., 30.
[25] Prosser (1953), 971.

> the forum (*lex fori*), or in accordance with the law of the other state or country. Is the forum or foreign law to be 'the law of the cause' (*lex causae*) or 'applicable law' that disposes of the case, and how does the forum court choose one or the other? This question is, naturally, only important if application of the forum's law is likely to give a different result to the application of the foreign law…[26]

Since the subject matters of private international law have been so confined, it has been observed that this branch of law has been detached from global governance issues[27] and that it "has not been able to tether unleashed private interests, protect collective goods of planetary concern, or grapple with the myriad black holes opened by the confiscation of transnational adjudication and regulation by private entities".[28] The need to widen the reach of private international law is also echoed in the view of Michaels, Abou-Nigm and van Loon who observed that it should no longer be the case that private international law is confined to a couple of "technical" facets it usually deals with. Instead, it should be perceived as "a core element of transnational regulation".[29] This is because in the modern world where we live our lives and where our children will live their lives in the future, activities done by private actors become more impactful—either good or bad. "Most transactions, most investments, most destruction of our environment, happen not through public but through private action, and are governed not exclusively by public law but also, perhaps predominantly, by private law".[30] Michaels, Abou-Nigm and van Loon gave the following example:

> … the ability for European victims of the Volkswagen diesel scandal to access courts like US victims, or providing recourse to compensation for Latin Americans victims of oil pollution on a similar level to those in Alaska. All of this has multiple implications in the sphere of cross-border civil procedure: the admissibility of global class actions and public interest actions, judicial jurisdiction, recognition and enforcement of judgments concerning corporate social and environmental responsibility, and so on.

Likewise, private dispute resolution mechanisms are increasingly used in matters which traditionally were perceived as falling within the realm of public international law. One such example is Article 287 of the United Nations Convention on the Law of the Sea 1982 which provides for a State to be able to choose an arbitral tribunal as a method for settlement of disputes. Another example is in investment treaties which referring disputes to arbitral tribunals become an option provided for in the settlement of disputes mechanism.

So, the question becomes whether a clear-cut distinction between public international law and private international law as a result of thoughts back in the seventeenth century still holds true in the contemporary environment. Or, whether these two disciplines which had not been separated prior to the seventeenth century become more convergent and are moving towards merger so they become one discipline. This is the question which this edited volume seeks to answer.

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[26] Mortensen et al. (2019), p. 3.

[27] Muir Watt (2011), p. 354.

[28] Ibid., 356.

[29] Michaels et al. (2021).

[30] Ibid.

3 From Breaking Point to Potential Merger

In addressing the question set out above, this book is arranged into four themes. In the first theme of this book, the boundary between public international law and private international law is explored from both historical and theoretical perspectives. This theme consists of three chapters from Basile, Lopes and Sooksripaisarnkit, respectively.

Tracing legal history, Basile argues that both Joseph Story and the Dutch School of Thoughts which developed what became known in modern days as private international law never intended this system or jurisprudence to be so confined. Instead, all they attempted to do was to reconcile territorial sovereignty with the requirements of international commerce by promoting the principles of comity that were universally applicable. Hence, any subsequent consideration of private international law as a totally separate discipline isolated from public international law is inconsistent with history.

Coming from a theoretical perspective, Lopes in her chapter discusses the concept of "recognition", which is common to both public international law and private international law. In private international law, this concept is seen in relation to judicial decisions and arbitral awards. In public international law, this notion is used in the context of States and governments. Exploring the contexts or situations in which recognition has been employed in the past few decades, Lopes seeks to demonstrate that this concept presents an area of growing intersectionality between public international law and private international law. In combination with the fluidity of boundaries between both disciplines, the rise of extraterritoriality, and the demands for pluralism, Lopes is inclined to think that recognition is raised to the status of a proper *transversal* legal instrument. Once again, a closer line between public international law and private international law is drawn and observed.

Along the line of comity, Sooksripaisarnkit traces the origin of this concept to public international law which in modern times forms a rationale underpinning the doctrine of *forum non conveniens.* Through the traditional case law analysis method, he argues that courts in Australia insincerely apply the concept of comity and largely pay lip service to it. He prefers the doctrine of *forum non conveniens* as used in the United Kingdom to that of Australia as he views it as more in line with the concept of comity and that he argues that in certain cases courts in Australia betrayed the formulation of the *forum non conveniens* employed in its own jurisdiction to bring the outcome of the case more in line with the result achieved in the United Kingdom and to that extent more in line with the concept of comity. He also argues that from the comity perspective any attempt at evaluating the competence of the foreign forum as part of the *forum non conveniens* analysis is contradictory to the very rationale of comity.

Moving to the second theme of this book, here the effectiveness and the problems with the rise of attempts at harmonising private international law by public international law instruments are evaluated. In this theme, Prasad discusses how the harmonisation of public international law and private international law can advance

the international rule of law. She does so by tracing developments and elaborating on the meaning of this concept. She then proposes that the harmonisation of public international law and private international law can advance the international rule of law through the principle of justice. She observes that harmonisation initiatives advance the goals of globalisation by reducing transaction costs associated with legal uncertainties. Harmonisation activities can facilitate access to foreign legal courts and legal systems which reduces issues pertaining to legal uncertainties. Harmonisation initiatives also facilitate cross-border transactions. Providing predictability and enhancing the freedom of individual actors are in line with the overall objective of the international rule of law.

A large part of this book is devoted to the third theme. In this theme, case studies of public international law consideration in private international law cases are explored to highlight the increasingly close tie between the two legal disciplines. The first group of such case studies involved issues pertaining to international investment law. In this group, there are two chapters from Mlambe and Mohanty, respectively.

In his chapter, Mlambe argued that public international law does not create a direct right of action for local citizens in the host state against foreign investors when the host government fails to pursue remedies on their behalf. On the other hand, private international law fails to guarantee these citizens an effective remedy since the rules on jurisdictions and recognition and enforcement of foreign judgments may make it difficult for them to secure the relief they want to seek. So, Mlambe contends that public international law ought to recognise that private citizens of the host state have direct rights as a group to proceed against foreign investors where the latter violates their rights. To achieve this, public international law needs private international law, given the missing link between the two and the problem of non-recognition of residents of the host state as an independent category in the international investment relationship. He then identifies two grounds to advance the call to develop public international law such that it can recognise private citizens in the host state as part of the relationship and for private international law to guarantee access to justice and effective remedies. These two grounds are (1) the requirement to interpret (and apply) investment treaties in good faith and (2) the use of general principles of law as a source of public international law and also as a basis of the approach to private international law questions. Mlambe then concludes his chapter by emphasising that public international law and private international law must be connected to tackle such concerns of the rights of private citizens in the host state.

With a different focus, Mohanty focuses on investment arbitrations. He attempts to navigate the contours of the rule of law in the context of "not-for-profit third-party funding" in arbitration and elaborates upon the role of the rule of law in ensuring procedural fairness and natural justice in arbitration proceedings. This is topical since international organisations have unveiled significant interest in discussing claim funding in international arbitrations. Predominantly, the Working Group III of the United Nations on International Trade Law (UNCITRAL) is currently working on the access to justice rationale set forth by the proponents of third-party funding vis-à-vis an investor to state dispute settlement.

The second group of case studies aim at the current state of global affairs where virtually everyone on earth is facing the same challenge caused by the pandemic due to the spread of the SARS-Cov-2 virus, known as the COVID-19. In an attempt to contain the virus, different countries have adopted different restrictions and measures. To some extent, these restrictions have impacts upon the international sale of goods. Three chapters under these themes from Jevremovic, Yüksel Ripley and Halatçı Ulusoy, and Mazzacano explore these challenges in the context of the United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980 (CISG).

In her chapter, Jevremovic explores whether and to what extent Article 79 of the CISG can accommodate for adverse social impacts in trading relationships between buyers from the Global North and the suppliers from the Global South. During the COVID-19, various government initiatives have significantly impacted international trade relationships where flexibility provided for by the contract law has come into question. Supply chain disruptions and uncertainties continue to loom. Parties to international sale contracts continue to have to make the difficult evaluation and identify options to keep existing commitments, to protect against future losses and to be compensated if the loss occurs. However, further complications are created by the lack of predictability regarding the scope, time, and location of governmental measures. Such complexity brings further challenges in the uniform application of the CISG, primarily through Article 79. In light of this, in her chapter, Jevremovic re-considers the negotiation leading to the final text of this provision of the CISG, highlights the trends and explores possible avenues for homogenous interpretation and application of Article 79 in the post-pandemic era.

Looking at the CISG from a different perspective, Yüksel Ripley and Halatçı Ulusoy, in their chapter explore to what extent the COVID-19-related export bans and restrictions are compatible with the overall regime of the World Trade Organization (WTO) law. Their focus is primarily on export bans and restrictions of medical products which have affected the international sale of goods concerning these types of products. They then move to determine the legal effects of these measures on the international sale of goods contracts under private international law and examine how the WTO regime considerations can be relevant to this determination. The process of determination of legal effects here involves both public international law and private international law questions and the interplay between them is analysed with emphasis on parties to the international sale contracts located in Member States of the WTO.

With the focus still on restrictions and measures to prevent the spread of the COVID-19, since these are imposed by public laws or regulations, Mazzacano examines these when they are used by private parties as grounds to excuse contractual non-performance pursuant to Article 79 of the CISG. Using the traditional doctrinal analysis, he traces historical records on the creation of the CISG and the drafting of Article 79 and then explore case laws on this provision, and explores interactions of this provision with other articles within the CISG to demonstrate how private international law and public international law intersect in complementary and co-dependent ways. He concludes that while the private–public law dimensions within the CISG seem to be separate and distinct, they interact and intersect in a manner that is similar to symbiotic relationships and dualistic persona. The exploration of

this complex network between public international law and private international law in the context of the CISG will aid in providing solutions to cross-border conflicts that contain both public and private law elements.

The third group of case studies explore other areas of intersectionality focusing primarily on the EU context. It consists of contributions from Gernert, Barral Martínez and Van Hof.

Gernert explores 'Blocking Statutes'. Within the EU context, "Blocking Statutes" is a convenient name for the framework established under the "Council Regulation (EC) No. 2271/96 of 22 November 1996 on protecting against the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon and resulting therefrom". In short, the aim of the Blocking Statutes is to protect individuals or companies within the EU from the extra-territorial effect of laws of a third country.[31] In his chapter, Gernert places the Blocking Statutes in the interface between public and private international law. He starts by establishing the meaning of extraterritorial jurisdiction and analyses its consequences. Then, he elaborates upon different public international law developments aiming at avoiding or at least mitigating these consequences and examines national reactions to foreign extraterritorial jurisdiction. He argues that measures under the Blocking Statutes necessarily impact private actors and international private relations. Yet, they are primarily meant to counteract the national interests of a foreign state. As a consequence, private individuals often find themselves entangled in interstate conflicts. Private parties pay the price in the form of serious legal and economic consequences, which can only be resolved by one of the two states renouncing its jurisdictional claim and accepting non-compliance with its regulation. Ultimately, Gernert favours international cooperation and coordination as a solution.

Barral Martínez then focuses on the interplay between the EU civil jurisdiction and immunity claims. She discusses the interplay between the principle of immunity under customary international law and the application of the Brussels Regime on the EU level. By analysing cases decided by the European Court of Justice, Barral explores the blurry concept of jurisdiction and its exceptions and the challenges that national courts in the European countries face when public international law and EU private law meet. She finally asks whether the European Court of Justice can play a role in the development of public international law in general. It remains to be seen whether it could be, for instance, the European Court of Justice through its judgments seek to narrow down the concept of immunity. If such can be done, then, the further question is how case laws from the European Court of Justice may affect the global trends.

Van Hof then moves to explore the relationship between children's rights law and private international law in international child abduction cases. Van Hof demonstrates that both domains are substantively and institutionally fragmented. She then examines referencing patterns between the domain's instruments and actors to explore whether there exists any link based on dialogue. The analysis shows that there are indeed many links between the two domains both on the level of their instruments

[31] European Commission (2021).

and actors. The examination of the referencing patterns revealed only one case of the European Court of Human Rights and one case of the Court of Justice of the European Union included relevant references. Given very few references, one cannot yet speak of genuine judicial dialogue in international child abduction cases. However, Van Hof reveals that many links between children's rights law and international family law lead to the belief that both domains can harmoniously be applied in cases of international child abduction. Nevertheless, whether this belief is valid and whether they can be applied together in practice by domestic courts are food for further thought.

The last theme of this book explores how the intersectionality between public international law and private international law will play into the future. The only chapter in this theme is from Garimella and Babu where they explore the governance of data. Such governance necessarily involves the understanding of the right to regulate which is usually location-specific. However, it is largely not possible or extremely difficult to establish the location of data and this makes the governance sits uneasily with the concept of territorial sovereignty. On the other hand, there are concerns in relation to privacy-related issues of the data which bring further complexity in terms of access and administration of data. They attempt to suggest that on an international level a treaty should be made to set the regulation and fix the choice of law issues for transnational personal data.

While not all aspects of potential intersectionality between public international law and private international law are dealt with, the authors believed that all contributions in this book address contemporaneous topics of importance. Readers are invited to consider all chapters and try to answer together the questions set out earlier in this chapter: Is a clear-cut distinction between public international law and private international law still holds true in this era? Or are private international law and public international law moving towards merger such that they will gradually become one discipline?

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Part I
Public International Law and Private International Law: Historical and Theoretical Considerations of the Boundary

Chapter 2
Private International Law's Origins as a Branch of the Universal Law of Nations

Marco Basile

Abstract This chapter examines 'private' international law's divergence from 'public' international law in the late seventeenth to early nineteenth centuries and argues that this divergence was not as great as often believed. At the centre of this story was a new approach to conflicts of law propounded by the American jurist Joseph Story, who coined the term 'private international law' in 1834, and preceding Dutch jurists. Per Story and the Dutch school, a nation enforced a foreign law or judgment within its borders only as a matter of comity, rather than obligation. Accordingly, comity's rise is conventionally understood to signal the decline of universalism in the law governing private transnational transactions. This chapter suggests, however, that Story and the Dutch school sought not to parochialize this law but rather to reconcile territorial sovereignty with the needs of international commerce by promoting comity principles that were universally applicable.

Keywords Conflict of laws · Private international law · Law of nations · Ulrich Huber · Joseph Story

1 Introduction

Public international law and private international law seemingly diverged in the late seventeenth to early nineteenth centuries. Though the law of nations has a much longer history, the terms 'international law' (to denote public international law) and 'private international law' (to distinguish it from the public branch) did not enter use until the late eighteenth and early nineteenth centuries.[1] Public international law governed relations among nations. Private international law governed relations

[1] Jeremy Bentham is generally credited for introducing the term 'international law' in the *Introduction to the Principles of Morals and Legislation*, printed in 1780 but not released until 1789. See Armitage (2013), p. 179. As discussed below, Joseph Story first used the term 'private international law' in *Commentaries on the Conflict of Laws*, published in 1834.

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among private persons—specifically when to apply foreign law (or to enforce a foreign judgment) with respect to a private transaction or dispute with a foreign element, such as a foreign party or foreign conduct. The distinction between these branches of law was less palpable during the Roman and Medieval periods when universal law—whether derived from reason or revelation—provided a foundation for both branches under the law of nations.

Following the Peace of Westphalia in 1648, however, the principle that nations were equal among themselves and sovereign within their territorial borders placed the problem of when to enforce foreign law in a new light. Dutch jurists and the American jurist Joseph Story—who coined the term 'private international law' in 1834—developed a new approach in the context of newly acquired national independence and growing international commerce. According to their approach, a sovereign nation applied foreign law within its borders as a matter of 'comity', or mutual courtesy, under that nation's municipal laws in the interest of promoting relations, and especially commerce, among nations. But because this approach left the extraterritorial force of foreign laws to each sovereign's discretion, comity's rise is often understood as a transformative moment when the regulation of private transactions with foreign elements diverged from public international law's body of universal rules.

This chapter suggests, however, that Story's project, following the Dutch school, was not to parochialize the branch of law governing private transactions with foreign elements, but rather to reconcile territorial sovereignty with the need for universal law to regulate private international commerce. Although foreign laws had extraterritorial force under comity doctrine only by means of a sovereign's municipal laws, the comity principles that sovereigns should use for selecting whether to apply a foreign or local law were intended to apply universally—and the extension of comity toward foreign laws was intended to occur liberally. 'We may thus indulge the hope', Story wrote, 'that, at no distant period, the comity of nations will be but another name for the justice of nations'.[2] Moreover, the very premise that nations could not be strictly bound to comity principles itself reflected a universal principle—namely, the equality and independence of sovereign nations. Thus, Story and the Dutch school did not intend to rupture private international law from public international law but rather to place it on firmer footing within the universal law of nations.

2 Roman and Medieval Approaches

Before the emergence of 'private international law' as a distinct branch of law in the late seventeenth to early nineteenth centuries, universal legal principles governed private transactions and disputes with foreign elements. A brief overview of the Roman and Medieval approaches illuminates this point.

Romans governed transactions and disputes with non-Romans under the *ius gentium*, or the law of nations, which Romans understood to be based on natural

[2] Story (1834), p. 532.

reason and thus to apply universally.[3] When the Roman Empire fragmented into ethnic and tribal communities, however, the Roman concept of universal law gave way to more parochial principles—namely, that the law of the community or the law of the land governed instead.[4]

During the twelfth and thirteenth centuries, renewed interest in Roman law revived the Roman concept of universal law.[5] Medieval legal scholars known as the glossators developed the *ius commune*—that is, 'they established the civil law of Rome, as adapted to current conditions, as the common law of Western Europe'.[6] They based the *ius commune* on a source of universally applicable principles: Christian natural law, as 'unveiled through revelation... or through reason'.[7]

Jurisdictions retained local laws in addition to the *ius commune*, however, and the proliferation of city-states and intercourse among the city-states increasingly presented the problem of deciding which local law should govern transactions and disputes not covered by the *ius commune*.[8] Medieval legal scholars again looked to universal principles to resolve this choice-of-law problem. Specifically, they sought a rational—and thus universally applicable—basis for selecting among competing local laws based on the nature of the case.[9]

The approach they developed became known as the statutory method—based on the use of the term 'statute' as a reference to any municipal law (that is, any local law), whatever its source, as opposed to the narrower connotation of 'statute' as an act enacted by a legislature.[10] The method's premise was that certain laws naturally attach to persons ('personal' laws), whereas others naturally attach to land ('real' laws).[11] Personal laws concerned the status, capacities and rights of persons and had legal effect wherever people subject to them travelled. For example, a law determining at what age a person is no longer considered a minor and thus eligible to form binding contracts was a personal law. Real laws concerned immoveable property and had effect only within the territory of the jurisdiction that promulgated them. A law establishing the rules for the inheritance of land is an example. Inevitably there emerged a third category of laws—'mixed' laws affecting both persons and immoveable property—and statutory theorists disagreed over how to treat them.[12]

The statutory method thus depended on how laws were classified in ways that could seem arbitrary, if not manipulable. The Italian jurist Bartolus famously suggested that the question of whether to apply a foreign law might sometimes turn on the mere fortuity of how the law was written. Would a law stating that 'the

[3] Juenger (2000), p. 1134.

[4] Yntema (1966), p. 10; Mills (2006), p. 7.

[5] Yntema (1966), pp. 10–11; Mills (2006), p. 8.

[6] Yntema (1966), p. 11.

[7] Mills (2006), p. 8.

[8] Mills (2006), p. 9.

[9] Yntema (1966), p. 12.

[10] See Story (1834), p. 11.

[11] Mills (2006), pp. 11–12.

[12] Mills (2006), p. 12.

estate of the deceased shall be inherited by the eldest son' be real, whereas a law stating that 'the eldest son shall inherit the estate' be personal?[13]

Tellingly, however, statutory theorists searched for answers regarding how to classify laws in universal principles. The French jurist Louis Boullenois, for example, wrote multiple volumes on the topic.[14] His ambition was to apply the Cartesian method to resolve conflicts of law—that is, to resolve conflicts of law by deducing universal principles. As he explained: 'Je me rappellai la methode que M. Descartes avoit autrefois pratiquée pour parvenir aux veritez philosophiques qu'il cherchoit; je me persuadai que le Jurisconsulte en pouvoir faire autant pour trouver celles de la Justice '[I remembered the method that Mr. Descartes had formerly practiced to reach the philosophical truths for which he searched; I persuaded myself that the Jurist is able to do as much to find those of Justice]'.[15] He called this project his 'Plan de Jurisprudence universelle' [Universal Plan of Jurisprudence].[16]

3 Early Modern 'Private' International Law

Political and intellectual changes between the seventeenth and nineteenth centuries brought new challenges for resolving choice-of-law problems for transactions and disputes with foreign elements. What we today think of as 'private' international law developed amid these changes.

3.1 Territorial Sovereignty and Legal Positivism

Most significantly, with the decline of the Holy Roman Empire, there was an increased emphasis on territorial sovereignty and the beginning emergence of a global system of nation-states that each claimed sovereignty—or supreme authority—within its territorial boundaries. The new significance of territorial sovereignty and the nation-state is most closely associated with the political writings of Jean Bodin and Thomas Hobbes, and the emphasis on treatymaking to achieve the Peace of Westphalia in 1648 serves as a convenient marker, if only a mythical one, of this development.[17]

A corresponding development was an increased focus on the historical practice of states, rather than reasoning from natural law or other first principles, to identify legal rules. This change of focus reflected broader intellectual changes during the Renaissance, which brought renewed attention to science and the inductive method

[13] *Saul v. His Creditors*, 5 Mart. (n.s.) 569, 591 (La. 1827) (quoting Bartolus).

[14] See Boullenois (1732), Boullenois (1766).

[15] Boullenois (1732), p. xiv. Translation is my own.

[16] Boullenois (1732), p. xxii.

[17] See Bodin (1576), Hobbes (1651).

(based on observation of behaviour and practice) in contrast to deductive reasoning from first principles.[18] A consequence of applying scientific methods to the study of law was a new way of thinking about the authority of laws, known as legal positivism.[19] From the perspective of legal positivism, law's authority arises from the fact of a sovereign's power to enforce the law, rather than from first principles derived from reasoning or revelation.

The rise of territorial sovereignty and legal positivism posed a new puzzle with respect to the resolution by national courts of legal disputes between private parties that concerned foreign persons or conduct. If a sovereign nation-state has supreme authority within its territorial boundaries and legal rules reflect the sovereign's power, why, if ever, should that nation-state's courts rely on foreign laws, as opposed to the nation-state's own laws, to resolve such legal disputes?

3.2 Comity

One influential set of answers came from a line of Dutch jurists—principally Ulrich Huber as well as Paulus Voet and his son Johannes Voet.[20] They were keenly interested in the puzzle posed by territorial sovereignty and foreign law's extraterritorial effect given the context in which they wrote. The Dutch provinces were the site of expanding maritime commerce yet had a federal and decentralized political structure following independence achieved during the Eighty Years' War. The result was legal diversity among the provinces and frequent conflicts of law brought about by commercial intercourse.

The Voets and Huber accepted territorial sovereignty as a self-evident principle, yet they concluded that foreign laws should nevertheless at times be recognized extraterritorially. They resolved the apparent tension between those propositions through the doctrine of 'comity', which referred to mutual recognition of courtesy among nations.

Paulus Voet used the term first. '[W]hen a people out of comity (*comiter*) wish to respect a neighbour's customs and would avoid many things being disputed, which have been validly done according to customs', he wrote, 'statutes are, after considering their effects, sometimes extended beyond the territory of the statute-maker'.[21] Again, the term 'statute' referred to any local law.

Johannes Voet elaborated on his father's reference to comity. He began from the premise that 'the truest rule to follow' is that 'statutes lose all their power beyond the territory of the statutor'.[22] And he reasoned from there that, to spare their subjects

[18] Mills (2006), pp. 15–16.

[19] Mills (2006), pp. 15–16.

[20] See generally Yntema (1966).

[21] Voet (1661), Sect. 4, Chap. 2, para 17 (p. 101).

[22] Voet (1880) [1698], title IV, part 2, para 11 (p. 96).

'very many inconveniences and difficulties', sovereigns must nevertheless sometimes 'remit the reign of the law' out of 'mutual comity' by 'the one more liberally approving the commands of the other, hold them as valid, and aid them'.[23]

It was Huber, however, who further developed the concept of comity and is now most famously associated with it. In his 1707 treatise on the conflict of laws, Huber outlined three maxims setting forth the doctrine of comity in tandem with principles of territorial sovereignty. First, a state's laws had effect within its territory but not beyond. Second, everyone within that territory, whether permanently or temporarily, was subject to those laws. Third, as a matter of 'comity', sovereigns gave effect to applicable foreign laws, in Huber's words, 'so far as they [did] not cause prejudice to the power or rights of such government or of its subjects'.[24] Thus, according to this doctrine, sovereigns had absolute authority within their territories but they were still to give effect to certain foreign laws out of comity absent prejudice.

The doctrine of comity was later popularized, especially in the English-speaking world, by the U.S. Supreme Court Justice Joseph Story in his 1834 treatise *Commentaries on the Conflict of Laws*. The treatise was the first systematic treatment of the conflict of laws viewed through the lens of comity.

Story's interest in comity as a resolution of apparent tension between territorial sovereignty and the need to at times apply foreign laws extraterritorially shared an analogous context to that of the Dutch school: newly independent American states with a federal political system and growing commerce among the American states as well as among foreign nation-states. 'The subject is one of great importance and interest', Story wrote in the preface to his treatise, 'from the increasing intercourse between foreign States, as well as between the different States of the American Union, it is daily brought home more and more to the ordinary business and pursuits of human life'.[25]

3.3 A Matter of Municipal Law?

Under the doctrine of comity, when a foreign law was given effect within a sovereign's territory, it was due to the sovereign's grace, and it was thus an application of foreign law as a matter of the sovereign's municipal law. It 'flows' from Huber's first two maxims, Story wrote, 'that whatever force and obligation the laws of one country have in another, depends solely upon the laws, and municipal regulations of the latter, that is to say, upon its proper jurisprudence and polity, and upon its own express or tacit consent'.[26]

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[23] Voet (1880) [1698], title IV, part 2, para 12 (p. 97).

[24] Huber (1707), p. 403.

[25] Story (1834), p. v.

[26] Story (1834), p. 24.

In this way, 'private' international law might be understood to operate differently than public international law. Public international law, as then described in the treatises of Hugo Grotius and Emer de Vattel for example, applied truly *international* rules.[27] For example, the rule that '[n]o nation... has a right to take possession of the open sea' applied to any given nation under public international law without the exercise of municipal law.[28] Not so with Huber and Story's private international law. Any foreign rule that was applied under the doctrine of comity had effect only by virtue of municipal law.

Much for this reason, the emergence of comity doctrine is often described as 'the beginning of the trend towards the decline of universalism in private international law'.[29] Huber and especially Story are portrayed as transitional figures from the statutory theorists who chased universal principles for resolving conflicts of law to modern positivists who understand the resolution of conflicts as merely a matter of the sovereign asserting its will. On this telling, Huber and Story mark a decisive move toward what would become 'the conventional wisdom' that 'private international law is wholly municipal not only in the sense that it submits multistate transactions to national laws but also as regards its own rules, which—unlike those of public international law—differ from one nation to the next'.[30] On some accounts, Huber and Story had already arrived at that proposition insofar as comity doctrine can be understood as simply an effort to mediate between sovereign interests.[31]

3.4 Comity Doctrine as a Set of Universal Principles

However, Huber and Story intended their comity principles to serve as universally applicable rules of selection between foreign and local laws when in conflict. Their doctrine of comity is thus best understood as an effort to achieve international uniformity across transnational commercial transactions *despite* territorial sovereignty, rather than as an effort to guard territorial sovereignty.

Their objective to universalize, rather than parochialize, the rules for resolving conflicts of law goes back to the motivating concern for both the Dutch jurists and their American successor to advance international commerce. After all, commerce needs

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[27] See Grotius (1625), Vattel (2008) [1758]. Grotius and Vattel used the term 'law of nations', but their treatises concerned the portion of the law of nations governing relations among states—later described by the neologism 'international law'.

[28] Vattel (2008) [1758], p. 250.

[29] Mills (2006), p. 25; see also Nussbaum (1947), p. 96 ('the Dutch writers inaugurated an evolution which made private international law essentially a matter of domestic law'); De Nova (1966), p. 449 (describing 'the common view'); Paul (1988), p. 161 (Story 'sowed the seeds for the isolation of private international law from the body of public law'). To be sure, these scholars have long appreciated the ambiguity, if not tension, between comity theorists' intentions (universal principles) and ideas (reliance on municipal law).

[30] Juenger (1994–1995), p. 46.

[31] See Childress (2010), pp. 17–28.

uniform and predictable rules. The development of comity doctrine was an attempt to reconcile the new reality of territorial sovereignty with the need for universal law to regulate and promote commerce across borders in an increasingly interconnected world.[32]

Huber made this point explicitly. He wrote in his treatise:

> It often happens that transactions entered into in one place have force and effect in a different country or are judicially decided upon in another place. It is well known, furthermore, that after the breaking up of the provinces of the Roman Empire and the division of the Christian world into almost innumerable nations, being not subject one to the other, nor sharing the same mode of government, the laws of the different nations disagree in many respects. It is not surprising that there is nothing in the Roman law on the subject inasmuch as the Roman dominion, covering as it did all parts of the globe and ruling the same with a uniform law, could not give rise to a conflict of different laws. The fundamental rules according to which this question should be decided must be found, however, in the Roman law itself. Although the matter belongs rather to the law of nations than to the civil law, it is manifest that what the different nations observe among themselves belongs to the law of nations.[33]

Huber thus explained that the 'fundamental rules' of selection between the local and foreign laws in conflict belonged to the law of nations.[34]

Story, too, saw the doctrine of comity as part of the law of nations. Though Story's treatise is often misunderstood as an effort to assert absolute territorial sovereignty against the application of extraterritorial application of foreign law, he sought to place private international law on a firmer basis within the universal law of nations.

To be sure, Story started from the premise that, in light of the equality of nations, '[i]t is plain, that the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country. They can bind only its own subjects, and others, who are within its jurisdictional limits; and the latter only while they remain there. No other nation, or its subjects, are bound to yield the slightest obedience to those laws. Whatever extra-territorial force they are to have, is the result, not of any original power to extend them abroad, but of that respect, which from motives of public policy other nations are disposed to yield to them, giving them effect... with a wise and liberal regard to common convenience and mutual necessities'.[35] This language, out of context, certainly may sound sceptical of the application of foreign law according to universal principles.

For Story, though, the fact of a world divided into territorial sovereignties presented a challenge for constituting a global legal order that could promote international commerce. He recognized that international commerce needed uniformity. 'Commerce is now so absolutely universal among all countries; the inhabitants of all have such a free intercourse with each other; contracts, marriages, nuptial settlements, wills, and successions, are so common among persons, whose domiciles are in different countries, having different and even opposite laws on the same subjects; that without some common principles adopted by all nations in this regard there

[32] Yntema (1966), p. 9.

[33] Huber (1707), p. 402.

[34] Huber (1707), p. 402.

[35] Story (1834), pp. 7–8.

would be an utter confusion of all rights and remedies; and intolerable grievances would grow up to weaken all the domestic relations, as well as to destroy the sanctity of contracts and the security of property'.[36]

Story's project thus started from the premise that the need to promote international commerce in a world divided into territorial sovereignties called for what he described as 'extra-municipal principles'.[37] It is the 'branch of public law' consisting of these 'extra-municipal principles' that Story called, for the first time, 'private international law'.[38] The modifier 'private' refers to the fact that this branch of law was 'chiefly seen and felt in its application to the common business of private persons' in their commercial transactions, rather than to the intercourse of nations.[39] But this branch of law was nevertheless intended to constitute 'international law' that could supply 'extra-municipal' rules of selection among local and foreign laws.[40]

In Story's search for extra-municipal principles in *Commentaries*, Story looked first to the statutory method, which he ultimately rejected because its principles for selecting between local and foreign laws were too vexing, not because the method relied on universal methods of selection. *Commentaries* began with the statutory theorists of Europe, who Story noted 'have examined the whole subject [conflicts of law] in all its bearings with a much more comprehensive philosophy, if not with a more enlightened spirit'.[41] But he found the method unavailing. 'Their works, however, abound with theoretical distinctions, which serve little other purposes than to provoke idle discussions, and with metaphysical subtilties, which perplex, if they do not confound, the inquirer'.[42] He was referring to the statutory method's thorny distinctions among personal, real, and mixed laws.[43] He rejected the statutory approach because he found the classification system on which it rested arbitrary and manipulable. 'Whenever they wish to express, that the operation of a law is universal, they compendiously announce, that it is a personal statute; and whenever, on the other hand, they wish to express, that its operation is confined to the country of its origin, they simply declare it to be real'.[44] Yet Story shared with statutory theorists their desire for universal principles to govern conflicts of law—what he called their 'more enlightened spirit'—he just rejected the principles they came up with.[45]

Story's affinity with statutory theorists' ambition for international law to govern private transactions across borders, while nevertheless rejecting their particular approach, is evident from the context in which he set out to write *Commentaries*. Story's treatise, although conventionally regarded as the first American treatise on

[36] Story (1834), p. 5.
[37] Story (1834), p. 9.
[38] Story (1834), p. 9.
[39] Story (1834), p. 9.
[40] Story (1834), p. 9.
[41] Story (1834), p. 10.
[42] Story (1834), p. 10.
[43] See Story (1834), pp. 11–18.
[44] Story (1834), p. 18.
[45] Story (1834), p. 10.

the subject, was written partly in response to an earlier American treatise and the controversy from which that treatise arose.

3.5 *Application of the Statutory Method to Which Story Responded*

The earlier treatise was Samuel Livermore's *Dissertations on the Questions which Arise from the Contrariety of the Positive Laws of Different States and Nations* (1828). Livermore was a writer and lawyer from the state of Louisiana, which, unlike Story's native Massachusetts, had a civil law system comparable to that of the European statutory theorists.[46] Livermore wrote *Dissertations* as an exposition and defence of the statutory method after he argued and lost a landmark conflicts-of-law case in the Louisiana Supreme Court, *Saul v. His Creditors* (1827).[47]

Saul concerned the estate of a couple that had married in the state of Virginia, where husbands owned all marital property, and then moved to Louisiana, where the marital property was held in common between husband and wife.[48] The wife died, and the husband later tried to protect half of the estate from his creditors by arguing that, under Louisiana law, this half of the estate had belonged to his wife and passed to their children upon her death.[49] The creditors, represented by Livermore, countered that the wife never held title to any portion of the estate because the Virginia law determining the wife's capacity to own property was a personal law that applied in Louisiana.[50]

The Louisiana Supreme Court, in an opinion by Justice Alexander Porter, rejected Livermore's reliance on the statutory method. Porter reasoned that the method could not resolve the case because statutory theorists disagreed among themselves over whether marital laws were personal or real.[51] Porter dismissed what he described as an unintelligible distinction between personal and real laws.[52] Next, Porter acknowledged that, as a matter of comity, Louisiana would generally recognize the law of the jurisdiction where the marital contract was formed, but he then emphasized an exception: Contracts made in foreign jurisdictions 'should not be enforced to the injury of the state whose aid is required to carry them into effect'.[53] Without explaining why

[46] See Rabalais (1981).

[47] 5 Mart. (n.s.) 569 (La. 1827); on *Dissertations*, see generally De Nova (1964); on *Saul*, see Stephenson (1934), p. 25.

[48] *Saul*, 5 Mart. (n.s.) at 570–572.

[49] *Saul*, 5 Mart. (n.s.) at 571.

[50] *Saul*, 5 Mart. (n.s.) at 571; see Livermore (1827).

[51] *Saul*, 5 Mart. at 598.

[52] *Saul*, 5 Mart. at 602.

[53] *Saul*, 5 Mart. at 585–586.

that exception was appropriate in the case, Porter applied Louisiana law and held that the Sauls had owned their property in common.[54]

Livermore's treatise sought to defend the statutory method—and the need for the extraterritorial application of certain foreign laws—in the wake of *Saul*. In contrast to Porter's reliance on comity, Livermore underscored the obligatory nature of foreign personal laws by describing the statutory method's rules as international law. The principle that the effect of a particular personal law was not confined to the promulgating state's territorial boundaries, Livermore declared, 'has been aptly styled, a rule of international law'.[55] For Livermore, this principle and the 'law of nations' rested 'upon the same foundation' of mutual utility.[56] The extraterritorial extension of personal laws, for example, had 'arisen from a sort of necessity, and from a sense of the inconveniences which would result from a contrary doctrine'.[57] He explained: 'Although they are separately sovereign and independent, yet the different nations, forming what we may call the civilized world, may be considered as one great society composed of so many families, between whom it is necessary to maintain peace and friendly intercourse, and whose duty it is, to maintain such principles, as are most conducive to that object and the general good'.[58]

For Story, *Saul* and Livermore's *Dissertations* crystallized the fundamental problem that motivated his *Commentaries*. Livermore emphasized what was at stake: the Enlightenment vision of a 'civilized world' engaged in peaceful commerce governed by law.[59] Yet *Saul* laid bare the inadequacy of the statutory approach. 'There is indeed great truth' in Porter's *Saul* opinion, Story wrote, that "[w]hen so many men of great talents and learning are thus found to fail in fixing certain principles, we are forced to conclude, that they have failed, not from want of ability, but because the matter was not susceptible of being settled on certain principles."[60] Only then, after quoting Porter's opinion, did Story's *Commentaries* turn to Huber's three maxims in search of new extra-municipal principles.[61]

4 Story's 'Extra-Municipal' Principles

Story believed that Huber's maxims could serve as extra-municipal principles applied by all nations, with the key principle being Huber's third maxim that, from comity, 'the laws of every people in force within its limits, ought to have the same force everywhere, so far as they do not prejudice the power or rights of other governments,

[54] *Saul*, 5 Mart. at 608.

[55] Livermore (1828), p. 133; see also Livermore (1828), pp. 142, 149, 151.

[56] Livermore (1828), p. 30; see also Livermore (1828), p. 133.

[57] Livermore (1828), p. 28.

[58] Livermore (1828), p. 30.

[59] Livermore (1828), p. 30.

[60] Story (1834), p. 29.

[61] See Story (1834), p. 30.

or their citizens'.[62] Based on Huber's maxims, Story sought 'the establishment of a general system of international jurisprudence, which shall elevate the policy, subserve the interests, and promote the common convenience of all nations. We may thus indulge the hope, that, at no distant period, the comity of nations will be but another name for the justice of nations; and that the noble boast of the great Roman Orator may be in some measure realized:—*Non erit alia lex Romae, alia Athenis, alia nunc, alia posthac; sed et omnes gentes et omni tempore una lex et sempiterna et immortalis continebit* [—And there will not be different laws at Rome and Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times]'.[63]

Story's quotation of Cicero is revealing. For Story's readers, it would have been a familiar reference to Lord Mansfield's opinion in the maritime commercial case *Luke v. Lyde* (1759), in which Mansfield quoted Cicero to support the proposition that 'the maritime law is not the law of a particular country, but the general law of nations'.[64] The allusion to *Luke v. Lyde* and maritime law was not coincidental—Story envisioned private international law as a type of general law much like maritime law and the law merchant, which governed commercial disputes between parties from different countries according to transnational legal principles.[65] As Story wrote for the U.S. Supreme Court of general commercial law in *Swift v. Tyson* (1842), 'the true interpretation and effect [of contracts and other commercial instruments] are to be sought, not in the decisions of the local tribunals, but the general principles and doctrines of commercial jurisprudence'.[66]

To be sure, Story recognized, as did Huber, that states could not be compelled to follow comity doctrine to recognize foreign laws within their territorial boundaries. Comity was a matter of 'courtesy' and 'not of absolute paramount obligation, superseding all discretion on the subject'.[67] 'Every nation must be the final judge for itself', Story acknowledged, 'not only of the nature and extent of the duty but of the occasions, on which its exercise may be justly demanded'.[68] For Story, that fact, however, did not make private international law much different from public international law. Even absent compulsion, both branches of law had force because it was in each nation's interest to comply. 'The true foundation, on which the administration of international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconveniences, which would result from a contrary doctrine, and from a sort of moral necessity to

[62] Story (1834), p. 30.

[63] Story (1834), p. 532. The translation is from Cicero (1928), p. 211.

[64] 97 Eng. Rep. 614, 617.

[65] See Juenger (2000), pp. 1134–1135.

[66] 41 U.S. (16 Pet.) 1, 19; see also Juenger (2000), p. 1143.

[67] Story (1834), pp. 33, 36.

[68] Story (1834), p. 33.

do justice, in order that justice may be done to us in return'.[69] For this proposition, Story cited, of course, Livermore.[70]

Even when it came to the exception to comity—namely, that a nation need not apply foreign law if it would be prejudicial to that nation—Story, like Huber, expected that nations would use the exception sparingly, given a calculation about long-term reciprocity. For Huber, the latter exception applied only in 'serious' cases, such as instances of fraud or incestuous marriages 'too revolting' to merit recognition.[71] Some scholars have suggested that Story understood the exception to be more discretionary and thus broader.[72] But Story's examples of foreign laws too prejudicial to enforce were extreme—such as a law allowing 'creditors to cut their debtor's body into pieces, and divide it among them'.[73] In any event, to the extent that comity's prejudice exception essentially allowed for considerations of public policy, the comity doctrine revealed that even 'private' transactions and disputes—and the law governing them—were not sealed off from the types of 'public' policy concerns motivating public international law.

Finally, Story's and Huber's recognition that nations could not be bound to exercise comity reflected a universal principle—the equality and independence of nation-states—that similarly underwrote public international law.[74] Story himself made this point. He derived the doctrine that foreign laws have extraterritorial effect only as a matter of comity under the territorial sovereign's municipal law 'from the equality and independence of nations'.[75] 'It is an essential attribute of every sovereignty', he wrote, 'that it has no admitted superior, and that it gives the supreme law within its domains on all subjects appertaining to its sovereignty'.[76] And he noted that it was the same for the public international law of the day: 'Vattel has deduced a similar conclusion from the general independence and equality of nations, very properly holding, that relative strength or weakness cannot produce any difference in regard to public rights and duties'.[77] For Story, what he dubbed private international law in 1834 was no less than a branch of the universal law of nations.

[69] Story (1834), p. 34.
[70] Story (1834), p. 34, n. 1.
[71] Huber (1707), pp. 404, 410.
[72] Watson (1992), Leslie (1948), p. 211.
[73] Story (1834), p. 27.
[74] See Mills (2018), pp. 16–18.
[75] Story (1834), p. 8.
[76] Story (1834), p. 8.
[77] Story (1834), pp. 8–9.

5 Conclusion

The understanding of private international law as a branch of law distinct from public international law developed in the late seventeenth to early nineteenth centuries. A new emphasis on territorial sovereignty and the equality of nations made municipal law, rather than universal law, the basis for giving foreign laws and judgments extraterritorial effect. But, at least as this branch of law was developed by Story and his Dutch predecessors, the goal was to reconcile territorial sovereignty with the need for universal law to regulate international commerce among private persons. The project was thus to place private international law on a firm basis within the law of nations, not to depart from it.

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Chapter 3
Recognition—A Story of How Two Worlds Meet

Dulce Lopes

Abstract Recognition as a legal category has been a traditional instrument in both private and public international law. In the former, concerning judicial decisions and arbitral awards; in the latter, concerning the recognition of States and governments. However, the multiple new uses of this doctrine over the last few decades have shown that it has immense potential for framing and operationalising other public and private international law situations. Recognition of foreign decisions and acts and recognition of foreign legal situations have demonstrated the growing intersectionality between public international law and private international law. This combined with the fluidity of the boundaries between both disciplines, the rise of extraterritoriality and the demands of pluralism, raises recognition to the status of a proper *transversal* legal instrument.

Keywords Recognition · Equivalence · *Ordre public* · Cooperation · Integration

1 Recognition: All But a Senseless Concept

The term recognition has various meanings within the legal domain and outside of it. It may refer to situations as diverse as becoming aware of something, admitting, or accepting something as authentic, ascertaining a reality, conferring a status or being convinced of a situation. Moreover, mutual recognition, is an essential element of life in society, indispensable to the formation of personal identity and social integration, because it mixes the relevant elements of identity and alterity into one single doctrine.[1]

It is not surprising, given this open-ended nature of recognition, that Menzel sees it as a very vague and not a "winning" notion, which has the little distinctive capacity to other notions such as *Berücksichtigung* (taking into consideration)

[1] Axel (2004), pp. 133–136.

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Anwendung (application) and *Vollstreckung* (enforcement), and which can only be specified amidst concrete rules.[2]

However, what others see as a weakness, we see as a strength, for it is this breadth and flexibility which enables the doctrine of recognition to assume growing importance in areas where it seemed to have no settled place as regards foreign public acts—as in international public law—or in areas where, with time and the decline of doctrines based on vested rights, it had seemed to have loosened its relevance—as happened in the field of private international law.

Even in the international administrative field, an area that has hardly taken off but is currently gaining speed, Neumeyer alerted to the fact that the delimitation of borders cannot be anarchic, nor do states behave in isolation, and, as members of the public international community, they are required to recognise acts of authority emanating from other members of that same community.[3]

Recognition is, as shall be seen, the doctrine that best facilitates the compatibilization of public and private interests co-involved in the extraterritorial exercise of public authority, regardless of the particular *nuances* of this exercise. Indeed, a specific situation may be framed as a private or as a public law issue, depending on the legal order(s) at stake and on the claims of the parties, which demands some kind of *common language* that bridges the distance between those "two worlds".[4]

In broad terms, recognition is an instrument of connection or relationship between legal orders, which—from the outset—fits the relational function that is at the core of any international law discipline. Recognition, in its variants, includes a habilitating rule or a "normative proposition"[5] through which a foreign law, decision or legal situation may take effect in the State of recognition.

However, this habilitation does not correspond to a "blank cheque" for the State of origin, even in cases where automatic recognition is established. The dimension of control—either prior or subsequent—is essential to the concept of recognition, and it is the responsibility of the host or recognising State to ensure that the criteria on which recognition depends are always met,[6] as a way for allowing for the extension or accommodation of effects of foreign legislation, decisions or legal situations constituted abroad. Indeed, recognition involves, in principle, the renunciation by the State of recognition to primarily regulate a situation,[7] but not, we add, to control the production of its effects, since this State, also due to constitutional constraints, cannot fully dispense with this scrutiny.

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[2] Menzel (2011), pp. 810–811 and 827–829.

[3] See Neumeyer (1911), p. 6.

[4] Two simple examples: (i) international surrogacy is seen in some countries as an issue to be legislated against and even criminalised; in others, it is seen as a contractual issue; (ii) some professions are reserved in some countries to holders of a specific diploma; in others, they are only subject to the market.

[5] Bureau and Watt (2017), p. 279.

[6] As already highlighted by Frankenstein (1926), pp. 328 and 443.

[7] Vicente (2009), p. 808.

Therefore, this does not involve a waiver of national sovereignty or a transfer of political power to other countries or authorities,[8] even if recognition is mandatory and there is no concrete act of recognition, since the recognising State reserves for itself the possibility to intervene whenever recognition endangers the vital interests, principles and values of its national legal order.

However, this fear of losing sovereignty explains in part why recognition has paved its way initially through the private international field, via the recognition of judicial decisions, arbitration awards and some legal situations. Recently it has found a securer place in areas of public law, mainly through the influence of the European Union, which applies the doctrine of mutual recognition to a wide array of fields such as criminal and administrative law.

A lot is yet to be said and done, but the wheels are turning, and the "theory of recognition" is increasingly an integral part of the response to disputed international situations, some of them with both public and private contours. Indeed, recognising a marriage celebrated in a third state (even if not under the rules applicable in the State of recognition) may have clear implications in public matters (for instance, the acquisition of nationality; social security and tax status of the spouses and children); and recognising professional qualifications attributed by a third state (though different from the ones in the State of recognition) may have clear implications in accessing the market and in contractual and labour terms.

The intertwinement of public and private concerns, evident in fields such as migration, environment and the digital market, and the growing trends towards extraterritoriality of statutes and decisions, demand that the traditional public/private divide is somewhat transposed by instruments that ensure a combination of features of both.

In the following parts of this Chapter, we will explore the structure and use of recognition as a *connecting* instrument between fields of law applicable to international situations by analysing the following dimensions:

- A genetic dimension: the communion of the significant interests, values and principles that underlie recognition in public and private international law;
- An instrumental dimension: the importance of public and private international law instruments in establishing recognition;
- A substantive dimension: the closeness of the criteria for (refusing) recognition in both fields;
- A procedural dimension: the importance of legal actors and adequate processes in recognition;
- An effects dimension: the function of recognition as a mechanism that entails a "prudential" acceptance of foreign systems.

[8] On this particular discussion, see Burbaum (2003), p. 27, Wojtyczek (2009), p. 115 and Wenander (2011), p. 756.

2 Genetic Dimension

Recognition implies overcoming a pure abstentionist paradigm in the relationship between public authorities.[9] Once one leaves aside what recognition is not, the question of the positive function of recognition remains. Does it refer to a position of retraction or containment by the State, which exercises deliberate self-restraint over the extraterritorial exercise of a foreign public authority, allowing it to extend beyond its original location, or is it rather a mechanism that promotes cooperation between authorities, both State and international, in the exercise of their respective functions?

The characteristics that we have attributed to recognition allow us to speak of self-restraint in a certain sense, translated into the renunciation of the primary substantive resolution of the situation (if it has already been resolved, why do it all over again?). This restraint results from the impossibility or inconvenience of re-regulating the situation and placing illegitimate obstacles in the way of an activity sustained by foreign law, decision, act or situation, based solely on its origin. But this is only valid up to a point.

Recognition obligations have long gone beyond a position of restraint by the State of recognition, requiring it to act in such a way as to strengthen the situation recognised (for example, preventing third-party intervention in recognised freedoms or making it possible to enforce foreign decisions), which in some cases may even prove to be a more favourable position than the one that the State of recognition would grant to similar legal situations.

Therefore, cooperation (or even integration in the case of the European Union) is the relevant *Leitmotiv* behind the recognition[10]since this is a privileged means of developing normative webs between States and an instrument of regulatory concert between States at the international level.[11]

At this point, we are looking for the ultimate basis of recognition and not its immediate source, since, as far as the latter is concerned, and as will be shown, recognition may derive from state rules, from rules of general international law, from international conventions or rules of international organisations, or even from custom (*mores*) or mere tolerance of the host state.

Cooperation seems in fact to be the common trait as regards provisions on recognition. Although it is disputable as to whether we can talk of an international obligation to cooperate, this is not a senseless concept[12] and a predisposition to cooperate (or an obligation to sincerely do so, as happens in some cases, within the European Union) may, in addition, be a driving factor in the establishment of recognition mechanisms. It is also common to align cooperation with a certain level of mutual trust (faith and credit) between States and authorities; however, if this seems to be the case within

[9] Luzzatto (1972), p. 247.

[10] Schmidt-Aßmann (2012), pp. 292–293.

[11] Bermann (2008), pp. 23–30.

[12] Delbrück et al. (2012), pp. 3–16.

sister States and member States of organisations with integrationist traits,[13] this need not be a prerequisite for recognition that depends on more technical appraisal, such as the equivalence between jurisdictions.

Besides cooperation, other grounds have been autonomously, or complementarily used to establish recognition.[14] These grounds range initially from comity (of nations)[15]to the notion of sovereignty itself,[16] and to others with a more marked legal content, such as the legal obligation theory[17] and the vested rights theory.[18] The latter has resurged as a ground to establish recognition, mostly in connection with fundamental freedoms and citizenship of the European Union, allowing acquired rights in the country of origin to pave their way with fewer constraints into other legal orders, both in the private and public international law fields (going from the right to a name to the right of economic initiative, for instance). The combination of two features of vested rights—a unilateral or territorial approach to the acquisition of a right and the duty of the courts or other entities to recognise rights created abroad—are indeed at the heart of the theory of recognition.[19]

Also, if considered individually, fundamental freedoms (linked with European citizenship, within the European Union)[20] and human rights (there and elsewhere)[21] are playing their part in establishing and formatting recognition. For instance, within the European Court of Human Rights, in cases of international surrogacy, the right to family life combined with the best interests of the child, has been pivotal to the demand that contracting States (though not allowing for surrogacy themselves) include "some sort" of recognition of internationally created situations, while at the same time conserving a margin of appreciation in defining the kind of recognition,

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[13] Even in these cases, *de iure* mutual trust is not always followed by de facto mutual trust, in cases for instance of systemic breach of recognition requirements. See Cambien (2017), p. 101.

[14] For a summing up, see Wiegant (2017), pp. 1488–1492.

[15] Voet (1715), p. 140, Huberi (1976), p. 25, Story (1834), pp. 33–37. This ground has not been forgotten and is evidenced, among others, by Maier (1996), pp. 70–73, Paul (2008), pp. 21–37, Collins (2002), p. 109, Childress (2010), pp. 59–61 and Briggs (2012), pp. 88–91. The OECD has even adopted, within its competition commission, Reports on Positive Comity 1999, https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2752161.pdf. Accessed 10 July 2021.

[16] Vareilles-Sommières (1900), pp. 16–28. A binary theory (Michaels (2004), pp. 67–70) and Roque (2014), p. 1202 emphasises that recognition may be based either on foreign interests or grounds inherent to the interests of the State of recognition.

[17] This legal obligation theory is quite heterogeneous and can be seen both as an obligation to recognise founded on the idea of justice or humanity (for instance, Maridakis (1963), p. 475); or on the need to withdraw effects from obligations incurred abroad by the parties (for instance, Kessedjian (1987), p. 207). Schwarz (1935), pp. 49–58, however, believed that there is no international obligation to give effect to foreign acts, but only a natural obligation of a public-legal nature.

[18] Although Morris (1971), p. 523 concluded that "*the vested rights theory is dead*", it seems to be still alive and kicking as demonstrated, among others, by Correia (1982), pp. 59–104, Ramos (1974), p. 216; Vicente (2017), pp. 263–276, Jayme and Kohler (2004), p. 484, Pataut (2009), p. 78 and Michaels (2006), pp. 42–43.

[19] Basedow (2017), p. 1818.

[20] Lagarde (2014), pp. 26–30 and Möstl (2010), p. 410.

[21] Guillaumé (2012–2013), pp. 522–523, 526–530, and Wallnöfer (2010), p. 691.

they allow for.[22] On the contrary, the violation of procedural defence rights has also played a decisive role in non-recognising judicial decisions,[23] showing how the individual's position is not a mere by-product within the doctrine of recognition.

These grounds all play a role, albeit a differentiated one, in justifying each specific case of recognition and its effects. Their weighing[24] and combined strength indicate whether recognition is merely a possible method, a preferential (or at least regular) one, or a necessary method in response to international situations.

3 Instrumental Dimension

Despite the importance of recognition, it does not present itself, strictly speaking, as an essential mechanism for conducting relations between public authorities in the external sphere. Therefore, it is not a fundamental nor a general principle both in public and private international law.

It is true that there are a growing number of international conventions and treaties that establish cooperation mechanisms and among them those that include recognition as one of their—if not the main—features.[25] However, in most cases, recognition stops there and, even if such conventional instruments exist, States may or may not decide to be bound by those mechanisms and therefore, autonomously accept or exclude recognition into their legal orders.

And even in civil and commercial matters, recognition of judgments, outside the European Union area has not made significant progress towards the creation of conditions of mutual recognition, and the application of internal rules of recognition is not always carried out consistently, since it is difficult to establish general recognition

[22] We refer only two of the most recent pronouncements of the ECHR: Advisory Opinion concerning the recognition in domestic law of a legal parent–child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother, 10 April 2019, request no. P16-2018–001; and Judgement *Valdís Fjölnisdóttir and Others v. Iceland*, 18 May 2021, application no. 71552/17. The Hague Conference is also taking a closer look at surrogacy and attempting to reach a Protocol on legal parentage established as a result of international surrogacy arrangements (https://www.hcch.net/en/projects/legislative-projects/parentage-surrogacy).

[23] ECHR decision, *Pellegrini v. Italy,* 20 July 2001, case 30,882/96.

[24] Accentuating the relevance of the balancing of interests as the fundamental basis for recognition, see Weiler (2005), p. 47, Kinsch (2010), p. 269, Janssens (2013), p. 263, Pamboukis (2008), p. 530, and Basedow (1980), p. 204.

[25] For instance in the public field, the Convention on the Recognition of Qualifications concerning Higher Education in the European Region 1997, Lisbon, 11 April 1997, https://www.coe.int/en/web/higher-education-and-research/lisbon-recognition-convention; the Global Convention on the Recognition of Qualifications concerning Higher Education 2019, Paris, 25 November 2019, http://portal.unesco.org/en/ev.php-URL_ID=49557&URL_DO=DO_TOPIC&URL_SECTION=201.html; and in the private field, the Hague Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (https://www.hcch.net/en/instruments/conventions/full-text/?cid=78) and the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (https://www.hcch.net/en/instruments/conventions/full-text/?cid=137). Accessed 10 July 2021.

practices that depend significantly on the degree of confidence in the quality of justice administered in the State of origin.[26]

This does not mean that a State cannot establish its own rules and procedures on recognition in line with a progressive opening to foreign law, but we do not believe, unless in the field of recognition of foreign (private) judicial decisions where such procedures can be found in detail in national legislations, that this has become a general trend.

As for mutual recognition, despite its growing relevance, especially in the European Union, we do not see that we should distance ourselves from the position taken by Baratta,[27] who did not see it as a fundamental principle of the Union (or, by that case, of any other organisation, such as Mercosur or the World Trade Organisation), as it did not respond to a necessary ideal of legislative policy of the Union, but only as a common principle, whose mobilisation depends on the principles of subsidiarity and proportionality.[28]

The so-called principle of mutual recognition is, after all, a rule that, although it is replicated within the European Union and may not require an express provision in law, essentially in cases involving the exercise of community freedoms, will not, therefore, merit the epithet of a fundamental principle of Union Law. It follows, however, from mutual recognition, seen then as a rule—often unwritten and repeated within the case-law of the Court of Justice, starting with the *Cassis de Dijon* case[29]—that any limitation on recognition must be read restrictively and interpreted in compliance with the requirements that Union law establishes in this regard.

It should also be borne in mind that this is only one among many other (consideration of foreign law, conflict of laws, technical harmonisation, information, consultation and procedural cooperation mechanisms) methods of resolving international situations, and also that in many "burning" cases (such as polygamy, adoption, surrogate parenting or marriage by same-sex couples) recognition is still highly contested and solutions patently diverge, given the different existing conceptions of State and society.

It is necessary to check beforehand if recognition is indeed the best method of solving international disputes, which depends on its ability to combine all aspects, public and private, that arise from "accepting" the regulation of a different authority.[30] According to Tichý, the following elements should be taken into consideration when deciding to establish recognition as a legal method of solving (certain) cases: the complexity involved in recognition; the interests of the parties or third parties;

[26] See Baumgartner (2008), pp. 181–183.

[27] Baratta (1993), pp. 775–778. See also Niehof (1989), pp. 11–13 and Weatherhill (2017), p. 5.

[28] Against, Hatzopoulos (2010), pp. 68–70.

[29] CJEU decision, *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein*, 20 February 1979, case 120/78.

[30] Janssens (2013), p. 77.

the public interests of the concerned authorities; specific interests, especially the fundamental rights involved and the sovereignty issue.[31]

In addition, a significant part of the decision as to whether to engage in recognition is founded on the degree of openness to and acceptance of foreign situations. As Watt puts it, a "hospitality" model—that departs from exclusion or mere tolerance—requires instruments that are moulded to accommodate difference and manage cultural pluralism. Recognition or "recognitive statutism" that accepts "*foreign law in its own terms*" but establishes some thresholds to such tolerance, sometimes through accommodation and adjustment,[32] is therefore welcomed.

When the decision is made towards establishing recognition as a legal instrument, a structured approach must be followed regarding both the criteria that recognition should be based on and the procedures that should be followed. These we will discuss in turn.

4 Substantive Dimension

Concerning the requirements on which recognition depends, the basis will be the existing regulations on recognising judicial decisions, which point progressively to an absence of control of merit and the retraction of reciprocity clauses.

However, requirements such as authenticity, absence of fraud against the law, non-infringement of fundamental procedural rights and the international public order (*ordre public)* of the recognising State are still parameters for the recognition of foreign decisions subject to revision or confirmation.

The development of other forms of recognition highlights the transformative potential of this doctrine in areas marked by cooperation or even integration and shows how requirements have been evolving over the years. For instance, within the European Union, *fraus legis* has become, in many cases, a much quarrelled over cause for non-recognition, given the importance of the exercise of fundamental freedoms in a transnational context.[33]

Other conditions have been widely discussed in specialised doctrine, mainly within private international law, and can be summarised as follows: acts should be authentic and stable, issued by a competent authority, and to some extent be equivalent to the recognising State's rules. The requirements such as respect for the State's public order play an unsurmountable role in guaranteeing recognition.[34]

Although these are the typical criteria for recognising foreign decisions (both of a private and of a public nature), not all of them intervene formally and in the same way. In addition, not all of them are perceived to incorporate the same legal demands.

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[31] Tichý (2011), p. 23. For other listings of relevant interests, see Mehren and Trautman (1968), pp. 1603–1604 and Casad (1984), p. 61.

[32] Watt (2017), pp. 134–139.

[33] Lopes (2018a), pp. 121–145.

[34] Lopes (2018b), pp. 529–579.

Depending on the type of recognition, these conditions can function as positive or negative criteria. In the first case, they intervene a priori and justify a recognition measure; in the second case, they are used a posteriori as means to oppose recognition that is ongoing or that has already taken place.

Furthermore, they may intervene with different *intensities*, according to the situations to be recognised. For instance, the equivalence requisite—seen as the *punctum crucis* of the recognition decision[35]—may, according to the matter at hand and the mutual trust reached, incorporate several layers: from a presupposed or presumed fulfilment of equivalence standards to the definition of minimum harmonisation parameters or even to the demand of proof of tangible equivalence criteria.[36] These levels of equivalence must also be in line with and proportional to the effects that will be withdrawn from such foreign acts.[37]

It is in addition important to understand that in cases where public concerns are at the heart of recognition, the control of respect for public order (*ordre public*) may be intertwined with political or public policy safeguards[38] or these may constitute an additional level of control for recognising foreign decisions.[39]

In the case where legal positions or contractual situations are directly at stake—in which no adjudicative act from a public authority exists—those requirements for recognition take a singular turn.

On this point, the theory of recognition has evolved from a more restrictive position that required some sort of intervention of public entities to crystallise the legal situation (for instance, the inclusion in a public registry) for it to be externally recognised[40]; into a more flexible trend that allows for such recognition based solely on the stability of the situation, the proximity to and validity of the situation according to the State of origin, the expectations and fundamental rights of the persons involved and, naturally, the absence of violation of the public order.[41]

The latter position has had some resonance in specific state legal orders[42] and at an international level, where, for instance, settlement agreements resulting from mediation agreements are sought to produce, without any previous judicial homologation or conversion into an arbitral award, effects in other States bound by the

[35] See Bernel (1996), pp. 133–136.

[36] These several forms of ascertaining equivalence show that there are different ways of coordinating plurality as discussed by Marty (2006), pp. 37–129.

[37] See Biscottini (1961), pp. 658–670.

[38] Berentelg (2010), pp. 265–273 includes in the public order notion the following dimensions: (i) fundamental rights; (ii) violation of international public law; (iii) the need for a connection with the recognising State; (iv) procedural public order and (v) and external policy interests.

[39] Fallon (2004), pp. 73–76, Burbaum (2003), pp. 56–59.

[40] Among others, see Mansel (2006), pp. 681–682 and p. 716, Coester-Waltjen (2006), p. 392, Kohler (2013–2014), p. 20 and Lehmann (2016), pp. 28–38.

[41] Lagarde (2014), pp. 38–40, Mayer (2005), p. 563 and Fulchiron (2014), pp. 359–381.

[42] For instance, in article 31(2) of the Portuguese Civil Code and in article 10(9) of the Netherlands Civil Code.

Singapore Convention.[43] This brings added challenges, but which we believe can still be understood under the umbrella of a structured theory of recognition that is adaptative enough to include all described *phenomena*.[44]

5 Procedural Dimension

Changing the light of our analysis and focusing on the procedural dimensions and *techniques of recognition*, distinctions can be made between unilateral recognition, which results from a unidirectional decision of the recognising State, and mutual recognition, seen as a manifestation of consensual or cosmopolitan extraterritoriality,[45] usually supported in international arrangements between public authorities.

Unlike what it may seem to be at first glance, unilateral recognition is not necessarily erratic. Not only is it framed by some international instruments and jurisprudential doctrine, but it is also subject to national regulation, which increasingly tends to impose an adequate composition of interests that might, in relevant cases, point towards recognition. It is indeed up to States to define judicial, administrative, or other procedures and the legal actors (judges, administration, notaries, registers) that may act as recognition authorities.

In addition, mutual recognition also has its critics. Some use the same arguments employed against unilateral recognition, mainly that it is hard to define mutual recognition in general terms[46] and that it is even a dishonest and unpredictable system that can be used as a "dangerous toy".[47] Others consider further that its nature may endanger the protection of human rights, which still encompass a significant national dimension.[48]

Recognition can, moreover, be automatic or conditional. These two modes of recognition do not oppose each other since the control task inherent to the doctrine of recognition can be reflected in a gradated set of requisites, rendering it challenging

[43] United Nations Convention on International Settlement Agreements Resulting from Mediation, 2019, available at: https://uncitral.un.org/sites/uncitral.un.org/files/singapore_convention_eng.pdf. Accessed 14 July 2021.

[44] However, from a terminological point of view, other concepts have started to pave their way into law, such as "acceptance" of authentic instruments (article 59 of Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession) and "reliance" or granting "relied" under articles 4 and 5 of the Singapore Convention. In this latter case, Esplugues Mota (2020), p. 78, takes the view that it is incomprehensible and technically reprehensible that the Convention does not mention recognition instead.

[45] Nicolaidis and Shaffer (2005), p. 267.

[46] Armstrong (2002), p. 230, Pelkmans (2005), pp. 103–104.

