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REVIEWS SYMPOSIUM

The contractualisation of public international law

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1 Introduction

This short paper intends to set out a general theory underpinning the process of contractualisation of public international law. In doing so, it explains that this has chiefly been engineered through the establishment of a third *sphere* of regulation – in addition to the spheres of domestic law(s) and international law – namely transnational law. Both private actors and states operate through this sphere, chiefly because of its flexibility, decreased transaction costs and access to capital (which is scarce in the other two spheres). These benefits of transacting in the transnational-law sphere and the contractualisation of pertinent relationships come at a cost. Such a cost, from the perspective of human rights and parliamentary sovereignty, is explored by reference to two case-studies. The second of these, on the outsourcing of indigenous land rights, is predicated on the research and observations offered by Bhatt (2020).

2 A general theory underlying the contractualisation of international law

The contractualisation of public international law is taking place as a result of the meeting of two, although seemingly incongruous, yet ultimately parallel, *universes*. Both universes are the direct result of the failure of domestic and international law to satisfy the key needs and desires of their chief stakeholders. The first universe consists of private commercial actors operating across more than one country, whereas the second consists of states, or state entities, desirous of investing their assets or contracting with private actors.

The first universe has traditionally been regulated by one or more domestic laws, whether corporate, contract or other. International law played little part in this universe because states zealously guarded this domain and only rarely conferred any rights directly upon private actors. As commerce and trade grew in the aftermath of World War II, it was impossible for domestic laws alone to satisfy the fast-growing demands of globalisation and the commercial ambitions of actors that possessed more capital and expertise than states. Such a regulatory framework was outdated, narrow-minded, inflexible and stifled cross-border trade, as well as entrepreneurship. As a result, private actors, particularly multinational corporations (MNCs), sought a velvet revolution releasing them from the shackles of domestic laws, including also private international law. They embarked upon a process of self-regulation, industry by industry, theme by theme, by pre-empting state regulation and ensuring, with a good degree of lobbying, that states either adopted laws replicating the subject of self-regulation or just accepted it as good practice. In time, the subject matter of self-regulation would become so entrenched and thus tacitly accepted by states as tantamount to (good) law.[1] A poignant example may be offered by the various standards adopted by the transnational construction industry.[2]

[1]E.g. s. 346 of the German Commercial Code states that 'due consideration shall be given to prevailing commercial custom and usages concerning the meaning and effect of acts and omissions among merchants'.

[2]The construction industry's International Federation of Consulting Engineers rules are distinguished threefold as follows: construction contracts per se (red book); plant and design-build (yellow book); and Engineering, Procurement and Production turnkey contracts (silver book).

Self-regulation that produces rules internal to an industry may (although not necessarily) culminate in its replication in domestic law, as either an acknowledged – albeit unwritten – business custom or a fully fledged written law. But this is of little importance. What is important is that the authority to self-regulate and the 'rules' emanating therefrom (*lex mercatoria*)[3] are part of a wider process that has become a new *sphere* comprising many disparate self-regulations and even more 'rules'. We may call this sphere *transnational law*, to which we shall return a little later.

The second universe comprises what is sometimes termed 'state capitalism' (Kurlantzik, 2016; Cuervo-Cazurra *et al.*, 2014). Modern states need to invest or trade their assets no less than private actors. Leaving aside rich, industrialised states, even poor ones, with little belief in global capitalism, need to invest in one way or another. Income may be derived from the sale of sovereign bonds, or through the investment of assets from pension funds. In both cases, states and their subordinate entities know all too well that trading with other sovereigns is not a worthwhile or profitable exercise. States (as *fiscus*) are saddled with and subjected to inflexible domestic laws, transparency requirements, several levels of bureaucracy and parliamentary (and thus political) approval demands. As a result, it is counter-productive (1) to trade with other states and (2) to trade under even one's own domestic laws on account of the reasons already identified. If states are to trade and invest their excess income and achieve the maximum profit with the least amount of risk, then it is clear that it is in their interest to trade and invest in the (flexible) regulatory environment inhabited by private actors. Given, however, that private actors dislike the asymmetry inherent in transacting with sovereigns, states must necessarily bow their heads and assume the guise of a private actor. There is little incentive to contract with a state entity that may later breach its contractual obligations by invoking a subsequent domestic law (of its own making), immunities, unilateral bankruptcy or other sovereign excuses.

