

**PUBLIC INTERNATIONAL LAW VERSUS PRIVATE
INTERNATIONAL LAW: RECONSIDERING THE DISTINCTION**

SUSAN L. KARAMANIAN*

* Associate Dean for International and Comparative Legal Studies, George Washington University Law School.

Summary: I. Introduction. II. The Relevance of the Label. III. The Development of the Public-Private Distinction. IV. Public and Private Aspects of Today's Pressing International Problems. Conclusion.

I. Introduction

In describing international law, many legal scholars and practitioners resort to a simple, conventional taxonomy. The international lawyer could be said to focus on public international law, or the body of law dealing with relations between States and also between States and other entities, such as international organizations¹. Or, the international lawyer could concentrate on private international law, the law that addresses relations between private actors usually engaged in cross-border transactions². Private international law sets out procedural rules relevant to the substantive law applicable to the relationship between the parties, the appropriate forum to resolve their disputes, and the effect to be given a foreign judgment³. It is grounded largely in national or municipal law⁴.

The public-private distinction is well-established beyond the practice of law. For example, the prestigious Hague Academy on International Law, which offers a summer course on international law at the Peace Palace in The Hague, offers three weeks on public international law and a separate three week course, with different faculty and students, on private international law⁵. The Bodleian Law Library at Oxford University, where I wrote most of this essay, has shelves for books and periodicals based on International Law and separate ones designated Private International. The U.S. Department of State, Office of the Legal Adviser, has regular annual meetings with outside advisers, consisting largely of international academics and lawyers. One group is named the Public International Law Advisory Committee and the other is the Private International Law Advisory Committee. Only a handful of people attend meetings of both committees.

This lecture encourages law students, scholars and practitioners to move beyond the distinction between public international law and private international law and accept that international law includes both public and private dimensions. The lecture examines the concepts of public international law and private international law in more detail and establishes the overlap between them. The blurring of the distinction signals that international problems cannot be understood, and indeed

¹ Black's Law Dictionary 822 (7th ed. 1999).

² Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law 1* (Cambridge University Press 2009).

³ James Fawcett & Janeen Carruthers, Cheshire, North & Fawcett, *Private International Law 3-4* (Oxford University Press 14th ed. 2008).

⁴ *Id.* at 4.

⁵ See The Hague Academy of International Law, <https://www.hagueacademy.nl>.

effectively resolved, by simply categorizing them as either public or private. In fact, such labeling is harmful as it needlessly establishes blinders when what is needed is an expansive yet tempered perspective.

II. The Relevance of the Label

The term used to describe a body of law applicable to a problem is relevant. The label could limit understanding of the law and, more importantly, foreclose the ability to address properly problems that beg a legal solution. For example, use of force is traditionally considered an issue of public international law as it governs State-to-State engagement⁶. The dynamics change, however, when a State hires a private contractor to conduct its war against another State. The contractor's relationship to the State is defined by a contract, which reflects terms negotiated between the State and the contractor. By describing the issue as one of public international law, such as the legality of the State's use of force, one could neglect the real actor engaged in the use of force, the private contractor⁷. The State may or may not have accountability under public international law for the acts of the contractor but perhaps imposing public duties on the contractor, the likely source of the wrong, could deter wrongful conduct. As Professor Laura Dickinson has correctly argued, in such a situation, "the norms applicable to governmental actors would simply be part of the contractual terms, enforceable like any other provisions, regardless of state action⁸."

Another way to understand how the public-private distinction constrains the development of solutions to international problems is to examine it from the perspective of the sale of goods across borders, what is largely seen as a matter of private international law. Private international law helps identify the law governing the sale, national law or perhaps the principal treaty in the area, the United Nations Convention on Contracts for the International Sale of Goods (CISG)⁹. Yet, the goods could be ones that cause pollution or be intended for use in conducting human rights abuses. Public international law principles could limit or even nullify the sale. Focusing solely on the private without regard to the public neglects an important body of law that reflects societal priorities beyond those of private contracting parties.

