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2018

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Dear Readers,

The 2018 volume of the Polish Yearbook of International Law is now out. Departing from our tradition of presenting the content of each new volume, this year we will would like to share some statistical data with you.

The Board of Editors eventually selected thirteen articles for publication in the current volume. All of them fall within the scope of the core interests of the Yearbook and relate either to public international law or EU law. In addition, the volume contains two book reviews.

The selection process was difficult as we received sixty-three submissions this year (not including some articles that were submitted after the deadline). This was a slight increase from the previous year, when we have received fifty-nine submissions. We can observe that over the last five years there has been a modest but steady growth of interest among scholars in publishing with us.

Among those articles timely submitted, six papers were subsequently withdrawn by the authors, while about 10% of texts were rejected because their subject matter was not sufficiently connected to public or private international law or EU law (these numbers were quite similar in previous years). One paper was rejected because of the author's infringement of publication ethics and academic malpractice, the details of which are provided on our webpage in the document entitled "Information for authors".

The forty-one submissions that passed the initial assessment by the Board of Editors were subsequently reviewed by at least two reviewers (in some instances, when the reviews were not conclusive or sharply differed, we engaged a third reviewer). This year altogether forty-six reviewers were involved in the process, seventeen of them (i.e. 36.95 per cent of the whole group) having affiliation outside of Poland. The full list of the reviewers is available at the end of the volume. Twenty-six reviewers reviewed for us for the first time, while the rest had shorter or longer experience with the Yearbook. In our opinion they all did an excellent job, offering suggestions to the authors on how to improve their works and allowing us to select the best submissions. We would like to take this opportunity to sincerely thank all of them for their hard work, expertise, and time.

In our opinion, the quality of the texts submitted to us this year was high. As a consequence, we considered for publication only those submissions that received at least two positive reviews.

Moving on to another issue, this past year was also significant in terms of our institutional development. We are currently working on a new webpage that will be more interactive and will include more scientific content. For now, the only change is a new address (http://www.pyil.inp.pan.pl/), although the old one will still be operational for

some time. We also would like to remind our readers that the content of each volume is also available in a free access format in a very user-friendly digital repository maintained by the Polish Academy of Sciences (http://www.pyil.inp.pan.pl). The repository now hosts the last eight volumes, and we are planning to add some older issues in the future. Note however that the new volumes will be added only after the lapse of the embargo period of 7 months from the date of publication.

As far as other plans are concerned, our major goal for the next year is to join the Scopus database. This would be a natural step following our inclusion in ERIH Plus and Emerging Sources Citation Index.

The Yearbook also went through the evaluation process by the Index Copernicus International and received 92.71 points (the so-called Index Copernicus Value). The details of the methodology and applicable benchmarks are available on the ICI webpage (http://www.indexcopernicus.com/). The Yearbook is also currently being evaluated by the Polish Ministry of Science and Higher Education, and the outcome of this assessment will be available in September 2019.

We thank you for participating in our scientific endeavors and look forward to future collaboration!

Karolina Wierczyńska, Łukasz Gruszczyński

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*Michał Balcerzak**

USES AND UNDERUSES OF THE INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION AT THE INTERNATIONAL COURT OF JUSTICE

Abstract:
As many as three international disputes containing allegations of infringement of the International Convention on the Elimination of All Forms Racial Discrimination (ICERD) have been brought before the International Court of Justice (ICJ), thus contributing to the number of cases allowing the Court to pronounce itself on the international human rights law. Even though none of the cases invoking violations of ICERD has been (yet) adjudicated on the merits, they have already provided an opportunity to clarify (at least in part) the compromissory clause enshrined in Art. 22 of ICERD, as well as to tackle some other issues related to provisional measures ordered by the Court. This article discusses the ICJ's approaches to the application of ICERD in the three above-mentioned cases, while posing the question whether indeed the 1965 Convention can be useful as a tool for settling inter-state disputes. The author claims that ICERD and the broad definition of "racial discrimination" set out in its Art. 1 constitute cornerstones for the international protection of human rights, though the recourse to the procedures provided in Art. 22 of ICERD – vital as they are – should not necessarily be perceived as a better alternative to the inter-state procedures and the functions exercised by the UN Committee on the Elimination of Racial Discrimination (CERD).

Keywords: International Convention on the Elimination of All Forms of Racial Discrimination, International Court of Justice, Committee on the Elimination of Racial Discrimination, provisional measures, human rights

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INTRODUCTION

While international human rights law (IHRL) can indisputably be applied by the International Court of Justice (ICJ or the Court), whose role in the development of this area may be considered as substantial,[1] cases concerning human rights obligations do not enter the Court's docket very often. B. Simma offers the view that after several decades of "hesitation and restraint" towards human rights issues, the ICJ started to apply the IHRL in a more straightforward way since the *Nuclear Weapons* advisory opinion of 1996.[2] A. A. Cançado-Trindade perceives the 21st century (and in particular its second decade) as a "new era of international adjudication of human rights", which has been reflected in a more human rights-oriented jurisprudence and possibly illustrates certain shifts in the paradigms of international law.[3] Irrespective of whether one adapts a more cautious or progressive approach towards the influence of IHRL on the Court's case-law or judicial reasoning, the fact remains that the 21st century has brought about more opportunities for the ICJ to engage in the interpretation and application of human rights law than ever before in the history of the World Court.

Arguably, some of the most notable examples from the last two decades include the *A.S. Diallo Case*[4] as well as the ICJ's Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[5] The list of such cases is of course longer, as one should not overlook cases which explicitly or implicitly concerned, *inter alia,* genocide,[6] the prohibition of torture (and implications

[1] *See* R. Wilde, *Human Rights Beyond Borders at the World Court: The Significance of the International Court of Justice's Jurisprudence on the Extraterritorial Application of International Human Rights Law Treaties,* 12(4) Chinese Journal of International Law 639 (2013), esp. at 645 *et seq. See* also the report of the International Law Association's Committee on *International Human Rights Law* (C. Cerna et al. (eds.)), 76 International Law Association reports of conferences 470 (2014), esp. at pp. 476-485.

[2] B. Simma, *Mainstreaming Human Rights: The Contribution of the ICJ,* 3(1) Journal of International Dispute Settlement 7 (2012), p. 18.

[3] *See* Judge Cançado-Trindade's Separate Opinion to the Courts' Order on provisional measures in the *Qatar v. UAE* case, 23 July 2018 (one of the three proceedings at the ICJ where a violation of the ICERD was invoked), paras. 7-8, with references to the same Judge's earlier opinions appraising the ICJ's openness to the jurisprudence of international human rights courts and certain states' reliance of human rights treaties before the ICJ.

[4] ICJ, *Case of Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo),* Merits, Judgment, 30 November 2010, ICJ Rep 2010, p. 639. *Cf.* remarks by S. Ghandhi, *Human Rights and the International Court of Justice. The Ahmadou Sadio Diallo Case,* 11(3) Human Rights Law Review 527 (2011), pp. 527 *et seq.*

[5] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, 9 July 2004, ICJ Rep 2004, p. 136.

[6] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, 26 February 2007, ICJ Rep 2007, p. 43. From a purely normative perspective, the prohibition of genocide may be seen as not belonging to the IHRL's sphere, however it is obviously founded on humanitarian considerations which are common to the IHRL and international criminal law.

thereof),[7] or consular protection exercised towards convicts sentenced to the death penalty.[8] The "new" case-law concerning human rights does not imply however that the ICJ has begun to adjudge these cases in an overly progressive manner. The Court's approaches to human rights issues are sometimes considered as disappointing, but its case-law does illustrate quite a complex picture of contemporary international law, which faces tensions between traditional and/or sovereignty-driven cautiousness vs. human rights-motivated activism. These tensions are in fact nothing new and tend to be reflected in different attitudes within the Bench itself. Another problem lies in the obvious limits to the ICJ's jurisdiction and its insurmountable inter-state character, which in effect obstructs the chances for the ICJ to express itself on what B. Simma describes as "pure" human rights cases.[9]

Despite the greater visibility of human rights in the ICJ's 21st century's case-law, it is not common that states directly invoke a compromissory clause from human rights treaties. Apart from political considerations, this could be partly due to the simple fact that not all treaties of this kind expressly provide for such a possibility.[10] Further, the clauses which may trigger the ICJ's jurisdiction are sometimes excluded by state reservations, and moreover the primary system of dispute settlement and application of the UN human rights treaties is that of the UN treaty bodies, i.e. the committees.[11] Taking into consideration the fact that the inter-state complaint procedures at the UN treaty bodies have remained (until very recently) a dead letter, one should perhaps not be surprised that states are even less keen to submit their claims to the ICJ under the human rights treaties (thus increasing the risk to appear at the ICJ in other cases as a respondent). It could reasonably be argued that an honest and good faith-based commitment on the part of states to their treaty obligations should normally result in the states' readiness to submit themselves to the judicial mechanisms of international dispute settlement. In other words, one should not view the submission of state-parties

[7] ICJ, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 20 July 2012, ICJ Rep 2012, p. 422.

[8] ICJ, *LaGrand (Germany v. United States of America)*, Judgment, 31 March 2004, ICJ Rep 2001, p. 466; ICJ, *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, 31 March 2004, ICJ Rep 2004, p. 12. B. Simma observes that the ICJ's reluctance to consider Art. 36(1) of the Vienna Convention on Consular Relations as the basis for a human right to consular assistance is at least partly due to the Court's unwillingness to pronounce on the Advisory Opinion of the Inter-American Court of Human Rights (OC16-99), which had confirmed the existence of such a right (Simma, *supra* note 2, p. 14).

[9] Simma, *supra* note 2, p. 16.

[10] *E.g.* the jurisdiction of the ICJ is not foreseen in the International Covenant on Civil and Political Rights (ICCPR), adopted on 16 December 1966. Art. 44 of the ICCPR stipulates, however, that its provisions "(...) shall not prevent the States Parties of the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them."

[11] For more on the inter-actions between the ICJ and the UN treaty bodies, *see* N. Rodley, *The International Court of Justice and Human Rights Treaty Bodies*, in: J.A. Green, C.P.M. Waters (eds.), *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi*, Brill Nijhoff, Leiden, Boston: 2015, pp. 11-33, esp. p. 20 *et seq.*

to dispute settlement procedures as "going the extra mile" but rather as part and parcel of a *bona fide* commitment to fulfil the aims of the treaty.