The benefits of transnational law so appealed to states desirous of investing/trading their excess income that state capitalism was subsumed within it. This was exactly the regulatory space state capitalism was looking for: something like a quiet neighbourhood away from the hassle and bustle of the city and where few rules and restrictions exist. If states were to be given access to this sphere of regulation, it was imperative that they strip themselves of their sovereign privileges and accept being treated just like any private business entity. States were more than happy to oblige. In this sense, transnational law should be viewed as a *sphere* of regulation that is distinct from the *spheres* of domestic law(s) and public international law, and is broader than the set of *universes* that exist within it. Domestic law is a vertical system of regulation in which rules are made by the state. International law, on the other hand, consists of a horizontal system of regulation that is based on state consent. Transnational law is different from its other two counterparts. It makes no hierarchical distinction between its various participants (i.e. between states and private entities) and all are conferred equal legal status and standing to create industry-wide rules through consent-based self-regulation. Of course, it is acknowledged that some participants are much more influential than others and such power may dictate the exercise, boundaries and outcomes of self-regulation, but this is no different to the myth of sovereign equality of states under international law.

If it is indeed true that states prefer to invest and trade in the sphere of transnational law, which includes also the fragmented international law on foreign investment,[4] then what are the role and function of domestic law? This may be explained by reference to an illustration. A strict disciplinarian may at will bend his house rules in favour of a dignified guest, but would have no qualm in punishing a member of his household even for the slightest of infractions. In equal manner, domestic laws apply and serve well for the purposes of social control, but are inadequate in the fast and voracious world of

[3]The ultimate validation of *lex mercatoria* rests on the fact that not all legal orders are created by the nation state and accordingly that private orders of regulation can create law (Teubner, 1997, p. 15).

[4]Bilateral Investment Treaties (BITs) generally create a cocktail of rights for investors that override constitutional norms and even general international human rights law, the latter on the ground that international foreign-investment law is fragmented from other spheres of international law and hence there is no real need to reconcile possible conflicts. See e.g. Vandevelde (2000, p. 499), who argues that BITs 'seriously restrict the ability of host states to regulate foreign investment'.

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cross-border trade and investment, where profit maximisation requires playing in accordance with an altogether different set of rules.

Access to the sphere of transnational law for states comes with many benefits, but also some cost. The cost is that, in exchange for access to an exclusive club that allows the greatest degree of profit maximisation, they too have to open their domestic economies to other public and private participants in this club. This is manifested through unlimited trade liberalisation, uninhibited competition and access to public procurement, recourse to international arbitration and the least possible state presence and intervention in public and private life. This inversion (or otherwise the application) of the transnational-law sphere into the regulatory space of domestic law is the direct result of the obligations assumed by states when accessing the sphere of transnational law. At the domestic level, this is manifested in the privatisation of most aspects of the state through the process of contract and contractualisation. The next section will provide some examples in order to explain how this theoretical framework operates in practice.

3 Transnational law and contractualisation in practice

Many fields traditionally associated with public law, while not necessarily privatised, have been partly regulated by means of contracts (with the distinction between administrative and private contracts being largely insignificant). This usually arrives as a natural process and as conforming to the particular procedural rules of the *sphere* within which the said activity occurs. Given space limitations, I shall confine the application of this theory to the fields of international finance and human rights, albeit the discerning reader will not fail to detect the interaction with other areas of international law and its impact on human rights in all cases.

3.1 Sovereign finance

A country attempts to raise its revenues by selling government bonds, taking out loans and undertaking some degree of privatisation[5]; poorer states will accept also direct aid or concessional funding. The first three means of revenue generation require investors with sufficient capital and the likelihood of profit, all of whom operate and invest through private markets. Hence, any calls for the sale of bonds, loan offers or privatisation can only be made through private markets and concluded under private market terms, even if the assets concerned or the recipients of loans are public in nature. All three require agreement concluded by a contract subject to a 'law' of a third state,[6] confidentiality, perhaps the absence of good faith,[7] recourse to arbitral tribunals or neutral courts, the waiver of the state party's typical privileges and immunities, as well as (depending on the agreement in question) the assumption of certain conditions by the state that are, in theory at least, designed to help the state

[5]This is true even of wealthy, resource-rich states, like Saudi Arabia, which, in 2019, put up to a public offering a small amount of shares in Saudi Aramco, with a view to raising liquidity and financing Aramco's future projects. See https://breakingnewsenglish.com/1911/191111-saudi-aramco-ipo-4.html (accessed 26 February 2021). Saudi Aramco's website provides restricted access to its initial public offering (IPO) documents. In mid-2020, the same country woke up to the post-Covid-19 realisation that its excess production in oil was a liability because of the cost of storage and transport during a global slump in consumption.