[47] Davies (2006), pp. 273–275.

[48] Sinopoli (2010), pp. 369–379.

to segment the purely automatic ones from the ones that imply a certain level of recognition mediation from the recognising State.

Indeed, in some cases, conditional recognition is accompanied by facilitation mechanisms, while in others, automatic recognition is complemented by formal obligations of registration, communications, or declarations from the interested parties.

As to the better option between automatic and conditional recognition, there is also no straight line, even though a long-standing trend within the European Union favours the former over the latter. It all depends on the interests and principles at stake.

In any case, control from the host State is not impeded by the fact that, in a relevant number of cases, recognition has become more and more automatic and guaranteed in general terms and therefore does not depend upon a *concrete recognition act,* once the State reserves a faculty of control of the basic premises of recognition, even when it is *prima facie* construed as mandatory.

We do not adhere, therefore, to the position that when no specific reception act has been adopted, the concept of recognition can merely be used in an imprecise manner.[49] Our position is rather the opposite since it values the control possibilities and review instruments of the State of recognition that is inherently multiform and flexible.

This does not mean that we ignore that most doctrinal developments have been centred on the qualification of the "recognition act", either by viewing it as a *condictio iuris*[50] or an accessory decision[51] which would allow for the extension of effects of a foreign act or by qualifying it as a constitutive decision which created a new nationalised (substitutive) situation based on the data provided by the foreign act.[52]

However, between these two extremes, a third proposal upholds the notion that both States (of origin and recognition) determine the effects of recognition together,[53] in a way that the recognition rule is a complex norm resulting from a collaborative effort between the *lex auctoris* and the *lex fori.*[54]

Given the new and ever-changing phenomenology of recognition, this proposal sets the correct framework for a wide range of control instruments available to the State of destiny,[55] both prior (recognition decisions, acts, declarations, certifications) or subsequent (revocations, suspensions, prohibitions) to recognition. This means that each State is called upon to establish their recognition procedures taking into account all relevant elements of such regulation, for instance, if there are specific agreements that should be respected (or European Union instruments that need to be implemented or executed); the importance of ensuring continuity in international

[49] Röhl (2011), p. 214 and Götz (1998), p. 778.

[50] Fedozzi (1929), p. 183 and Meng (1992), p. 51.

[51] Schmidt-Aßman (2006), p. 260.

[52] Giuseppe Biscottini (1964), pp. 118–120 and Vogel (1965), pp. 323–337.

[53] Weiß (1932), p. 56.

[54] Pamboukis (1993), p. 151 and Niboyet (1949), p. 671.

[55] Mansel (2006), pp. 681–682.

situations and, in some cases, reciprocity; the relevance of fundamental rights and freedoms (and which); the need to accommodate demands from the parties involved, mostly if they also correspond to pressing social needs (for instance in what regards migratory movements, etc.).

The doctrine of recognition is, therefore, in its essence, a control procedure that links the issuing State and the receiving State in a wide variety of forms, conceding, in any case, relative autonomy to the receiving State, since it must be allowed to adopt its own criteria and procedures for recognition (criteria that do not necessarily correspond to the ones laid down by the State of origin while actively issuing the act to be recognised).

This allows us to distance ourselves from the positions that link recognition and the State of origin rule, viewing it as occult or implicit conflict rule. In fact, recognition supposes a flexible mix between regulation of the State of origin (that primarily regulates the situation) and of the State of destination (that "accommodates" such regulation into its legal order), contrary to a strict conflict of law perspective.[56] It is, in sum, this openness to alterity, combined with the closure strictly necessary to adjust an act both substantively and technically to the host legal order that is at the core of the recognition decision.

6 Effects Dimension

Another factor that points to the variability of recognition is the diversity of effects to which recognition can lead.

In short, recognition may be aimed either at extending the effects (*Wirkungserstreckung*) of the foreign act, or at assimilating it to similar acts of the *lex fori* (*Gleichstellung* or *Wirkungsanleihung*), or at finding a solution in the space between the two.[57]

The scope of recognition can essentially be understood in two ways: either by the model of the extension of effects, implying a reference to the law of the State of origin and the effects recognised in this State or by the model of assimilation of effects (or of "equal value") to the same or a similar doctrine in the legal system of destination.

In addition to these antipodes, there is an intermediate and flexible path that allows the extension of effects with limits (allowing for the effectiveness of the situation under the provisions of the State of origin, but with restrictions resulting from the regulation of the State of recognition).[58] In this case, the modelling of those effects is based on various legal instruments, such as *ordre public*, international mandatory rules, partial recognition and adaptation.

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[56] Also, among others, Patrão (2017), pp. 433–449.

[57] Neumeyer (1936), p. 319, Coester-Waltjen (2004), pp. 125–126 and Wenander (2011), p. 779.

[58] Coester-Waltjen (2006), p. 392 and Lehmann (2016), pp. 18–19.

Despite the preferences shown by some authors as to the perspective to be adopted, there are others, such as Kment, who allow, without hesitation, a panoply of possible solutions within the scope of recognition: either increasing, reducing or modifying the effects of those triggered in the State of origin.[59] Lagarde, too, assumes that one of the problems of recognition lies precisely in the indeterminate nature of its effects, proposes that each recognition instrument should define precisely what effects result from it,[60] although the matrix should be, in principle, the one deriving from the State of origin.

Even if a national act of recognition is adopted, there is no nationalisation or *nostrification* of the foreign act. On the contrary, the act of recognition incorporates contents that do not lose their origin and function in the legal system that issued them, even though they have been adapted to their new phenomenology and enriched by an array of effects that arise from such recognition. This leads to the conclusion that any recognition task should not be oblivious of its *origin*, not only in terms of procedure and criteria used but also in terms of effects reached, in particular when interpretation and adaptation are required.

Taking a closer look at the *possible effects of recognition*, although the most relevant ones promote fundamental freedoms and rights and reinforce the stability of legal situations, having, therefore, a positive influence on the position of individuals, others have negative consequences by impeding or curtailing liberties sought by individuals.[61] Of course, this second type of recognition, mainly in the public field, is much harder to establish and to enforce since the effects linked to it demand a higher level of mutual trust and the adoption of stricter equivalence mechanisms, reasons why they are not very common in practice.[62]

It is of great importance therefore that, in dealing with recognition, States take into due account the effects that arise from it, since they change the way public authority is exercised and manifested.

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[59] Kment (2010), pp. 463–465. Harder (2013), pp. 441–443 discusses a *maximum-effect approach* and a *minimum-effect approach*.

[60] Lagarde (2004), p. 234.

[61] Möstl (2010), p. 409.

[62] This is, for instance, the case European Union Council Directive 2001/40/EC of 28 May 2001 on the mutual recognition of decisions on the expulsion of third-country nationals, and of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties.

7 Concluding Remarks

Recognition is a polysemic notion,[63] which finds various fields of application, incorporates various forms of control, and generates multiple effects. It is a concept that is essential to the recognitive function of legal orders and the structuring of open and pluralist legal orders, but it can be misleading[64] if not properly framed.

The question that arises, therefore, is whether it is possible to find unity of meaning within this concept, that is, whether we can speak of a method of recognition or whether we should opt for the designation "methods of recognition", as Mayer does,[65] which includes in the scope of recognition disparate situations such as the recognition of judicial decisions, other state decisions, authentic acts, arbitral awards and recognition of foreign situations.

We have tried to highlight in this Chapter the fact that it is possible to define a common framework for the several playing fields where recognition arises, showing that it has a relevant part to play in numerous areas of law, bridging the gap between what was seen as traditional public and private international law instruments and allowing for the joint consideration of public and private concerns that permeate many, if not most, international situations.

The genetic, instrumental, substantial, procedural and effects dimensions of recognition (either unilateral or mutual, automatic, or conditioned) should indeed be taken seriously by States and other public authorities at an international level when deciding to engage in recognition and when defining its significant traits. In a world marked by plural affiliations and a significant embrace of cultural pluralism, recognition finds fertile ground for proliferation, so it is vital to use it wisely not to curtail its potential to interweave legal orders to give the best possible response to a situation that binds them.[66]

In any case, recognition—even if regulated or imposed by conventional arrangements or national legislation—can never exclude a *prudential* dimension, since it will be up for the legal authorities of the State of recognition to ensure as an ultimate guiding criterion the preservation of the fundamentals of the recognising State while engaging willingly with others—both public and private—and keeping a "door open" to what they have to offer.

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[63] Bureau and Watt (2017), p. 277.

[64] Brownlie (1982), p. 197.

[65] Mayer (2005), p. 549.

[66] Avoiding, therefore, recognition being used as an argument to justify legal ruptures or conundrums, such as Brexit. On this, see Nicolaidis (2017), pp. 227–266.

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Chapter 4
Forum Non Conveniens in Australia—How Much Weight Should Be Given to Comity?

Poomintr Sooksripaisarnkit

Abstract A historical tracing suggested that the concept of comity has its root from public international law. In modern days, it forms a rationale underpinning the doctrine of *forum non conveniens* in private international law. However, Australia has rejected a popular formulation of the 'more appropriate forum' test used in England and other common law jurisdictions and instead decided to adopt a more stringent test of 'clearly inappropriate forum'. To what extent is this version of the *forum non conveniens* doctrine in compatible with the comity concept? It is argued that the courts in Australia largely pay lip service to the comity concept in their consideration.

Keywords Comity · *Forum non conveniens* · More appropriate forum · Clearly inappropriate forum

1 Introduction

The doctrine of comity is an elusive doctrine with unclear origin.[1] Yet, in conflict of laws cases where the courts consider the *forum non conveniens* doctrine, they refer to this concept of comity from time to time. This is not only in the context of the Australian courts. Yet, in Australia, it becomes a peculiar issue how the concept of comity interacts with the doctrine of *forum non conveniens* as adopted there. The question becomes: how much weight should a judge give to the concept of comity in determining the *forum non conveniens* case? Through subsequent exploration of case laws in the subsequent parts of this chapter, the author is inclined to think that the courts have been paying lip service to the concept of comity and it is argued that the weight should be attached more to the concept in the courts' *forum non conveniens* analysis. To do so, this chapter will be divided into four parts. After this Introduction, in the second part, a brief history of the concept of comity will be outlined so to explore its meaning and scope. Then, in the third part, some cases in

[1] Paul (2008), p. 20.

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Australia where the courts made reference to the concept of comity in their decisions on the *forum non conveniens* issues will be examined to see whether and, if so, how the courts took regard of this concept in practice. Afterwards, in the fourth part, a conclusion will be made with some suggestions on the role of the concept of comity going forwards in the *forum non conveniens* cases in Australia.

2 A Brief History of the Concept of Comity

A concept of comity has been described by some to the extent that it is in fact synonymous to 'public international law'.[2] Leading treatises on private international law also accepted that the concept of comity has its root in public international law. The learned editors of the fourteenth edition of *Dicey, Morris and Collins The Conflict of Laws* observed that this concept has been referred to in common law countries "in a sense which owes much to the rules of public international law…"[3] For the learned editors of the fourteenth edition of *Cheshire, North and Fawcett Private International Law*, the use of the concept in private international law is plainly misplaced because it is "incompatible with the judicial function" and it is "a matter for sovereigns".[4] However, some scholars traced the origin of this doctrine to the need to facilitate free flow of international trade, which suggested its root in private international law itself.[5] While another scholar maintained that comity does not fall within the ambit of public international law and it is wrong to regard it as a synonymous to public international law either because it is "not legally binding" and it appears in "rules, albeit of tradition or usage".[6]

For scholars who maintained that the concept of comity was devised to facilitate international trade, namely Schultz and Mitchenson, it all started with the idea of sovereignty which came into sharp focus as a consequence of the birth of new nations following the end of the Thirty Years War and the signing of the Treaties of Westphalia.[7] One of such nations was the "United Netherlands".[8] During that time, the United Netherlands arose as "the first modern European State".[9] Yet, the overall structure of the governance was such that different provinces within the United Netherlands were loosely united for the common purpose of defence against Spain only. As to other aspects,

> …the traditional privileges and rights of each were not to be diminished … This decentralized regime, combined with the fierce independence of the provinces, provided a fertile breeding

[2] Mann (1986), p. 134.

[3] Collins et al (2006), para 1–009.

[4] Fawcett and Carruthers (2008), p. 5.

[5] Schultz and Mitchenson (2019), p. 383.

[6] Kämmerer (2020).

[7] Schultz and Mitchenson (2019), pp. 389–390.

[8] Ibid., 390.

[9] Ibid., 395.

> ground for reflecting on private international law. The Dutch needs a means to resolve both inter-national and intra-national conflicts of authority that arose between sovereign States and provinces.[10]

Therefore, this historical account traced the origin of the concept of comity to the Dutch School of Thought. Schultz and Mitchenson relied particularly on the work of Huber,[11] as translated and explained in the work of Lorenzen.[12] According to Lorenzen, Huber pointed out that private international law rules are based on three maxims:

1. The laws of each state have force within the limits of that government and bind all subjects to it; but not beyond.
2. All persons within the limits of a government, whether they live there permanently or temporarily, are deemed to be subjects thereof.
3. Sovereigns will so act by way of comity that rights acquired within the limits of a government retain their force everywhere so far as they do not cause prejudice to the powers or rights of such government or their subjects.[13]

While it is true that Huber stated these maxims in the context of formulating the conflict of laws rules, he seemed to suggest the methodology he propounded had its root from what States or nations came to agree as their practices, as he explained:

> …it appears that this subject is to be derived not simply from the civil law, but from the convenience and *tacit consent of nations*, for although the laws of one country cannot have any direct force in another, yet nothing could be more inconvenience to the commerce and general intercourse of nations than that that which is valid by the law of one place should be rendered invalid elsewhere owing to a difference in the law. And this is the reason for the third maxim concerning which no one hitherto seems to have entertained any doubt.[14]

The fact that there was no clear distinction between public international law and private international law at the era when Huber was alive coupled with Huber's idea was quite convoluted, it would be quite a gloss to say the concept of comity had its root in private international law. As Mills observed, "[s]ome of Huber's writing supports the view that his rules were intended to be part of a universal international law, and hence not discretionary".[15] As far as the third maxim on comity is concerned, Huber sought to inject into private international law system the discretionary expression of "state will".[16] The reference to the will or intention of a state in Huber's work gave much of the (public) international law flavour. The fact that Huber had no private or public international distinction in mind is supported by an example he gave when he sought to demonstrate the application of the three maxims where he set out the

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[10] Ibid., 396.

[11] Ibid., 398–399.

[12] Lorenzen (1918–1919), pp. 376 and 378.

[13] Ibid., 376.

[14] Llewelyn Davies (1937), pp. 65–66 (emphasis added).

[15] Mills (2009), p. 47.

[16] Ibid.

case involving the recognition and enforcement of a foreign judgment. In doing so, he actually gave an example of a foreign judgment case in a criminal matter which he maintained the same concept is applicable in civil matters alike. The case involved a man who inflicted injury on the other person in one country. That person got soaked with blood from his nose and he only died a night after. That man fled to the other country and there he was caught. The court in that foreign country did not find the man was wrong and instead found that the cause of the person's death was irrelevant to the wound on his nose. In such instance, the court in the country where the injury occurred would find it hard to recognise the judgment and this provided the exception grounded in the third maxim because "such an escape into a neighbouring country and feigned proceedings appeared to open the way too much for the evasion [the court's jurisdiction] …"[17] In civil cases, Huber proceeded to give examples of foreign default judgments.[18] Huber's work stopped short of considering how the concept of comity can be applicable to the jurisdictional question, a very topic to be examined in this paper. Suffice it to say Huber's application of the comity concept is broader than just a mere consideration in the application of foreign law as the work of Schultz and Mitchenson seemed to so much focus on.

As observed by Briggs, the concept of comity originated from Huber caught attention of courts and legal scholars particularly those in the United States of America.[19] Despite no reference to these terminologies in historical sources, Calamita distinguished between a "prescriptive comity" which involves a question when a court should apply a foreign law and an "adjudicatory comity" which involves the concept of comity "as a basis for domestic courts to defer or limit the exercise of jurisdiction in deference to the courts of another sovereign".[20] On this, he further drew a fine line between an "adjudicatory comity" and the "comity of the courts". The latter is, according to Calamita, "a tool of analysis used by the domestic forum's courts in determining whether to extend adjudicatory comity in the case at bar".[21] According to him, the adjudicatory comity (and as well the comity of courts) was recognised in 1895 in *Hilton v Guyot*,[22] which was in itself a case on the recognition and enforcement of a foreign judgment. There, Mr Justice Gray explained of comity in an oft-cited passage:

> "Comity" … is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.[23]

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[17] Llewelyn Davies (1937), p. 69.

[18] Ibid., 69–70.

[19] Briggs (2012), p. 80.

[20] Calamita (2006), p. 606.

[21] Ibid., 629.

[22] Ibid., 624 referring to *Hilton* et al. *v Guyot* et al. 159 U.S. 113 (1895).

[23] 159 U.S. 113, at 143.

Apart from perhaps instances of serving the process out of one's jurisdiction, it is unclear in which circumstance any consideration of jurisdictional issue involves one nation allows a judicial act of another nation.

After referring to *Hilton v Guyot,* Calamita, then, with rather far-fetched and scant evidence in support, maintained that comity came into the consideration in cases involving jurisdictional issues via the doctrine of *forum non conveniens.*[24] The problem with this suggestion is judges in earlier cases did not explicitly mention about comity in cases where they considered *forum non conveniens.* In *The Abhidin Daver*,[25] Lord Diplock mentioned comity almost in passing where he said "judicial chauvinism has been replaced by judicial comity…"[26] such that the doctrine of *forum non conveniens* should be recognised in place of a far stricter rule where the courts would only stay its proceedings if such was proved to be vexatious or oppressive.[27] As shall be seen, Australian courts have remained conservative and the *forum non conveniens* test adopted here is far more stringent than its English counterpart. This shall be analysed further to see to what extent this Australian version is compatible to the notion of comity. Suffice it to say that, apart from a passing reference to judicial comity in the speech of Lord Diplock, other judges in the same case or in subsequent cases did not spell out comity in their *ratio* in cases involving *forum non conveniens.* In any event, this does not reflect any instance where the court of one nation allows a judicial act of another nation, as per *Hilton v Guyot.* Perhaps, the better explanation is that comity flows naturally from public international law, including the use of comity in jurisdictional context. As Mann succinctly argued:

> …we apply foreign law or recognise foreign acts (such as judgments or naturalisations), because the refusal to do so would be contrary to public international law. The consequence of the refusal would be that we would have no alternative but to apply domestic law, the *lex fori.* Domestic law would claim exclusive control and, more particularly, an extraterritorial reach which public international law does not attribute to it … or we recognise the judgment of a foreign court to the jurisdiction of which the defendant is subject, because it has created a relationship of a binding character in that it has the effect of *res judicata*, the disregard of which would mean that we would claim overriding control over foreign sovereign acts.[28]

A similar line of reasoning can be put in respect of the courts' jurisdiction in each country. It is not possible to discuss public international law without taking into account sovereign states.[29] A sovereign state is understood as one that "is a universal territorial decision-making unit, internally and externally".[30] In countries or states which adopt the Western democratic system, such decision-making is done within the framework of the separation of powers, with judicial powers are exercised by the courts. Looking at the matter from this perspective, the rationale underpinning the

[24] Ibid., 631.

[25] [1984] 1 Lloyd's Rep. 339.

[26] Ibid., 344.

[27] Ibid.

[28] Mann (1986), p. 135.

[29] Dyzenhaus (2019), p. 140.

[30] Ibid.

doctrine of *forum non conveniens* is to ensure the courts of one state will not intrude into or trespass the sovereignty of other states exercised by the judicial organs of those states through their judicial powers. So, instead of what Calamita claimed that comity went into the jurisdictional consideration via the doctrine of *forum non conveniens,* the better view is this doctrine was constructed to reflect the rationale of comity. In this respect, comity seems to present just a convenient shorthand for the process of respecting or recognising the sovereignty of other states. However, an ever-increasing globalised world make it more complicated for the courts in a state to maintain that only they can exercise sovereignty over disputes between private parties.

3 Australian Courts and Their Approaches to Comity

If one is to accept that comity is a public international law concept and that comity underpins how courts decide whether to exercise their jurisdiction in cases involving foreign elements, then logic would suggest the rules such as *forum non conveniens* should arguably be the same in all countries. However, a narrow focus caused by a consideration of private international law as a separate legal discipline led to serious ignorance of the concept of comity among courts worldwide. This led to different versions of *forum non conveniens* used in different countries. In this section, how the courts in Australia reflect the notion of comity in their consideration of the *forum non conveniens* will be examined.

Before moving on, it must be recalled that in the United Kingdom the criteria for the *forum non conveniens* are laid down in the classic decision of the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd*[31] where Lord Goff of Chieveley stated:

> The basic principle is that a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e in which the case may be tried more suitably for the interests of all the parties and the ends of justice.[32]

So, the court will grant a stay once the court is satisfied that there is another more appropriate forum with the exception if "there are circumstances by reason of which justice requires that a stay should nevertheless not be granted".[33] In Australia, the High Court of Australia in *Voth v Manildra Flour Mills Proprietary Limited and Another*,[34] in denying to follow Lord Goff's formulation, pointed out that the English formulation stress on "the need to make a comparative judgment" between the local and the foreign forums.[35] Instead, the formulation in Australia, which is

[31] [1987] 1 A.C. 460.

[32] Ibid., 476.

[33] Ibid., 477.

[34] [1990] HCA 55; (1990) 171 CLR 538.

[35] Ibid., 558.

based upon the more stringent enquiry of the "clearly inappropriate forum" only has its emphasis on "the advantages and disadvantages arising from a continuation of the proceedings" in the local forum.[36] This test has been summarised in a succinct manner in *CSR Ltd v Cigna Insurance Australia Ltd*[37]:

> In cases such as the present, where different issues are involved in the local and foreign proceedings, albeit that the different proceedings arise out of the same sub-stratum of fact, the question is not whether the Australian court is a clearly inappropriate forum for the litigation of the issues involved in the Australian proceedings. Rather, the question must be whether, having regard to the controversy as a whole, the Australian proceedings are vexatious or oppressive in the *Voth* sense of those terms, namely, that they are "productive of serious and unjustified trouble and harassment" or "seriously and unfairly burdensome, prejudicial or damaging".

With respect, the English approach in taking a comparative judgment in an attempt to locate a natural forum appears to be more in line with the concept of comity. As Kirby J in his dissenting opinion in *Regie Nationale des Usines Renault SA and Another v Zhang* put it, the English approach is one which "is harmonious with the rules of public international law as well as with comity and mutual respect ordinarily observed between the courts of different nations".[38] Moreover, different from what the High Court of Australia believed in the *Voth* case, it does not mean the Australian approach can discard altogether the comparative exercise. As Keyes observed,[39] the High Court of Australia in *Henry v Henry*[40] perceived the need for the comparative exercise. The case involved the divorce proceedings in Australia by the husband which the wife challenged this on the ground that there existed the divorce proceedings which were under consideration in Monaco.[41] The majority (including Dawson and Gaudron JJ who were also among the panel of judges in the *Voth* case) observed (at least in the context of cases involving marital relationship) that, where there are parallel proceedings and when the courts in both countries have jurisdiction over the case, to consider whether a proceeding in Australia should be stayed, "it will be relevant to consider which forum can provide more effectively for complete resolution of the matters involved in the parties' controversy".[42] The problem is the High Court of Australia in the *Voth* case in affirming the "clearly inappropriate forum" formulation did not close the doors for any comparative exercise between courts in two countries. It is true that in that case Mason, Dean, Dawson, and Gaudron JJ pointed out that the "clearly inappropriate" formulation emphasised more on the advantages or disadvantages of the local forum, nevertheless they proceeded to observe "considerations relating to the suitability of the alternative forum are

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[36] Ibid.

[37] *CSR Limited v Cigna Insurance Australia Limited and others; CSR America Inc v Cigna Insurance Australia Limited and Others* [1997] HCA 33; (1997) 189 CLR 345.

[38] [2002] HCA 10; (2002) CLR 491, [94].

[39] Keyes (2004), p. 52.

[40] [1996] HCA 51; (1996) 185 CLR 571.

[41] Ibid., 581–582.

[42] Ibid., 592.

relevant to the examination of the appropriateness or inappropriateness of the selected forum".[43] In *Henry v Henry*, the High Court of Australia was cautious not to consider the rules wider than the limited context of the case. Keyes went on to point out that a different approach was reached by a more recent case of the High Court of Australia.[44] That was in *Regie Nationale des Usines Renault SA and Another v Zhang*.[45] With respect, upon reading this case, the author did not form the same impression that the High Court of Australia address any point pertaining to the comparative exercise. At most, there was a passing statement where the majority mentioned that a fair trial "might be hand in the courts of either of the jurisdictions concerned".[46] Therefore, it remains not entirely clear how the Australian courts will approach the issue of the balancing exercise.

Closely linked to the above issue, another criticism mounted on the Australian approach, at least on a theoretical level, is that the Australian's version is flawed to the extent that it can result in the denial of the natural forum to decide the case. As convincingly argued by Schultz and Mitchenson,

> Whilst the High Court adopted the "clearly inappropriate forum" test to avoid having to pass judgement on the competency or willingness of foreign courts, the result of the test is that in some cases Australian courts will not grant a stay despite a foreign court being the natural or more appropriate forum. In circumstances where it is clear that a foreign court is clearly more suitable than the Australian court, but it cannot be said the Australian court itself is "clearly inappropriate", Australian courts will refuse to grant a stay. Such a result is contrary to considerations of comity…[47]

While this argument was sound on the theoretical level, Schultz and Mitchenson did not cite any authority as an example of an instance where the court in Australia refused to stay its proceedings despite the natural forum elsewhere.

Perhaps, the closest example would be the case which Schultz and Mitchenson also acknowledged in their work, albeit not on exactly the same point.[48] That case is *Telesto Investments Ltd and Others v UBS AG*.[49] The case involved disputes relating to financial facilities. Because of these, UBS AG received an indication that the client, Telesto, might initiate proceedings in Australia.[50] As disputes grew deeper, UBS AG decided to initiate proceedings against Telesto and relevant parties in Singapore.[51] After the proceedings were initiated in Singapore but before the writ was served on Telesto and the relevant parties, Telesto started proceedings against UBS AG in Australia.[52] This made UBS AG to seek an anti-suit injunction in Singapore as well

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[43] (1990) 171 CLR 538, at 558.

[44] Keyes (2004), p52.

[45] [2002] HCA 10; (2002) 210 CLR 491.

[46] Ibid., [82].

[47] Schultz and Mitchenson (2016), p. 369.

[48] See ibid.

[49] [2012] NSWSC 44; (2012) 262 FLR 119.

[50] Ibid., [30].

[51] Ibid., [32].

[52] Ibid., [39].

as to apply for temporary stay of the proceedings in Australia.[53] On the other hand, Telesto sought a stay of the proceedings in Singapore on the basis of the *forum non conveniens*.[54] At first instance, an anti-suit injunction was granted restraining Telesto and relevant parties from continuing with the proceedings in Australia.[55] Telesto appealed.[56] It was established that, before the judge on appeal in Singapore handed down his reasoned judgment, debts which Telesto owed to UBS AG were ultimately discharged "by way of realisation of part of the collateral" but this was not made known to the judge.[57] UBS AG demonstrated clear intention to continue pursuing the case in Singapore for declaratory relief and indemnity.[58] The judge in Singapore who heard the appeal determined that Singapore was the natural forum for the disputes[59] and as well he concluded Singapore was the more appropriate forum.[60] On the anti-suit injunction, the judge found Telesto and relevant parties acted "vexatiously and/or oppressively" in continuing with the proceedings in Australia since Singapore was the natural forum and that there was no grave injustice to them if the Singapore proceedings were to continue.[61] On this, the judge was satisfied there was not much different in the substantive laws of Singapore and Australia.[62]

Before Ward J who heard the stay application in Australia, UBS AG argued that the concept of comity dictates that the court in Australia "should be slow to permit or require a party to engage in any act or omission which contravenes [the anti-suit injunction]".[63] Ward J perceived the anti-suit injunction to be only one of the factors she would take "due recognition" in considering whether New South Wales was a clearly inappropriate forum.[64] The judge emphasised that it would be equal to an enforcement of foreign injunction if the court was too ready to stay its own proceedings based upon the anti-suit injunction.[65] So, in the words of Ward J:

> …the fact that continued prosecution of these proceedings by the Telesto parties would be in defiance of an anti-suit injunction … and would have the necessary consequence that … there will be an inevitable overlap between the issues to be determined in both the foreign and local proceedings is something that goes to the question whether … it is vexatious or oppressive for Tolesto parties to maintain these proceedings (and hence goes to the question whether this Court is a clearly inappropriate forum).[66]

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[53] Ibid., [48].
[54] Ibid., [50].
[55] Ibid., [51].
[56] Ibid., [53].
[57] Ibid., [55].
[58] Ibid., [59].
[59] Ibid., [68].
[60] Ibid., [73].
[61] Ibid., [86].
[62] Ibid., [87].
[63] Ibid., [90].
[64] Ibid., [111].
[65] Ibid., [113].
[66] Ibid., [115].

Before Ward J, UBS AG put further argument on the basis of the issue estoppel maintaining that there had been a finding by the court in Singapore that any continuation of proceedings in Australia would be vexatious or oppressive and that there had also been a decision from the court in Singapore determining (albeit on the different version of the *forum non conveniens* doctrine) that the natural forum in this instance was Singapore.[67] On this, Ward J denied there was an issue estoppel, emphasising on the different versions of the *forum non conveniens* doctrine. In Singapore, the issue was whether Singapore was the natural or more appropriate forum while in Australia the question would be whether the court in Australia was a "clearly inappropriate" forum.[68] Nor did the finding by the court in Singapore that the continuation of the proceedings in Australia would be vexatious and oppressive created an issue estoppel:

> Rather, what it amounts to is an acceptance of the proposition that the Telesto parties may be estopped from now denying the effect of their behaviour, in continuing the present proceedings, on UBS AG, that issue having already been determined in a judgment binding on them in Singapore. Such a conclusion does not represent any abdication of the power of this Court to determine whether on the facts at hand the conduct of the Telesto parties amounts to an abuse of process of this Court nor is it inherent in the finding that there is an issue estoppel as to the finding that the conduct of these proceedings is vexatious or oppressive that this Court is bound by a foreign court's finding as to what amounts to an abuse of process of this Court.[69]

Nor was the argument of UBS AG based on the ground of the abuse of process found convincing by the judge. The gist of the argument lies on the point that the issues which were already determined by the court in Singapore should not be re-litigated in Australia.[70] Moreover, UBS AG had already spent a lot on the jurisdictional fight in Singapore such that "the expenditure would be wasted … were it now required to litigate through to a contested final hearing substantially the same dispute in two countries".[71] On this, Ward J relied on the discharge or reduction of debts which subsequently transpired and that would change how the Singapore proceedings would move forwards and hence the litigation in Australia ultimately may not turn out to be a re-litigation as such.[72] So, ultimately Ward J came to consider the *forum non conveniens* issue whether in this instance the court in Australia could be perceived as a "clearly inappropriate forum" in which she maintained all the grounds she had considered earlier weighed into this consideration.[73] Despite this, it seems Ward J ultimately gave weight on whether the issues to be raised and argued before the court in Singapore will be the same as those to be argued in Australia. Provided that the issues to be raised before the court in Singapore would be essentially the same as those to be argued in Australia, then the proceedings in Australia should be perceived

[67] Ibid., [117].
[68] Ibid., [130].
[69] Ibid., [134].
[70] Ibid., [138].
[71] Ibid., [146].
[72] Ibid., [147].
[73] Ibid., [172].

as vexatious and oppressive, considering the fact that Singapore is a natural forum and that UBS AG incurred substantial expenses on jurisdictional issues.[74] In the absence of any overlapping of issues to be raised before the court in Singapore and those to be argued in Australia, then Ward J would not consider any continuation of proceedings to be vexatious or oppressive. In this instance, of note is what Ward J mentioned of the anti-suit injunction:

> While I consider it invidious to be placed in the position where the Court might be seen to condone a breach of the anti-suit injunction … that seems to me to be the result of the authorities that make it clear that such injunctions operate only in personam; that the courts will not enforce non-monetary orders of this kind; and that unless the present jurisdiction is clearly inappropriate forum no stay should be granted.[75]

Since Ward J could not predict how the proceedings in Singapore would turn, she decided to only grant a temporary stay.[76]

Two observations could be made here of the decision of Ward J. First, by reading her lengthy analysis on whether the Australian proceedings should be stayed, one would feel that the consideration of comity was ultimately diluted and disappeared in the background. It is hard to say how much weight Ward J in fact took of the comity in the entire analysis. Closely linked to this, secondly, one would doubt how much weight she in fact placed on the point that Singapore was the natural forum, and it was not clear why consideration should be different depending upon the issues to be argued in Singapore would be the same with those in Australia.

The relevance of the natural forum to the *forum non conveniens* analysis came to be considered again in the more recent case of *CMA CGM SA and Another v The Ship Chou Shan and Another.*[77] The case involved a collision between the ship *CMA CGM Florida* and the ship *Chou Shan* in the Exclusive Economic Zone of the People's Republic of China.[78] Just three weeks after the collision, the owners of the *CMA CGM Florida* invoked the *in rem* jurisdiction of the court in Australia.[79] This led to subsequent arrest of the *Chou Shan* in Western Australia a month later.[80] Shortly after the owners of the *CMA CGM Florida* invoked the *in rem* jurisdiction in Australia, the owners of the *Chou Shan* sought to establish the limitation fund before the Ningbo Maritime Court.[81] They also applied successfully which led to the arrest of the *CMA CGM Florida* in the People's Republic of China.[82] The owners of *Chou Shan* came to apply for the stay of the proceedings.[83] While McKerracher J accepted that no factor clearly pointed to Australia being a clearly inappropriate

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[74] Ibid., [218].

[75] Ibid., [219].

[76] Ibid., [222].

[77] [2014] FCAFC 90; (2014) 224 FCR 384.

[78] *CMA CGM SA v Ship "Chou Shan"* [2014] FCA 74, [1].

[79] Ibid., [2].

[80] Ibid., [4].

[81] Ibid., [2].

[82] Ibid., [3].

[83] Ibid., [5].

forum, he found the combination of factors led to such conclusion.[84] At the forefront, he found the court in the People's Republic of China to be a natural forum as far as all disputes arising from the collision is concerned.[85] This is so even when he found diverse connecting factors which did not point one way or the other.[86] Neither was he certain that the Chinese law would be applicable to the collision liability since the collision occurred in the Exclusive Economic Zone.[87] Of interest, in the course of his analysis, he observed at one point that the Chinese Maritime Court "is a sophisticated and experienced legal system which has already substantially embraced all of the disputes arising out of the collision".[88] If the "clearly appropriate forum" formulation has its focus on the local forum, arguably there is no need to examine the competency of the foreign forum. On appeal to the Full Court of the Federal Court of Australia, the argument was indeed raised that the judge purported to state the correct *forum non conveniens* test as applicable in Australia, yet his analysis ultimately came to be resembled that of the English formulation, especially since he referred to the Chinese court as the natural forum.[89] While the Full Court of the Federal Court of Australia was not convinced that McKerracher J directed his mind to the English formulation, they observed certain parts of the reasoning did "display a degree of concordance of expression with the English test".[90] Nevertheless, they found the reference to the Chinese court as a natural forum by the judge "relevant to the assessment of suitability of Australia".[91] They observed:

> One other consequence of the clearly inappropriate forum test's focus upon the local court is the avoidance of what might be the difficulty or inappropriateness of deciding whether a plaintiff will obtain justice in a foreign court … The primary judge here accepted that

[84] Ibid., [157].

[85] Ibid., [158].

[86] Ibid., [147].

[87] Ibid., [158].
Article 56(1) of the United Nations Convention on the Law of the Sea 1982 provides:

1. In the exclusive economic zone, the coastal State has:
   (a) sovereign rights for the purpose of exploring and exploiting, conserving, and managing natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
   (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:
      (i) the establishment and use of artificial islands, installation and structures;
      (ii) marine scientific research;
      (iii) the protection and preservation of the marine environment;
   (c) other rights and duties provided for in this Convention.

[88] Ibid., [158].

[89] (2014) 224 FCR 384, [42].

[90] Ibid., [46].

[91] Ibid., [62].

> substantial justice will be done in the Chinese court … that assessment can be viewed as a consideration relating to the suitability of the alternative forum …[92]

With respect, this is rather confusing and it is unclear how much weight in fact should be placed on the comparative exercise in determining whether Australia is a clearly inappropriate forum. While the natural forum analysis does seem to be in line with the concept of comity, the examination of the competence of the foreign forum does not seem to sit easily with the concept of comity, especially if one takes Mr Justice Gray's understanding in *Hilton v Guyot* that this concept only entails recognition of the judicial acts of the foreign state into account. In the instance case, the judge found the Chinese courts to be sophisticated to handle collision liability cases. The question is: what if the local court finds a court in State X to be inexperienced in handling certain type of case? All it can be said is the "clearly inappropriate forum" formulation does not have the certain advantage which the High Court of Australia in *Voth* perceived it to have. In the twenty-first century where civil litigations involving foreign elements are more common and where courts in different countries are far more advanced than how they used to be at the time in 1987 when the *Spiliada* case was decided or in 1990 when the *Voth* case was decided, in line of the concept of comity which judges should bear in mind at the forefront, it is submitted that judges should no longer engage in any such analysis which requires examining the competence of the foreign forum.

In the earlier case of *Garsec v His Majesty The Sultan of Brunei and Another,*[93] one could see that McDougall J, albeit *obiter*, applied the natural forum analysis in arriving at the conclusion that the court in New South Wales was a clearly inappropriate forum. The case concerned an alleged breach by his Majesty the Sultan of Brunei of contract for the purchase of a rare manuscript of the Holy Koran.[94] The judge was satisfied that the contract in issue was governed by the law of Brunei.[95] The main question then came whether his Majesty the Sultan can rely on immunities afforded to him under the Constitution of Brunei Darussalam.[96] Applying the choice of law rules in Australia, McDougall J characterised this as a substantive issue.[97] Hence, even if the case would be tried in Australia, the court would give effect to the immunities available to his Majesty the Sultan under the Constitution. On this aspect, the outcome would be indifferent if the case would be tried in Brunei.[98] Since the issue would involve the application of the Constitution of Brunei Darussalam, the judge found "it is appropriate for the dispute to be dealt with in the Courts of

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[92] Ibid., [58].

[93] [2007] NSWSC 882; (2007) 213 FLR 331.

[94] Ibid., [1].

[95] Ibid., [98].

[96] Ibid., [5] and [79].

[97] Ibid., [95].

[98] Ibid., [108].

Brunei".[99] He found support for this finding in another provision of the Constitution which entrusted the power to construe to the "Interpretation Tribunal".[100] With these reasons, the judge came to conclude that "the proceedings in this Court should be stayed so that [the plaintiffs] should bring the case in the courts of the proper forum—Brunei".[101] Despite the judge was bound by the *Voth* decision, the language he employed in reaching the conclusion is more akin to the more appropriate form analysis as in the *Spiliada* case. The way the judge structured his written judgment rendered it unclear whether the earlier analysis he made and the conclusion he reached fell within the framework of the *forum non conveniens* consideration as he subsequently turned to consider what he termed the *Voth* factors. In this latter part, he identified certain connecting factors, including the impact upon administration in Brunei upon the absence of his Majesty the Sultan, the need for officials to follow him to Australia, the necessity to accommodate him and his followers in the hotel, the burden of making security arrangements, etc.[102] These factors were put in comparison with other factors, especially the slight inconvenience to the plaintiffs to travel to Brunei and the likelihood that other witnesses would find it more convenient to attend the court there.[103] Plus, the legal system in Brunei closely follows the English legal system and nothing could indicate that "the legal system of Brunei would be oppressive, unfair, or capricious".[104] Such analysis led the judge to arrive at this significant conclusion: "An analysis of the competing connections of Brunei and New South Wales to the subject matter of the proceedings requires the conclusion that this Court is a clearly inappropriate forum".[105] This passage is significant because this case is an example of how the court adopted the more appropriate forum analysis in the guise of the clearly inappropriate forum analysis as in the *Voth* case. Aside from the point on the interpretation of the Constitution, nowhere in the judgment where the judge did in fact put emphasis on the inappropriateness of the court in Australia. Yet, the overall conclusion reached in this case is in consonant with the sense of comity in that the case was ultimately stayed in favour of the natural forum. In this circumstance, there was no room for the court to compare the competence of the local forum and the international forum viewing that the international forum is the best place to construe its own statute. In the New South Wales Court of Appeal, the judges (consisting of Spigelman CJ, Hodgson JA, and Campbell JA) did not criticise the approach McDougall J adopted in his analysis. Their focus was centred on whether the judge was correct in characterising provisions concerning immunities to his Majesty the Sultan to be the substantive matters. On this, they confirmed

[99] Ibid., [107].
[100] Ibid., [82] and [107].
[101] Ibid., [111].
[102] Ibid., [116].
[103] Ibid., [119]–[121].
[104] Ibid., [122].
[105] Ibid., [125].

McDougall J was correct in his characterisation method.[106] As to the claimant's argument that the stay of the Australian proceedings would result in the plaintiffs being left with no alternative forum and hence such factor should be taken into account in the *forum non conveniens* analysis, once again the judges did not disturb McDougall J's finding that the result would be the same either the case is brought in Australia or Brunei in that his Majesty the Sultan will be protected by immunities afforded to him in the Constitution.[107]

4 Conclusion

Comity dictates that the natural forum should be one which exercises sovereignty over the case having real or substantial connection with that forum. The *forum non conveniens* doctrine has been instrumental in identifying such natural forum. It is disrespectful and goes against the concept of comity for the local forum to evaluate the competence of the foreign forum and, on either the clearly inappropriate forum analysis or the more appropriate forum analysis, this should be avoided at all costs. The examination of certain cases as the author has done in this chapter proved that the belief of the High Court of Australia in formulating its own *forum non conveniens* version in that this would reduce or eliminate any need for comparative exercise with the foreign forum proved to be wrong. In certain cases, the courts in Australia were willing to betray the language of the clearly inappropriate forum test and ultimately adopted the more appropriate forum analysis despite they were not in the position to spell this out so clearly due to the doctrine of precedent. The rationale is clear. Implicit in the judges' mind was the notion of comity. It is regrettable that the concept of comity does not always form part of the *forum non conveniens* analysis. While there is a valid concern that a strict compliance with the clearly inappropriate forum formulation may result in the court insists on its own jurisdiction despite the existence of the natural forum elsewhere, no case in Australia so far has pointed to this outcome which would amount to the blatant breach of the notion of comity. Being a concept derived from public international law, like other concepts originated from the same source, there is no clear sanction if the local forum exercises discretion to refuse to grant a stay in breach of the comity concept. It is submitted here that the sanction should be put in place in not recognising the judgment given by the court which exercises its jurisdiction against the notion of comity.

[106] *Garsec v His Majesty The Sultan of Brunei* [2008] NSWCA 211, [130].

[107] Ibid., [142].

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Part II
Harmonisation of Private International Law by Public International Law Instruments—Evaluation of Process, Problems, and Effectiveness

Chapter 5
International Rule of Law and Its Relation to Harmonization

Dharmita Prasad

Abstract What does it mean when we say the international rule of law (IROL)? How does harmonization contribute toward the development of the IROL? When we refer to harmonization, what do we mean by it? What does it mean when we refer to the harmonization of public and private international laws? Do public and private international laws play different roles toward the IROL and harmonization? We address these questions in this chapter and try to understand their significance. Harmonization of international law can lead to the growth of the IROL. With this premise, the chapter aims to examine the concept of IROL and the harmonization of international law. The chapter also highlights the convergence of public and private international laws through scholarly work. The final part of the chapter addresses various elements of IROL and harmonization. It also analyzes the application of the principle of justice to both the international rule of law and the harmonization of international law.

Keywords International rule of law · Harmonization · Justice · Private international law · Public international law

1 Introduction

Harmonization and the international rule of law (IROL) interact in several different ways. This chapter will try to analyze how harmonization contributes to the growth of the latter. For our purposes, the IROL refers to an international application of the rule of law.

Simon Chesterman uses the concept of "consensus" to understand the rule of law (ROL). He says the concept of the ROL has "been embraced across the political spectrum" and endorsed by international organizations such as the United Nations, the World Social Forum, and the World Bank.

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> Such a high degree of consensus on the virtues of the rule of law is possible only because of dissensus as to its meaning. At times the term is used as if synonymous with "law" or legality; on other occasions it appears to import broader notions of justice. In still other contexts it refers neither to rules nor to their implementation but to a kind of political ideal for a society as a whole. [1]

IROL promotes the right of a people to govern themselves without obligations to other states. It also protects the domestic groups and individuals against its state. IROL is not only an asset to the international community for its values on equality and justice but also, in a tangible form, provides predictability to international law and allows greater freedom to individual actors.[2]

The United Nations has been a major advocate of harmonizing international laws. The UN Charter 1 lays down one of its purposes as "to be a center for harmonizing the actions of nations in the attainment of these common ends."[3] This highlights the nature of the ROL and what it means to the international community. This paper claims the same is true for harmonization as well.

Harmonization of international law is not only a scholarly debate. States, through their governments and legislators, have often worked on an assumption that laws no matter how different have a common core. At the level of international conventions and the making of regulation, it is often observed how despite differences in internal laws, states are able to interpret and come together to create international law by identifying their common core. Harmonization can be understood as a product of "genes" of several laws.[4]

With this in mind, international law has been broadly classified into public and private international law. A discussion on harmonization typically refers to one kind and type of international law. For the purposes of this chapter, we will see how private and public international laws interact with each other and is there a way for them to achieve harmonization?

The core difference between private and public international laws are the subjects they seek to regulate. A general understanding of the subjects points us to the relationship between private parties and the state. If it is a matter of private parties, it is treated under private international law and if it is between states or international organizations, public international law. Private international law has also been treated as national laws trying out their luck in the international forum, which would not be technically incorrect as they are national laws with foreign elements. Their operations are largely limited at domestic levels in national courts. Private international laws, even when they function to harmonize and unify national laws and practices for private parties, include hints of public international law.[5]

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[1] Chesterman (2008, p. 332).

[2] Kumm (2003, p. 25).

[3] Available at: https://www.un.org/en/about-us/un-charter/chapter-1 last visited on 25th September 2021.

[4] Hagen (2012, p. 232).

[5] See generally Stewart (2009, p. 1122).

Hence it becomes important to understand how and when public and private international laws interact with each other and how they can compete and complement each other while working toward a common goal. The chapter at first recounts the development of the IROL, particularly its subjects and recognition. It then focuses on harmonization and the three main theories that have explored and characterized the relationship between public and private international laws, namely the scholarship of Savigny, Anglo-American scholars and modern scholars. It then progresses to discuss and analyze the focal aspect of this conversation, with specific references to the principle of justice.

2 Development of International Rule of Law

The modern understanding of the ROL is attributed to the British constitutional scholar A. V. Dicey, who in 1885, referred to it as "supremacy of law.[6] His three aspects of the ROL are–regulating government power,[7] implying equality before the law,[8] and privileging judicial process.[9] There are a couple of ways to understand the term "rule of law."[10] One way, perhaps, is to look at the international application of ROL, which is the perspective this chapter undertakes.

Simon Chesterman introduces the "international rule of law" and provides three possible meanings:

> First, the "international rule of law" may be understood as the application of rule of law principles to relations between States and other subjects of international law. Secondly, the "rule of international law" could privilege international law over national law, establishing, for example, the primacy of human rights covenants over domestic legal arrangements. Thirdly, a "global rule of law" might denote the emergence of a normative regime that touches individuals directly without formal mediation through existing national institutions.[11]

The meaning as discussed by Chesterman depends on the subjects of the IROL. Before going into the discussion of who is IROL for, it would be useful to look at

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[6] Dicey (1979, pp. 183–205).

[7] No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.

[8] No man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.

[9] We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as, for example, the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts.

[10] For further discussion see Chesterman (2008, pp. 355–360), Bishop (1961, pp. 553–574).

[11] Chesterman (2008, p. 355).

the levels of relations as put forth by Machiko Kanetake. In the introductory chapter of her book, she discusses how IROL not only governs the relations between states, or by the standard understanding of ROL but also the authority that international institutes may exercise over the states and individuals.[12]

The three levels of relations that affect international rule of law.

> [A] horizontal state-to-state relations, [B] authority exercised by the government against individuals and non-state entities, and [C] authority exercised by international institutions,…. [13]

The distinction between these is important because of the correlation between the national and the IROL, and the degree to which it is applicable to each. In the latter part of the chapter, we shall discuss how this is a reflection of public–private international law convergence.

2.1 Who Are the Subjects of IROL?

Jeremy Waldron raises two pertinent questions on the need for IROL.

> Is there any need for that in IL, where (i) there is no all-powerful world government that the ROL needs to protect us all from, and (ii) the subjects of IL – sovereign states – are not vulnerable to power exercised against them or upon them at this level in the same way as natural individuals are vulnerable to the power of national governments. [14]

These questions not only discuss the necessity of IROL but also give an insight into whom IROL affects.

The work of Joseph Raz points us in the right direction about question one. The objective of ROL is to protect individuals from the exploitation of the law itself. This misuse could arise from the state, the government, or any other pillar of democracy.

> The rule of law is essentially a negative value. The law inevitably creates a great danger of arbitrary power—the rule of law is designed to minimize the danger created by the law itself. [15]

Though Raz discusses ROL in the traditional sense it is relevant to the application of IROL. Waldron has reasoned that though Raz's position is insufficient. The application of ROL in the international arena is also to safeguard the subjects of international law. Misuse of law can occur at either the national or the international level. It is imperative that law does not create its own dangers.

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[12] The interfaces between the national and international rule of law can be analyzed from three different angles: (1) how the national rule of law understands…international rule of law; (2) how the international rule of law understands… national rule of law; and (3) how the interactions can be understood and evaluated from external (outside) angles.

[13] Kanetake (2016, p. 16).

[14] Waldron (2011, pp. 322–324).

[15] Raz (1979).

On question two, Waldon makes a relevant point that some states will need IROL if only to protect from one another at both individual and international levels. The interests of a state are not necessarily contradictory to those of individuals.[16]

2.2 Recognition of IROL

IROL has gained recognition by elevation of ROL to the international level by usage in treaties and international organizations. There is a practical reason for the existence of IROL. Human rights treaties have strongly advocated ROL as a founding feature for any rights-respecting state. It is also viewed as an essential factor for economic growth. And lastly, the UN Security Council has promoted ROL as a form of conflict resolution.[17]

The United Nations World Summit in 2005, the World Summit Outcome Document states.

> Recognizing the need for universal adherence to and implementation of the rule of law at both the national and international levels,…[and] reaffirm our commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States. [18]

Even though the policies of states in such areas have increasingly been made subject to international law, the performance of international obligations often remains problematic. Given the interdependence between international and national law, this defect also undermines the ROL domestically, for it may mean that acts of states in areas that are mixed international-national are not ruled by law.[19] This is another instance where the harmonization of international law might better equip the states for the application of IROL.

3 Harmonization of International Law

The fundamental rise in harmonization may be attributed to a larger change in the role of international law and universalism. The rise of interdependence in this field led to a doctrinal emphasis on convergence and universalism, which ultimately resulted in processes such as harmonization, unification, and integration.[20]

Earlier expressions of such interdependence may be attributed to the unification of law, e.g., German law in 1871, since which newer methods such as integration have

[16] Id note 14.

[17] Chesterman (2008, p. 343).

[18] Available at: https://undocs.org/en/A/RES/60/1 last visited on 25th September 2021.

[19] Nollkaemper (2011).

[20] Bezborodov (2017).

come into the picture.[21] One such method is the discussion on monism and dualism. The theory on monism and dualism refers to the harmonizing nature of international law. It can be understood as the convergence and divergence of public and private international laws.

Monism means that international law municipal law of a particular state is viewed by the courts of that a single system of legal norms and applied as such. This implies that is no need for the transformation of international law into municipal before it can be applied by a municipal court. Under dualism international law and municipal law are seen as two separate norm systems international law must be transformed through one or other prescribed mechanism, before it may be applied freely by a municipal court.[22]

The discussion on the harmonization of public and private international law is further supplemented by initial efforts to harmonize private international law, notably at a European level through conventions.[23] This approach constituted as regional harmonization on particular subject matters, e.g., contract law, family law, and more,[24] set the foundation for considering increasingly larger harmonization of regimes. These prominent efforts at harmonizing international law pertaining to the Hague Conference, UNCITRAL, and more.[25] Overall, it is important to note that harmonization in some aspects of the law is slow, given the competing interests of states.[26]

Leebron has suggested that harmonization is the Procrustean[27] response to international trade. He observes that several scholars have recognized harmonization as an instrument to eliminate unfair differences. In a symbolical sense, it can create a balance and establish fairness at the international level.[28] It is an interesting perspective and provides an opportunity to see whether the "one size fits all" approach is equivalent to harmonization.

3.1 The Relationship Between Public and Private International Law

The relationship between public and private international law as envisaged by various scholars is disputed, at the very least. Various underlying parameters, such

[21] Ibid.

[22] Ferreira (2013, pp. 337–364).

[23] Szabó (2011, pp.143–151), Bezborodov (2017).

[24] Ford (2013) Private International Law.

[25] Ibid.

[26] Sieber (2010, pp. 1–49).

[27] *Infra*, the myth of Procrustes, who tied all travellers to his iron bed. "If they were shorter than the bed, he stretched their limbs to make them fit it; it they were longer than the bed, he lopped off a portion."

[28] Leebron (1996, pp. 63–107); See also Cutler (1999, pp. 25–48).

as sovereignty, comity, and judicial developments, have been referenced in the arguments as to the connection, or lack thereof, between public and private international law.

There are three prominent theories—two take an extreme view of the interaction between public and private international law.

The underlying premise of the "law of nations doctrine" of private international law, as defined by Nussbaum, is that private international law principles are drawn from and sanctioned by public international law.[29]

According to Savigny, each state has its own private legal system based on its own value system, which is independent of the interests of the sovereign state. So in the interest of justice, the applicable law should be the one that has the closest connection to the issue, even if it means applying foreign private law. The application of this understanding results in the first theory, which is public and private international law do not have a fundamental difference.[30]

Savigny's theory echoes in the works of French scholars Antoine Pillet (1923) and André Weiss (1926), who, as recounted by Starke in 1936, suggest that there is no fundamental difference between public and private international law.[31]

Anglo-American scholars have firmly rejected Savigny's theory. The majority have also denied that private and public international law have any link at all. Dicey, one of the most divisive English private international lawyers, argued that the rules governing the choice of law and jurisdiction belong solely to municipal law and are an integral part of the English Common law system and that international law, or "rights acquired under foreign laws," can only be enforced with the territorial sovereign's permission.

The challenge of articulating the relationship between private and public international law was made easier for Dicey by Austinian jurisprudence. He disregarded public international norms as not being "laws" in the proper sense because they were not "commands proceeding from any sovereign." On the other hand, private international law is law "in the strictest sense of the term," as it emanates from a sovereign authority. Because public international law, in his opinion, enforces no legal constraints on a sovereign entity, Dicey could constitute his idea of private international law with topics such as diplomatic immunity while maintaining a consistent denial of any connection to public international law.[32]

This stance, regarding the lack of a relationship between public and private international law, was seconded by Barrister G. C. Cheshire in the fourth edition of "Private International Law."[33] However, he changed his stance in the following edition stating

[29] Nussbaum (1942, p.189).

[30] Kegel (1989, p. 39), Nadelmann (1971, pp. 213–222).

[31] Starke (1936, pp. 95–401).

[32] Fowler V. Harper, J. H. C. Morris and Dicey, 'Dicey's Conflict Of Laws' (1950) 59 The Yale Law Journal, pp.3.

[33] Cheshire (1952).

"*It would, of course, be a fallacy to regard Public and Private International Law as totally unrelated*" which is synonymous with that of modern scholars.[34]

The relationship between public and private international law as envisaged by various scholars is disputed, at the very least. Various underlying parameters, such as sovereignty, comity, and judicial developments, have been referenced in the arguments as to the connection, or lack thereof, between public and private international law. Modern jurists have further spoken endlessly to the "nuanced" and "blurry" relationship between public and private international law. Neuwirth, in 2000, spoke on the interrelation and effect of the two on each other, and the beneficial role of joint considerations between the two in the larger global framework.[35]

An interesting piece of scholarship was provided by Boer in 2010, who substantially commented upon the evolved relationship between private and public international law. Emphasizing the decline of a strict bifurcation between the two, Boer references the subject matter as a common point and the sources as a divergent point among them.[36] Based on this, the following interesting characterization is provided vis-à-vis the relationship between public and private international law:

> Public and private international law are like an old couple living in separate homes but still united by their common history, their old ideals and shared interests, and their motivation for the same cause. Once in a while they still meet, under the auspices of institutions devoted to the study of 'international law', but those encounters only confirm that public and international law are living apart together: bound by their international outlook but divided by their commitment to different tasks and their allegiance to different legal orbits. [37]

Subsequently, many have commented upon this subjective confluence between public and private international law. Narasimhan and John wrote on the inherent scepticism in correlating "conflict of laws" and "public law," commenting that the realization of public international law in private international law shall require such to be negated.[38]

Whytock in 2018 elaborated upon the unclear division between the two, by using the example of the enforcement of foreign arbitral awards as a recognized example of the combined presence of public and private international law.[39] Moreover, the writings of Karamanian qualify the "blurring" of lines between the two as an indicator that international law issues cannot be solely categorized as either public or private, further commenting that using either public or private international law exclusively would subvert its objectives.[40]

Additionally, Arroyo and Mbengue in 2018 spoke to the nuanced and factor dependant relationship between public and private international law, though emphasizing

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[34] Cheshire (1957).

[35] Neuwirth (2000, p. 393).

[36] Boer (2010, p.20).

[37] Ibid.

[38] Narasimhan and John (2000).

[39] Whytock CA, *From International Law and International Relations to Law and World Politics*, ID 3,170,066, 27 April 2018.

[40] Karamanian (2013).

their recent convergence, particularly about the approaches of international courts and tribunals.[41]

A specific area within international law that has recently become prone to such conversations on public and private international law is dispute resolution. Harten, in discussing international arbitration, points out the distinguishment made between the two across the system, though emphasizes that such is not categorical or definitive.[42]

4 International Rule of Law and Harmonization Through the Principle of Justice

Harmonization of public and private international laws can lead to the growth of the IROL. This section discusses the elements of IROL and harmonization and how justice is an integral part of both. The idea of justice as understood by various scholar in the public and private international law as well as in IROL has been expanded upon. The idea of global justice is closely related to legal certainty and predictability, which can be demonstrated by international transactions.

4.1 Elements of IROL and Harmonization

Machiko Kanetake has assembled the requirements for rule of law under two heads.

> 'Formal' requirements under the umbrella of the rule of law typically include: law-based decision-making (namely, the 'rule by law' requirement), the independence of the judiciary, and democratic and participatory decision-making, as well as certain non-substantive qualities of the law, such as non-retrospectivity, openness, and certainty of law.
>
> 'Substantive' elements, on the other hand, require the content of the law and law-based decisions to conform to justice and the protection of individual rights.[43]

Kanetake further clarifies that each element can be defined in different ways. A requirement can also be both formal and substantive. For instance, democracy could be defined procedurally as a popular election, or more substantively, as the respect for human rights.[44]

These elements for IROL see a recurrence in other scholarly works as well. Next, we look at the elements of public and private international law. Alex Mills has identified six connections between public and private international law—(1) principle, (2)

[41] Arroyo and Mbengue (2018). They emphasized on the productive intersection of public and private international law in forms of international dispute resolution.

[42] Van Harten (2007, pp. 71–393).

[43] Kanetake (2016, pp. 19–20).

[44] ibid.

history, (3) functional commonality, (4) policy incorporation, (5) shared objectives, and (6) methodology.[45]

For the purposes of this chapter, the element we are concerned with is "shared objective." He states that private international law has its own policy concerns and interests which occupy the space of regulatory discretion left by public international law. Like public international law, private international law governs the allocation of this regulatory authority between states. It relies on the territory or personal connection to justify regulation. But within the discipline of private international law, there is a range of policy goals that have been developed, which relate to how this regulation should function.[46]

However, states are responsible for the application of not only their national laws but also international laws. Public and private international laws can together fill the gap which exists when they work separately.

One such shared objective can be the concept of justice which is one of the elements for IROL. The courts are required to follow due process and the principle of natural justice. It is imperative that an impartial forum can adjudicate disputes.

4.2 The Idea of Justice

Terry Nardin offers an interesting insight into the meaning of justice under ROL.

> The rule of law offers a standard of justice, but it is a quite specific standard: not a general, undefined justice whose content anyone can supply, but a justice specified in conditions presupposed by the idea of law as a system of authoritative obligations governing the transactions of citizens who may in some capacities be authors as well as subjects of law. To claim this is not to reduce the idea of the rule of law to the rule of justice, for the rule-of-law criteria are not criteria of 'just' law but of law itself as the basis of a relationship among moral equals, and not solely an instrument of someone's purposes. [47]

The meaning of justice as understood here resonates with the "Theory of Justice" as formulated by the English jurist RH Graveson.[48] He maintained that there were five elements that contributed to "the principle of justice,"

1. individual liberty,
2. maintenance of validity of acts,
3. equality between national and foreign rules of private international laws and between the people they apply to,
4. the sentiment of responsibility toward the international society, which leads to a movement toward the uniformization of the law,
5. limiting the use of public policy as much as possible in order to allow for the normal functioning of rules of conflict of laws."

[45] Mills (2018).

[46] Ibid.

[47] Nardin (2008, p. 395).

[48] Graveson (1962).

Under Private international law has had a division in the form of "conflicts justice" and "material justice." Conflicts justice states that the function of private international law is to ensure that each multistate legal dispute is resolved according to the law of that state that has the "most appropriate" relationship[49] with that dispute. Material justice on the other hand states that the object of private international law is to resolve disputes in a manner that is substantively fair and equitable to the parties as much as it is of internal law.[50]

Janne E Nijman, while analyzing the work of Grotius, states that ROL aims to empower everyone to enjoy their private rights for which the government exists. There needs to be trusted, as it allows everyone to rely on contracts and honor their obligations. This is the rule of enforceable or expletive justice.[51]

Saladin Meckled-Garcia in his paper determines that international law has an innate statist nature. International law utilizes these characteristics to define what is important to it. Its nature (mostly public international law) is to regulate the relationship between states. He explores the possibility of challenging the statist approach of international law to move toward governance and hence a chance for global justice.[52] The idea can be further expanded to include private international law, which has its roots in the territorial nature of international law.

Nardin explores the link between justice and permissible coercion. The state can assure justice and should secure it for its citizens. A state is responsible for creating laws that fall within the purview of justice. It cannot enact provisions that go against its principles of morality[53] and justice. The same is true for enacting public policies which cannot support a just legal order.[54]

As we saw earlier public and private international law have been converging to the point that they supplement each other. The limitation as pointed out by Meckled-Garcia can be confronted by the application of private international law. Justice as an idea forms an integral part of both public and private international law.

4.2.1 Legal Certainty and Predictability

Another aspect of justice is the creation of legal certainty. Legal certainty is essential for every legal system. The principle of *Stare Decisis* evolved in the common law system to bring about a sense of consistency and certainty. It has been rightly called

[49] The idea dates to Savigny.

[50] Symeonides (2001).

[51] Nijman (2019).

[52] Meckled-Garcia (2011, pp. 2073–2088).

[53] Nardin in the paper discusses the role of morals and its relation to law. It can be interpreted widely as the perception on enforceability differs.

[54] Nardin (2008, pp. 385–401).

"oracle of law"[55] by Dawson as it provides the judges with continuity in the legal framework and also helped in formulating justice into rules of law.[56]

Coudert in 1905 stated that there is an ever-present conflict between a desire for certainty and flexibility. The laws cannot be absolutely certain and it is also important that the legal system is taken into account changing notions of equity. There is a fine line to balance, while settling disputes the courts should evolve with time but without causing a degree of uncertainty. The change in perceptions of morality and justice is expected but so is certainty and expectations of the parties.[57] Despite Coudert's thesis being nearly 125 years old, this still holds true.

Mattias Kumm makes a case for IROL by emphasizing the requirement of consistency would also provide greater predictability. A stable international environment encourages the international community to reform and improve international rules. He states.

> … the international rule of law also provides predictability and enhances the freedom of individual actors. The rule of law secures fixed points of reference by stabilizing social relationships and providing them with predictability. In this way, the international rule of law protects and enhances the freedom of various actors, creating a predictable environment in which actors can make meaningful choices. [58]

A direction toward harmonization is also a step toward IROL. Paul R. Dubinsky claims procedural values are at the core of the unification[59] movement. Predictability and regularity are such important values. The movement relies on transparency, multilateralism, and inclusiveness. Another aspect is the cause of global justice. In order to achieve it the national and international laws need to provide a dependable forum and innovative methods.[60]

It is the duty of each state to so shape its municipal law to enable it to fulfill its international obligations. Like all customary law international law is based on a slowly changing body of usage to which it automatically adjusts itself. It is always a question of the evidence whether any given rule is or is not a part of any system of customary law; and the custom of nations, like the custom of merchants, is forever being modified.[61]

According to John Linarelli, normative economics tends to support harmonization as well. He highlights the problem of high cost through the examples of letters of credit and bills of lading. They are needed during international transactions to provide protective measures but are dependent on certain laws and trade practices. An alternative would be to equip international transactions to function within a single

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[55] Hamza (2003).

[56] Coudert (1905).

[57] Ibid.

[58] Kumm (2003, p. 26).

[59] Unification and harmonization though are different terms however their approach is similar. Unification here can be understood as both unification and harmonization.

[60] Dubinsky (2005, p. 211).

[61] Farrelly (1893, pp. 242–260).

default set of international rules. It would also allow for the uncertainty of law to be removed and even benefit smaller traders and states.[62]

4.2.2 International Transactions

Giesela Ruhl in her paper[63] theorizes that plurality of law due to the territorial nature of state dampens the spirits of international transactions. She emphasizes that this plurality leads to "constitutional uncertainty" which is a specific form of uncertainty, named so as it arises after the constitution of the state. The legal system of different states will inevitability structure and protect rights differently to another state, which may not be recognized by another.

