Remarks by Peter Trooboff*

The techniques and intellectual style of private international law can be useful in analyzing public international law issues.[1] I shall provide some examples from my experience. I do so with emphasis that I am trying out these ideas in an effort to building on the thinking reflected in the work by Knop, Michaels, and Riles. My fellow panelists and the audience will determine whether the examples are apt and useful for future thinking.

The first example would be techniques of characterization and false conflicts in relation to the debates that have regularly occurred concerning U.S. assertions of extraterritorial jurisdiction. I have chosen this example because there has been a recent development that has gone largely unnoticed. At the end of 2012, the U.S. Treasury sanctions against Iran were amended for the first time since the Cuban Regulations to assert jurisdiction over owned or controlled foreign subsidiaries of U.S. companies.[2] Unlike what happened in previous similar instances, there has been no controversy in this assertion of jurisdiction. Is it because this type of sanction has been categorized differently? But this merely defines the issue. The U.S. government believes that it can exercise this jurisdiction over companies—even if they are organized under the laws of another country—if they are owned by a U.S. company, but other nations do not believe this to be true. They think that they are the ones that should regulate companies organized under their laws. The idea of a false conflict arises here, because a very substantial effort has been made to gain a multilateral consensus on policy regarding sanctions against Iran—to take action that would achieve through the laws of these other countries what we are trying to achieve through our sanctions. As a result, there is no clash of the kind in previous controversies.

The second example would be in relation to proof of foreign law.[3] Under Rule 44.1 of the Federal Rules of Civil Procedure on proof of foreign law, law is law when presented in a court, even though very frequently foreign experts are used to support the content of foreign law. In this respect, there has been great controversy over whether courts should have experts to interpret the foreign law. The most significant recent case on this subject is *Bodum USA Inc.,* decided in 2010,[4] in which Judge Richard Posner excoriated his colleagues for relying on experts. His view, in essence, was that there was plenty of legal material in English on the French legal issue before the court and he was quite capable of reading it and coming to a conclusion on what the relevant French law was. Judge Diane Wood, in a concurring opinion, wrote that she did not disagree with Judge Posner's reading of the law, but was of the view that it is not necessarily true that expert testimony is inferior to published materials in the English language.[5] There are, she reasoned, nuances of law that those who have grown up in a foreign legal system could highlight. She elaborated on this point and noted that the rules of evidence furnish ''tried and true methods'' for testing testimony of experts and protecting the courts ''against self-serving experts in foreign law.''

* Senior Counsel, Covington & Burling LLP.

[1] *See* Karen Knop, Ralf Michaels & Annelise Riles, *From Multiculturalism to Technique: Feminism, Culture, and the Conflict of Laws Style*, 64 Stan. L. Rev. 589 (2012).

[2] Iranian Transactions and Sanctions Regulations, 31 C.F.R. § 560.215, 77 Fed. Reg. 75,845 (Dec. 26, 2012), implementing Section 218 of the Iran Threat Reduction and Syria Human Rights Act of 2012 (Pub. L. 112-158) and Section 4 of Executive Order No. 13,628 (Oct. 9, 2012).

[3] *See* Knop, Michaels & Riles, *supra* note 1, at 629–32.

[4] Bodum USA, Inc. v. La Cafetiere, Inc., 621 F.3d 624 (7th Cir. 2010).

[5] *Id.* at 638–40.

https://doi.org/10.5305/procannmeetasil.107.0338 Published online by Cambridge University Press

If we think about it, and do not just address this as a theoretical matter, private international law techniques might be useful. Let us then think of some other practical situations in which they might be useful.

Remarks by Julie Maupin*

Investor-state arbitration is a crossover between the public and private law worlds because part of it is treaty-based and part of it is contract-based, and conflict of laws and public international law both have to be dealt with. I will pick up on the theme of using techniques in public international law drawn from private international law, and provide some examples where the techniques can help us to resolve conflicts.

I begin with explicit conflicts clauses in treaties. Article 22 of the Convention on Biological Diversity[1] states: ''The provisions of this convention shall not affect the rights and obligations of any contracting party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.'' The point being made in this provision is that although supremacy over other treaties is not being claimed per se, the state parties do intend for the Convention's provisions to take primacy over at least some of their other treaty commitments in situations where the threat to biological diversity is a *serious* one. So what would happen if a biodiversity measure were also trade-restrictive,[2] such that it could be challenged in the World Trade Organization? Would this modified superiority clause help to ameliorate the conflict between treaty regimes? The answer would necessarily relate to where the challenge is likely to be lodged, who would lodge it, and who would decide it. For me, the utility of functional techniques developed in private international law depends on the context. For instance, there is a difference between the dispute being brought before the World Trade Organization and the dispute being brought before a panel convened under the Convention on Biological Diversity. The former is likely to privilege trade rationales, while the latter is likely to privilege conservation rationales.

If we turn to the context of investor-state arbitration, the complexities of using private international law techniques become even more apparent. To give an example, I consider whether functional techniques would assist in a case such as the *Philip Morris* dispute.[3] In this case, the Australian government enacted a plain packaging law in an attempt to reduce the smoking rate in Australia. This led to investor-state arbitration proceedings being commenced by Phillip Morris Asia against Australia, in which it claimed that Australia had breached the Australia-Hong Kong bilateral investment treaty in various ways, including the expropriation of its intellectual property rights.[4] Apart from the claims under the bilateral investment treaty, this dispute also features arguments concerning Australia's obligations

* Fellow, Center for International and Comparative Law, Duke University School of Law.

[1] Convention on Biological Diversity, Dec. 29, 1993, 1760 U.N.T.S. 79.

[2] *See, e.g.*, GATT Dispute Panel Report on United States Restrictions on Imports of Tuna, 30 I.L.M. 1594 (Aug. 16, 1991); GATT Dispute Settlement Panel Report on United States Restrictions on Imports of Tuna, 33 I.L.M. 839 (June 1994); WTO Appellate Body Report on United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998).

[3] Phillip Morris Asia Ltd. v. Austl., PCA Case No. 2012-12 (Perm. Ct. Arb.).

[4] Agreement for the Promotion and Protection of Investments, Austl.-H.K., Sept. 15, 1993, 1748 U.N.T.S. 385, [1993] A.T.S. 30.

https://doi.org/10.5305/procannmeetasil.107.0338 Published online by Cambridge University Press