[6]In accordance with Art. 28(1) of the UNCITRAL Model Law, the parties in arbitral proceedings can designate as their governing law not only the laws of a legal system, but any 'rules of law'. This term is particularly important because it allows the tribunal to take into account internationally accepted trade practices and non-binding instruments, even if they are not considered law in the formal sense, as is the case with *lex mercatoria* and non-ratified treaties or other instruments (Bantekas, 2020, pp. 738–741).

[7]Bad faith may arise where, for example, the creditor enters into an agreement that knowingly violates the borrower's constitutional and international-law obligations and that the borrower is forced to accept even though the resulting transaction is manifestly disadvantageous to the borrower. Some, but few, English courts have accepted that good faith is part of English law through EU law and principles. *Yam Seng Pte v. International Trade Corp Ltd* [2013] EWHC 111 (QB), paras 119–154, but especially para. 124. This is, however, a minority position and the absence of (implied) good faith in English contract law is considered one of its advantages for its cross-border end users.

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to perform its obligations to the buyer/lender.[8] Hence, from the very moment a state ventures to increase its revenues (other than by raising taxes or the collection of customs duties), it must effectively forego its Constitution and in addition implement its international obligations with investors through contracts.[9]

From that moment onwards, every aspect of the parties' contractual relationship will be subject to the terms of the contract, including the parties' web of precontractual rights and duties. This is not, of course, unusual and it is assumed that prudent commercial parties are aware of conflicting relationships, or of the lesser cost of breaching one obligation in favour of the higher benefits in implementing another.[10] However, unlike MNCs, states carry with them obligations emanating from the *sphere* of international law. The obligations of MNCs arise from private contracts under the *sphere* of domestic law(s) or the *sphere* of transnational law. The calculated breach of a private obligation over another may, as already explained, be beneficial for the breaching entity. On the other hand, state obligations arising from a treaty or custom (particularly *jus cogens*) cannot be measured in terms of economic cost because they encompass obligations relating to the livelihood and well-being of human beings, or environmental preservation. While international law generally posits that obligations derived from treaties and custom override contractual or similar obligations, the practice[11] of international financial institutions (IFIs), such as the World Bank Group or the European Central Bank (ECB), and supporting states is that states must honour their contractual obligations. In fact, in the case of the Greek debt-restructuring process, the various creditors and guarantors, such as the EC Commission, Eurogroup, the International Monetary Fund (IMF) and the ECB, contracted with Greece either through memoranda of understanding (MoU) (Markakis and Dermine, 2018) or private contracts and were at pains to show that they were acting outside the framework of EU law or general international law.[12] It is interesting to note that, while all these institutions maintained since 2010 that MoU were not binding, it was only in 2018 that the Court of Justice of the European Union (CJEU) accepted in *Florescu* that MoU entered into by EU institutions in the implementation of EU law were in fact 'mandatory'.[13]

What we have seen thus far is that states play in accordance with private market rules to finance their budgets, achieved through private contracts, which are in turn guaranteed or restructured (in the event of indebtedness) by further private agreements. Up to this point, sovereign finance is anything but sovereign, having been reduced to a string of contracts, which, moreover, restrict the ability of the borrowing state to fully implement its human rights (among other) obligations. As a result, the contractualisation of sovereign finance encompasses also human rights and parliamentary democracy, which are prescribed in the *spheres* of national and international law. The contracts on the basis of which these two spheres are bypassed typically provide for international arbitration, whereby

[8]The IMF and Paris Club, for example, as a matter of practice, impose a significant number of conditionalities on borrowing states or states subject to debt-reduction agreements (Villaroman, 2009).

[9]BITs and foreign-investment law create investor–host state relationships that are akin to the horizontal nature of contractual relationships between equal parties. Investors enjoy all guarantees in the BIT, including recourse to investment arbitration, even though they are not signatories to the BIT.

[10]This is known as the theory of efficient breach of contract (Klass, 2014).

[11]This consists of conditionalities that effectively impose human rights retrogression, foreign (usually English) governing law and the opening-up of national economies to privatisation. English law, and not international law, was the governing law between IFIs/bilateral sovereign creditors with Greece and other indebted states in their contracts or MoUs, chiefly because, in the opinion of this author, of its clear deference to commercial interests (rather than good faith, for example) (Bantekas, 2018, p. 539).