Ruhl also discusses ways to solve the international transaction dilemma. One such discussion can be related to harmonization which is public ordering.[64] Public ordering comes with enormous economic costs. The economic costs referred here has a direct correlation to harmonization. Private international law as earlier discussed is technically national law which means the same international transaction is capable of being interpreted differently in separate jurisdictions. The choice of law problems is still national in nature.[65] They are not sufficient to provide relief to international problems. Private international law also has regulatory inadequacy. The costs associated with interpreting, choosing law, and applying the law while being left with public policy exception or renvoi are too high. Hence, there is a strong argument to be made for harmonization if the states want to do justice for their citizens.

Harmonization can diminish transactional costs[66] which have often been associated with legal uncertainty, thereby making cross-border transacting easier and more lucrative. Harmonization can contribute to globalization by facilitating the convenience and know-how of foreign legal systems and confront any issues on legal uncertainty head-on.[67]

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[62] Linarelli (2002, pp. 339–342).

[63] Ruhl (2010, pp. 59–92).

[64] *Ibid*, Public ordering as discussed in the paper are promulgated by a central regulator, especially a domestic or international legislator. They are imposed on the relevant private actors ("top-down strategies") and come in two different forms: (i) conflict of laws; and (ii) unification and harmonization of law.

[65] For further discussion on national solutions to global problems see von Mehren (1974, p. 347).

[66] The point has been made in relation to mediation in private international law matters. However, it can be extended to costs involved in private international law in general.

[67] Alexander (2012, pp. 131–204).

5 Conclusion

The element of "internationalism" in private law regimes, or of "private law" in the international law regime, is the breeding ground for conversations on the nature and relationship between public and private international law. A number of specific arguments regarding sources, the status of norms, and more can be advanced in this regard as well. Growing conversations on harmonization come to the aid of such, and academics have empirically highlighted the growing confluence emerging and intentionally employed by such organizations and states. Thus, the relevance of this discussion pertains to the very premise and fundamental characteristics of international law, signifying its notability.[68]

International law has been growing as diverse as national laws. Many of the traditionally demarcated areas of national law such as water law, the law of contract, insolvency, and mergers and acquisitions are now developing an international counterpart.[69] It cannot be denied that by bringing different legal systems (national and international), under the same umbrella, there is a potential to open Pandora's box. National laws need to be carefully harmonized in order to cater to the needs of the changing times, without neglecting the interests of individual states.[70] However, the pursuit of justice is a commendable goal to take necessary risks.

Justice as understood under the IROL, public international law, and private international law remains more or less similar. Justice should consist of fair hearing, equality, certainty. Legal certainty as a principle is appealing to both national and international law. It is a fundamental requirement of ROL. Legal certainty provides a sense of predictability which can be achieved through harmonization. And the growth of the IROL can be best achieved through harmonization. This can be done through international conferences, support from international organizations such as the UN, the Hague Conference on Private International Law, and government support.

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[68] Frédéric (2008).

[69] Olivier (2008, pp. 437–442).

[70] Ibid.

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Part III
Case Studies of Intersectionality Between Public International Law and Private International Law

Chapter 6
The Missing Link in the Resolution of International Investment Disputes Affecting Host States' Citizens Under Public and Private International Law

Richard Mike Mlambe

Abstract It is widely accepted that the attraction of foreign investment is vital for development. As a result, deliberate measures aimed at attracting foreign investors are put in place in most countries of the world. One way of attracting foreign investment is to adopt a legal environment that guarantees non-interference with the investment by the government of the host country and the availability of remedies when such interference occurs. Public international law creates several rights and obligations between investors and host states in this relationship. However, the interests of the resident of the host state are invariably ignored despite that they are a class of people who are particularly affected by such investments in areas like health and environment. This means that the establishment of an investment by an alien investor not only creates a bilateral relationship between the investor and host state but also with the host state's citizens. Public international law does not create a direct right of action in favour of the residents when the host government fails to pursue remedies on their behalf arising out of grievances occasioned by the investor in carrying out his activities under the investment. On the other hand, private international law, on its own, fails to guarantee aggrieved citizens effective remedies since the rules of jurisdictions and recognition and enforcement of foreign judgments may make it difficult to secure such reliefs. This gives rise to a need for the two subjects to cooperate in ensuring access to justice and effective remedies to residents of the host states, whose link is missing in current theory and practice.

Keywords International investment · Human rights violations · International investment relationship · Sending state · Host state

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1 Introduction

At the outset, this chapter acknowledges the traditional distinction between public international law and private international law as unrelated, parallel, and independent subjects.[1] Professor Alex Mills in his book focusing on the interaction between the two subjects has stated that while the former is concerned with relations among states with respect to each other and individuals, the latter is concerned with issues of jurisdiction, choice of law and the recognition and enforcement of foreign judgements before national courts. Mills writes:

> In turn, public international law traditionally neglects the analysis of private international interactions and disputes, which are viewed as outside its 'public' and 'state-centric' domain. Thus, public and private international law are viewed as distinct disciplines, as two separate intellectual streams running in parallel. [2]

In disagreeing with this (nearly) complete separation of the two areas of law, Mills contends that the distinction does not reflect their real character. Upon recognizing that the two subjects are increasingly facing the same problems and issues, he contends:

> The theory that provides the foundations for the distinction between public and private international law thus reflects and replicates outdated international norms. It does not support but rather obstructs the development and implementation of contemporary ideas of international ordering in and through international law, both public and private. The distinction between public and private international law obscures the important 'public' role of private international law, both actual and potential, in ordering the regulation of private international transactions and disputes.[3]

In agreeing with Mills, this chapter challenges the traditional dissociation of the two subjects from each other and explores their relationship in the context of disputes between foreign investors and local citizens under international investment agreements between/among states. It will be demonstrated that on principle, public international law ought to recognize that private citizens in the host state have direct rights as a group to proceed against the investor where the latter violates their rights. However, to achieve this, public international law needs private international law in the ways discussed below.

From a public international law perspective, the treatment of foreign investment creates rights and obligations between states inter-se for the benefit of the investors within the territories of the state parties to investment treaties.[4] For example, if nationals of country X see an opportunity and decide to invest and establish an enterprise in country Y, and comply with all the requirements for setting up such

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[1] For the differences between the subject matter of these two areas of law in general, see O'Brien (1999, p. 3).

[2] Mills (2009, pp. 1–2).

[3] Idem.

[4] Borchard (1939). The Minimum International Standard in the Protection of Aliens. 33 ASIL Proceedings and Fatouros (1983, Chap. 8).

an investment under the law of Y, or where a treaty is in force between X and Y, and all the (additional) requirements under the treaty are met, a set of rights and obligations under public international law is triggered once the investment is admitted and established in Y. However, the direct beneficiaries of the said rights are the investors themselves, and the states are only indirect beneficiaries. This means that typically, the regulation of foreign investment involves, at least, three parties: the state whose nationality the investor possesses (hereinafter referred to as "the sending state"); the state receiving and admitting the investment within its territory (the host state); and the investor himself (albeit the fact that the investor is not a party to the relevant international investment agreements/treaties nor do they have direct obligations under customary public international law).[5]

Once an investor gets established and commences his business activities, legal relationships arise with more persons and entities. For example, there will be new employment and commercial contracts necessary for doing business.[6] Further, non-contractual obligations also arise with respect to those aggrieved by the investor in various ways such as in tort.[7] The bulk of those affected by the investor in this manner are private entities and persons in the host state. This is the fourth category of parties that public international law does not recognize in the international investment relationship. The present author contends that private persons situated in the host state in the international investment relationship are a necessary and independent category of stakeholders worthy recognizing as forming part of the international investment relationship. Their non-recognition as part of that relationship under international law gives rise to problems and questions, which will be discussed below.

2 The Problem of Non-recognition of Residents of the Host States as an Independent Category in the International Investment Relationship

The problem that arises from the non-recognition, under public international law, of the rights and obligations existing between the investor and the private persons[8] in the host state, coupled with the treatment of such rights as purely a matter of internal law, is at the centre of this chapter. As already stated, in international investment law, the following relationships are recognized under public international law:

[5] Foreign investment can take various forms: (1) The establishment of a new and independent entity in a foreign country; (2) setting up an establishment in a foreign country, such as a subsidiary, agency or office of an existing entity and (3) effecting a cross-border merger or acquisition of an existing foreign entity. See also Graham (2005, p. 2).

[6] The latter may include suppliers of goods and services necessary in the investor's business.

[7] For example, those injured in the course of the investor's business may have non-contractual claims such as in personal injuries, among others.

[8] Citizens/residents/private persons will be used interchangeably.

(i) Between the State parties to the relevant investment agreement;
(ii) Between the sending state and its national, the investor, in which case the former may take steps to secure remedies[9] on the latter's behalf where the host state commits an injurious act[10]; and
(iii) Between the investor and the host state, who have mutual rights and obligations relating to the enjoyment and regulation of the investment.

It will be clear that citizens do not fit anywhere in this engagement. However, there is no doubt that the investor also owes to the host state obligations and must account for his activities on the basis of both the investment agreement and, where applicable, the local law. It may, of course, be argued that any duty of accountability in the activities of the investor is owed to the host state's government and not to the private citizen themselves. This may be regarded as justification for the non-recognition of private citizens in the investment relationship. In other words, the host government is the one that represents its citizens, and, therefore, there is no need to recognize them separately. Where they are aggrieved, it is the responsibility of the host government to claim on behalf of its citizens.

It may be pertinent at this point to set out the various forms that the injurious activities of the investor towards the residents of the host state may take. As observed by Anna Kozyakova:

> …misconduct encompasses all manner of actions and omissions that trigger negative legal consequences within a field of law. The term 'misconduct', as applied in this monograph, should be understood to include the following patterns of behaviour:
>
> – The non-fulfilment or violation of direct obligations required by law. This category may cause the issue of legal responsibility, subject to the direct legal provision thereof.
> – The non-satisfaction of the criterion set by law. This category of omissions may result in the elimination or restriction of otherwise granted protection and procedural capacity.
> – Dishonest, fraudulent or abusive actions committed in order to be granted legal status, procedural and material rights. This category may be equated to the non-satisfaction of the criterion set for the achievement of such legal status, procedural and material rights and results in the elimination of the thus obtained rights. [11]

Further, when one looks at the reality in practice, particularly where the investment is established in the less powerful third world countries by an investor from the stronger and more powerful countries, one will notice that reliance on host governments to protect and uphold the rights of its citizens may undermine the ability of the citizens to access justice and legal remedies for their grievances arising out of the investor's actions.[12] For a variety of reasons, the host government may not be willing

[9] Marzal (2021). Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS. Journal of World Investment and Trade 22:249–250.

[10] See, for example, the Republic of Ecuador v Occidental Exploration & Production Co-Commercial Court, Case No 04/656 of 2 March 2006.

[11] Kozyakova (2020, pp. 50–51).

[12] These concerns have led to international efforts aimed at bringing forth accountability for human rights violations committed by multinational corporation. See Report on the Fifth Session of the

or able to assist its own citizens. This brings us to the observation that was made by a distinguished English professor, Trevor Hartley, over a decade ago. Hartley observed:

> Multinational companies, especially those exploiting mineral resources, often carry on their activities in Third World countries. Sometimes they cause major environmental pollution; sometimes they cause serious health problems, and been acting in a developed country, such as the United Kingdom or the United States, the law would provide a remedy; indeed, they would probably not have done what they did. In Third World countries, however, the position is different. The governments of many such countries are so weak and short of resources that they cannot stand up to big companies.[13]

After lamenting the harm to which multinational companies subject the citizens of the host countries, he proceeds to identify the challenges associated with suing in the local courts of the host state as opposed to suing in the courts of the sending state. He cites, *inter alia*, the following constraints:

i. Lack of funds on the party of the litigants to engage quality lawyers.[14]
ii. Lack of resources by local lawyers to do the strenuous work involved in such big cases.[15]
iii. Cases may take too long to complete.[16]
iv. Local judges may be corrupt and lack expertise to deal with the case involving complicated scientific evidence and expert witnesses.
v. Host government may be unwilling to assist the citizens to access remedies locally.[17]

The foregoing challenges put citizens in a disadvantaged position. As far as public international law is concerned, the residents have no right to directly pursue their grievances against the investor on the international plane. This is the case since the residents and the investor are both private entities and are not subjects of international law, at least in terms of the traditionally recognized subjects of international law.[18] This leaves the citizens with one option only, i.e. to institute proceedings against the investor before the local courts. However, as observed above, the local courts may not be the best forum to pursue their actions for the reasons cited by professor Hartley, among others.

Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises With Respect to Human Rights (2020, p. 2) General Assembly, Human Rights Council.

[13] Hartley (2009, pp. 303–304), Chaisse (2013) Exploring the Confines of nternational Investment and Domestic Health Protection- Is a General Exception Clause A Forced Perspective? American Journal of Law and Medicine. 39:332–360.

[14] As legal aid may not be available in some countries.

[15] Some of the cases involve complex scientific and otherwise technical matters.

[16] Some jurisdictions in the third world are notorious with this.

[17] For political reasons.

[18] For an illuminating discussion on the subject, see the case of Reparation for Injuries Suffered in the Service of the United Nations, (Advisory Opinion) [1949] ICJ Rep 174.

These sentiments have been echoed by a study on access to legal remedies for victims of corporate human rights abuses in third countries caused by European investors. The study finds:

> European-based multinational corporations can cause or be complicit in human rights abuses in third countries. Victims of corporate human rights abuses frequently face many hurdles when attempting to hold corporations to account in their own country. Against this backdrop, judicial mechanisms have increasingly been relied on to bring legal proceedings in the home States of the corporations.[19]

An interesting observation has been made by Francioni as follows:

> The increasing impact of foreign investment on the social life of the host state has raised the question whether the principle of access to justice, as successfully developed to the benefit of investors through the provision of binding arbitration, ought to be matched by a corresponding right to remedial proceedings for individuals and groups adversely affected by the investment in the host state. This question arises especially in circumstances in which the foreign investment has an actual or potential impact on the health, the environment, or socio-cultural values of the host state's population. Under normal circumstances, the right of access to a court for the local population should be guaranteed by the law and the justice system of the host state.[20]

This predicament compels the private citizens to consider another option, especially for local investors that are linked to other entities in the sending state, namely, suing before the courts of the sending state. This appears to be an attractive means of dealing with the problem associated with the local courts outlined above. However, jurisdictional challenges are always part of such litigation. In most cases, the investor objects to the jurisdiction of the courts outside the host state while the claimant residents fight for the establishment of the same.[21] It is at this point that the relevance of private international law emerges. This problem can be illustrated by the most recent English decision involving harm to victims of the operations of a multinational enterprise operating from Africa- *Okpabi and others v Royal Dutch Shell Plc and another*.[22]

This is the decision of the Supreme Court of the United Kingdom (UK) on the (possible) liability of parent companies domiciled in the UK for human rights violations allegedly committed by their foreign subsidiaries. Two sets of proceedings originating from Nigeria were dealt with together in this appeal. The issue was *"whether the claimants have an arguable case that a UK domiciled parent company owed them a common law duty of care so as properly to found jurisdiction against a foreign subsidiary company as a necessary and proper party to the proceedings"*. The claimant's sued both the UK domiciled parent company and the

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[19] Study on Access to legal remedies for victims of corporate human rights abuses in third countries (2019), European Parliament, Directorate General for External Policies of the Union.

[20] Francioni (2009). Access to Justice, Denial of Justice and International Investment Law. The European Journal of International Law. Vol. 20 no. 3. P. 788.

[21] See, for example, the case of *Vedanta Resources PLC and another (Appellants) v Lungowe and others (Respondents)* [2019] UKSC 20.

[22] [2021] UKSC 3.

Nigerian subsidiary, which occasioned the alleged harm to them, Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd, respectively. It was contended by the claimants that the parent company owed them "a common law duty of care because it exercised significant control over material aspects of [the Nigerian subsidiary's] operations …including by the promulgation and imposition of mandatory health, safety and environmental policies, standards and manuals which allegedly failed to protect the [claimants] against the risk of foreseeable harm arising from [the subsidiary's] operations".

The parent company challenged the jurisdiction of UK courts on the basis that there was no arguable case against it for the alleged harm caused by the Nigerian subsidiary. The High Court and the Court of Appeal (by majority) agreed with the defendants and found that the claimants did not have an arguable case, which finding the claimants appealed against to the Supreme Court of UK. In allowing the appeal, the Court, after finding that the Court of Appeal had erred in its approach to the determination of the arguability of the claim at an interlocutory stage, stated as follows with regard to the possible liability of a parent company for breaches of human rights committed by its subsidiary abroad:

> First, to the extent that the Court of Appeal indicated that the promulgation by a parent company of group wide policies or standards can never in itself give rise to a duty of care, that is inconsistent with Vedanta. Indeed, a submission to that effect, based on the Court of Appeal's decision in this case, was rejected by the court at para 52 of Vedanta…Secondly, the majority of the Court of Appeal may be said to have focused inappropriately on the issue of control. Simon LJ appears to have regarded proof of the exercise of control by the parent company as being critical—see, for example, paras 124, 125, and 127. The Chancellor's judgment at para 205 is to similar effect. As Lord Briggs pointed out at para 49 in Vedanta, it all depends on: "the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations … of the subsidiary…In considering that question, control is just a starting point. The issue is the extent to which the parent did take over or share with the subsidiary the management of the relevant activity (here the pipeline operation). That may or may not be demonstrated by the parent controlling the subsidiary. In a sense, all parents control their subsidiaries. That control gives the parent the opportunity to get involved in management. But control of a company and de facto management of part of its activities are two different things. A subsidiary may maintain de jure control of its activities, but nonetheless delegate de facto management of part of them to emissaries of its parent…It would be wrong, however, to approach the issue of whether a duty of care is owed by reference to any generalised assumption or presumption.[23]

In the above statement, the Supreme Court laid down an important principle regarding the potential liability of a parent company for torts committed by its foreign subsidiary. The court categorically declared that the fact that the subsidiary is distinct from and in general manages its affairs and does its operations independent of the parent company, does not mean that the parent company can never incur liability arising out of activities of its foreign subsidiary. The separation of the personality of parent and subsidiary and the latter's independence from the former do not signify

[23] *Okpabi and others v Royal Dutch Shell Plc and another* [2021] UKSC 3, [143], [146], [147] and [150].

the existence of a principle of law according to which the former may never be found liable for the latter's tortious acts. Whether the parent company is liable or not for those acts depends on the nature and extent of its involvement in the subsidiary's business. Most importantly and relevantly for present purposes, the decision demonstrates that where there is a connection between the investor in the host state and an entity in the sending state, the courts in the sending state, in this case, English courts, may accept and exercise jurisdiction in actions that may be brought by the victims of the actions of the investor in the host state.

The institution of the action by the citizens against the investor in the local courts has its constraints. The citizens are faced with a dilemma: the local courts are readily available and easily accessible, but no guarantee that an effective remedy will be obtained for reasons like corruption of the judiciary, lack of expertise to handle the complex matters etc. On the other hand, litigating in the foreign courts of the sending state may present good prospects for an effective remedy if the legal system is more developed, while at the same time presenting a number of jurisdictional impediments, since all or at least most factors are connected with the host country, and it is difficult to satisfy a court in the sending state that its territory is connected to the matter sufficiently so as to possess the requisite jurisdiction.

One observation that can be made here is that litigating before the local courts of either the host state or those of the sending state brings forth some tension between two countervailing and fundamental rights: *the right to access to justice*[24] and the right to *effective legal remedy*. Whilst local courts may be relatively more accessible to the citizens thereby guaranteeing access to justice, the availability of an effective remedy may be seriously undermined if the judicial system is compromised by corruption or lack of competence to deal with some of the complicated matters that have to be decided. The reverse also seems to be true with respect to instituting the action in the foreign country. Whilst effective remedy may be obtained, access to the foreign courts may not be easy due to jurisdictional challenges available to the investor.[25]

Apart from jurisdictional impediments, another challenge faced by citizen emanating from private international law is that of recognition and enforcement of a judgment which they may obtain from the local courts of the host state. It may happen that a local court may render a judgment in their favour in the host state,

[24] This is a fundamental right recognized in international instruments and in almost constitutions of all civilized countries—see Arts. 6, 7, 8 of the Universal Declaration of Human Rights and S. 41 of the Constitution of the Republic of Malawi.

[25] It is interesting to note that the behaviour of parties to these actions seems rather paradoxical. Whilst one would have expected the claimants to be willing to institute and prosecute their action in the local courts to which they are close and whose procedure they are familiar with, they are the ones who fight tooth and nail for the acceptance of jurisdiction by the foreign courts. On the other hand, the defendants, while they are expected to be happy to be sued in their own country, they fight that the matter should be heard by the claimants' country's courts. It would, therefore, not be out of proportion to assert that the behaviour of claimants and defendants in litigation involving the liability of foreign parent companies for harm caused by their subsidiaries, their preference or choice of venue is contrary to what is expected of parties to international litigation.

only to discover that the investor does not have sufficient assets to satisfy it.[26] Where such is the case, it necessitates the application for recognition and enforcement of the judgement in the courts of the sending states. The challenge with this is that there is no guarantee that the judgement will be recognized, and the foreign courts may refuse to do so.[27] Therefore, the citizens may have a judgement that is no more than a mere piece of paper.

3 The Missing Link in Public International Law and Private International Law

What link is missing in the two subjects, in view of the unfortunate situation of the private citizens in the international investment relationship?

On one hand, public international law refuses to recognize them as part of the international investment relationship and consequently does not create any rights and obligations directly applicable to them in their dealings with the investor. In the eyes of public international law, whatever happens between the investor and the residents is purely a matter of the local law of the host state. If an investor violates the citizen's human rights, even within the context of and in the course of the investor's activities directly connected to the investment, public international law is not concerned.

On the other hand, private international law fails to guarantee the availability of effective remedies due to the aforementioned jurisdictional constraints and the challenges associated with the recognition and enforcement of foreign judgments. Therefore, in order to improve the situation of the citizens, there are two issues that are needed: (1) public international law needs to develop and recognize them as part of the relationship and (2) through private international law, public international law needs to mandate states to prepare their internal jurisdictional and foreign judgment recognition rules in accordance with the said recognition under public international law. The fundamental question, therefore, is whether the two subjects are connected to achieve this in the currently prevailing theory and practice. In the view of the present author, as things stand now, the answer is negative. That is the gap that, as contended, must be filled. There is a need to connect the two subjects in order to close that gap for the benefit of victims of human rights violations by the investors. We shall proceed further to justify the connection between the two subjects.

[26] See, for example, Motorola v Kemal Uzan, et al. 293 f.r.d. 595 (S.D.N.Y. 4, 2013).

[27] In the absence of any treaty obligations to that effect.

4 Justifications for the Link Between the Two Subjects in the Context of International Investment

This chapter identifies the following two bases for the call to develop public international law so as to recognize private citizens in the host state as part of the relationship and, through private international law, to guarantee access justice and effective remedies to them:

i. The requirement to interpret and apply investment treaties in good faith.
ii. General principles of law as a source of public international law and as the basis of the approach to private international law questions.

4.1 Application of Investment Agreements in Good Faith

Pacta sunt servanda is a fundamental principle in the interpretation of treaties. According to this principle, "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*".[28] This principle has been held by the International Court of Justice (ICJ) to reflect customary international law.[29] Again, in the earlier case of Nuclear Tests Case (Australia v France),[30] the ICJ had stated that "*one of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith*".[31] In the context of international investment, the object and purpose of investment agreement are the guarantee of protection of the rights of the investor and protection from illegal actions that may prevent the enjoyment of the investor's rights, including expropriation. This is achieved by prescribing certain minimum standards of treatment of the investor by the host state. As stated by Asante,

> host States are enjoined by international law to observe an international minimum standard in the treatment of aliens and alien property. The duty to observe this standard—objective international standard—is not necessarily discharged by according to aliens and alien property the same treatment available to nationals. Where international standards fall below the international minimum standard, the latter prevails. Breach of the minimum standard engages the responsibility of the host State, and provides a legitimate basis for the exercise by the home State of the right of diplomatic protection of the alien, a right predicated on the inherent right to protect nationals abroad[32]

The application of investment agreements in good faith, therefore, entails, among others, the avoidance of actions that undermine the security of the investment.

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[28] Vienna Convention on the Law of Treaties, 23 May 1969, article 26.

[29] See the *Case Concerning Gabcˇíkovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7.

[30] [1969] ICJ Rep 3.

[31] Idem, para. 46.

[32] Asante (1988). International Law and Foreign Investment: A Reappraisal. ICLQ, pp. 588–628,590.

However, this chapter is of the view that it is incomplete and unsatisfactory to dissociate the benefits accruing to the investor from his amenability to be held accountable for his actions in the host state. Further, it is the present author's view that such accountability can only be meaningfully achieved if the sending country is ready and willing to cooperate in holding its own national, the investor, accountable for his action in the host state.

In this connection, it is hereby submitted that for investment agreements, the duty to perform obligations in good faith also entails on the part of the sending state, the duty to assist and cooperate in making an investor, who is that state's national, accountable for any human rights violations that may be committed in the host country. Such a duty is a necessary corollary of the security guaranteed to its national, the investor. In other words, any willingness and readiness on the part of the sending state to support a complaint or claim of its national against the host state[33] must be matched by the corollary readiness and willingness to assist in making its national accountable for his human rights violations committed in the host state.

From a public international law perspective, it is our submission and call that there must be a recognition that the requirement of the application of investment agreements in good faith imposes the obligation to cooperate and assist in ensuring access to justice and effective remedies to victims of human rights obligations committed by a national of a state party to private citizens of another state party. This obligation is on the sending state.

This chapter suggests two ways in which this can be done. First, it is suggested that the arbitration tribunals that are provided for in investment agreements for the resolution of disputes between the investor and the host country must also be conferred with jurisdiction to entertain claims by private citizens against the investor. This must be the case where the host government is not willing, for a variety of reasons, to pursue such claims against its citizens.[34] The tribunals should be able to give remedies available both under the applicable national law and international law.[35]

As has been stated by Subedi:

> Since the trend emerging in the jurisprudence of international investment tribunals is to extend BIT protection to companies affected negatively by investment contracts, albeit under narrowly defined conditions, it could be argued that the real victims of the activities of foreign investors which undermine human rights and the environment should also be given access to international investment tribunals to present their cases under narrowly defined conditions and especially in cases of gross violations of human rights and massive degradation of the local environment.[36]

Second, as it is generally the case, victims of human rights violations in the host state have no difficulties to access the local courts. However, such courts may, though accessible, not be able to grant effective remedies because of corruption or because a judgment in favour of the victims may not be fruitful as the investors may lack

[33] i.e. diplomatic protection.

[34] This includes the reasons identified by Professor Hartley. See footnote n. 10.

[35] Hepburn (2017, p. 113).

[36] Subedi (2008, p. 212).

assets in the host country to satisfy the judgment. This is the main reason that may prompt victims to litigate before the courts of the sending country as that is where substantial assets may be available. The victims' challenge, however, is to convince the courts of the sending state to accept jurisdiction and entertain the claims. That is where private international law issues arise.

In our view, where such is the case, we submit that the public international law obligation to cooperate and assist in ensuring accountability of the investor creates a further obligation, on the part of the sending state, to grant access to justice and legal remedies to the victims. The sending state has a public international legal obligation to create a system that grants the victim direct access to its courts for purposes of filing lawsuits regarding human rights violations occasioned by an investor who is a beneficiary under an investment agreement to which the sending state is a party. In this connection, it is our contention that the said public international law obligation means that the state parties must create a private international law regime that contains rules that enable them to discharge their public international law obligations in good faith. This call relates to both rules of jurisdiction and recognition and enforcement of foreign judgments. The former are to grant the victims direct access to their courts as a way of assisting in the accountability of the investor, whereas the latter relates to enabling the victims to have access to legal remedies by enforcing judgments that may have, for example, been granted by the local courts in the host state.

4.2 Considerations from General Principles of Law

General principles of law are an undisputed source of public international law. These are principles recognized by the community of nations of the world.[37] Commenting on general principles of law as a source of international law, Charlesworth and Chinkin have stated:

> The content of the category of 'general principles of law recognised by all civilised nations' is controversial. When drafted as part of the Statute of the PCIJ, article 38(1)(c) was a compromise between those who regarded general principles as derived from natural law and those who saw them as drawn from national law. It is now widely accepted that article 38(1)(c) applies to principles of both international and domestic law. The concept incorporates maxims normally found within state domestic law, including procedural principles, good faith and res judicata. It does not, however, contemplate the incorporation of municipal law principles 'lock, stock and barrel' into international law[38]

Of relevance to our discussion is the case of the Factory at Chorzów. In this case, the court made the following illuminating statement:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore is the indispensable complement

[37] See Art. 38(1)(c) of the Statute of the ICJ and the case of The Sheikh of Abu Dhabi [1951] 18 ILR 144.

[38] Charlesworth and Chinkin (2000, p. 15).

> of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.[39]

In stating his views on the above statement of the PCIJ, Professor Dixon (et al.) stated, inter alia, that "*the use of concepts found in most legal systems would seem to be within the spirit of 'general principles'*.[40] It being a general principle of law, it is recognized and applied by municipal courts with respect to transactions between private parties, both natural and legal persons. Accordingly, it can be concluded that it is a generally recognized principle of law that any breach of an engagement involves an obligation to make reparation. In our view, the use of the word "engagement" covers both contractual and non-contractual obligations such as human rights violations. Therefore, this principle is equally applicable to investors in their activities and conduct towards citizens.

Since the investor has an obligation falling under general principles of law recognized by the community of nations, it is fitting and proper that the sending state should have a duty to see to it that any breaches committed by the investor are matched by reparations by the investor to the victims. In this connection, the sending state is under an obligation to do all that is necessary to ensure that reparation is duly affected by the investor, including by mandating its courts to adjudicate any claims brought by the victims and to enforce any judgments against the investor.

4.3 Choice of Court Agreements in Investment Agreements

It is also submitted that in the alternative to the aforementioned means of addressing the problem under discussion, state parties of international investment agreements should make provision for a choice of court agreement clause in favour of the citizens of the state parties. This will ensure that the constraints relating to jurisdiction and recognition and enforcement of foreign judgments are avoided.

Such choice of court provisions should stipulate that the investor submits to the jurisdiction of both the local courts in the host state and the courts of the sending state for actions commenced against him by the residents of the host state concerning injury to them as a class arising out of the investment and that the residents should have the right to choose where to sue between the two forums. The inclusion of such provisions in international investment agreements shall create a public international legal obligation on the state parties to guarantee access to justice and effective remedies to the affected citizens/residents thereby closing the gap between public and private international law that prevents the residents from enjoying these fundamental rights.

This can be buttressed by the fact that governments and, in particular, residents in the host states are relatively weaker parties than the investors. As such, they need special recognition and protection by the law. Private international law generally

[39] PCIJ Rep Ser A (1928) No. 17.

[40] Dixon et al. (2016, p. 42).

operates in manner that takes into account the differences in the bargaining powers and strengths of parties to international litigation. The law recognizes that in international civil cases, the relative powers and positions of the parties is not always the same. Some parties are stronger and more powerful than others. Typically, there is recognition that the insured, employee and consumer are weaker parties than the insurer, employer and supplier respectively. As such, jurisdictional and choice of law rules are developed in such a manner as to bring about a balance between the parties. For instance, courts have been given the power to refuse to enforce choice of law or forum agreements that appear to be only in favour of the stronger party. In the context of international investment relationships, state parties ought to recognize that multinational corporations are stronger parties than residents and that necessitates that special consideration is given to residents if they are to have access to justice and legal remedies for injurious activities of the investor against them.

5 Concluding Remarks

In view of the foregoing discussion, several conclusions and observations may be made.

First, the traditional view that public and private international law are unrelated and parallel subjects is not entirely correct. Private international law is and ought to be, where applicable, a means of effecting the prescriptions of public international law.

Second, since host governments are representatives of their citizens towards the foreign investor, it is fitting and proper that where the government is unable or unwilling, for a variety of reasons, to defend the rights of its citizens, the citizens should be allowed to pursue their claims and defend their rights on their own. Accordingly, public international law ought to recognize them as a special category in the international investment relationship with entitlement and standing to commence legal actions directly against the investor as a class.

At the same time, private international law on its own fails to ensure access to justice and effective remedies to the citizens. Whilst the local courts may be accessible, remedies may not be received due to corruption, delayed judgments, and lack of expertise, among others. Similarly, judgements obtained by the citizens from the local courts of the host state may not be readily enforced in the investor's home country depending on the applicable rules for the recognition and enforcement of foreign judgments in the sending state. Therefore, the two subjects need to be linked in a way that alleviates the challenges of the citizens.

In order to achieve this, public international law must be connected and linked to private international law. There must be a recognition that there is a public international legal obligation to cooperate and assist, on the part of sending states, in holding the investor accountable for its misconduct against citizens in the host country. In this connection, the sending states should be ready, through their private international law regime, to give effect to the aforementioned public international legal obligation by

mandating their local courts to assume jurisdiction where the victims of the investor's misconduct bring actions before them. Similarly, the sending states' courts should be mandated to recognize and enforce judgments rendered by the host state's courts in favour of the victims. To make this easier to achieve, there must be the choice of court agreements in international investment agreements entitling the victims to choose either the courts of the host or the sending state for purposes of their actions.[41]

Finally, it is submitted that there should be recognition of the fact that foreign investors are, in their relation with victims of human rights violations emanating from their activities, stronger parties and the law should accord the victims special recognition and protection. Accordingly, the victims should have the right to choose a forum for the determination of their grievances.

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Chapter 7
Visualizing the Role of International Rule of Law in "Not-For-Profit Funding" in Investment Arbitration

Gautam Mohanty

Abstract Contemporary developments in international arbitration have discussed the necessity of ensuring adherence to the rule of law in various facets of arbitration. International institutions deliberating on dispute resolution mechanisms and strategies have been evincing interest in discussing claim funding in international arbitration. The Working Group III of the United Nations Commission on International Trade Law (UNCITRAL) is currently engaged with the access to justice ("ATJ") rationale set forth by proponents of third-party funding in the context of an investor to state dispute settlement ("ISDS"). This chapter aims to discuss the potential overlap between the nascent practice of "not-for-profit third-party funding" ("**TPF**") or "ideological funders" and the need to ensure the rule of law through disclosure in situations where TPF is identified. Although shrouded in mystery and less prominent compared to the traditional TPF, the author believes that the prevalence of not-for-profit funding is only set to increase in investment arbitration since a financial return on investment would not in usual circumstances be required to be given to that funder party. Through this chapter, the author will also attempt to define the contours of the rule of law in the context of TPF in arbitration and also elaborate upon the role of the rule of law in ensuring procedural fairness and natural justice in arbitration proceedings.

Keywords Third-party funding · Ideological funders · Financial return · Confidentiality · Natural justice

1 Introduction

This chapter identifies "not-for-profit funding" in investment arbitration and its potential impact on the proceedings through the lens of the rule of law. The high costs in international investment arbitration for the parties involved in the proceedings, coupled with the need to maintain financial stability while pursuing a legal claim, have shaped the path for the emergence of third-party funding ("TPF") in investment

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arbitration.[1] A cursory glance over the recent International Centre for Settlement of Investment Disputes ("ICSID") cases highlights the increased use of complex and novel financial arrangements to facilitate third-party funding. More generally, in practice, a third-party funder does not have a direct relationship to the substantive issues of the arbitration proceedings but is only interested in the financial returns, usually a percentage of the total compensation flowing out from the dispositive section of the final award. It is estimated that the average cost for a party in an ISDS proceeding is around USD 5 million[2] while the average return from an arbitral award is over USD 120 million.[3] As a case on point, Burford Capital, a prominent arbitration funder in *Teinver v. Argentina*,[4] secured a 736% return amounting to USD 94.2 million on invested capital in 1 year in an investment arbitration case. The tribunal in its arbitral award awarded USD 324 million in damages in favour of claimants observing that the host state had engaged in unlawful expropriation and violation of the fair and equitable treatment obligation. Against the above backdrop, one such facet of TPF will be addressed in detail in this chapter, i.e., not-for-profit funding.

The merits and demerits of TPF aside, it is without a doubt that the presence of a third-party funder may influence the conduct of the proceedings. The substantial financial interest of the funder and the potential transfer of control from the investor to the funder undoubtedly risk the sanctity of the arbitral proceedings.[5] In such a scenario, the disclosure of the funder's presence must be mandated to ensure that tribunals and the responding party adopt a holistic approach towards calculating costs and damages in the proceedings. Although investment tribunals have noted the presence and influence of a funder, they have avoided a detailed discussion on examining the effects emanating from the presence of a funder. As the number of instances of TPF increases, in the context of transparency of investment arbitration proceedings and the independence and impartiality of arbitrators, it can be stated that significant rule of law concerns emerges from the non-disclosure of TPF.

The investor-state dispute settlement (ISDS) framework has come under much scrutiny and criticism by investment-importing and investment-exporting countries to the extent that questions concerning its legitimacy have been consistently raised.[6] In the above context, the analysis of the relationship between investment arbitration and the rule of law assumes great importance to reform the ISDS framework in order to address the rule of law concerns regarding (i) legal certainty, (ii) transparency, (iii) procedural fairness and (iv) avoidance of arbitrariness[7] in investment proceedings.

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[1] Brabandere and Lepeltak (2012), pp. 379–398.

[2] International Council for Commercial Arbitration (ICCA) (2018) Report of the ICCA-Queen Mary task force on third-party-funding in international arbitration. In: The ICCA Reports No. 4, p. 38. https://cdn.arbitration-icca.org/s3fs-public/document/media_document/Third-Party-Funding-Report%20.pdf. Accessed 6 Sep 2021. (ICCAQM Report).

[3] *Ibidem*, 244.

[4] *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award (21 July 2017).

[5] See footnote n. 1.

[6] Ranjan (2016), pp. 115–142.

[7] Van Harten (2010), pp. 627–657; Gaffney (2016), pp. 267–273; Reinisch (2016), pp. 291–307.

The multifaceted perspectives of the concept of the rule of law in investment arbitration have resulted in it being elusive. Nevertheless, the consensus is that the fair and equitable treatment standard in investment arbitration is the nearest equivalent to ensuring compliance with the tenets of the rule of law, i.e., due process and a fair trial.[8] In addition to the fair and equitable treatment standard, the law on expropriation also encapsulates the principles of the rule of law. A perusal of most international investment agreements ("IIAs") indicates that all expropriations are obliged to be carried out in compliance with due process of law[9] and a non-discriminatory fashion.[10] Similarly, this chapter aims to discuss and analyze not-for-profit funding TPF as another perspective of investment law wherein the doctrinal theories of the rule of law can be incorporated and imbibed into the investment arbitration framework.

In investment arbitration, as awards are routinely relied on as a form of soft precedent, it is expected that the practice of not-for-profit funding will witness a rise as states or non-profit entities will attempt to shape the development of the law or protect their rights indirectly. This chapter will thus examine the practice of not-for-profit funding in investment arbitration and the consequent ramifications emanating therefrom, in the particular context of the rule of law such as disclosure obligations.[11] This chapter proceeds by first explaining the phenomenon of not-profit funders in investment arbitration. In that regard, the first part will, in particular, deal with two public instances of not-for-profit funding, i.e., *Philip Morris International v. Uruguay*[12] and

[8] See, e.g., *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award (30 Apr 2004) 98, which states that "the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant." See also Schill (2010), pp. 83–151.

[9] See Austria-Georgia BIT (2001) art 5(3): "Due process of law includes the right of an investor of a Contracting Party which claims to be affected by expropriation by the other Contracting Party to prompt review of its case, including the valuation of its investment and the payment of compensation in accordance with the provisions of this Art by a judicial authority or another competent and independent authority of the latter Contracting Party." See also *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary*, ICSID Case No. ARB/03/16, Award (2 Oct 2006) 435 (ADC) wherein it has been stated that: "Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that "the actions are taken under due process of law" rings hollow.".

[10] *Mike Campbell (Pvt) Ltd. and Others v. Zimbabwe*, SADC (T) Case No. 2/2007, Decision (28 Nov 2008) 53. See also, Maniruzzaman (1998), p. 57; Reinisch (2012), pp. 271–304.

[11] For example, it appears that Global Petroleum Group funded both Grenada and St Lucia in their efforts to defend against competing claims for access to oil reserves asserted by rival RSM. See also Honlet (2015), pp. 699–712.

[12] *Philip Morris Brands Sàrl* et al. *v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7.

Quasar de Valores SICAV S.A. et al. *v. Russian Federation.*[13] The second part of the chapter will deal with the disclosure of TPF in investment arbitration and the relevant jurisprudence regarding the same. Subsequently, the chapter's third part will begin with a brief narration on the rule of law in investment arbitration and conclude by ascertaining its applicability to not-for-profit funders.

2 Not-For-Profit Third-Party funding—The Case of Philip Morris and Quasar De Valores

2.1 Understanding Not-For-Profit Third-Party Funding

The practice of not-for-profit third-party funding can be understood as a subset of the overarching practise of third-party funding wherein the funder funds either party to the proceedings without seeking a financial return on its investment.[14] In simple parlance, not-for-profit funding can be defined as funding that aims not to give a financial return but to create a precedent or change the law favouring the funder. Although it can be argued that given the lack of financial interest in the outcome of the case, the financial aid provided by the third-party funder can be better termed as a donation[15]; however, such an approach is counter-intuitive as even though there is no financial interest in the outcome of the case, nonetheless, there exists to a large extent an interest in achieving a favourable outcome of the case. As evinced by the two prominent instances of not-for-profit funding, which will be discussed in detail in the following paragraphs, it is well illustrated that the funding was provided with an interest to achieve a favourable outcome for future litigation.[16] Further, unlike the case involving a funder seeking to receive remuneration or monetary benefit wherein the funder conducts extensive due diligence to assess the enforceability of the claim, merit of the claim and related costs, a funder in not-for-profit funding does not conduct any such due diligence and is driven by other interests.

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[13] *Quasar de Valores SICAV S.A.* et al. *v. Russian Federation*, SCC Case No. 24/2007, Award (20 July 2012).

[14] Cremades Jr (2011), pp 17–18.

[15] See footnote n. 1. "[…] It has also been said that this kind of funds… may be better qualified as donations rather than funding agreements, and the risks inherent in third-party funding, which we will address later, are not pertinent in this scenario. Nonetheless, it is clear that problems in respect of control over the proceedings and conflicts of interest, which we will discuss later, may also be applicable in the case of donations."

[16] Sahani VS (2017) Revealing not-for-profit third-party funders in investment arbitration. https://oxia.ouplaw.com/page/565. Accessed 5 Aug 2021. "[…]Not-for-profit funders are primarily motivated by goals other than turning a profit, such as creating a favorable precedent for future claims, defending state laws from challenges, gathering information about parties, or supporting or fighting against an industry…."

In the regulatory sphere, Article 8.1 of the Comprehensive Economic and Trade Agreement (CETA)[17] acknowledges the practice of not-for-profit funding by donations and includes it within the definition of TPF. Article 8.1 of CETA states as below:

> …third-party funding means any funding provided by a natural or legal person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for remuneration dependent on the outcome of the dispute.

Further, the disclosure requirements in Article 8.26 of the CETA postulate as below:

Third party funding

1. Where there is third party funding, the disputing party benefiting from it shall disclose to the other disputing party and to the Tribunal the name and address of the third party funder.
2. The disclosure shall be made at the time of the submission of a claim, or, if the financing agreement is concluded or the donation or grant is made after the submission of a claim, without delay as soon as the agreement is concluded or the donation or grant is made…

Therefore, it follows as a necessary corollary that the drafters of CETA have noted the presence of not-for-profit funders and their donations/grants in investment arbitration proceedings, and as a result, have impliedly acknowledged their potential to influence the proceedings.[18] Also, the above-stated aims to establish that the absence of a direct financial interest should not be the sole criterion for dismissing funding of any kind as not constituting TPF.

In the Philip Morris[19] case, the State of Uruguay was funded by the "*Anti-Tobacco Trade Litigation Fund*" created by the Bloomberg Philanthropies and Bill and Melinda Gates Foundation to support States in their efforts to curb tobacco consumption. Even though there were no financial rewards/returns for the funder in the above case, it cannot be missed that a favourable decision would have enormous implications not only to the tobacco industry in general but also to future cases initiated in the context of tobacco regulations which were well aligned with the aims of the funder. The understanding that emerges from an analysis of the relevant schema of literature is that a typical not-for-profit funder would be a non-profit organization or a third party that funds a particular arbitration proceeding to increase the likelihood that an award from that arbitration will further a particular policy, or provide meaningful precedent to indirectly promote the policy interests or legal interests of

[17] EU-Canada Comprehensive Economic and Trade Agreement (Provisional Application 2017). (CETA).

[18] In addition to CETA, the current draft of the EU-Vietnam Free Trade Agreement (2020) Chap. 8, Chap. II, Sect. 3, Art. 2 defines third-party funding as "any funding provided by a natural or juridical person who is not a party to the dispute but who enters into an agreement with a disputing party in order to finance part or all of the cost of the proceedings in return for a remuneration dependent on the outcome of the dispute or in the form of a donation or grant.".

[19] See supra footnote n. 12.

the funder or to create a helpful precedent.[20] This is in stark contrast to the practice prevalent in TPF, wherein the profile of a funder would be a bank, hedge funds or insurance companies.[21]

2.1.1 *Philip Morris V. Uruguay*[22]

The case concerned a dispute based on Article 10 of the Agreement between the Swiss Confederation and the Oriental Republic of Uruguay on the Reciprocal Promotion and Protection of Investments ("the Switzerland-Uruguay BIT") dated 07 October 1988. The Claimants in the present case were Philip Morris Brand and Abel Hermanos S. A, while the Respondent was the Oriental Republic of Uruguay. At its core, Philip Morris International challenged the tobacco control measures concerning branding and warning levels of tobacco products introduced by the Government of Uruguay. The measures included the Government's adoption of a single presentation requirement precluding tobacco manufactures from marketing more than one variant of cigarette per brand family and the increase in the size of graphic health warnings appearing on cigarette packages ("Challenged Measures").

In the context of the measures described above, the Claimants argued that the Challenged Measures breached Respondent's obligations under BIT entitling the Claimants to compensation under the relevant Treaty and international law. *Per Contra*, Respondent averred that the Challenged Measures were in consonance with its international obligations of protecting public health. The relevant observation of the tribunal, which is to be noted for the present discussion, is when the tribunal noted that Respondent had received support from the international community such as WHO,[23] PAHO[24] and the private sector. The funder in the case, i.e., Bloomberg Foundation, did not expect a monetary reimbursement of its investment; instead, it sought for a favourable outcome in the case, i.e., an award in favour of Uruguay's efforts to curb tobacco consumption[25] to establish a precedent in the context of future tobacco litigation as part of its "Campaign for Tobacco-Free Kids".[26] The Tribunal

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[20] ICCAQM Report, cit. at footnote n. 2, p. 110.

[21] Garcia (2018a), p. 2914.

[22] See supra footnote n. 12.

[23] See also World Health Organization 62nd Session of the Regional Committee and Pan American Health Organization 50th Directing Council, Resolution CD50.R6 adopted with regard to Strengthening the Capacity of Member States to Implement the Provisions and Guidelines of the WHO Framework Convention on Tobacco Control, 29 September 2010 (R-230) (endorsing the SPR); Memorandum of Understanding between the Secretariat of the WHO Framework Convention for Tobacco Control and the Uruguayan Ministry of Public Health, 21 May 2014, (R-301-bis) (showing the FCTC Secretariat support for the creation of the International Cooperation Center on Tobacco Control (ICTC) within the Ministry of Public Health).

[24] See also Pan American Health Organization (PAHO) (2014), R-300.

[25] Sahani et al. (2018).

[26] Garcia (2018b) The case against third-party funding in investment arbitration. https://www.iisd.org/itn/en/2018/07/30/the-case-against-third-party-funding-in-investment-arbitration-frank-garcia/. Accessed 5 Aug 2021. Mr. Bloomberg in a press release stated that ""No country should

ultimately rejected all of the Claimants' claims and, on balance, favoured the Respondent to a large extent in its findings. *Lastly*, the Tribunal also ordered Claimants to reimburse Respondent all amounts paid by it.

2.1.2 Quasar De Valore V. Russian Federation

The Claimants in the present case were Spanish investors in Yukos and the Respondent was the Russian Federation. In this case, the funder was Group Menatep Limited, a majority shareholder of Yukos who was unable to bring claims against the Russian Federation under the BIT.[27] As per Claimants, they were the owners of Yukos American Depository Receipts (ADRs). The Claimants alleged that Respondent illegally dispossessed Yukos of its assets and expropriated its shareholders by employing various abuses of executive and judicial power. Hence, as per Claimants, they were entitled to compensation for their loss. The Claimants placed reliance on the Agreement for Reciprocal Promotion and Protection of Investments between Spain and the USSR ("Spain-Russia BIT") which entered into force on 28.11.1991 for raising their claims. The relevant bone of contention in the present discussion was raised by Respondent when it argued that the Claimants were not the "real parties" in interest because they had no genuine interest in the arbitration and the entire arbitral proceedings was an abuse of process because of the presence of the funder.[28] Russia argued that the Claimants were not *domini litis* (masters of the suit) in terms of choosing counsel, experts or making other strategic choices in the prosecution of their claims.[29] Further, as per Respondent, the funder, i.e., Group Menatep Limited by financing the present claim for zero returns, sought to create a favourable "precedent" in hopes that such a precedent would be applied in another shareholder dispute against the Respondent under the Energy Charter Treaty.[30]

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ever be intimidated by the threat of a tobacco company lawsuit, and this case will help embolden more nations to take actions that will save lives." It has been argued that investment regime is asymmetric and provides greater benefits to the investor. It certainly makes developing countries vulnerable. Thus, the not-for-profit TPF may become more active role in levelling the field in investor-state disputes in the future…"

[27] Van Boom (2011) Third-party financing in international investment arbitration, p. 50. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2027114. Accessed 6 Aug 2021.

[28] See footnote n. 13. In para 11, the Russian Federation has argued that "Claimants are not here to vindicate any alleged right of their own. They are nothing more than willing shills in Group Menatep's "lifetime of litigation." In this regard, it is worth remembering that the Claimants' counsel has been Group Menatep's lobbyist for years, and the head of its international practice remains a member of Group Menatep Limited's advisory board to this day. Group Menatep, however, is not entitled to invoke the Spain/Soviet bilateral investment treaty. Nor is that treaty intended to be used by Claimants as a tool for harassment."

[29] *Ibidem*, para 31.

[30] See *ibidem*, paras 33, 223. In para 33, it was held that "…is the Respondent has sought to discredit the Claimants by suggesting that they are not the true parties in interest, and that the entire arbitration is an abuse of process. At its core, this argument is a reaction to the Claimants' disclosure that their costs of prosecuting this case are born entirely by another party, namely Menatep, in part in order

The tribunal rejected the contention of the Respondent by observing that the Claimants had purchased shares in Yukos and will be the actual beneficiaries of any award in their favour. It is noteworthy, at this juncture, that the tribunal did note that Menatep had financed the claim of Claimants but opined that the Claimants were under no legal obligation to share the proceeds with the funder. The tribunal held that Russia's argument was.

> at its core … a reaction to the Claimants' disclosure that their costs of prosecuting this case are born entirely by another party, namely Menatep, in part in order to establish that portfolio investors in Yukos are able to recover under BITs to which the Russian Federation is a party.[31]

The tribunal was of the view that the "*good samaritan*" funder Menatep, even though it sought to create a favourable precedent for its future benefit, was beyond the tribunal's jurisdiction and did not impact the arbitration proceedings in any way. The tribunal also stated that:

> not see any element of abuse in this respect. The Claimants held very small stakes of Yukos which would scarcely have warranted the commitment of substantial resources to bring international proceedings against the Russian Federation. But there is no reason of principle why they were not entitled to pursue rights available to them under the BIT and to accept the assistance of a third party, whose motives are irrelevant as between the disputants in this case.[32]

Ultimately, the tribunal ruled in favour of the Claimants and ordered the Respondent to compensate the Claimants for its losses and costs of arbitration proceedings. Subsequently, the Respondent appealed against the tribunal's award in the Stockholm District Court, averring that as the Claimants were funded by a funder, they had not incurred any costs to arbitration and were thus not liable to be compensated for the costs of the arbitration proceedings. The District Court, after a brief analysis, held that it was settled law for a party to be compensated for litigation costs and thus, the Respondent was liable to compensate the Claimants for their litigation costs. Consequently, the Respondents appealed the decision of the District Court to the Court of Appeal, wherein the Court ruled that the tribunal did not have jurisdiction to decide the case and discharged the Respondent from the obligation to compensate the Claimants.

2.1.3 Takeaways

More importantly, the general takeaway from the above discussion is that the tribunal failed to consider that the funded parties in both instances did not make a substantial monetary investment in the arbitration proceedings. So far so that both the funded

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to establish that portfolio investors in Yukos are able to recover under bits to which the Russian Federation is a party."

[31] *Idem.*

[32] See *idem.*

parties were under no legal obligation to reimburse the funder. Such being the case, the appropriateness of the tribunal's order regarding the allocation of costs to the losing party to pay costs to the funded party can be questioned. Given the significance of allocation of costs in investment arbitration proceedings, especially that liability of adverse costs has enormous implications for an investor,[33] it was pertinent for the Tribunals to address this substantial and non-negligible risk. The cost-shifting schemes involving the funder adopted by the party in the arbitration proceedings merits greater attention while juxtaposing the same with the discretionary power of the tribunal concerning the allocation of costs, the regulations regarding cost allocation in the applicable procedural rules and the previous practice established by decided cases.[34]

The crucial question that needs to be addressed is whether investment tribunals can consider TPF arrangements when deciding on allocating costs? The answer appears to be affirmative as the ICSID Convention gives the Tribunals a wide array of powers concerning allocating costs between the foreign investor and the host state.[35] As Professor Schreuer explains: "Neither the Convention nor the attendant Rules and Regulations offer substantive criteria for the tribunals" decision on which party should bear the costs. Possible principles are the equal sharing of costs, the "loser pays" maxim or the use of costs as a sanction for procedural misconduct.'[36] Accordingly, various ICSID tribunals have adopted varied approaches regarding costs such as parties should bear their costs,[37] "loser pays"[38] approach and other hybrid approaches.[39] The 2015 ICC Commission Report on Decisions on Costs in International Arbitration observes that a funder should be able to recover costs in the following terms:

> 86. The rationale behind allocating costs to a successful party is that the party should not be out of pocket as a result of having to seek adjudication to enforce or vindicate its legal rights...
>
> 87. Where a successful claimant or counterclaimant has been funded by a third party, the third-party funder is usually repaid (at least) the costs of the arbitration from the sum awarded. Therefore, the successful party will ultimately be out of pocket upon reimbursing such costs to the third-party funder and may therefore be entitled to recover its reasonable costs, including what it needs to pay to the third-party funder, from the unsuccessful party. The

[33] See supra footnote n. 1.

[34] Smith (2011), p. 768.

[35] Rubins (2003), p. 119.

[36] Schreuer (2001), p. 1224, cited in *Siag and Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009) para 616.

[37] See *L.E.S.I. S.p.A. & ASTALDI S.p.A. v. République Algérienne Démocratique et Populaire*, ICSID Case No. ARB/05/3, Award (12 Nov 2008), para 186. See also *Alasdair Ross Anderson and Others v. Republic of Costa Rica*, ICSID Case No. ARB(AF)/07/3, Award (19 May 2010) paras 62–64.

[38] See e.g. ADC, cit. at footnote n. 9, paras 531–33. See also *Gemplus S.A., SLP S.A., & Gemplus Industrial S.A. de C.V. v. United Mexican States*, ICSID Case No. ARB(AF)/04/3, Award (16 June 2010) paras 17–22.

[39] See also Hodgson (2014), p. 1.

> tribunal will need to determine whether these costs were incurred and paid or payable by the party seeking to recover them, and were reasonable. The fact that the successful party must, in turn, reimburse those costs to a third-party funder is, in itself, largely immaterial.[40]

Further, in 2015, the ICCA Queen Mary University suggested that funding costs should not be recoverable:

> It is not appropriate for tribunals to award funding costs (such as a conditional fee, ATE premium, or litigation funder's return), as they are not procedural costs incurred for the purpose of the arbitration. The success portion payable to a third-party funder results from a trade-off between the funded party and the funder, where the funder assumes the cost and risk of financing the proceedings and receives a reward if the case is won. This agreement is not linked to the arbitration proceedings as such. The reasonable legal fees incurred by a funded party should remain recoverable.[41]

Following the above, the ICC Commission Report on Decisions on Costs in International Arbitration observed that funding costs, in limited circumstances, are recoverable:

> 92. In reality, funding arrangements are rarely limited solely to the costs of the arbitration. Usually, the third-party funder will require payment of an uplift or success fee in exchange for accepting the risk of funding the claim, which is in effect the cost of capital. As a tribunal only needs to satisfy itself that a cost was incurred specifically to pursue the arbitration, has been paid or is payable, and was reasonable, it is feasible that in certain circumstances the cost of capital, e.g. bank borrowing specifically for the costs of the arbitration or loss of use of the funds, may be recoverable.
>
> 93. The requirement that the cost is reasonable serves as an important check and balance in protecting against unfair or unequal treatment of the parties in respect of costs, or improper windfalls to third-party funders. Tribunals have from time to time dealt with this when assessing the reasonableness of costs in general, sometimes including the success fee in the allocation of costs and sometimes not, depending on their view of the case as a whole.[42]

In fact, in both of the above-mentioned cases, the Tribunal, as a matter of law or principle, refused to take into consideration the presence of the funder in their decision on the allocation of costs, thereby entailing that a funding arrangement is of no relevance to the investment proceedings when it should have been of some relevance, at least.

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[40] ICC Arbitration and ADR Commission (2015) 87.

[41] ICCA-QMUL Task Force on TPF in International Arbitration (2015), p. 10.

[42] See footnote n. 20.

3 Disclosure Requirements Concerning Not-For-Profit Funding TPF Arrangements

It is an established principle in international arbitration that parties have a fundamental right to have their dispute adjudicated by an independent and impartial arbitral tribunal.[43] As a corollary to ensure adherence to independence and impartiality, the disclosure must be made by arbitrators to the parties as to whether there exists a relationship between the arbitrator and the party which could give rise to justifiable doubts in the mind of the parties.[44] Although it is understood that the arbitrator cannot disclose relationships of which he or she was unaware, there is an expectation that arbitrators should make diligent efforts in analysing the information available to them to ascertain whether the disclosure is mandatory.

The public law aspect of investment arbitration demands that a high level of procedural transparency is maintained during the arbitration proceedings.[45] Given that in an ideal scenario, a funder is not a party to the arbitration proceedings, Tribunals will not have the requisite jurisdiction to exert direct control over it. In such a case, Tribunals will need to find a middle ground to tread without violating confidentiality obligations of the funding agreement while maintaining due process in the arbitration proceedings through disclosure obligations. In some known instances, such as *Oxus Gold v Republic of Uzbekistan,*[46] the existence of TPF was voluntarily disclosed by the funded party without any order to that effect by the Tribunal. However, the aforesaid is not common practice as in most cases; the disclosure will depend on the funding agreement[47] which likely will contain a confidentiality clause.[48] Funded parties will understandably be hesitant to disclose details of their funder and the funding arrangement in the apprehension of imposition of an adverse cost allocation scheme by the Tribunals. Such hesitancy results in a hindrance to the flow of information that is requisite for arbitrators to make disclosure thereby affecting the right of the parties to an independent and impartial arbitral tribunal. Therefore, in the absence of rules mandating disclosure, it is ultimately the Tribunals prerogative to make specific inquiries to the parties as to the presence of TPF. Notably, neither the ICSID Convention, the ICSID Arbitration Rules, the UNCITRAL Arbitration Rules, nor other relevant arbitration Rules stipulate any rule mandating a general obligation to disclose not-for-profit TPF agreements or TPF agreements. Nonetheless, the current version of the IBA Guidelines published in October 2014 in General

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[43] Blackaby et al. (2015), pp. 253 et seq. and 327 et seq.

[44] *Idem.*

[45] See generally Delaney and Magraw (2008), pp. 721–88.

[46] *Oxus Gold plc v. Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat*, UNCITRAL. See for the press release, in which the funding agreement was disclosed, Oxus Gold plc Press Release (2012) Litigation funding. http://www.lse.co.uk/share-regulatorynews.asp?shareprice=OXS&ArticleCode=0acxo35h&ArticleHeadline=Litigation_Funding. Accessed 5 Aug 2021.

[47] Khouri et al. (2011).

[48] Ross (2012), pp. 12, 19.

Standard 6(b) provides that third parties which have an "*economic interest*" in or duty to indemnify a party for the award to be rendered in arbitration fall within the ambit of the term "party." General Standard 6(b) postulates as below:

> If one of the parties is a legal entity, any legal or physical person having a controlling influence on the legal entity, or a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration, may be considered to bear the identity of such party.

Further, the Explanation to General Standard 6(b) states that:

> Third-party funders and insurers in relation to the dispute may have a direct economic interest in the award, and as such may be considered to be the equivalent of the party. For these purposes, the terms "third-party funder" and "insurer" refer to any person or entity that is contributing funds, or other material support, the prosecution or defence of the case and has a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration.

Similarly, General Standard 7(a) envisages the procedure for disclosing in case there is a TPF involved:

> A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) of any relationship, direct or indirect, between the arbitrator and the party (or another company of the same group of companies, or an individual having a controlling influence on the party in the arbitration), or between the arbitrator and any person or entity with a direct economic interest in, or a duty to indemnify a party for, the award to be rendered in the arbitration. The party shall do so on its initiative at the earliest opportunity (emphasis added).

Consequently, the Explanation to General Standard 7(a) provides:

> The parties are required to disclose any relationship with the arbitrator. Disclosure of such relationships should reduce the risk of an unmeritorious challenge of an arbitrator's impartiality or independence based on information learned after the appointment.

Therefore, it emanates from the above that under the IBA Guidelines, a party is expected to disclose any direct or indirect relationship between the arbitrator and (1) the party, (2) another company of the same group, (3) an individual having a controlling influence on the party, (4) any person or entity that is contributing funds, or other material support, to the defence of the case and that has a direct economic interest in the award and (5) any person having a duty to indemnify a party for the award. In furtherance of the above, Explanation 7(c) and 7(d) stipulates:

> In order to satisfy their duty of disclosure, the parties are required to investigate any relevant information that is reasonably available to them. In addition, any party to an arbitration is required, at the outset and on an ongoing basis during the entirety of the proceedings, to make a reasonable effort to ascertain and to disclose available information that, applying the general standard, might affect the arbitrator's impartiality or independence (emphasis added).
>
> In order to satisfy their duty of disclosure under the Guidelines, arbitrators are required to investigate any relevant information that is reasonably available to them (emphasis added).

It is unclear to what extent the system of conflicts envisaged by the IBA guidelines is reliable as in essence the IBA guidelines are merely recommendations and functions on the belief that parties will disclose all information to the tribunal. The above-mentioned shortcoming can be tackled by simply mandating the party to disclose the existence and identity of the source of funding. Additionally, another potential solution that could address the concern of conflict of interest could be statutorily imposing on the funder a contractual obligation to conduct thorough due diligence to determine the existence of any conflict. However, the new reforms sought to be introduced by ICSID aim to ensure mandatory disclosure of all forms of TPF[49] while clarifying that the presence of a funder by itself will not be sufficient enough to justify an order for security for costs.

Notably, the ICCA Queen Mary Task Force on TPF in International Arbitration[50] has significantly addressed the debate involving disclosure and TPF in the context of conflicts of interest inChapter 4.[51] The above Task Force has in unequivocal terms endorsed the principle of mandatory disclosure in the following terms:

> A.1. A party and/or its representative should, on their own initiative, disclose the existence of a third-party funding arrangement and the identity of the funder to the arbitrators and the arbitral institution or appointing authority (if any), either as part of a first appearance or submission, or as soon as practicable after funding is provided or an arrangement to provide funding for the arbitration is entered into.[52]

The report further explains that "broad agreement existed on the Task Force that disclosure by the funded party of the existence and identity of funders is necessary so that arbitrators could make appropriate disclosures and decisions regarding potential conflicts of interest."[53]

Theoretically, a compelling legal argument that can be advanced in favour of mandatory disclosure is that disclosure should be mandated of not the terms of the funding arrangement but the details of the funder to ensure independence and impartiality of arbitrators and to avoid any conflict of interest. As is the general rule,

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[49] International Centre for Settlement of Investment Disputes (ICSID) (2020) Rules 14, 53(4) The arbitration rules for ICSID Convention proceedings. In: Working paper 4: Proposals for amendment of the ICSID rules. https://icsid.worldbank.org/sites/default/files/documents/WP_4_Vol_1_En.pdf. Accessed 5 Aug 2021. (Draft Arbitration Rules) "…Rule 14 - Notice of Third-Party Funding (1) A party shall file a written notice disclosing the name and address of any non-party from which the party, directly or indirectly, has received funds for the pursuit or defense of the proceeding through a donation or grant, or in return for remuneration dependent on the outcome of the proceeding ("third-party funding")…" The Tribunal shall consider all evidence adduced in relation to the circumstances in paragraph (3). Rule 53(4) states that: "The existence of third-party funding may form part of such evidence but is not by itself sufficient to justify an order for security for costs…"

[50] See supra footnote n. 2.

[51] See supra footnote n. 2.

[52] *Ibidem*, p. 81. The Report continues: "A.2. Arbitrators and arbitral institutions have the authority to expressly request that the parties and their representatives disclose whether they are receiving support from a third-party funder, and, if so, the identity of the funder."