Arguing for an approach to international legal matters that minimizes the public-private international law distinction is not novel. Many years ago, Professor Philip C. Jessup wrote about the concept of transnational law, or the body of law that "regulates actions or events that transcend national frontiers. Both public and

⁶ James Crawford, *Brownlie's Principles of Public International Law* 744-74 (Oxford University Press 5th ed. 2010).

⁷ See Laura A. Dickinson, *Outsourcing War and Peace: Protecting Public Values in an Era of Privatized Foreign Affairs* 75-79 (Yale University Press 2011).

⁸ *Id.* at 79.

⁹ U.N. Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, S. Treaty Doc. No. 98-9 (1983), 19 I.L.M. 668-99 [hereinafter CISG].

private international law are included, as are other rules which do not wholly fit into such standard categories¹⁰.” The “other rules” include national law, both civil and criminal¹¹. Embedded in civil law is the *lex mercatoria*, the law that reflects practices of private actors in international trade and commerce¹². In a similar vein, Professor Harold Koh, the former dean of Yale Law School and the former US Legal Adviser to the US Department of State, has written about transnational legal process, in which an actor, state or non-state, prompts another to engage on an international matter and thus generates a binding norm¹³. According to Professor Koh, law is established through interaction, interpretation and internalization¹⁴. The process applies regardless of whether the initiating actor is the State or a private entity. Likewise, Professor Paul Schiff Berman has written about global legal pluralism, the recognition that the State has a limited role and it along with regional, local and private institutions must work together to fill regulatory gaps, and do so with a healthy regard for differences¹⁵. A perfect example of why we need to think of a new way to solve international problems relates to cyberspace. The absence of a physical border renders territory less relevant in attempting to regulate.

III. The Development of the Public-Private Distinction

While many scholars and lawyers have written and spoken about the need to put aside formal constructs, the public-private dichotomy pervades and no doubt this is true due to the separate development of the disciplines over centuries. Public international law's principal focus traditionally has been the State. The Peace of Westphalia in 1648, which ended the 30 Years War in the Holy Roman Empire and the Eighty Years' War between Spain and the Dutch Republic, recognized that the foundation of the relevant legal order was no longer the Church but instead, the State¹⁶. The State is the sovereign¹⁷. It has a defined territory, over which it has control as to the people

¹⁰ Philip C. Jessup, *Transnational Law* 2 (1956). See also Mathias W. Reimann, James C. Hathaway, Timothy L. Dickinson & Joel H. Samuels, *Transnational Law: Cases and Materials* v (West 2013) (the casebook “does not focus on any of the traditional categories, such as public international law, private international law (conflict of laws), or comparative law” and “[i]nstead, it strives to transcend these categories because the issues you as students will face in practice typically defy the established divisions”).

¹¹ Jessup, *supra* note 10, at 106.

¹² Harold Koh, *Why Do Nations Obey International Law?*, 106 *YALE L. J.* 2604, 2605 (1996-97) [hereinafter Koh].

¹³ Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181 (1996).

¹⁴ *Id.* at 203-05.

¹⁵ Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press 2012).

¹⁶ Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 *AM. J. INT'L L.* 20, 26 (1948) (stating that the Peace of Westphalia “undoubtedly promoted the laicization of international law by divorcing it from any particular religious background, and the extension of its scope so as to include, on a footing of equality, republican and monarchical states”).

¹⁷ *Id.* at 28-29.

and natural resources within it¹⁸. A State may define its political order, so we have democracies, constitutional monarchies, monarchies, and dictatorships. It may elect to identify a religion to be practiced within the State, such as Arab States recognize in their constitutions that Islam is the governing law, or it may not, such as those States that recognize freedom of religion or ban the State from establishing a religion¹⁹. Each State is entitled to equal respect and a legal status due to the fact it is a State²⁰. A State is entitled to self-defense²¹. A State can be bound based largely on consent²². A State can enter into a treaty²³. A State is responsible for internationally wrongful acts²⁴ but may be immune from liability in foreign courts for various wrongs²⁵.