[12]In Joined Cases C-105-109/15, *P, Konstantinos Mallis and Others v. European Commission and European Central Bank*, EU:C:2016:702, the CJEU found that the Eurogroup is an informal grouping of the euro area finance ministers and, as a result, its acts could not be attributed to the Commission or the ECB. But see Joined Cases C-8-10/15P, *Ledra Advertising Ltd and Others v. European Commission and European Central Bank*, EU:C:2016:701, where the CJEU held that, where the EC Commission is involved in the signing of an MoU within the framework of the European Stability Mechanism, it is acting within the sphere of EU law. Therefore, it is bound to refrain from MoUs that are inconsistent with EU law, including the EU Charter of Fundamental Rights.

[13]Case C-258/14, *Eugenia Florescu and Others v. Casa Jude ţeanăˇ de Pensii Sibiu and Others*, Judgment of the Court (Grand Chamber) of 13 June 2017, EU:C:2017:448, para. 41.

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tribunals do not possess authority to assess the compatibility of the contract with the constitutional or treaty/customary obligations of the state party in question.[14] In a case entertained by the Caribbean Court of Justice (CCJ), a last-instance court for Caribbean island-states, a newly elected Belize government repudiated a tax concession granted to a group of companies by means of a settlement deed negotiated by its predecessor government. The concession was adhered to by the parties for a period of two years notwithstanding the fact that it had not been approved by the Belize legislature, was confidential (hence non-transparent) and was manifestly contrary to the country's tax laws. The successor government repudiated the concession and the group of companies commenced arbitral proceedings culminating in a damages award, which they sought to enforce in Belize. Even though the CCJ refused to enforce the arbitral award holding its violation of fundamental constitutional principles and international public policy,[15] the opposing parties bypassed the CCJ by seeking to enforce the award in New York and ultimately succeeded.[16]

3.2 Indigenous peoples and the outsourcing of indigenous land rights

While it is quite clear that indigenous peoples (IPs) under international law enjoy at the very least the rights of minorities under Article 27 of the International Covenant on Civil and Political Rights (Bantekas and Oette, 2020), as well as general international human rights law (which is, however, individualistic in nature), the question of land rights is unsettled as a matter of consistent state practice. Bhatt eloquently demonstrates the rather 'invisible' practice of several states with IP populations of demarcating indigenous lands and rights (of occupancy, usufruct or other) thereto not on the basis of domestic regulation, but through contracts between concessionaires and IPs (Bhatt, 2020, pp. 91–122). Such contracts would be meaningless as to the regulation of substantive land rights if state laws had already conclusively dealt with this matter. Yet, such contracts substitute the state in perhaps its most sovereign function, namely the allocation of land rights on its national territory. No doubt, in playing devil's advocate, one may wonder whether the contractualisation of IP land rights is in fact a better alternative, from a political and financial perspective, as opposed to public allocation. I can think of no compelling reason, other than the fact that public land-rights allocation would make concessions impossible, or would otherwise require arbitrary (and forceful) state intervention. The concessionaire, although not the owner of the land, is provided with authority to negotiate with IPs concerning possible land rights/tenure of the latter, as well as a share in the royalties (Bhatt, 2020).

Although this may be viewed as better than no royalties or land tenure whatsoever, the transformation of the agreement into a contract is replete with conditions that constitute a sharp retrogression from the general sphere of IP protection under international law, as well as the ordinary constitutional protection one would expect in the sphere of domestic law. Such contracts effectively provide authority to the concessionaire to resettle IPs on the basis of the concession deed, as well as violate other collective or individual rights.[17] Bhatt brings to light many of the intentional shortcomings identified in the previous section dealing with the contractualisation of sovereign finance. A recurring element is the emphasis on English law as the governing law of most concession agreements (Bhatt, 2020, p. 49), as well as the involvement of IFIs, either as facilitators of the project's finance or as guarantors. In any event, the World Bank Group imposes upon the concessionaire its Operational Policy on

[14]Under Art. 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration, such unauthorised assumption of power by the tribunal is a ground for setting the award aside.

[15]*BCB Holdings Ltd and Belize Bank Ltd v. Attorney-General of Belize* [2013] CCJ 5 (A.J.).

[16]*Government of Belize v. Belize Social Development Ltd* [formerly BCB], US Ct Appeals judgment (13 May 2016), *cert den* US Supreme Court decision (12 January 2017).

[17]Bhatt, 2020, pp. 33–34, 151–152, concerning the Ugandan study, which demonstrates that the powers conferred on the concessionaire were highly informal, involving a tacit/implied delegation to deal with public-law issues in the case of public–private partnerships (PPPs) that result in resettlement and other negative human rights impacts.

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Indigenous People, which includes catchy phrases derived from UN instruments,[18] while, at the same time, the financing aspects of the contract between the concessionaire and the host state are subject to IFC[19] private regulation standards (Bhatt, 2020, p. 106).