[53] *Idem*. The Report continues: "There was also general agreement on the Task Force that, absent exceptional circumstances, no other information except the existence and identity of third-party funders was required for the purposes of analyzing conflicts of interest."

arbitrators must disclose their past or present relationships with the disputing parties or the counsels appearing before them.[54] As investment arbitration encompasses a public policy aspect, it is of utmost necessity that the tenets of independence and impartiality are upheld at all times. Hence, in case there is a non-disclosure of the funder, the same might get heightened to a serious substantive issue, thereby resulting in the setting aside of the arbitral award. For example, suppose the same not-for-profit funder is financially supporting a party in one arbitration proceeding and simultaneously supports another party in another arbitration proceeding having the same arbitrator or legal counsel. In that case, it might result in a conflict of interest. Thus, in such a scenario, disclosure is the only means of enabling the parties to evaluate the impact of the aforesaid indirect relationship on the arbitrator's independence and impartiality. Moreover, in situations when the Tribunals suspect the presence of a TPF, it may exercise its general power to preserve the "integrity of the arbitral process"[55] and the "good faith of the proceedings".[56]

There have already been a few instances wherein Tribunals have utilized their inherent powers to order disclosure of a funder. In *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*,[57] the Tribunal ordered the disclosure of the TPF after the Claimant declared that it was being financed by a TPF. Similarly, in *Julio Miguel Orlandini-Agreda and Compania Minera Orlandini Ltda v. Bolivia*,[58] the Tribunal ordered both parties to disclose any information regarding the presence of a TPF and directed the parties to disclose the identity of the funder. *Lastly*, in *Muhammet Cap & Sehil In v. Turkmenistan*,[59] the Tribunal directed the Claimant to disclose whether it was being funded and if so, the identity of the funder and also the terms of the funding.[60] Needless to say, awareness of the funding agreement can have an impact on the overall financial strategies of the parties and security of costs, in particular.

[54] Blackaby et al. (2009), para 4.72.

[55] See footnote n. 47.

[56] *Idem.*

[57] *EuroGas Inc. and Belmont Resources Inc. v. Slovak Republic*, ICSID Case No. ARB/14/14, Award (18 Aug 2017) para 108.

[58] *Julio Miguel Orlandini-Agreda and Compania Minera Orlandini Ltda v. Bolivia*, PCA Case No. 2018–39, Procedural Order No. 1 (4 Feb 2019) para 11.

[59] *Muhammet Çap & Sehil Inşaat Endustri ve Ticaret Ltd. Sti. v. Turkmenistan*, ICSID Case No. ARB/12/6.

[60] *Ibidem*, Procedural Order No. 3 (12 June 2015) para 1.

4 Dogmatic Underpinnings of Rule of Law in International Investment Arbitration Vis-À-Vis Not-For-Profit Funders

The United Nations (UN) has defined "rule of law" as "a principle of governance in which all persons, institutions and entities, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with internationally recognized human rights." Rule of law vis-à-vis international investment arbitration has always functioned in tandem within cross-border commerce. As the global commerce industry recovers from the impact of COVID-19, it is timely to critically examine the extent to which investment arbitration meets the demands of the values of the rule of law. Rule of Law manifests itself in investment arbitration through issues about independence and impartiality of arbitrators, the right to have a fair trial which broadly includes the right to be heard, procedural fairness, access to justice and an extent, the review system in place for the screening of awards either by ICSID or the setting aside procedures before domestic courts.[61] The notion of the rule of law in investment arbitration has two aspects: formal[62] and procedural.[63] The procedural aspect of the rule of law is the relevant portion of the rule of law that merits discussion within investment arbitration. Pertinently, the procedural elements of the rule of law include the principles of natural justice, which broadly deal with the right to be heard, the impartiality and independence of arbitrators and transparency in arbitration proceedings.[64] However, in the context of the present discussion, the following will briefly deal with only those facets of the rule of law which have a direct bearing with not-for-profit TPFs intending to bring forth the true contours of the rule of law within the investment arbitration framework:

i. Independence and Impartiality of Arbitrators: The need for independent and impartial arbitrators is an essential prerequisite of a fair trial. The significance of independence and impartiality of arbitrators is well highlighted in various arbitration rules,[65] and the lack of it constitutes a legally valid ground for

[61] Reinisch (2016a), pp. 291–307.

[62] The formal aspects of the rule of law focus on the content and promulgation of laws, more importantly that laws must be clear, consistent, practicable, stable, and of general application; they must be publicized and applied prospectively; and administered in a manner that is congruent with their purpose and content.

[63] Menon (2021), pp. 1–26.

[64] See Bingham (2011); Bingham (2007), p. 67. As stated: "There are a number of broader requirements implicit in the concept of the rule of law, including that: (a) The law must be accessible, intelligible, clear and predictable; (b) Issues should be resolved by law, not discretion; (c) Laws should apply equally to all; (d) The law must protect fundamental human rights; (e) Disputes must be resolved economically and reasonably speedily, (f) Public powers must be exercised reasonably, bona fide, and appropriately; (g) Adjudicative procedures provided by the state should be fair; (h) The state must comply with its obligations in international law."

[65] ICSID Convention (1966) art 57 ("A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14"); UNCITRAL Arbitration Rules, UN Doc

setting aside or annulling an award. In recent years, the number of challenges to arbitrators has increased[66]; however, few challenges are upheld by ICSID. Notably, of the challenges that have succeeded the underlying premise is that arbitrator disqualifications are more frequent where there is an apparent lack of formal independence.

ii. Procedural Fairness: The thorough scrutiny and analysis of submissions of parties by the Tribunal constitute an essential aspect of the understanding of the rule of law in investment arbitration. The principle of equality of arms has long been considered a cornerstone of the arbitral process.[67] The principle of equality of arms stipulates that a fair balance of opportunities be afforded to both the parties involved in the arbitration proceedings.[68] ICSID Awards, in practice, entail an elaborate discussion on the submissions advanced by both parties concerning their claims, which necessarily implies that all submissions of parties are equally addressed and fairly adjudicated. The above can be termed as the rule of law-inspired concept as lack of analysis and proper reasoning is a ground for setting aside arbitral awards.[69]

iii. Transparency: The issue of transparency in investment arbitration has been viewed as one of the major criticisms against the investment arbitration framework.[70] The underlying tension between confidentiality of arbitration proceedings and transparency in arbitration proceedings assumes a specific focus because of the public interest involved in the disputes.[71] In light of the public interest aspect of investment disputes, Tribunals have made multiple adaptations to allow certain arbitration documents to be published in the public domain,[72] to disseminate information about the existence of investment disputes and to publish investment awards.[73] Notably, investment Tribunals

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A/Res/65/22 (2010) art 12(1) ("independent and impartial arbitrator") ("Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence").

[66] Sheppard (2009), pp. 131–156.

[67] Blackaby et al. cit. at footnote n. 54, para 6.11; Wälde (2011).

[68] Wälde, *idem.*

[69] ICSID Convention (1966) Art 52(1)(d) ("Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:... (d) that there has been a serious departure from a fundamental rule of procedure"); on this notion see most recently *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on Annulment (18 Dec 2012) para 73 (fundamental rules "include the right to be heard, the fair and equitable treatment of the parties, proper allocation of the burden of proof and absence of bias"). See also UNCITRAL Model Law on International Commercial Arbitration (1985), UN Doc A/Res40/72 (1985) and UN Doc A/Res61/33 (2006) Art 34(2)(a)(ii). See also Blackaby et al., cit. at footnote n. 54, para 10.50.

[70] Knahr (2007), p. 327.

[71] Van Harten and Loughlin (2006), p. 121; Burke-White and von Staden (2010), pp. 283–346.

[72] *Biwater (Gauff) Tanzania Ltd v. United Republic of Tanzania*, ICSID Case No ARB/05/22, Procedural Order No. 3 (29 Sept 2006) para 122. See also Knahr and Reinisch (2007), p. 97.

[73] See ICSID Administrative and Financial Regulations, ICSID/15 (2006) Regulation 22(1).

with an aim to counter the criticism levelled against the confidentiality of arbitration proceedings have remarked that there is no "general principle of confidentiality" in investment arbitration.[74] Further, investment tribunals, as part of a general understanding, have promoted the publication of awards to develop the "soft" precedent system in the investment arbitration framework, thereby increasing the predictability and certainty of investment arbitration-rule of law values.

The underlying conclusion that emerges from the foregoing paragraphs is that the doctrine of the rule of law in its traditional sense is not present in investment arbitration but rather an attenuated model of the rule of law is present, which draws support from the conscious decisions of States to forego certain features of the rule of law in order to realize other goals.[75]

5 Applicability of Rule of Law to Not-For-Profit Funders in Investment Arbitration

International arbitration has a long-standing public–private partnership. Arbitrators through their decisions have enforced the tenets of rule of law by ensuring compliance of the parties to their obligations and an extent creating predictability and certainty. In investment arbitration, arbitrators through their decisions have an impact on issues involving public importance. Arbitrators have invariably helped in establishing a supranational rule of law by creating norms for acceptable State behaviour. Pertinently, the Tribunal in Saipem has observed that investment Tribunals, in general, have "a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law."[76] The blurry boundaries between private and public international law are well recognized and acknowledged in investment arbitration. In private international law, the private nature of dispute settlement per se vis-à-vis rule of law encapsulates adhering to party consent, promoting party autonomy, and upholding the sanctity of contracts. On the other hand, in public international law, the idea of constraining the conduct of states under international law by imposing procedural and substantive conditions highlights the embeddedness of the rule of law within the framework of investment arbitration.

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[74] See *SD Myers Inc v. Canada*, Procedural Order No. 16 (13 May 2000) para 8; *Metalclad Corporation v. Mexico*, ICSID Case No. ARB(AF)/97/1, Award (30 Aug 2000) para 13. See also NAFTA Free Trade Commission (2001) Notes of interpretation of certain Chapter 11 provisions, para 1 ("Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter 11 arbitration").

[75] See supra footnote n. 63.

[76] *Saipem S.A. v. Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures (21 Mar 2007) para 67.

Notwithstanding the above, it is noteworthy that investment arbitration establishes itself in the thin line between public and private international law and does not lean heavily onto either legal regime. Investment arbitration tribunals regularly go beyond private business interests and implicate the host state's public policies and the rights of the citizens of the host state. For example, disputes on sovereign debt restructuring,[77] cigarette packaging[78] and the environment.[79] With regard to traditional public international law that under customary international law provides for the protection of foreign investment as part of international minimum standard between states, investment arbitration performs a distinct function by empowering a foreign investor and protecting its right to initiate arbitration directly against the host state *"based on the States' prospective and generalized consent to arbitrate any matter under the governing treaty."*[80] Similarly, even though investment arbitration operates on almost identical procedural rules as commercial arbitrations which are conducted within the realm of private international law they are not similar. Investment arbitration involves public law disputes on, *inter alia*, regulatory policies and the implementation thereof. Further, the jurisdiction in investment arbitration does not emanate from a contract like in commercial arbitration but from a treaty that contains dispute resolution provisions.

In the context of not-for-profit funders, severe rules of law concerns emerge while addressing the question of how much control does the not-for-profit funders exercise over case strategy and costs of proceedings. In particular, the issues of transparency, independence and impartiality of arbitrators, which essentially culminate to issues pertaining to conflict of interest, have regularly come to the fore. The limited empirical evidence on the above suggests that, on the one hand, not-for-profit funders will usually function as distant spectators while hoping for a favourable outcome,[81] while on the other hand, as per anecdotal reports, funders in general play a crucial role in the appointment of the arbitrator or other aspects of the proceedings.[82] The issue of "control" is a significant aspect in the discussion about the rule of law, which directly has a bearing on the Tribunal's determination of the actual party to the proceedings. It is settled law in England and the United States that if a funder is exercising control over the arbitration proceedings, then the relevant Court may issue costs order against the funder.[83] Although the definition of "control" has not been

[77] *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction (4 Aug 2011).

[78] See supra footnote n. 12; *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case No. 2012–12.

[79] *Glamis Gold, Ltd. v. United States*, UNCITRAL, Award (8 June 2009).

[80] Schill (2013a) The public law paradigm in international investment law. https://www.ejiltalk.org/the-public-law-paradigm-in-international-investment-law/. Accessed 5 Aug 2021.

[81] Molot J Theory and practice in litigation risk. http://rippmedia.com/Molot-TheoryandPractice.pdf. Accessed 6 Aug 2021.

[82] Brekoulakis and Rogers (2020).

[83] See e.g. *Excalibur Ventures LLC v. Texas Keystone Inc*. et al. *& Psari Holdings Ltd. and Others*, [2014] EWHC 3436 (Comm) (23 Oct 2014) paras 4, 161; *Arkin v. Borchard Lines Ltd. and Others*, [2005] EWCA Civ. 655 (26 May 2005) para 36 ("[w]here … the nonparty not merely funds the

promulgated, it can be assumed that such costs order ensures that there is procedural fairness in the arbitration proceedings whereby submissions to the effect involving the not-for-profit funder can be submitted to the Tribunal. Further, as stated by some scholars, the amount of control exercised by funders depends on the financial terms of the funding agreement, the nature of the case, internal practices of the funder or specific control provisions in the funding agreement. As noted by Jonas von Goeler:

> when some major litigation funders emphasise in their webpages that they do not control cases, perhaps what they mean is that such express contractual rights to veto specific decisions tend to be absent. However, to what degree a litigation funder will be able to exercise control over the conduct of a claim is not only determined by the existence or not of express veto rights over key decisions. This will also depend on the funder's termination rights and, not least, on the configuration of the litigation funder's case monitoring.[84]

The issue of conflict of interest and concerns emanating therefrom are likely to increase manifold as arbitrators accept positions within the organizational scheme of the funder.[85] In such a scenario, it is imperative that strict disclosure obligations be imposed on parties to disclose the presence of not-for-profit funder when they accept the proposed funding.[86] The counter-argument to disclosure that is advanced by some funders is that disclosure tends to increase frivolous challenges to arbitrators and untenable requests for the security of costs.[87] However, such a narrative is misleading as most legal frameworks currently employed to combat conflict of interest are not based on "see no evil" but based on an affirmative duty for the arbitrator to ascertain potential conflict of interest.[88] The reason for this is that even though a conflict of interest relating to a not-for-profit funder may be unknown at the time of the constitution of the Tribunal, but discovered during the proceedings or after the completion of proceedings, the same would inevitably result in the removal of the arbitrator thereby raising costs and wasting valuable time. Additionally, the legitimacy of the dispute settlement framework may suffer in general.

Furthermore, mandatory disclosure of not-for-profit TPF addresses a fundamental issue of arbitration, which is the right of the prevailing party to obtain amounts relating to costs. The idea of mandatory disclosure is further concretized by the argument that a non-funded party and the tribunal can conduct an appropriate assessment concerning orders for the security of costs. Additionally, the need for disclosure is heightened by the fact that independence and impartiality form the plinth on which the entire legitimacy of the arbitration proceedings rest and it is of utmost necessity to ensure that an arbitrator is not tainted by bias or at least the perception of bias.

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proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs."); *Abu Ghazaleh and Others v. Chaul and Others*, 36 So. 3d 691 (2 Dec 2009).

[84] von Goeler (2016), p. 35.

[85] See supra footnote n. 82.

[86] The consensus is that the existence of a TPF can give rise to serious conflict of interest issues.

[87] See ICCAQM Report, cit. at footnote n. 2, Chapter 6, and for an extended discussion of competing views in the underlying policy debate, see ICCAQM Report, cit. at footnote n. 2, Chapter 8.

[88] See supra footnote n. 82.

Notwithstanding the above, recent proposals for ICSID reforms seek to address this issue by mandating compulsory disclosure of the presence of the funder. For example, ICSID has introduced a new draft Rule 21, which obligates parties to disclose TPF "immediately upon registration of the Request for arbitration, or upon concluding a third-party funding arrangement after registration."[89] The above proposal will to a great extent sufficiently ensure that the thresholds as enunciated by rule of law are met as it will allow arbitrators to make an informed declaration of their independence or subsequently disclose their relationship with the funder.

6 Concluding Remarks

The burgeoning rise of global commerce has contributed immensely to the rise in cross-border disputes. As the number of disputes increases, parties are resorting to alternate forms of financing to maintain the liquidity of funds. In light of the above, it can be safely presumed that the practice of TPF will only increase manifold in arbitration and investment arbitration, in particular. In spite of only a handful of reported instances of not-for-profit funding, it is expected that the number of instances will increase thereby necessitating an elaborate discussion on disclosure of TPF. In addition to regular treaty-based standards, investment tribunals will have to ensure compliance with rule of law inspired investment standards which will only ensure a positive effect on the general rule of law climate in host states. As investment arbitration comes under a litany of criticisms for several structural deficiencies, efforts must be made to incorporate the new and existing rule of law standards in its various procedural aspects. It is without a doubt that investor-state arbitration is an accountability mechanism for the government of the host state whose conduct is expected to embody and implement the rule of law without requiring strong and multilateral institutions as a counterweight.[90] Hence, it is pertinent to culture the rule of law within investment arbitration especially in light of the recent criticism that has been levelled against it. Moving ahead, the role of arbitrators is presumably going to be pivotal in cementing and furthering the requirements of rule of law.

[89] See Draft Arbitration Rules, cit. at footnote n. 49, Rule 21. Draft ICSID Arbitration Rule 21 defines TPF in the following terms: "Third-party funding' is the provision of funds or other material support for the pursuit or defense of a proceeding, by a natural or juridical person that is not a party to the dispute ('third-party funder'), to a party to the proceeding, an affiliate of that party, or a law firm representing that party. Such funds or material support may be provided: (a) through a donation or grant; or (b) in return for a premium or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the proceeding."

[90] Schill (2013b).

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Chapter 8
Article 79 CISG: Testing the Effectiveness of the CISG in International Trade Through the Lens of the COVID-19 Outbreak

Nevena Jevremovic

Abstract The resilience of contracts and the role of contract law has been put to the test in responding to the global COVID-19 pandemic. Various government measures significantly impacted international trading relationships. Supply chain disruptions and uncertainty continue to pose a threat as different countries approach the pandemic with differing priorities and interests. Therefore, parties to international sales contracts seek to identify ways to keep existing commitments, protect against future losses, be compensated for losses they have suffered, and decide whether it is profitable to keep the contract in place. It is vital to examine the legal issues around the possible legal responses to the COVID-19 crisis. However, it is plausible that the lack of predictability regarding the scope, time, and location of governmental measures will introduce further complications. Moreover, the impact of the COVID-19-related measures extends beyond the contractual parties, contributing to adverse social consequences worldwide. The United Nations Convention on Contracts for the International Sale of Goods (***CISG*** *or Convention)* should reduce these complications by providing predictability and certainty in dealing with the consequences of the pandemic through its uniform rules. The reality, however, is far from ideal. The impact of COVID-19 will bring further challenges in the uniform application of the Convention; and it will do so through one of its most controversial provisions: Article 79. Through the lens of Article 79, this chapter will discuss the effectiveness of CISG as an instrument of public international law adopted with the goal of unification of international sales law. It will (re)consider the negotiation leading to the final text of Article 79, highlight trends in its interpretation and application, and consider possible routes to uniform interpretation and application in the post-pandemic era. In doing so, the chapter will explore whether and to what extent interpretation of Article 79 can encompass adverse social impact in trading relationships between the buyers of the global north and the suppliers of the global south.

Keywords CISG · COVID-19 · Article 79 · Party autonomy · Adverse social impact · Uniform interpretation

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1 Introduction

COVID-19 led to unprecedented disruption in the global flow of goods and services, causing a collapse of businesses worldwide. Immediate legal responses included considerations on exemptions from liability on national[1] and international levels.[2] Scholars acknowledged the devastating impact breakdown of commercial relationships had on parties in the local economy or a global supply chain.[3] Even post-pandemic, companies worldwide will be forced to make difficult decisions. They will focus on ensuring the global supply chain resilience by introducing new and improved measures toward supply chain management, and exploring different approaches

[1] See e.g., Adegoke (2020) [focusing on the impact of coronavirus on commercial contracts in Nigeria]; Andres Velez-Celle et al. (2020) [proposing a typology of force majeure clause specificity and identifying factors that affect the likelihood of a force majeure clause being included in a joint venture contract]; Ayalew (2021), [providing a comparative legal analysis of the application of force majeure and hardship clauses in Ethiopia and China in light of international law in situations of COVID-19 pandemic]; Beale and Twigg-Flesner (2020) [discussing the impact of COVID-19 under English law]; Crespi (2020) [discussing frustration of purpose defense in the U.S. law]; Douglas and Eldridge (2020), [discussing the impact of COVID-19 in Australia]; Ghodosi (2022) [discussing the doctrines in the US law]; Heesaker (2021), [discussing the COVID-19, frustration and contractual discharge in the Canadian common law]; Hoffman and Hwang (2021); Jentsch (2020), [discussing government responses on corona and contracts in Europe: a compilation of extraordinary measures in times of crisis]; Schwartz (2020) [discussing legal doctrines of impossibility and restitution in the US contract law]; Schwartz (*forthcoming 2022*); Catellanos (2020) [discussing the impact of COVID-19 in Bolivia]; Singh and Leo (2021), [discussing the impact of COVID-19 in India]; Sirena and Patti (2020), [discussing hardship and renegotiation of contracts in the prospective recodification of Italian civil law].

[2] See e.g., Berger and Behn (2020), [providing a historical and comparative study of force majeure and hardship in the age of corona]; Blair et al. (2020), [outlining steps to minimise the risk of a deluge of disputes following the COVID-19 crisis and to increase the prospect of constructive outcomes]; Wuest et al. (2020), [discussing the impact of COVID-19 on manufacturing and supply networks]; Twigg-Flesner (2020), [providing a comparative perspective on commercial contracts and the impact of COVID-19].

[3] See e.g., Bohrer (2020), [discussing crisis and cultural evolution: steering the next normal from self-interest to concern and fairness]; Fuhriman (2021), [companies that shutdown due to mandatory government regulations will have better force majeure outcomes than companies which have shut down as a result of voluntary government regulations; consequently, Fuhriman questions whether such a "perverse result militates in favor of rethinking whether parties should be treated differently' and further argues the need to rethink *force majeure* doctrine, at least in the context of the pandemic"]; Kie Hart (2021), [arguing that contracts and contract law produce social consequences beyond the individual contract and the contracting parties, and the need to acknowledge as part of the solution for some of the most pressing problems currently confronting American society]; Twigg-Flesner (forthcoming), [discussing the potential of the COVID-19 crisis to cause legal disruption to contracts and contract law].

to supplier assessment.[4] An indispensable part of that process will be to reconsider risk-related contractual mechanisms in long-term contracts or supply chain agreements.[5]

When I set out to write this article, I intended to contribute to the existing discussion concerning COVID-19 and international sales contracts by providing an overview of possible routes to uniform interpretation and application of Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (*Convention or CISD*). The vast and rich discussion surrounding the interpretation and application of Article 79 CISG intensified with the consequences of COVID-19 pandemic and the accompanying governmental measures on the global economy. A dominant topic in academic debate was if COVID-19 qualifies as an impediment under Article 79 (1) CISG, and if circumstances of different pandemic-related scenarios would lead to exemption from liability under the CISG.[6] My initial goal was to consider various scenarios that arose in international contracts concerning COVID-19 and excuses for non-performance. However, the impact of the pandemic on global commercial relationships extended beyond the buyer–seller dynamic, producing dire socio-economic consequences for the most vulnerable economies. These issues attracted limited attention in the context of specific jurisdictions. Thus far, Article 79 and CISG's role has not been examined in the broader context of pandemic consequences. Thus, in this chapter, I would like to offer an additional view and focus on the interplay between public interests and private commercial relationships: the consideration of adverse social and environmental consequences in the context of Article 79 CISG.

"*Modern economies are held together by innumerable contracts.*"[7] While the ecosystem of contracts holding the world economy has a high potential for resilience and recovery, it is equally important to recognize its inherent vulnerability. Nothing exemplifies this more than the responses of Western buyers, usually lead companies

[4] From vast discussions, see e.g., Linton and Vakli (2020) [Discussing that government measures are not sufficient to support small and medium sized companies in the supply-chains, further arguing that the manufacturers should take measures to keep their suppliers operational. Methods, however, do not consider their societal impact or human right considerations, but mostly focus on financial and operational factos.].

[5] See e.g., World CC 2020 [Limitation of liability clauses consistently ranked as 1 most negotiated term. Although force majeure clauses specifically rank significantly lower –29 out of 30—they are narrower in scope of application than limitation of liability. Therefore, it is possible that companies will address unforeseeable external events under limitation of liability and not necessarily under force majeure clauses. Moreover, force majeure clauses may rank lower not because of their low importance for parties, but due to their stickiness, i.e., standardized templates which do not significantly change over time. Even if companies audit their *force majeure* clauses, it will likely be with less tension than negotiating other forms of limitation or exemption from liability.] On stickiness of force majeure clauses, see Ghodosi (*forthcoming* 2022), p. 23 ["It shows that force majeure clauses are quite sticky in their contents and parties repeat similarly worded language for force majeure clauses in their contracts. This is consistent with other research showing that contractual clauses tend to be sticky (i.e., repetitive in content)."].

[6] See e.g., Jensen and Wahnschaffe (2021), Kan So et al. (2021).

[7] Press release: The Prize in Economic Sciences 2016.

in global supply chains, as they faced the consequences of COVID-19.[8] Power-asymmetry between buyers in the global north and suppliers in the global south gives buyers more discretion to define a contract, often in "take-it-or-leave-it" form.[9] Consequently, their immediate response was to trigger *force majeure* clauses to cancel or curtail completed or ongoing orders.[10] Their suppliers in emerging markets suffered the consequences as "*tens of thousands of workers were suddenly unemployed, with no savings, no severance payments, and no government safety net.*"[11] As Professor Sherman aptly points out, "*[j]ust because an action is permitted by contract does not mean that a company has acted responsibly and in the company's best interests.*"[12] Such "*moral bankruptcy*" may have a long-term impact on companies' reputation since consumers will judge "*how humanely*" companies handled the crisis both internally and externally in their supply chain.[13] Companies' "*social license*" will depend on their ability to ensure that their suppliers survive triggering *force majeure* clauses.[14]

In the post-pandemic trading relationships, "*social license*" will encompass whether courts considered adverse social and environmental circumstances in the interpretation of contract clauses or default rules, including Article 79 CISG. The first question is should the CISG consider adverse social and economic consequences of international sales contracts? Considering Convention's extrinsic goals set out in its Preamble, the social and political context in which it exists, and its underlying values, the answer to the first question should be *yes*. Moreover, scholars recognized the link between adverse social impacts and production of goods, through an expanded concept of quality that includes the human-centered production process, e.g., protection of workers' rights, and a relationship between the Convention and

[8] Triponel and Sherman (2020) ["Companies are hurriedly looking for ways to stop bleeding cash. Beyond fashion and retail, we are seeing this the most starkly in transportation, tourism, hospitality, entertainment, and some consumer goods companies. Companies—large and small—are focused on business survival."].

[9] Sherman (2021), pp. 128–129.

[10] Triponel and Sherman (2020) ["Strategies to protect cash flow include reducing overheads, reducing payroll costs, expediting the collection of cash from debtors, cancelling supplier orders, and lengthening payment terms with suppliers. Some companies are asking their lawyers to trigger force majeure clauses in their contracts, to avoid paying suppliers for orders they have already produced."].

[11] Sherman (2021), pp. 127–128; see further Triponel and Sherman (2020) ["But this strategy comes at a high human cost. In lower-income countries, suppliers already have low cash reserves and little access to credit. They have already paid for wages and materials on these past orders. When combined with the future loss of business, cancelling past orders will be enough to put many of them out of business. Workers will be let go overnight, some without wages or severance, many of which support households, lack savings, and have no access to a governmental social safety net. A large number of the 150 million workers in low-income countries producing goods for the west will be impacted by these factory closures, with 4 million alone in apparel in Bangladesh."]; for a discussion on the impact of order cancelations on workers in Bangladesh, see Anner (2020).

[12] Sherman (2021), p. 129.

[13] Triponel and Sherman (2020).

[14] *Id*.

soft law instruments, e.g., UN Guiding Principles on Business and Human Rights and OECD Guidelines for Multinational Enterprises.[15] The CISG community should follow the same path in the interpretation and application of Article 79 CISG (*Part 2).* The second question is what interpretative methodology can facilitate consideration of social and environmental circumstances in the interpretation of Article 79 CISG. On one side, the provision had little practical importance and, likely, that will not change in the post-pandemic era. However, Article 79 CISG's aim is to incentivize party autonomy in addressing the risks of unforeseen circumstances in their dealings. Thus, a more satisfactory answer may lie in considering the role of party autonomy in the practice of structuring exemption from liability clauses, as well as, in seeking guidance in the interpretation of Article 79 CISG. The existing interpretative methods of dynamic, constructive, or proactive interpretation of the Convention and its provisions further support such an approach (*Part 3*).

2 Article 79 CISG in the Post-Pandemic Era

CISG embodies the principle of *pacta sunt servanda through* the system of strict liability. As long as there is a legally binding promise, the breaching party is liable for the failure to perform their promise.[16] Parties to international sales contracts under the CISG give unqualified promise to perform their respective obligations either as required under the contract or the CISG.[17] If a party fails to perform their obligation (even partially), they are liable for breach of contract and must adequately compensate the non-breaching party.[18] To counter-balance such a system of strict liability, CISG drafters introduced Articles 74 and 79 with a common underlying premise: party to an international sales contract under the CISG should be liable only for the damages caused by circumstances that they could not have reasonably considered during the contract conclusion.[19] While Article 74 limits damages that a debtor should pay, Article 79 sets out a regime under which the debtor can be exempt from paying damages at all.[20] In CISG's system of strict liability, Article 79 plays a central role.[21]

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[15] See e.g., Schwenzer (2017), Schwenzer and Leisinger (2007), Butler (2016), Ramberg (2014). Schlechtriem considered ethical values as a circumstance to consider when awarding damages under Article 74 CISG. See Schlechtriem (2007).

[16] Atamer (2018), p. 1055.

[17] *Id.*, p. 1056.

[18] *Id.*, p. 1056.

[19] *Id.*, pp. 1056, 1060–61.

[20] Art. 79, however, has its limits—it only goes so far to exempt the party from paying damages, leaving other remedies unaffected. See further Atamer (2018), pp. 1056–57. Burden of proof is on the party claiming exemption; for details see Enderlein and Maskow (1992), p. 320, Lookofsky (1993), p. 300.

[21] Honnold (2009), p. 611 ["even in domestic law it has been difficult to provide coherent answers to the problems that arise when unexpected difficulties prevent or severely impact the performance

2.1 Article 79 CISG: A Brief Overview

Comparatively speaking, national rules typically qualify the external event as e.g., *force majeure*, hardship, commercial impracticability, the frustration of contract.[22] The focus is on the scope of the effect on the party's ability to perform.[23] The degree of inability to perform determines the legal nature of the ground for exempting performance and the available remedy. It is conceivable that absolute inability would qualify as *force majeure* or impracticability, while onerous performance would range between hardship, the frustration of purpose, or commercial impracticability. These national rules developed over years of changing socio-economic structures.[24] Each national rule reflects the specific socio-economic background of its system, the role of contract within such a system, and the extent of governmental interferences in restoring the balance between the parties when an external event disturbs that balance.[25] Despite different origins, their common thread lies in the need to balance the *pacta sunt servanda* principle with the adaptability of parties' expectations and the changes in circumstances that may occur over the contract's lifetime.[26]

The CISG drafters defined a *uniform rule* that qualifies a barrier to performance as an *impediment*, while being agnostic to the different socio-economic backgrounds of the national rules.[27] It is not sufficient for an impediment beyond the party's control to prevent her performance to succeed with an exemption under Article 79 CISG. Instead, several cumulative factors are necessary: (a) the party's failure to perform is a result of an impediment beyond her control, (b) the impediment was unforeseeable at the time of contracting, and (c) the impediment or its consequences were unavoidable.[28] Despite the neutral and autonomous language in Article 79 CISG, language,

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of a contract. The settings are diverse: […] these are only points on a continuum of difficulties with varying degrees of scope, severity and unpredictability."]; Dornis (2019), p. 368.

[22] See Tallon (1987), p. 572 [discussing various approaches in East European countries, different theories that emerged in the twentieth century, and differences between French, Geman, English, and Amercian law.].

[23] Dornis (2019), p. 369.

[24] For a detailed overview of the historic and socio-economic context in which civil and common law concepts concerning exemption of liability developed see Mazzacano (2011).

[25] A wonderful example of the depth and relevance of such interplay is Chung's article exploring the difference between a *hands-off* approach which is dominant in Hong Kong and English law and the *interventionist* approach dominant in the German law. See Chung (2017).

[26] For a discussion on origins of the principle of excuse for non-performance, see Mazzacano (2011), pp. 7–11.

[27] Honnold (2009), p. 626 ["it is not practicable to enumerate the circumstances that will excuse a failure to perform. Instead, words must try to express a dividing point on a continuum between "difficult" and "impossible".]; further discussion on p. 627, citing Tallon ["In spite of strenuous efforts of legislators and scholars we face the likelihood that Article 79 may be the Convention's least successful part of the half-century of work towards international uniformity. This prospect calls for careful, detailed contract drafting to provide solutions to fit the commercial situation at hand."].

[28] Secretariat Commentary on Article 65 of the 1978 Draft, available at https://iicl.law.pace.edu/cisg/page/article-79-secretariat-commentary-closest-counterpart-official-commentary#Text. See

courts may still see similarities to their national rules, resulting in *a homeward trend* in its interpretation and application.[29] As Professor Honnold explains, the goal in Article 7 CISG "*would be best served if we could … purge our minds of presuppositions derived from domestic traditions and, with innocent eyes, read the language of Article 79 in the light of the practices and need of international trade.*"[30] The danger of the homeward trend especially exists concerning the following. Does *failure to perform* cover the delivery of non-conforming goods?[31] Does the term *impediment*

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further Tallon (1987), pp. 583–584; Enderlein/Maskow, p. 320 ["Many of the above-mentioned phenomena will generally become impediments. But they are not such per se and without any examination; further criteria must serve as themeasure for them."]; Lookofsky (1993), p. 300, Honnold (2009), pp. 627–632, Butler and Schlechtriem (2009), pp. 201–203, Schwenzer (2016), 1133–1143, Atamer (2018), pp. 1071–1079, Dornis (2019), p. 369.

[29] Honnold (2009), pp. 615–616, pp. 622–626 [considering the hazards of following diverse domestic law: "[…] the danger that local tribunals may unconsciously read the patterns of their domestic law into the general language of the Convention—an approach that would be inconsistent with the Convention's basic goal of international unification (Art. 7(1)). And deliberate recourse to the exemption rules of a single domestic system would flagrantly violate the Convention. […reference to Art. 7(2)] The fact that a provision of the Convention presents problems of application does not authorize recourse to some one system of domestic law since this would undermine the Convention's objective "to promote uniformity in its application."].

[30] Honnold (2009), p. 616 [In the absence of such innocence, the preconceptions based on domestic law may be minimized by close attention to the differences between domestic law and the Convention.]; at the same time, Honnold sees no danger in seeking guidance through comparative law], see further p. 623 ["In seeking guidance from a consensus or "common core" of domestic law, certain standards of relevance would be appropriate. The Convention is designated for international trade; the most relevant rules of domestic law are those that reflect the practices and problems of international trade or, at least, grow out of domestic transactions that are comparable to those of international trade. And, akin to this, is the special value of legal trends that reflect a careful reworking and modernization of traditional and archaic legal concepts."]. contrast with Enderlein and Maskow (1992), p. 319 [explaining that the Convention developed a concept of its own concerning impediments, which is why "This saves from borrowing from a domestic law in interpretation, which could be very misleading, especially when it comes to one's own domestic law. […]. For this reason, we are, like Tallon, also skeptical in regard to the recommendation by Honnold to adopt the comparative law approach when it comes to the interpretation of the grounds for exemption. There are no generally recognized methods which could be used to comprehensively identify the prevailing patterns and trends of modern domestic law which he recommends."].

[31] A majority view is that it should, and it does relying on dogmatic considerations concerning the conformity of goods and the drafting history. See e.g., Tallon (1987), pp. 576–577; Enderlein and Maskow (1992), pp. 319–320 ["But we, too, are of the opinion that these differences of opinion are of littlepractical weight, because impediments as defined in Article 79, paragraph 1 will seldom be the cause of non-conformity."]; Butler and Schlechtriem (2009), pp. 204–206, Atamer (2018), pp. 1059–1060 [explaining the difference between civil and common law approaches to interpreting Art. 79, concluding that "[…] it would make no sense to differ between the applicability of Art. 79 according to the effect of the unforeseeable impediment."]; Dornis (2019), p. 369. Some authors, nonetheless, maintain the view that non-conformity should not fall within the scope of Article 79. In any case, an impediment has to cause the party's failure to perform for such failure to fall under Article 79 analysis. See e.g., Honnold (2009), pp. 617–621 ["The position that a seller's reasonable lack of awareness of a non-conformity should exempt it from liability for damages contradicts the structure and drafting history of the Convention, as well as its goal of uniform application."]; Flechtner (2007), pp. 47–48 [supporting Honnold's view, and further discussing the ethical perspective behind the

cover hardship?[32] Does *failure to perform by third-party* cover suppliers?[33] Does reference to *remedies* in Article 79 (5) exclude specific performance?[34] The interpretation difficulties further intensified with the consequences of COVID-19 and the accompanying governmental measures on the global economy. CISG commentators focused on whether COVID-19 qualifies as an impediment under Article 79 and if circumstances of different pandemic-related scenarios would lead to exemption from liability.[35] However, the impact of the pandemic on global commercial relationships extended beyond the buyer–seller dynamic, producing dire socio-economic consequences for the most vulnerable parties in some of the most vulnerable economies. Examining the role of the CISG and its Article 79 in the broader context of pandemic

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issue stating that "there is no mention of the complementary ethical issue of whether it is fair that a buyer—who generally has even less control over or knowledge of the actions of the seller's supplier, and who is generally also not 'at fault' for the non-conformity—should suffer uncompensated damage."].

[32] From vast academic contributions, see e.g., Nicholas (1979), Puelinckx (1986), Gordley (2004), Kessedjian (2005) and comment by Lookofsky (2005/2003), Schwenzer (2008), Lookofsky (2005), DiMatteo (2015), Petsche (2015), Kuster and Andersen (2016), Ishida (2018), Oral (2019), Kim and Kim (2019). The debate, spanning several decades, from the time of CISG's drafting until now, seems to be far from settled. Some are of the view that hardship does not fall under the umbrella of Article 79(1), arguing further that any interpretation or application to the contrary would go against the intended scope and purpose of the provision and would lead to expanding Article 79 (1) beyond its limits. Others believe that an external event may qualify as a hardship if the analysis is focused on the effects of the event on the failure of performance. In other words, events that lead to hardship under national systems can, factually, constitute an impediment under Article 79 (1). However, such a conclusion should not by default mean that remedies that follow hardship in national systems or in, for example, UNIDROIT Principles, should automatically follow.

[33] The prevailing view, following the language of paragraph 2, a party may not rely on subcontractors or supplier's failure to perform for exemption if subcontractor's or supplier's obligation was a precondition for the seller's performance. The seller has to engage an independent third party to perform the whole or part of the contract. See e.g., Tallon (1987), pp. 584; Lookofsky (1993), pp. 304–305, 308–309; on exemption from liability for the conduct of third person, see Atamer (2018), pp. 1079–1083; for a notion on third party, see Atamer (2018), pp. 1080–1083; for a notion of and default by third party, see e.g., Honnold (2009), pp. 632–636; Butler and Schlechtriem (2007), p. 207; Schwenzer (2016), p. 1129 ["The relevant indicator is, however, the procurement risk. Where the seller bears the procurement risk, his exemption is generally governed by Article 79(1); in any other case, by Article 79(2). As regards distribution chains, Article 79(1) is decisive, because the seller is burdened with the procurement risk for the whole chains. Only under exceptional circumstances may an exemption pursuant to Article 79(2) be conceivable."]. Case law is not clear on this point; for example, the German Bundesgerichtshof did not clearly define the boundaries of seller's liability for failure of his suppliers. See further, Dornis (2019), p. 374.

[34] In principle, the right remains unaffected; however, as long as the impediment exists, specific performance is not possible. Moreover, the outcome would also depend on whether the performance is objectively or subjectively impossible. In any event, the duration of the impediment determines the duration of the temporal scope of Article 79 coverage. In other words, as long as an impediment exists, the party is exempted from liability and no specific performance is possible. This applies in cases of temporary or passing impediments; once the impediment ends, the party must perform. See e.g., Schlechtriem (1986), pp. 103–104; Butler and Schlechtriem (2007), pp. 207–208; Honnold (2009), pp. 636–639; Atamer (2018), pp. 1062–1063; Dornis (2019), p. 376.

[35] See e.g., Jensen and Wahnschaffe (2021); Kan So et al. (2021).

consequences requires a dive into Convention's extrinsic goals, the social and political context in which it exists, and its underlying values.

2.2 *Article 79 CISG: Considering Adverse Social Impact*

The Convention results from a lengthy, decades-long debate, to adopt uniform rules for the international sale of goods considering the different social, economic, and legal systems. Consequently, the Convention aims to contribute to the removal of legal barriers in international trade and promote its development.[36] It represents the most successful instrument of uniform rules in the sphere of international trade. Aside from being an instrument of unification of substantive laws, the Convention also has political connotations. As Professor Kastely argues, the powerful context of the CISG lies in the fact that it aims to "*subject people worldwide to a single set of rules and principles and have them understand and conform to these rules and principles as they would to the laws of their community*."[37] More importantly, unification requires that the *unified system* responds to future changes *and develops uniformly*.[38] Unification of such a nature and scale can only exist through a community that will engage in the development of uniform application of the CISG; otherwise, any discourse on the unification or uniform application remains purely theoretical.[39] Professor Kastely goes even a step further, suggesting that the true underlying goal of the Convention is to achieve an international community as a direct consequence or a pre-requisite of the unification of substantive rules.[40] Its text creates such a community, defines the fundamental values of this community, a common language, and a process through which the community can develop.[41]

The purpose of the union among member states should exist beyond the text of the CISG; they have actual relations, in which context the CISG promotes economic and political cooperation on an international scale.[42] CISG is not just an instrument of substantive unification but is also *profoundly political* in its aspiration. Specifically, Professor Winship focuses on the language in the Preamble that, for the first time, responds to the concerns of developing countries. To join the CISG community

[36] CISG, Preamble, paragraph 3.

[37] Kastely (1988), pp. 575–576; Heidemann (2007), p. 36 ["The concept of uniform source of law is the core concept of unity in the law. The law materialises as one text which is applied by diverse users."].

[38] Martonyi (2015), p. 5 ["CISG may therefore be not only a bridge between treaty made uniform law and international commercial practice, […] but also between the past and the future. In other words, it is not only a bridge, but an anticipation and anchor for the future."].

[39] Kastely (1988), p. 576: ["The creation of such a community is fundamental to the unification effort; without such a community, a theoretical unification will have no function or significance in the world of human affairs."].

[40] *Id.*, p. 576.

[41] *Id.*, pp. 576–577.

[42] *Id.*, p. 577.

is "*to recognize the equal status of less developed countries, to remove barriers to self-development, and to create a 'New International Economic Order'—a phrase redolent with meaning to the states that form the audience.*"[43] Professor Felemegas stresses that there was no other option for the CISG but to be both political and rhetorical. Otherwise, it would not come to existence and establish compromise solutions acceptable to delegates of different socio-legal backgrounds, nor create a "*textual community*" and a *new lingua franca* of international trade.[44] The rhetorical coherence is a direct result of the political environment in which CISG originated. The drafters aimed to create a community by reconciling the differences in the socio-economic and legal backgrounds and creating a sense of shared interest, responsibility, and participation.[45] However, recognizing the equal status of the less developed countries runs the risk of only being a "*symbolic gesture*" unless we achieve "*the correct interpretation and uniform application of the text can safeguard the benefits conferred to both developing States and developed States by CISG's principles of equality and fairness.*"[46]

A core set of values, such as contractual commitment, honest and direct communication between parties, good faith and trust, and human error forgiveness, reflect a commitment to equal treatment and respect for international traders' different cultural, social, and legal backgrounds.[47] Inequality is present in international trade, which is why the Convention must establish and maintain fair and equal treatment for traders from all parts of the world.[48] Not only is the CISG consensual in nature, but at the time of its drafting, there was a real fear of international economic domination and exploitation. Traders from different parts of the world do not have equal resources, access to information, and level of sophistication in global commerce—to remedy this and to enable the CISG to establish and maintain equality in treatment, Professor Kastely suggests a more complex notion of equality:

In interpreting these provisions and reconciling them with the general principle of equal treatment, decision-makers will be able to develop a notion of international equality that goes beyond the simple refusal to acknowledge the difference. In a case

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[43] Winship (1987–1988), p. 625.

[44] Felemegas (2007).

[45] *Id.*.

[46] *Id.* Professor Felemegas argues that the uniformity of CISG's application depends on the uniform interpretation of its rules in different legal systems and that it develops uniformly to address the future challenges the community subject to it will face.

[47] Kastely (1988), pp. 593–594 ["These values, taken together, provide coherence to the language established by the Convention. There is, throughout, a sense of individual autonomy and serious promissory commitment, balanced by the need for honest communication, good faith, concern for others, and the forgiveness of innocent mistakes. This complex of values structures the particular issues emphasized by the Convention and gives a richness to the language that is essential to its ability to generate a sense of commonality among its readers and to serve as the medium for development of an ongoing community. If the Convention does have the potential to do these things, it is because of the persuasiveness and coherence of its underlying values."]; see further Felemegas (2007).

[48] Kastely (1988), pp. 593–594.

involving a sophisticated French manufacturing company and an illiterate Argentinean farmer, for example, a court might decide that the French company cannot expect the same promptness and precision of communication that it would expect of a more sophisticated trader. Such an approach is consistent with the Convention's commitment to respect legal, social, and economic differences. The debate over true equality thus may become a way of speaking about the significance of difference and the appropriate response of individuals in a world that is acutely aware of inequality.

The Sale Convention's rhetorical strength may be greatly enhanced by this complexity. Yet this again emphasizes how the success of the Convention is dependent on future discussion and deliberation. The Convention has defined a community, its language, and the occasions for discussion; the success of this community will depend on the vigour of its discourse.

In this context, uniformity should mean procedural and methodological interpretation, and a consideration that, within the CISG community it is vital to recognize that "*many of the CISG's key provisions invite, and may well require, that tribunals reach case-specific and contingent interpretations that may differ across jurisdictions and among contracts.*"[49] Uniformity should not mean uniformity of outcomes but the uniformity of methodological approach to the interpretation of the Convention a and its provisions. Approaches such as constructive,[50] dynamic,[51] or proactive interpretation of the Convention[52] or its provisions are all possible paths in addressing some of the most pressing questions surrounding international trade presently.

The Convention, therefore, leaves sufficient room for its community to recognize the *public side of contracts for the sale of goods*, i.e., the adverse social impact of sales contracts on suppliers in the emerging economies of the global south in cases where buyers trigger *force majeure* clauses or rely on Article 79 CISG. To consider the adverse social impact and ensure uniform interpretation and application of the provision, the courts should reach case-specific outcomes considering specific cultural and factual circumstances to the parties of emerging economies.[53]

These parties, typical suppliers in global supply chains, are often small and medium enterprises with cultural and factual circumstances including high degrees of poverty, illiteracy, and comparatively lesser technical, operational, or other availability of resources to overcome the consequences of COVID-19. Such factual circumstances are important when considering if whether a pandemic was foreseeable for them or whether they were able to overcome it or its consequences. Considering the social and cultural circumstances specific to the emerging economies of the global south, it is questionable whether their ability to assess and manage the risk or bear the consequences of the risk is balanced in comparison to that of the Western buyers. The

[49] Blair (2011), p. 301.

[50] Köhler (2021).

[51] Meyer (2009).

[52] Haapio (2014), Jevremovic (2020).

[53] On considering cultural and region-specific circumstances in interpretation and application of the CISG, see e.g., Schroeter (2017–2018), Buckingham (2016).

question should be whether the parties, reasonably, given the totality of *their* circumstances, were able to foresee the consequences of the pandemic and take alternative measures to overcome it. In considering the possibility of the parties to overcome it should also encompass the considerations of human rights abuses and environmental consequences coupled with available remedies. For example, if a Western buyer succeeds in being exempt from liability for damages, should they nonetheless be asked to cooperate with their suppliers, mitigate the consequence of such exemption, and be subject to specific performance after the impediment? Decisions in comparable scenarios signal that the outcomes of considering cultural and region-specific factual circumstances will lead to inconsistent results.[54] Instead, in the post-pandemic era, the focus should be on party autonomy especially concerning interpretation and application of Article 79 in scenarios involving parties from western economies of the global north and emerging economies of the global south.

3 Party Autonomy and the Exemption from Liability Under Art 79 CISG

Commercial contracts, including international sales contracts, are inherently incomplete.[55] No contract, however detailed the parties make it, can account for all possible future events that may impact the contract performance.[56] Consequently, the default rules fill in the contract gaps, in cases where the contract is incomplete because parties did not adequately address a certain aspect of their relationship or did not address it at all.[57] CISG prescribes such default rules for international sales contracts and, in doing so, promotes the development of international trade.[58]

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[54] See e.g., Germany, 11 September 1998, Appellate Court of Koblenz, available at https://iicl.law.pace.edu/cisg/cisg [When deciding whether a Moroccan buyer notified her German seller of the non-conformity concerning sophisticated chemical substance, the Court failed to consider the region-specific factual circumstances and the differences between Western economies and emerging economies. For further discussion on this specific case, see, e.g., Alaoudh (2012), Akaddaf (2001)].

[55] Blair (2011), p. 280 [citing H.L.A. Hart "The inevitability of incompleteness of contracts reflects, to borrow a distinction from H.L.A. Hart, both our 'relative ignorance of fact' and 'our relative indeterminacy of aim'."]. On incompleteness of contracts, see also the work of Hart and Moore (1998), Schmidt (2017) [discussing contributions of Oliver Hart and Bengt Holmström to Contract Theory. Hart and Holmström have been jointly awarded the 2016 Nobel Prize in Economic Sciences for their work on contract theory, see further at https://www.lindau-nobel.org/oliver-hart-incomplete-contracts-and-the-theory-of-the-firm/.].

[56] Blair (2011), pp. 281–282.

[57] *Id.*, p. 282. CISG offers a fruitful basis for reflecting commercial interests through contract terms, a contract drafting technique developed within the *proactive law* theory. For further discussions on this, see Haapio (2014) and Jevremovic (2020).

[58] CISG Preamble, paragraph 3 [*Being of the opinion that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade*].

3.1 CISG's Party Autonomy: Expansive View of Contractual Freedom

While national default rules develop in their specific legal and socio-economic traditions, in the design of uniform rules to govern international contracts for the sale of goods, the CISG drafters faced two essential questions. First, what should the content of CISG rules be, and second, what is the extent of the mandatory rules in contrast to non-mandatory default rules that would apply in absence of specific contract terms? In other words, the drafters needed to decide, primarily as a matter of policy, the extent of party autonomy in international sales contracts. Considering the scale and diversity of trading relationships worldwide, CISG adopted an expansive view of contractual freedom in Article 6 allowing the parties to have "*virtually unfettered discretion to adjust the default rules governing their transactions*"[59] by either opting out of the CISG system in whole or in part or adjusting the specific terms to meet their individual needs by modifying the effect of its provisions.[60] As Professor Blair points out:

The CISG regime self-consciously places party autonomy and freedom at the centre of its priorities.[61]

When paired with the Convention's underlying goal of reducing the costs of international sales and thus enhancing the welfare of contracting parties, this commitment to freedom of contract demonstrates that the drafters of the CISG intended to promote, first and foremost, the intentions of the contracting parties, allowing them to design their deals in whatever ways would maximize their perceived gains from trade.[62]

The importance of party autonomy is coupled with the fact that most international transactions are relational, i.e., they extend over an extended time, including a series of individual transactions, and depend on the relationship between the parties.[63] Moreover, the global supply chains add further complexities to the existing structures of international trade, including networks of suppliers worldwide involved in manufacturing, production, delivery, and other auxiliary activities. An economic approach to contract law sees contracts in any of these structures—be it relational or network-based in supply chains—as a tool to allocate risk and maximize joint gains.[64] In any contractual structure, parties strive to reach an agreement that reconciles their commercial interests, while adequately addressing *relational risk*, *performance risk*, and the *risk of lack of adaptability*.[65] The parties aim to reduce the *ex-ante costs* by

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[59] Blair (2011), p. 287.

[60] Article 6 CISG: The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.

[61] Blair (2011), p. 307.

[62] *Id.*, p. 288.

[63] Spivack (2006), p. 759; on relational contract theory in the context of adaptability of contracts, see e.g., Smythe (2003).

[64] Ghodosi (*forthcoming* 2022), pp. 12–13.

[65] Eckhard and Mellewigt (2006), pp. 19–21, Sorsa et al. (2011), pp. 205–206. The risk concerning adaptability is particularly important for the present discussion since it encompasses the risk that

addressing the unforeseen (or unforeseeable) events that might prevent or impede them from performing the contract successfully.[66] The contract terms are, therefore, risk-preventive terms defining principles and guidelines about how to address the change in circumstances or how to address the effect of the changes to the contract performance. Examples include *force majeure* and hardship clauses, price adjustments, and change procedure mechanisms.

In the absence of such a contractual provision, Article 79 CISG would serve as a default rule. However, as most of the leading commentators explain, Article 79 is of little practical importance since the courts worldwide rarely allow for exemption from liability, although they allow the parties to bring claims of *force majeure* and hardship.[67] Therefore, Article 79 incentivizes parties to address the risks through their contract,[68] providing for details concerning the events that would allow for excuses to non-performance, and the type of remedies or a contractual mechanism to overcome such scenarios, e.g., through renegotiation or suspension of performance or other methods depending on the industry and the type of contract in question. CISG embodies commercial values and commercial rules that incentivize the parties to address the contractual risks through their agreement, while at the same time offering the default rules also as a template or as a starting point in the drafting process.

Convention's neutrality and simplicity of language and structure make it an especially powerful tool allowing the parties to address not only their private dealings but also address matters of public interest. Professors Honnold, Enderlein and Maskow, emphasize the importance of party autonomy especially concerning Article 79 CISG. Parties are better equipped to address potential impediments to their contract performance than to rely on default domestic or international contract rules that "*can scarcely provide clear and satisfactory answers to all these problems.*"[69] Further than that, "*contracts drafted jointly by sellers and buyers may be useful (**along with***

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contractual relationship is not adaptable to the changes that may unexpectedly arise on the market or which might otherwise affect the contract performance (e.g., market shifts, technological advancements, or other events that mostly occur during contract performance). Examples include force majeure and hardship clauses, price adjustments, and change procedure mechanisms.

[66] *Id.*

[67] See, Spivack (2006), p. 759 [arguing that, if applied strictly and according to its wording, Art. 79 renders most of the political and economic events unavailable as excuses for performance and in fact, the provision would deny them a forum to be heard.]. See further e.g., Schwenzer (2016), p. 1129 ["parties have repeteadly attempted to invoke Article 79 for exemption, they only very rarely succeeded"]; Dornis (2019), p. 368; for an overview of Article 79 related case law, see Kuster and Andersen (2016).

[68] *Id.*, p. 759, 760 ["The CISG language may also move parties to include some kind of renegotiation clause" allowing the parties to continue their contract further promoting the CISG goals.]; See also, Smythe (2005) [discusses use a behavioral economics approach to analyze the effects of the doctrine of impracticability on "relational" contracts—long-term contractual agreements that are typically adapted to changed circumstances and unforeseen contingencies as they arise].

[69] Honnold (2009), p. 614 ["Consequently, in important transactions and in a wide variety of standard contracts explicit provision is made for the consequences of serious impediments to performance. The contracts can (and do) take account of the conditions and needs presented by various types of

modern patterns of contract law*) to help solve problems of interpreting and applying the general standards of the Convention*" [emphasis added].[70] Contracting patterns, according to Professor Honnold, operate as evidence of practices that parties regularly observe and incorporate in their contracts.[71] However, considering the broad societal impact of the COVID-19 pandemic, and generally, the growing recognition of the *public side* of contracts including the negative social and environmental costs they produce,[72] contracting patterns should also include soft law instruments and model contract clauses which aim to bridge the governance gap between the global north buyers and global south suppliers.

3.2 CISG's Party Autonomy in the Post-Pandemic Era: Reconsidering Contract Patterns in International Sales

Before the pandemic, the UN Human Rights Council and the Organization for Economic Co-operation and Development (OECD) issued guiding principles and standards that multinational companies should observe in their contracting practices, while the American Bar Association issued model clauses with a vision of *using contracts to achieve social and environmental, and human rights protections.* Additionally, private initiatives, such as the Chancery Lane Project, produce model clauses focused on, among other aspects, greening the supply chains.

3.2.1 UN Guiding Principles on Business and Human Rights

UN Guiding Principles on Business and Human Rights (*Guiding Principles*) adopt a three-pillar approach: protect—embodying the states' duty to protect human rights, respect—embedding the corporate responsibility to respect human rights, and remedy—embodying access to remedy for victims of business-related abuse.[73] Consequently, the UN Guidelines include general principles and fundamental and

transactions. […] Principles of efficiency and fairness can best be distilled from contracts prepared with the cooperation of both sellers and buyers."].

[70] Honnold (2009), p. 625.

[71] *Id.*, p. 626.

[72] See e.g., Kie Hart (2021), p. 49 ["The first thing that needs to happen is to actually acknowledge that contracts and contract law produce social (i.e., public) consequences. In essence, this step is a call to shift the frame from within which contract law is currently understood and analyzed. This may seem like a trivial step to take but it is not. This is because "frames" are what enable people to make sense of the world around them. Indeed, the purpose of a "frame" and the process of "framing" is to create common meaning and shared understandings of the world and how it works, which then legitimates those meanings and the responses to them. In short, by explicitly trying to influence what people think and how they think about them, frames help shape reality."].

[73] See https://www.business-humanrights.org/en/big-issues/un-guiding-principles-on-business-human-rights/. The full text of the UN Guiding Principles on Business and Human rights, including

operational principles for each pillar, respectively.[74] As for their general principles, the Guiding Principles prescribe that "*the role of the business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and respect human rights.*"[75] The Guiding Principles are all-inclusive and applicable to "*all […] business enterprises, both transnational and others, regardless of their size, sector, location, ownership, and structure.*"[76] However, they should not be read "*as creating new international law obligations, or as limiting or undermining any legal obligations, a State may have undertaken or been subject to international law concerning human rights.*"[77] Instead, the Guiding Principles "*should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices […]to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.*"[78]

Guiding Principles set out five (5) foundational principles and nine (9) operational principles concerning the corporate responsibility to protect human rights. At the outset, the Guiding Principles set out that "*business enterprises should avoid infringing on the human rights of others and address adverse human rights impacts with which they are involved.*"[79] As explained in the commentary, such responsibility exists independently from the States' ability to fulfil their human rights protection obligations. It is a "*global standard of expected conduct for all business enterprises wherever they operate* that exists *above compliance with national laws and regulations protecting human rights.*"[80] Corporate responsibility refers to internationally recognized human rights, encompassing at minimum, those expressed in the International Bill of Human Rights and principles set out in the International Labor Organization's Declaration on Fundamental Principles and Rights at Work.[81] The Guiding Principles recognize the vast impact business enterprise may have on the entire spectrum of internationally recognized human rights, thus making the corporate responsibility scope as broad as possible.[82]

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unofficial translations is available at https://www.business-humanrights.org/en/big-issues/un-guiding-principles-on-business-human-rights/text-of-the-guiding-principles/.

[74] UN Guiding Principles on Business and Human Rights, 2.

[75] *Id.*, General Principles, 2.

[76] *Id.*, General Principles, 2.

[77] *Id.*, General Principles, 2.

[78] *Id.*, General Principles, 2.

[79] *Id.*, II. The Corporate Responsibility to Respect Human Rights, A. Foundational Principles, Principle 11, 14.

[80] *Id.*, II. The Corporate Responsibility to Respect Human Rights, A. Foundational Principles, Principle 11, Commentary, 14.

[81] *Id.*, II. The Corporate Responsibility to Respect Human Rights, A. Foundational Principles, Principle 12, 14–15.

[82] *Id.*, II. The Corporate Responsibility to Respect Human Rights, A. Foundational Principles, Principle 12, Commentary, 14–15: ["An authoritative list of the core internationally recognized human rights is contained in the International Bill of Human Rights coupled with the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration

3.2.2 OECD Guidelines for Multinational Enterprises

OECD Guidelines for Multinational Enterprises (*OECD Guidelines*) are recommendations to and for governments and multinational enterprises.[83] They provide non-binding principles and standards for responsible business conduct in a global context aligned with applicable laws and internationally recognized standards.[84] The MNEs' primary obligation is compliance with national and international laws; therefore, their observance of OECD Guidelines is voluntary and not legally enforceable since the guidelines are not a substitute, nor do they override applicable laws and regulations.[85] The OECD Guidelines express the shared values of the governments from which a large share of international foreign direct investment originates and which are home to many of the largest multinational enterprises.[86] They promote the positive contributions of MNEs to economic, environmental, and social progress worldwide.[87] The 2011 changes to the Guidelines, apart from incorporating the Guiding Principles, also included a new and comprehensive approach to due diligence and supply chain management, as well as and provide for a pro- OECD issued Due Diligence Guidance for Responsible Business Conduct to provide practical support to MNEs to implement the OECD Guidelines.[88] OECD RBC Due Diligence Guidelines provide an overview of the due diligence process for responsible business conduct,[89] explain the essential elements of due diligence in general,[90] and provide a detailed overview and input to conduct the due diligence process.[91] The value of these guidelines is in the detailed annex that breaks down and provides answers related to OECD MNEs Guidelines and RCB Guidelines.[92]

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on Fundamental Principles and Rights at Work. […] The responsibility of business enterprises to respect human rights is distinct from issues of legal liability and enforcement […] Depending on circumstances, business enterprises may need to consider additional standards […] such as instrument on the rights of indigineous peoples, women, children, persons with disbilities, migrant workers and their families."].

[83] OECD (2011), Concepts and Principles, 17.

[84] OECD Guidelines for Multinational Enterprises, Concepts and Principles, 17, ¶1.

[85] *Id.*, Concepts and Principles, 17, ¶¶1–2.

[86] *Id.*, Foreword, 3.

[87] *Id.*, Foreword, 3.

[88] OECD (2018), OECD Due Diligence Guidance for Responsible Business Conduct, Foreward.

[89] OECD Due Diligence Guidance for Responsible Business Conduct, 14–16.

[90] *Id.*, 16.

[91] *Id.*, 16–20.

[92] For example, the guidelines provide clarification concerning due diligence prioritization – how to decide on prioritization, at which stages is prioritization relevant, what is the difference between human rights' prioritization when compared to adverse impacts prioritization. For more details, see Annex: Questions related to the overview of due diligence for responsible business conduct, 37–91.

3.2.3 ABA Model Contract Clauses for Human Rights 2.0

In 2021, the Working Group of the American Bar Association published an updated version of their Model Contract Clauses for Human Rights (*MCCs*).[93] MCCs integrate Guiding Principles and OECD Guidelines into contractual terms, providing buyers and suppliers in international supply chains practical tools to ensure workers' human rights protection. MCCs further recognize the power asymmetry between buyers and suppliers, recognizing that buyers, through their practices, often contribute to the violations of workers' human rights. MCCs received significant scholarly praise, as innovative tools to address the governance gap and transform contracts into tools that achieve outcomes beyond purely allocating risks and maximizing joint gains of the parties. As part of the revision of MCCs, the Working Group conducted consultations in 2020 with representatives of Western buyers, multilateral organizations, union and labor advocates, industry associations, and suppliers from several countries in East and South Asia.[94] After the consultations "*the Working Group does not doubt that buyer demands, typically related to production times, price requirements, or change orders can often cause or contribute to human rights violations. It has become clear that improving buyers' purchasing practices is central to protecting workers from human rights abuses.*"[95] A significant change introduced in the MCCs was a shift from warranties and representations to due diligence as an effective mechanism to share responsibility between buyers and suppliers.[96] Although it does not solve all problems concerning the *force majeure*, hardship, and change of circumstances, MCCs nonetheless represents a powerful shift in contract negotiation and drafting since they bring human rights to the table in designing, managing, and performing the contract.

3.2.4 Chancery Lane Project

Apart from MCCs, a similar project emerged focused on bringing the adverse environmental impact within the contract negotiation and drafting process. The Chancery Lane Project (TCLP) is a collaborative effort of lawyers and legal professionals to create new, practical contract clauses that deliver climate solutions.[97] A unique approach to climate-conscious contracting in harmony with law business underpins their vision where every contract and law enables solutions to climate change.[98] The

[93] For discussions on the first version of the MCCs, see Dadush (2019).

[94] Snyder and Maslow (2021), p. 9.

[95] *Id.*, p. 9.

[96] *Id.*, pp. 10–12, see p. 11 ["Human rights due diligence is a prospective, retrospective, and ongoing risk management process that enables businesses to respect human rights by identifying, preventing, mitigating, and accounting for how they address the impacts of their activities on human rights."].

[97] The information about The Chancery Lane Project is available at https://chancerylaneproject.org/about/.

[98] See *About us* section at https://chancerylaneproject.org/about/.

work focuses on model clauses and model laws; each clause is developed through five stages: a collaborative drafting event and a rigorous peer review.[99] TCLP is independent of any professional body or practice and is politically neutral. It currently includes 700 legal professionals collaborating on the draft of the clauses and 155 participating organizations. In its approach, TCLP helps "*contractual law to become a crucial part of the way net-zero is realized* and *the legal sector to become an enabler of environmental change that it needs to become*."[100] Thus far, the use cases show the inclusion of TCLP clauses into organizations' standard forms, with a potential further replication as a standard throughout the organization's agreements.[101] TCLP model contract clauses encompass a broad range of subjects, covering banking and finance, investment projects, the energy and construction industry, and dispute resolution.[102] All model clauses are published in Climate Contract Playbook.[103]

3.3 Case Study: MCCs, TCLP, and The CISG

The expectation behind Guiding Principles and OECD Guidelines is that they will influence parties' negotiation and drafting processes. In that context, MCCs and private initiatives such as TCLP are essential as they provide examples of contractual clauses that parties can use. Therefore, their compatibility with the CISG as an overall framework requires closer consideration.