This account of the Peace of Westphalia and what followed after the Peace is fairly general. No doubt, before the Peace, States had some form of status. Since World War II, in particular, a robust regime of human rights has “caused a radical change in the state international system²⁶.” Nevertheless, the basic assessment of the centrality of the State is not in doubt.

The law that governs the relationship between States was once recognized as the *jus gentium*, or the law of nations²⁷. According to Shabtai Rosenne, the law of nations “operates exclusively in the international political environment where the principal actors are sovereign independent States²⁸.” The Dutch theorist Hugo Grotius announced substantive principles concerning international law in his *jus gentium*²⁹. These principles are largely grounded in Natural Law and custom and tacit consent³⁰. As Gordon E. Sherman has written:

He [Grotius] looks at a system of law governing nations in their mutual intercourse, therefore, in the light of universal concepts

¹⁸ Id.

¹⁹ See, e.g. Basic Law of Saudi Arabia art. 8; US Const. Amend. 1.

²⁰ Ian Brownlie, *Principles of Public International Law* 287-318 (6th ed. Oxford University Press 2003).

²¹ UN Charter art. 51.

²² Brownlie, *supra* note 20, at 4.

²³ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

²⁴ James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* p. 77 (Cambridge University Press 2002) (referring to Article 1 of the Draft Articles on State Responsibility, which provides that “[e]very internationally wrongful act of a State entails the international responsibility of that State”).

²⁵ Brownlie, *supra* note 20, at 319-40.

²⁶ See, e.g., Louis Henkin, *Human Rights and State ‘Sovereignty’*, 25 GA. J. INT’L & COMP. L. 31, 31 (1995/1996).

²⁷ Gordon E. Sherman, *Jus Gentium and International Law*, 12 AM. J. INT’L L. 56, 56 (1918)

²⁸ Shabtai Rosenne, *The Perplexities of Modern International Law* 17 (Martinus Nijhoff Publishers 2004).

²⁹ Hugo Grotius, *The Law OF War and Peace* (Carnegie Endowment for International Peace; Francis W. Kelsey (trans.) 1925) (1646).

³⁰ George Grafton Wilson, *Grotius: Law of War and Peace*, 35 AM. J. INT’L L. 205 (1941).

*drawn from the ancient ideas of an unwritten law of right reason combined with a system striving to develop the sense of equality and fairness in the personal dealings of men*³¹.

Grotius's conception of an international society accepted State sovereignty and the legal independence of States³², yet he infused in these concepts a moral component, particularly with regard to respect for humankind and dignity³³.

The *jus gentium* was not limited to States as it was seen as binding on all of mankind. Thus it included local law, both public and private, and the *lex mercatoria*³⁴. So hundreds of years ago there was an understanding of a single source of law that could apply to non-states³⁵.

With colonization, the law of nations was transplanted beyond Europe³⁶. Rapid growth in industrialization and trade followed, as did the law to guide international commerce. With decolonization, some of the substantive legal principles became part of the law of those countries³⁷. The term "some" is used as in Latin America, for example, resisted certain European international law concepts, such as the notion of a minimum standard of treatment for foreign investment that a foreign state could protect by espousing a claim, *versus* recourse to local courts to assert the claim³⁸.

With the rise of international trade and investment, States became focused on commercial matters. Public international law regulates States, and attempts to do so uniformly, but States may directly deal in business or seek to promote an environment supportive of business. Hence, States may enter into treaties that have a business purpose and impose duties on them relating to private actors within their

³¹ Sherman, *supra* note 27, at 63.

³² Ove Bring, *The Westphalia Peace Tradition in International Law: From Jus ad Bellum to Jus contra Bellum in International Law Across the Spectrum of Conflict: Essays in Honor of Professor L.C.Green on the Occasion of his Eightieth Birthday 57, 58-59* (Michael Schmitt ed., Naval War College 2000).

³³ E. Jiménez de Aréchaga, *The Grotian Heritage and the Concept of a Just World Order in International Law and the Grotian Heritage 5-24* (T.M.C. Asser Instituut 1985).

³⁴ Koh, *supra* note 12.