In fact, some core UN human right treaties allow for submitting a dispute to the ICJ. Apart from Art. 22 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[12] relevant compromissory clauses are enshrined in Art. 29 of the Convention on the Elimination of All Forms of Discrimination Against Women of 1979, Art. 30 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, Art. 92 of the International Convention for the Protection of the Rights of Migrant Workers and Members of their Families of 1990, as well as Art. 42 of the International Convention for the Protection of All Persons from Enforced Disappearances of 2006.[13] Interestingly, clauses allowing for the jurisdiction of the ICJ were also provided in three significant treaties relating to the recognition of women's rights in the era preceding the UN treaty bodies system: Art. IX of the Convention on the Political Rights of Women of 1953; Art. 10 of the Convention on the Nationality of Married Women of 1957; and Art. 8 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages of 1962.[14] While the first of the above Conventions provides for the possibility to refer a dispute to the ICJ "at the request of any one of the parties to the dispute", the other two require that a referral be submitted by a *compromis* (i.e. by "all parties to the dispute").

Over the recent decade referrals to the Court were made in as many as three instances involving application of the International Convention on the Elimination of All Forms of Racial Discrimination. Although the first of them (*Georgia v. Russian Federation*)[15] was not adjudicated upon on the merits, and the other two (*Ukraine v. Russian Federation* and *Qatar v. United Arab Republic*)[16] are currently pending, all these cases resulted in ICJ orders for provisional measures. It could thus be argued that they have already contributed to a better understanding of the procedural aspects of inter-state disputes based on the compromissory clause enshrined in Art. 22 of ICERD.

The cases referred to above merit attention also due to the nature of the claims submitted by the applicant states, in particular those raising allegations of discrimination

[12] 660 UNTS 195, no. 9464.

[13] *See* respectively: 2131 UNTS 96, no. 20378; 1465 UNTS 112, no. 24841; 2220 UNTS 3, no. 39481 and 2716 UNTS 3, no. 48088, The compromissory clauses enshrined in these treaties and the important differences between them are discussed by A. Zimmermann in *Human Rights Treaty Bodies and the Jurisdiction of the International Court of Justice*, 12 The Law & Practice of International Courts and Tribunals 5 (2013), pp. 9-22.

[14] *See* respectively: 193 UNTS 135, no. 2613; 309 UNTS 65, no. 4468; 521 UNTS 231, no. 7525.

[15] *See* ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order on provisional measures, 15 October 2008, Judgment, 1 April 2011.

[16] *See* ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Order on provisional measures, 19 April 2017, and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Order on provisional measures, 23 July 2018.

based on "national or ethnic origin". Furthermore, the cases may stimulate the debate on the utility of the UN human rights dispute settlement procedures. It remains to be seen whether the recent increase of interest in litigation based on ICERD proves to be a positive phenomenon and could contribute to strengthening of the procedural protection of the rights enshrined in this treaty. However, the three cases examined in this article have some potential to fuel the discussion on the uses – and potential misuses – of IHRL as such.

1. ICERD AND ITS PROCEDURES

The Convention was adopted and opened for signature and ratification by the General Assembly resolution 2106(XX) of 21 December 1965. It entered into force on 4 January 1969, following the deposition of the twenty-seventh ratification instrument. Preceded by the UN Declaration on the Elimination of All Forms of Racial Discrimination,[17] as well as some more narrowly targeted anti-discrimination conventions,[18] the 1965 Convention was in fact the first of the UN core human rights treaties, notwithstanding the importance and the human rights "spirit" of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide.[19] Understandably, the drafting of ICERD was to a large extent influenced by the struggles connected with de-colonialization and the suppression of segregation; however its teleological basis remains more complex, as it was also drafted with the intention to challenge the rise of anti-Semitism[20] and other forms of racial discrimination.[21]

The Convention unequivocally condemns all manifestations of racial discrimination,[22] which encompass:

[17] Resolution 1904(XVIII) of the UN General Assembly, adopted on 20 November 1963.

[18] *Cf.* the Convention concerning Discrimination in respect of Employment and Occupation (ILO Convention no. 111), adopted on 25 June 1958, and the Convention against Discrimination in Education, adopted by UNESCO on 14 December 1960.

[19] 78 UNTS 277.

[20] T. Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 (2) American Journal of International Law 283 (1985), pp. 283-284.

[21] R. Wolfrum, *The Committee on the Elimination of Racial Discrimination*, 3 Max Planck Yearbook of United Nations Law 489 (1999), p. 490. *See also* M. Banton, *Extending the rule of law*, in: D. Keane, A. Waughray (eds.), *Fifty years of the International Convention on the Elimination of All Forms of Racial Discrimination. A living instrument*, Manchester University Press, Manchester: 2017, pp. 35-50. For the analysis of *travaux préparatoires* set in a broad historical perspective, with reference to the concepts of "race" and colonialism, *see* P. Thornberry, *The International Convention on the Elimination of All Forms of Racial Discrimination. A Commentary*, Oxford University Press, Oxford: 2016, pp. 5 *et seq.*

[22] *Cf.* Art. 2(1) of the Convention: "States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among races (…). The Preamble to the Convention stipulates inter alia that (…) any doctrine of superiority based on racial discrimination is scientifically false, morally condemnable, socially unjust and dangerous, and (…) there is no justification for racial discrimination, in theory or in practice, anywhere (…)."

any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life (Art. 1(1) of ICERD).

Although the prohibition of discrimination in the enjoyment of human rights was already anchored in Art. 1(3) of the UN Charter and Art. 2 of the Universal Declaration of Human Rights, the definition enshrined in Art. 1 of ICERD constituted a novelty and contained an added value. By referring to "national and ethnic origin" apart from race, colour and descent as the differentiating grounds of racial discrimination, the Convention offered quite a broad spectrum of protection. It resulted in developing standards regarding ethnic minorities and indigenous populations.

Over the last fifty years the Convention has remained a principal UN instrument aimed at suppressing racial discrimination. The ICERD standards have been an obvious point of reference for the World Conference for Human Rights in Vienna (in 1993), as well as the World Conferences against Racism, and in particular the one held in Durban in 2001.[23] Irrespective of some political controversies related to these conferences, the fact remains that the international community has confirmed the solid position of ICERD as a fundamental source of states' obligations in the domain of the fight against racism, racial discrimination, xenophobia and related intolerance. Furthermore, ICERD remains a key point of reference in the activities of special procedures of the UN Human Rights Council, developed to study and react to incidents of racism and the situation of groups particularly vulnerable in this respect. Two key special procedures were created for this purpose: the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance,[24] as well as the Working Group of Experts on People of African Descent.[25] Two other "post-Durban" bodies were also established.[26]

The ICERD set up a treaty body, i.e. the Committee on the Elimination of Racial Discrimination (CERD), and entrusted it with the competences to consider state reports (Art. 9 of ICERD) as well as exercise other functions provided for in the treaty. The latter include the two supervisory mechanisms, i.e. the inter-state complaint procedure (Arts.11-13 of ICERD) and the individual complaint procedure (Art. 14 of ICERD). The competence to receive and consider communications from individuals or groups of individuals was the first of its kind at the time of adoption of ICERD, even though

[23] *See* the Durban Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, adopted on 8 September 2001 (A/CONF.189/12), para. 77

[24] *See* resolutions no. 1993/20 and 1994/64 of the Commission on Human Rights, subsequently renewed.

[25] *See* resolution no. 2002/68 of the Commission of Human Rights, also subsequently renewed.

[26] The Intergovernmental Working Group on the effective implementation of the Durban Declaration and Programme of Action (under the aforementioned resolution no. 2002/68) and the Eminent Group of Experts on the Implementation of the Durban Declaration and the Programme of Action (*see* para. 191(b) of the Durban Programme of Action and the resolution no. 56/266 of the UN General Assembly).

it might have brought back some memories of the right of petition introduced within the League of Nations to strengthen – not very successfully – the regime of protection of national minorities. In any event, the competence of CERD to receive and consider individual communications was made optional, in order not to obstruct the states' ratification of ICERD. Writing at the end of the 20th century, T. van Boven observed that Art. 14 was "one of the most under-utilized provisions of ICERD."[27] This holds true nowadays as well, and moreover Arts. 11-13 of ICERD – which refer to inter-state complaints – have had even less practical effect.

Among the 179 state-parties to ICERD, the competence of the Committee to consider individual communications has been recognized by 58, and the total number of such complaints between 1984 (date of the tenth declaration required under Art. 14 of ICERD) and 2018 amounted to 62 and concerned 15 states.[28] The reasons why only about one-third of the state-parties to ICERD have recognized the competence of the Committee under this provision – and why so few complaints have been received – are manifold.[29] The attitudes of states towards the obligations enshrined in ICERD have not changed much between the 20th century and today, i.e. an acceptance of ICERD has been perceived by states as both a legal and political commitment, but submitting to the individual complaint procedure has regrettably not been seen as a natural (i.e. stemming from the *bona fine* principle) consequence of these commitments. T. van Boven observed – and this also holds true in the present-day – that many states regarded ICERD more in terms of a foreign policy instrument than a human rights document.[30] Lack of information about the individual complaint procedure might also be a factor. Moreover, a constant argument of European states for not recognizing the competence of CERD under Art. 14 is that the individual application mechanism to the European Court of Human Rights (ECtHR) constitutes a stronger and sufficient procedural guarantee against racial discrimination.[31] While the judicial mechanism of control provided for in the European Convention of Human Rights (ECHR) can indeed be seen as moderately effective, the right to lodge an individual application with the ECtHR should not always be perceived as a better alternative to an individual communication under ICERD. In essence, the material scopes of the ECHR and ICERD do not fully overlap, so it may happen that a complaint under ECHR would be inadmissible *ratione materiae*, but not so when lodged under Art. 14 of ICERD. Furthermore, although an

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[27] T. van Boven, *The Petition System under the International Convention on the Elimination of All Forms of Racial Discrimination*, 4 Max Planck Yearbook of United Nations Law 271 (2000), p. 272.

[28] Report of the Committee on the Elimination of Racial Discrimination of its 93th, 94th and 95th sessions, presented to the General Assembly in 2018 (A/73/18), paras. 42-44. The CERD delivered final decisions on the merits in 35 cases, and found violations of the Convention in 19 of them. Six complaints are pending consideration as of the time of this writing.

[29] *See* Thornberry, *supra* note 21, p. 69. The author refers to, *inter alia*, the "unpalatability of a finding of racial discrimination, especially but not limited to States that were prominent in the anti-colonial and anti-apartheid struggles, the embers of which still burn" (*ibidem*).

[30] van Boven, *supra* note 27, p. 285.