3.3.1 MCCs and The Right to a Responsible Exit

For the present discussion, it is essential to illustrate that MCCs designed specific clauses to ensure a *responsible exit* in case of any "*reasonably unforeseeable, industry-wide or geographically specific, material change*" regardless of whether the change constitutes a *force majeure*.[104] The addition recognizes that where an event, such as COVID-19, upsets the supply chain, the judicial outcomes under international sales law are "notoriously unpredictable" and "often impractical anyway."[105] Therefore, MCCs included a solution allowing the parties to adequately address the risks, and balance the positions of both the buyers and the suppliers.[106] MCCs recognize the power asymmetry between buyers and suppliers through the treatment of the right to exit the relationship. While the suppliers can do so without default if

[99] See *About us* section at https://chancerylaneproject.org/about/.

[100] See *Resources* section at https://chancerylaneproject.org/comms-resources/.

[101] See *Resources* section at https://chancerylaneproject.org/comms-resources/.

[102] All clauses are available https://chancerylaneproject.org/model-clauses/.

[103] Climate Contract Playbook (2020).

[104] Snyder and Maslow (2021), p. 14.

[105] *Id.*, pp. 13–14.

[106] *Id.*, p. 14.

otherwise would lead to a breach of their obligations, the buyers, irrespective of the reason for exit, have a duty to "*consider the potential adverse human rights impacts and employ commercially reasonable efforts to avoid or mitigate them.*"[107]

3.3.2 TCLP Climate Contract Risk-Sharing Model Clause

The Climate Risk-Sharing Model Clause (Model Clause) aims to tackle the risk of known and unforeseeable events and the complex and expensive consequences for the parties to insure against.[108] The drafters of the Model Clause mainly considered the consequences of the COVID-19 pandemic on the contractual risk allocation. The parties could not foresee the consequences of the global pandemic on their commercial relationships, but reliance on traditional *force majeure* clauses and the inability to invoke standard contractual remedies led to more significant uncertainty on cash flows.[109] Consequently, a vital element of contracting in the future will focus on balancing risk between the contractual parties.[110] The proposed solution is to embed the concept of *climate risk-sharing* in the supply contracts[111] by amending and adjusting the standard *force majeure* clauses to ensure that the contracting parties work together to balance financial risks and avoid unintended adverse environmental and social issues.[112] The drafters of the Model Clause are of the view that such an approach will ensure that the parties take a fair share of risk, consequently making the supply chain more resilient, adaptable to the new environment, increasing certainty, and ensuring cooperation between the parties to minimize the impact of *force majeure* events on the climate and the environment.[113] Although designed for supply chain agreements, the Model Clause is flexible enough allowing the parties to tailor it to any type of commercial relationship.

In terms of the detailed structure, the Model Clause defines adverse climate and adverse social outcomes.

Adverse social outcome exists where non-performance of an affected obligation or enforcement of the *force majeure* clause to that non-performance directly leads to the insolvency of a party, redundancies over and above a set threshold, an increase in

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[107] *Id.*, p. 14.

[108] *Id.*, 37. [The model clause specifically refers to COVID-19 pandemics which shown that "relying on current contractual risk allocation can lead to adverse environmental consequences and to uncertainty."].

[109] *Id.*, p. 37.

[110] *Id.*, p.37.

[111] *Id.*, p. 38 ["The clause has been drafted for a supply contract, but the principles of climate risk sharing can be applied to a variety of contractual agreements. The definitions of adverse climate outcomes and adverse social outcomes should be tailored to fit the potential adverse outcomes of non-performance."].

[112] *Id.*, pp. 37, 38 ["The wording of the definition of Force Majeure is flexible. Parties may use their preferred wording, so long as the carve out for pandemic and climate change event is added."].

[113] *Id.*, p. 37.

poverty, deprivation or hunger, or other adverse effects.[114] *Adverse climate outcome* occurs in the same scenario but directly leads to adverse effects such as reduced air quality, an increase in GHG emissions, dumping of stock that was created using natural capital, wasted embedded carbon,[115] or other events.[116]

Under the Model Clause, the parties agree that neither should bear the entire risk. Instead, the model clause sets out a cooperation framework for the parties to address the circumstances. The affected party shall notify the other party as soon as it is reasonably practicable and provide a reasonably detailed summary of the event and its consequences.[117] Following the notice, the parties shall work together in good faith or use reasonable efforts to prevent the occurrence or minimize the impact of an adverse social or adverse climate outcome. They ensure that each party's disruption liquidity ratio is maintained under the agreement. They further mitigate waste embedded carbon and mitigate the effects of the climate change event on the performance of the agreement and reduce the period of disruption if it is safe and will not cause adverse social or adverse climate outcomes.[118]

3.3.3 MCCs, TCLP Model Clause, and the CISG

The compatibility of the MCCs, the Model Clause, and the CISG is easy to identify. To state the obvious, in a sales contract under the CISG, the use of the MCCs or the Model Clause in a contract is an exercise in party autonomy resulting in either a derogation or varying effect of Article 79.[119] But beyond this, MCCs and Model Clause reflect two emerging patterns. First, they recognize the correlation between commercial activities and their social and economic consequences. MCCs do so by reflecting the idea of innovative use of contract terms to share responsibilities of buyers and suppliers in ensuring human rights protection, while the Model Clause does so by defining the *adverse social and environmental impact*. Second, they recognize the role of the contract in addressing adverse impacts. MCCs achieve this by differentiating the conditions of the right to exit for suppliers and buyers, while the Model Clause does so by *providing a cooperation and mitigation framework for the parties*. The latter especially reflects the compatibility of the Model Clause and the underlying principles and values of the CISG, by focusing on principles of communication through adequate and timely notice to allow the parties to cooperate and mitigate the negative impact. Beyond Article 79, one can identify other CISG provisions designed precisely to incentivize the parties to communicate timely, share

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[114] *Id.*, Additional definitions, p. 38.

[115] *Id.*, p. 39 ["Embedded Carbon: the Greenhouse Gas Emissions emitted during the lifecycle production, delivery and disposal of the [Products/Services]"].

[116] *Id.*, Additional definitions, p. 38.

[117] *Id.*, Section 1.2, p. 40.

[118] *Id.*, Section 1.3, p. 40.

[119] Of course, the relationship between the Model Clause and Article 79 would ultimately depend on the interpretation of parties' intent.

relevant information, and take mutual steps to mitigate any obstacles in contract performance, including those that stem from an impediment beyond their control.

Considering Professor Honnold's suggestion of using contract patterns as a tool to guide the interpretation of Article 79 CISG, the emerging practices outlined above move rapidly in the direction of encompassing adverse social (and environmental) impact within parties' rights and obligations. An example of a possible interpretation is a *right to demand renegotiation* Jensen and Wahnschaffe based on the principles of maintaining good faith in international trade, the principle of cooperation, the principle of preserving the contract, and the principle of reasonableness:

[…]it seems appropriate to draw the following conclusions: in the event of an extreme and simply untenable shift in the economic parameters of contractual performance, triggered by external factors and leading to a corresponding, equally extreme distortion of the contractual equilibrium, the affected party may seek to preserve the essence of the contractual equilibrium by demanding renegotiations and, ultimately, adjustment of the contract to a reasonable extent, restoring the economic feasibility of adhering to the contract.[120]

Compatibility of the MCCs and the Model Clause with the underlying principles of the CISG would further depend on the courts' approach to contract interpretation. In recognizing the adverse social impacts of sales contracts and considering the need to remedy the power asymmetry and ensure equality in treating parties of different socio-economic backgrounds, it is essential to consider cultural and factual circumstances in contract interpretation.

3.4 Considering Region-Specific Cultural and Factual Circumstances in Contract Interpretation

All issues concerning contract interpretation should be resolved either through the CISG's express provisions or its general principles.[121] When assessing Article 8 (2) CISG, it may be possible that a contract term or a party's statement could be interpreted by *more than one understanding of a reasonable person in the same circumstances*. Put differently, although Article 8 (2) appears to be straightforward in its text, because of a possibility of diverging positions that a reasonable person may have, the provision itself needs interpretation that would limit the risk of homeward trend and ensure uniform interpretation of the Convention and not a resort to domestic rules on interpretation in every situation of ambiguity.[122] The liberal rules on admissibility of evidence and the number of different factors that a court should

[120] Jensen and Wahnschaffe (2021), p. 26; see also, p. 27 ["In any event, what cannot be inferred from the general principles of the CISG is the judicial (or arbitral) competence to adapt the contract."].
[121] Smythe (2016), p. 8.
[122] *Id.*, pp. 15–16.

consider—*all circumstances of a given* case—inevitably lead to multiple understandings of what is reasonable understanding in light of all *circumstances.*[123] The purpose is to equip the courts with a uniform methodology when facing diverging outcomes.

Smythe proposes that Article 8 (2) CISG directs the courts to interpret the jointly drafted contract terms to be *mutually* reasonable by looking at each party's statements and conduct independently from the other and subjecting it to the reasonable person test.[124] A court can come to one of three possible outcomes: identify a unique mutually reasonable interpretation of the term, identify a set of more than one mutually reasonable interpretation of the term, or not identify any mutually reasonable interpretation of the term.[125] If a court does not identify a unique reasonable person interpretation of the term, or if it identifies multiple options, then the issue could be resolved by resorting to reasonableness to identify the interpretation that best promotes reasonable commercial standards of fair dealing *the trade.*[126] In that way, CISG becomes an instrument that promotes reasonable commercial standards of fair dealing in the trade.

What is reasonable would depend on what is acceptable in the trade, or more specifically, would depend on usages as set out in Article 9 CISG.[127] Of course, then the question depends on the interpretation and understanding of usages in international trade. As Saidov argues, the notion of usages should be considered liberally, given the changes on the market and the increase of soft law instruments that aim to address the business operations and trade from a more regulatory perspective.[128] Considering once again Professor Honnold's argument on using contract patterns as informative in the interpretation of the Convention, assessing *what is reasonable* should also include a consideration of the soft law instruments, such as UN Guiding Principles and OECD Guidelines.

Irrespective of the standard one wishes to apply, Article 8 (3) CISG calls for a "*due consideration of all relevant circumstances of the case.*" The purpose is to give general guidelines of elements relevant in contract formation and contract performance to interpret intent in a broader range of scenarios in international commerce. Although Euro-Western legal traditions dominated the Diplomatic Conference,[129] nonetheless, some regional circumstances were discussed, e.g., whether the businesses in a certain country are predominantly producers of complicated goods (like machines), or whether they mainly export bulk commodities and other simple goods.[130] Moreover, scholars such as Professor Schroeter, argue that cultural factors should affect contract interpretation, either concerning the interpretation of intent in Article 8 (1)

[123] *Id.*, pp. 18.
[124] *Id.*, p. 16, 18.
[125] *Id.*, p. 19.
[126] *Id.*, pp. 33–34.
[127] *Id.*, pp. 33–34; see also Honnold (2009), pp. 220–222.
[128] Saidov (2013), p. 3.
[129] Schroeter (2017–2018), pp. 7–8.
[130] *Id.*, p. 6.

and (2) CISG or at the very least, as relevant circumstances in Article 8 (3) CISG.[131] Among the circumstances to consider, especially in the context of socio-economic consequences of the triggering *force majeure* clauses to human rights and the environment, courts should include regional specificities, especially factual and cultural circumstances specific to a region.[132] Examples of regional circumstances include "*the high level of illiteracy, the importance of an informal economy, the weakness of legal culture and the prevalence of corruption*" in Africa, the concept of "face" in Asia, due to which "*some Asian societies [are] less litigious*" in commercial matters and "*less likely to have recourse to the courts,*" a "*relational approach to contracts rather than a transactional approach wherein merchants consider the ongoing relationship as more important than the letter of the individual contract*" in Indonesia and other Asian countries, and specificities of Islamic law and trading relationships in that context.[133]

4 Conclusion

In the post-pandemic era, the adaptability of the CISG as an instrument aiming to promote international trade would depend on the readiness of its community to first, recognize the adverse social and environmental impact of commercial activity, and second, find ways to address these issues within its framework. Scholars recognized the link between adverse social impacts and production of goods, through an expanded concept of quality that includes the human-centered production process, e.g., protection of workers' rights, and a relationship between the Convention and soft law instruments, e.g., Guiding Principles and OECD Guidelines.[134] The CISG community should follow the same path in the interpretation and application of Article 79. Finding a way to tackle adverse social and environmental impact within CISG's framework would require a broader consideration when interpreting parties' intent, i.e., a broader understanding of what is *reasonable under all circumstances* in international trade considering cultural and factual circumstances. It would also require a continued conversation on the dynamic interpretation of the Convention

[131] *Id.*, pp. 30–34. Factual circumstances such as illiteracy or merchants or lack of experience of buyers in the global south can be considered in the context of Articles 11 and 44, respectively.

[132] *Id.*, pp. 5–6 ["[…] factual circumstances that exist in some regions of the world, but only to a lesser extent or not at all in others. Closely related to factual circumstances are cultural factors, including different regional socio-economic and political environments. When using a rather crude dichotomy between law and facts, cultural factors may even be regarded as a sub-category to factual circumstances, while a definition of culture as „the socially transmitted behaviour patterns, norms, beliefs and values of a given community would invite a stricter distinction between the two concepts."].

[133] *Id.*, pp. 5–6.

[134] See e.g., Schwenzer (2017); Schwenzer and Leisinger (2007); Butler (2016); Ramberg (2014). Schlechtriem considered ethical values as a circumstance to consider when awarding damages under Article 74 CISG. See Schlechtriem (2007).

to explore the boundaries of addressing the adverse impact of contracts in practice. Essential commercial values embedded in the CISG include party autonomy and perseverance of the contract, facilitated through communication during the contract performance support such an approach.[135]

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[135] See Schroeter (2018) pp. 17–27 [discussing the commercial values within CISG].

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Chapter 9
COVID-19 Related Export Bans and Restrictions Under WTO Law and the Determination of Their Legal Effects on International Sale of Goods Contracts Between Parties Located in WTO Member States: Interplay Between Public and Private International Law

Burcu Yüksel Ripley and Ülkü Halatçı Ulusoy

Abstract The COVID-19 pandemic has led to an unprecedented global health crisis. States, in an attempt to control the spread of COVID-19, have imposed drastic measures, including export bans and restrictions on medical products. The measures have affected the performance of international sale of goods contracts concerning medical products subject to the measures. The determination of the legal effects of the measures on international sale of goods contracts raises public and private international law questions. It also reveals an interplay between WTO law and private international law, which are traditionally seen as separate areas of law. The chapter analyses this interplay in the context of international sale of goods contracts concerning medical products and between parties located in WTO Member States. The chapter first considers COVID-19 related export bans and restrictions under WTO law and examines whether and to what extent they are consistent with WTO law. The chapter then focuses on the determination of the legal effects of these measures on international sale of goods contracts under private international law and examines how WTO law considerations can be relevant to this determination.

Keywords COVID-19 · Export bans and restrictions · WTO law · Public international law · Private international law · International sale of goods contracts · Mandatory rules

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1 Introduction

Following the declaration by the World Health Organization (WHO) of COVID-19 as a global pandemic on 11 March 2021,[1] countries, in an attempt to control the spread of COVID-19, have increasingly imposed drastic measures affecting trade in goods, including lockdowns, border closures, airport shut downs, precautionary restrictions at ports and export bans and restrictions on medical products.[2] Although these measures are primarily aimed to safeguard public health, they inevitably have had a severe impact on international trade.[3] Supply chains have been significantly disrupted worldwide and the performance of international sale of goods contracts concerning medical products subject to COVID-19 related export bans and restrictions have been affected by this disruption.[4]

From a public international law point of view and in World Trade Organisation (WTO) law, bans or explicit limits on the quantity of goods to be imported or exported constitute Quantitative Restrictions (QRs) regulated under Article XI of the General Agreement on Tariffs and Trade 1994 (GATT).[5] According to this provision, which provides for the general elimination of QRs, QRs applied to respond to COVID-19 are, in principle, in breach of WTO law. They can be allowed and justified in WTO law only in certain specific circumstances.

From a private international law point of view, COVID-19 related export bans and restrictions constitute an example of mandatory rules. Depending on whether and to what extent these measures are given effect by courts, they may provide a legal basis for a contractual party exercising the right to terminate the contract for breach or raise the application of the concepts of *force majeure* or hardship or, in rarer cases, the doctrine of frustration under the law applicable to the contact.[6]

In cases concerning international sale of goods contracts being disrupted by the COVID-19 related export bans and restrictions, courts can come across WTO law related questions (such as (in)consistency of the measures with WTO law) in assessing the nature, purpose and the consequences of the application or non-application of the measures as part of a private international law analysis. They can also take account of WTO law considerations in assessing the notion of public policy in deciding whether or not to invoke the forum's public policy on an exceptional basis

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[1] See the WHO Director-General's opening remarks at the media briefing on COVID-19, https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020. Accessed 13 July 2021.

[2] See https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm. Accessed 13 July 2021.

[3] See eg Yüksel Ripley (2020).

[4] See generally COVID-19 Implications for Commercial Contracts: International Sale of Goods on CIF and FOB Terms, United Nations Conference on Trade and Development (UNCTAD), UNCTAD/DTL/TLB/INF/2021/2, 2 March 2021, https://unctad.org/system/files/official-document/dtltlbinf2021d2_en.pdf. Accessed 13 July 2021.

[5] https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm. Accessed 13 July 2021.

[6] See generally Franciosi (2020), Berger and Behn (2019–2020), Tsang (2020), Janssen and Wahnschaffe (2020), Kiraz and Üstün (2020).

and whether or not to give effect to the export bans and restrictions of a third state. There is therefore an interplay between WTO law, as a field of public international law, and private international law. This interplay has been largely overlooked in legal literature in both fields[7] and is likely to give rise to further complications in legal practice in the context of COVID-19.

The purpose of this chapter is to critically analyse this interplay between public and private international law in the context of international sale of goods contracts concerning medical products and between parties located in WTO Member States. The chapter first considers COVID-19 related export bans and restrictions under WTO law and examines whether and to what extent they are consistent with WTO law under the relevant WTO agreements and case-law. It then focuses on the determination of the legal effects of these measures on international sale of goods contracts under private international law and examines how WTO law considerations can be relevant to this determination. The chapter aims to provide guidance and offer solutions to judiciary and legal practice in dealing with COVID-19 related disputes, suggests new mechanisms for consideration in reforming the WTO to ensure a dialogue between the WTO and national courts of WTO Member States and a uniform application of WTO law, and contributes to addressing the gap in legal literature in both public and private international law on the interplay between these fields.

2 COVID-19 Related Export Bans and Restrictions Under WTO Law

The very early reaction of many states, as part of the fight against COVID-19, was to impose export bans and restrictions on medical products. At the very beginning of the pandemic, more than 80 state and regional organisations notified the WTO Secretary General of the measures they had taken in a very short period of time.[8] The WTO expressed concerns that the impact of increasing export restrictions on trade in medical supplies is worrisome.[9]

An imposition of this kind reflects a nationalist approach to protect public health.[10] Some states completely banned exports on medical products at the very beginning of the pandemic.[11] For example, India, the largest producer of a drug called hydroxychlorine, imposed a complete ban on this drug, which is used in the treatment of COVID-19, and argued that 70% of the active ingredients of the drug to be supplied

[7] Legal literature is scarce on the interaction between WTO law and private international law, see eg Mengozzi (2001) and Dornis (2017).

[8] https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf, https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm. Accessed 13 July 2021.

[9] https://www.wto.org/english/news_e/news20_e/igo_15apr20_e.htm. Accessed 13 July 2021.

[10] Moon (2020), p. 20.

[11] https://www.europarl.europa.eu/doceo/document/E-9-2020-001633_EN.html. Accessed 13 July 2021.

from China could no longer be imported from there.[12] Other states have limited exports of medical products by introducing mechanisms such as pre-authorization or approval.[13] This included enacting regulations to limit the export of personal protective equipment, including face masks and shields, as seen in the United States of America[14] or tightening the COVID-19 export control mechanisms, as seen in the European Union (EU).[15]

The public international law dimension of the COVID-19 related export bans and restrictions on medical products raises questions relating to WTO law. The WTO, with 164 members worldwide,[16] is an umbrella organization responsible for the implementation of the GATT and its supplementary treaties, the General Agreement on Trade in Services (GATS), the Treaty on Trade-Related Intellectual Property Rights (TRIPS) and all other WTO agreements.[17] The Treaty of Marrakesh is a framework agreement establishing the Organization and contains both procedural and substantive rules. This Establishing Treaty of the WTO, together with the treaties in its annex, are called "WTO Treaties".[18] Annex 1A of the Treaty of Marrakesh includes treaties regulating trade in goods. The rules governing the trade of medical products are also covered by the GATT on trade in goods contained in this Annex. The GATT is in a close relationship with the "The Agreement of Safeguards" contained in the same Annex since the exceptional measures included in "The Agreement of Safeguards" can directly affect the implementation of the GATT provisions.[19] Therefore, COVID-19 related export bans and restrictions on medical products, from a WTO law point of view, need to be analysed under this legal framework within the scope of the general rule on prohibitions and restrictions of this nature as well as the exemption and exception provisions to the general rule.

2.1 General Rule on Prohibition of Exports Bans and Restrictions

According to Article XI(1) of the GATT, "*No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other*

[12] Coke (2021).

[13] https://www.wto.org/english/tratop_e/covid19_e/trade_related_goods_measure_e.htm. Accessed 13 July 2021.

[14] Coke (2021).

[15] https://ec.europa.eu/commission/presscorner/detail/en/ip_21_1352. Accessed 13 July 2021.

[16] https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. Accessed 13 July 2021.

[17] Halatçı Ulusoy (2009), p. 56. For WTO legal texts, see https://www.wto.org/english/docs_e/legal_e/legal_e.htm. Accessed 13 July 2021.

[18] Van Den Bossche (2005), p. 44.

[19] Ibid p. 49.

contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party". It is therefore prohibited, within the WTO system, to apply any restrictions other than taxes or other financial obligations collected on the import or export of a product by any method, including QRs.

As the WTO panels pointed out in their different decisions, the prohibition under Article XI(1) of the GATT is a *"very comprehensive prohibition"*[20] and the scope of the ban on QRs under this article should be interpreted very broadly, including all direct or indirect restrictions on both imports and exports.[21] In *China-Raw Materials*, the Panel ruled that the quotas imposed by China on exports of minerals such as soda, fluorite, and silicon constitute a violation of Article XI of the GATT and the WTO Appellate Body stated that any restriction on both export and import should be assessed within the framework of the prohibition within the scope of this article.[22] Voluntary export restrictions, as another aspect of QRs, are also prohibited under WTO law. According to Article 11(b) of the WTO Safeguards Agreement, "*…a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.…*". This analysis therefore suggests that the WTO Member States, in principle, are prohibited from imposing bans or restrictions of the nature described above on the export of medical products due to the COVID-19 pandemic unless these measures can be justified under the exemption or exception provisions.

To ensure international transparency and predictability, one of the most important objectives of the WTO, Member States are required, under Article X of the GATT, to notify the WTO of the measures they take. In accordance with the "Decision on Notification Procedures for Quantitative Restrictions", adopted by the WTO Council on Trade in Goods on 22 June 2012, the WTO Secretariat is to be notified of QRs and similar restrictions.[23] In the context of COVID-19, the former WTO Director-General Azevedo called on WTO Member States to notify the WTO of any measures taken related to COVID-19.[24] Although some states made the necessary notifications immediately at the early stage of the COVID-19 pandemic justifying the measures under the exemption or exception provisions, many states did not fulfil this notification obligation subsequently.[25]

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[20] India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products - Status Report by India, WT/DS90/R, para 5.129. (*India—Quantitative Restrictions*).

[21] *Colombia-Ports of Entry*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds366sum_e.pdf. Accessed 13 July 2021.

[22] China—Measures Related to the Exportation of Various Raw Materials, WT/DS394/AB/R, para 320 (Appellate Body Report, *China—Raw Materials*).

[23] G/L/59/Rev.1, 3 July 2012, para 1.

[24] DG Azevedo Requests WTO Members to Share Information on Trade Measures related to Covid 19, https://www.wto.org/english/news_e/news20_e/dgra_24mar20_e.htm. Accessed 13 July 2021.

[25] https://www.wto.org/english/tratop_e/covid19_e/export_prohibitions_report_e.pdf. Accessed 13 July 2021.

2.2 Temporary Restrictions Exemption in Case of Critical Deficiency of Essential Products

Article XI(2)(a) of the GATT provides for an exemption from the general rule for "*export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party*". Based on this exemption, it is possible to impose an export ban or restriction for a certain period of time in case of a critical supply shortage of essential products.

As the WTO Appellate Body ruled in the *China-Raw Materials Dispute,* concerning the export bans imposed by China for more than 10 years on a raw material used in steel production, the QRs to be applied must be *"absolutely indispensable or necessary"* for the exporting state and there must be a *"critical"* shortage.[26] The Appellate Body interpreted that the shortage of supply must be *"at the level of reaching a decisive impotence state or its absence reaching a decisive turning point"*, which can cause a serious crisis in the exporting state.[27]

The COVID-19 related export bans and restrictions on medical products notified to the WTO may be justified under this exemption since these products are essential products in the COVID-19 context and the measures are applied temporarily during the pandemic. For these export bans and restrictions to be exempt from the general rule, there must be concrete evidence regarding the deficiency necessitating the implementation of these measures. In many cases, this condition will probably be met, as most states were unprepared for a pandemic and therefore have had a critical deficiency of medical products to combat COVID-19. However, for example, measures for stockpiling the products will not be considered to be within the scope of Article XI(2)(a) of the GATT.[28] The burden of proof that measures do not meet the conditions of the exemption is on the complaining state.[29]

2.3 General Exceptions

Article XX of the GATT provides exceptions that allow WTO Member States, if certain requirements are met, to take measures concerning various issues such as the protection of public morality, the protection of human, animal and plant life and health, the protection of exhaustible natural resources, and the acquisition and distribution of goods needed in cases of general and local famine. Provided that the requirements are met under a three-stage test, a measure which is otherwise

[26] Appellate Body Report, *China—Raw Materials*, para 324. The Appellate Body decided that a raw material used in steel production is an essential good. For an analysis of this case, see Rolland (2021).

[27] See also the Appellate Body Decision on *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef—Agreement*, WT/DS161, DS169/AB/R.

[28] Aetreya (2020).

[29] Pauwelyn (2021), pp. 7–8.

inconsistent with WTO law can be justified. First, the measure must fall into one of the exceptions under paragraphs (a) to (j) of Article XX. Second, the measure must be *"necessary"* or *"relevant"* to protect the value or interest in question. Third, the measure must satisfy the requirements of the preamble (chapeau) of Article XX (i.e. "*not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail*, or *a disguised restriction on international trade*").

Although exceptions are, in principle, interpreted narrowly, WTO panels and the Appellate Body have tended to interpret the Article XX exceptions broadly,[30] possibly given the sensitive nature of the issues dealt with by the exceptions. The burden of proof under Article XX of the GATT is, in principle, on the state which introduced the measure in question (i.e. the respondent state) as it is the state that benefits from a given exception.[31]

The question of whether COVID-19 related export bans and restrictions on medical products can be justified under Article XX requires a case-by-case analysis. In the first stage of the test, the COVID-19 related export bans and restrictions on medical products must fall into one of the exceptions under paragraphs (a) to (j) of Article XX. More than one exception appears to be potentially relevant to these measures. Given the aspect of the protection of public health in the COVID-19 context, these measures can fall into the scope of Article XX(b) which includes the protection of *"human life and health"*.

They can also fall into the scope of Article XX(i) as *"involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan"*. *"Measures essential to the acquisition or distribution of products in general or local short supply",* in Article XX(j), is another exception that can be relevant to the COVID-19 related export bans and restrictions on medical products. Unlike Article XI(2)(a), Article XX(j) only looks for the short supply of a product, not a *"critical*" deficiency. This is because Article XI(2)(a), which is an exemption from the general rule on QRs, requires a higher threshold to be met[32] compared to Article XX(j), which is an exception to the general rule on QRs. Based on this analysis, the COVID-19 related export bans and restrictions on medical products can therefore meet the requirement at the first stage of the test.

In the second stage of the test, as stated by the WTO Panel in the *Brazil-Retreaded Tires Dispute*, QRs imposed for interests or values at stake must meet the necessity requirement.[33] In the necessity analysis of the COVID-19 related export bans and restrictions on medical products, a holistic approach is to be adopted by taking account of *"the severity of the situation threatening public health", "the suitability*

[30] Van den Bossche (2005), p. 599.

[31] https://www.meti.go.jp/english/report/data/2016WTO/pdf/02_06.pdf, p. 329. Accessed 13 July 2021.

[32] Pauwelyn (2021), p. 11.

[33] Brazil—Measures Affecting Imports of Retreaded Tyres—Status Report by Brazil, para 156.

of the measure for the purpose", and *"the effect of the measure on trade"*.[34] The interpretation of the WTO Appellate Body in the *European Communities-Asbestos Dispute*[35] that the measure taken for the citizens of the states should be urgent and inevitable[36] will also be applicable to the COVID-19 related export bans and restrictions on medical products. The fact that the COVID-19 outbreak was declared as a global pandemic by the WHO is of great importance in terms of the necessity analysis. This was a consequence of the rapid spread of COVID-19 worldwide due to some economic, political, and natural reasons leading to a "Global Emergency", despite the initial thought that it could be brought under control at the regional level which had been the case with SARS.[37] Against this background, it is clear that states are in a public health crisis.[38] Based on this analysis, the COVID-19 related export bans and restrictions on medical products can therefore meet the necessity requirement at the second stage of the test.

In the third stage of the test, the COVID-19 related export bans and restrictions on medical products must satisfy the requirements of the preamble (chapeau) of Article XX and not be applied *"in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade"*. This means that these measures must not violate the principles of "most favoured nation (MFN)"[39] and "national treatment",[40] which are among the core principles of the WTO and relate to another core principle, namely "non-discrimination".[41]

As is seen, the WTO Member States are expected to strike a balance between a measure to be taken and the relevant exception under Article XX of the GATT while also taking account of other principles of the WTO in a holistic manner. The COVID-19 related export bans and restrictions on medical products, which are otherwise inconsistent with WTO law, can be justified under WTO law, provided they meet the requirements of the three-stage test in Article XX.

2.4 Security Exceptions

A measure, which is otherwise inconsistent with WTO law, can be justified under Article XXI of the GATT concerning security exceptions. As the national security of states is prioritised in international trade, the WTO Member States are allowed to deviate from the provisions of WTO law in certain matters in cases of war or similar

[34] Mert (2020), pp. 957–958.
[35] WT/DS135/AB/R.
[36] Ibid, para 174.
[37] Gruszczynski (2020), pp. 1–6.
[38] Fei and Liu (2021), p. 7.
[39] Article I of the GATT.
[40] Article III of the GATT.
[41] Cottier and Oesch (2005), p. 346.

emergencies, provided they face a fundamental security issue. The burden of proof under Article XXI of the GATT, like the exceptions under Article XX, is, in principle, on the state which introduced the measure in question (i.e. the respondent state).

Article XXI(b)(iii) allows a WTO Member State to take any action *"which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations"*. The state which invokes the security exception is the state to determine what its essential security interest are (i.e. self-judgeing).[42] However, there is no doubt that there should be a limit to the discretion left to states in making this determination. This can be inferred from the decision of the WTO Panel in the *Russia—Traffic in Transit Dispute*,[43] which is the WTO's first ruling on the security exceptions. In this dispute, Russia wanted to invoke the exception under Article XXI of the GATT to justify its measures which restricted the export of goods of Ukrainian origin to Kyrgyzstan and Kazakhstan through the Russian territory, imposed in response to its conflict with Ukraine in 2014. Although Russia claimed that it had the right to self-judge whether the measure taken was in its own essential security interests, the Panel found that this was *"not entirely within Russia's discretion, and in parallel, the measures implemented based on the security exception cannot be excluded from judicial review"*.[44] The Panel also clarified that essential security interests are to be interpreted that *"there must be an external threat to the lands and people of a state, and the protection of the public and legal order must be in question"*.[45] This decision therefore confirms that measures taken by WTO Member States under Article XXI can be subject to judicial review. On the other hand, there are arguments that it would be more appropriate for WTO Member States to resolve Article XXI related disputes through bilateral negotiations given the difficulty of assessing the security exception due to its political nature.[46]

The question of whether the COVID-19 related export bans and restrictions on medical products can be justified under Article XXI requires a case-by-case analysis. The preparatory work of Article XXI of the GATT[47] suggests that it had not been considered at that time whether a global pandemic might pose a threat to the security of states. In the context of COVID-19, following the declaration by the WHO of COVID-19 as a global pandemic, states have imposed certain COVID-19 measures to ensure their national security in response to this global health emergency.[48] It can therefore be interpreted that there is an essential security interest of states in this context within the scope of public health and safety which they protect with these

[42] Halatçı Ulusoy (2021), p. 90.

[43] Russia – Measures Concerning Traffic in Transit- Report of the Panel, WT/DS512/R.

[44] Ibid, paras 7.101–7.103. On this decision, see also Dasierto (2021).

[45] Panel Report, *Russia-Traffic in* Transit, para 130.

[46] Lindsay (2003), p. 1312.

[47] See https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art21_e.pdf, p. 600. Accessed 13 July 2021.

[48] https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/21/national-security-directive-united-states-global-leadership-to-strengthen-the-international-covid-19-response-and-to-advance-global-health-security-and-biological-preparedness. Accessed 13 July 2021.

measures by invoking security exceptions.[49] In this regard, the COVID-19 related export bans and restrictions on medical products can be considered under the security exceptions in Article XXI(b)(iii). These measures can be subject to judicial review, and should still comply with the core principles of WTO law.

3 Determination of the Legal Effects of COVID-19 Related Export Bans and Restrictions on International Sale of Goods Contracts between Parties Located in WTO Member States

COVID-19 related export bans and restrictions imposed by states have disrupted the performance of international sale of goods contracts. The determination of the legal effects of these measures on international sale of goods contracts and any legal remedies that contractual parties may accordingly have first requires a private international law analysis.

The private international law dimension of the COVID-19 related export bans and restrictions on medical products raises questions relating to the legal nature and effects of these measures which may belong to the law of the forum or to a foreign law. Some of these questions, concerning mandatory rules and public policy, are also interconnected with WTO law.

3.1 Legal Nature of Exports Bans and Restrictions

Export bans and restrictions constitute a typical example of what private international law regards as mandatory rules.[50] Mandatory rules can be defined as non-derogable provisions which are provided for pursuing policy objectives such as political, economic, cultural, and social and which are applied to any situation falling within their scope.[51] In the case of COVID-19 related export bans and restrictions on medical products, they have been imposed in response to a public health emergency and to support efforts to combat the spread of COVID-19. Therefore, from a private international law point of view, they are to be regarded as mandatory rules.

The broad definition of mandatory rules includes domestic mandatory rules, which cannot be derogated from by parties' agreement, and international or overriding mandatory rules, which cannot be derogated from irrespective of the law applicable to the contract.[52] Every legal system has rules of this nature. The identification of a

[49] Fei and Liu (2021), p. 9.

[50] Plender and Wilderspin (2019), para 12–006, Chong (2006), p. 31.

[51] See generally Hartley (2020), pp. 687–688; Chong (2006), pp. 31–32.

[52] See ibid. For a definition of the category of overriding mandatory rules, see also Article 9(1) of the Rome I Regulation ((EC) No 593/2008 of the European Parliament and of the Council

provision as a mandatory rule in the domestic or international context is usually a matter of interpretation[53] since provisions do not always self-declare that they are to be treated as mandatory rules. In the context of broader COVID-19 related measures, there are examples of provisions self-declaring themselves as overriding mandatory rules, such as the ones found in a series of Decree-Law enacted by Italy in March 2020 to fight the emergency caused by COVID-19.[54] Even in the absence of such self-declaratory provisions, the COVID-19 related export bans and restrictions on medical products imposed in response to the global health crisis are to be regarded as international or overriding mandatory rules unless their nature, purpose, and scope indicate otherwise.[55]

3.2 Legal Effects of Exports Bans and Restrictions

Export bans and restrictions, as a result of being regarded as mandatory rules, are applied to any situation falling within their scope. They cannot be derogated from by parties' agreement, and this is the case irrespective of the law applicable to the contract. As long as export bans and restrictions are in force, all parties located in the imposing state must comply with them; otherwise, they assume the legal consequences of breaching the export bans or restrictions in question.

It follows that, for example, a seller of an international sale of goods contract concerning medical products may not perform his delivery obligations fully or partially due to COVID-19 related export bans or restrictions on medical products imposed by the state he is located in or, if medical products subject to the contract are located elsewhere, by the state they are located in. Performance, in private international law, is deemed to be a matter falling within the scope of the law applicable to the contact. If the law of the imposing state and the law applicable to the contract are the same law, the seller cannot perform his delivery obligations under the contract; otherwise, he would be in breach of the export bans or restrictions in question. If these two laws are not the same, this is likely to give rise to further complications as the seller may find himself in a situation where, if he performs, he may be in breach of the export bans or restrictions in question, or, if he does not perform, he may be in breach of his contractual obligations under the applicable law.

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of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, pp. 6–16) which was inspired by the decision of the European Court of Justice in the joined cases C-369/96 *Jean-Claude Arblade and Arblade & Fils SARL* and C-376/96 *Bernard Leloup, Serge Leloup and Sofrage SARL* [1999] ECR-08453, 22.10.1999. See also C-184/12 *United Antwerp Maritime Agencies (Unamar) NV v. Navigation.*

[53] Chong (2006), p. 32.

[54] See Piovesani (2020). For a similar discussion regarding the French Ordinance 2020–306 of 25 March 2020, as amended and supplemented by Ordinance 2020–427 of 15 April 2020, see Debourg (2020).

[55] On the issue of COVID-19 measures and overriding mandatory provisions, see Nardell and Parry (2020); Franciosi (2020), pp. 434–438.

In a dispute that may arise in this context, the determination of the legal effects of export bans and restrictions would depend on whether the bans or restrictions in question belong to the law of the forum (*lex fori*) or to a foreign law (which can be the law applicable to the contact (*lex contractus*) or the law of a third state).

If the COVID-19 related export bans or restrictions in question belong to the law of the forum, they are, in principle, to be given effect.[56] It is a general principle of private international law that mandatory rules of the law of the forum apply to any issue falling within their scope irrespective of what the applicable law is[57] and their application is usually not a matter left to the discretion of the judge.[58]

If the COVID-19 related export bans or restrictions in question belong to the law applicable to the contract, they are, in principle, to be given effect as part of the applicable law, unless this would be contrary to the public policy of the forum. This is irrespective of their public or private law nature. It is a general principle of private international law that mandatory rules of the applicable law apply to any issue falling within their scope unless their application is contrary to the public policy of the forum.[59] In this regard, for example, the application of measures, which are unjustifiably discriminatory in nature or inconsistent with the rights and obligations provided under international agreements, including WTO agreements, can be considered contrary to public policy.[60]

If the COVID-19 related export bans or restrictions in question belong to the law of a third state, the question of whether they would be given effect or not would depend on the circumstances of each case and the approach that the private international law of the forum takes on mandatory rules of a third state. There is no uniform approach in private international law regarding the mandatory rules of a third state. Contemporary private international law instruments include examples which permit them to be taken into consideration[61] or to be given effect[62] under certain criteria. These criteria may include that the given rule has a close connection with the contract,[63] or belongs to the law of the state where the obligations arising out of the contract have to be, or have been, performed and renders the performance of the contract unlawful.[64] The difference among criteria reflects a preference to give

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[56] On this issue, see further Sect. 3.3 below.

[57] Beaumont and McEleavy (2011), para 10.291.

[58] For different legal jurisdictions which provide for an express provision on mandatory rules of the law of the forum, see Symeonides (2014), pp. 305–306.

[59] Kunda (2007), paras 123, 146.

[60] For an example of this rare situation in the context of exchange control regulations, see *J. Zeevi and Sons, Ltd. v. Grindlays Bank (Uganda) Limited* 37 N.Y.2d 220, pp. 894–900, 16.06.1975. On this issue, see further Sect. 3.3 below.

[61] See eg Article 19 of the Swiss Federal Act on Private International Law (Bundesgesetz über das Internationale Privatrecht) (IPRG).

[62] See eg Article 9(3) of Rome I; Article 31 of the Turkish Private International Law (PIL) Act, numbered 5717 and dated 22 November 2007 (Turkish Official Gazette numbered 26,720 and dated 4 December 2007).

[63] See eg Article 31 of the Turkish PIL Act.

[64] See eg Article 9(3) of Rome I.

a narrow or wide scope of application to mandatory rules of a third state. The private international law instruments, which permit mandatory rules of a third state to be given effect, usually also provide that their nature and purpose and the consequences of their application or non-application are to be regarded in considering whether to give effect to those rules.[65] It is to be noted that courts are usually reluctant to give effect to the mandatory rules of a third state.[66] If the third state in question is the state that a seller is located in or the state where the medical products subject to the contract are located in, this may satisfy criteria for giving effect to the COVID-19 related export bans or restrictions of that state. In such cases, and in the course of assessing whether the respective export ban or restriction is to be given effect, it is also to be taken into account whether the interests pursued by the ban or restriction are acceptable from the perspective of the forum.[67] The interests that COVID-19 related bans and restrictions pursue to protect public health and safety should be, in principle, deemed acceptable in the current global health crisis.[68]

The questions relating to the legal consequences of the application of COVID-19 related export bans or restrictions in a given case, such as the enforceability of the international sale of goods contracts in breach of already existing bans or restrictions or performance of the international sale of goods contracts affected by newly imposed bans or restrictions,[69] will be determined according to the law applicable to the contract.

3.3 Interaction Between WTO Law and Private International Law

An interesting issue that may potentially arise before a court located in a WTO Member State is whether the COVID-19 related export bans or restrictions in question are consistent with WTO law. (In)consistency of the measures with WTO law may be alleged by one of the parties or, depending on the procedural law of the forum, can be considered by the court on its own motion. This raises two main questions: (1) Can a national court review the (in)consistency of a ban or restriction with WTO law and, if so, how? and (2) If the court finds that the measure in question is inconsistent with WTO law, how would that impact the given case?

The question of whether a national court can review the (in)consistency of a ban or restriction with WTO law would depend on whether the ban or restriction in question is imposed by the forum or another state. If the ban or restriction is imposed by the

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[65] For different criteria and rules that exist in different legal jurisdictions, see Symeonides (2014), pp. 305–309.

[66] Blessing (1999), p. 56; Lando and Nielsen (2008), p. 1722.

[67] On this point regarding Article 19 of the IPRG, see Hellner (2009), p. 468. See further Sect. 3.3 below.

[68] On this issue, see further Sect. 3.3 below.

[69] On this kind of substantive law questions, see eg legal literature cited in footnote n. 6.

forum, the national court, in principle, should be able to conduct a review as the ban or restriction in question is part of the law of the forum. If the ban or restriction is imposed by another state, the national court cannot conduct such a review as that would otherwise constitute an interference with the sovereign rights of the state imposing the ban or restriction in question. However, as will be analysed below, this should not prevent the court from considering the consequences of the application of the measure on the forum's public policy in the given case and, on an exceptional basis, from disapplying the measure.

As seen in Sect. 2 above, it is not an easy task to assess whether a measure is consistent with WTO law or whether a measure, otherwise inconsistent with WTO law, could be justified in WTO law under the exemption or exception provisions. This is the case even for specialist WTO panels and the Appellate Body, let alone for national courts dealing with private law matters. Further complications might also arise in this review, for example regarding burden of proof. Under WTO law, the burden of proof is on the complaining state in relation to the exemption under Article XI(2)(a) of the GATT whereas it is on the respondent state in relation to the exceptions under Articles XX and XXI.[70] It is a general principle of private international law that procedure is governed by the law of the forum.[71] However, it is a controversial issue whether burden of proof is a matter of procedure and therefore to be governed by the law of forum, or whether it is a matter of substance and therefore to be governed by the law applicable to the contract.[72] Regarding burden of proof, a national court reviewing the (in)consistency of a measure with WTO law would need to somehow reconcile private international law and WTO law and interpret how respondent and complaining states in WTO law would translate into a private law case concerning an international sale of goods contract between non-state parties.

There is no formal mechanism in the WTO that enables national courts to refer questions to the WTO concerning the interpretation of WTO law. WTO law and private (international) law have been perceived as separate areas of law[73] and this could be one of the reasons why such a mechanism does not exist. However, as this chapter demonstrates in the context of international sale of goods contracts affected by the COVID-19 related exports bans and restrictions, this perception is no longer accurate and there is an interplay between the two areas of law. A formal mechanism, for example one similar to the preliminary reference procedure in the EU, could be useful in the WTO context. The Court of Justice of the EU (CJEU), the judicial authority of the EU, gives preliminary rulings, at the request of courts or tribunals of EU Member States, on the interpretation of EU law as part of its mission set out under

[70] See Sects. 2.2, 2.3 and 2.4 above.

[71] See eg Collins et al. (2012), para 7–002, Torremans et al. (2017), pp. 73–74.

[72] On this discussion, see Collins et al (2012), para 7–034; Torremans et al. (2017), p. 85; Beaumont and McEleavy (2011), paras 27.17–27.19. See Article 18 of Rome I which considers apportionment of the burden of proof a matter for the law applicable to the contract for contractual obligations falling within the scope of Rome I.

[73] Dornis (2017), p. 1.

Article 19(3)(b) of the Treaty on the EU.[74] The preliminary reference mechanism, provided under Article 267 of the Treaty on the Functioning of the EU,[75] ensures a dialogue between the CJEU and national courts with a view to providing national courts with assistance on questions concerning the interpretation of EU law and contributing to a uniform application of EU law across the EU.[76] A similar formal mechanism could be useful for the WTO to assist the courts of WTO Member States on questions concerning the interpretation of WTO law. The WTO Appellate Body, as a permanent body reviewing the legal aspects of the reports issued by panels,[77] seems to be the appropriate authority to take on such a role. This mechanism could also contribute to a uniform application of WTO law among WTO Member States. As part of the current discussions on reforms that the WTO needs, in particular the reform of the dispute settlement system,[78] it would be useful to consider the establishment of this mechanism to help strengthen the provision of security and predictability to the multilateral trading system as the central objective of the dispute settlement system.

In the absence of a formal mechanism within the WTO providing national courts with assistance on questions concerning the interpretation of WTO law, one possibility for a national court that needs such assistance could be seeking guidance from the WTO Appellate Body on the given question of WTO law. The provision of such guidance by the WTO Appellate Body for consistency of decisions can be interpreted as deriving from the functions and objectives of the WTO dispute settlement system under Article 3(2) of the Dispute Settlement Understanding (DSU)[79] in providing security and predictability to the multilateral trading system. Depending on the domestic law of the WTO Member State in question, another possibility for the national court could be treating the question of (in)consistency of the measure with WTO law as a prejudicial question and referring it to another court in the country to answer. The national court could also seek assistance from experts, governmental departments, or institutions specialising in international trade and request opinions from them.

As regards the second question concerning the impact of a ban or restriction which is inconsistent with WTO law, the national court should decide not to apply the ban or restriction in question or give effect to it in the given case. The legal basis may differ depending on whether the ban or restriction in question belongs to the law of

[74] Consolidated version of the Treaty on European Union [2012] OJ C326/13.

[75] Treaty on the Functioning of the European Union [2012] OJ C 326/47.

[76] Mańko (2017). On the effectiveness of the CJEU in interpreting EU private international law regulations, see Yüksel (2017), pp. 44–52.

[77] https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm. Accessed 13 July 2021.

[78] See Schneider-Petsinger (2020), pp. 13–22; Statement of Director-General Elect Dr. Ngozi Okonjo-Iweala to the Special Session of the WTO General Council, 13 February 2021, https://www.wto.org/english/news_e/news21_e/dgno_15feb21_e.pdf, p. 4. Accessed 13 July 2021.

[79] https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm. Accessed 13 July 2021.

forum, the law applicable to the contact, or the law of a third state. However, in many cases, it is likely that it would find its root in the notion of public policy.[80]

The interference of the forum's public policy in exceptional circumstances is accepted as a general principle of private international law.[81] Accordingly, if the application of a provision of an applicable foreign law in a given case is contrary to public policy, that provision will not be applied.[82] Given the exceptional nature of the public policy interference, it is stressed that it is not the content of a provision in abstract but its application in a particular case before the court which is to be contrary to public policy and that this contradiction must be manifest.[83] It is additionally noted that the given situation is also to have a genuine and sufficient connection with the forum to invoke the forum's public policy.[84] In assessing whether the interference of the public policy of the forum is required, the court is to interpret public policy more narrowly in private international law for international contracts compared to domestic law for purely domestic contracts.[85] Therefore, the notion of public policy in private international law, which can change depending on time and place, requires a case-by-case analysis free from any categorical classifications of private law fields.[86]

Although, a court, in principle, is to apply the COVID-19 related export bans or restrictions belonging to the law of the forum or to the law applicable to the contract,[87] if these measures are inconsistent with WTO law, their application in a given case by the court located in a WTO Member State could be manifestly contrary to the public policy of the forum. The public policy of the forum is to be understood as including international public policy and in this context also the rights and obligations provided under WTO agreements. Therefore, the court should be able to invoke the public policy exception in such a case. If these measures, inconsistent with WTO law, belong to the law of a third state, the court may not give effect to them by considering the consequences of their application. In such a case, the court would be likely to find the interests pursued by the ban or restriction to be not acceptable from the perspective of the forum.

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[80] On the interrelationship between public policy and mandatory rules, see Chong (2006), pp. 32–35.

[81] Collins et al. (2012), p. 241.

[82] See eg Article 21 of Rome I, Article 17 of the Swiss IPRG, Article 6 of the Turkish PIL Act. For provisions in different legal jurisdictions, see Symeonides (2014), p. 241.

[83] Beaumont and McEleavy (2011), para 10.305; Collins et al. (2012), para 32–185.

[84] On this point in Turkish private international law, see eg Yüksel (2014), p. 20.

[85] Beaumont and McEleavy (2011), paras 10.315–10.316; Kunda (2007), para 225.

[86] See Yüksel (2014), p. 178.

[87] See Sect. 3.2 above.

4 Conclusion

The COVID-19 pandemic, caused by a new type of coronavirus, has led to an unprecedented global health crisis. States, in an attempt to control the spread of COVID-19, have imposed drastic measures, which have significantly disrupted the global supply chains. There has been an extraordinary increase in demand for medical products and this has resulted in states taking urgent measures based on protectionist policies, banning or restricting the export of medical products. These measures, which have affected international sale of goods contracts concerning medical products subject to the measures, raise public and private international law questions in determining the legal effects of the measures on international sale of goods contracts between parties located in WTO Member States.

In WTO law, export bans and restrictions on medical products are, in principle, prohibited under Article XI of the GATT. However, the exemption and exception provisions may allow states to go beyond this prohibition in the face of a global pandemic provided that the requirements set out in the provisions are met. Based on the exemption under Article XI(2)(a) of the GATT, temporary restrictions can be imposed on medical products in cases of a critical shortage as they are deemed to be essential products in the COVID-19 context. Based on the general exceptions under Article XX of the GATT, states may invoke in the COVID-19 context Article XX(b) which includes the protection of human life and health, and/or Article XX(j) which concerns measures essential to the acquisition or distribution of products in general or local short supply. Given that the global pandemic can be seen as a situation threatening the national security of states, another exception that states can invoke is the security exception under Article XXI of the GATT, although this is controversial due to the predominant political aspect of the issue of security. In relation to the exemption, the burden of proof is on the complaining state whereas it is on the respondent state in relation to all the exceptions.

In private international law, export bans and restrictions on medical products constitute an example of international or overriding mandatory rules. This means that they are, in principle, applied to any situation falling within their scope, they cannot be derogated from by parties' agreement irrespective of the law applicable to the contract, and they must be complied with by all parties located in the imposing state. In the context of international sale of goods contracts concerning medical products, the measures imposed by a state that the seller is located in or by the state that the medical products are located in, are likely to cause the seller not to be able to perform his contractual obligations fully or partially. The determination of the legal effects of these measures on the contract would depend on whether they belong to the law of the forum, the law applicable to the contact, or the law of a third state. The COVID-19 related export bans or restrictions belonging to the law of the forum and to the law applicable to the contract would, in principle, be given effect unless their application would be manifestly contrary to the public policy of the forum. On the other hand, if they belong to the law of a third state, the answer is not straightforward and would depend on the private international law approach

of the forum on mandatory rules of a third state. The measures that belong to the state that a seller is located in or the state where the medical products subject to the contract are located in may be considered to be given effect due to their close connection with the contract and its performance depending on the circumstance of the case and criteria to be satisfied in forum's private international law.

This analysis reveals an interplay between WTO law and private international law, which are traditionally seen as separate areas of law, particularly on two questions concerning international sale of goods contracts being disrupted by COVID-19 related export bans and restrictions. First, national courts can come across WTO law related questions (such as (in)consistency of the measures with WTO law) in assessing the nature, purpose and the consequences of the application or non-application of the measures. These are not easy questions to answer for national courts, particularly in the absence of a formal mechanism through which they can seek assistance from the WTO. This chapter suggests that a mechanism, similar to the EU's preliminary reference system, could be useful for the WTO to assist the courts of WTO Member States on questions concerning the interpretation of WTO law via preliminary rulings of the Appellate Body and contribute to the uniform application of WTO law among WTO Member States. This could be considered as part of the current calls for reform of the WTO dispute settlement system to help strengthen its central objective of providing security and predictability to the multilateral trading system. Second, national courts can take account of WTO law considerations in assessing the notion of public policy in deciding whether or not to invoke the forum's public policy on an exceptional basis and whether or not to give effect to the export bans and restrictions of a third state. The application of the measures, which are inconsistent with the rights and obligations provided under WTO agreements, can be considered contrary to public policy and they may be disapplied or they may not be given effect after taking into account the consequences of their application.

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Chapter 10
Public International Law Versus Private International Law: Competing or Complementary Intersectionality in the CISG?

Peter Mazzacano

Abstract This chapter examines the often-cited distinction between private international law and public international law in the context of the UN Convention on Contracts for the International Sale of Goods ('CISG'). The traditional view holds that private and public international law are separate bodies of law that exist independently of each other. This chapter refutes that view as being constraining and unhelpful. Jurists need a nuanced understanding of the intersectionality of private and public international law to assist them in solving legal problems that contain both dimensions. Such problems occur when public laws or regulations are used by private parties as grounds for invoking private law, such as Article 79, to excuse contractual non-performance. Using the primarily doctrinal methodology, the historical record on the creation of the CISG, and case law on Article 79, it examines select provisions of the CISG to demonstrate how private and public international law intersect in complementary and co-dependent ways. It finds that while the private–public law dimensions within the CISG are separate and distinct, they interact in a manner that resembles a symbiotic relationship and dualistic persona. Understanding this complexity helps to facilitate solutions to cross-border conflicts that contain both public and private law elements.

Keywords CISG · Article 79 · Force majeure · Excuses for non-performance · Contractual impediments · State reservations · COVID-19 pandemic

1 Introduction

Public international law, like its domestic counterpart, public law, is frequently distinguished from private international law and the private law found in states. This perspective, which is common in legal circles and academia, suggests that these two groups of law somehow stand in antagonistic opposition to each other. At the international level, the former concerns nations only and their relationships with each

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other; the latter concerns only individuals or businesses in situations where the law of one or more nations may apply. The conventional view is that never the twain shall meet—that public international law and private international law exist in independent and autonomous spheres, and never cross paths, interact or influence each other. They are completely different, estranged mates. Or as GC Cheshire stated long ago, '[t]here is, of course, no affinity between Private and Public International Law'.[1]

This article seeks to rebuke that view (and Cheshire subsequently changed his mind).[2] With an examination of certain provisions in the UN Convention on Contracts for the International Sale of Goods ('CISG' or 'Convention'),[3] and with a particular focus on Article 79, this chapter demonstrates how private international law interacts with, supports, and compliments public international law. It takes the position that while public and private international law intersect with the CISG, as they do with other international conventions, the interaction and relationship are not mutually exclusive, nor does it suggest that public and private international law are merging into one; rather, they are complementary, and at times co-dependent, and exist separately but in a symbiotic relationship.

While this article discusses various CISG provisions that relate to public and private international law, CISG Article 79 is chosen as the focal point because of its obvious private international law orientation. It is a prototypical private law provision within the CISG as it addresses when a party to an international sales contract can be excused from performance due to a supervening event. This is a particularly current topic in the context of the worldwide COVID-19 pandemic, where the contractual performance of the international sale of goods obligations has become extremely onerous, if not impossible, for private parties affected by public laws, such as emergency decrees, economic shutdowns, border closures, and travel bans.

Article 79 is an implicit refutation of the *pacta sunt servanda* principle, and under the Article, parties can, in exceptional circumstances, be excused from their contractual performance obligations. But the utility of Article 79 is not entirely within the confines of private international law. Indeed, as this chapter argues, and as the COVID-19 pandemic illustrates, the lines between public and private law, whether domestic or international, may, at times, intersect and blur. Indeed, they not only blur but the realms of public and private international law often rely on each other to confirm their existence.

Thus, what is needed is a more comprehensive and flexible approach in the treatment of public and private international law to allow jurists to move beyond the constraints of the conventional taxonomy. This public–private nomenclature has previously limited our understanding of the law, thereby foreclosing solutions to basic and complex legal problems, such as those often encountered in Article 79. To transcend the established taxonomy, what is required is a nuanced understanding

[1] Cheshire (4th edn, 1952), p. 16.

[2] In the next edition of his book Cheshire changed his mind. He qualified his earlier view by stating: 'It would, of course, be a fallacy to regard Public and Private International Law as totally unrelated'. (5th edn, 1957).

[3] United Nations, Convention on Contracts for the International Sale of Goods (CISG) (1988).

of the intersectionalities of public and private international law. Such awareness of the interplay between and co-dependence of public and private international law will assist jurists in solving legal problems that contain both public and private law dimensions.

2 Public–Private International Law Intersections in the CISG

The sale of goods across national borders is traditionally thought to be within the exclusive realm of private international law. The term 'private international law'[4] helps to identify the law that governs the sale, whether it be a national law[5] or an international one, such as the CISG.[6] Private international law also assists in the identification of the appropriate forum, the exercise of personal jurisdiction over the foreign party, and the enforcement of any judgment from outside the state. In this respect, it has a dualistic persona in that it balances international obligations with domestic recognition and implementation. It also balances sovereign actions with the actions of private players.

In this way, the relationship between private actors and the state is co-dependent and complementary. The individual actors rely on the state to provide them with a legal framework within which they can conduct their commercial transactions. In turn, the state needs to justify its construction of a legal framework and it does so through its use by private actors. In this respect, it is a symbiotic relationship in the sense that there is an intimate interaction between two dissimilar bodies of law. This is the dualistic character of private international law and is reflected in many of its definitions. For example, in the words of the American Society of International Law, private international law is the 'body of conventions, model laws, national laws, legal guides, and other documents and instruments that regulate private relationships across national borders'.[7] Private actors have the freedom to contract with each other and may do so internationally, but that activity takes place within the legal framework and context of one or more states.

[4] Sometimes the order of words is changed, and the term is referred to as 'international private law'; it is also known in certain legal circles by the term 'conflict-of-laws'.

[5] By 'national law' I mean purely domestic law, such as, for example, the UK Sale of Goods Act 1979 or the American Uniform Commercial Code.

[6] Of course, it must be recognised that any 'international' law, such as the CISG, must be adopted into national law to take affect and to govern sale of goods transactions between parties of different states.

[7] Ford (2013), p. 3.

2.1 Article 1(1)(a) Intersections

Within the text of the CISG itself, private international law is not defined, but there are references to it. One reference is at the outset, in Chapter I on 'Sphere of Application'. There, Article 1(1) states that the CISG 'applies to contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State'.[8] Under Article 1(1)(a), there would be a direct application of the CISG to the parties' transactions. By contrast, under Article 1(1)(b), there may be an indirect application of the CISG via the private international law rules of the forum that leads to the law of a contracting state, or the CISG may not be applicable at all, and the international sale will instead be applicable under some other domestic law. In this way, the drafters of the Convention created a distinction between contracts for the international sale of goods that were to be governed by the CISG and contracts for the international sale of goods that were to be governed by sources of law other than the CISG—to be identified based on the rules of private international law.

The CISG is the creation of states acting in their public international law capacities. Article 1(1) sets out the CISG's internationality requirement and it is this internationality that triggers the recourse to private international law. In essence, Article 1(1)(a) makes clear that the internationality of a sale of goods contract is dependent upon the parties having their places of business in different contracting states. Where this internationality requirement is not met, the CISG will not normally be applicable. This does not mean that the contract is not necessarily an international one; rather, it simply signifies that the contract does not meet the CISG's internationality requirement. This may be the outcome even where the performance of the contract involves different states. In such a situation, a court will not need to look further at the substantive rules under CISG Article 1(1)(a). Instead, a court will be required to turn to its rules of private international law to determine the domestic law that applies to the contract.

There is an important caveat to Article 1(1)(a), and it involves the interplay between public and private international law. While Article 1(1)(a) is *prima facie* applicable to businesses resident in states that are contracting states to the CISG, this applicability may be doubtful in certain cases, and resort to a private international law analysis may still be necessary. This is because of the public international law role that states played during the drafting and creation of the Convention.

2.2 Article 1(1)(b) Intersections

Public–private intersections are also evident in Article 1(1)(b). As noted above, while Article 1(1)(a) is relatively straightforward in that it is an autonomous provision

[8] CISG, cit. at footnote n. 3, Article 1(1).

giving courts no need to refer to the rules of private international law, matters become more complicated with Article 1(1)(b). This Article makes contracts of sale of goods applicable between parties whose places of business are in different states when the rules of private international law led to the application of the law of a contracting state. For example, these rules may be found in an international set of rules if in force and applicable, or in the domestic body of rules on the private international law of that state. However, the CISG does not itself provide any guidance on how to find and apply the forum's private international law rules. This application of the private international law rules of the forum will lead to the designation of the sales law of a particular state that governs the dispute. In this manner, the court will examine whether this state is a contracting state of the CISG. If so, the CISG will apply to the contract, and not the domestic sales law of the designated state; if the state is not a contracting state, the court will apply its own rules of private international law which will designate the applicable (usually, but not always, domestic) sales law.

During the negotiations and drafting of the CISG at the 1980 Diplomatic Conference in Vienna, some state representatives were opposed to Article 1(1)(b).[9] One delegate argued that countries with special legislation on international trade should be allowed to avoid 'the effect which article 1(1)(b) would have on the application of their special legislation'.[10] As a consequence, Article 95 was introduced to allow contracting states the opportunity to choose not to be bound by Article 1(1)(b). Tangentially, this is a reminder that private international law conventions, like the CISG, are created by state-to-state engagement. States, in their sovereign capacity, create treaties, conventions, and other international legal instruments. They do so in their public international law role, but this is often-times done for the benefit of private actors. Indeed, the focus of public international law has traditionally been on the state, to the exclusion of all other entities. However, this traditional focus on the state alone is now shifting towards private actors as well.

At the Vienna Conference additional objections to Article 1(1)(b) came from several delegates, who noted that the rules of private international law might point to the law of one state concerning contract formation, and the law of another state on issues related to contractual performance.[11] Consequently, private international law, invoked by Article 1(1)(b), might lead to the applicability of only parts of the CISG. This would be contrary to the objectives of the states convening in Vienna, which was to create a comprehensive, unified sale of goods convention. It was created as a substantive law convention, but its applicability is dependent on the private international law rules of the forum state. Put simply, resort to the rules of private international law to determine the applicability of the Convention created by public international law actors will, indeed, be necessary. For example, whenever a court is charged with determining the applicability of the CISG, it will have to resort to its own private international law rules. Thus, the CISG's possible indirect or direct

[9] Honnold (1999), pp. 37–38.

[10] United Nations (1981), p. 229. The delegate was from the former state of Czechoslovakia.

[11] Ibid.

applicability under Article 1(1)(b) depends entirely on a private international law analysis by the court in the forum state.

2.3 Article 7(2) Intersections

The second reference to private international law in the CISG is in Article 7(2).[12] There, resort to 'the rules of private international law' may be made to solve 'matters governed by [the] Convention which are not expressly settled in it'.[13] Thus, the CISG provides for resort to private international law to determine the applicable law. More specifically, this provision provides a methodology for 'gap filling' when 'internal' or 'hidden' gaps within the Convention cannot be filled. This is a two-step process. The first step requires that reference be made to the general principles within the Convention itself. These general principles are to be discerned from the four corners of the Convention or its legislative history. In using this process, many CISG commentators are of the view that resort to analogical legal reasoning should be used.[14] Needless to say, the boundaries between matters that are governed by the CISG and those which are not can be blurry. However, the decision-maker who resolves a matter 'governed but not settled' by a CISG 'general principle' need not revert to the private international law of the forum to apply the domestic rules of substantive law.

In the absence of uncovering such a general principle by way of analogy, one must, as a last resort, revert to the second step: the rules of private international law. In other words, matters not governed by the CISG can only be settled by resorting to non-Convention rules and principles. This is necessary to identify the applicable substantive law, that is, domestic law and the process is known as filling an 'external gap'. The 'internal' and 'external' gaps in the CISG, and the complex interface between the Convention and domestic law, evince that it is a non-exhaustive uniform sales law convention designed for private international actors; it is the creation of the public international law actions of states in their sovereign capacities. However, the 'gaps' within the CISG make it impossible to always exclude resort to private international law.

[12] It states: 'Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.' CISG, cit. at footnote n. 3.

[13] Ibid.

[14] Franco Ferrari (2018), p. 92.