³⁵ Benedict Kingsbury & Benjamin Straumann, *State of Nature versus Commercial Sociability as the Basis of International Law: Reflections on the Roman Foundations and Current Interpretations of the International Political and Legal Thought of Grotius, Hobbes and Pufendorf in The Philosophy of International Law 33, 41-42* (Samantha Besson & John Tasioulas eds.) (Oxford University Press 2010) (Recognizing that Grotius attributed natural rights to both sovereigns and private entities).

³⁶ Federic Megret, *Globalization in IV The Max Planck Encyclopedia of International Law 493, 494* (Rüdiger Wolfrum ed., Oxford University Press 2012).

³⁷ *Id.*

³⁸ Donald Shea, *The Calvo Clause: A Problem of Inter-American and International Law and Diplomacy 20* (1955).

jurisdiction. In light of this, we have witnessed the emergence of the World Trade Organization, bilateral investment treaties, and tax treaties. These treaties, while affecting business, are State obligations and thus generally fall within the public realm.

Over the past century, substantial inroads have been made as to the centrality of States in the international legal order. The two World Wars raised doubts that the principles that Grotius had pronounced would be sufficient to sustain mankind. The States of the world thus agreed on a new order as reflected in the United Nations Charter and the UN Declaration of Human Rights³⁹. States have ratified many of the UN human rights treaties and certain States have entered into regional human rights treaties, which impose a duty to respect, protect and fulfill international human rights. State parties to the European Convention on Human Rights, for example, have agreed to allow aggrieved individuals to bring complaints directly against States before the European Court of Human Rights⁴⁰. Certain OAS States have consented to have the Inter-American Court on Human Rights sit in judgment of their conduct in light of their obligations under the American Convention on Human Rights⁴¹. Similarly, as discussed in more detail below, many bilateral investment treaties and free trade agreements, under which States undertake commitments to foreign investors, authorize aggrieved investors to bring arbitration claims directly against State. The obligation is still seen as one arising under public international law as the State bears the duty under a treaty yet the case quickly can focus on private international law issues such as the law applicable to the dispute, and if that law is national law, the terms and meaning of that law.

The increased emphasis on the role of the individual, both in the natural and juridical sense, is perhaps one of the most significant developments in international law since the end of World War II. In fact, the American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States*, section 101, states that international law addresses "the conduct of states and of international organizations and with the relations inter se, as well as with some of their relations with persons, whether natural or juridical⁴²." Individuals and corporations, once relegated to the private sphere, could have international rights derived from international law. The phrase "some of their relations" is used, so there could be areas in the private sphere that do not fall within public international law.

While public international law largely concerns relations between States it also has as its objects individuals and corporations. The rise of multinational

³⁹ Martin Scheinin, *Core Rights and Obligations in The Oxford Handbook of International Human Rights Law* 526, 537 (Dinah Shelton ed., Oxford University Press 2013).

⁴⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

⁴¹ American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123.

⁴² Restatement (Third) of Foreign Relations Law of the United States § 101 (1987).

corporations, with some of them for many years generating annual revenue larger than the gross national product of some nations, raises key issues⁴³. Corporations have established networks and associations and codes of conduct, which in themselves are norm generating⁴⁴. By yielding power, corporations can shape the conduct of States. In particular, in some countries like the United States, corporations play an important part in the law-making process⁴⁵.

The focus of private international law is largely on individual to individual or business-to-business relationships. There are two relevant definitions of private international law. In a traditional sense, it is synonymous with “conflict of laws,” which the law “that undertakes to reconcile” differences between the laws of different countries or “to decide what laws is to govern.” For example, if Microsoft Corporation were to provide software to a purchaser in Brazil and the software failed, the purchaser would likely want to sue Microsoft in Brazil. Private international law would identify the applicable national law and deal with issues concerning the conflict between one law, perhaps the law of Brazil, and the other law, perhaps the law of the State of Washington, where Microsoft has its headquarters. But private international law does more. It deals with the issue of the appropriate forum, such as when a court can exercise personal jurisdiction over a foreign party and the enforcement of any judgment outside of the jurisdiction of the country where it was entered. The American Society of International Law has thus defined private international law as the “body of conventions, model laws, national laws, legal guides, and other documents and instruments that regulate private relationships across national borders⁴⁶.” A critical aspect of private international law is its recognition that States may differ in their approaches to the law and that this difference must be managed.

