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

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[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.

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).

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