[31] *Ibidem.*

autonomous prohibition of discrimination (i.e. not linked exclusively to ECHR-based rights but all rights protected by domestic law) has been introduced to the European system through Protocol no. 12 to the ECHR, the latter has been ratified so far only by 20 out of the 47 state-parties.[32]

The inter-state complaint procedure provided for in Arts. 11-13 of ICERD had never been used in practice until 2018, even though it is not optional, hence mostly political rather than legal reasons probably explain this "lack of interest". The reluctance of states to engage in this kind of disputes was foreseen quite early on,[33] and not much has changed in this regard. It is an effect of political reality, since in legal terms the inter-state procedure could be regarded as of a purely conciliatory nature, referring to the traditionally known form of "good offices" as a means of resolving state disputes. The procedure can be initiated by any state-party invoking Art. 11(1) of ICERD, which stipulates:

> If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by the State.

The next step in an inter-state procedure is provided in Art. 11(2):

> If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State.

If the Committee is seized of jurisdiction pursuant to Art. 11(2) of ICERD, the Chairperson of CERD appoints an *ad hoc* Conciliation Commission, consisting of five persons. The latter may or may not be members of CERD, but if parties to the dispute cannot reach a unanimous consent as to the composition of the Commission, the members not agreed upon by the State Parties to the dispute should be elected, by secret ballot, by a two-thirds majority vote of CERD among its own members.

Art. 12 of ICERD provides for the procedural arrangements concerning the Conciliation Commission, whose tasks are exercised under Arts. 12-13 of this Convention and consist in offering good offices to the parties of the dispute, with a view toward reaching an amicable solution of the matter on the basis of respect for ICERD (Art. 12(1)). Having fully considered the matter, the Conciliation Commission reports its finding to the Chairperson of ICERD and includes such recommendations as it

[32] As of 1 March 2019, *see* the Chart of signatures and ratifications of Protocol no. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, available at www.coe.int.

[33] S. Leckie, *The Inter-State Complaint Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?* 10 Human Rights Quarterly 249 (1988), p. 265.

deems proper for the amicable resolution of the dispute (Art. 13(1)). The parties to the dispute are free to accept or decline the recommendations contained in the report of the Conciliation Commission.

The inter-state dispute settlement procedures provided for in ICERD, as well as several other core UN human rights treaties,[34] were never initiated until 2018. Two such complaints were brought by Qatar on 8 March 2018: one against Saudi Arabia and one against the United Arab Emirates. The third complaint was submitted on 23 April 2018 by Palestine against Israel. All these complaints were based on Art. 11 of ICERD and are pending in the Committee on the Elimination of Racial Discrimination.[35]

2. THE COMPROMISSORY CLAUSE IN ART. 22 OF ICERD – "NEGOTIATION" AS A PRECONDITION AND THE CONCEPT OF A "GENUINE ATTEMPT"

States-parties to ICERD have the possibility to refer a dispute with another state-party to the ICJ under Art. 22 of this Treaty, which provides:

> Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negotiation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

One of the most pivotal questions which has arisen with respect to the above provision is whether the ICJ's jurisdiction is dependent on prior recourse to (and the exhaustion of) the "negotiations or procedures" expressly provided for in ICERD, or whether the state-parties are at liberty to refer a case to the ICJ whenever such as a dispute is simply pending, as it has not been resolved by other means (such as negotiations or procedures under Arts. 11-13 of ICERD). Moreover, if one adopts the former position, i.e. conditioning the ICJ's jurisdiction upon prior recourse to "negotiation or procedures" provided in ICERD, it is further not entirely clear whether it suffices that the dispute at stake was a matter of negotiations between the parties prior to subject to seisin of the ICJ, or whether the applicant state is not only obliged to engage in negotiations, but also to refer the dispute to CERD under Art. 11 of ICERD. It must be borne in mind that the "procedures provided in the Convention" include at least two phases: the "soft" one under Art. 11(1), which consists of an exchange of positions between the parties with CERD acting as an intermediary, and a "more intense" one which requires

[34] *See* fn 14.

[35] *See* CERD information note on inter-state communications, delivered on 30 August 2018 in Geneva, available at: https://bit.ly/2WasX1v. For a comment on the complaint brought by Palestine against Israel, *see* D. Keane, *ICERD and Palestine's Inter-State Complaint*, 30 April 2018, available at: https://www.ejiltalk.org/icerd-and-palestines-inter-state-complaint/ (both accessed 30 May 2019).

the establishment of an *ad hoc* Conciliation Commission and full-fledged proceedings aimed at "amicable solution of the matter."

The prerequisite conditions which must be met to allow for the ICJ's jurisdiction were partly explained in the first case concerning the application of ICERD, i.e. *Georgia v. Russian Federation*. The applicant government claimed that the Russian Federation – acting both through its own organs, agents and other persons and entities exercising governmental authority, as well as through South Ossetian and Abkhaz separatist forces and other agents – "has practised, sponsored and supported racial discrimination through attacks against, and mass expulsion of, ethnic Georgians, as well as other ethnic groups, in the South Ossetia and Abkhazia regions of the Republic of Georgia,"[36] in violation of obligations under several articles of ICERD and that it did so "during three distinct phases of its interventions in South Ossetia and Abkhazia" in the period from 1990 to August 2008.

Upon the request of Georgia and on the basis of Art. 41 of the ICJ Statute, the Court issued provisional measures (by eight votes to seven) and reminded the parties to the dispute of their duty to comply with the obligations under ICERD.[37] In their joint dissenting opinion the judges of the minority expressed doubts whether the potential dispute met the conditions of Art. 22 of ICERD, *i.e.* whether there had been a prior attempt to settle it "by negotiation or by the procedures expressly provided for in this Convention."[38] With respect to the requirement of negotiations, the majority noted that Art. 22 of ICERD does not necessarily mean that "formal negotiations" had to be put in place, and that it suffices if the issues concerning the interpretation and application of ICERD have been raised between the parties in bilateral contacts. However, according to the view of the minority judges such negotiations had never taken place prior to the submission of Georgia's claims to the ICJ, which resulted in their inadmissibility and precluded the jurisdiction of the Court.

The seed of doubt sown by the minority judges turned out to be a decisive argument in the Court's judgment of 1 April 2011. After elaborating on the contents and interpretation of Art. 22 of ICERD, the Court confirmed that the latter includes preconditions which must be satisfied before resorting to the Court. As regards the meaning of the term "negotiations", or – to put it more precisely – the nature and standard of the required negotiations, the ICJ observed that:

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[36] The order of the ICJ in *Georgia v. Russian Federation*, 15 October 2008, para. 3.

[37] *See* the comment by M. Dubuy, *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires: un formalisme excessif au service du classicisme?*, 57 Annuaire français de droit international 183 (2011).

[38] The minority judges also raised the issue that there had been no dispute between both the parties concerning the interpretation or application of ICERD, neither prior nor after the outbreak of hostilities between the two states. According to the minority judges, the armed activities of the Russian Federation after 8 August 2008 could not in and of themselves constitute acts of racial discrimination in the sense of Art. 1 of ICERD unless it was proven that they were aimed at establishing a "distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin" (para. 9 of the dissenting opinion).

> ... negotiations are distinct from mere protests or disputations. Negotiations entail more than the plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims. As such, the concept of "negotiations" differs from the concept of "dispute", and requires – at the very least – *a genuine attempt by one of the disputing parties to engage in discussions with the other disputing party, with a view to resolving the dispute*.[39]

The Court also pointed out that an attempt to negotiate does not require reaching an actual agreement; however in the case at hand there had in fact not been any genuine attempt to negotiate the substance of the Georgian claims. According to the Court:

> ... to meet the precondition of negotiation in the compromissory clause of a treaty, these negotiations must relate to the subject-matter of the treaty containing the compromissory clause. In other words, the subject-matter of the negotiations must relate to the subject-matter of the dispute which, in turn, must concern the substantive obligations contained in the treaty in question. (para. 161 of the judgment)

Even though it was a matter of subjective individual consideration whether negotiations had taken place, and whether they had failed or become futile or deadlocked, the Court was not persuaded that such negotiations had been conducted and proved unsuccessful as of the date of submission of the Georgian claims before the Court (12 August 2008).[40] Thus, by ten votes to six the Court found that it had no jurisdiction to entertain the Georgian application.

The judgment in the *Georgia v. Russian Federation* case set a standard for negotiations required prior to seisin of the Court, notwithstanding sound and convincing reasons provided in dissenting opinions of the minority judges that the ICJ should have applied a less formalistic interpretation of the reference to "negotiations" in Art. 22 of ICERD (i.e. not construing this term as a formal "precondition"), given the ambiguous wording of that provision as well as the prior jurisprudence of the Court.[41] The minority judges also rightly noted that the Court applied a very formalistic approach to the question of negotiations, especially due to the expectation that the latter will not only be attempted, but also must have "failed or become futile or deadlocked", whereas in some previous cases the ICJ preferred to address the issue of negotiations by its own assessment whether negotiations had a chance of success or not.[42]

The judges referred to the assessment of "negotiations" by the ICJ in the cases of *South West Africa* and the *Aerial Incident at Lockerbie*, however it should be noted that the treaty clauses providing for the jurisdiction of the Court in those cases used the phrases "any dispute (...) if it cannot be settled through negotiation" (Art. 7(2) of

[39] *Cf.* para.157 of the judgment in the case of *Georgia v. Russian Federation* (preliminary objections) (emphasis added).

[40] *Ibidem*, para. 182.

[41] *See* the joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *Ad Hoc* Gaja, paras. 14-38; and the dissenting opinion of Judge Cançado Trindade, paras. 88-118.

[42] *See* the joint dissenting opinion, paras. 48-63.

the Mandate) and "any dispute (...) which cannot be settled through negotiation" (Art. 14(1) of the Montreal Convention for the Suppression of Unlawful Acts against the Civil Aviation). Even though these clauses are not identical with the one used in Art. 22 of ICERD ("which is not settled by negotiation"), they all seem indeed to imply a realistic assessment by the ICJ of whether the chances of resolving a dispute by negotiation were at all realistic.