Of note is the growing body of public international law in the form of treaties that regulate private relations. Examples of multilateral treaties of this sort include the following:

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: guides State courts on when to give effect to an agreement to arbitrate and when to recognize and enforce foreign arbitral awards⁴⁷.

⁴³ Bret E. Billet, *Investment Behavior of Multinational Corporations in Developing Areas 3-4* (Transaction Publishers 1991). See also WTO Trade Liberalization Statistics, available at http://www.gatt.org/trastat_e.html (noting that “51 of the 100 largest economies in the world are corporations”).

⁴⁴ See Sean D Murphy, *Taking Multinational Corporate Codes of Conduct to the Next Level*, 43 Colum. J. Transnat'l L. 389 (2005).

⁴⁵ *Citizens United v. FEC*, 130 S.Ct. 876 (2010).

⁴⁶ Don Ford, *Electronic Resource Guide: Private International Law 3* (2013), available at http://www.asil.org/sites/default/files/ERG_PRIVATE_INT.pdf.

⁴⁷ U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

Inter-American Convention on Commercial Arbitration (Panama Convention): similar to the New York Convention, although adopted by certain member States of the Organization of American States (OAS)⁴⁸.

UN Convention on Contracts for the International Sale of Goods (CISG): establishes rules concerning international contractual obligations⁴⁹.

Convention on the Law Applicable to Contractual Obligations (Rome Convention): establishes a common choice of law rules for contracts within the European Union⁵⁰.

Further, public international law concepts shape a State's application of its own law. International law may limit the extraterritorial reach of a State's law. If a State is barred under international law from physically meddling in another State then surely its national laws cannot reach into that other State absent some connection to the former. For example, the United States would be constrained to insist that its liberal understanding of freedom of speech apply to citizens of France for speech that occurs wholly in France. But the dynamics may change if the speech in France is by a US citizen and the US citizen thinks he is free to speak in France as he is allowed under the US Constitution. Could a French court apply US law under this circumstance? Or what if the speech is by a US citizen and is broadcast on the internet in France. Does it make a difference where the physical act of putting the speech on the internet occurred? Principles of public international law help guide us on these issues as do private international law principles⁵¹.

Understanding private international law requires a focus on the national law of States. Municipal law, however, may expressly incorporate public international law. Argentina, for example, provides a constitutional hierarchy to certain human rights treaties⁵². South Africa recognizes that customary international law is the law of the Republic unless it is inconsistent with the Constitution or an act of Parliament; and courts are obligated to interpret a case consistently with international law over an alternative that is inconsistent⁵³. Hence, in certain jurisdictions, the mere reference to municipal law means that public international law is relevant.

Finally, private international law principles shape application of public international law in national courts. For example, assume a national of Argentina brings a claim against the government of Uruguay in the courts of Argentina regarding

⁴⁸ Inter-American Convention on International Commercial Arbitration, opened for signature Jan. 30, 1975, OAS SER A20 (SEPEF), 14 I.L.M. 336.

⁴⁹ CISG *supra* note 9.

⁵⁰ Rome Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (L 266) 1, 19 I.L.M. 1492.

⁵¹ See Berman; *supra* note 15, at 300-03 for a more detailed analysis.

⁵² Art. 75(22), Constitución Nacional (Arg.).

⁵³ S. AFR. CONST. §§ 232, 233.

an alleged taking of property in Uruguay in violation of international law. Private international law may guide the Argentinean court's decision to exercise jurisdiction and find that the action in Uruguay violated the public order of the forum⁵⁴.

IV. Public and Private Aspects of Today's Pressing International Problems

The overlap between public international law and private international law manifests itself in many ways. In addition to the examples raised in the earlier part of this lecture, some other ones are prevalent today and they are discussed below. Examining, understanding and resolving these international problems from solely the public or private perspective would undermine law's goal of a predictable and orderly environment based on fundamental principles of justice.