Let us now explain why the contractualisation of indigenous land rights is antithetical to fundamental notions of behavioural (public) law and economics, even if the 'gains' made by IPs through their agreement with the concessionaire are higher than the rights, if any, conferred by law. The IPs–concessionaire agreement involves a bargain of considerable asymmetry.[20] The concessionaire possesses an army of financial and legal advisers who have thoroughly weighed each and every aspect of the concession. IPs, when left to bargain, will assume judgments of a heuristic nature – that is, they will resort to mental shortcuts, which in turn ensures that their decisions will not be economically sound (Jolls *et al*., 1998, p. 1478). The cognitive operation of a heuristic-value judgment forces the mind to seek easy answers in response to difficult questions that would otherwise require access to data and information (known as mental substitution) (Kahneman and Thaler, 2006, p.223). Despite the hype of free, prior and informed consent (FPIC) in the contractualisation of IP land rights (Bhatt, 2020, pp. 54–57), there is no particular urgency, benefit or obligation on the concessionaire to provide hard-earned data that will upset its bargaining power with IPs – quite the opposite. As a result, the IP heuristic-value judgment will be manipulated, coloured and perceived from short-term gains and expectations.[21] Ultimately, the benefits that IPs will end up getting from their bargain with the concessionaire will be contractual in nature. If they are unhappy with them, particularly if they end up being unfair or restrictive, they must resolve these solely by recourse to the contract, its governing law and its choice of dispute mechanism. Just like in the discussion in the previous section, the arbitral tribunal will determine the IP claim on the basis of a commercially inclined 'law', to the exclusion of attendant human rights considerations. The territorial state is equally bound by this contract because it has agreed to it in its own concession agreement/law. The prospect of fewer, or no, rights by the state to IPs would be far more preferable because IPs and civil society could continue their political struggle through the local courts and other democratic processes (national parliament). In such a process, there would be no bargaining asymmetry because public law does not create immutable bargains between the state and its citizens.[22]

4 By way of conclusion

While it is easy to see the benefits for non-state actors to bypass the spheres of domestic and international law, states have clearly fallen in the trap of over-competitive regulation. Their laws possess a value only if they increase the number of end users. If potential users at the top end (rich investors and traders) avoid using it (and the courts of that state), then its value decreases exponentially and, in

[18]Para. 1 of the World Bank's Operational Policy (OP) 4.10 on Indigenous People (as revised in April 2013) requires the borrower to engage in a process of 'free, prior, and informed consultation', also known as FPIC (which is now part of customary international law) with the affected indigenous group. FPIC must yield 'broad community support' for the project in order for it to be financed.

[19]The International Finance Corporation (IFC) is the private corporate vehicle of the World Bank Group. That intergovernmental entities set up subsidiary entities the form of corporations is now common practice and serves to reinforce the contractualisation of the international-law paradigm. The European Financial Stability Fund (EFSF) was set up as a corporation under Luxemburg law and its shareholders consisted of EU Member States.

[20]The literature suggests several key points when negotiating with a stronger counterpart, namely: alliance-building; developing alternatives away from the table; attention-getting; taking initiatives; dividing and conquering; and bridge-building (Salacuse, 1999).

[21]It has been clinically found that low-risk events fresh in one's memory create a greater degree of fear in comparison to events of high risk that are distant in one's perception (Gaissmaier and Gigerenzer, 2012).

[22]Research on asymmetric contractual relationships (between retailers and manufacturers) clearly suggests that complex contracts with high stakes are generally: (1) made in respect of established and continuing relationships and not in new untested relationships and (2) contracts are more important for the stronger party in asymmetric relationships (Mouzas and Ford, 2007).

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order for the state in question to maximise its assets, it needs to migrate, at least as far as commercial potential is concerned, into the sphere of transnational law. This brings with it largely unintended consequences, particularly the contractualisation of many aspects of public life. As has been demonstrated in this paper, the replacement of public law by private contracts is detrimental to states and its values, even where prima facie the gains for people/citizens are manifold as compared to the rights granted by (poor and authoritarian) states.[23]

Conflicts of Interest. None

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[23]See 'Rio Tinto Admits Damaging Australian Aboriginal Heritage Site', *The Jakarta Post*, available at https://www.thejakartapost.com/news/2020/05/27/rio-tinto-admits-damaging-australian-aboriginal-heritage-site.html (accessed 26 January 2021). Rio Tinto is one of the mining companies on which Bhatt focuses in respect of its FPIC-related contracts with IPs in Australia. See Bhatt (2020, p. 174 (n. 21)).

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