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.

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On Institutional Dimensions and the Use of Private International Law Techniques[2]

In considering whether private international law techniques may be applied in the public international law context, institutional dimensions may have to be considered. In this respect, it must be queried whether the forum in question will be willing to avail itself of private international law techniques that might assist it in resolving disputes. Even though private international law techniques are highly developed and are capable of providing solutions in disparate complex situations, whether they may do so in practice ultimately depends on the decisionmaker and the applicable rules of the forum. The decisionmaker may not be able to apply private international law techniques with the same competence as a conflicts-of-laws scholar, and the application of private international law techniques may not be permitted by the applicable rules of the forum. Such an institutional capacity issue may be a limit on the ability of private international law techniques to assist in the resolution of normative conflicts between jurisdictions.

That aside, it may be possible for fragmentation to be pre-empted or even avoided by institutions collaborating to identify possible conflicts. A recent example of such collaboration may be found in the area of terrorist financing, where there was creative gap-filling at the UN in terms of, among other things, the steps taken by the Security Council and the creation of committees to deal with designations, as well as the consensus that was arrived at among finance ministries and treasury officials in most of the developed world. On the other hand, a lack of collaboration has led to uncertainty in the interrelationships between different treaties. There are, at present, many provisions such as Article 22 of the Convention on Biological Diversity, discussed by Julie Maupin in her remarks, which are ambiguous in wording. The problem is the present siloed approach to negotiating different types of treaty regimes, which militates against a cooperative model that might be preferable.

On Whether Private International Law Is Really Private Law and Other Conceptual Issues[3]

The question of whether private international law is really private law, or is more public in nature, is something that continues to be debated. It might, for instance, be argued that private international law is private as it deals with private actors in the main. On the other hand, private international law issues arguably appear to be public in some sense, as they involve the consideration of whether a particular jurisdiction's public law values (i.e., by choosing one set of governing norms over another) ought to prevail in the situation in question.

That having been said, the discussants reiterated that private international law is an intricate and complex set of techniques that cannot be learned easily and must be mastered over time. Public international lawyers do not master private international law techniques easily. Whether private international law is truly private in nature ought to be secondary to the question of whether its techniques are helpful.

In addition, there appears to be a temporal aspect to the dissonance in private international law. It was suggested that private international law a century ago meant something very clear: it meant conflict of laws, choice-of-law issues, jurisdictional issues, and judgment

[2] Based on remarks from Peter Trooboff, Julie Maupin, and Professor Margaret Young.

[3] Based on remarks from Professor Mathias Reimann, Dr. Stephan Schill, and Professor Mark Wojcik.

recognition issues. In the past 25 to 40 years, another kind of private international law that is substantive in nature has arisen. The CISG is a prime example.[4] Such laws are not private international law in the traditional sense, but are international law either based in treaty or soft law. There may also be a cultural component to the differences in understanding of what is covered by the field of private international law. It was suggested that American lawyers tend to view the substantive element as being part of private international law. European lawyers, in contrast, tend to adopt the traditional definition of conflict of laws.

On International Commercial Arbitration[5]

The international commercial arbitration system that currently exists is a prime example of a transnational legal order, as it overlaps and harmonizes numerous legal systems at the same time. It could be thought of simultaneously as private law and transnational governance, albeit governance satisfying the contractual wishes of private users and designed primarily by them. Nevertheless, international commercial arbitration might, as it broadens and penetrates more deeply, be more likely to encounter fairly traditional problems. Limited purely to commercial business-to-business arbitrations that are based on consent, international commercial arbitration is largely autonomous of the state apparatus. However, when it is broadened and extended, clashing sovereign claims might be encountered. In the context of consumer disputes, for instance, the very broad permissibility of the United States can be contrasted with the very protective mindset in Europe. In sum, in arbitration, conflicting notions of regulation and justice between legal orders cannot be permanently avoided.

[4] United Nations Convention on Contracts for the International Sale of Goods, Mar. 2, 1987, 1489 U.N.T.S. 3.
[5] Based on remarks from Dean David Caron, Professor Mathias Reimann, and Rahim Moloo.

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