2.4 State Reservation Intersections

CISG Articles 92 to 96 provide contracting states with the option to declare reservations, and this, in turn, has an impact on the CISG's direct applicability under Article 1(1) and beyond. States may also make declarations that they will not be bound by Part II or Part III of the CISG, which deals with contract formation and the rights and obligations of sellers and buyers.[15] Reservations themselves are strange beings that exist at the borderline between private international law and public international law related to treaties. An unintended consequence is that the dual nature of these instruments as both treaty law and internationally unified private law can create difficulties for parties and courts seized with ordinary disputes that happen to involve the cross-border sale of goods. For example, one such reservation is that provided in Article 94. The reservation can be applicable when both parties have their relevant place of business in a contracting state. It provides that '[t]wo or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply to contracts of sale or to their formation where the parties have their places of business in those States'.[16]

This Article became part of the Convention due to the lobbying efforts of Scandinavian countries,[17] and they are the only contracting states so far that have invoked it.[18] The rationale behind an Article 94 reservation is to allow contracting states to make the CISG inapplicable to contractual relationships between parties that have their places of business in countries that have a sales law that is already relatively uniform. With respect to Article 94, the Scandinavian countries made it known that they would accede to the Convention only if they could continue to apply their own regionally harmonized sales laws to their intra-Nordic trade. Thus, Article 94 allows regionally harmonized sales law to have limited prevalence over the Convention. This helps to ensure that regional sales law unification efforts do not become redundant.

With an Article 94 reservation in place, it will be necessary for disputing parties and the courts to resort to the private international law rules of the forum to determine the applicable law. If the applicable law is that of a contracting state that has made an Article 94 reservation, the CISG will not apply. Instead, the pertinent domestic law will be applicable.

Resort to the rules of private international law may also be necessary even where the CISG is the applicable law and the parties have not excluded or derogated from any of its provisions. This is the case with regards to the issue of the validity of

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[15] CISG, cit. at footnote n. 3, Part II and Part III.

[16] Ibid, Article 94.

[17] United Nations (1981), cit. at footnote n. 10, p. 436. Accordingly, Denmark, Finland, Iceland, Norway and Sweden declared that the Convention would not apply to contracts of sale or to their formation where the parties have their places of business in any of those countries.

[18] A current list of contracting states that have made Article 94 reservations, as well as other reservations under the CISG, can be found at United Nations Commission on International Trade Law (UNCITRAL) <http://www.uncitral.org>.

contracts governed by CISG Article 11 but subject to an Article 96 reservation under Article 12. In recognition of party autonomy and freedom of form, Article 11 states that a 'contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses'.[19] In other words, a contract of sale does not need to be concluded in writing and is not subject to any form requirements; it can be concluded orally or through the conduct of the parties. However, this is subject to Article 12, which the parties are not allowed to derogate from or vary its terms. Per Article 12, the freedom of form provision in Article 11 does not apply where one of the parties has its place of business in a state that has declared a reservation under Article 96. Article 12 states that any contract provision 'that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of an intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention'.[20] As these articles demonstrate, the relationship between the CISG and the rules of private international law is far from antagonistic. Indeed, it is a symbiotic relationship where private law and public law become so interwoven that, rather than clash, they more often co-operate with each other, and in the process validate their existence. This is a form of legal mutualism, where both laws benefit from the presence of the other. By doing so, the traditional dichotomy between public law and private law is gradually fading.

2.5 Final Provisions Intersections

In addition to these references to private international law, the CISG also contains provisions that are in the realm of public international law. Indeed, an entire section, which is often ignored by commentators, is devoted to questions related exclusively to public international law: Part IV, entitled 'Final Provisions' (CISG Articles 89–101), many articles of which have already been discussed, above. As Peter Winship once remarked with respect to international conventions generally, '[n]o commentator—and I barely exaggerate—spends much time examining the "Final Provisions" of international conventions'.[21] While the bulk of the CISG text is devoted to private law rules for commercial parties, the Final Provisions addresses states exclusively in their treatymaking capacity as public international law actors. As public law, these Final Provisions have gained little interest from private law actors, such as international merchants, legal practitioners, and arbitral tribunal members. Notwithstanding this lack of interest, a review of these Final Provisions shows how deeply private law and public law are inextricably intertwined.

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[19] CISG, cit. at footnote n. 3, Article 11.

[20] Ibid, Article 12.

[21] Peter Winship (1990), p. 711.

While the CISG's Final Provisions concern many technical issues related to the Convention's ratification by states, it would be an error to assume that these matters are exclusively within the realm of public international law. For example, and as we have already noted, the public international law element is missing whenever a CISG case is decided by a non-contracting state or by an arbitral tribunal where they are obliged to resort to the rules of private international law.[22] Further, when reviewing the CISG's Final Provisions, it is essential that one also refers to the subject matter of each provision, as they address matters that are regulated elsewhere in the Convention.

Indeed, CISG Article 7(1) explicitly demands this approach. In a sense, the entire Convention is a cross-reference to this article. It states that '[i]n the interpretation of this Convention regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade'.[23] The reference to the 'international character' suggests that state courts and arbitrators are obliged to resort to the Vienna Convention on the Law of Treaties interpretative provisions, anchored therein in Articles 31–33.[24] Further, the reference to 'this Convention' means the CISG in its entirety, including the Final Provisions and establishes the blurring and overlap between public and private international law.

Thus, while the sale of goods across borders is thought to be a matter governed by private international law, public international law could be invoked to limit or even nullify the sale. For example, the sale of goods in a state may result in personal injury, pollution, or some other type of public harm within a state. Focussing on the private aspect, such as the substantive rules within the CISG that govern the international sale of goods transactions, without regard for the public law component, as provided for in the Final Provisions, would mean neglecting an important, complex, and symbiotic interplay between these two bodies of law.

3 Public–Private International Law Intersections: CISG Article 79

In the context of intersections in public–private international law, CISG Article 79 is a worthy focal point because of its clear private international law orientation, which at times, may collide with public laws. As the archetypal private law provision within the CISG, Article 79 addresses when a party to an international sales contract can be excused from performance due to a supervening event. The provision provides that a party is exempted from paying damages if the breach is due to an impediment beyond its control, and either the impediment could not have been reasonably foreseen at the time of the conclusion of the contract, or the party could not reasonably avoid or overcome the impediment or its consequences.

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[22] This point is made by Honnold, cit. at footnote n. 9, para 103.2.

[23] CISG, cit. at footnote n. 3.

[24] United Nations (1980).

This is a particularly current topic in the context of the worldwide COVID-19 pandemic, as virtually every country in the world has been affected by the virus, and governments everywhere have taken public health measures to contain it. In this context, the contractual performance of the international sale of goods has become extremely onerous, if not impossible, for private parties affected by public laws, such as emergency decrees, lockdowns, and border closures.

The relationship between a *force majeure* 'impediment' enshrined in a private international law instrument, such as the CISG, and public laws that recognize a pandemic as grounds for suspending, perhaps even terminating, contractual performance, is a complex one. Indeed, the study of the relationship between private international law and public law is not a common undertaking by scholars.[25] When it occurs, it is usually in a domestic context, that is, within the forum with the latter's public law, and also within a quasi-international context, that is, with the private international law of the forum and foreign public law.[26] In this respect, private international law has a dual character: its function is international, in that there is an international element, but it has a domestic origin. In this way, foreign public law is invoked and utilized through the forum's private international law. However, there are major differences between them: private international law typically consists of procedural norms, commonly known as conflict-of-law rules, while public law consists of substantive norms. These substantive norms are in the form of laws and rules that decide cases. By contrast, private international law in the form of conflict-of-law rules only chooses the substantive law that applies to the case, and only because of the presence of an international element.

The interplay between public law and private law in the context of private international law appears only in a domestic context, within the state's legal framework. Thus, under the private law provision in Article 79, a party may be excused for non-performance if an external, unforeseeable and irresistible event prevents the fulfilment of that party's contract obligations. The relevant provision states:

> A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.[27]

In response to the pandemic, governments and public authorities in various parts of the world acted to recognize COVID-19 as an 'impediment' or *force majeure* event. For example, on 10 February 2020, a Chinese government spokesperson announced that measures to combat the virus would include official recognition of a *force majeure* event applicable to all domestic and international contracts. In this manner, the public arm of the government would sanction a legal principle (*force majeure*) and make it applicable to contracts between private parties. In this case, public law would trump private law. Following this announcement, the China Council for the

[25] Rostam J Neuwirth (2000), p. 57.

[26] Ibid.

[27] CISG, cit. at footnote n. 3, Article 79(1).

Promotion of International Trade (CCPIT), a quasi-governmental body, issued over 6000 *force majeure* certificates to Chinese companies in March 2020.[28] The certificates covered contracts with a total value that approached US$90 billion.[29] They were designed to exempt local exporters from fulfiling contracts with foreign parties by certifying that non-performance of their contracts was due to COVID-19 public law measures like factory closures and lockdowns.

Public law measures did not impact private contracts in China alone. Public law and private law collided all over the globe, and it did so in the early months of the pandemic. In another example, on 28 February 2020, the French Ministry of Economy stated that the COVID-19 pandemic would be considered a *force majeure* event and that penalties for late deliveries will not be applied in contracts between the government and the private sector.[30] The Iraqi government issued a similar declaration, qualifying the COVID-19 crisis as a *force majeure* event for all projects and contracts effective from 20 February 2020.[31] The declaration affected projects worth approximately US$291 billion.[32] Similar declarations were made by other governments. In May 2020, the UK government called upon contracting parties to act fairly and responsibly in performing and enforcing contracts that were impacted by the COVID-19 pandemic, especially in relation to 'making, and responding to, *force majeure*, frustration, change in law, relief event, delay event, compensation and excusing cause claims'.[33]

It is expected that the COVID-19 pandemic will result in a surge of cases on CISG Article 79. The latest published case on Article 79 as it relates to the impact of the COVID-19 pandemic is 'Guiding Opinions III' from the Supreme People's Court of

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[28] 'CCPIT Guides Enterprises to Leverage Force Majeure Certificates, which Help to Maintain Nearly 60% Contracts' (10 April 2020), online: China Council for the Promotion of International Trade <http://en.ccpit.org/info/info_40288117668b3d9b017163990e5a082a.html>. Accessed 9 March 2021. See also Berger and Behn (2019–2020), pp. 79–80.

[29] Ibid.

[30] 'Déclaration de M. Bruno Le Maire, ministre de l'économie et des finances, sur l'impact économique de l'épidémie de COViD-19, à Paris le 28 février 2020 (28 February 2020), online: Vie Publique <https://www.vie-publique.fr/discours/273763-bruno-le-maire-28022020-coronavirus> ; 'Mesures d'accompagnement des entreprises impactées par le coronavirus (Covid-19)' (28 March 2020), online: Direction générale de la concurrence, de la consommation et de la répression des fraudes <https://www.economie.gouv.fr/dgccrf/mesures-daccompagnement-des-entreprises-impactees-par-le-coronavirus-covid-19>. Accessed 9 March 2021. See also Berger and Behn, ibid.

[31] 'Iraq's Crisis Cell extends curfew, announces additional measures to contain Covid-19' (22 March 2020), online: Government of Iraq <https://gds.gov.iq/iraqs-crisis-cell-extendscurfew-announces-additional-measures-to-contain-covid-19/> . Accessed 9 March 2021.

[32] 'Iraq declares Covid-19 a force majeure for all contracts' (1 April 2020), online: Offshore Technology <https://www.offshoretechnology.com/comment/iraq-covid-19-force-majeure-contracts/> . Accessed 9 March 2021.

[33] UK Cabinet Office, 'Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency' (7 May 2020) at para 15(c), online: GOV.UK <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883737/_Covid-19_and_Responsible_Contractual_Behaviour__web_final___7_May_.pdf> . Accessed 9 March 2021.

China.[34] It guides the proper adjudication of civil cases in that country in the context of COVID-19. All Guiding Opinions[35] are said to be 'stealth' guidance to China's lower courts in that those courts are required to refer to them when adjudicating similar cases, but they cannot be cited as precedent in a court judgment or ruling.[36] Guiding Opinions III focuses on the applicable laws to be applied in foreign commercial contracts, all of which have been greatly affected by the pandemic. It specifically provides that if foreign law applies, the People's Court shall apply the statutory provisions or case law details concerning any *force majeure* rule as applicable in foreign law, and shall not automatically apply them per their understanding of the *force majeure* provisions in Chinese law, which tends to be more narrow and limited in scope.[37] Indeed, the concept of *force majeure* in China is thought to be so restricted that it has been compared to the common law principle of frustration.[38]

As a public law and judicial policy document, there are no factual details of any case, and Guiding Opinions III is solely restricted to laying out the criteria to be used by Chinese courts when interpreting, *inter alia*, private international law, such as Article 79 CISG, in relation to COVID-19. As a public law instrument, Guiding Opinions III exists to remind lower court judges not to substitute Chinese law if foreign law governs, and in doing so, it specifically includes guidance on the application on the CISG. As such, it declares that if a private party claims partial or full exemption from contractual liability on the grounds that it has been impacted by the pandemic or by public law measures to prevent or control COVID-19, the People's Court shall examine the claim per the relevant provisions of Article 79 of the Convention. In doing so, Guiding Opinions III acts like symbiosis itself, interacting with two dissimilar types of law: public and private. The specific kind of legal symbiosis is mutualistic as both types of law benefit from the relationship and continue their co-dependent relationship but in separate public and private spheres.

A recent Dutch case is a further example of the interaction between public and private international law.[39] In the case, the court considered an infectious disease affecting animals in the context of CISG Article 79(1). It is a noteworthy case in that it foreshadows the approach that various foreign courts may take in future cases

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[34] Supreme People's Court, Guiding Opinions (Part III), 8 June 2020, No. 20 [*Guiding Opinions III*], online: Institute of International Commercial Law, Pace Law Albert H Kritzer CISG Database <https://iicl.law.pace.edu/cisg/case/china-june-8-2020-supreme-peoples-court-guiding-opinion-2020>. Accessed 9 March 2021.

[35] Also referred to as 'Guiding Cases'.

[36] Supreme People's Court Monitor, Supreme People's Court's New Policy on Cross-border Commercial Issues and Covid-19, 19 June 2020, online: <https://supremepeoplescourtmonitor.com/2020/06/>. China is primarily a civil law country, so higher court precedents are not treated as binding on lower courts. Thus, when a court refers to a Guiding Opinion, it may quote it as a contributing reason for its decision, but it cannot cite it as the basis for the decision.

[37] Mazzacano (2014), pp. 123–124.

[38] Leclercq (1989), p. 238.

[39] Gerechtshof [Appellate Court, Netherlands] (UAB Ivabalté v Nederlandse Schapen- en Geitenfokkersorganisatie), 1 December 2020 [*Dutch sheep case*], online: Pace Law School CISG Database <https://iicl.law.pace.edu/cisg/case/netherlands-december-1-2020-gerechtshof-appellate-court-uab-ivabalte-v-nederlandse-schapen>. Accessed 8 March 2021.

concerning COVID-19 and Article 79. The case involved a Lithuanian buyer of sheep from a Dutch seller, with delivery to Belarus. The sheep were quarantined and inspected but an infectious disease was found in some of the animals. As such, the Belarusian authorities banned the import of sheep, based on the country's public health regulations. The buyer thus refused to take delivery of any of the sheep (i.e. the healthy ones) and claimed a full refund. In response, the seller invoked the *force majeure* clause in the contract, but the court found that that contract provision was ill-defined and instead referred to Article 79. Although the court found the infectious disease was a circumstance beyond the control of the seller, its *force majeure*-Article 79(1) defence failed. Under the contract, the seller was obliged to provide healthy sheep, and the quarantine was to ensure this would be the case. However, the seller failed in this regard, so the outbreak of the disease was at the seller's risk. Public law health measures trumped private international law contract provisions.

As the Dutch sheep case illustrates, public and private law do not always exist in harmonic form; collisions between them can also occur. In the case of CISG Article 79, there are a number of pre-COVID-19 examples of clashes between public and private law.[40] Indeed, it is not uncommon for parties, like the seller in the Dutch sheep case, to cite government regulations (public law) as grounds for invoking *force majeure* or Article 79 (private law) to excuse non-performance. To date, most of these defences have been unsuccessful. A number of these unsuccessful cases come from arbitrations emanating from the China International Economic and Trade Arbitration Commission ('CIETAC'). Many of these decisions have acknowledged that an impediment existed in the form of public law, typically a governmental regulation, but the common conclusion often was that the impediment was foreseeable or should have been considered a normal business risk. Thus, the necessity of getting import approval from its government, via public law, should have been foreseen by the buyer of semi-automatic weapons.[41] Similarly, where a buyer could not open a letter of credit in time due to a provisional government measure that required an importation certificate, this was deemed not 'due to an impediment that was beyond his control'.[42] The seller reiterated the more widespread view that '[b]ased on the common practises of international trade, the reasons of force majeure could be war, strike or Act of God'.[43] Even though the buyer thought that the public law measure was 'unforeseeable, unavoidable and insurmountable', the CIETAC tribunal agreed with the seller and held, without much elaboration, that the buyer was not exempt under Article 79.[44]

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[40] Many of the public and private law clashes at CIETAC, as discussed in this section, are documented in more detail in Mazzacano (2013a), pp. 195–200.

[41] CIETAC Arbitration Award, 7 August 1993 [CISG/1993/11] [*Semi-automatic weapons case*], online: Pace Law School CISG Database <http://cisgw3.law.pace.edu/cases/930807c1.html>. Accessed 9 March 2021.

[42] CIETAC Arbitration Award, 31 December 1996 [CISG/1996/58] [*High carbon tool steel case*], online: Pace Law School CISG Database <http://cisgw3.law.pace.edu/cases/961231c2.html>. Accessed 9 March 2021.

[43] Ibid.

[44] Ibid.

Similar situations applied in several other CIETAC cases, where public laws in the form of government import or export requirements were used as an excuse for non-performance. In the Steel bar case, due to Chinese foreign exchange controls, the buyer was required to obtain an original invoice from the seller.[45] This regulation, and a national holiday that required banks to close, caused a delay for the buyer. The seller was not obliged to ship the goods until receipt of the letter of credit. Because of this interruption, the seller could not charter a ship on time, and the buyer's importation certificate became void. The buyer claimed that the invalidation of its importation licence should be considered an act of the government that would exempt it from liability under Article 79. According to the buyer, this governmental act was an impediment that was 'unpredictable', and the 'impediment or its consequences could not be overcome or avoided'.[46] The tribunal disagreed. Without referring to Article 79, but rather to the private law rules in the Convention generally, it ruled in favour of the seller.

The Alumina case[47] and Australian cotton case[48] had similar issues regarding the requirement that the buyer obtain a governmental importation certificate. In the former case, the buyer used an amended government regulation to excuse it from non-performance in the purchase of a large quantity of alumina. It argued that after the contract was signed, the imposition of the amended regulation was out of the parties' control and represented a public law 'legal barrier' to performance.[49] Without referencing Article 79, the tribunal found that the revised regulation did not completely prohibit the import of alumina, but rather stipulated some new requirements that the buyer could have overcome. The buyer was, thus, found to have fundamentally breached the contract. Similarly, in the Australian cotton case, the buyer claimed that its ability to conform with the public law requirements of obtaining a quota and import permission were preconditions to contractual performance. The tribunal disagreed. It noted that as a company that specializes in textiles, it knew, or ought to have known, that the importation of Australian cotton was restricted by the Chinese trade system. It held that neither the quota nor the import permission constituted preconditions to performance or were sufficient public law excuses to exempt the buyer from its private law liability for non-performance.

An American buyer also attempted to rely on a *force majeure* clause in its contract to release it from its obligations to purchase and import Sanguinarine into the United States. Sanguinarine is a product that is used in insecticide. The contract contained a

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[45] CIETAC Arbitration Award, 4 February 2002 [CISG 2002/17] [*Steel bar case*], online: Pace Law School CISG Database <http://cisgw3.law.pace.edu/cases/020204c2.html>. Accessed 11 March 2021.

[46] Ibid.

[47] CIETAC Arbitration Award, 26 June 2003 [CISG 2003/10] [*Alumina case*], online: Pace Law School CISG Database <http://cisgw3.law.pace.edu/cases/030626c1.html>. Accessed 11 March 2021.

[48] CIETAC Arbitration Award, 17 September 2003 [CISG 2003/14] [*Australia cotton case*], online: Pace Law School CISG Database <http://cisgw3.law.pace.edu/cases/030917c1.html>. Accessed 11 March 2021.

[49] Alumina case, cit. at footnote n. 47.

force majeure clause that specifically noted a public law requirement: 'the [buyer's] failure to get an import licence shall not be deemed as a force majeure event'.[50] This did not prevent the buyer from arguing that the government's restriction or ban on products containing Sanguinarine was different from the requirement to obtain an import licence. Thus, it was the ban on the product, not the failure to get an import licence that was beyond the buyer's control. Referring to Article 79(1), the tribunal disagreed. It noted that as a prudent businessperson, and as a normal business risk, the buyer should have been aware of the government's public health banning order.

Even where a *force majeure* clause has been incorporated into the contract between the parties that deems that government conduct in the form of public laws falls within the scope of *force majeure*, the excuse for non-performance has been denied. The Iron ore case, for example, contained such a contractual provision.[51] From the time that the contract was signed, the price of iron ore had dropped dramatically. The seller shipped the goods, even though the buyer had failed to open a letter of credit in time as required by the contract. The buyer claimed that a new government document had been issued with revised guidelines that were designed to control credit risk. Due to this public policy change, its bank could not open the letter of credit. Additionally, it argued that because the seller shipped the goods before the credit was issued, such an uncommon practise allowed it to refuse delivery. The tribunal held that the decline in the price of iron ore was a normal commercial risk and was not a relevant *force majeure* defence. Further, the government conduct that caused public law restrictions on credit did not fall within the scope of *force majeure*. Although the tribunal did not explicitly state this, presumably, changes in government conduct in the form of new policies regarding credit were also deemed to be normal commercial risks of private parties.

Collisions between public and private law in the context of Article 79 go well beyond CIETAC decisions. The Spanish paprika case also involved an argument over non-conforming goods, partial non-payment, and the invocation of Article 79—all clashes between public and private law.[52] The seller brought an action against the buyer for payment for a partial consignment of paprika pepper powder. The buyer counterclaimed for damages for breach of contract. It contended that some of the goods delivered were not fit to be sold in Germany due to its public health laws. According to an expert's analysis, the pepper contained approximately 150 per cent of the maximum concentration of ethyl oxide admissible under German food and drug law. However, courts will not usually make a seller liable for knowing and

[50] CIETAC Arbitration Award, 7 May 1997 [CISG/1997/11] [*Sanguinarine case*], online: Pace Law School CISG Database <http://cisgw3.law.pace.edu/cases/970507c2.html>. Accessed 11 March 2021.

[51] CIETAC Arbitration Award, 25 May 2005 [CISG 2005/09] [*Iron ore case*], online: Pace Law School CISG Database <http://cisgw3.law.pace.edu/cases/050525c1.html>. Accessed 11 March 2021.

[52] Landgericht [LG] [District Court] Ellwangen, 21 August 1995, 1 KfH O 32/95 [*Spanish paprika case*], online: Pace Law School CISG Database <http://cisgw3.law.pace.edu/cases/950821g2.html>. Accessed 11 March 2021. See Mazzacano (2013a), cit. at footnote n. 40 pp. 231–233 from which this material on the Spanish paprika case is extracted, See also Mazzacano (2013b).

complying with the public laws and regulations in the buyer's country. However, in this case, the court found that the seller had prior knowledge of the public laws and, therefore, could not argue that it was ignorant of the requirement that the goods comply with the German health regulations. The court held that since the paprika contained more ethylene oxide than permitted under German public law, the goods failed to conform to the contract and specifically failed to meet the buyer's purpose that was made known to the seller. This amounted to a fundamental breach as it deprived the buyer of what it was entitled to expect from the contract as per CISG Articles 35(1)[53] and 25,[54] thereby making the seller liable for damages under CISG Articles 74[55] and 75.[56]

Before the litigation commenced, the seller agreed to take back the goods and admitted that they were non-conforming under German food law. It stated it would deliver substitute goods but failed to perform within the additional time for performance fixed by the buyer. It later argued that it should be exempt from having to pay damages under Article 79. The reason for invoking Article 79 is not made explicit in the court's judgment, but it appears that the seller tried to convince the court that the contamination of the pepper was beyond its control. The court correctly noted that the seller 'is responsible for the performance of its contractual obligations (Art. 79 CISG) independently of whether the goods were contaminated with ethylene oxide through treatment in the plant of the [seller] or in any different way. In the latter case, [the seller] was able to examine the goods before delivering them to the [buyer]'.[57] Indeed, non-conformity of goods is almost always deemed to be within the seller's sphere of control, even if the non-conformity was caused by the seller's supplier, producer, or by a change in regulations by a government acting in its public law role.

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[53] See CISG, cit. at footnote n. 3, Article 35.

[54] CISG, cit. at footnote n. 3, Article 25 states: 'A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result'.

[55] CISG, cit. at footnote n. 3, Article 74 states:

> Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

[56] CISG, cit. at footnote n. 3, Article 75 states: 'If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74'.

[57] Spanish paprika case, cit. at footnote n. 52, para III A.

4 Conclusion

As this chapter has attempted to demonstrate, the borders, boundaries, and demarcation between public international law and private international law have continued to intersect, overlap, and blur. Despite their different subjects and different focus, public and private international law are like two branches of the same tree, but each branch is sustained and fed by a different source. To use the CISG as a living example, it is the creation of states acting in their sovereign, public international law capacity. In this role, contracting states to the CISG can declare reservations under Articles 92 to 96 that make the CISG either totally or partially inapplicable to certain international sales transactions. However, we now live in the age of globalization, and the focus is no longer on the extent of the legislative jurisdiction of states, which is essentially a matter of public law. The power to make conventions like the CISG, and to declare treaty reservations, is not driven by politicians and bureaucrats alone. Today the drivers and subjects are more often private commercial parties, but private law relationships are the subject matter of many governmental acts. In this process, we have witnessed a shift in the sovereign right of states to make public international law, to more of an emphasis on the facilitation of international legal transactions between private parties.

But as the cases on CISG Article 79 show, public and private laws still intersect, overlap, and collide. A common collision is when government regulations in the form of public laws or regulations are used by private parties as grounds for invoking private law, such as Article 79, to excuse non-performance. However, public and private international law have never really existed as two separate, water-tight compartments. They often infiltrate each other's territory in a symbiotic manner. The distinctions between public international law and private international law, and their domestic counterparts, public law and private law, are not as sharp as might be supposed. Indeed, there is much more that unites public and private international law than what sets them apart. Both forms of law address problems that arise in a world divided by sovereign, national borders. And both forms of law have a global outlook, in that the principles and rules contained in each contribute to the needs of an international legal order. Both are meant to facilitate solutions to cross-border conflicts, whether public or private, promote international cooperation, and ultimately provide global justice to all parties, whether it is a state, company, or an individual.

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Chapter 11
Blocking Statutes: Private Individuals Entangled in Interstate Conflicts

Marcel Gernert

Abstract The aim of this chapter is to provide an overview of the instrument of Blocking Statutes and to place them in the interface between public international law and private international law. This article first establishes the meaning of extraterritorial jurisdiction and its consequences. It then describes different public international law measures that aim at avoiding or at least mitigating these consequences, followed by possible national reactions to foreign extraterritorial jurisdiction. In this context, the content of Blocking Statutes and their effects will be analyzed in detail. Particularly the latter, i.e. the effects of Blocking Statutes, will show that Blocking Statutes are not an appropriate alternative to international cooperation and coordination.

Keywords Blocking Statute · Extraterritorial jurisdiction · Economic sanctions

1 Introduction

As nationalist movements are on the rise worldwide and governments are increasingly turning away from multilateralism, more and more states in this globalized world are attempting to enforce their interests abroad by way of applying national law extraterritorially, i.e. extending it beyond its borders to the territory or the nationals of other states. This is a widespread technique, employed by many states, in an attempt to enforce their interests to the greatest possible extent. Blocking Statutes are legislative reactions to such attempts and aim at repelling extraterritorial jurisdictional claims of foreign states through private international law measures. Since these statutes are directed against the foreign state's behaviour, private individuals end up being subjected to interstate disputes. Legislators use private individuals to enforce their (foreign) political interests, which is why these laws go beyond the realm of mere legal rules and their implementation and have major political implications too.

Given the mentioned nationalist movements worldwide, Blocking Statutes seem to be becoming an increasingly popular instrument at the political level to counter

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unwelcome foreign behaviour and play therefore a key role in the blurry line between public international law and private international law, (supposedly) enabling states to assert their interests without having to compromise in negotiations and international agreements. This chapter will show, how states through Blocking Statutes try to counteract public international law issues via private international law instruments, ignoring contradictory efforts of harmonization and cooperation.

2 Extraterritorial Jurisdiction and Its Consequences

Every now and then Blocking Statutes find their way into everyday news. The EU-Blocking-Regulation,[1] for instance, received particular attention when it was updated[2] as an important part of the EU's reaction to the United States' withdrawal from the Iran Nuclear Deal[3] and the reimposition of U.S. sanctions against Iran. This Regulation is also crucial with regard to the widely known Helms-Burton Act[4] of the United States, which again became the subject of public debate and gained new attention in 2019 when former U.S. President Trump allowed its application and extraterritorial effects for the first time since its enactment in 1996.[5] Most recently, a so-called Anti-Foreign Sanctions Law of the People's Republic of China made headlines, which is supposed to counteract U.S. economic sanctions against China.[6]

What all of these cases have in common is that the enactment of the respective Blocking Statute was motivated by extraterritorial jurisdiction of another state. In order to allow for a deeper understanding of the concept of Blocking Statutes, the meaning of the term extraterritoriality will be briefly elucidated, as well as some prominent examples will be pointed out, in the following.

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[1] Council Regulation (EC) No 2271/96 of 22 November 1996 protecting against the effects of the extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom, Official Journal L 309, 29/11/1996, p. 1.

[2] Commission Delegated Regulation (EU) 2018/1100 of 6 June 2018 amending the Annex to Council Regulation (EC) No 2271/96 protecting against the effects of extraterritorial application of legislation adopted by a third country, and actions based thereon or resulting there from, Official Journal LI 199, 7/8/2018, p. 1.

[3] Joint Comprehensive Plan of Action (JCPOA) of 14 July 2015, adopted on 18 October 2015 (United Nations Security Council Resolution 2231 [2015]).

[4] Cuban Liberty and Democratic Solidarity Act (LIBERTAD), Pub. L. 104–114, 110 Stat. 785 (codified at 22 U.S.C. §§ 6021-91 [1995]); the Act is an important and controversial part of the extensive US economic embargo against Cuba.

[5] Gernert (2020a), p. 171.

[6] Süddeutsche Zeitung (2021), China demonstriert seine Macht. https://www.sueddeutsche.de/wirtschaft/china-sanktionen-menschenrechte-1.5320972. Accessed 14 June 2021.

2.1 The Term of Extraterritorial Jurisdiction

2.1.1 Extraterritorial Jurisdiction to Prescribe

The term "jurisdiction" describes the exercise of sovereign power by all three state powers, i.e. legislative, executive, and judicial powers, through the enactment and enforcement of the law.[7] Different sub-areas are usually distinguished[8]: While this chapter is not concerned with "jurisdiction to adjudicate",[9] "jurisdiction to prescribe"[10] means the authority of a sovereign to subject persons, activities, and other situations to its laws[11] and thus reflects the geographical scope of these laws.[12] Regulations within the scope of jurisdiction to prescribe are ultimately intended to (intentionally) control the behaviour of the persons addressed by the norm.[13]

Extraterritoriality could therefore be defined as a state's claim to enact and apply laws in such a manner that they regulate situations outside its territory[14] in order to control the conduct of persons abroad.[15] This definition should be independent of the legitimacy of this jurisdiction under public international law, i.e. whether the acting state can justify its jurisdiction based on a recognized jurisdictional title such as the personality principle. The crucial criterion is whether the state acting extraterritorially intends to influence behaviour abroad.

First, this can be achieved through direct regulations to foreign persons, meaning that the state extends the scope of the law to persons abroad. By threatening severe negative consequences for non-compliance, the state attempts to create sufficient pressure on these persons to compel the desired behaviour. A state may further influence foreign behaviour through territorial regulations, which is—because of its intended extraterritorial effect—also included in the term extraterritoriality for the purposes of this chapter. This applies, for example, to regulations that prohibit domestic companies from trading with foreign persons, who engage in unwanted conduct. Likewise, domestic banks might be prohibited from granting loans to such foreign companies. These territorial regulations are meant to coerce banks into acting in accordance with the regulations, as otherwise, the banks will no longer be able to

[7] Meng (1994), p. 1.

[8] See for an overview Randall (1988), p. 786 ff.; see also Bagheri and Jafar Ghanbari Jahromi (2016), p. 398 ff.

[9] American Law Institute (2018) Restatement (Fourth) of the Foreign Relations Law of the United States, § 401 (b); see Dodge (2018), p. 143 ff.; for the previous Restatement (Third) see Hixson (1988), p. 129.

[10] See Mann (1964), p. 23 ff.; Mann (1984), p. 19 ff.

[11] See Lowenfeld (1986), p. 91.

[12] Ryngaert (2015), p. 9.

[13] See on jurisdiction in the sense of (territorial or extraterritorial) behaviour control Kim (2003), p. 387 f.

[14] See for a detailed distinction between territoriality and extraterritoriality Emmenegger (2016), p. 638.

[15] Parrish (2012), p. 1678.

enter into business relations with companies seated in the legislating state. Depending upon the extent of the latter's global economic power, these regulations can have a significant extraterritorial coercive effect on foreign companies, without obligating or even addressing them directly.

The so-called primary and secondary sanctions of the United States against Iran illustrate this dynamic particularly well. Primary sanctions restrict persons and institutions of the sanctioning country from relations with the sanctioned target state[16]; with regard to the United States, they describe sanction measures that have a U.S. nexus,[17] i.e. that extend their scope to all U.S. persons.[18] Secondary sanctions, on the other hand, are mostly territorial regulations with extraterritorial effect[19] and include the sanctioning of individuals or companies without a U.S. nexus[20] that become a secondary target due to a sanctioned business contact.[21] This is done by prohibiting U.S. persons from having business contacts with foreign secondary sanctioned targets who themselves engage in business with primary sanctioned companies.[22] While the foreign companies still have a choice between trading with the U.S. market or that of the primary sanctioned country,[23] economic pressure is placed on other countries to join the sanctioning state.

With respect to the aforementioned Helms-Burton Act, particular attention should be drawn to the damages remedy created in Title III. Following its enactment in 1996, it had initially been suspended in relation to the EU. This changed during the intensified sanctions policy under President Trump, who as of May 2019 enabled U.S. plaintiffs to sue foreign persons in U.S. courts for the "trafficking" of property expropriated during the Cuban Revolution.[24] In the event of a violation of this prohibition, a private cause of action for damages is created[25] that can be directed against persons abroad.

2.1.2 Extraterritorial Jurisdiction to Enforce

Jurisdiction to enforce[26] is the third pillar of the term jurisdiction. It covers a state's claim to enforce its domestic laws and regulations.[27] Extraterritoriality in

[16] Tirkey (2019), p. 2.

[17] Eren and Pinter (2013), p. 16; Tehrani (2016), p. 87; Meyer (2009), p. 925.

[18] Karpenstein and Sangi (2019), p. 309.

[19] Differently: Ryngaert (2008), p. 626; Tirkey (2019), p. 2; Hoff (2019b), p. 1341.

[20] Cf. Karpenstein and Sangi (2019), p. 309; Haellmigk (2018), p. 34 f.

[21] Tehrani (2016), p. 87.

[22] Meyer (2009), p. 926; Tehrani (2016), p. 87.

[23] Senz and Charlesworth (2001), p. 79; Meyer (2009), p. 926.

[24] See as an introduction to the Helms-Burton Act and the claim of Title III Kern Alexander (1998), p. 523 ff.

[25] See in detail on this claim for damages Adams (1997–1998), p. 157 ff.

[26] See in detail Mann (1964), p. 127 ff.; Mann (1984), p. 34 ff.

[27] Emmenegger (2016), p. 638 f.

this area consequently refers to the enforcement of national laws outside the national territory.[28]

Of particular importance are acts of cross-border taking of evidence to obtain evidence located abroad. These cases have already led to severe jurisdictional conflicts in the past. Here, authorities and courts oblige persons or companies abroad to submit documents or other information located there[29] or to testify in domestic court proceedings.[30] As already mentioned above, requests for disclosure can also be made territorially, aiming at obtaining information from persons abroad. As an example, regulations can be made for domestic parent companies to exert influence on a subsidiary abroad to make the requested information available to the domestic court.

2.2 Consequences of Extraterritorial Jurisdiction

2.2.1 Conflicts of Jurisdiction

It is inherent in the definition of extraterritoriality that the addressed persons are simultaneously subject to the regulatory sovereignty and territorial jurisdiction of their state of residence (territoriality principle). Irrespective of whether the extraterritorial jurisdiction of the foreign state is in line with public international law, the territorial state can claim to regulate the conduct of the same person, which means that the conduct of this person is simultaneously subject of both the state of residence and the foreign state. In such situations, a conflict of jurisdiction,[31] in the sense of a conflicting competence over regulatory sovereignty, arises. If the foreign state prohibits or forbids a certain behaviour (extraterritorial order), while the state of residence has not issued any regulation on the matter (regulative freedom), this leads to a "conflict of jurisdictional authority", notwithstanding other questions of conflict, that may still arise.[32] In this context, it is crucial, whether the non-regulation is based on a lack of interest or an intentional decision. In the latter case, this territorial freedom to act would also contradict the extraterritorial regulation of the other state, as the non-regulation is also an expression of regulatory competence.

When situations of the mentioned territorial regulations (addressed to domestic persons) with intentional extraterritorial effect occur, the legislating state does not claim jurisdiction over the foreign person. The states involved only regulate the conduct of domestic persons, which does not lead to a conflict of jurisdiction. However, the person in the territorial state can still find himself in a difficult situation, which will be described below.

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[28] Colangelo (2014), p. 1304 f.

[29] Cf. Bertele (1998), p. 410.

[30] See for subpoena procedures in the U.S. Meng (1994), p. 252 f.

[31] See for example Warner Jr. (1990–1991), p. 372.

[32] Buxbaum (2019), p. 307.

2.2.2 Conflict of Duties for Private Individuals

If two regulations conflict and the two states involved require opposing conducts, a direct conflict of duties arises for the person addressed[33]: one state may prohibit the conduct in question, while the other state imposes the same conduct[34] or vice versa. In the case of a "conflict of jurisdictional authority", in which a foreign order meets territorial freedom to act due to non-regulation, no collisions of duties arise, since the foreign order can be followed without violating domestic regulations. This may include, for instance, an export ban by a foreign state, while this behaviour (the export) is covered by the freedom of contract in the territorial state. However, a conflict may arise if an economic operator has exercised its freedom and entered into a specific contractual obligation, which then can be contradicted by a foreign regulation.[35] Then, it is relevant how the private international law of the forum handles such cases.

When it comes to territorial regulations with extraterritorial effect, there may not be a conflict of duties, but a conflict of interests for the person involved, because, if two states wish to control the behaviour of one person, that person can only comply with one. The foreign economic operator is not subject to any obligations from abroad, as he or she is formally free to act according to his or her will. The problem arises when this "extraterritorial freedom"—which does not exist in business terms—comes up against an order imposed by the territorial state whose public interest then explicitly is incompatible with the foreign state. The persons involved would then be faced with a conflict of interests as they would not be able to perform the conduct expected abroad due to the domestic regulations, although they might have to for economic reasons.

3 Public International Law Attempts to Mitigate Conflicts

3.1 International Harmonization

The most effective way to prevent or mitigate extraterritoriality and its consequences at the international level is the harmonization of the applicable substantive rules.[36] If the same (supranational) rules apply in two (or more) states to a certain situation, there can be neither conflicts of jurisdiction between the states nor conflicts of duties for the private parties involved. In the area of trade law, for example, the international community was able to establish the World Trade Organization (WTO) and agree on

[33] See already American Law Institute (1987) Restatement (Third) of the Foreign Relations Law of the United States, Chap. 4 Introductory Note.

[34] Cf. Warner Jr. (1990–1991), p. 372.

[35] Cf. Rowold (2020), p. 51.

[36] Buxbaum (2019), p. 288.

a worldwide set of regulations and principles for its member states.[37] The European Union has created an important (regionally limited) legal system and has (in some instances completely) harmonized regulations in many areas of economic activity.[38]

International harmonization is also possible with regard to procedural regulations. Any conflicts arising in the jurisdiction to enforce can be reduced through harmonized or supranational law enforcement. An example is the enforcement of the unified competition law of the European Union, where the European Commission acts as the competent authority.[39] If a supranational body has been established, conflicts between national authorities and courts and their procedural rules can no longer arise. A similar effect would be achieved by harmonizing or at least approximating, the procedural rules in question. Such an attempt has been made, for example, by UNIDROIT, when it advocated a transnational civil procedure law.[40] However, the principles developed have only rarely been adopted into national systems.[41]

3.2 Convergence of National Laws

Another (similar) possibility is the increasing convergence of national regulations. In this case, national regulations are not replaced by supranational or other international instruments; instead, the national regulations of different states in a given area of law converge in content (either intentionally or through development).[42] The initiative for the development of such convergences of national laws originates from international organizations: They do not seek to create directly applicable rules, but rather a regulatory framework, which the member states agree to act within in future.[43] This happened within the WTO, for instance, when certain minimum standards for the protection of intellectual property rights were agreed upon; the ratification of these standards into national law is then left to the member states.[44] Model laws, such as those of UNCITRAL or UNIDROIT, can also lead to the convergence of national laws.[45] The same principle applies to the approximation of laws by means of directives (Art. 288 (3) TFEU) in the European Union.

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[37] Buxbaum (2019), p. 288.

[38] For example, in competition law, see in detail Mestmäcker and Schweitzer (2014), p. 141 ff.

[39] Mestmäcker and Schweitzer (2014), p. 512; cf. also Buxbaum (2019), p. 300.

[40] Buxbaum (2019), p. 351 f.

[41] Buxbaum (2019), p. 352.

[42] Buxbaum (2019), p. 302; Gerber (1999), p. 126, 131 ff.

[43] Buxbaum (2019), p. 299.

[44] Buxbaum (2019), p. 299.

[45] Basedow (2013), p. 124 f.; Buxbaum (2019), p. 303.

3.3 International Coordination and Cooperation

Furthermore, the bilateral or multilateral coordination of regulatory responsibilities concerning cross-border conduct can prevent or reduce conflicts of jurisdiction and conflicting obligations.[46] Common rules on the allocation of these responsibilities in the sense of conflict of laws, i.e. when which law should apply, would also lead to better foreseeability for all parties involved and avoid the risk of under-or over-regulation.[47]

The *comity* provisions, which are sometimes part of bilateral or multilateral agreements, also have an important coordinating role. The concept of comity[48] can justify, among other things, the non-application of one's own substantive law in cases that might otherwise lead to a regulatory conflict with a foreign system.[49] This is done by taking into account the relevant foreign interests when applying one's law.

At the level of law enforcement, mainly in areas where substantive harmonization or sufficient approximation of the respective law does not (yet) exist, the competent authorities can cooperate and coordinate their actions to increase the effectiveness of national regimes and mitigate conflicts.[50] For these purposes, transnational networks and bilateral alliances of the respective authorities of the states involved—so-called "memoranda of understanding"[51]—have been formed, where the exchange of information, mutual assistance, and other types of cooperation take place. It may also be coordinated between the contracting parties whether and, if so, what assistance is to be provided, for example, in obtaining evidence located in the other contracting state.

In civil jurisdiction, agreements on mutual legal assistance also result in fewer conflicts with the territorial sovereignty of the state where the evidence is located. Here, at the multilateral level, the Hague Evidence Convention[52], in particular, should be mentioned. This agreement provides for certain procedures for evidence located in another member state.[53]

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[46] Buxbaum (2019), p. 317.

[47] Sterio (2006–2007), p. 113 ff.; see on over- and under-regulation as a result of conflicts Buxbaum (2019), p. 292 ff.

[48] See in general Kämmerer (2006), http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e691?rskey=Ey5mjS&result=1&prd=EPIL. Accessed 14 Jun 2021.

[49] Dodge (2015), p. 2079.

[50] Buxbaum (2019), p. 289.

[51] See on such cooperation agreements in detail Du Toit (1999), p. 29 ff.

[52] Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

[53] For a description of the provisions of the agreement, see Heck (1986), p. 233–237.

4 National Reactions to Extraterritorial Jurisdiction

4.1 Collaborative Approach

A state confronted with extraterritorial jurisdiction can react cooperatively and accept the action of the other state. Taking into account the foreign interests, the former could consider withdrawing its claim to regulation. If it wants to support the foreign law, it could even apply these laws itself which would be a question of the rules of conflict of laws.[54] The reacting state could recognize existing official acts issued by the other state.[55] In addition, (unilateral) legal assistance could be granted to support the enforcement of the extraterritorial law. In the following, however, the focus will be on the opposing position of the reacting state.

4.2 Confrontational Approach

Where a state's action is considered unlawful, offensive, or simply an infringement of national interests—which will often be the case with extraterritorial jurisdiction—, another state will most likely react not by just accepting said action, but rather by implementing countermeasures.[56] In a broad sense, the term countermeasure covers all measures taken by a state against another state in response to, and with the aim of, curbing the latter's conduct.[57]

4.2.1 Public International Law

Where political or diplomatic protests[58] have not led to a solution, a state may consider other actions like targeted sanctions[59] or reprisals,[60] which can increase the political pressure on the other state. However, there may be limits to such measures under public international law. Considering world trade law, for instance, member states of the World Trade Organization must first obtain the authorization of the Dispute Settlement Body "before suspending concessions or other obligations under

[54] Meng (1994), p. 103 ff.
[55] Meng (1994), p. 90 ff.
[56] See for the term countermeasures Klein (1998), p. 42 ff.
[57] Basedow (2017), p. 209.
[58] See Forwick (1993), p. 104 f.; Kayser (2001), S. 93.
[59] See Hoff (2019a), p. 31 ff.
[60] See for instance Klein (1998), p. 45 ff.

the covered agreements in response to the failure of the member concerned to implement the recommendations and rulings".[61] This approach tries to establish legal limits to reprisals which otherwise could undermine an effective rule of law in international relations.[62]

Nevertheless, the initiation of such dispute settlement procedures in international agreements—when the affected state believes that the extraterritorial action violates these international obligations—is itself a confrontational reaction and can be used as a political tool. This is what happened in the dispute over the enactment of the Helms-Burton Act in 1994, when the European Union, among others, attempted to defend itself and filed such proceedings.[63] Ultimately, this dispute was settled with a separate agreement where the EU agreed, as a compromise, not to pursue the proceedings before the WTO anymore.[64] In addition, NAFTA and the OAS also provide for such procedures, which also came into play as a reaction to the Helms-Burton Act.[65]

4.2.2 Private International Law

Given these limited options for countermeasures under public international law, a state can also try to counter the effect and scope of extraterritorial jurisdiction under private international law. The scope for action is broad and covers a range of possible measures. For example, an attempt could be made to prevent the service of certain foreign documents on national territory. Another example would be the termination of judicial cooperation and mutual legal assistance to complicate foreign proceedings. It is worth mentioning that such measures are not subject to any limits under public international law (provided that the acting state has not entered into any explicit obligations).[66] In addition, secrecy orders can be issued for certain information, making it more difficult to gather evidence for the foreign proceedings. Foreign proceedings can also be jeopardized by so-called anti-suit injunctions, i.e. by prohibiting certain persons from initiating or continuing proceedings abroad. Once foreign proceedings have been completed, a state may prevent the recognition and enforcement of judgments rendered by the foreign courts.[67]

On the other hand, if a state considers the role of foreign extraterritorial law in its domestic proceedings, the question of whether the foreign law may be applied (or at least taken into account) arises, especially in civil cases, which will be answered by the applicable private international law of the forum. Consequently, if the forum

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[61] Art. 23 para 2(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 to the Treaty of Marrakesh, 1869 UNTS 401).

[62] Basedow (2017), p. 209.

[63] Nissen (1999), p. 352 f.

[64] Arendt (1998), p. 271 f.

[65] Trice (1997), p. 99 ff.; Adams (1997–1998), p. 160 ff.

[66] Basedow (2017), p. 209.

[67] See Schnyder (1998), p. 88 f.

state wishes to prevent even further enforcement of the foreign extraterritorial law—namely, not only by the authorities and courts of the foreign state but also by its public authorities—it can ensure that this law is neither applied nor given any effect.[68] Finally, it can issue explicit counter-orders prohibiting compliance with the foreign extraterritorial law.

In the following sections, the measures relevant to Blocking Statutes will be examined in more detail.

5 Key Elements of Blocking Statutes

Blocking Statutes are laws that attempt to prevent the effects of foreign extraterritorial jurisdiction reactively as an immediate response through international private and civil procedural measures.[69] They are directed against private individuals and their legal relations to enforce (foreign) political interests. The first laws of this kind were enacted in the 1940s[70] and have since been a popular tool, especially as a countermeasure against U.S. economic sanctions (U.S. pipeline embargo against Russia in the 1980s; Helms-Burton Act against Cuba in 1996; reimposed sanctions against Iran in 2018/2019) and broadly applied U.S. competition law. The following is an overview of the standard content of these laws.

5.1 Prohibition of Complying with Foreign Regulations

An essential element of a Blocking Statute is the prohibition of compliance with the extraterritorial regulations of the foreign state.[71] This includes both compliances with the law and with decisions by foreign authorities or courts based on it. In this case, a jurisdictional conflict between extraterritorial regulations and territorial substantive law is not only addressed by the application of domestic law in disregard of the foreign orders—i.e. the person involved must nevertheless follow domestic law—but by the explicit prohibition to follow the foreign orders. This further intensifies a conflict of duties of the private party concerned.

Such counter-orders are of particular importance if there are no territorial regulations for the respective matter, but rather regulatory freedom where individuals are free to act as they wish ("conflict of jurisdictional authority", see above). A prohibition on compliance then leads to conflicting regulations in the first place, and thus to a conflict of duties. This is the case, for example, with an extraterritorial trade

[68] See Schnyder (1998), p. 89 ff.

[69] Schnyder (1998), p. 92.

[70] See as the first Blocking Statute "The Business Records Protection Act of the Province of Ontario", RSO 1980 ch. 56, passed in 1947.

[71] See as an example Art. 5 EU-Blocking-Regulation.

ban imposed by the United States on Iranian business partners, while the European Union prohibits compliance with this ban.[72]

Other Counter-orders that do not prohibit compliance with the foreign regulation but require certain conduct that, however, is aimed to counteract the conduct required by the foreign state, have a similar intended effect. An example may be the obligation to offer services that require affected parties to enter into and perform contracts for certain supplies despite the U.S. trade ban.[73]

5.2 Prohibition of Recognition and Enforcement of Foreign Acts

If the foreign state has already issued a specific act, such as a judgement based on its extraterritorial law, the recognition of this act by another state would mean a self-restriction of the latter's jurisdiction. By doing this the recognizing state cooperates in the enforcement of the foreign (extraterritorial) law and thus accepts the underlying law. If a state affected by this extraterritoriality wants to achieve just the opposite, it can govern that these acts shall not be recognized. In these cases, the state does not agree with the statements of the foreign jurisdiction on its assessment of the facts and insists on its examination, rather than simply recognizing the result of a foreign judicial process.

A state does not have to rely on case-by-case examination by its authorities or courts to refuse to recognize foreign acts but can determine this for certain cases on a legislative basis. Such explicit provisions prohibiting the recognition of actions that attempt to enforce extraterritorial law[74] are an essential component of Blocking Statutes.[75]

As long as states have not entered into any obligations under an international treaty, they are free to decide whether to recognize foreign acts, meaning there is no reason in public international law to prevent them from refusing the recognition of foreign extraterritorial acts. However, even international agreements on mutual recognition provide this possibility, at least regarding the national public policy doctrine. This is further evidence of the blurry boundary between public international law and private international law, due to the employment of Blocking Statutes.

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[72] See for the EU-Blocking-Regulation Bälz (2020), p. 416 ff.

[73] For example in France, see Forwick (1993), p. 103.

[74] Basedow (2017), p. 212.

[75] See as an example Art. 4 EU-Blocking-Regulation.

5.3 Clawback Provisions

Furthermore, Blocking Statutes create so-called clawback provisions.[76] In many cases, it will not be sufficient to declare foreign acts ineffective and deny them recognition, because domestic companies may nevertheless have been ordered to pay exorbitant damages abroad. A domestic counterclaim is intended to protect against enforcement levied against assets located abroad or as reparation for payments already made or enforced. Clawback claims enable the former defendant to recover from the original plaintiff all or part of the sum as damage in a territorial proceeding.[77] Many problems of private international law occur concerning jurisdiction and applicable law.[78] However, the clawback claims are of little practical importance.[79]

5.4 Prohibition of Disclosure of Information

Another key provision is the prohibition on disclosing information that is needed and requested abroad, to enforce extraterritorial law.[80] Closely related to this, and similar to the prohibition of compliance in substantive law, is a prohibition on complying with foreign requests to testify or to hand over evidence or other information.

Information is often already protected by general laws that apply equally to similar domestic measures (e.g. data protection laws, bank secrecy laws, etc.). In a Blocking Statute, a state—in an even more confrontational manner—directly opposes foreign requests and, for example, explicitly prohibits the release of certain information to foreign states. The consequence for the private person involved is that he or she is requested by a foreign state to hand over evidence (and must expect considerable sanctions in case of non-compliance), while at the same time being prohibited from handing said evidence over by his or her state of residence. Here, as already mentioned above, the addressed person is forced into a conflict of obligations. The legislating state of the Blocking Statute relies on the foreign state refraining from enforcing this request if the disclosure is prohibited by the territorial state. However, this depends on whether this is given any effects in the foreign state's decision. This will be discussed in a moment.

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[76] See as an example of such clawback provisions Art. 4 EU-Blocking-Regulation; § 6 of the British "Protection of Trading Interests Act", 1980 c. 11; Art. 5 of the Mexican„Act to Protect Trade and Investment from Foreign Norms that Contravene International Law", I.L.M. 36 (1997) 133–154.

[77] Schnyder (1998), p. 93; Basedow (2017), p. 212; April (1984), p. 231; Gotto (1981), p. 946, 956 f.

[78] See generally, Basedow (2017), p. 212 f.; Basedow (2013), p. 339 f.; see in particular for the clawback claim of the EU-Blocking-Regulation Lieberknecht (2018), p. 578 f.

[79] Basedow (2013), p. 341.

[80] See for provisions of this type in detail April (1984), p. 224 ff.

6 Consequences and Effects of Blocking Statutes

Blocking Statutes and their contents, which lead to explicitly contradictory orders of two states, can cause private individuals to face even more severe conflicts of duties, than the ones described/mentioned above. For this reason, a few examples will be shown below to briefly demonstrate whether it is worth taking such measures given these negative consequences for one's economic operators, meaning whether Blocking Statutes can have the intended effects.

6.1 Legal Effects

6.1.1 Effects in the Legislating State of the Blocking Statute

Sanctions legislation is aimed primarily at private individuals who are prohibited from trading or having business and contractual relations (e.g. concerning the supply of certain goods) with a particular sanctioned country. In order to oppose the state that acts extraterritorially, Blocking Statutes are therefore intended to maintain this trade and to determine the behaviour of the economic participants themselves. This makes the private international law significance of Blocking Statutes particularly interesting.

Regulations in the context of economic sanctions must be classified as overriding mandatory provisions under private international law.[81] Considering, for example, the private international law of the European Union, it has long been the subject of discussions to what extent mandatory provisions of third states—such as those of the United States in this case—may also be applied or taken into account by European courts. According to the pertinent Art. 9 Rome I Regulation,[82] this is only possible to a limited extent. However, this does not exclude the possibility that the circumstances and facts created by the foreign (extraterritorial) law can be given effect in substantive law.[83] As a result, this may, for instance, allow the debtor of a shipment to refuse to fulfil the contract if the foreign law makes it impossible or unreasonable for him or her to do so.[84] In this case, the prohibition of compliance under Art. 5 EU-Blocking-Regulation, as well as the general objective of the Regulation in its (narrow) scope of application, must result in the debtors having to fulfil their contract in any case,[85] i.e. they must also be denied the right to invoke any defences that they might otherwise be entitled to under foreign sanction laws. In this respect, the Blocking-Regulation

[81] Lieberknecht (2018), p. 576; Cremer (2016), p. 18.

[82] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), Official Journal L 177, 4/7/2008, p. 6.

[83] See ECJ, 18/10/2016 – C-135/15 (Nikiforidis), para 40 ff.

[84] This is the solution in German substantive law, see for example Mankowski (2016), p. 489 ff.

[85] See in detail Gernert (2020b), p. 332; Lieberknecht (2018), p. 576; see also the Opinion of the Advocate General in the case C-124/20 (Bank Melli).

has a significance in conflict of law in domestic courts, which would maintain trade with the sanctioned country.

However, the fulfilment of the obligation of a shipment into the sanctioned state, which is maintained due to Art. 5 EU-Blocking-Regulation, would then at the same time be a violation of U.S. sanctions. This could cause great difficulties for the private individuals involved. The question is, therefore, whether Blocking Statutes can also have an effect abroad, which will be discussed in the next section.

6.1.2 Effects in the Extraterritorially Acting State

If the abovementioned case is brought before the courts of the extraterritorial state, the question arises as to whether foreign Blocking Statutes have to be taken into account when, for instance, a decision is to be made on a shipment obligation to the sanctioned country. If these courts were to waive the obligation, as it contradicts national economic sanctions, the obligated party would, if it complied with the decision, be in breach of the prohibition of compliance of the Blocking Statute of its territorial state.[86]

This fact could be taken into account in the sense that the state acting extraterritorially provides the private party involved with defences that allow justifying its non-compliance with the extraterritorial regulation. This would resolve conflicting obligations. The Foreign-State Compulsion doctrine in the United States can be used as an example. Under certain circumstances, it requires excusing non-compliance with U.S. law because of a conflict with the law of another state.[87] With respect to Blocking Statutes, two main issues are of concern: First, the person involved must have acted in good faith, meaning that a person cannot invoke the Foreign-State Compulsion doctrine when he or she is about to comply with a foreign state's order prohibiting him or her from complying with U.S. law.[88] Second, there must be a true conflict between the two competing regulations, which only exists if the individual cannot comply with both U.S. law and foreign law[89]; however, this is not the case when certain conduct is permitted but not required abroad.[90] These narrow requirements effectively preclude invoking the Foreign-State Compulsion doctrine in the United States because of conflicting provisions in a foreign Blocking Statute, which is why they have little effect—at least in the United States. In the end, it is up to the forum to determine to which extent it wishes to consider foreign Blocking Statutes.[91]

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[86] See on the conflict of duties in Blocking Statutes Mankowski (2019), p. 184.

[87] American Law Institute (2018) Restatement (Fourth) of the Foreign Relations Law of the United States, § 442, Comment a; see also Meng (1994), p. 256.

[88] American Law Institute (2018) Restatement (Fourth) of the Foreign Relations Law of the United States, § 442, Comment c.

[89] American Law Institute (2018) Restatement (Fourth) of the Foreign Relations Law of the United States, § 442, Reporters' Notes Nr. 2.

[90] Cf. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993), at 799; Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287 (3d Cir. 1979), at 1293.

[91] See on the problem of effective enforcement of Blocking Statutes Mankowski (2016), p. 489.

However, the fact that foreign states pay little attention to foreign Blocking Statutes is not surprising, since they are supposed to directly oppose them.

Meanwhile, it is noteworthy that none of the actions brought under Title III of the Helms-Burton Act has been successful in current U.S. case law since May 2019, which indicates that foreign companies are not doomed to failure in U.S. courts. Although one might think that this indicates the effectiveness of Blocking Statutes, such as the EU-Blocking-Regulation, a closer look shows that the first claims brought in the past have been dismissed by a question of statutory standing or for lack of "personal jurisdiction".[92] Blocking Statutes have therefore not played any role in the pertinent lawsuits to this day, which is why they cannot be deemed to have had any effect on the outcome of unsuccessful claims.

In contrast, with regard to foreign prohibitions on compliance with measures aimed at gathering information and evidence, U.S. case law is clear: Here, the U.S. Supreme Court ruled that "[blocking] statutes do not deprive an American court of the power to order a party subject to its jurisdiction to produce evidence even though the act of production may violate that statute".[93] Because of this explicit rejection, foreign Blocking Statutes cannot prevent the extraterritorial collection of evidence by the United States.[94]

6.2 Political Implications and Effects

In view of these limited legal effects,[95] Blocking Statutes are usually considered to have merely symbolic value and are meant to act as a political lever on the foreign government whose acts and policies are disapproved of.[96] The individuals and companies involved are merely tools to achieve this goal.[97]

At the same time, Blocking Statutes can be the basis for the work of diplomats and serve as leverage in negotiations.[98] Conflicts between states, at least between allied states, which are intensified by Blocking Statutes, are often resolved through public international law instruments.[99] The conflict between the United States and the EU over the Helms-Burton Act was eventually settled politically. In May 1998, an international agreement was concluded, in which the United States promised

[92] See for an overview of previous cases Bellinger III et al. (2021) Two Years of Title III: Helms-Burton Lawsuits Continue to Face Legal Obstacles. https://www.arnoldporter.com/en/perspectives/publications/2021/05/two-years-of-title-iii-helmsburton-lawsuits?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration. Accessed 14 Jun 2021.

[93] Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court for S. Dist. of Iowa, 482 U.S. 522 (1987), at 541–42, 544 n.29.

[94] See Hoda (2018), p. 231 ff.

[95] See also Basedow (2013), p. 341.

[96] Mankowski (2019), p. 184; Lieberknecht (2018), p. 579.

[97] Basedow (2013), p. 341.

[98] Lieberknecht (2018), p. 579; Mankowski (2019), p. 184.

[99] See for examples Basedow (2013), p. 341.

to suspend the application of Title III, while the EU agreed, among other things, to withdraw its complaint to the WTO.[100] However, it is not possible to measure the role of the EU-Blocking-Regulation in this process. Whether Blocking Statutes have a political effect—especially due to their weak legal effects—remains questionable.[101]

7 Conclusion

This chapter provided an overview of the instrument of Blocking Statutes and placed them in the interface between public international law and private international law.

While extraterritorial law already creates difficult situations for persons of other states due to jurisdictional conflicts, the enactment of Blocking Statutes clearly and intentionally exacerbates these situations. Their measures directly address private actors and therefore have perceptible impacts on international private relations.[102] However, they are primarily meant to counteract the national interests of a foreign state. Both sides use their actions as leverage for the implementation of their foreign policies and practically take the businesses of the other state as hostages of the latter's conduct.[103] As a consequence, private individuals find themselves entangled in interstate conflicts, in which little attention is paid to the actual effects of Blocking Statutes in international relations between private parties.[104]

Private parties pay the price in form of serious legal and economic consequences, which can only be resolved by one of the two states renouncing its jurisdictional claim and accepting the non-compliance with its regulation. Whether this happens is in the end a political decision, which then often results in public international law agreements. Blocking Statutes alone cannot counter the extraterritorial jurisdiction of other states. As is often the case, the solution lies in international cooperation and coordination.

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[100] See on this Compromise Smis and Borght (1999), p. 227 ff.

[101] Lieberknecht (2018), p. 579.

[102] Basedow (2017), p. 209.

[103] Basedow (2017), p. 210.

[104] Basedow (2013), p. 342.

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Chapter 12
When Public International Law Meets EU Private International Law: An Insight on the ECJ Case-Law Dealing with Immunity Vis-À-Vis the Application of the Brussels Regime

María Barral Martínez

Abstract EU private law and public international law intersection remains a gray-zone. The potential risk of conflict between EU jurisdiction vis-à-vis immunities seems to be a challenge for EU national courts when determining its international competence. This article examines the interplay between EU civil jurisdiction and immunity claims, in the light of two recent judgments of the European Court of Justice dealing with the articulation of the Brussels Regime and the customary rule on immunity. The analysis revisits the debate on the right to access courts as a potential limitation to uphold immunity. Further, it poses the question of whether the ECJ as the judicial actor of the EU can actively contribute to the development of international law in the wider world.

Keywords Public international law · EU law · Private EU law · ECJ · Brussels regime · Immunity · Customary international law · Article 47 CFR · Right to access courts

1 Introduction

The Court of Justice of the EU—hereinafter, ECJ/the Court—has dealt with immunity claims vis-à-vis the application of the Brussels regime and its material scope on a few occasions. In 2020, two judgments came to light with a strong significance in the field of public international law (PIL). On May 2020, the ECJ rendered a judgment in case C-641/18, *LG v Rina SpA*[1]; at stake was the articulation of state immunity of jurisdiction alleged by a ship certification company—acting on behalf of or as a delegate of the State of Panama—and the application of the Brussels I Regulation in respect of a compensation claim. In September 2020, the decision on case C-186/19,

[1] ECJ judgment of 7 May 2020, *LG v Rina*, C-641/18, EU:C:2020:349.

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Supreme Site Services et al.[2] was released. There, the ECJ clarified how the immunity from execution, allegedly enjoyed by an international organization (IO), articulates with the Brussels I Bis Regulation.

By looking into the ECJ case-law, the present contribution analyses the blurry concept of jurisdiction and its exceptions, and the challenges that EU national courts face when PIL and Private EU law meet.

First, the analysis covers the interaction between PIL and EU Law as an autonomous legal order. Within this context, it discusses the interplay between the principle of immunity under customary international law and the application of the Brussels Regime.[3]—an instrument of EU private international law ranked as secondary EU legislation.

Next, the contribution revisits the debate on the right to access courts as a potential limitation to uphold immunity when private parties have no other means (or forum) to seek redress. This part will take the reader through the International Court of Justice (ICJ) decision on *jurisdictional immunities of state* in the case Germany v Italy, the ECJ *Rina´*s judgment, and relevant case-law of the European Court on Human Rights (ECtHR) on this matter.

Finally, all this begs for the question of whether the ECJ can play a role in the development of PIL in general. It is yet to be seen whether it could be, for instance, narrowing down the concept of immunity through its judgments and how its case-law would affect the global trends.

