under the TRIPS Agreement of the World Trade Organization,[5] the Paris Convention for the Protection of Industrial Property,[6] and the World Health Organization's Framework Convention on Tobacco Control,[7] as well as arguments about the role of Australian domestic law (constitutional, administrative, and health, among others). All five sources of law would take different views on the question of, for example, comparative impairment. This raises the broader question of whether a functional approach can do much to assist a public international law system that is functionally split up along subject-matter lines, rather than along territorial lines, which after all was the context in which conflict of laws rules were developed. I am not sure about this.

In the background, there is the suspicion of public international lawyers that private international lawyers' reliance on private international law techniques to resolve conflicts between different types of subject matter orders actually masks or enables the privileging of certain values or certain policy choices over others. The interesting question then becomes: How far can private international law techniques go in helping to narrow the zone of conflict between competing public international law regimes? Perhaps private international law techniques can indeed narrow the zone of conflict somewhat, for example, by distinguishing between true and false conflicts. But I am not yet convinced that conflicts techniques can help decisionmakers make good value choices at the end of the day, much less avoid making value choices altogether.

I turn to my final point. Under the ICSID Convention,[8] in the absence of an agreement as to the applicable rules of law, Article 42 provides for the application of the law of the host state with a supplementary role for international law. The law of the host state includes its conflict-of-laws rules as well. Most investment treaties contain a very similar, if not identical, choice-of-law clause. But what is seen in practice—because an increasing number of claims are brought under treaties and not contracts—is that there are very few cases where the domestic law of the host state is actually applied in a material way. Instead, the law of the treaty itself (international law) is applied in line with background norms of public international law. The question that must be considered is the role that private international law might play in helping public international lawyers understand, from an institutional design perspective, the instances where transnational governance regimes can or should give pride of place to domestic law and its conflict-of-laws techniques.

Remarks by David D. Caron*

It is suggested by many that there has been a change in both public international law and private international law. Such change may imply a convergence or even a merger of one field into another. Thus far today, the discussion has been about the techniques that can be taken from one field to assist analysis in the other. I have two points to add to this discussion and two framing observations to set out before doing that.

[5] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994; Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

[6] Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, 21 U.S.T. 1583, 828 U.N.T.S. 305.

[7] WHO Framework Convention on Tobacco Control, May 21, 2003, 2302 U.N.T.S. 166.

[8] Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159, 4 I.L.M. 532 (1965).

* Dean and Professor, King's College London, The Dickson Poon School of Law.

https://doi.org/10.5305/procannmeetasil.107.0340 Published online by Cambridge University Press

I will begin, however, by suggesting that we shift our focus away from the ''midlife crisis'' as postulated by the moderator—namely that public international law has a crisis vis-à-vis politics and that private international law has a crisis somewhat in relation to public international law. Instead, I suggest we focus on what greater and greater dissatisfaction with the explanatory power of either of these fields for the world around us suggests. Both of these fields are a response to a conception of the international system and political and economic order, and that conception is one of sovereign states and distinct legal systems. Public international law is a means of addressing the interaction between states. Private international law is a means of addressing the interaction between legal systems. It may be that the order is more complicated than that, but it is also true that these fields were, and in some measures remain, responses to manifestations of the underlying realities. In this sense, the opening question in my view is: What are the fundamental changes to the underlying political, social, and economic reality that render both public and private international law inadequate ordering responses?

My first framing observation is that it is clear that a good amount of the traditional underlying political and economic reality remains in the sense that legal ordering remains distinct both in terms of different states and different legal systems. Both public international law and private international law will thus continue to have questions to answer. My second framing observation is that change is nonetheless happening, and that this change is significant. It is natural for a scholar to adapt or tweak his or her field to accommodate changes. But perhaps it ought to be asked, at some point, whether the changes are so fundamental that tweaking (or borrowing from another field) might not be the answer. What might be changing at present? Our program description has two suggestions. One would be globalization, and the other would be that private actors have more presence in public international law and law-making in general. How do we think about these changes, and do these changes somehow change the fundamental conception of what our fields are a response to?