Irrespective of the above, the "negotiations-as-a-precondition" standard and the "genuine attempt" requirement has been applied in proceedings concerning provisional measures requested by applicant governments in further cases concerning the application of ICERD, e.g. *Ukraine v. Russian Federation*, and *Qatar v. UAE*. In both of these cases the respondent governments pleaded the lack of jurisdiction of the Court under Art. 22 of ICERD and repeated the arguments as to the non-fulfilment of the preconditions enshrined in that provision. The Court, however, considered that the standard of a "genuine attempt" had been met in both these instances.[43] In the *Qatar v. UAE* case the Court found that the required standard was fulfilled inasmuch as the parties to the dispute had exchanged their positions concerning the dispute on several occasions in international fora, including at the 37th session of the UN Human Rights Council in February 2018. Moreover, a letter dated 25 April 2018 referring to the alleged violations of CERD arising from the measures taken by the UAE was sent by the Minister of Foreign Affairs of Qatar, who indicated a two-week deadline for entering into negotiations on the matter. The letter remained unanswered, which led the Court to the conclusion that the dispute between the parties had not been resolved by negotiations at the time of submitting the claims by Qatar under Art. 22 of ICERD.[44]

It should be observed that although the standard of a "genuine attempt" at negotiation set in the *Georgia v. Russian Federation* case might indeed have been formalistic and capable of hindering access to the Court, the application of this standard in the subsequent cases did not result in an overly rigorous attitude to the substance of the requirement. In both cases attempts to negotiate had been undertaken and evidently failed, having regard to the positions and lack of will to settle the dispute in an out-of-court manner by the respondent governments. In essence, the "genuine attempt" standard can be considered as surmountable, which nonetheless does not remove doubts as to the effects of its application in the *Georgia v. Russian Federation* case.

A question not yet resolved by the ICJ in any of the three cases involving the application of ICERD is whether both "preconditions" laid down in Art. 22 of the Convention – i.e. "negotiations" and "procedures expressly provided for in this Convention" – should be fulfilled cumulatively or alternatively prior to referring a dispute to the ICJ. Let us recall that Art. 22 of ICERD uses the conjunction "or" in a negative clause ("which is not settled by negotiations or by the procedures (...)"). While some judges of the

[43] *See* the Orders of the Court of 19 April 2017 (*Ukraine v. Russian Federation*), para. 59 and of the 28 July 2018 (*Qatar v. UAE*), para. 40.

[44] *Ibidem*, para. 38.

ICJ have considered that the preconditions referred to in Art. 22 of ICERD are of an alternative character, opposite views have also been expressed both by the ICJ judges as well as in the doctrine.[45] For those supporting the view that the preconditions foreseen Art. 22 of ICERD are indeed mandatory because of the subsidiary nature of the ICJ's jurisdiction vis-à-vis the jurisdiction of CERD under Arts. 11-13 of the treaty, it would be logical to support the view that both negotiations and recourse to Art. 11 of ICERD ought to be attempted prior to referring the case to the ICJ.

However, even if one supports the view that under Art. 22 of ICERD state-parties must not go to the ICJ unless they were involved in searching for an amicable solution to the dispute, it remains an open question whether Art. 22 requires exhaustion of both the negotiation path and the procedures under Arts. 11-13 of ICERD. While it cannot be denied that Art. 22 of ICERD does refer to prior involvement in attempts to find an amicable solution, nevertheless the judges of the minority in the *Georgia v. Russia* case very convincingly argued that

> the point of this text (i.e. reference to "negotiation" or "procedures" established expressly provided in ICERD) cannot be to require a State to go through futile procedures solely for the purpose of delaying or impeding its access to the Court. (…) Consequently, where a State has already tried, without success, to negotiate directly with another State against which it has grievances, it would be senseless to require it to follow the special procedures in Part II [of ICERD], unless a formalism inconsistent with the spirit of the text is to prevail. It would be even less sense to require a State which has unsuccessfully pursued the intricate procedure under Part II to undertake direct negotiations destined to fail before seisin of the Court.[46]

In the two pending cases (*Ukraine v. Russian Federation* and *Qatar v. UAE*), the Court will probably not avoid addressing the above-outlined question of the cumulative or alternative character of preconditions to be fulfilled by the applicant state-party of ICERD prior to addressing the ICJ under Art. 22. It can be hoped that a more realistic and teleological interpretation prevails, which would not require states to go through both negotiations *and* the procedures under Arts. 11-13 of ICERD if doing so would be manifestly futile and only unnecessarily protract (or obstruct) the access to the ICJ. The idea of considering the ICJ as a serious forum to ensure the *effet utile* of ICERD has its strong supporters also within the Bench.[47] It remains to be seen whether this approach succeeds, but the whole debate about interpretation of Art. 22 of ICERD should not be considered as a competition between CERD and the ICJ. In a perfect world, states

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[45] *See* Zimmermann, *supra* note 13, p. 9.

[46] *See* the joint dissenting opinion of President Owada, Judges Simma, Abraham and Donoghue and Judge *Ad Hoc* Gaja, para. 43. The judges believe that this interpretation of Art. 22 is supported by *the travaux préparatoires* to Art. 22 of ICERD, since the draft text of the treaty referred only to "negotiations" and the procedures were added on a much later stage and the general understanding was that the draft contemplated just one means of non-judicial settlement of inter-state disputes, i.e. negotiations.

[47] *See* the dissenting opinions of Judge Cançado-Trindade to the ICJ Judgment of 1 April 2011 in the *Georgia v. Russia* case, esp. paras. 64-78 and 88-118 and to the ICJ Order for provisional measures in the *Qatar v. U.A.E.* case, paras. 62-67.

should have the widest choice possible to select the forum and procedure they find most fit to address their grievances under ICERD and to ensure that the rights and freedoms protected under this treaty are not rendered illusory and theoretical only due a doctrinal debate about the meaning and importance of the conjunction "or" in Art. 22 of the treaty. The rule of reason should be given a leading role in interpreting this provision.

3. AN ADMISSIBILITY ISSUE: "NATIONAL ORIGIN" VS. "NATIONALITY"

In all three cases submitted so far to the ICJ under Art. 22 of ICERD it has been claimed that the respondent state had committed acts of discrimination based on the criterion of "national or ethnic origin". In the two cases against the Russian Federation, the applicant states referred to actions undertaken in respect of Georgians (first case), and ethnic Ukrainians and Crimean Tatars (second case), whereas the case brought against the UAE raised the issue of treatment of Qatari nationals. The ICJ has thus far never dismissed a case due to the fact that it referred to the situation of nationals of an applicant state rather those of a different "national origin". It should be noted however that for some judges of the ICJ, the lack of an explicit reference to "nationality" among the criteria of prohibited discrimination under Art. 1 of ICERD speaks against the admissibility of claims referring to the treatment of an applicant's nationals only.[48]

The absence of an explicit reference to "nationality" in the text of Art. 1(1) of ICERD should be viewed in the context of Art. 1(2) of ICERD, which provides that "the Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens." Interestingly, the next paragraph of Art. 1 of ICERD refers to "nationality" twice, stipulating that: "[n]othing in this Convention may be interpreted as affecting in any way the legal provisions of States concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate any particular nationality." Some authors have argued that the above provision uses the term "nationality" in the "politico-legal" sense, whereas some have been ready to admit that the first reference to this term means "citizenship", and the second – "national origin".[49] It appears that the latter understanding is much more convincing given the essence of this norm is aimed at preventing discrimination against a particular national group based on states' powers to shape the regime of citizenship. Notwithstanding the above, the exclusion of discrimination based on nationality from the remit of ICERD is not as clear as it may seem. Distinguishing between citizens and non-citizens should not be equated with permission for the latter's

[48] *See* the Joint Declaration of Judges Tomka, Gaja and Gevorgian to the ICJ Order for provisional measures in the *Qatar v. UAE* case, paras. 3-4, and the Dissenting Opinion of Judge Crawford to the same Order, para. 1.

[49] *See* Thornberry, *supra* note 21, p. 145.

discrimination within the meaning of Art. 1 of ICERD. Legally speaking, nationality is indeed not identical to "being of national origin". Nevertheless, and as reflected in the *travaux préparatoires* of this provision, states were far from speaking with one voice on what they perceived "national origin" to be.

Furthermore, the General Recommendation of CERD no. 30 of 2005[50] implies in its paragraph 4 that differences in treatment based on citizenship or immigration will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim and are not proportional to the achievement of this aim.[51] The minority judges in the *Qatar v. UAE* Order on provisional measures were not persuaded by this view.[52] However, it is hard to deny that that discriminating between one group of foreigners and another group of foreigners in fact constitutes an act of discrimination based on national origin (prohibited under Art.1(1) of ICERD), and as such should be distinguished from differentiating between citizens and non-citizens (excluded from the scope of ICERD under the second paragraph of Art. 1(2) of the treaty). Along these lines, when assessing the legal situation of Qatari nationals who were expelled or at least obliged to leave the territory of the UAE, it seems necessary to compare the measures adopted towards them vis-à-vis the situation of other foreign nationals.

The Court's finding of *prima facie* jurisdiction in the *Ukraine v. Russian Federation* and the *Qatar v. UAE* cases – being one of the bases for ordering provisional measures under Art. 41 of the Statute of the ICJ – could be regarded as a sign that the Court might lean towards a broader and more systemic interpretation of "national origin" as a grounds of prohibited discrimination. It would be regrettable if the criterion of citizenship dictated whether or not a person can benefit from the guarantees enshrined in ICERD, notwithstanding the states' powers to apply "distinctions, exclusions, restrictions or preferences" to citizens vis-à-vis non-citizens under Art. 1(2) of the Convention.

The above considerations give rise to a more general reflection: while it is fully understandable that states stand up in defence of their nationals' rights and for this purpose initiate international procedures based on ICERD provisions, a vigilant observer of international relations would have little difficulty in seeing the cases brought to the ICJ under Art. 22 of ICERD as reflections of broader political and legal conflicts between the applicant and respondent states. The question could reasonably be asked whether the proceedings at the ICJ are not just "side-effects" of the inability to tackle "actual" problems underpinning the political inter-state relations between the states. However, even if this might sometimes be the case it should not dissuade us from recognizing that states are fully entitled to address international bodies in defence of

[50] *See* General Recommendation No. 30 on discrimination against non-citizens, adopted on the sixty-fifth session of CERD, available at www.ohchr.org.

[51] *Ibidem.*

[52] *See* the Joint Declaration of Judges Tomka, Gaja and Gevorgian to the ICJ Order for provisional measures in the *Qatar v. UAE* case, para. 5.

human rights *and* their own interests at one and the same time.[53] It could hardly be expected that when adjudicating under ICERD the ICJ goes *ultra petita partium* and addresses issues not related to the Convention itself. Nonetheless, the Court faces a real opportunity to apply the provisions of a human rights treaty (in this case ICERD) which may bring judicial protection and relief to at least some of those affected by inter-state conflicts. To put it briefly, in cases under ICERD human rights *are* at stake, apart from other, possibly political, considerations.