2 Framing the Intersectionality of Private EU Law and Public International Law

The encounters of PIL and private EU law are framed in a much broader debate among international and EU lawyers, this is, the interplay between EU Law—a legal system of its own—with general international law. Legal narrative approaches the discussion from different angles: the place—as a hierarchy of law matter—PIL has within the EU legal order and vice versa[4]; the reception of PIL in EU law—both from the source and substantive perspective[5]—and how it is given effect. And perhaps more interestingly for both disciplines development, how they can influence and learn from each other.[6]

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[2] ECJ judgment of 3 September 2020, *Supreme Site Services GmbH and Others v Supreme Headquarters Allied Powers Europe*, C-186/19, EU:C:2020:638.

[3] The Brussels Regime are rules regulating jurisdiction, recognition and enforcement of civil and commercial matters. For the purposes of this article, it refers to the Brussels Convention of 1968 and its successors: Council Regulation (EC) No 44/2001 of 22 December 2000 and Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012.

[4] See Klabbers (2015)

[5] See for example: Ziegler (2015), p. 45, Klabbers (2015), p. 59.

[6] See Wessel (2019)

In defining the interaction between both legal orders, the ECJ played a key role ever since the famous seminal judgment in *Van Gend & Loos*.[7] However, the approach taken by the Court over the years has not been linear when dealing with cases posing issues of international law. Against this background, international lawyers and EU lawyers voice arguments in stark contrast. The former posits that the ECJ judgments portray a rather ambivalent/dualist/selective approach when EU law interacts with PIL, resulting in isolating EU Law and creating a self-contained legal order.[8] The latter argue that EU law is receptive toward PIL and that the ECJ is respectful in its application and interpretation while shaping EU law.

The present section briefly addresses the key takeaways on the relationship between EU law and PIL (2.1), before focusing on the specific interplay with EU private law in the realm of the jurisdiction (2.2). In doing so, it will zoom into two recent ECJ judgments—*LG and others vs Rina Spa* and *Supreme Site Services*—dealing with immunity allegations vis-à-vis the application of the Brussels Regulations, an instrument of EU secondary law[9] governing jurisdiction, recognition, and enforcement in civil and commercial matters.[10] The last part (2.3) will discuss whether human rights, concretely the right to access courts, can shrink the privilege of immunities acting as a limitation whenever no other means of redress or forum are available to private individuals.

2.1 The Eternal Debate Concerning the Relationship Between International Law and EU Law

EU Law is not purely international law and neither domestic law nor it is ordinary international law.[11] Still, it can hardly be disputed that EU law as such is international law.[12] At least, it has departed from it to become a new and autonomous legal order reinforcing the idea of the European integration project.[13] After all, the European

[7] ECJ Judgment of 5 February 1963, *Van Gend & Loos*, 26/62, EU:C:1963:1 "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights[…]".

[8] Moreno-Lax and Gragl (2016), p. 3.

[9] EU Primary legislation refers to the European Union (EU) treaties: Treaty of the European Union (TEU), Treaty on the Functioning of the European Union (TFUE), protocols, and the Charter of Fundamental Rights (CFR). EU secondary law are acts enacted by the EU institutions: regulations, directives, decisions, recommendations, and opinions.

[10] In *Rina* Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and in *Supreme Site Services* its predecessor: Regulation (EU) No 1215/2012 of the European Parliament and of the Council of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast).

[11] Klabbers (2015) p. 4, Lenaerts et al. (2021) p. 52.

[12] Wessel (2019), p. 73, Lenaerts (2019), p. 1.

[13] See Lenaerts (2019), p. 1.

Union (hereinafter, the EU or the Union) is an international organization (IO) with a legal personality[14] and subject to international law. It was set up under international law through the EEC Treaty[15] by its founding members acting as sovereign States. No matter how it should be labeled given its special treats as opposed to regular IOs—*sui generis* IO, international legal experiment,[16] or even a unicorn[17]—its nature and essence remain the same.

In the early 1970s, Pierre Pescatore wrote that community law—today's EU law—is a specific legal order, forming a complete legal system, closed on its way, because it has all the necessary resources to develop and to realize itself. As such, this legal sphere is different from the legal system of the Member States (MS) and the international legal order.[18] At that time, the Court had already delivered a few judgments building on the autonomy and uniqueness of EU law,[19] which in turn, strengthened the intense European integration process of that decade. As he rightly pointed out, the ECJ as a guardian of the EU needed to ensure that the EU legal order could be demarcated from the different domestic legal systems and the international legal order.[20] Admittedly, the ECJ has done a good job in preserving the special character of EU law, paving the way for a supranational constitutional order that has no similar precedent elsewhere in the world. Unfortunately, in its efforts to protect this rarity at the international level, the Court has been criticized for judicial activism to serve its interests.

Commentators observed that the underlying issue is that the EU Treaties do not contain any provisions regarding the relationship of both legal systems and the status of international law within the EU legal order.[21] While a combined reading of Article 3(5) and Article 21(3) TEU points to the EU commitment to respect and observe international law and even to actively contribute to its development, only Article 216(2) TFUE[22] states that international agreements concluded by the Union are binding upon the institutions and the MS. Instead, it has been the ECJ the one filling the Treaties gaps and developing a line of case-law fleshing out the autonomy of the EU legal order while parting from the shores of international law.[23]

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[14] See ECJ Judgment of 31 March 1971, *Commission of the European Communities v Council of the European Communities*, *European Agreement on Road Transport*, Case 22–70, EU:C:1971:32.

[15] Treaty establishing the European Economic Community, Rome, 25 March 1957.

[16] De Witte (2011)

[17] Klabbers (2015), p. 1.

[18] Pescatore (2006), p. 163.

[19] See *Van Gend & Loos supra* note 8; ECJ judgment of 13 November 1964, *Commission vs Luxembourg and Belgium*, joined cases 90/63 and 91/63, EU:C:1964:80; ECJ Judgment of 30 of April 1974, Haegeman, C-181/73, EU:C:1974:41.

[20] Note supra 18, p. 164.

[21] Da Silva Passos (2019) p. 295, Ziegler (2015), p. 45.

[22] Article 216.2 codifies the ECJ ruling in the *Haegeman* case.

[23] In *Van Gend & Loos, Commission v Luxembourg and Belgium,* and *Costa v Enel (*ECJ judgment 15 July 1964, Costa v E.N.E.L., EU:C:1964:66) the Court laid down the foundations of the EU constitutional framework based on EU Legal Order autonomy.

In this light, international law scholars argue that the position of the ECJ toward PIL has not been clear-cut and its judgments demonstrated a lack of consistency, showing, therefore, a rather ambivalent attitude, particularly, when the protection or interests of the Union are at stake. As Klabbers puts it "the EU legal order is mostly friendly in its disposition to international law when being so coincides with, or even strengthens, the protection of its own legal order".[24]

At the other end of the spectrum are EU lawyers, endorsing the traditional view of EU law as international law-friendly and fairly monistic when it comes to its reception. They claim that the autonomy of the EU legal order should not be read as a complete detachment,[25] in fact, EU law never sought to insulate from external sources or block the migration of ideas between legal orders.[26] EU autonomy enables the ECJ to strike the right balance between the preservation of EU values and the openness to other legal orders.[27]

A look into the Court's case-law dealing with PIL issues supports this openness to interpret EU law in the light of existing international law. The ECJ is no expert in international law, and for that matter, it is not called upon to deliver authoritative interpretations of public international norms[28]. Hence, it is worth mentioning that when it comes to the application and interpretation of PIL rules, the General Court[29] and the Court can make different readings. Judgments as the *Kadi* saga,[30] *Vereniging Milieudefensie,*[31] and *Front Polisario*[32] are good examples of how both Courts may take different routes to tackle international law questions.

The international law-friendly attitude of the Court is seen in a variety of judgments. In relation to customary international law, the Court held in *Poulsen*,[33] that the EU must respect international law in the exercise of its powers and that it must comply with customary international law. In *Racke,*[34] it applied the *rebus sic stantibus* doctrine to suspend a cooperation trade agreement between the EU and the former Republic of Yugoslavia. The Court went a step further and concluded that customary international law is binding on the EU and forms an integral part of the EU legal

[24] Klabbers (2011), p.114.

[25] Lenaerts (2019), p. 5, Lenaerts et al. (2021) p. 57.

[26] See AG M. Poiares Maduro comments regarding the relationship between PIL and EU law in its Opinion of 23 January 2008 on *Kadi I* C-415/05, EU:C:2008:30, points 21–24, and Lenaerts (2019) p. 10.

[27] Lenaerts et al. (2021) p. 87.

[28] Rosas (2013), p. 159.

[29] The Court of Justice of the EU comprises two different courts, the General Court (GC) and the Court of Justice, informally known as the ECJ.

[30] Kadi I: ECJ judgement of 3 September 2008, *Al Barakaat International Foundation v Council and Commission*, case C-415/05 P (Joined Cases C-402/05 P, C-415/05 P), EU:C:2008:461; Kadi II: ECJ Judgment of 18 July 2013 European Commission and Others v Yassin Abdullah Kadi, joined Cases C-584/10 P,C-593/10 P and C-595/10 P, EU:C:2013:518.

[31] ECJ judgment of 13 January 2015, *Vereniging Milieudefensie*,C-401/12 P, EU:C:2015:4.

[32] ECJ judgment of 10 December 2015, *Council v Front Polisario*, Case C-104/16, EU:C:2016:973.

[33] ECJ Judgment 24 November 1992, *Poulsen and Diva*, C-286/90, EU:C:1992:453.

[34] ECJ Judgment of 16 June 1998, *Racke GmbH&Co*, C-162/96, EU:C:1998:293.

order.[35] In the *Air Transport Association* judgment,[36] the ECJ shed some light in respect to the possibility for private individuals to rely upon rules of customary international law to challenge an act of EU secondary legislation—a Directive in that case. Regarding international agreements, the Court found that agreements concluded by the EU form an integral part of EU law, prevail over acts of the EU,[37] and therefore, EU secondary legislation should be read in so far as possible in conformity with this type of agreements.[38]

Concerning the dualistic approach of the Court, there are three landmark decisions, which best illustrate it: The *Kadi* litigation,[39] *Opinion 2/13* regarding the accession of the EU to the European Convention of Human Rights[40] and the *Achmea* case on intra bilateral investments treaties.[41] In all instances, to shield the Union from international law, the Court substantially relied on the autonomous character of EU law argument, to the extent that some authors considered the wording of the judgments quite aggressive toward PIL.[42]

Finally, the ECJ revisits often its relationship with PIL and the lens through which it looks at it depends on the particularities of the case at hand. While the autonomy of EU law must be preserved and for that the ECJ will try to find solutions within the EU legal order, there is nothing that prevents looking for the sources of that law, where appropriate, in international law.[43] Nevertheless, reliance on external norms is made conditional upon those norms complying with the fundamental values and structures on which the EU is founded.[44] Eventually, one could also think that it may all boil down to the domestication of international law[45] that, rather than being seen as an instrumentalization of the international legal order to justify EU law autonomy, it could push the somewhat static boundaries of PIL toward further evolution. Such a claim comes with the potential caveat of distorting the core principles of the international legal order.

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[35] Ibid, para 46.

[36] Judgment of 21 December 2011, *Air Transport Association of America*, C-366/10, EU:C:2011:864.

[37] Those acts being EU secondary legislation. See *Haegeman* case *supra* note 20.

[38] ECJ judgment of 26 April 1972, *Interfood GmbH*, C-92/71, EU:C:1972:30;ECJ judgment 11 April 2013, *HK Danemark*, Joined cases C-335/11 and C-337/11, EU:C:2013:222.

[39] See Kadi cases: C-402/05 P and C-415/05 Kadi I, C-584/10 P, C-593/10 and C-595/10 P Kadi II.

[40] ECJ Opinion of 18 December 2014, O 2/13, *Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, EU:C:2014:2454.

[41] ECJ Judgment of 6 March 2018, *Achmea*, C-284/16, ECLI:EU:C:2018:158.

[42] For Kadi I see Tomuschat (2009), Tomuschat (2016) p. 616 "One may unhesitatingly speak of an arrogant judgment, which establishes the European Union as an entity outside any universal regime of law, in any event regarding international human rights", for Opinion 2/13 see Eeckhout (2015).

[43] ECJ Opinion of AG Legrande of 12 June 1956, *Fédération Charbonnière de Belgique*, C-8/55, EU:C:1956:6EU:C:1956:6.

[44] Lenaerts et al. (2021) p. 60.

[45] Malenovský (2013), p. 58.

2.2 The Interface Between Private EU Law and PIL Within the National Legal Order: EU Civil Jurisdiction Versus Immunity Claims

EU national courts are at the frontline dealing with cases where Private EU Law and PIL may meet, devising creative solutions that respect both legal orders. Judges of MS are required to apply EU (Private) law and, if guidance is necessary for its interpretation, they can suspend the national proceedings and submit a preliminary ruling to the ECJ.[46] In contrast, the PIL position and effects on domestic legal systems are determined by national law, usually at the constitutional level, and its degree of integration is based on a monist or dualist reception.

EU law, thus, has a certain advantage against PIL: on the one hand, national courts must apply EU law directly, and on the other hand, they have at their disposal a channel for judicial dialog with the ECJ, key for the uniform interpretation of EU law. One could say EU law is more sophisticated in this regard or simply: PIL is disadvantaged because it is a decentralized system.

In light of the foregoing, how EU national judges may reconcile a clash between competing legal orders when at stake is a national judge civil jurisdiction challenged by one of the parties based on immunity? —be that of States or IOs. And, within this specific scenario, when the immunity of jurisdiction should be examined within the context of the national proceedings? Could the Brussels Regulations repel the application of the customary rule on immunities? Or how this instrument of EU secondary law could be articulated with PIL?

Some of these questions may have been in the mind of the Italian and Dutch judges seized with the *Rina* and *Supreme Site Services* (hereinafter, *Supreme*) cases, respectively,[47] before submitting their preliminary ruling requests to the ECJ. Both cases[48] bring to the fore one more time, the interplay between a general international customary rule and an instrument of EU secondary law.[49] Furthermore, Rina presented an interesting issue for the ECJ to explore, namely, the protection of a fundamental right enshrined in the EU Charter of Fundamental Rights (CFR)—an instrument of primary EU law. Albeit the different background and scope of the preliminary requests, both prove that when a norm of international law gets in the way, the relation between the international, EU, and domestic legal orders may become something difficult to untangle.

Before stepping into the analysis of the cases, it is necessary to briefly present their factual background, the content of the preliminary questions referred to the ECJ, and the answer provided by the Court.

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[46] Under the preliminary ruling procedure set in Art. 267 TFEU, a Court or Tribunal of a Member State can submit a preliminary question to the ECJ to interpret and decide on the validity of EU Law.

[47] See *supra* note 1 & 2.

[48] Ibid, *Rina.*

[49] See *supra* note 34 *Paulsen Diva*; *supra* note 35 *Racke.*

The *Rina* case is part of several civil liability claims brought before the Genoa's District Court by the survivors and relatives of the victims of the sinking ferry Al Salam Boccaccio'98.[50] In essence, the claimants sought compensation against a ship certification company based in Genoa—the Rina companies—because of its engagement in the classification and certification activities of the vessel acting on behalf/delegate of the state of Panama, being the latter the flag State. In the national proceedings, the Rina companies challenged the jurisdiction of the Italian judge arguing that, since they acted on behalf/delegate of Panama, the activities were carried out in the exercise of Panama public powers, and thus covered by the immunity of that State.

Against this backdrop, the Italian District Court pondered if it could decline its jurisdiction flowing from the Brussels I Regulation, considering Article 47 CFR, Article 6(1) of the ECHR, and recital 16 of Directive 2009/15/CE,[51] on the face of a customary principle of international law such as immunity. The referring Court was concerned with the fact that the immunity plea could be upheld considering ICJ case-law and other national decisions.[52] Therefore, the preliminary question aimed to seek guidance on how to read the Brussels I Regulation in the light of the Charter against the law on immunities, not in the scope of the "civil and commercial" definition under Article 1(1) of the Regulation. In other words, how EU secondary law could be benchmarked against customary international law from a hierarchy of norms approach. In addition, there was a second layer of complexity, namely, if the Italian judge declined jurisdiction, it could amount to the encroachment of the claimants' rights to access courts and to an effective remedy.

The ECJ tackled the question from a slightly different perspective. First, it assessed whether the dispute could fall within the autonomous concept of civil and commercial matters set forth under article 1(1) of the Regulation, triggering the jurisdiction of the Italian Court. Second, it analyzed whether the principle of customary international law concerning State immunity of jurisdiction could preclude the national Court from exercising its jurisdiction. Lastly, and bypassing, dealt with the question regarding the right of the claimants to an effective remedy—Article 47 CFR—and the hypothesis of upholding the immunity claim.

Supreme Site Services concerns a contractual dispute for default payment of fuel supply between Supreme (a private company) and SHAPE (an IO, the military headquarters of NATO based in Belgium). Supreme signed several agreements to supply fuels to SHAPE in the context of a military operation in Afghanistan, mandated by the United Nations Security Council. Supreme also signed an escrow agreement with JFCB (a military headquarters organization based in the Netherlands subject

[50] Sinking report: BBC NEWS | Middle East | Egyptian ferry sinks in Red Sea.

[51] Directive 2009/15/EC of the European Parliament and of the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations and for the relevant activities of maritime administrations.

[52] The Italian Court referred to the ICJ judgment on *jurisdictional immunities* that will be discussed later, ICJ judgment on Jurisdictional immunities of the State, Germany v Italy: Greece intervening, 3 February 2012.

to SHAPE's authority) to cover mutual potential payments after the mission termination. At the national level, two sets of proceedings were initiated in parallel. In the first set —the proceedings on the merits—Supreme, sought a declaratory judgment for it was entitled to the payment of several amounts owed by SHAPE. These proceedings were under appeal before a Dutch District Court because SHAPE challenged the first instance court's jurisdiction. In the second set—the proceedings for interim measures where the preliminary ruling to the ECJ originated from—SHAPE brought an action seeking the lift of an interim garnishee order and requesting the prohibition of further attempts from the Supreme to levy an interim garnishee order against the escrow account in Belgium. In the context of the second proceedings, the Dutch Supreme Court asked the ECJ, essentially, (a) if the action for interim relief brought by Supreme was a "civil and commercial matters" per Brussels I bis Regulation, activating the Dutch Court jurisdiction, (b) if such an action would fall within the exclusive jurisdiction of the Belgian Courts where the interim garnishee order was executed, as provided by Article 24(5) of the Regulation,[53] and last, (c) what consideration should be given to the plea of immunity from execution relied upon the IO, when determining if the action of the case falls under the scope of the Regulation.

2.2.1 On the Articulation of the Brussels Regime and Customary International Law on Immunity

Although the ECJ had previously dealt with cases involving immunities of states and the scope of application of the Brussels Regime,[54] it never engaged with the question about at what stage a plea of immunity should be reviewed and how this review would tie-up with ascertaining international jurisdiction provided by EU law. As stated above, the order and scope of the analysis may open different scenarios: if immunity limits the jurisdiction of sovereign states by creating a "jurisdictional void", the forum State judge would determine if the claim is admissible by analyzing whether the subject matter of the dispute relates to *acta iure imperii* or *acta iure gestionis* as per international immunity law. Under this premise, the customary international rule on immunities is a self-imposed limitation on territorial jurisdiction, derived from the principle of equality of sovereign States.[55] Hence, the analysis would be carried out solely on the basis of PIL without even looking at the rules on jurisdiction established by Private EU law.

Per contra, if immunity is purely seen as an exception to the jurisdiction of the sovereign State, the limitation falls on the adjudicatory powers of the national judge.

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[53] "The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties: in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced".

[54] ECJ judgment 17 February 2017, *Lechouritou v Germany*, C-292/05 EU:C:2006:700; ECJ judgment, 19 July 2012, *Mahamdia*, C-154/11, EU:C:2012:491.

[55] *Par in parem non habet imperium*, an equal cannot have jurisdiction over an equal. Unless the Sovereign State consents to it.

Yet, this would not precondition its jurisdictional competence.[56] It follows then, that a national court would first need to assess whether it has jurisdiction, in this case, by looking into the internal system of the Brussels Regime and subsequently, determine if jurisdiction can be exercised considering the immunities claim.

In the *Lechouritou* case, a Greek Court asked the ECJ if the Brussels Regime was compatible with a plea of immunity put forward by the defendant (Germany). And, if that were the case, whether the application of the Brussels Regime would be "neutralized". Only Advocate General Ruiz-Jarabo in his Opinion attempted to shed some light on the matter. He reasoned that deciding whether immunity from jurisdiction should be upheld happens at a previous stage, before engaging with the Brussels Regime. If proceedings cannot be brought, there is no point in finding out which court can hear the action.[57]

In the *Rina* and *Supreme* judgments, the order in which the ECJ handled the questions encompasses the idea that immunity is perceived as an exception to jurisdiction—in *Supreme* as an exception to execution. Jurisdictional competence flowing from Private EU law will not interfere with the national judge duty to ensure the protection of immunities and give them effect, if applicable.[58]

In both judgments, the Court sent a clear message to national courts: the examination of international jurisdiction (Private EU law) and immunities (customary international law) are completely independent of each other and take place at different stages within the proceedings,[59] implying that the former precedes the latter, yet one could assume that they are both relegated to the admissibility phase. Accordingly, to determine the effect of immunities vis-à-vis the application of the Regulation, first, the national judge needs to find out if the Regulation applies at all. Next, in analyzing the scope of application *rationae materiae* of the Regulation on the face of an immunity plea, the national judge does not need to rely on international law. For that purpose, a plea on immunity does not weigh in, international jurisdiction will be ascertained by virtue of EU secondary law and not against the yardsticks of international law.

For the application *rationae materiae* of the Regulation, the ECJ followed the same procedure in both judgments: first it determined if the dispute met the definition of "civil and commercial matters" in Article 1(1) of the Brussels Regulations, next it analyzed if the action brought fell under the scope of the Regulation, and finally, it looked into the role played by the immunities in the cases.[60] As for the first part of the examination, it should be noted that the notion of civil and commercial matters under the Brussels Regime does not extend to States liability for acts and omissions

[56] See Article 6 of the United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/RES/59/38, (Dec. 16, 2004).

[57] ECJ Opinion of AG Ruiz- Jarabo, 8 November 2006, *Lechouritou v Germany*, C-292/05, EU:C:2006:700.

[58] *Supreme* para. 64 and ICJ judgment *supra* note 51, para. 56.

[59] *Supreme* para. 74.

[60] *Rina* para 28; *Supreme* para 48 and 74.

in the exercise of State authority (*acta iure imperii*).[61] EU law has domesticated the concept of *acta iure imperii* from international law to give it an "autonomous meaning" under EU law.

In this light, the Court recalled that certain actions between a public authority and a person governed by private law may come within the scope of the Brussels Regime, provided the public authority had no recourse to public powers.[62] This mirrors the assessment that a domestic judge should perform when faced with immunity allegations. However, here, this examination will be performed within the meaning of EU law, particularly, attending to criteria laid down by extensive ECJ case-law.[63] Those criteria—namely, the legal relationship between the parties, the subject matter of the dispute, and the basis and the detailed rules governing the action[64]—serve to establish if the exercise of public powers by a State or a public body falls outside the scope of the ordinary legal rules applicable to relationships between private individuals and excludes such a case from the "civil and commercial matters" definition. In the cases at hand, the Court held that the purpose of certain actions—in this instance, the classification and certification activities carried out by the Rina companies upon delegation or on behalf of Panama; or the use made by the IO SHAPE of the fuel supplied by Supreme—did not in itself constitute sufficient basis to classify them as *iure imperii* for the purpose of EU law.[65]

Finally, in relation to the role played by immunities—jurisdictional in *Rina* and execution in *Supreme*—the ECJ concluded that the fact that the parties—with no distinction between a private actor or an IO—relied on immunities as a defense does not automatically preclude the application of the Regulation and therefore, the exercise of the national judge adjudicatory powers.[66] It would be for the latter to determine if the parties relied on the exercise of public powers within the meaning of PIL.[67] The ECJ assessment presupposes that the relationship between both norms is not in conflict, not for establishing jurisdiction and neither for a preliminary exercise of it. In this regard, there is a clear distinction in the sources of the law to be applied in each case: on the one hand, for establishing international jurisdiction under EU law, the Brussels Regime and the case-law of the ECJ provide the national judge with guidance. On the other hand, a national judge internationally competent under the Brussels Regime to decide if immunity can be upheld in a particular case should resort to the application of international law.

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[61] Rogerson (2016), Art 1, Note IV.

[62] *Rina* para. 33; *Supreme* para. 56.

[63] See para. 55 in *Supreme* and case-law noted therein.

[64] *Rina* para. 35; *Supreme* para 55.

[65] *Rina* para. 41; *Supreme* para. 66.

[66] *Rina* para. 58; *Supreme* para. 62.

[67] See *Rina* para. 58.

2.3 *The Right to Access to Justice: A Limitation to Uphold Immunity?*

The preceding section reveals that immunities remain a messy affair[68] and a blurry concept when applied at the intersection with Private EU law. Furthermore, the *Rina* case echoed another matter of content in international law concerning immunities, namely the unsettled tensions between the right to access courts and to seek judicial redress vis-à-vis recognizing immunity. The case resurfaces the two main hurdles for national courts to overcome when calling upon resolving such tensions: first, they need to establish if there is an interference between both sets of norms. Second, they have a duty to ensure the protection of fundamental rights—in the national legal order and at EU/international level—and at the same time, to comply with PIL.

As the current law stands, courts are required to grant immunity regardless of the court access consequences in a particular case,[69] which undeniably weakens the position of human rights. Italian Courts notably have shown a strong concern in this respect, and as it will be discussed later, different national judgments have put the emphasis on the duty to balance the protection of fundamental rights against the recognition of immunities, drifting away from the current *status quo*. These domestic decisions came as a response to the *jurisdictional immunities* case.[70] There, one of Italy's arguments drew on the plaintiffs' right to access courts and the right to judicial redress, to waive Germany's immunity from jurisdiction. Such an argument shifts the state-centric international rules on immunity toward fundamental human values, and if endorsed by judicial practice, could pave the way for the emergence of a new rule under customary international law.

The ICJ's judgment brings to the spotlight the first hurdle for national courts to overcome. The ICJ argued that there is no conflict between *jus cogens* rules and rules on State immunity for they address different matters, emphasizing the procedural character of the immunity rules and the fact that they are devised to determine whether a State may exercise jurisdiction in respect of another State.[71]

Immunity, thus, operates as a procedural bar limiting the jurisdictional realm,[72] confined to the early stage of the proceedings, while substantive matters are subject to the findings on the merits. Even if—as the ICJ indicated—there is an encroachment with the parties' fundamental rights. Italy contended under the famous "last resort argument" that immunity cannot be accorded when serious violations of human rights law have been committed by a State *and* the claimants do not have available other means of judicial redress. The ICJ rejected this argument concluding that at that moment in time, no such customary rule crystallized in PIL.[73] Moreover, it

[68] Peters (2014) p. 1.

[69] Whytock (2014) p. 2077.

[70] See *supra* note 52.

[71] *Supra* note 52, para 93.

[72] Ibid.

[73] Ibid. para 101.

held that granting immunity could not be dependent upon the existence of effective alternative means of securing redress for the claimants.[74] Despite the fact that the procedural-substantive divide is not always discernible,[75] it added "immunity cannot, therefore, be made dependent upon the outcome of a balancing exercise of the specific circumstances of each case to be conducted by the national court before which immunity is claimed[76]". There cannot be an interference with the right to access a court or to seek judicial redress, for such a conflict could never arise.

Withal, the ICJ did acknowledge that granting immunity might preclude the judicial redress of the claimants.[77] In that respect, it should be recalled that the Italian Constitutional Court (hereinafter, *Corte Constituzionale*) declared the ICJ's judgment inapplicable[78]; arguing that the right to access courts may limit state immunity. In its view, according to jurisdictional immunities to a State for gross violations of human rights and precluding the claimants from requesting damages of those violations, was incompatible with the right to judicial protection of fundamental rights, a core principle of the Italian constitutional order. The *Corte Constituzionale* noted that by upholding immunity the claimants would be effectively denied access to justice, with no other form of judicial redress.[79] While the right to judicial protection can be limited by reasons of public interest as maintaining good international relations, granting immunities to a State accused of war crimes, goes beyond the proportionality threshold vis-à-vis the protection of fundamental rights.[80]

Additionally, the *Corte Constituzionale* discarded the procedural-substantive argument adduced by the Italian government—replicating the same reasoning of the ICJ. That is, the immunities examination should not regard the seriousness of the wrongful acts at stake because otherwise it would result in an analysis of the merits. The *Corte Constituzionale* precised that when assessing jurisdictional objections, a *prima facie* analysis of the parties' arguments is required.[81]

Considering the above, it is no surprise that in the *Rina* case, another Italian Court referred a preliminary question to the ECJ inquiring if the Brussels Regulation, Article 47 CFR/Article 6(1) ECHR[82] could allow an Italian court to waive the alleged jurisdictional immunities of a private actor acting on behalf-delegation of a

[74] Ibid.

[75] See Jervis (2019)

[76] See note *supra* 54, para. 106.

[77] Ibid. para. 104.

[78] Italian Constitutional Court, judgment 238/2014 of 22 October 2014, IT:COST:2014:238. For a commentary on the constitutional arguments, see De Sena P (2017) pp. 64–71.

[79] Ibid. Italian Constitutional Court judgment, para 5.1 *in fine.*

[80] In connection with the right to a judge envisaged in Art. 24 of the Italian Constitution.

[81] Ibid. *supra* note 80 at para 2.2 and see Pavoni (2015), p. 403.

[82] The right to effective remedy and to a fair trial is enshrined in Article 47 CFR, which is the equivalent to Article 6(1) ECHR.

sovereign state, since granting immunity could impact the right to access courts of the claimants.[83]

The ECJ, in an *obiter dictum* fashion provided some guidance "the referring Court must satisfy itself that, if it upheld the plea relating to immunity from jurisdiction, […] the claimants would not be deprived of their right of access to the court, which is one of the elements of the right to effective judicial protection in Article 47 of the Charter". An international law-friendly and non-*Völkerrechtsfreundlich* readings can be inferred: On the one hand, if the recognition of immunity does not impair the right to access courts of the parties, customary international law on immunities could "prevail" over secondary EU law (The Brussels Regime).[84] On the other hand, where a conflict between immunity from jurisdiction and the application of the Charter arises, the ECJ instruction to national judges suggests that granting immunity should be limited, insofar as upholding immunity could result in hampering the chances of the plaintiffs to exercise their right to effective judicial protection stemming from Article 47 CFR. In other words, primary EU law (the CFR) would trump customary international law, narrowing the immunities effect. Moreover, this passage expresses the polar opposite to what the ICJ held in respect of making immunity dependant on the outcome of a balancing exercise.[85]

To this extent, the ECJ proposition puts EU national judges between a rock and hard space, confronted with two competing obligations: first, respecting the primacy of EU law and second, complying with customary international law. Leading thus, to a second issue for national courts to resolve: can a national court strike a fair balance between both norms?

In addressing the above dilemma, a look at ECtHR case-law on Article 6(1) ECHR is imperative. First, Article 6(1) ECHR is subject to limitations provided they are proportionate to the legitimate aim pursued.[86] Hence, the right of access to courts and therefrom, to obtain judicial redress, is not an absolute right. This was confirmed in the context of State immunity claims and the application of Article 6(1) ECHR.[87] Granting State immunity cannot be regarded as a disproportionate restriction of the right to access to a court.[88] The proportionality of the measure would depend on to what extent the measure undermines the essence of the right of access courts.[89] Further, granting immunity pursues the legitimate aim of "complying with international law to promote comity and good relations between States through the

[83] As mentioned earlier, the action brought by the claimants sought the compensation for damages against a ship certification company for the alleged responsibility in the sinking of a vessel.

[84] It should be noted that EU secondary law does not take precedence over international law.

[85] Ibid *supra* note 52 para 93.

[86] ECtHR judgment, *Golder v the United Kingdom*, app no. 4451/70, 21 February 1975, CE:ECHR:1975:0221JUD000445170.

[87] See notably, ECtHR judgment, *Al-Adsani v the United Kingdom*, app no.35763/97, 21 November 2001. CE:ECHR:2001:1121JUD003576397.

[88] Ibid, para 56.

[89] ECtHR judgment, *Cudak v Lithuania*, app no. 15869/02, 20 March 2010, CE:ECHR:2010:0323JUD001586902, para 74.

respect of another State's sovereignty[90]". In *Jones and Others*,[91] the ECtHR endorsed this approach, even though the applicants requested to revisit the proportionality assessment performed by the Court in *Al-Adsani*, arguing that the proportionality test should extend to the existence of alternative means of redress. The ECtHR, decided not to engage in a new assessment.[92] In other judgments, the ECtHR concluded that the mere alternative of judicial remedy shall not constitute by itself a violation of the right of access to a court[93] and purposely referred to the ICJ decision on *jurisdictional immunities*. Surprisingly, in *Waite and Kennedy,*[94] a case concerning an IO immunity and the applicants' right to access courts, the ECtHR, in carrying out the proportionality test deemed a material factor the fact that the claimants have reasonable alternative means to seek redress.[95]

Regarding the application of Article 47 CFR in the EU law sphere, the *Benkharbouche* case[96] in the UK illustrates how as a result of the international, EU, and national legal orders overlap,[97] the need to strike a balance between competing obligations comes into play at national level. The judgment features how the application of a right to a remedy under Article 47 CFR can in fact limit immunity due to the primacy of EU law. Moreover, it displays the multi-polar human rights setting around the right to effective remedy of private individuals[98] vis-à-vis immunity law before national courts.

The English Court of Appeal was called to examine the articulation of the State Immunity Act (SIA) provisions with customary international law and Article 6(1) ECHR/47 CFR. The judgment focused on determining if the SIA provisions granting immunity went beyond what is strictly required under customary international law in order to establish the compatibility of those provisions with Article 6(1) ECHR.[99] The English Court of Appeal refrained from neither following the approach of the ECtHR discussed above nor several UK authoritative judgments suggesting that immunities are not engaged with Article 6(1) ECHR.[100] The English decisions did

[90] See *supra* note 87, para 54.

[91] ECtHR judgment, *Jones and Others v. the United Kingdom*, applications nos. 34356/06 and 40,528/06, 14 January 2014, CE: ECHR:2014:0114JUD003435606, para. 186.

[92] ECtHR judgment *Jones and Others,* para. 195.

[93] ECJ judgment, *Stichting Mothers of Srebrenica and Others v The Netherlands*, application no. 65542/12, 11 June 2013, CE:ECHR:2013:0611DEC006554212, para 164.

[94] ECtHR judgment, *Waite and Kennedy v Germany*, App No 26083/94, 18 February 1999, CE: ECHR:1999:0218JUD002608394.

[95] Ibid, para. 68.

[96] England and Wales Court of appeal judgment, 5 February 2015, *Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya* (2015) EWCA Civ. 33.

[97] See Ziegler (2017)

[98] Ibid at p. 146.

[99] See *supra* note 96 para. 53.

[100] See *supra* note 96 paras 13–14, particularly the case on *Holland v. Lampen-Woolfe.*

not conceive the privilege on immunities as a jurisdictional exception but rather as a defense removing altogether the court's jurisdiction.[101]

While the interplay between customary international law and Article 47 CFR needs to be further scoped by the practice of EU national courts, the learnings from the ECtHR seem to dominate the current EU national landscape. Good examples can be found in the context of the respective national proceedings in *Rina* and *Supreme*. The Italian Supreme Court, in a 2020 decision concerning a parallel case[102] to *Rina*, reviewed whether a Court of lower instance could have jurisdiction to hear a case where the Rina companies also raised the immunity defense in relation to their classification and certification of ship activities. The Italian Court highlighted the centrality of fundamental rights[103] while stating that the Italian constitutional order can only recognize a restrictive approach to immunity given the need to balance out the exercise of immunity with the fundamental right of access to a court.

In framing its argument, it acknowledged that the right to access courts is sanctioned at the international level—interestingly, remarking that it was not only confined to Article 47 CFR—but also in the Italian Constitution,[104] and where immunities do not pursue a legitimate aim, they can unreasonably restrict the right to access to a court. Consequently, an Italian court assessing if it can give effect to party immunity rights, should also evaluate if that immunity is not disproportionate to the claimants right to access courts.

In *Supreme*, the clash between jurisdictional immunities and the right to access courts arose within the national proceedings on the merits.[105] The Dutch Court of Appeal, relying on the ECtHR *Waite and Kennedy* and *Stichting Mothers of Srebrenica* judgments, concluded that the national judge must perform a case-by-case analysis to determine whether an IO offers reasonable alternative means to protect the rights set forth under Article 6(1) ECHR, and if needed, set aside the immunity of jurisdiction of the IO. The Dutch Court was of the view that Supreme had a reasonable dispute settlement mechanism available to submit its claims, thus, Article 6(1) ECHR was not breached by upholding immunity from jurisdiction.[106]

Although the ECtHR proportionality test can be an initial mechanism to balance both obligations also when applying Article 47 CFR, national courts would still need to delve into the question of whether having alternative means of redress or forum could be the *ratio decidendi* in restricting immunity. In connection to article 6(1) ECHR cases, Garnett has stressed the significance of having alternative

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[101] This resonates with AG Ruiz-Jarabo Colomer reasoning on the *Lechouritou* case see *supra* note 54 and with the position of the ICJ in *jurisdictional immunities*.

[102] Italian Supreme Court, Judgment 28,180/2020 of 10 December 2020, case Abdel Naby Hussein Mabrouk.

[103] Ibid, para. XII.

[104] Ibid. para. XI *in fine*.

[105] Judgement of the Den Bosch Court of Appeal, 10 December 2019, SHAPE and JFCB v Supreme Site Services, NL:RBLIM:2017:1002 (Check link).

[106] Ibid. para. 683. The Dutch Court found the Release of Funds Working Group which was agreed by the parties to settle any possible contractual differences, a reasonable dispute settlement mechanism. Therefore, the Court had no jurisdiction.

forum for private individuals to obtain redress and proposed to make the granting of immunity subject to provision of an alternative forum.[107] This could be achieved, so the argument goes, by requiring the defendant State to offer its own courts for adjudication.[108]

However, this seems problematic when private law bodies or IOs rely on immunity. In the former, the extension of State immunity to private entities is not systematic and as the *Rina* case shows, typically the Foreign State does not take part in the litigation, so it would be for the private actor to demonstrate that the State courts on behalf of which it acts is in the position to settle the dispute. In the latter, an IO would need to prove that it offers alternative means of redress. Having regard to the proceedings in *Supreme*, this may be conditioned by the existence of a dispute settlement mechanism or the establishment of an ad-hoc arbitration body to hear the claims.

Yet, it remains unclear if the fact that the immunity plea is alleged by a State, a private body acting on behalf of a State or an IO would make a difference, whether such a distinction is appropriate, and under which criteria should be established.

3 The ECJ' Role in Developing Public International Law

So far, the ECJ *Rina* and *Supreme* cases have acted as a lens to explore different aspects of the relationship between Private EU law and PIL. Yet, both cases raise a much further-looking question: can the ECJ as the judicial actor of the EU influence the development of PIL through its case-law?

Tackling the question requires some preliminary remarks to set the right expectations. To begin with, one should keep in mind that the ECJ is the Court of the EU—a regional IO—and its functions gravitate around disputes of EU law. The Court encounters issues of PIL while fulfilling its primary task: interpreting and applying EU law.[109] Yet, it is evident that questions of PIL come before it not fortuitously but rather on a steady basis. Next, going beyond the criticism about its approach toward PIL, what should be discussed is how the ECJ should give effect to the obligation set under Article 3(5) TEU to contribute to the strict observance and development of PIL. Admittedly, the duty to respect international law is quite abstract, subject to concretization within the context of a given case and to conformity with EU law. While the Court must preserve the integrity of the EU legal order, it should pay attention to the way it interprets and applies PIL. One can agree that mastering international law should not be one of the skills of the Court judges and that international

[107] Garnett (2018) p. 15.

[108] Ibid. p. 14.

[109] Article 19(1) TEU.

law cannot be applied aseptically without considering the EU values.[110] However, interpreting international law with a short-sighted vision or a too EU-centric one can have an undesired distorting effect for the international law discipline and hinder the Court's chances to be instrumental in shaping international law.

Odermatt has provided a thorough study on the variety of ways that PIL questions come before the Court, how it deals with them and how it may resort to the authority of the ICJ judgments in an attempt to reassure its commitment with international law.[111] It is argued that when required, the Court relies in international law, cites Article 3(5) TEU in its judgments and refers to the duty to observe PIL. However, a mere statement to the strict observance and contribution to PIL is just a formality. Although the ECJ already plays a role in concretising principles of international law throughout its case-law, in order to make a sound contribution at global level, the ECJ needs to redefine its approach to international law rules. As Odermatt suggests, the Court has the tools to develop a more principled method to international law issues, *inter alia*, taking into account the legal traditions of the MS[112] but also looking at the practice of other international tribunals. Article 3(5) should not be used as the default status of the Court reasoning toward compliance with PIL but rather as the compass to achieve the strict observance of PIL. To that effect, an appropriate method to use PIL will ensure coherence and avoid fragmentation.

Avoiding fragmentation is especially relevant in the context of the EU external action, where the Court is bound to face politically sensitive cases, which in turn involve highly controversial issues of PIL. Judgments dealing with PIL issues like self-determination, terrorism, and the legal status of occupied territories will receive major scrutiny globally. The relevance of consistent use of international law in these instances should therefore not be underestimated. Take for example the judgments on *Front Polisario*[113] and *Western Sahara Campaign*[114] posing complex issues pertaining to self-determination, the territorial scope of international agreements, and the doctrine of the relative effect of the treaties. Many commentators have called into question how the Court circumvented the political issues involved and in so doing, bended the PIL rules involved to a breaking point.[115] Notably, the criticism arose regarding the way the Court applied the rules on treaty interpretation laid down in article 31.3 VCLT. For the sake of safeguarding the unity and integrity of PIL, international lawyers insist on the need for the ECJ to engage thoroughly with international law rules.

In this setting, one wonders if the ECJ *Rina* judgment could contribute to the reformulation of the concept of immunity under customary international law. Concretely,

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[110] In this respect, see Malenoswký (2013) p. 58. He notes that in the process of domesticating international law, each State can shape international law to adapt it to its legal tradition and values arguing that the EU does the same.

[111] Odermatt (2016) and Odermatt (2019)

[112] Odermatt (2016) p. 67.

[113] See *supra* note 32.

[114] ECJ judgment of 27 February 2018, *Western Sahara Campaign UK*, C-266/16, EU:C:2018:118.

[115] See Kassoti (2019) and Cannizzaro (2018)

whether it could carry weight into a human rights limitation on immunities. As stated above, the ECJ succinctly answered the referring court concern over immunities limiting the right to access courts. Albeit brief, the statement was powerful: if one of the elements of the right to effective judicial protection—e.g., the right to access courts—is undermined, immunity will not be upheld, regardless of its customary international law status.

It is beyond doubt that the judgment has opened a door for EU national courts to consider that, when EU law comes into play and immunity impairs the right to access courts under Article 47 CFR, immunity should bow to the protection of a fundamental right.

The question is, can the ECJ judgment make a statement of its own and have an effect beyond the EU boundaries? If so, what relevance would it be awarded? Would it amount to the practice and acceptance of law of a State's court, to the contribution of an international court or as the expression of 27 MS? The International Law Commission (hereinafter, ILC) has recently confirmed that IOs—citing the EU as an example—may contribute to the formation or expression of customary international law in certain cases.[116] One could assume then, that the ECJ, as the judicial body of the EU, has a role to play in the formation/identification of a new custom.

In addition, the ILC also referred to the significance of decisions national and international courts and tribunals on questions of international law as a subsidiary means for the determination of customary international rules.[117] Still, it noted that the value of such decisions varies and will depend on the quality of the reasoning and the reception of the decision, in particular by States and case-law.[118] This turns the spotlight on the need for the ECJ to approach PIL properly but also on the academic discussion about the ECJ being closer to a municipal court or an international one.

It has been submitted that in developing customary international law, the ECJ may differ in the way a court of a State does it, especially, when applying state-centric concepts as territoriality and jurisdiction to the context of IOs.[119] However, in this specific passage of the *Rina* judgment, the Court's reasoning resembles more to a constitutional court dealing with fundamental rights and the permeability of PIL rules at a domestic level. Here, the displacement of customary law to a lower rank is a consequence of the primacy of the CFR, but it could also be perceived as the obligation to respect fundamental rights in the context of international law and evidence altogether a form of practice and *opinio juris.*

At any rate, if the reception of the decision and subsequent case-law can back up the existence or identification of a customary international rule, EU national courts will have to comply with the instruction of the ECJ, and through their judicial decisions, they can contribute to the realization of a limitation to immunities. Ultimately, apart from its capacity to contribute to a new customary rule shrinking the position of

[116] International Law Commission (ILC), Draft conclusions on identification of customary international law, with commentaries (2018); for further comment Daugirdas (2020), p. 204.

[117] Ibid. Conclusion 13.

[118] Ibid. Conclusion 13, Commentary (3).

[119] Odermatt (2017) pp. 21–22.

immunities vis-á-vis human rights, one could only hope that *Rina* anticipates winds of change after the *Jurisdictional Immunities of the State* case and can be used as a sword to enhance the position of human rights as a global value of the international community while confirming the pertinence of the ECJ as a global actor.

4 Conclusion

By focusing on the ECJ *Rina* and *Supreme* judgments dealing *inter alia* with the effects of immunities pleas on the application of jurisdictional rules under the Brussels Regime, this article has navigated through the blurry boundaries between Private EU law and PIL. The interplay between both disciplines should be contextualized within the interaction of EU law as an autonomous legal order and international law.

The cases under review reveal the challenges faced by EU national courts in charting a line between jurisdiction and immunities and achieving compliance with both EU law and PIL. While at first glance, Private EU law rules on jurisdiction—the Brussels Regime—seem to clash with the duty to recognize immunities, the ECJ clarified that exercising the jurisdictional competence flowing from Private EU law in civil and commercial judicial proceedings where a party alleges immunity, does not restrict the scope of immunities. Customary international law on immunities will be analyzed in the light of international law, once the national judge has established its competence under Private EU law.

Moreover, the *Rina* judgment acknowledged the primacy of the Charter by displacing customary international law on immunities to a lower rank when it is at odds with Article 47, concretely, with the right to access courts and to an effective remedy of private individuals. In coordinating the compliance with the supremacy of EU law and with PIL, EU national courts, however, would still need to define the parameters to strike a balance. In this quest, national judges may rely on the learnings from the ECtHR. Nevertheless, it remains to be seen if having alternative means of redress or the availability of another forum are key factors in the assessment.

As seen, the ECJ has been applying PIL throughout its judgments since its inception and certainly plays a role in its development. However, it is observed that to make a sound contribution and become a global actor, the Court needs to ensure a coherent and uniform approach toward international law while at the same time, gives legs to the duty under Article 3(5) TEU to contribute to "the strict observance and development of international law". In this fashion, the *Rina* judgment may be signaling a change to the wider world after the *Jurisdictional Immunities of the State* case, contributing to enhance the position of human rights vis-á-vis immunities as a limitation of the latter.

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Chapter 13
Children's Rights Law and Private International Law in Family Matters: What Do Referencing Patterns Reveal About Their Relationship?

Tine Van Hof

Abstract This chapter aims to uncover the relationship between children's rights law and private international law in international child abduction cases. The relation between both domains is first analyzed against the background of the theory of fragmentation. This shows that the domains are substantively and institutionally fragmented. While fragmentation need not be a bad thing, it is important that it does not lead to domains de-linked from each other. One way in which such a link between domains can be ensured is by establishing an explicit dialogue between them. In parts three and four of this chapter, referencing patterns between the domains' instruments and actors are examined to uncover whether there is such a link based on dialogue. The analysis of these referencing patterns will show that there are indeed various links between the two domains on the level of both their instruments and actors.

Keywords Children's rights law · Private international law · Fragmentation of international law · International child abduction · Referencing patterns between legal instruments · Referencing patterns between supranational courts

[1] Children's rights law is defined as a 'legal category that refers to the fundamental rights of children, i.e. the human rights of children' (Vandenhole et al. (2015), p. 27).

[2] Private international law in family matters consists of two components. First, private international law governs the relationship between different (national) legal systems. To do that, it includes rules on jurisdiction, applicable law, recognition, enforcement and on administrative and judicial cooperation (Kruger and Verhellen (2015), pp. 4–9). Second, the concept 'family matters' covers the distinct relationships between family members (horizontal, vertical, or at the intersection) and their rights and duties with respect to each other (Swennen 2019 pp. 3–4).

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1 Introduction

Children's rights law[1] and private international law in family matters (hereinafter: family law)[2] are two domains of law that apply to many of the same situations. One can think, e.g., of child abduction, adoption, or surrogacy. The relation and the interaction between both domains form the central thread of this contribution.

Their relation will first be analyzed from the perspective of the theoretical framework on the fragmentation of international law. This framework's basic premise is that the international legal order is fragmented into numerous "specialized rule-systems". This concept is defined in part two, and the domains of children's rights law and family law are tested against this definition. The analysis will make clear that those two domains can be considered "specialized rule-systems", but that this is not necessarily a bad thing. However, what must be avoided is this leading to "self-contained islands of international law, de-linked from other branches of international law".[3] One way to ensure a link between these domains is by establishing an explicit dialogue between them.

In parts three and four, this contribution aims to uncover whether such a link between children's rights law and family law exists by examining the referencing patterns between their instruments and actors dealing specifically with international child abduction. This focus is chosen because, in child abduction situations, both domains claim they serve the child's best interests while they have a different approach regarding this concept. Thus, while claiming to serve the same aim, both domains can come into conflict.[4] In that regard, it is all the more important for the domains to take each other into account. References between family law instruments that are relevant in a European context and that deal with the topic (the 1980 Hague Convention, the Brussels II *bis* Regulation, and the Brussels II *bis* Recast Regulation) and the most important children's rights law instrument (the United Nations Convention on the Rights of the Child (UNCRC)) will be analyzed in part three of this contribution. Lastly, in part four, the contribution will look at the references between the two supranational courts dealing with the topic (the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU)).[5]

[3] Pauwelyn (2004), p. 904.

[4] Fully following the children's rights approach when deciding on an international child abduction may lead to a different and conflicting outcome than when one fully follows the family law approach (see example in footnote 21).

[5] Domestic courts also play an important role in this dialogue since they are the ones that must apply the rules of both domains in the first place. However, it would lead us too far for the limited scope of this contribution to include an analysis of the referencing patterns of domestic courts.

2 Children's Rights Law, Family Law, and the Fragmentation of International Law

The fragmentation of the international legal order can occur on a substantive and an institutional level.[6] Both levels can also be distinguished for the children's rights and family law domain and are discussed in the subsequent sections.

2.1 Substantive Fragmentation

Substantive fragmentation entails the emergence of specialized rule-systems in response to the precise needs of actors in the global society.[7] In that sense, fragmentation reflects the complexity that the international legal order has acquired; it "has matured into a complete legal system covering all aspects of relations"[8] and thus requires differentiated norms.[9] According to the International Law Commission (ILC), a set of rules qualifies as a "specialized rule-system" if it consists of "interrelated wholes of primary and secondary rules that cover some particular problem differently from the way it would be covered under general law".[10] In line with this definition, children's rights law and family law can be considered specialized rule-systems. They both include primary and secondary rules[11] and cover a particular problem in a specific way; they emerged to "respond to new technical and functional requirements".[12]

Children's rights law emerged shortly after the First World War to address the needs of children as a special vulnerable group.[13] Over the years, children's rights law developed and culminated in the 1989 United Nations Convention on the Rights

[6] A third level of fragmentation (methodological fragmentation) is defined by Andenas and Bjorge (Andenas and Bjorge (2015)). However, this level will not be discussed given the limited scope of this contribution.

[7] International Law Commission (2006), pp. 13–14; Martineau (2016), pp. 10 and 16; Peters (2016), pp. 1012–1014; Megiddo (2019), pp. 115–116.

[8] Franck (1995), p. 5.

[9] Peters (2017), p. 680.

[10] International Law Commission (2006), pp. 68 and 247.

[11] Primary rules set the standard for the behaviour of the rules' addressees. They entail obligations or prohibitions. Secondary rules regulate the creation, modification, extinction, interpretation, and operation of the primary rules and determine the consequences when one fails to comply with the primary rules (Gourgourinis (2011), p. 1016). The UNCRC includes primary rules in its first part (Articles 1–41) and secondary rules in its second and third part (Articles 42–45 and 46–54). In the 1980 Hague Convention, one could identify the first four chapters (Articles 1–21) as primary rules and chapters five and six (Articles 22–45) as secondary rules.

[12] International Law Commission (2006), p. 14.

[13] Verhellen (1997), pp. 64–65, Fortin (2009), pp. 36–37.

of the Child.[14] The objective remained the same, namely addressing the special safeguards and care that children need.[15]

Family law instruments emerged to cater to the needs created by the internationalization of family relations.[16] National laws became inadequate to manage family issues and to address parents' and children's needs since families were formed, extended, and dissolved across borders.[17] As an example, the creation of an instrument dealing with international child abduction was prompted by the increase of child abductions due to increased migration.[18]

While the existence of specialized rule-systems, such as children's rights law and family law, reflects the complexity and maturity of the legal system and is in that sense a positive thing, it can also pose problems. The problem does not lie in the mere existence of these specialized regimes, but in the fact that "specialized law-making […] tends to take place with relative ignorance of legislative and institutional activities in the adjoining fields".[19] This ignorance might then result in conflicts between the rules of rule-systems.[20] Such a conflict can indeed arise between children's rights law and family law in child abduction situations. In one and the same case on international child abduction, the judge might come to a different and thus conflicting outcome when fully applying one or the other domain.[21] This is due to the domains' focus on a particular problem, which results in a different approach to the concept of the child's best interests. Family law approaches the concept of the child's best interests in a general way by providing for a quick return procedure. The idea behind this approach is that child abduction is not in the best interests of children in general and that restoring the *status quo* when the abduction took place is the best solution. Children's rights law approaches the concept in an individual way by providing that the best interests of the (individual) child shall be a primary consideration in all matters involving the child (Article 3 UNCRC).

[14] Fortin (2009), pp. 37–39.

[15] UN General Assembly (1989), p. 3, preamble.

[16] On the internationalisation of family relationships, see e.g. Estin (2010).

[17] Estin (2010), pp. 47–48.

[18] Dyer (1980), pp. 18–19, Beaumont and McEleavy (1999), p. 2, Loo (2016), p. 615.

[19] International Law Commission (2006), p. 8.

[20] International Law Commission (2006), p. 11; Peters (2017), p. 678–679.

[21] As an example, when a child with medical problems is abducted from a poor country to a rich country, it is in line with family law instruments to return the child to the poor country since abduction is seen to be contrary to children's interests. When considering children's rights law instruments, it could be deemed better for this individual child to stay in the rich country since health care is better.

2.2 Institutional Fragmentation

Fragmentation on the institutional level entails the proliferation of implementing organs—often specialist courts—for specific rule-systems.[22] On the international level, the UN Committee on the Rights of the Child serves as an implementing organ for the domain of children's rights law. The domain of family law does not have such an organ on the international level. In the European context, children's rights issues will be submitted to a different supranational court than questions on family law. For children's rights law issues, parties can turn to the ECtHR, which has a practice of interpreting the European Convention on Human Rights (ECHR) in the light of the UNCRC.[23] For questions concerning the interpretation of EU law, domestic courts can request a preliminary ruling by the CJEU.[24] Then, the specific EU law under interpretation is the Brussels II*bis* Regulation. However, the relevant Articles of the Regulation supplement the Hague Convention.[25] This close link between both instruments means that the interpretation of Brussels II*bis* by the CJEU also has implications for the interpretation of the Hague Convention.[26]

Institutional fragmentation has positive and negative consequences. First, the complexity of the legal order on the substantive level requires judicial bodies that can deal with specialized problems.[27] Further, the existence of more judicial bodies leads to more case law, which goes hand in hand with "an improvement in the quality of judgments"[28] and "a further elucidation of fundamental principles underpinning the order".[29] However, "much depends on how the judges […] make use of the case-law of others, potentially competing bodies".[30] If one judicial body "relies on the case-law of other such [bodies], applies and maybe develops it, without, however, changing it fundamentally, it will add to the legitimacy of a judgment".[31] This technique, called judicial dialogue, contributes to a certain consistency in the case law and thus has a positive impact on the coherence of the international legal system.[32] In the other case, if judicial bodies do not look at the case law of judicial bodies of

[22] International Law Commission (2006), p. 247, Megiddo (2019), p. 115. For an extensive discussion on such organs see: Popa (2018).

[23] Kilkelly (2001), Peters (2017), p. 679. This is also apparent in child abduction cases, see e.g. ECtHR, *Maire v Portugal*, no. 48206/99, 26.06.2003, para. 72.

[24] Article 19(3)(b) TEU and Article 267 TFEU.

[25] McEleavy (2005), pp. 5–6, Trimmings (2013).

[26] Dekar (2011), pp. 1466–1468.

[27] Popa (2018), pp. 21–22.

[28] *Ibidem*, p. 22.

[29] Peters (2017), p. 681.

[30] *Idem.*

[31] Popa (2018), pp. 23–24.

[32] Kassoti (2015), p. 34, Popa (2018), pp. 23–24.

adjoining fields, deviating institutional practices and divergent—but equally authoritative—jurisprudence may occur.[33] This then leads to a lack of clarity, predictability, and legal certainty.[34]

3 Referencing Patterns Between Instruments

As mentioned before, children's right law and family law can come into conflict since they have different approaches to the concept of the child's best interests. This raises the question of whether children's rights law and family law overlooked each other while the law-making took place and whether both domains are thus de-linked.

3.1 Family Law

3.1.1 The 1980 Hague Convention

The text of the Hague Convention does not include references to legal instruments dealing with children's rights law. That no reference is made to the UNCRC is not surprising since the Hague Convention was adopted in October 1980, and the UNCRC in November 1989.[35] However, the domain of children's rights law already existed before the adoption of the UNCRC. The most important children's rights document before 1989 was the non-binding 1959 Declaration on the Rights of the Child (1959 Declaration).[36] The text of the Hague Convention suggests that this children's rights instrument has been taken into account since the preamble to the Convention states the following: "Firmly convinced that the interests of children are of paramount importance in matters relating to their custody". This concept of the child's best interests was first introduced in Principle 2 of the 1959 Declaration.[37] This presumption is strengthened by the drafting history, which started with a study of the legal and social aspects of child abduction, initiated by the Hague Conference. This study was produced by the First Secretary of the Conference at that time, Dyer.[38] In his report, Dyer pays extensive attention to the then existing legal context, including "Human Rights Conventions, Declarations and Recommendations".[39] Dyer first refers to four human rights law instruments that include provisions relevant from a children's rights

[33] International Law Commission (2006), pp. 11 and 247, Kassoti (2015), pp. 31–32.

[34] Peters (2017), p. 679, Megiddo (2019), p. 121.

[35] This does not detract from the fact that the drafting period of both instruments overlapped (Office of the United Nations High Commissioner for Human Rights (2007), p. 31).

[36] Fortin (2009), pp. 36–39.

[37] Wolf (1992), p. 125.

[38] Bodenheimer (1980), p. 101.

[39] Dyer (1980), pp. 12–51.

perspective: Article 25(2) of the Universal Declaration of Human Rights, Article 8 of the ECHR,[40] Article 24 of the International Covenant on Civil and Political Rights, and Article 19 of the American Convention on Human Rights.[41] He concludes the part on the legal context with a reference to the 1959 Declaration as an instrument fully concerned with children's rights. However, he does not refer to the latter instrument as a separate source of law. Rather, he observes that "the drafting of the [International] Covenant and the American Convention may well have been influenced by the ten principles for the well-being of all children which were set forth in the Declaration of the Rights of the Child".[42] The minimal attention given to the 1959 Declaration may be explained by its non-binding character. Notwithstanding this minimal attention to the only instrument fully focused on children's rights, it is apparent that during the preparation for the Hague Convention, the drafters did not overlook the state of play in the domain of children's rights law.

This conclusion is supported by the Explanatory Report on the Hague Convention, of which Section C is dedicated to the "Importance attached to the interest of the child".[43] While also this section does not explicitly refer to the 1959 Declaration, it is maintained that the silence of the dispositive part of the Hague Convention "ought not to lead one to the conclusion that the Convention ignores the social paradigm which declares the necessity of considering the interests of children in regulating all the problems which concern them".[44] The Explanatory Report further states that the Convention and more specifically the right not to be removed or retained is based upon children's "true interests".[45] In this regard, reference is made to the first general principle of Recommendation 874 of the Parliamentary Assembly of the Council of Europe.[46] This Recommendation invites the Committee of Ministers to take the necessary steps for the creation of a European Charter on the Rights of the Child. The first general principle that must be taken into account is that "children must no longer be considered as parents' property but must be recognized as individuals with their rights and needs".[47] Although this children's rights law instrument has never been adopted, it makes again clear that the drafters of the Hague Convention were aware and receptive of the developments in the children's rights law domain.

Lastly, we turn to the recent Guide to Good Practice on Article 13(1)(b) of the Hague Convention.[48] While this document does not form part of the law-making process, it does shed light on how children's rights law is viewed and possibly included in the discourse on family law. The Guide refers twice to Article 12 UNCRC,

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[40] Dyer observes, however, that Article 8 ECHR 'does not appear to be a very strong guarantee of a minor's rights within the family' (*Ibidem*, p. 33).

[41] *Ibidem*, p. 32–34.

[42] *Ibidem*, p. 33.

[43] Pérez-Vera (1980), pp. 430–432.

[44] *Ibidem*, p. 431.

[45] *Idem.*

[46] *Idem.*

[47] Parliamentary Assembly of the Council of Europe (1979).

[48] Hague Conference on Private International Law (2020).

which provides for the right of the child to express his/her views.[49] It is pointed out that States member of both the Hague Convention and the UNCRC have "obligations in relation to issues such as the participation of children in return proceedings".[50] It is further stated that "the 1980 Convention supports the right of children to be informed of the process and consequences of return proceedings, and to express views in return proceedings".[51] It is noteworthy that, although the Guide includes several references to the concept of the child's best interests, there is no reference to Article 3 UNCRC. Especially since the draft of the Guide did refer to the UNCRC.[52]

3.1.2 The Brussels II*bis* Regulation

This Regulation is only applicable when a child is abducted from one EU Member State to another.[53] The Regulation, which still applies to legal proceedings instituted until 31 July 2022, includes four Articles relevant to international child abduction.[54]

Recital 33 of the preamble includes the only reference to a provision relevant from a children's rights perspective; it states that the Regulation "seeks to ensure respect for the fundamental rights of the child as set out in Article 24 Charter of Fundamental Rights of the European Union" (Charter). Next to this reference, recital 12 of the preamble, which is relevant for the Articles on international child abduction, points out that "the grounds of jurisdiction in matters of parental responsibility established in the present Regulation are shaped in the light of the best interests of the child". Article 10 on the jurisdiction in cases of child abduction is thus assumed to be shaped in the child's best interests. The text of the Regulation thus shows that the lawmakers were not ignoring children's rights law. However, references to children's rights law instruments are very limited.

The drafting history of Brussels II*bis* confirms that considerations of children's rights law were not at the top of the drafters' agendas. The Regulation was first incentivized by dissatisfaction concerning the functioning of the Hague Convention.[55] The second incentive was the European Council's statement that "the principle of mutual recognition […] should become the cornerstone of judicial co-operation in both civil and criminal matters".[56]

The Practice Guide for the application of the Regulation refers more extensively to children's rights law instruments. First, the Practice Guide refers twice to Article

[49] *Ibidem*, p. 16 and 56.

[50] *Ibidem*, p. 16.

[51] *Idem.*

[52] Permanent Bureau of the Hague Conference on Private International Law (2017), p. 9.

[53] This with the exception of Denmark (Article 2(3) Brussels II*bis*).

[54] Articles 10, 11, 40 and 42 Brussels II*bis.*

[55] McEleavy (2005), p. 5.

[56] European Council (1999).

12 UNCRC[57] to reiterate that courts dealing with international child abductions shall, in principle, give children the opportunity to be heard.[58] Reference is further made to Article 24(1) Charter, which also entails the child's right to express his/her views. Further, the Practice Guide states that "one of the main policy objectives of the Regulation is to ensure that a child […] can maintain contact with all holders of parental responsibility", which is said to reflect the principles underlying Articles 9 and 10 UNCRC and Article 24(3) Charter.[59] Lastly, the Practice Guide refers to Article 3 UNCRC as one of the UNCRC provisions that "have had a direct influence on the development of policies in proceedings involving children notably as to how children's rights and interests are to be taken into account".[60]

3.1.3 The Brussels II*bis* Recast Regulation

This Regulation modifies the rules on international child abduction in several ways. However, more interesting for this contribution are the numerous references to the child's best interests and the express references to the UNCRC throughout the Regulation's text.

Recital 19, which is similar to Recital 12 Brussels II*bis,* includes a first reference to the concept of the child's best interests. It contends that the grounds of jurisdiction in matters of parental responsibility are shaped in the light of the child's best interests but also, and this goes further than in Brussels II*bis*, that these grounds should be applied in accordance with the child's best interests. The concept of the child's best interests in the context of international child abduction cases is further mentioned in Recitals 20, 30, 47, and 48 and in several provisions specifically addressing child abduction cases.

An interesting novelty of the Recast Regulation is the express reference to other legal instruments to clarify how the concept of the child's best interests should be interpreted.[61] Reference is not only made to Article 24 Charter but also to the UNCRC. These express references cater to the criticism voiced by scholars on the ambiguous interpretation by Brussels II*bis* of the child's best interests.[62]

The UNCRC is also mentioned regarding the child's right to express his/her views.[63] Recital 39 points out that this right, as safeguarded by the Recast Regulation in Article 21, is in accordance with Article 24(1) Charter and Article 12 UNCRC. Indeed, a novelty of the Recast Regulation is that the wording of Article 21 was

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[57] European Commission (2016) Practice Guide for the Application of the Brussels IIa Regulation. Pp. 55 and 77.