The first example concerns international human rights. As previously noted, human rights treaties generally impose a duty on the State to respect, protect, and fulfill human rights. The obligation, being treaty-based or, arguably, even based on customary international law, is thus grounded in public international law. Is it enough to focus only on the State and accept that the duty is fulfilled when a State establishes a legal regime that has regulations to prevent human rights abuses and punish offenders? Should we not also examine non-State actors that may be direct perpetrators, such as a corporation, and consider duties it may owe? Private international law may instruct that the duties arise from national law and thus give rise to a claim an individual has in tort law against the corporation⁵⁵. So, in interpreting and apply a human rights treaty, one cannot ignore applicable State municipal law. The inter-relatedness, however, could be taken to an even higher level. The UN Guiding Principles on Business and Human Rights⁵⁶, which have been endorsed unanimously by the UN Human Rights Council⁵⁷, provide that:

“Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved⁵⁸.”

⁵⁴ Oscar Schachter, *International Law in Theory and Practice* 244 (Springer 1991).

⁵⁵ Craig Scott, *Translating Torture into Transnational Tort: Conceptual Divides in the Debate on Corporate Accountability for Human Rights Harms* in Craig Scott, *Torture as Tort* 44, 51 (2001).

⁵⁶ Special Representative of the Secretary-General, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), available at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-21-mar-2011.pdf> [hereinafter *Guiding Principles*].

⁵⁷ Human Rights Council Res. 17/4, 17th Sess., July 6, 2011, U.N. Doc. A/HRC/RES/17/4 (July 6, 2011), available at <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/G11/144/71/PDF/G1114471.pdf>

⁵⁸ *Guiding Principles*, *supra* note 56, Art. II.A.11.

The Guiding Principles were not intended to create new international law but to “elaborate the implications of existing standards⁵⁹.” The inter-action of public and private international law is essential to the establishment and definition of the corporate duty to respect human rights.

Second, one of the biggest challenges to economic development throughout the world is corruption. For a number of years, the problem was considered a national one. In 1977, the United States passed a far-reaching law, the Foreign Corrupt Practices Act (FCPA), which imposes civil and criminal liability for US publicly-traded corporations and domestic concerns for their corrupt dealings with foreign officials⁶⁰. Under the FCPA, U.S. courts have the power to police conduct around the world based principally on the conduct’s link to a US concern, *e.g.*, a company or individual. It is a national law that has extraterritorial reach, or, in other words, addresses corruption by using private international law means. The FCPA approach, however, attempts to tackle a local problem, corruption in a foreign country, using a foreign law, US law. An approach to corruption at the international level that compels States to change their national laws is more likely to have a lasting impact. Hence, over the past few decades, treaties have emerged, such as the Organization for Economic Cooperation and Development’s (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention)⁶¹, the Inter-American Convention against Corruption, which came into force in 1997⁶², and the United Nations Convention against Corruption⁶³. Under these treaties, State parties commit to enact laws to combat corruption. In tackling anti-corruption at the international level, a public international law approach and one based on national laws are the relevant foundations.

Third, there are thousands of bilateral investment treaties, or agreements between states that protect investors from one State party to the treaty that invests in the other State party to the treaty⁶⁴. Investment protections, while not uniform, are generally national treatment, most favored nation treatment, fair and equitable treatment, and protection against expropriation absent due process and compensation⁶⁵. Many treaties allow for the investor to bring a claim in arbitration

⁵⁹ *Id.* at General Principles.

⁶⁰ 15 U.S.C. sec. 78dd-1, *et seq.*

⁶¹ Convention on Combating Bribery of Foreign Public Officials in International Business Transactions opened for signature Dec. 17, 1997, 37 I.L.M. 1 (entered into force Feb. 15, 1999)

⁶² Inter-American Convention against Corruption, opened for signature Mar. 29, 1996, 35 I.L.M. 724 (entered into force Mar. 6, 1977).

⁶³ United Nations Convention against Corruption opened for signature Dec. 9, 2003, 43 I.L.M. 37 (entered into force Dec. 16, 2005).