The two points that I wish to add to the views presented in this panel are as follows. First, globalization as distinct from interactions in the past implies a density to transnational activity, and a transnational interconnectedness between cause and effect, that is so great that it is clear that it is no longer possible simply to refer to interactions between states or interactions between legal systems. I would suggest that for some of these activities, what is actually seen and actually sought is transnational legal order. In these sectoral efforts at coordinated governance, a greater presence of the private along with the public can therefore be seen.

Second, the nature of some of the problems to be addressed is different than in the past. In both public and private international law, states that did not meet specified standards could be excluded. For example, in public international law, the move from simple coexistence to mutual benefit through cooperation took place between states who believed in each other's commitment to and capacity for cooperation. However, cooperation in the twentieth century very often involved only a subgroup of states, with some states being ignored. Similarly, in private international law, there are exceptions that allow for the exclusion of some states. For such states, among other things, their judgments may not be recognized and their laws may be deemed as contrary to public policy and thus not applied. But our contemporary problems—such as climate change, terrorist financing, and narcotics—do not afford us the option of simply excluding some jurisdictions. The task, therefore, is not only about serial interactions, but also about ongoing governance. Crucially, if one's thinking shifts from interaction to governance, then there are geographic areas which cannot simply be left out,

particularly when those areas are important to governance of the particular problem in question.

Thomas Holland has a wonderful line—international law ''is the vanishing point of jurisprudence.''[1] When I first came across this line, I viewed it as a critique of international law in that it meant that international law was at the philosophical edge of law. However, when the passage in which the line appears is read in its entirety, the line actually says something quite different. What Holland argues is that the moment that international law triumphs—at the moment when there actually is governance internationally, transnationally, or however one defines it—international law goes out of existence. Why? Because by definition international law is responding to an underlying reality, and once that reality changes, international law is no longer needed or an appropriate response.

If the fundamental change underway is transnational activity and transnational legal order is the new shape of order appropriate to that new underlying reality, then I would suggest that the midlife crisis posed by our moderator is not for either public or private international law, but rather for both simultaneously. In this sense, the techniques that need to be borrowed are not from public or private *international* law, but rather from private law and public law. It is the international that is vanishing. In my opinion, the major shift underway is not from public international law to private international law, or vice versa; rather, both fields will be looking at the emergence of the national, public, and private, simultaneously.

A Summary of the Ensuing Discussion*

The panel's remarks were followed by a lively discussion. We have attempted to summarize the key points made in the discussions under what, in our view, were the main themes that presented themselves.

On the Use of Private Institutional Law Techniques in the Public International Law Context in General[1]

It is certainly plausible that public international law might be able to draw from techniques of private international law. Private international law techniques, in particular, may possibly be used in relation to jurisdictional conflicts in public international law and conflicts of public law. In the investment arbitration context, jurisdiction and choice-of-law techniques from private international law may assist significantly in the characterization of the issues and the determination of the law to be applied to particular issues in question. On the other hand, it may be questionable whether the application of private international law techniques, which are irrelevant on their face in the public international law context, could lead to solutions. It might even be argued that the best approach could be collaborative in nature, in which one examines how the various systems of law and norms that are applicable in the life of a transnational activity complement and coordinate with one another. This may be viewed in terms of coordinated governance. Thus, it is necessary to consider what is lost and what is gained by the different approaches to dealing with conflicts in public international law.

[1] Thomas Erskine Holland, Elements of Jurisprudence 392 (13th ed. 1924).

* Summary provided by Rahim Moloo and Nathaniel Khng.

[1] Based on remarks from Dean David Caron, Ronald J. Battauer, Professor Catherine Kessedjian, Professor Campbell McLachlan QC, and Rahim Moloo.

https://doi.org/10.5305/procannmeetasil.107.0340 Published online by Cambridge University Press