The orders for provisional measures in the two pending cases could be regarded as very moderate. In the *Ukraine v. Russian Federation* case the Court merely indicated that the respondent state must refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the *Mejlis*;[54] ensure the availability of education in the Ukrainian language; and refrain (as must the applicant state) from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.[55] In the *Qatar v. UAE* case the Court repeated the phrase about "refraining" and indicated that the UAE must ensure the reunification of separated Qatari families;[56] provide Qatari students with the opportunity to complete their education in the UAE or obtain their educational records; and allow access to tribunals and other judicial organs of the UAE to Qataris affected by the measures adopted by the UAE.[57] The contents of the orders for provisional measures were considerably less than what was requested, however, Art. 41 of the Statute of the ICJ gives the Court quite a wide latitude in establishing whether the circumstances really require such measures and whether it is "appropriate" to do so. Let us keep in mind that the issuance of provisional measures does not prejudge the outcome of the case at the Court, but at the same time does manifest that the ICJ found it had *prima facie* jurisdiction; that the rights claimed by the applicant were plausible; and further that there was a risk of irreparable prejudice and urgency.

[53] *See* A. Peters, *"Vulnerability" versus "Plausibility": Righting or Wronging the Regime of Provisional Measures? Reflections on ICJ, Ukraine v. Russian Federation Order of 19 April 2017*, available at: https://bit.ly/2JQUlLf (accessed 30 May 2019).

[54] The highest executive-representative Crimean Tatar body, delegalized by the Russian Federation in 2016.

[55] *See* the operative part of the ICJ Order of 19 April 2017. *See* also the commentary by: T. Thienel, *Provisional Measures in the Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, 1 Goettingen Journal of International Law 143 (2009).

[56] Judge Crawford noted in his dissenting opinion that at the time of adopting the Order by the Court many cases concerning family reunification might have already been resolved, although Qatar denied this (*see* the dissenting opinion of Judge Crawford to the Order of 19 April 2017, paras. 5-6). For more on this issue in a broader international legal context, *see*: W. Burek, *Family Reunification Regulations and Women: The Perspective of International Law*, 36 Polish Yearbook of International Law 83 (2016).

[57] *See* the operative part of the ICJ Order of 23 July 2018.

4. ARE THE ICERD DISPUTE SETTLEMENT PROCEDURES "UNDERUSED"?

Taking into consideration that the compromissory clause in Art. 22 of the Convention has been invoked only three times in the sixty years since the ICERD's entry into force, and that the competence of CERD to engage in the conciliation of inter-state disputes has never been availed of until 2018, it would be difficult to argue that states have shown much willingness to use the settlement dispute procedures they themselves created in 1965. Whereas the cases brought to the attention of the ICJ and CERD in recent years should probably not be considered as a breakthrough in reversing this trend, they could however stimulate discussion on the "under-usage" of the dispute settlement procedures provided for in the Convention.

As regards inter-state disputes, much effort has been put by the respondent states in the cases brought to the ICJ into arguing that "negotiations or the procedures provided in ICERD" must be exhausted prior to submitting a case under Art. 22 of the treaty. It is still not clear if states have to go through both negotiations *and* the procedures set out in Arts.11-13 of ICERD to successfully bring a claim to the ICJ. Essentially, states should be allowed to make an educated choice as to which forum and legal remedy has the best chance to resolve the dispute and provide relief, for the benefit of those protected under ICERD. An obligation to go through a futile and time-consuming conciliatory procedure with a doomed-to-fail result does not best serve the idea of effective international justice. On the other hand, one could imagine that an inter-state dispute over the interpretation or application of ICERD might well be examined and resolved through CERD's good offices and conciliation procedures in accordance with the Convention provisions, without recourse to Art. 22 of ICERD.

The general answer to the question posed in the title of this section is thus in the affirmative. ICERD inter-state dispute settlement procedures – both the "internal" ones as well as the one allowing for seisin of the ICJ – are underused. The same could be observed about the individual complaint procedure under Art. 14 of ICERD, which – unlike the inter-state applications – usually refer to a situation occurring in the state-party of the claimant's origin or residence. It is unrealistic to expect a dramatic increase in the number of disputes involving ICERD "internal" procedures nor a significant increase in the number of cases brought to the ICJ under Art. 22 of ICERD. Nevertheless, the debate about resolving disputes involving ICERD provisions is about the effectiveness of procedural protection against racial discrimination. In a broader sense, it is about the utility and effectiveness of a human rights treaty's obligations as such. In this context, much remains to be done to ensure that the dispute settlement procedures provided for in ICERD are truly effective and that states show more openness to the jurisdiction of the ICJ under its Art. 22.

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ENDOGENOUS AND EXOGENOUS LIMITS OF THE AFRICAN CHARTER ON DEMOCRACY, ELECTIONS AND GOVERNANCE

Abstract:
This article analyses the capacity of the African Charter on Democracy, Elections and Governance to counteract the democratic governance shortfall. It argues that the tangible impact of the treaty on the states' practice has been limited by various endogenous and exogenous factors. The former are identified as directly linked to content of the document and refer to the accuracy of the drafting. The latter are rooted outside the text and beyond the character of the Charter and include issues relating to the states' reluctance to ratify the document, certain constitutional constraints undermining implementation on the national level, and the weak international guarantees of enforcement.

Keywords: The African Charter on Democracy, Elections and Governance; rule of law; interpretation of treaties

INTRODUCTION

The rationale behind the following analysis rests upon two general observations. Both are well proven and uncontested in principle. First, Africa is affected by the overall democratic governance shortfall.[1] In particular, the deficit relates to widespread manipulations in order to extend tenures by incumbent officials, common rejections of election results, and frequent violations of fundamental human rights.[2] Taking into consideration

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[1] United Nations Economic Commission for Africa, *African Governance Report III. Elections and the Management of Diversity*, Oxford University Press, Oxford: 2013, pp. 1-3.

[2] These challenges were identified in 2017 by the Chairperson of the African Union Commission as limiting the realisation of the promises of democracy, AU, Press Release No. 011/2017. The African Commission on Human and Peoples' Rights periodically expresses its concern about the deteriorating human rights situation in African States before, during and after elections, as well as about the irregularities surrounding electoral processes, ACHPR/Res.331(EXT.OS/XIX)2016, Preamble, tiret 6 and tiret 8; *see also* S.M. Burchard, *Electoral Violence in Sub-Saharan Africa: Causes and Consequences*, First Forum Press, Boulder: 2015; H.A.A. Miezah, *Elections in African Developing Democracies*, Palgrave Macmillan, London: 2018.

that these situations *prima facie* involve constitutional infringements, it is legitimate to qualify them as undermining the principle of the rule of law on the continent.[3]

The second observation justifies a view that the African citizenry and the African Union (AU) – which is the Pan-African international organization promoting democratic principles and institutions[4] – share ambitions to counteract the rule of law deficit by fostering good governance, democracy, justice, and respect for human rights. In particular, the joint aspiration expressed in the Agenda 2063[5] is to ensure that: (a) elections at all levels are free, fair and transparent; (b) freedom of expression and freedom of association are guaranteed; (c) constitutional changes of government are the norm.[6] As the Agenda 2063 constitutes a long-term scheme for socio-economic and integrative transformation, the blueprint has required delineation of shorter ten-year plans to reach the relevant aspirations over the fifty-year horizon. Therefore, the AU Commission prepared the First Implementation Plan,[7] adopted by the AU Assembly in June 2015.[8] This document covers the period 2013-2023, setting relevant milestones within priority areas of democratic values and human rights. The first short-term targets have been determined mostly by reference to measurable criteria. Namely, a test of the public perception of the governance status has been applied, alongside with setting thresholds for adoption and the domestication of certain treaties. Thus, on the national level the established goals for the period 2013-2023 include the following: (a) at least 70 per cent of the people perceive that the free access to information and freedom of expression is guaranteed; (b) at least 70 per cent of the public perceive elections to be free, fair and transparent by 2020; (c) there is zero tolerance for unconstitutional changes in government; (d) the African Charter on Democracy, Elections and Governance (the Charter)[9] is signed, ratified and domesticated by 2020; (e) at least 70 per cent of the people perceive the entrenchment of a culture of respect for human rights, the rule of law and due process.

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[3] E. de Wet points out that the poor domestic records of African States in relation to human rights protection and judicial independence evidences an endemic disregard for the rule of law as such, *The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa*, 28(1) ICSID Review 45 (2013), p. 62.

[4] Art. 3(g) of the Constitutive Act of the African Union (Constitutive Act, adopted 11 July 2000, entered into force 26 May 2001).

[5] In 2013 the AU decided to develop the Agenda 2063 as a road map for structural transformation of the continent, Assembly/AU/Decl.3(XXI), p. 6. While the AU Commission was tasked with preparing draft agenda documents, the civil society was also involved through an extensive consultative process, *see e.g.* AU Commission, *Agenda 2063. Framework Document*, p. 26, available at: https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf (accessed 30 May 2019). *See also* K. De Ghetto, J.R. Gray, M.N. Kiggundu, *The African Union's Agenda 2063: Aspirations, Challenges, and Opportunities for Management Research*, 2(1) Africa Journal of Management 93 (2016).

[6] AU Commission, *Agenda 2063*, p. 151 (Aspiration 3).

[7] Available at: https://au.int/sites/default/files/documents/33126-doc-ten_year_implementation_book.pdf (accessed 30 May 2019).

[8] Assembly/AU/Decl.5(XXV).

[9] Adopted 30 January 2007, entered into force 15 February 2012. Unless otherwise indicated, all treaties cited in this article are available at: https://au.int/en/treaties.

The foregoing background raises the issue of how the prevailing democratic governance and the rule of law predicaments are going to be treated by the African states and the AU in order to overcome the quandary and achieve the goals over both the short- and in the long-term. This matter has been addressed broadly by the AU Commission in the First Implementation Plan. This document has indicated strategies to be introduced separately on both the national and on the continental levels in order to achieve the relevant aims.[10] In particular, on the national plane two distinct lists of strategies, designated as priority areas in terms of democratic values and human rights, have been drawn up. While each establishes slightly different remedies to be followed, there is a substantive correlation between them on at least one point. They recommend that the states should implement both the Charter and the African Charter on Human and Peoples' Rights (the HR Charter).[11] The role of the Charter as a tool to promote democratic values has been also impliedly envisaged on the continental plane, inasmuch as the First Implementation Plan has stressed the need to employ the African Governance Architecture (AGA)[12] in order to achieve the aspirations within the priority area of democratic values. The AGA constitutes the overall political, normative and institutional framework for the promotion of good governance in Africa,[13] thus contributing to realization of the substantive vision of governance, grounded on, *inter alia,* the Charter.[14] Thus it is evident that the AU perceives the treaty as a significant

[10] *Supra* note 7, pp. 73-75.