[58] This obligation is enshrined in Article 11(2) Brussels IIbis.

[59] *Ibidem*, p. 43.

[60] *Ibidem*, p. 80.

[61] Recital 19 Brussels II*bis*.

[62] Kruger and Samyn (2016), p. 155.

[63] Recitals 71 and 84 also mention the UNCRC. However, these are not discussed since they are not relevant to international child abduction.

aligned with the wording of Article 12 UNCRC. Both Articles are almost identical, while the old Article regarding this right (Article 11(2) Brussels II*bis*) significantly differed in wording from Article 12 UNCRC.[64]

The text of the Recast Regulation makes clear that this instrument has an intensified relationship with children's rights law. References to this domain are not limited to outlining the legal landscape before the drafting of a new instrument (as for the Hague Convention) or to including them in guidelines on how the new instrument should be applied (as for both the Hague Convention and Brussels II*bis*). Instead, children's rights instruments and particularly the UNCRC are explicitly mentioned in the actual text of the new instrument and have an impact on the content of the latter. Indeed, the UNCRC influences the interpretation of the concept of the child's best interests, which is used several times throughout the Recast Regulation.

That the relationship between family law and children's rights law would be strengthened in the Recast Regulation was already apparent during the drafting phase. In the Commission's proposal for a recast, it stated that "the objective of the recast is to further develop the European area of Justice and Fundamental Rights based on Mutual Trust […] and to better protect the best interests of the child".[65] Thus, while the typical EU-objective of enhancing mutual recognition based on mutual trust was still an incentive, the protection of the interests of the child was also one. Further, the Commission stated that "the proposed changes will strengthen the rights of the child […] and bring the Regulation further in line with the [UNCRC] by linking the provisions more closely to it".[66] As discussed, Article 21 is the clearest example where the Recast Regulation was aligned with the UNCRC.

3.2 Children's Rights Law

This section focuses on the UNCRC. While also concerned with the rights of the child in Article 24, the Charter will not be analyzed since it is not a children's rights law instrument in its entirety. Further, it is acknowledged that the jurisdiction of the ECtHR to interpret children's rights law is mostly based on Article 8 ECHR, but also this Article will not be discussed since it does not entail specific children's rights law principles.

The final text of the UNCRC includes references to the Charter of the United Nations, to several human rights instruments, and the UNCRC's predecessors (1924 Geneva Declaration and 1959 Declaration). However, the text does not include references to any instrument adopted outside the UN framework. This can be explained by

[64] For an analysis on the difference in wording between Article 11(2) Brussels II*bis* and Article 12 UNCRC see: Van Hof et al (2020).

[65] European Commission (2016) Proposal for a Council Regulation. P. 2.

[66] *Ibidem*, p. 12.

pragmatic arguments. First, the UN is the most encompassing organization geographically speaking so an instrument under the auspices of the UN must reflect this.[67] Secondly, UN instruments such as the UNCRC are not aimed at providing rules applicable to one specific topic. On the contrary, the UNCRC aims at reflecting the basic rights of every child regardless of the specific situation the child finds himself/herself in.[68] A reference to a family law instrument dealing with a specific topic such as child abduction can thus not be expected.

An analysis of the legislative history, however, shows that the Hague Convention did have an impact on the UNCRC. In 1982, the Economic and Social Council voiced its concerns about the proliferation of conflicts between couples of different nationalities and the consequent proliferation of cases of removal and retention of children.[69] To address this issue, the Council invited States to conclude bilateral arrangements or to accede to regional or international conventions and expressly referred to the Hague Convention as an example. Further, the Council invited the Commission on Human Rights to "take into consideration the protection of the rights of the child in cases of unauthorized international removal" when drafting the UNCRC.[70] The Council's concern eventually led to current Articles 9, 10, and 11 UNCRC.[71]

Mostly Article 11 UNCRC is interesting when examined in light of the Hague Convention. The first paragraph of this Article provides that "States Parties shall take measures to combat the illicit transfer and non-return of children abroad". Interesting is the choice for "illicit transfer and non-return", which is different from the Hague Convention's wording of "wrongful removal or retention". The drafting history makes clear that the drafters of the UNCRC did look at the Hague Convention as an authoritative source but that there were differences in language versions.[72] To cover all nuances, it was proposed to use the term "illicit".[73] The second paragraph of Article 11 UNCRC reiterates the invitation of the Economic and Social Council toward States to conclude new agreements or to accede to existing agreements. Thus, not only did the UNCRC use the Hague Convention as an inspiration, it even promotes accession to the latter instrument. Not in that many words of course, but the Hague Convention was the most important existing instrument to combat child abductions

[67] The UN has 193 Member States (https://www.un.org/about-us/member-states. Accessed 12 July 2021). As a comparison: the Hague Conference on Private International Law has 89 Members (https://www.hcch.net/en/states/hcch-members. Accessed 12 July 2021) and the European Union 27 (https://europa.eu/european-union/about-eu/countries_en. Accessed 12 July 2021).

[68] Black (1986), p. 356.

[69] Economic and Social Council (1982) Resolution 1982/39 on the Protection of the rights of children and parents in cases of removal or retention of children (Office of the United Nations High Commissioner for Human Rights (2007), p. 100).

[70] *Idem.*

[71] *Ibidem*, pp. 102–106 and 108.

[72] The French language version uses the wording "déplacement et non-retour illicite".

[73] Office of the United Nations High Commissioner for Human Rights (2007), p. 436.

so it would only have been logical for States to accede to this instrument rather than acceding to the 1980 Luxembourg Convention[74] or creating a new instrument.[75]

Important for the interpretation of the UNCRC, are the General Comments written by the Committee on the Rights of the Child. General Comment no. 14 on the right of the child to have his/her best interests taken as a primary consideration, includes references to the Hague Convention.[76] The Committee encourages the ratification and implementation of the Hague Conference's conventions and thereby explicitly refers to the 1980 Hague Convention.[77] According to the Committee, these conventions "facilitate the application of the child's best interests and provide guarantees for its implementation if the parents live in different countries".[78]

4 Referencing Patterns Between Actors

References between actors are defined in literature as "judicial dialogue". This concept has several facets and the intensity of the dialogue can differ. The first facet is the mutual attentiveness of courts for each other's case law.[79] This attentiveness and the study of each other's case law can lead to a visible engagement (second facet). This can include the citation, discussion, application, and interpretation of the other court's case law.[80] A third facet, the "genuine dialogue", entails the exchange of views and experiences for example during inter-court conferences.[81] All these facets of judicial dialogue contribute to consistency in case law and thus to the coherence of the international system.[82]

In the following sections, the focus will be on the second facet of judicial dialogue, namely, the visible engagement between the ECtHR and the CJEU. The judicial

[74] The main differences between the Luxembourg Convention and the Hague Convention are the territorial scope (The Luxembourg Convention is ratified by 35 States and the Hague Convention by 101 (https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/105?module=signatures-by-treaty&treatynum=105 and https://www.hcch.net/en/instruments/conventions/status-table/?cid=24. Accessed 12 July 2021) and the obligation to have a court decision on custody before the Luxembourg Convention can be used.

[75] Fortin observes that Article 11 UNCRC might have had a positive influence on the accession of States to the Hague Convention (Fortin (2009), pp. 102–106).

[76] The General Comment further refers in broad terms to 'regional instruments and many national and international laws' in which the concept of the best interests of the child was already enshrined before the adoption of the UNCRC (Committee on the Rights of the Children (2013), p. 3).

[77] The Committee referred further to the conventions regarding intercountry adoption and maintenance obligations (Committee on the Rights of the Children (2013), p. 15).

[78] Committee on the Rights of the Children (2013), p. 15.

[79] Kassoti (2015), p. 35, Peters (2017), p. 695.

[80] Kassoti (2015), p. 35, Webb (2015), p. 167, Peters (2017), p. 695.

[81] Webb (2015), p. 167.

[82] Kassoti (2015), pp. 34–36, Peters (2017), p. 695, Popa (2018), pp. 23–24.

dialogue between these two courts has been discussed before,[83] but not with a focus on international child abduction.

4.1 The European Court of Human Rights

The only relevant case concerning international child abduction in which the ECtHR refers to the case law of the CJEU is *Povse v Austria*.[84] However, this is hardly surprising since the same dispute (involving the same child and parents) first led to a case before the CJEU.[85] The question before the CJEU most important for present aspirations was whether the enforcement of the order to return the child of the court of the State of origin (Italy) could be refused by the court of the State of refuge (Austria) because this judgment might be seriously detrimental to the child's best interests as a result of a change in circumstances arising after the adoption of the judgment. The CJEU decided that such a judgment cannot be refused and that a change in circumstances must be pleaded before the court in the State of origin. The Austrian Courts followed the CJEU judgment and consequently ordered the return of the child.

The mother then took the case to the ECtHR and claimed that the decisions of the Austrian courts to enforce the return order violated the right to respect for family life, guaranteed under Article 8 ECHR since they had not taken into account the argument that the return of the child would constitute a serious danger to her well-being. Interestingly, she acknowledged that the decisions of the Austrian courts were in accordance with the ruling of the CJEU, but she nevertheless asserted that they violated Article 8 ECHR.

The ECtHR bases its examination on its own *Bosphorus* case law.[86] This case law can be briefly summarized as follows. Even when a State is a member of an international organization to which they have transferred part of its sovereignty, such as the EU, it remains responsible under the ECHR for the measures taken to comply with their obligations *vis-à-vis* the international organization. The ECtHR has however decided that measures taken in compliance with such obligations are justified and presumed in compliance with the ECHR on three conditions. First, the international organization should protect fundamental rights as regards the substantive guarantees offered and the mechanisms controlling their observance. Second, the fundamental rights must be protected in a manner equivalent to that for which the ECHR provides. The ECtHR already found, regarding these first two conditions, that the EU does in principle offer equivalent protection of fundamental rights. Concerning the required mechanism controlling the observance of the fundamental rights, the ECtHR states

[83] Jacobs (2003), Voeten (2010), pp. 564–566.

[84] ECtHR, *Povse v Austria*, no 3890/11, 18.06.2013.

[85] CJEU, *Povse v Alpago,* C-211/10 PPU, 1.07.2010, ECLI:EU:C:2010:400.

[86] ECtHR, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, 30.06.2005.

that it has "particular regard to the role of the European Court of Justice".[87] Thirdly, the State should have done no more than strictly implementing legal obligations flowing from its membership of the organization. Regarding this last criterion, the ECtHR holds that the Austrian courts applied Article 42 Brussels II*bis*, which does not leave room for discretion. Further, the Austrian courts made use of the control mechanism by asking for a preliminary ruling by the CJEU. The ruling of the latter made clear that the Austrian courts did not have any discretionary power. Consequently, the ECtHR decides that also the last condition was fulfilled.

Lastly, the ECtHR had to examine the mother's argument that the CJEU has not considered the alleged violation of their rights under the ECHR, contrary to the *Bosphorus* case, and that therefore the presumption of equivalent protection has been rebutted. The ECtHR agrees that this case is different from *Bosphorus* since the CJEU was called upon to interpret Brussels II*bis* without being required to rule on alleged violations of fundamental rights. The ECtHR notes that the CJEU nevertheless made clear that within the framework of Brussels II*bis* "it was for the Italian courts to protect the fundamental rights of the parties involved" so the applicants are certainly not deprived of any protection of their Convention rights.[88] The ECtHR consequently decides that it cannot find any dysfunction in the control mechanisms for the observance of the rights guaranteed by the ECHR and declares the mother's application inadmissible.

While, as stated above, it is not surprising that the ECtHR referred to the CJEU in this case, *Povse v Austria* is nevertheless telling for the relationship between both courts. The case, both before the CJEU and the ECtHR, revolves around the automatic enforcement of a return decision taken in the State of habitual residence and thus around the principle of mutual recognition and mutual trust. This principle is very important in European family law.[89] The application by the ECtHR of the *Bosphorus* case law shows that it is "respectful of the way in which the principle of mutual trust […] operates within the EU".[90] Indeed, the ECtHR notes that the "presumption of equivalent protection is intended, in particular, to ensure that a State Party is not faced with a dilemma when it is obliged to rely on the legal obligations incumbent on it as a result of its membership of an international organisation".[91] The ECtHR thus shows that it is aware of the specific structure in which the CJEU and EU law operate and takes these specificities into account for its decision-making.

[87] ECtHR, *Povse v Austria*, para. 77.

[88] *Ibidem*, para. 85.

[89] For a discussion on this principle in the context of child abduction, see i.a.: Kruger and Samyn (2016); Bartolini (2019).

[90] Lenaerts (2019), p. 316.

[91] ECtHR, *Povse v Austria*, para. 104.

4.2 The Court of Justice of the European Union

The CJEU only explicitly referred to the ECtHR in the case of *McB v E*.[92] In this case, the Irish Supreme Court requested a preliminary ruling by the CJEU on the question of whether Brussels II*bis*.

> must be interpreted as precluding a Member State from providing by its law that the acquisition of rights of custody by a child's father, where he is not married to the child's mother, is dependent on the father's obtaining a judgment from a national court on the basis of which the removal of the child by its mother or the retention of that child may be considered wrongful, within the meaning of Article 2(11) of that Regulation.[93]

The CJEU considers that Brussels II*bis* does not determine which person must have rights of custody. This decision is fully entrusted to the law of the Member State where the child was habitually resident before the abduction. This conclusion is, however, not the end of the matter. The Irish Supreme Court further asked whether the Charter and in particular Article 7 thereof would affect such an interpretation of Brussels II*bis*. According to the father, such an interpretation could lead to a situation incompatible with his right to respect for private and family life (pursuant to Article 7 Charter and Article 8 ECHR), or with the rights of the child (pursuant to Article 24 Charter).

In its examination on whether fundamental rights preclude the specific interpretation of Brussels II*bis*, the CJEU recalls that the meaning and scope of rights guaranteed in the Charter shall be the same as those of corresponding rights guaranteed by the ECHR (Article 52(3) Charter). The CJEU determines that the right guaranteed by Article 7 Charter is nearly identical to that of Article 8(1) ECHR. Consequently, Article 7 Charter must be given the same meaning and scope as Article 8(1) ECHR, "as interpreted by the case-law of the European Court of Human Rights".[94] Thus, Article 52(3) Charter explicitly links the rights guaranteed in that instrument to the rights guaranteed by the ECHR and in that same vein also links the CJEU's case law to that of the ECtHR. It is then only logical for the CJEU to look at the ECtHR's case law as an inspiration for its decision-making.

The CJEU notes that the ECtHR ruled in the case of *Guichard v France* that it is not contrary to Article 8 ECHR for national legislation to grant parental responsibility by operation of law solely to the mother if the father can acquire parental responsibility through the decision of a national court.[95] Consequently, Article 7 Charter, read together with Article 8(1) ECHR and the ECtHR's case law, does not affect the interpretation given to Brussels II*bis*. Then, the CJEU turns to Article 24 Charter and decides that also this Article does not preclude the particular interpretation of Brussels II*bis* since the child's best interests are aptly protected by the possibility for

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[92] CJEU, *McB. v E.,* C-400/10 PPU, 5.10.2010, ECLI:EU:C:2010:582.

[93] *Ibidem*, para. 39.

[94] *Ibidem*, para. 53.

[95] ECtHR, *Guichard v France*, no 56838/00, 2.09.2003.

the father to request an award of custody rights to a national court. This enables this court to take into account all the relevant facts for a decision on custody.[96]

The case of *McB v E* shows that the CJEU is not only aware of the case law of the ECtHR but also uses it to guide its decision-making. This is not in the least due to Article 52(3) Charter, which provides that the meaning and scope of rights guaranteed in the Charter shall be the same as those of corresponding rights guaranteed by the ECHR. This provision opens the way for the CJEU to expressly rely on ECtHR case law, resulting in "a closer connection between the ECtHR and the CJEU" and "reducing the opportunity for divergent interpretations between the ECHR and the Charter".[97]

5 Conclusion

The referencing patterns between instruments show that the lawmakers in both domains did certainly not overlook the other domain. While the family law instruments itself do not contain many references to instruments of children's rights law, the drafting history, and the instruments developed to assist in instruments' interpretation and application do reveal an interesting referencing scheme to children's rights law. Doing the same exercise for the UNCRC leads to a similar outcome. The UNCRC does not explicitly refer to an instrument of family law, but the drafting history and the documents guiding the interpretation and application do show a clear link with family law instruments. While lawmakers are thus attentive to the state of play in the adjoining domain, this attentiveness is not reflected in the texts of the instruments itself. Therefore, the approach of the Brussels II*bis* Recast Regulation, which expressly refers to the UNCRC, is to be welcomed.

The examination of the referencing patterns between actors showed first that the case law of both courts included very few references to the case law of the other court; only one case of the ECtHR and one case of the CJEU included a relevant reference. Given the very few references between both courts, one cannot yet speak of genuine judicial dialogue in international child abduction cases. However, both cases in which the courts did refer to each other are telling for their relationship. The *Povse* case showed that the ECtHR is aware and respectful of the specific structure in which the CJEU operates and that it takes these specificities, as the principle of mutual trust, into account for its decision-making. In the *McB* case, the CJEU uses the case law of the ECtHR as guidance on how to interpret Article 7 Charter. This shows that the CJEU is not only aware of the case law of the ECtHR but also uses it to guide its decision-making. This is not in the least due to Article 52(3) Charter, which opens the way for the CJEU to expressly rely on ECtHR case law. These two cases thus show that both courts have mechanisms to consider the specificities of the other court. Such mechanisms contribute to the interlinkage of the courts and thereby

[96] CJEU, *McB v E*, para. 60.

[97] Dekar (2011), pp. 1469 and 1471.

help to avoid conflicting judgments. Nevertheless, a more extensive dialogue seems possible and should be encouraged.

The main question of this chapter was what referencing patterns reveal about the relation between children's rights law and family law. It can be concluded that these referencing patterns have shown various links between the two domains on the level of the instruments and the level of the actors. The various links between children's rights law and family law lead us to believe that both domains can harmoniously be applied in cases of international child abduction. Whether this belief is valid and they are applied together in practice by the domestic courts, is food for further research.

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Tine Van Hof is currently a PhD Candidate at the University of Antwerp (Belgium). Her research focuses on the interaction between children's rights law and private international law. More specifically, she looks at the best interests of the child as a concept that can lead to conflicts but simultaneously to conciliation between both areas of law. The title of her doctoral dissertation is: "Fragmentation of International Law: Issue Study on International Child Abduction Proceedings". During her study for the Master of Laws, she started doing research on the topic of international child abduction and the best interests of the child as a student researcher under the supervision of Professor Dr Thalia Kruger. Her Master's degree dissertation on the topic of international child abduction and the best interests of the child was published as an article in the Netherlands International Law Review. After obtaining her Master's degree but before commencing her PhD study, she became a member of the VOICE research team, an EU co-funded project on the practices of domestic courts dealing with international child abduction cases. She gave ample presentations on the results of the VOICE project and on the topic of international child abduction more generally and is the co-author of several publications on the latter topic.

Part IV
Future Trends in Relationship Between Public International Law and Private International Law

Chapter 14
Ringfencing Data?—Perspectives on Sovereignty and Localisation from India

Sai Ramani Garimella and B. Parthiban

Abstract Governance of data, essentially a free-flowing product of the industrial (technology-driven) revolution 4.0, has been the subject of much discussion and policy action among States. Such governance, however, has presented questions turning the traditional understanding of the right to regulate, which is based on the geographic location, heads down, given that the task of establishing the location of the data and thereby its linkages with a specific territory is involuted and arduous. On the other hand, concerns remain about the privacy-related issues of the data, either located or handled overseas, thereby presenting difficulties in access and administration of data. This research addresses the model of governance of data via the path of data sovereignty and, therefore, insistence on data localization. It further presents the law in India, sparse as it is, through the lens of jurisprudence and law reform efforts, wherein the eagerness to ringfence the data is evident, even in disregard of the contractual obligations.

Keywords Cyberspace · Data governance · Jurisdiction · Conflict of laws · Territorialisation · Data localisation · Data protection

[1] Interim orders in *Balu Gopalakrishnan and others v State of Kerala and others* W. P.(C). Temp. NO.84 OF 2020, https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2020/05/Balu-gopalakrishnan-v-State-of-kerala.pdf accessed 21/09/2021. The Kerala High Court exercised jurisdiction despite the presence of a forum selection clause that vested jurisdiction in the courts of New York.

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1 Introduction

> Therefore, as at present, we deem it apposite to confine our focus on ensuring that there is no breach of confidentiality of the data collected by the State and processed by Sprinklr, and since we are not in a position to conclusively persuade ourselves that the terms of the impugned contract would effectively ensure it, we feel it requisite to issue the following directions as an interim measure; also to enable this Court to obtain an overall control over the conduct of the parties in terms of the contract concerning data confidentiality.[1]
>
> All system providers shall ensure that the entire data relating to payment systems operated by them are stored in a system only in India. This data should include the full end-to-end transaction details/information collected/carried/processed as part of the message/payment instruction,[2]
>
> The Reserve Bank of India (RBI) has barred Mastercard, American Express, and Diners Club from issuing cards in India for their failure to meet data localization norms prescribed by the regulator in April 2018.[3]

Regulation of human activity has, essentially, been addressed via the concept of geographical delimitation, leading to a surmise that activities and events could, in their entirety, be geographically delimited, and thus do not exist beyond such limitation. Therefore, on this assumption, a right to regulate is premised whereby geographically defined States share the jurisdiction, again predominantly based on geographic connection. States regulate the conduct occurring on their territory—location is the deciding factor for exercising jurisdiction. The idea of allocation of a certain conduct/activity works perfectly if all its aspects are located within a single territory. However, data and the activities related to its management operating on the internet beat this traditional notion of the right to regulate because it cannot be linked to any single territory. Does that mean that multiple States could exercise their right to regulate every activity connected with the online generation and handling of data? If not, which State could exercise this right, and when should other States stay away?

Further, and importantly, what is the conceptual legal basis for any State to exercise the right to regulate such data management? Data, as a technological tool and in the form of content, are inherently transnational,[4] and content and service providers, therefore, endeavor to ensure worldwide accessibility.[5] While the discussion as well as the clamour for regulation of data gains momentum, one pertinent question that begs clarification relates to identifying the legal location of the data to establish the regulatory right of any specific State, baffled as it is by the ever-increasing transnationality. Therefore, in the context of issues related to the identification of the applicable

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[2] Circular on Storage of Payment System Data issued by India's central bank, the Reserve Bank of India, dated 6th April, 2018. https://rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=11244 accessed 17/09/2021.

[3] Effective July 2021, the payments firm Mastercard has been barred from adding new customers in India thereby significantly impacting its business which otherwise covered a third of credit and debit card business in India. https://theprint.in/economy/what-is-data-localisation-why-mastercard-amex-diners-club-cant-add-more-customers-in-india/703790/ accessed 17/09/2021.

[4] Haibach (2015) p. 252, 253–54.

[5] Simpson (2016) P. 669, 670–73.

law, and of the forum for dispute resolution,[6] the Internet presents an entirely new dimension to the problem of squeezing transnational activity into the national legal straitjacket.[7] While the internet-related opportunities, especially access, are galore, these opportunities render establishing a legal personality for regulation problematic, for the reason above mentioned. That, however, has not stopped efforts by States to enhance regulation in the form of governance of data, as has recently been evidenced in the Covid-19 pandemic. States, ostensibly guided by health governance,[8] overhauled their privacy-related laws and made health records of their population publicly available, with questionable practices on anonymization. In India, information about the daily infection spread is made available through Twitter and other social media platforms even by officials of the State. Further websites that are crowd-sourced initiatives, often display personal details information, including the geographical location of the infected person, thus exposing such person to a potential risk of social ostracism, especially in a multi-racial society like India.

States like China moved further and released health and personal details data of even non-citizens required for their pandemic-related governance measures.[9] This research explores the increasing, and therefore alarming, shift in the idea of regulation of data, moving toward what could be called data sovereignty. Toward this, the first part of this research addresses the idea of territorialization of data, and the models in existence and how these models challenge the traditional contract-based administration of data via the rules of private international law—party autonomy and applicable law. The second part of this research exemplifies the idea of territorialization through a recent attempt by an Indian court ordering interim injunctory relief in a dispute involving data administration related to the covid pandemic, despite not possessing contractual jurisdiction. The third part would further discuss the Indian attempts at domestic regulation of what could be characterized as transnational data management—through policy notifications as well as law reform efforts. The research concludes with poser on whether data localization alone could and would achieve better data governance when States could pursue the path of trans-nationalization through hard and soft law regimes, and importantly enhanced cooperation between themselves and via international organizations.

[6] Ji (2020) p. 1283.

[7] Uta (2007) p. 1, 4.

[8] See, for example, the extensive guidance from UK in, Hale, T. et al., ' global panel database of pandemic policies (Oxford COVID-19 Government Response Tracker)' (2021) 5, *Nature Human Behaviour* 529–538 (2021). https://doi.org/10.1038/s41562-021-01079-; on the position in India, https://vidhilegalpolicy.in/blog/indias-covid-19-response-calls-for-urgent-data-disclosure-norms/

[9] Nectar (2020).

2 From Jurisdictional Clarity to Data Sovereignty

Clarity on competence in dispute resolution is of primordial necessity toward maintaining law and order for States. Writing in the context of international law, and these words hold immense value today in the context of our increasingly connected world, Rosalyn Higgins observed, "There is a no more important way to avoid conflict than by providing clear norms as to which State can exercise authority over whom, and in what circumstances. Without that allocation of competence, all is rancour and chaos."[10] This observation cannot be emphasized more in the context of internet and data governance that witnesses increased transnational civil disputes arising from online activity given the extensive internet footprint covering about 4.6 billion global population.[11] The International Telecommunications Union notes that over 4.1 billion people, around 53.6% of the world population, used the Internet in 2019. The World Economic Forum predicts daily data creation of 463 exabytes each day by 2025.[12] There is also pressure on governments to regulate the online activity of their citizens/persons, natural and legal, to ensure maintenance of law and order as well as preventing unfair online competition on businesses.

However, such attempts at regulation have to confront the fundamental question—can States exercise jurisdiction in cyberspace? The right to govern cyberspace was perceived to be antithetical to the idea of freedom that is a part of its inherent nature and nebulous character.

2.1 Regulation by the States?

Matter forms the basis on which jurisdiction could be exercised. Further, State control over matter and, therefore, the exercise of jurisdiction is achieved through erecting borders that define the extent of such control and jurisdiction. Cyberspace is difficult to be explained in the context of these parameters. The nascency and nebulous nature of early activity in cyberspace led pioneers such as Barlow to boastfully declare that States keep away from cyberspace.[13] Johnson and Post were of the view that the nature of cyberspace meant that the physical sphere laws should not be applied

[10] Rosalyn (1994) p. 56. For an extensive discussion on jurisdiction and competence, including a discussion on internet governance the following emblematic literature may be accessed. Thierer and Crews Jr (2003); Snijders and Weatherill (2003), Schiff (2002) p. 311, Smith, (2000) p. 229.

[11] It is reported that by January 2021, internet connectivity covered 4.66 billion active internet users worldwide - 59.5 percent of the global population, a whopping 92.6 percent (4.32 billion) accessed the internet via mobile devices. https://www.statista.com/statistics/617136/digital-population-worldwide/ accessed 18/09/2021.

[12] Jeff (2019).

[13] Perry (2016).

there.[14] This idealism has had much and lasting impact[15] with supporters, including the United States.[16] Early arguments about avoiding the path of regulation referred to the inherently global nature of cyberspace and the impact that such regulation would have on international comity and the foreign policy consequences of any such action, including orders emanating from local judicial action.[17] The United Nations Group of Governmental Experts [GGE] tasked with addressing issues/concerns in the field of information and telecommunications in the context of international security was of the view that the normative content of international law, especially the UN Charter, is applicable to cyberspace as well. Normative regime on state sovereignty and jurisdiction could thus be made applicable to activities related to internet and internet technologies within a State's territory.[18] A subsequent report of the year 2015 listed 11 voluntary, non-binding norms, rules, or principles of responsible behavior of States aimed at furthering "an open, secure, stable, accessible and peaceful ICT environment."[19] These norms emphasized upon cooperation between states in the exchange of information related to any ICT-based activity that could impact each other. They specified positive obligations concerning the right to privacy in the digital space, responsible reporting of vulnerabilities and remedies, therefore, and also obligate states to desist from conduct or knowingly support activity to harm the information systems of another state's emergency response teams (CERT/CSIRTS) and should not use their teams for malicious international activity, among others. States shall therefore ensure that the fundamental norms of international law related to sovereignty, pacific settlement of disputes, avoidance of threat or use of force, non-intervention, and respect for human rights shall also apply to activities in cyberspace.[20] Therefore the normative regime germane to territorially bounded spaces does hold relevance in the context of the possible regulation of cyberspace. Tsaugourias termed this as "the territorialisation of cyberspace, namely the application to cyberspace of territorialist and, by consequence, of sovereign's notions of authority and law."[21]

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[14] David and David (1996) pp. 1367, 1402.

[15] Mueller Milton (2019) pp. 1, 2; Shane (2000) p. 151.

[16] Clinton and Gore Jr, 'A Framework for Global Electronic Commerce' https://clintonwhitehouse4.archives.gov/WH/New/Commerce/read.html accessed 21/09/2021.

[17] Brief for Appellant at 3, *Microsoft Corp. v United States* (In re Warrant to Search a Certain E-Mail Account Controlled & Maintained by Microsoft Corp.), 855 F.3d 53 (2d Cir. 2017) (No. 14–2985). Interestingly, the pleadings by Microsoft or the arguments made within the *amicus curiae* brief submitted by Ireland (which argued that Ireland's sovereignty was being threatened) did not refer to any specific law of Ireland being violated by compelling Microsoft to locally store emails in Ireland. Also see, *Google Inc. v Equustek Sols. Inc.,* [2017] 1 S.C.R. 824, 828 (Can.) The court, reiterating the jurisdiction of Canadian courts, observed, "If Google has evidence that complying with such an injunction would require it to violate the laws of another jurisdiction, including interfering with freedom of expression, it is always free to apply to the British Columbia courts to vary the interlocutory order accordingly. To date, Google has made no such application.").

[18] UNGA Doc A/68/98, (2013) pp. 19–20.

[19] UNGA Doc A/70/174, (2015) p. 13.

[20] *Ibidem*, p. 23.

[21] Tsaugourias (2015). Also see, Geoffrey (2007).

To explore the possibility of states asserting sovereignty over cyberspace, there were a few attempts to articulate the concept of cyberspace, albeit for the limited purpose of understanding the scope/possibility of regulation. Notably, Kuehl defined it as follows,

> […] global domain within the information environment whose distinctive and unique character is framed by the use of electronics and the electromagnetic spectrum to create, store, modify, exchange, and exploit information via interdependent and interconnected networks using information-communication technologies.[22]

Cyberspace, therefore, involves a physical layer composed of a variety of hardware devices, and a logical layer wiring through the hardware via the appropriate software exchanged in the form of data packets. Finally, a social layer involves human intervention in various roles.[23]

2.2 The Domestication of Regulation of Cyberspace

Recognition of the role of the States was emerging quickly, with the acknowledgement of the existing regulatory action by States, negating[24] averments about the unacceptability of State regulation of cyberspace. Further, there is increasing recognition among States, that the United States has had inordinate influence in cyberspace through various keystones of the architecture[25] despite the vast majority of internet users being non-American.[26] Given the advances made in the aspect of regulation through the methods of extra-territoriality of judicial orders via conflict of laws rules,[27] as well as a recognition of the need for regulation leading to a decoupling from the idealism-driven global cyberspace, there is an assertion of sovereignty over cyberspace, prominent among them being the model adopted by China.[28] The decoupling thus allowed States a path to assert cyber sovereignty, both domestically and externally.[29] Some States have by their regulations (not reaching a decoupling, but

[22] Kuehl (2009) pp. 1, 28.

[23] Tsagourias (2018) pp. 523, 539.

[24] Wu (1997) p. 647.

[25] See, Clinton William and Albert (2000); Ironically, the United States pleaded for a regulation-free internet, premised on the inherent difficulty nature of the cyberspace and an idealism-driven motive to keep it free, and also an awareness of the difficulties in regulating cross-border activity. Referring to Bill Clinton's comment that regulating the internet would be like 'nailing jell-o to the wall, Laskai commented that in the initial years of the internet it was presumed that cyberspace would elude any efforts at territorialized regulation. Laskai (2016), Adam (2020) p. 87, Woods (2016) p. 729, 741.

[26] Woods (2018) pp. 328, 352, Kerr (2015) pp. 285, 287–88.

[27] *Ibidem*, p. 353.

[28] Laskai, cit., see footnote n. 25. Laskai recalled that as early as 1997, attempts to regulate the internet by China through a multifaceted system of Internet censorship were noticed and critiqued as well, notably by Geremie R. Barmé and Sang Ye in an article they wrote for Wired magazine in 1997 who termed it as the Great Firewall.

[29] See, generally, Broeders and van den Berg (2020), Schia and Gjesvik (2017).

may still be considered an excessive exercise of State sovereignty) impeded their populations' access to cyberspace or generally caused for cyberspace's alignment within the nexus of the State.[30]

Data sovereignty disputes usher in concerns related to state sovereignty and the capability of the State to regulate the global internet without presenting conflicts likely to impact the comity of nations. Interestingly, data sovereignty-related issues are often staged as conflicts between a firm and a state, however, they subliminally impact the states, given their pursuit of regulating the same internet activity. *Microsoft Ireland*[31] exemplifies the abovementioned scenario well-framed as a dispute between an American firm and American law enforcement, it generated much interest from sovereign States who participated in the judicial proceedings before American courts.

On a related note, after some initial unsuccessful attempts,[32] States were hesitant to move toward international law-making in the context of cyberspace and issues connected with data governance. Averse to explicit interpretations in the case of tendentious legal issues as well as developing international law principles, they preferred the term "norms" notorious for its inscrutability.[33] Thus progress in international law-making was way too slow and has seen only limited success, the notable being the Tallinn Manual.[34] States have therefore indulged in creating domestic "norms"[35] and norms founded upon insufficiently developed principles in other regimes like, for instance, the conflict of laws that offered primitive tools for complex problems. The downside of activating domestic normative architecture—these norms were much conflicting in their content and purpose, leading some commentators to lament that cyberspace is in a moment of crisis.[36]

2.3 Localized Regulation—Issues Related to Conflict of Laws

Regulation related to personal data protection via domestic law has been varied and requires the identification of the appropriate applicable law in disputes related to transnational personal data. As per the general practice of jurisdictions in matters related to conflict of laws, identification of the *lex causae* is a three-stage procedure:

- characterization of the issue into one of the established choice of law classifications, via identification of the nature of the dispute.

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[30] Mueller Milton (2017).

[31] *Microsoft* cit., see footnote n. 17. Note that this dispute saw amicus curiae briefs being filed on behalf of European Union, New Zealand, Great Britain, apart from Ireland.

[32] Russia and China have been noted within the literature as being the early movers towards a positivist normative regime in international law, but their attempts were unsuccessful. See, Mačák (2016).

[33] *Ibidem*, 127.

[34] Tallinn Manual on International Law Applicable to Cyber Warfare (2013).

[35] Osula and Rõigas (2016).

[36] Macak, cit., see footnote n. 33.

- identify the specific conflict of laws rule and the connecting factors, as designated by such rule.
- identify the system of law which is tied by the connecting factor found in stage two to the issue characterized in stage one.[37]

The connecting factors could relate to the parties (their nationality/place of business at the time of conclusion of the contract), the place of conclusion of the contract, the place of performance of the contract, among others. Therein lies the concern—identifying the appropriate connecting factors in any dispute, even in the traditional disputes. The problem is much accentuated in disputes concerning data and cyberspace wherein it is difficult to identify the place of performance of the contract when the contract is performed through a web of sub-contracts, as seen in contracts related to outsourcing of database management.[38] Given the scale and volume of data transfers across jurisdictions,[39] the concern of addressing and complying with multiple regulatory regimes addressing a variety of asset classes and clients, conflicts in the nature and content of regulation pose a heightened challenge. It becomes therefore necessary to ensure that the law, domestic as well international, is up and ready to address the requirements of the digital society, and not be mired in sovereignty-related issues alone. Toward this, the conflict of laws mechanisms should be empowered to address beyond the traditional issues of personal law and civil and commercial matters that it is currently equipped to address. However, this methodology could be a concern in the context of disputes related to data technologies which are characterized differently under the variety of regimes, national, regional and as well as the norms of general international law.[40] For example, differences exist in the way China, the US, and the EU characterise the right to personal data, the connecting factors they consider, and the law applied to personal data protection. These are significant issues for legislators tasked with law reform but they are equally important for businesses to design their global service, and provide the background material for international organizations engaged in the preparation of treaties and model laws. Common to these regimes is the belief that *lex fori* ought to be applied because these jurisdictions commend their law on personal data protection to its territorial nature. The personal data protection law is a part of the mandatory law and therefore beyond the contractual freedom of the parties.[41] However, personal data and the methodology for its classification as such is differently articulated in the three regimes. The EU has

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[37] *Macmillan Inc. v Bishopsgate* [1996] 1 WLR 387 (Eng.). see, Huang cit., see footnote n. 6, p. 1285.

[38] Marcus (2020)

[39] McKinsey (2016), According to McKinsey, it is estimated some 900 million people have international connections on social media, and 360 million take part in cross-border e-commerce. While digital technologies significantly enhanced the response mechanisms in combating the pandemic, they are also of immense value to the economic recovery. See, Marcus, cit., see footnote n. 38.

[40] Huang, cit., see footnote n. 6, p. 1286; Also see, Mueller Milton (2020) p. 779. Mueller asserts that given cyberspace's unique technical structure, it is best administered through an approach styled upon the idea of global commons.

[41] *Idem.*

accorded protection to personal data as a fundamental human right,[42] a data subject's right to their personal data is recognized as the "right to privacy with respect to the processing of personal data."[43] Similarly, the TFEU also provided for a right to data protection.[44]

US law views the right to privacy as civil liberty. Warren and Brandies explained privacy as the "right to be alone."[45] Today, it exists in the form of a constitutionally protected right.[46] The Fourth Amendment to the US constitution has implications for data-related activity, however, it is limited to government and state institutions, and therefore has little relevance to the issues arising from transnational data-related activity, managed by corporate entities. The Supreme Court ratio in *Roe v Wade* premised the right to privacy on the Fourteenth Amendment's concept of personal liberty and restrictions on state action.[47] Other courts have been less conciliatory toward holding information privacy as a protectable civil liberty interest,[48] thus leaving the right in a shroud of uncertainty.[49] However, the First Amendment's free

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[42] David and Federico (2016) p. 223.

[43] GDPR, Regulation 2016/679, of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, and Repealing Directive 95/46/EC, 2016 O. J. (L 119) 1 (EU), at art. 1.2; *see* Directive 95/46/EC, of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, art. 1(1), 1995 O. J. (L 281) 31; Huang (n 6) 1287.

[44] Article 16, TFEU is as follows,

1. Everyone has the right to the protection of personal data concerning them.
2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities. Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) art. 16, Oct. 26, 2012, O. J. (C 326) 47. https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF accessed 10/10/2021.

[45] Warren and Brandeis (1890) pp. 193, 195–96.

[46] US Privacy Act, 5 U.S.C. § 552, 552a (as amended) https://uscode.house.gov/view.xhtml?req=(title:5%20section:552a%20edition:prelim accessed 12/10/2021; Raul, et. al, (2014) p. 268, 269.

[47] *Roe v Wade*, 410 U.S. 113, 153 (1973) at [78] https://www.law.cornell.edu/supremecourt/text/410/113 accessed 12/10/2021. In *Whalen v Roe* 429 U.S. 589, 605–06 (1977) while the Supreme Court of the United States outlined a right to "information privacy" in the Fourteenth Amendment, nevertheless upheld a New York statute that mandated identification of records of physicians and patients in with regard to certain specified drug prescription records. https://supreme.justia.com/cases/federal/us/429/589/ accessed 24/09/2021.

[48] See, for instance, *Am. Fed'n of Gov't Emps. v Dep't of Hous. & Urban Dev.*, 118 F.3d 789, 791 (D. C. Cir. 1997).
https://casetext.com/case/american-federation-of-gov-employees-v-hud?__cf_chl_jschl_tk__=pmd_9eSHLg6DS0D01ybjR66cJ_aoCoqugd3bo0IwftuNnNg-1632570610-0-gqNtZGzNAlCjcnBszQuR accessed 25/09/2021.

[49] See, generally, Paul M. Schwartz, (1995) p. 553, 574–82.

speech provision allows for a free flow of information,[50] which could be characterized as a fundamental human right to privacy and data protection in the US. The right to free flow of information was reiterated in *Sorrell v IMS Health Care*[51] wherein the Court held the Vermont law related to confidentiality as unconstitutional for violating First Amendment. It observed that the impugned law did not advance the policy goals, howsoever appropriate they were, in a permissible way. The court opined, "[…] the fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech."[52]

Unlike the EU and US where the right to personal data is a fundamental right, it remains only as a personality right in China.[53] Despite a decentralized system, the Chinese government, via the Great Firewall, retains control via a territorial regulation of cyber-connectivity to regions beyond its borders. It censors the flow of information through its borders and is known to have penalized people for their usage of VPNs.[54] Further, despite constitutional limitations, Chinese law has walked farther to include provisions that allow the acquisition of data from private companies about their businesses, including the personal data of their clients. As per Article 25 of the Chinese E-commerce Law the administration can mandate e-commerce businesses to share their e-commerce data information, which could include personal information, privacy, and trade secrets, although the competent authority itself is under a duty to protect the security of such data information as received.[55] Chinese constitution protects individuals in the context of freedom and privacy of correspondence, however, the protection to personal data of the individual is unclear, as the law does not view privacy and the right to personal data similarly. The Civil Code of the People's Republic of China, 2020[56] views the content and the reach of both these provisions differently. Article 1032 of the Chinese Civil Code defines privacy as "[..] the undisturbed private life of a natural person and his private space, private activities, and private information that he does not want to be known to others"; Article 1033 mandated against any intrusion into the right to privacy. The focus of Articles 1034–37 is on data collection and its handling ensuring compliance with

[50] *Liquormart, Inc. v Rhode Island*, 517 U.S. 484, 503, 116 S. Ct. 1459 (Opinion of Stevens, J.) The Judge observed, "The First Amendment directs us to be especially sceptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.".

[51] *Sorrell v IMS Health Care*, 564 U.S. 552, 561 (2011) wherein the Court heard a plea of first amendment violation by the Vermont Prescription Confidentiality Law that prohibited disclosure or otherwise allowing pharmacies to share prescriber-identity information with anyone except for marketing reason. https://www.supremecourt.gov/opinions/10pdf/10-779.pdf accessed 24/09/2021.

[52] *Ibidem*, 560.

[53] Huang, cit., see footnote n. 6, p. 1289.

[54] Benjamin Haas (2017).

[55] E-Commerce Law of the People's Republic of China (Adopted at the Fifth Session of the Standing Committee of the 13th National People's Congress on August 31, 2018) https://ipkey.eu/sites/default/files/documents/resources/PRC_E-Commerce_Law.pdf accessed 10/10/2021; Huang, cit., see footnote n. 6, p. 1289.

[56] Adopted at the Third Session of the Thirteenth National People's Congress on May 28, 2020. http://www.npc.gov.cn/englishnpc/c23934/202012/f627aa3a4651475db936899d69419d1e/files/47c16489e186437eab3244495cb47d66.pdf accessed 11/10/2021.

legality, proportionality, and necessity. It needs to be noted here that the focus of the right to privacy is preventing intrusions in such rights, while the right to personal data addresses its legal usage.[57]

Judicial opinion in China has been in favor of viewing the right to privacy and the right to personal data as two distinct rights. Sherry Gong and Nolan Shaw[58] commenting upon the decision in *Ye Zhu v Baidu,*[59] concerning China's search engine Baidu.com explained how the Chinese Court articulated the difference between the two—the search history of any user on the internet is their privacy, however, if separated from the data subject, they could not identify the data subject, so they were not personal data. Further, while the Chinese law allowed trade in consumer data, the law, however, is unclear—the amount of consumer data that could be processed is not specified in the law, neither is it explainable through the principles of competence, necessity, and proportionality.[60]

The abovementioned narrative is but an example of the differences within the three legal systems with regard to explaining the legal relationship between the data controller and the data processor. While all three systems subscribe to the *lex fori*, their characterization of the right to personal data and the connecting factors present much difference.

3 The Indian Perspective

The following narrative will explain the Indian law, nascent as it is, in its progression toward a law on data protection. As identified in the introduction, Indian law seems to be in favor of territorialization, and data localization as well. While it could be founded on concerns like safeguarding privacy and security,[61] digital protectionism could also be at play. This is achieved by the promotion of domestic ICT enterprise either directly through preferential treatment to domestic cloud computing businesses or indirectly through coercing foreign companies to locate their servers locally. Such preferential treatment could enfeeble the market access for foreign suppliers of digital services, thereby impeding trade and investment opportunities.[62] The India story will present two recent developments—an order from one of the constitutional courts of India emphasizing upon the local holding of the data and jurisdiction to the lex fori, and the much-expected law reform on personal data protection.

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[57] Huang, cit., see footnote n. 6, p. 1290.

[58] Sherry and Nolan (2015).

[59] *Ye Zhu v Baidu*, Nanjing Intermediate People's Court (2014) Ning Min Zong Zi No. 5028. See, Ken Oliphant et al. (2018) pp. 1, 2.

[60] Huang, cit., see footnote n. 6, p. 1294.

[61] Christopher (2011).

[62] Mitchell and Hepburn (2017) p. 182, 186; Shahmel and Christopher (2016) p. 11.

In *Balu Gopalakrishnan and others v State of Kerala and others*[63] the Kerala High Court was hearing a writ petition in the matter related to the handling of covid-19 patient data contracted to a New York-based business entity Sprnklr, (with its registered office located in Bangalore, India). The petitioners, *ad vindictam publicam,* contended that the Union of India and Government of Kerala contracted with Sprnklr LLC and its Indian entities to manage the patient data during the pandemic and that the said contract raised certain confidentiality concerns. It must be stated here that the contract had a forum selection clause, which vested the power of dispute resolution in the courts at New York. This fact was also the basis of an apprehension of the petitioners presented in their arguments to the court and duly recorded in the interim orders of the court. The presence of the forum selection clause was an irritant, the petitioners averred, lamenting the possibility of absence of legal recourse locally, in the event of a breach of confidentiality.[64]

In its interim orders, the court attempted to define data confidentiality (and not data protection) as follows,

> Prefatorily, data confidentiality is, in its ultimate sense, about protecting data from unlawful, unauthorized as also from unintentional access and disclosure.[65]

It may be noted that the petitioners primarily alleged that the contract in question has little or no safeguards against the commercial and unauthorized exploitation of the data entrusted to Sprinklr for processing by the Government of Kerala. This contention was refuted within the arguments of the counsel when they informed the court that the Government of Kerala has acquired full custody and control over the data.[66]

Regarding the apprehension related to access to justice given the existence of forum selection clause, the counsel for the respondents averred,

> […] that "the data resides in India" and therefore, that the breach of its confidentiality would expose Sprinklr to action in India, both at the hands of individual citizens and the State. They, however, expressly admitted that the "mandate of the New York jurisdiction" binds the Government of Kerala for the breach of the terms of the contract.[67]

The petitioners further submitted [..] that the Government of Kerala, by ceding to the jurisdiction of courts outside India, has rendered recourse to law, both for the citizens and itself, illusory in the event of a breach of the contract by Sprinklr.

The court's interim orders noted the fact that the data is located in India and is in the possession of the Government of Kerala. Exercising jurisdiction on the substantive issue of confidentiality of data,[68] it ordered respondents 1, 2, and 3 to ensure anonymization of the data and take all necessary steps to prevent a breach of

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[63] *Gopalakrishnan et. al. v State of Kerala et. al.* cit., see footnote n. 1.

[64] *Ibidem*, 6.

[65] *Idem*, 2.

[66] *Idem*, 10.

[67] *Idem*, 11.

[68] *Idem*, 21.

the confidentiality clause in the Masters Services Agreement between Respondent 1 and Respondent 3, Sprnklr LLC.

The court ordered Sprinklr to adopt complete confidentiality of the data entrusted to them by the Government of Kerala as per the contract(s) and injuncted the company against any disclosure of such data.

> We hereby injunct Sprinklr from committing any act which will be, directly or indirectly, in breach of confidentiality of the data entrusted to them for analysis/processing by the Government of Kerala under the impugned contracts; and that they shall not disclose or part with any such data to any third party/person/entity – of whatever nature or composition – anywhere in the world.[69]

It needs to be noted here in the context of India's tryst with regulating data protection and data governance that the Court felt that the presence of data in India, attributed a jurisdiction to the courts in India, and secondly the data concerning Indian population, there is a vested interest in the local courts exercising jurisdiction. This interim order, therefore, demonstrates the tendencies of territorialization of jurisdiction based upon localization of data.

3.1 The Puttaswamy judgment—a Watershed Statement on Digital Footprint

On 24th August 2017, a nine-judge bench of the Supreme Court in *Justice K. S. Puttaswamy v Union of India*[70] declared the right to privacy an integral component of Part III of the Constitution of India.[71] The key features derived from the ratio of the decision encapsulated hereinbelow,[72] reiterate a recognition of privacy as an intrinsic right, and the judicial standards of review that would be applied to actions that allegedly impinge upon privacy.

Privacy being an intrinsic and inseparable feature of human personality the right to privacy is not just a common law right but a fundamental right guaranteed by Part III of the Constitution.The right itself is not absolute though and could be limited with permissible restrictions. Such restrictions shall be sourced from the law to meet a legitimate aim of the State and the intrusion into privacy itself must be "proportionate to the need for such interference." Enforcing claims against non-state actors would require legislative intervention by the State.[73]

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[69] *Idem*, 23.

[70] *Justice K.S. Puttaswamy (Retd.) v Union of India & Ors.* Writ Petition (Civil) No. 494 of 2012 & connected matters, https://main.sci.gov.in/supremecourt/2012/35071/35071_2012_Judgement_26-Sep-2018.pdf accessed 21/09/2021.

[71] Constitution of India (1950)

[72] For a detailed discussion, see, ELP Discussion Paper: Justice BN Srikrishna Committee - White Paper on Data Protection (2017).
https://elplaw.in/wp-content/uploads/2018/08/ELP-Discussion-Paper-Justice-BN-Srikrishna-Committee-Data-Protection-2.pdf accessed 11/10/2021.

[73] *Ibidem.*

On the standards/criteria for judicial review, the court enlisted a few—legality, a legitimate purpose explaining the proposed action, and a rational nexus between the objects and the means adopted to achieve them, Justice Kaul suggested the inclusion of procedural guarantees to prevent abuse of State interference.[74] Despite being a unanimous decision, there were differences with regard to the articulation of the review standards, wherein Justice Kaul's opinion seemed to lean closer to the EU model.

3.2 The Normative Content

The Information Technology Act, 2000 ("IT Act") and the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Information) Rules, 2011 (the "IT Rules") form the bulwark of the normative regime on data governance.[75] Rule 2(i) defines personal information as follows,

> [..] any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person.

Further, following the *Puttaswamy* judgment, the Government of India in 2018 proposed legislation that aims at a comprehensive regulation of data protection. The bill is a result of extensive research reports submitted by the Justice Sri Krishna Committee,[76] The TRAI Report,[77] and the Justice AP Shah Report.[78] The Personal Data Protection Bill[79] is now for consideration and scrutiny before a Select Committee of the Parliament, before being returned to the Parliament for a vote. The following section discusses the rights envisaged under the SPDI Rules, 2011 and how they compare with the content under the Data Protection Bill, 2018 (hereinafter, "the Draft Bill").

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[74] Vrinda et al. (2017).

[75] Other regulatory mechanisms addressing data governance in India include,

- Consumer Protection Act, 2019 ('CPA') and Consumer Protection (E-Commerce) Rules, 2020;
- rules made by the Reserve Bank of India ('RBI').
- rules imposed by the Telecom Regulatory Authority of India ('TRAI');
- rules imposed by the Insurance Regulatory and Development Authority of India;
- rules imposed by the Securities and Exchange Board of India ('SEBI');
- various decisions of Indian courts; and.
- Unified Licence Agreements issued pursuant to the National Telecom Policy, 2012 by the Department of Telecommunications ('DOT').

[76] The Committee of Experts on a Data Protection Framework for India (2018).

[77] Telecom Regulatory Authority of India Recommendations on Privacy, Security and Ownership of the Data in the Telecom Sector (2018).

[78] Report of the Group of Experts on Privacy (2012)

[79] The Personal Data Protection Bill (2019).

The IT Act mandates that a body corporate responsible for handling sensitive personal data or information is liable for compensating loss based upon a fault liability arising from negligence in implementing and maintaining reasonable security practices and procedures. Such reasonable security practices and procedures have been specified in the SPDI Rules as minimum standards of data protection for sensitive personal data. The SPDI Rules, a non-exhaustive collection, mandate a privacy policy, and consent for collecting and handling all sensitive personal information. Data subjects possess the following rights.

1. Right to be informed—applicable for all personal information, including sensitive personal data. The Rules insist on a privacy policy that will address, apart from the information so collected, the security procedures adopted to prevent leakage and misuse of such information, unlike the Draft Bill wherein at the time of the collection of personal data, the data principals would have to be informed by the data fiduciaries about the consent and the procedural for its withdrawal, the processing of such data and any cross-border transfers and procedures related to grievance redressal.
2. Right to access –Individuals can review their information possessed by the body corporate. Further, the Draft Bill proposes making available copies or summaries of the personal data processed by the data fiduciaries, including how and with whom the data has been shared.
3. Right to Rectification—The Rules and the Draft Bill allow for the data principals to rectify any inaccurate information about themselves in possession of the data fiduciaries including updating any such outdated data.
4. Right to erasure—while the SPDI did not refer to a right to erasure, the Draft Bill empowered the data principal with a right to request the erasure of any personal information that may no longer be required for the purpose for which it was procured. The law recognized a right to be forgotten for the data principles.
5. Right to object/opt-out—Withdrawal of the consent by the data principals is possible under the SPDI Rules as well as the Draft Bill.
6. The Draft Bill provides for a Right to portability for the data principals concerning personal data that is processed through automated means, including transfer of such data among data fiduciaries.
7. However, the Draft Bill does not make place for a right to the data principals not to be subjected to automated decision-making.

The Indian law offers protection only to sensitive personal data (a subset of personal data). Rule 5 of the IT Rules prescribes that no body corporate shall collect sensitive personal data or information unless (a) the information is collected for a lawful purpose connected with a function or activity of the body corporate; and (b) the collection of such information is considered necessary for that purpose. Rule 6 of the IT Rules prescribes that no body corporate can disclose sensitive personal information to any third party without permission from the provider of such information.[80]

[80] For a detailed discussion, see, ELP Discussion Paper, cit. footnote n. 72.

The Draft Bill retains the distinction between personal data and sensitive personal data. Unlike the SPDI Rules, all identifiable data, concerning any characteristic, attribute, trait, or other feature of a person's identity, are classified as personal data. It is worth noting that the definition of personal data applies to both online and offline mediums and includes inferences drawn by the profiling of personal data.

Sensitive personal data is a subset of personal data that is subject to enhanced processing requirements. It includes health or financial data, biometric data, sex life, sexual orientation, and religious or political beliefs. The Bill allows the Government to specify further categories of sensitive personal data.[81]

While the Draft Bill does not provide for the processing of anonymized data, data fiduciaries could be compelled by the Government to share anonymized or non-personal data to enable better targeting of delivery of services or formulation of evidence-based policies offered by the Government.[82]

3.3 The Possible Regulatory Guidance on Doing Business with/in India

According to a recent paper from the Organization for Economic Cooperation and Development (OECD), regulatory divergence can add between 5 and 10 per cent to the cost of doing business.[83] However, empirical evidence also indicates that, where laws are harmonized, foreign direct investment can increase by as much as 15 per cent.[84] David Markus used the APAC privacy matrix to identify the challenges in implementing content similar to the harmonized law, for instance, the GDPR. The Matrix placed India on Category 3 along with a few other Asian emerging economies.[85]

Category 3: The GDPR 'Push–Pull Late Adopters': 2018 onwards.

India, China, Thailand, and Vietnam—the focus with these recent reforms is on adopting a GDPR style framework to achieve data security in the eyes of EU regulators, with some attempts to opt-out of data transfer through localized security assessments and onshore servers.[86]

While businesses achieve data centralization through strategies like a private cloud or rent an on-demand cloud, or even adopt a hybrid of both these methods, regulatory

[81] For a detailed discussion, see, Chacko and Misra, 'India—Data Protection Overview' (2021) https://www.dataguidance.com/notes/india-data-protection-overview accessed 12/10/2021.

[82] *Idem.*

[83] Regulatory Divergence: Costs, Risks, Impacts: An International Financial Sector Study by Business at OECD and the International Federation of Accountants (2018) p. 5.

[84] David (2020).

[85] *Idem.*

[86] For a detailed reading of the OECD's work on Privacy law see, *The OECD Privacy Framework* (2013).

structures are increasingly moved toward insisting on localization through assertions of sovereignty and territorialization. Cross-border data transfers are increasingly getting exposed to the risk of conflicts with regulatory content that is exponentially expanding.[87] In 2019, it was noted that the total number of regulations on data transfer and localization storage requirements was over 200 globally.[88]

Given that almost 40% of India's goods and services exports consist of data-related activities in IT and ITES,[89] it is of significant concern that India is not recognized as a jurisdiction meeting adequacy on the GDPR. The enactment of the Data Protection Bill could lead to a positive change in this regard, but India has to address issues concerned with localization requirements[90] within its regulations.

4 Conclusion

Standard Contractual Clauses (SCCs) could be a safe way of contracting, they could ensure safe and regulation-compliant data transfers, especially in jurisdictions that have concerns related to adequacy as per the GDPR. They could be reviewed periodically, and their scope needs to be limited or expanded depending on changes to projects or the use of other vendors in different locations. Further, Binding Corporate Rules[91] are a mechanism that often complements SCCs and sits well alongside them.

However, the need of the hour is law reform that would ensure better regulatory compliance. The territorialization of cyberspace is increasingly becoming a reality and therefore, the scope and delimitation of state sovereignty in cyberspace is an immediate agenda for international law. This is a political question for individual states but also the society of states, and one way to address it is through enhanced cooperation in all areas that see the digital footprint traveling beyond boundaries. States could draw inspiration from the reports of the United Nations Group of Governmental Experts on developments in the field of information and telecommunications in the context of international security [GGE][92] and strive toward achieving harmonization in their regulatory activities concerning cyberspace.

Dispute resolution in matters related to data transfer could be exposed to various conflict of laws methods like comity, consistency, and predictability to international civil litigations and discourage forum shopping. However, the foregoing narrative shows that data transfer disputes are decided via the unilateral applicable law, and there is less preference for the application of foreign law, thus center-staging the role

[87] Measuring the Economic Value of Data and Cross-Border Data Flows: A Business Perspective (2020) p. 28.

[88] Casalini and González (2019).

[89] Mattoo and Wunsch (2004) p. 765.

[90] Article 40 of the draft Personal Data Protection Bill states: 'Every data fiduciary shall ensure the storage, on a server or data centre located in India'.

[91] GDPR, Article 47.

[92] UNGA, cit. footnote n.19&20.

of jurisdiction in disputes related to transnational data breach leaving little role for the choice of law issues. However, the ease of dispute resolution could be achieved by cooperating toward an international treaty, or at least a model law on the regulation and applicable law issues. There ought to be rules of the road in cyberspace, which would regulate the conduct of all stakeholders.[93] Adamson charts the passage of dialogue over the last two decades veering from "possible multilateral treaty to the application of existing international law, and the development and application of cyber norms."[94] This could go far in ensuring credible legal regimes in an inherently global sphere.

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[93] Liisi (2020).

[94] *Idem.*

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Chapter 15
Private International Law and Public International Law—Increasing Convergence or Divergence as Usual?

Poomintr Sooksripaisarnkit and Dharmita Prasad

Abstract In Chap. 1, the authors set two questions that need to be answered. First, whether a clear-cut distinction between public international law and private international law still holds in a contemporary environment. Or whether these two disciplines which had not been separated before the seventeenth century become more convergent and are moving toward merger so they become one discipline. In this chapter, the authors conclude that, while evidence suggests increasing convergence between the two disciplines, the time is not ripe for a complete merger into one unique discipline. However, there are ways whereby public international law and private international law may be taught together, as international law and EU law are at present living examples. To do so, the focus of private international law should be slightly adapted with more emphasis on its role in regulatory functioning.

Keywords Public international law · Private international law · Harmonization · Convergence · Divergence

This chapter is set to ponder some thoughts on the questions which the authors have set since Chap. 1 of this book. The first question is whether a clear-cut distinction between public international law and private international law has become obsolete viewing modern global circumstances. Another question is whether public international law and private international law have been in convergence such that they will gradually be subsumed into one unique legal discipline. In the process of pondering upon these questions, two further aspects have to bring into consideration since the so-called distinction or separation appears in two levels. First, public international law and private international law are always taught as separate disciplines and such has been

[1] Paul (1988), p 150–152.

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carried on into legal practices where practitioners tend to maintain such division.[1] Secondly, a real separation between public international law and private international law occurs at the doctrinal level. These two aspects bring complexity as they can be detached from each other. As Paul elaborated,

> Even if one concedes that private international law derives from municipal law one could argue that there is a sufficient relationship to the objectives of public international law to justify teaching both subjects together, just as, for example, criminal procedure is often taught in the same course or by the same faculty as criminal law. On the other hand, if one argues that the principles are identical, one could still conclude that the material is sufficiently distinct to offer it as separate disciplines in the same way criminal procedure is based upon constitutional principles but offered separately from constitutional law.[2]

On the doctrinal level, as suggested by the contribution from Basile, the thoughts of the Dutch School and Mr. Justice Joseph Story in using the concept of comity to justify a refusal to give effect to foreign law was no more than an attempt to place private international law within the context of the law of nations. This is in line with what Sooksripaisarnkit observed from analysis of certain Australian case laws on the *forum non-conveniens* that the courts tried to gear the outcome toward the goal of comity, the concept of which located within public international law domain. Perhaps, this is an obvious topic that can be linked. This also does not seem to be a topic that requires separate teachings. This is of course an area in which one can potentially argue that the concept of comity has never belonged to private international law in the first place. Another potential area where linkage can be established is in the realm of recognition where the concept is intertwined in public international law and private international law senses and it encompasses the fields as diverse as migration, environment, digital market, and many others. Yet, whether the idea of recognition requires separate teachings or not needs separate thoughts. Another area of linkage, albeit one would be reluctant to classify this as falling into any doctrinal level, is harmonization. Prasad in her chapter raises the point that the harmonization is closely intertwined with the developments of the concept of the international rule of law and these can potentially be discussed together in the course of public international law teachings. While the CISG in itself is a private law treaty, the recent spread of the SARS-Cov-2 virus known as the COVID-19 which has impeded freedom of movement of private citizens and disrupted the global supply chain for two years or so now has revealed much of the linkage between the CISG and public international law, especially as far as measures or restrictions imposed by different States in an attempt to contain the spread of the virus. This is explored in the contributions by Jevremovic and Mazzacano. Likewise, restrictions or export bans on medical products during the COVID-19 have given rise to issues both in terms of the Quantitative Restrictions (QRs) under the GATT and the WTO laws. References may be made to GATT or WTO law in considering justifications for such export bans and how to invoke restrictions as a ground to raise public policy exceptions to excuse performance in the context of the obligations within the CISG. Such complications are explored in the work of Yüksel Ripley and Halatçi Ulusoy. Perhaps, it is no longer

[2] Ibid., 150.

sufficient for the CISG to be taught in law schools in the subjects like international commercial law or international trade law or international sale of goods law.

Perhaps, how public international law and private international law can be taught together may be found in two prime examples: EU law and international investment law. On the EU level, the Members States of the European Union are bound together by treaties among them. They are protected from the law of other third-party States under the framework of the Blocking States, a topic which was touched upon in detail by the work of Gernert. They also have implemented treaties addressing private international law issues with an aim to bring certainties among the Member States both in terms of the choice of law as well as in terms of allocation of jurisdictions. In her contribution, Barral Martínez discusses the interaction between immunity claims and the civil jurisdiction regime in the EU. Also, all Member States of the EU are State Parties to the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. While much of the substance of this treaty touches upon private international law issues, for example, to determine a country where the child has his or her habitual residence, nevertheless, to consider whether the request for the return of a child should be refused, the court may have to take into account the law relating to the rights of the child along with international family law in order to evaluate whether there is any concern on the grave risk of the child in the event of the return. This is discussed in a thought-provoking contribution of van Hof.

International investment law has proved over the year to be a popular subject among students. While international investment starts with investment treaties, these treaties often provide for a private dispute resolution mechanism. Mohanty touches upon investment arbitrations in his contribution. While investment treaties deal with relationships between a State and a foreign investor coming into that State, activities of foreign investors may impact private citizens within the State and the rights of these citizens need to be protected as well. Mlambe highlights intersectionality within this context.

Overall, while not all aspects or all areas of public international law and private international law can be linked on the doctrinal level, an increasing convergence between them is evident as virtually all contributions in this work highlighted this. Even though the topic touched upon by Garimella and Babu in their contribution, namely, data privacy, may not be a subject in its own right in law schools. Yet, as the world is moving toward Industry 4.0 with technologies such as blockchains and Artificial intelligence, law schools will need to adapt as legal scholarships around these evolve. In touching on these topics in law schools, as Garimella and Babu have demonstrated, students should be taught from both public international law and private international law lenses in the curriculum.

Upon reflection, the authors are also inclined to think that there are ways in which public international law and private international law can be taught in combination, taking examples from international investment law and the EU law and potentially technology law. To do so successfully though, the discipline of private international law needs to be broadened such as its focus should be shifted from its limited boundary of jurisdiction, choice of law, and recognition and enforcement of

foreign judgments in order to emphasize more on its role in regulatory functioning as canvassed by Muir Watt and Michaels et al., as considered in Chap. 1 of this book.

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