⁶⁴ UNCTAD, World Investment Report 2013: Global Value Chains: Investment and Trade for Development 101 (2013), available at: http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf.

⁶⁵ Rudolf Dolzer & Margrete Stevens, *Bilateral Investment Treaties* 58-75, 97-114 (1995).

against the host State if the latter is alleged to have breached the treaty⁶⁶. The law that the arbitral tribunal applies to the dispute could depend on the parties' agreement. If there is not such an agreement, the applicable law could be the law "the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable⁶⁷." In resolving these disputes, arbitral tribunals tackle fairly complex conflict of laws issues. In fact, Article 42(1) of the ICSID Convention expressly brings public and private international law into the equation. As one commentator has noted:

ICSID tribunals should normally apply the law of the State party. The result of the application of that law should then be tested against international law to detect any unfair outcomes. In case of inconsistency with or violation of international law the relevant ICSID tribunal may decide not to apply the host State's law or part of it⁶⁸.

In other words, the tribunal must be versed in municipal law and international law and be able to examine the former in light of the latter.

Fourth, the International Court of Justice (ICJ), the principal judicial organ of the United Nations, largely addresses matters of public international law, such as boundary or treaty disputes between States. Private international law, however, is relevant to its critical work⁶⁹. For example, as De Dycker has noted, the ICJ may be asked to interpret a treaty concerning private international law. Such a request arose recently in 2009 when Belgium asked the ICJ to interpret the Lugano Convention of 16 September 1988 on jurisdiction and enforcement of judgments in civil and commercial matters⁷⁰. In its application, Belgium challenged the refusal of Swiss courts not to enforce a judgment of the Belgian courts and their refusal to stay proceedings pending an action in Belgium⁷¹. The case appears to have settled, yet it is plausible that cases similar to it could appear again as States sometimes consent to have disputes arising under a treaty resolved by the ICJ. Even when a specific treaty is not a stake, the ICJ may be called on to apply what are considered private international law principles or municipal law to resolve jurisdictional issues⁷². This development is not new. In fact, in *Barcelona Traction*, the ICJ appears to

⁶⁶ Id. at 119-64.

⁶⁷ See, e.g., Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 42(1).

⁶⁸ Domenico Di Pietro, Applicable Law under Article 42 of the ICSID Convention, *Transnational Notes* (Oct. 19, 2011), available at <http://blogs.law.nyu.edu/transnational/2011/10/applicable-law-under-article-42-of-the-icsid-convention/>.

⁶⁹ Stephanie De Dycker, Private International Law Disputes before the International Court of Justice, 1 *J. INT'L Dispute Settlement* 475 (2010).

⁷⁰ Id. at 475-76, 479 (discussing Application for Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belg.v. Switz)).

⁷¹ Id.

⁷² Id. at 480, 486-88.

have first looked to general principles of corporate law to determine whether the shareholders of a company had any rights to assert claims against Spain⁷³. It then relied on international law to hold that “the national State of the company alone [can] make the claim⁷⁴.” In short, in resolving disputes between States, the International Court of Justice applies both public and private international law and does so with little fanfare.

Conclusion

The significance of the withering of the public-private international law demarcation extends well beyond semantics and theory. The current generation of lawyers and legal scholars working in international law no doubt appreciate that effective solutions to international legal problems require them to work seamlessly between the public and private. This realization has become acute over the past decade, particularly given the rise and growing influence of corporations that operate in multiple jurisdictions.

The fluidity poses a unique challenge to the academy, one that for many years has largely divided its law faculties into public international law and private international law, with little inter-action between the two. While some law schools awoke years ago to the need to have a transnational, problem-focused approach, others have languished in formalism, refusing to discard outdated course names and methods. Law students around the world would be well-served to be taught international law as international law in its full and rich sense and they should demand nothing less.

⁷³ Case Concerning the Barcelona Traction, Light and Power Company, Ltd. (Judgment), Feb. 5, 1970, paras. 39- 42.

⁷⁴ *Id.* para. 88. See also DeDycker, *supra* note 69, at 496-97.