[11] Adopted 27 June 1981, entered into force 21 October 1986.

[12] The AGA has been developed as a policy approach within the AU to coordinate the promotion of democracy, good governance, and human rights in Africa. Historically, the AGA is a product of the problem-solving attitude adopted by AU. It is traceable to the Strategic Plans developed since 2004 by the AU Commission in order to harmonize activities undertaken by the organization. In particular the plans helped to identify certain values to be promoted at the individual, national and regional levels, such as, is *inter alia,* human rights, the rule of law, and democracy; AU Commission, *Strategic Plan 2009-2012,* Assembly.AU/3(XII), pp. 30-31. Next, in 2010 the AU Executive Council recommended to the AU Assembly to identify obstacles and the measures to be adopted in order to facilitate continental integration based on such values, suggesting that "a pan-African Architecture on Governance" could form "a platform for dialogue between the various stakeholders"; EX.CL/Dec.525(XVI). Finally, in 2011 the AU Executive Council endorsed the strengthening of the process focusing on shared values through launching the Governance Platform as an informal mechanism to advance the AGA; EX.CL/Dec.635(XVIII). The AGA Platform was initiated in June 2012; AU, Press Release No. 053/2012. Its Rules of Procedure forms the only document procedurally streamlining the activities of the Platform; Assembly/AU/Dec.589(XXVI) at para. 2(xiv).

[13] The policy approach embodied by the AGA is composed of four different components. They embrace already-existing substantive standards (Pan-African treaties and the soft-law) and institutional mechanisms developed within the AU and RECs, as well as the AGA Platform and the Africa Governance Facility located within the AU Commission.

[14] The Charter is one of 23 international instruments covering five substantive clusters, namely: democracy, human rights and transitional justice, socio-economic issues, constitutionalism and the rule of law, and humanitarian affairs. The role of the Charter for the promotion of the shared values was highlighted in 2015 by the AU Assembly, which called upon States to ratify, domesticate, and implement the treaty: Assembly/AU/Dec.585(XXV), para. 4.

instrument to be applied on both the national and on the continental levels to foster a reduction of the democratic deficit.

Taking into consideration the omnipresence of the Charter in the First Implementation Plan, a more detailed question arises concerning the capacity of the Charter to produce the desired output. On the whole, it may be assumed that the document has a "civilizing effect".[15] It is sufficient to point out that the treaty has already become a reference standard declared by the AU organs as an instrument which sets parameters for member states' behaviour.[16] Such an introduction of the treaty into the narrative of the AU agenda serves as a *prima facie* evidence that the Charter has been used to proclaim an important shift on the continental level. This means that the international agreement has contributed to the declaratory replacement of the principle of sovereign constitutional autonomy, once prevailing in Africa,[17] with the requirement for states to establish democratic legitimacy of governments through their adherence to the notions of democracy, the rule of law and human rights.[18] Yet, the changed rhetoric of AU

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[15] While the phrase may carry a sinister meaning in Africa, it was used by the International Court of Justice (ICJ) outside the colonial context in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Rep 1951, p. 23.

[16] *See e.g.* AU, Declaration on the Commemoration of the Fifteenth Anniversary of the African Peer Review Mechanism, Assembly/AU/Decl.4(XXX), Preamble, tiret 10-11; Decision on the Inaugural Report of the Peace and Security Council of the African Union on the Implementation of the African Union Master Roadmap of Practical Steps for Silencing the Guns in Africa by the Year 2020, para. 10; Decision on the Outcome of the 5th Retreat of the Executive Council held in Addis Ababa, Ethiopia on 8 and 9 December 2016, para. 2(vi).

[17] Symbolically, the Charter of the Organization of African Unity (OAU), which was the predecessor of the AU, did not contain any provision substantively prefiguring Arts. 3(g) and 4(m) of the Constitutive Act. For nearly three decades the OAU operated as a forum for heads of state who were convinced that principle of non-interference in the internal affairs of States forecloses any discussion on what a government had a right to do within the limits of the State's internal sovereignty (C.E. Welch, *Protecting Human Rights in Africa: Strategies and Roles of Non-governmental Organizations*, University of Pennsylvania Press, Philadelphia: 1995, p. 151; C. Clapham, *Africa and the International System. The Politics of State Survival*, Cambridge University Press, Cambridge: 1996, p. 115). Only at the end of 1980s and the beginning of 1990s did a series of geopolitical processes call for joint efforts to protect human rights and for the closer economic integration of African States; *see e.g.* Declaration on the Political and Socio-Economic Situation in Africa and the Fundamental Changes Taking Place in the World, AHG/Decl.1(XXVI)1990. *See also* G.K. Kieh, *Africa and the New Globalization*, Routledge, Aldershot: 2008, p. 164.

[18] In particular, the Charter was adopted as the first Pan-African treaty completing a standard-setting process that had been continuing since 1990s, as evidenced by the affirmation of democratic principles in several non-binding documents: Intergovernmental Conference of Ministers on Language Policies in Africa; The Harare Declaration, available at: https://unesdoc.unesco.org/ark:/48223/pf0000145746_eng (accessed 30 May 2019); OAU; The Algiers Declaration, AHG/Decl.1(XXXV) and the Algiers Decision, AHG/Dec.142(XXXV); OAU; Solemn Declaration of the Conference on Security, Stability, Development and Cooperation in Africa, AHG/Decl.4(XXXVI); OAU; Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, AHG/Decl.5(XXXVI); OAU/AU; The Durban Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1(XXXVIII); AU, Declaration on Democracy, Political, Economic and Corporate Governance, AHG/235(XXXVIII), Annex I. The Preamble to the Charter confirms that the treaty was not written in a vacuum and enumerates the relevant preceding documents (paras. 12-13). It also reveals the commitment of the Member States

documents cannot be employed to support a far-reaching argument that the Charter has constituted a factor actually influencing a transition in states' practice.

Methodological problems with measuring such an impact aside, this article deals with a related question of a more fundamental character. The problem discussed here is whether the Charter has any legal capacity to change patterns of states' behaviour that potentially could be detected using African Governance Indicators (AGIs)[19] or other instruments of sociological enquiry.[20] The problem and the following analysis starts from two salient premises. First, the Charter is an international instrument that sets standards for states' conduct. Hence, it potentially possesses the capacity to stimulate the transition between the declaratory shift towards democratization discernible in AU documents and the tangible democratization shift, subject to e.g. AGIs testing.[21] Second, the tangible impact of international documents on states' practice may be limited by various legal (both substantive and procedural) as well as political constraints, further labelled as the endogenous and exogenous limits of treaties.

This article examines the constraints in four sections. Following this introduction, section 2 identifies and examines the endogenous limits of the Charter as directly linked to the content of the document and referring to its legal character, as well as to the accuracy of the drafting. Section 3 deals with the exogenous limits of the instrument,

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of the AU to further promote the universal values and principles of democracy, good governance, human rights and the right to development (paras. 6-7).

[19] In 1999, the United Nations Economic Commission for Africa launched the project titled "Assessing and Monitoring the Progress towards Good Governance in Africa". This has resulted in the periodic African Governance Reports (AGR) based upon AGIs and aimed at monitoring political, economic and corporate governance trends on the African continent. AGIs rest on a methodology combining three principal research instruments: desk research, expert surveys, and household surveys; *see supra* note 1.

[20] *See e.g.* F. Viljoen, L. Louw, *State Compliance with the Recommendations of the African Commission On Human and Peoples' Rights, 1994–2004*, 101(1) American Journal of International Law 1 (2007); J.E. Alvarez, *Measuring Compliance*, 96 Proceedings of the Annual Meeting (American Society of International Law) 209 (2002); R. Goodman, D. Jinks, *Measuring Effects of Human Rights Treaties*, 14(1) European Journal of International Law 171 (2003); S. Nyambi, *Progress and Challenges of Consolidating the African State: 'Consolidation Indicators' and the African Charter on Democracy, Elections and Governance*, 12(1) International Journal of African Renaissance Studies – Multi-, Inter- and Transdisciplinarity 22 (2017).

[21] This premise is based on two more specific arguments. The normative one is the elementary principle that binding treaties must be performed (*pacta sunt servanda*), *see e.g.* ICJ, *Gabčíkovo-Nagymaros Case (Hungary v. Slovakia)*, Judgment, 25 September 1997, ICJ Rep. 1997, paras. 114 and 142. The empirical argument was roughly and imprecisely stated by L. Henkin, who noted that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time", L. Henkin, *How Nations Behave: Law and Foreign Policy*, Columbia University Press, New York: 1979, p. 47. Yet, the modern doctrine underlines that "to get an accurate sense of the impact of law requires more than an observation that states comply most of the time. It is necessary to determine if and when international law changes the behavior of states" (A.T. Guzman, *How International Law Works: A Rational Choice Theory*, Oxford University Press, Oxford: 2008, p. 22). While there are numerous theories explaining why States decide to change (or not to change) their behaviour to come into compliance with international law, it is generally undisputed that there are examples of treaties influencing states' practice on the domestic and on international level. A relevant bibliography can be found in M. Bothe, *Compliance*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*.

understood as rooted outside its text and beyond its legal nature. These include problems relating to the states' reluctance to ratify the document, to certain constitutional constraints undermining implementation on the national level, and finally to relevant international guarantees of enforcement. Concluding remarks summarize the key points of the analysis.

1. THE ENDOGENOUS LIMITS OF THE CHARTER

In this section we begin with a brief review of the Charter in order to identify the standard-setting parts of the text. Against this background two specific factors are diagnosed and discussed as possibly impairing the capacity of the document to influence states' practice, and thus to generate tangible progress in democratic governance. The issues examined here relate to the character of the Charter and to the quality of the drafting.

1.1. General overview of the document

The text starts with a Preamble and contains 53 articles, divided into 11 chapters. The parts have different focuses and may be classified as: definitional (chapter 1); teleological (chapters 2-3); substantive (chapters 4-6 and chapter 9); procedural (chapter 8, chapter 10); and mixed (chapter 7, chapter 11).

The definitional part merely explains the abbreviations used in the document and does not clarify the substantive terms used in the Charter.[22] Thus this chapter is patently irrelevant to the problem discussed here as it does not contribute to the establishment of a pattern of the required conduct. The procedural parts establish a triple mechanism for application of the Charter: by individual states; on regional levels; and on the continental level. Further, they provide for a sanctions mechanism to be employed against any state that violates the Charter and set out actions in cases of unconstitutional change of government. Finally, they form a framework for cooperation between the AU organs and states to strengthen democratic elections and to monitor implementation of the document. The procedural provisions will be examined in section 3 below in the context of the exogenous limits of the Charter.

The remaining parts of the text (except the administrative and procedural provisions in chapters 7 and 11) are strongly intertwined as they specify substantive commitments to implement the Charter according to enumerated underlying principles (Art. 3) in order to achieve the objectives of the document (Art. 2). The extensive list of the objectives is reducible to four interdependent core aims which permeate the Charter, i.e. adherence to the values of democracy, human rights, the rule of law, and good governance.[23]

[22] *Cf.* Art. 1 of the African Nuclear-Weapon-Free Zone Treaty (adopted 11 April 1996, entered into force 15 July 2009).

[23] Arts. 2(1), 2(2) and 2(6). Unless otherwise indicated, all provisions cited in the footnotes refer to the Charter.

Consequently, both the teleological (Arts. 2-3) and substantive parts of the document (chapters 4-6, chapter 9 and relevant provisions of chapter 7) should be taken into account jointly when discussing endogenous constraints impairing the capacity of the Charter to generate tangible progress of the democratic governance. Accordingly, 81 units of the document – that is articles or sections of articles (if separated) – can be identified as establishing substantive patterns of the states' conduct.

1.2. Character of the Charter

At the outset, a fundamental distinction must be made between international instruments advancing moral or political commitments and instruments creating legal obligations. While the former are not entirely deprived of their standard setting potential,[24] only the latter are enforceable and, if breached, can result in international responsibility of a state for an internationally wrongful act,[25] possibly coupled with a loss of reputation in the eyes of other states. From this point of view the legally non-binding commitments seem less credible and more easily violated. As a result, the legally binding obligations are potentially more conducive to change the states' practice.

The terminology and formal structure are not decisive factors in determining the character of international instruments,[26] but the relevant indicators help to identify the intention of the parties.[27] Against this background one must take into account chapter 11 of the document. This part identifies measures against states violating the Charter (Art. 46); contains provisions on the entry into force of the document (Arts. 47-48); on amendments thereto (Art. 50); on its registration in accordance with Art. 102(1) of the UN Charter (Art. 51(3)) as well as specifies the functions of the depositary (Art. 51). Considering the relevant clauses as typical for treaties, it may be concluded that the Charter was designed as a binding agreement within the meaning of Art. 2(1)(a) of the Vienna Convention on the Law of Treaties (VCLT).[28] This assumption is further strengthened by the wording of certain substantive provisions, which use phrases typical for legal obligations.[29]

However, there are also three circumstances which could possibly distort the above straight forward observation. First, the adoption of the Charter by the AU Assembly

[24] *E.g.* the African Court on Human and Peoples' Rights has confirmed that the Universal Declaration of Human Rights, a formally non-binding resolution of the UN General Assembly of 10 December 1948, "is recognized as forming part of Customary International Laws"; *Anudo Ochieng Anudo v. United Republic of Tanzania* (App. No. 012/2015), Judgment, 22 March 2018, para. 76.

[25] ICJ, *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, 24 May 1980, ICJ Rep 1980, para. 56.

[26] ICJ, *South West Africa Case (Ethiopia v. South Africa)*, Preliminary Objections, Judgment, 21 December 1962, ICJ Rep 1962, p. 331.

[27] ICJ, *Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment, 22 December 1986, ICJ Rep 1986, para. 40.

[28] Adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331.

[29] *E.g.* "State Parties shall" (Art. 17). However, the doctrine also stresses ambiguity of the modal verb "shall" pointing at its complex deontic and epistemic functions, *see generally* L. Bartels, *Human Rights Conditionality in the EU's International Agreements*, Oxford University Press, Oxford: 2005, p. 95.

was preceded by several regional documents on democratic governance which merely recommended the implementation of relevant values in domestic constitutional systems.[30] Therefore, the historical context of the Charter may support a presupposition as to its non-binding character. Second, a comparative perspective reveals that international standard setting on the democratic governance frequently materializes in non-binding recommendations and declarations.[31] Consequently, a finding that the Charter contains binding commitments would appear to be an extraordinary solution in Africa.[32] Finally, the wording of the Charter, discussed below in subsection 2.3, allows to interpret the document not as a set of legal commitments but (partly, at least) as a wish list of values to be merely promoted. This in turn may serve as an indirect proof of the non-binding character of the instrument as a whole.[33]

Considering the circumstances mentioned above, it is necessary to corroborate the tentative assumption on the binding character of the instrument by referring to the subsequent international practice. Interestingly, this analysis reveals that the AU political bodies do not explicitly articulate the binding character of the Charter. Although such pronouncements are not uncommon in the rhetoric of the AU in different contexts,[34] the AU Assembly and the AU Executive Council prefer to declare the principal objective of Charter merely as the "promotion" of the universal values of democracy.[35] Moreover, even if the AU organs decide to emphasize the importance of implementation of the Charter[36] or to reiterate its significance in the consolidation of commitments collectively undertaken by member states to promote democracy and good governance,[37] the legally binding nature of the instrument is usually not exposed. On the contrary, provisions of the Charter and other non-binding documents are sometimes presented jointly as mutually reinforcing, without making a distinction between the Charter and the earlier recommendations.[38]

Judicial and quasi-judicial organs of the AU are less restrained in articulating the binding character of the document. In particular, although the African Commission of

[30] On pre-Charter efforts to promote democracy in Africa *see generally* S.-A. Elvy, *Towards a New Democratic Africa: The African Charter on Democracy, Elections and Governance*, 27 Emory International Law Review 41 (2013).

[31] *E.g.* UN Doc. A/RES/45/150.

[32] But *see* Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism for Conflict Prevention, Management, Resolution, Peacekeeping and Security, adopted 21 December 2001, entered into force 20 February 2008, available at: http://documentation.ecowas.int/legal-documents/protocols/ (accessed 30 May 2019).

[33] A similar argument was initially advanced by some authors in respect of the African Charter on Human and Peoples' Rights, *see e.g.* R. Gittleman, *The African Charter on Human and Peoples' Rights: A Legal Analysis*, 22(4) Virginia Journal of International Law 667 (1982).

[34] *E.g.* EX.CL/502(XV) *in fine* on the African Union Convention on the Protection and Assistance to Internally Displaced Persons in Africa.

[35] Assembly/AU/Decl.4(XXX), Preamble, tiret 10.

[36] Assembly/AU/Dec.645(XXIX), para. 10; PSC/PR/COMM.2(CDXLII), para. 7(iii).

[37] Assembly/AU/Dec.147 (VIII), para. 2; Assembly/AU/Dec.324(XV), para. 3; EX.CL/Dec.320(X), para. 2.

[38] Assembly/AU/Dec.188 (X), para. 2.

Human and Peoples' Rights (ACHPR) is not competent *ratione materiae* to decide on violation of the Charter,[39] the organ has invoked[40] several provisions of the instrument to delineate parameters of the right to vote under the HR Charter. The African Court on Human and Peoples' Rights (ACtHPR), which is a judicial organ enjoying a definitively broader *ratione materiae* jurisdiction than the ACHPR,[41] has explicitly recognized the binding character of the Charter. The Court stated that the Charter had been adopted in order to implement certain rights proscribed in the HR Charter[42] and constitutes a legally binding instrument which is to be interpreted and applied by ACtHPR.[43] Having examined the facts of the case in question, the Court found that the respondent had violated its obligation to establish an independent and impartial electoral body in breach of Art. 17 of the Charter.[44]

Therefore, the survey justifies the conclusion that the AU practice corresponds with the formal indicators and confirms the legally binding character of the Charter.

1.3. Quality of the drafting

Treaties as sources of legal obligations may have different coercive and persuasive forces. Suffice it to point out that this quality is primarily, although not exclusively, determined by the practice of their enforcement as well as by the degree of precision and cogency of the legal text.[45] While the former issue is discussed in section 3, the present subsection focuses on the latter problem.

To put this overview in its proper perspective it is necessary to make a preliminary point. The application of legal norms always entails, by the very nature of the legal syllogism, a requirement to give substance to a text in order to establish rights and duties. During this process, an interpreting entity cannot rationally conclude that an operative interpretation (that is a technical act governed by relevant secondary rules) is not required because a legal text under scrutiny is completely clear. On the contrary, the true meaning of a norm should always be established through a proper interpretative method employed consciously or, if a text is plainly unequivocal, subconsciously. The secondary rules governing the interpretation of treaties are contained in Arts. 31-32 of the VCLT and in many respects are considered as reflecting pre-existing customary international

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[39] Art. 47 in conjunction with Arts. 55 and 56(2) of the HR Charter.

[40] ACHPR, *Open Society Justice Initiative v. Côte d'Ivoire* (App. No. 318/06), Decision, 28 February 2015, para. 164; decisions of the Commission are available at: http://www.achpr.org/communications/ (accessed 30 May 2019).

[41] Art. 3(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples\ Rights, adopted 10 June 1998, entered into force 25 January 2004.

[42] ACtHPR, *APDH v. Côte d'Ivoire* (App. No. 001/2014), Judgment, 18 November 2016, paras. 61-63.

[43] *Ibidem*, para. 65. This position was also affirmed by the AU Commission presenting its opinion before the Court, *ibidem*, paras. 50-52.

[44] *Ibidem*, para. 153(5).

[45] R.R. Baxter, *International Law in 'Her Infinite Variety'*, 29(4) International and Comparative Law Quarterly 549 (1980).

law.[46] Their hermeneutics is based on two principles. The first is that treaties must be interpreted in good faith, in accordance with the ordinary meaning of the text, in their context and in light of their object and purpose. Furthermore, the second principle states that recourse may be had, if needed, to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.

When an interpreting entity performs the operation in order to understand a provision, it may find certain elements of the text objectively blurred to a lesser or to a greater extent. In particular, the complexity of the comprehension process is increased where exceptionally vague terms or excessively general phrases are used. As a result, it may be difficult or impossible to establish the sense of a norm considering merely the ordinary meaning of the relevant words.[47] In such circumstances an interpreting body needs to rely more on the teleological method, necessitating certain interpretational choices as to, e.g., the dominant hermeneutic (party intent versus underlying objective); timing (original versus evolutionary interpretation); and activism (the work-to rule approach versus the gap-filling approach).[48] Consequently, teleological analyses frequently produce incompatible outcomes depending on who makes the interpretation,[49] and hence diminish the persuasive force of a norm the content of which remains uncertain and unclear. In other words, as the field for reasonable interpretation is reduced by precision in drafting, vagueness in this respect expands the perimeter of a rational understanding and thus may blur the sense of what is required.

The line between these two limits, namely between what is a clear text and what requires interpretative choices, is a seamless continuum. Yet, the difference between them is evidently discernible. In particular, there are hortatory provisions representing ideals, aspirations or principles[50] in such a general and nebulous way that they are virtually impossible to be breached[51] and hence their standard-setting capacity is negligible.[52] To take an example – the Treaty of the Southern African Development Community (SADC Treaty)[53] proclaims in Art. 4(c) that the organization and its member states act in accord-

[46] ICJ, *Arbitral Award of 31 July 1989 (Guinea Bissau v. Senegal)*, Judgment, 12 November 1991, ICJ Rep 1991, p. 70.

[47] *See* ICJ, *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment, 13 December 1999, ICJ Rep 1999, para. 30.

[48] *See generally* J. Pauwelyn, M. Elsig, *The Politics of Treaty Interpretation: Variations and Explanations across International Tribunals*, in: J.L. Dunoff, M.A. Pollack (eds.) *Interdisciplinary Perspectives on International Law and International Relations Variations and Explanations across International Tribunals*, Cambridge University Press, Cambridge: 2012, pp. 449-459.

[49] *E.g.* E. Posner, M.F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34(2) Journal of Legal Studies 599 (2005), p. 624.

[50] *E.g.* ICJ, *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, 18 August 1972, ICJ Rep 1972, Separate Opinion of Judge Dillard, p. 92, fn 1.

[51] *E.g.* A. Boyle, C. Chinkin *The Making of International Law*, Oxford Scholarly Authorities on International Law: 2007, p. 221.

[52] *E.g.* ICJ, *North Sea Continental Shelf (Federal Republic of Germany v. Denmark)*, Judgment, 20 February 1969, ICJ Rep 1969, para. 72.

[53] Adopted 17 August 1992, entered into force 5 October 1992, available at: https://www.sadc.int/documents-publications/sadc-treaty/ (accessed 30 May 2019).

ance with the principles of "human rights, democracy and the rule of law." Indubitably, good faith requires an assumption that the phrase was drafted to mean something, rather than nothing.[54] Therefore, it may be argued that the provision sets out the said values as objects of international concern on the regional level. Moreover, considering the plentiful judicial and doctrinal attempts to define all the elements of the triad and to interpret them in the various contexts surrounding the numerous international documents in which they appear, the ensuing norm cannot be deemed to be entirely devoid of substantive content. Hence, it is both legally required and technically possible to decode a detailed standard embedded therein. However, on the other hand the exhortations of the SADC Treaty do not give any guidelines for determining, *inter alia,* the substantive scope of: human rights and their limitations; the organization of elections; the role of military forces in a democracy; or the management of national resources. Moreover, provisions of the kind are not considered as self-executing by domestic courts, which may refuse to directly apply relevant stipulations.[55] Consequently, the standard-setting capacity of the provision remains purely prospective in nature, at least until activated by subsequent international practice constituting objective evidence on how state parties to the SADC Treaty and the SADC understand the ensuing norms.[56]

Bearing in mind that certain imprecise provisions may result in an extremely restricted capacity to practically configure states' behaviour, the following part of this subsection attempts to map out the substantive units of the Charter in order to identify such vague provisions. This aim is accomplished in three stages. First, the index quantifying legal precision (IQLP) and factors constituting indicators of a limited quality in the drafting are introduced. Next, the relevant factors are detected in the substantive units of the Charter. Finally, the distribution of the IQLP throughout the document is discussed. For the purposes of this analysis[57] three major variables are recognized as affecting the precision of legal stipulations. They refer to: the clarity of phrases used to indicate goals established under the treaty; the accuracy of wording applied to formulate measures required to achieve the goals; and finally the character of relevant obligations chosen between obligations of conduct and those of result.

1.3.1. Clarity of goals

The first variable results from the assumption that if the ordinary meaning of terms used in a provision to establish a goal or an underlying value protected by a norm is plainly unequivocal or its meaning has been already explained in the case law of

[54] *E.g. Ad Hoc* Tribunal (UNCITRAL), *Eureko BV v. Poland,* Award, 19 August 2005, Oxford Reports on International Law: International Investment Claims 2005, para. 249.

[55] *E.g.* Cour de Cassation (Sénégal), *Habré Case,* Judgment, 20 March 2001, African Human Rights Law Reports 183 (2002), paras. 37-40.

[56] *E.g.* ICJ, *Kasikili/Sedudu Island,* para. 50.

[57] Another advanced calculation of the index, in the context of international investment law, is presented by M.S. Manger and C. Peinhardt, *Learning and the Precision of International Investment Agreements,* 43(6) International Interaction 920 (2017).

the judicial and quasi-judicial organs of the AU, then precision reduces the field for reasonable interpretation. In this case, one point should be added to the total count of the IQLP – otherwise, no point is scored.

For example, Art. 4(2) of the Charter provides that states "shall recognize popular participation through universal suffrage as the inalienable right of the people." The goal of the relevant norm can be identified as ensuring popular participation through universal suffrage. Taking into account the natural and ordinary meaning of the words,[58] the phrase is plainly unequivocal and the intention of the parties is clearly discernible, "above all upon the text of the treaty."[59] In particular, it explicitly refers to the right of every citizen to elect representatives or entities empowered to make and to abolish national laws. Moreover, the goal of the provision is relatively easy to grasp against the backdrop of Art. 13(1) of the HR Charter and taking into account relevant case law of the ACHPR and the ACtHPR.[60] Thus, the provision scores a point to the total count of the IQLP.

On the other hand, there are also provisions of the Charter which raise serious doubts in this respect. For example, Art. 9 proclaims that states "undertake to design and implement social and economic policies and programmes that promote sustainable development and human security." The goal of the ensuing norm can be determined as safeguarding sustainable development and human security. Although this goal has recently attracted widespread doctrinal attention,[61] its meaning is still far from clear.[62] In particular, while the term "sustainable development" is also present in the regional political discourse,[63] it has been predominantly exploited as a catchword to denote the highly nebulous idea of an equitable balance between development and the environmental needs of present and future generations. A notable manifestation of this approach can be found in the single decision of the ACHPR invoking sustainable development. The organ, discussing the right to a general satisfactory environment under Art. 24 of the HR Charter, noted that sustainable development constitutes one from among several values to be secured through the said right. The organ pointed out that in order to promote sustainable development states are required "to take reasonable and other measures to prevent pollution and ecological degradation."[64] Still, although the

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[58] *E.g.* ICJ, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Judgment, 15 December 2004, ICJ Rep 2004, para. 101.

[59] ICJ, *Territorial Dispute (Libyan Arab Jamahiriya v. Chad)*, Judgment, 3 February 1994, ICJ Rep 1994, para. 41.

[60] *E.g.* ACHPR, *Constitutional Rights Project v. Nigeria* (App. No. 102/93), Decision, 31 October 1998, para. 50.

[61] *E.g.* N. Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status*, 329(1) Recueil des Cours 217 (2007).

[62] *E.g.* U. Beyerlin, *Sustainable Development*, in: Wolfrum (ed.), *supra* note 21.

[63] *E.g.* AHG/Decl. 1(XXXVII), paras. 3 and 8; *The NEPAD Strategic Plan for the period 2014-2017*, *passim*, available at: http://www.nepad.org/resource/nepad-strategic-plan-period-2014-2017 (accessed 30 May 2019).

[64] ACHPR, *SERAC and CESR v. Nigeria* (App. No.155/96), Decision, 27 October 2001, para. 52.

ACHPR generally identified actions which contribute to the promotion of sustainable development, the reasoning hardly assists in determining the content of the guaranteed value. Therefore, the provision scores no point in the total count of the IQLP.

Having surveyed 81 substantive units of the treaty, 18 of them (22.82 per cent) have been categorized as stipulating their goals using vague phrases and hence virtually excluding any consistent interpretation.[65]

1.3.2. Precision of required measures

The next variable has been introduced because norms may vary in terms of the measures required to achieve their goals. In this respect, two categories are discernible. On one hand, there are norms which establish parameters of a specific conduct and hence either leave no room for reasonable divergent interpretations or significantly reducing the field thereof. On the other hand, one may encounter directives merely setting out goals that must be achieved by the parties, while granting them broad discretion on how to reach these aims.

A norm is qualified into the former category if either of the two following conditions are met: First, a disposition of a norm uses a verb (e.g. "shall adopt") and an object (e.g. "legislative and administrative measures") which obliges states to undertake precisely defined actions. As a result, the compliance with the disposition is objectively and quantitatively measurable. This means that relevant actions of the legislature can be specified and examined with respect to their capacity to secure the relevant values. For example, Art. 14(2) of the Charter provides that states "shall take legislative and regulatory measures to ensure that those who attempt to remove an elected government through unconstitutional means are dealt with in accordance with the law." The goal of the provision is to guarantee transfers of power accomplished through the means envisaged in relevant constitutions. It is true that the ensuing norm leaves some room for manoeuvre as to which appropriate legal mechanisms are to be applied, but the crucial parameters of the mandatory baseline behaviour are accurately set out. In particular, the pattern of the action required is established with a precision that realistically enables one to decode what the disposition of the norm indicates ("to take legislative and regulatory measures") and, as a result, the practical monitoring of compliance is possible.[66] Therefore one point should be added to the total count of the IQLP.

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[65] Art. 4(1) ("democracy, the principle of the rule of law and human rights"); Art. 9 ("sustainable development and human security"); Art. 11 ("culture of democracy and peace"); Art. 12(1)-(4) ("democratic principles and practices as well a culture of democracy and peace"); Art. 13 ("democracy and peace"); Art. 16 ("democracy); Art. 27(9) ("democratic values of traditional institutions"); Art. 28 ("strong partnerships and dialogue between government, civil society and private sector"); Art. 29(1) ("development and strengthening of democracy"); Art. 30 ("citizen participation in the development"); Art. 32(8) ("the rule of law"); Art. 35 ("democratic system"); Art. 36 ("democratic governance"); Art. 37 ("sustainable development and human security"); and Art. 39 ("a culture of respect, compromise, consensus and tolerance").

[66] *Cf.* ACHPR, *Concluding observations on Initial Report of Cameroon (2001-2003) adopted at 31st Ordinary Session, 2-16 May 2002, Pretoria, South Africa*, paras. 257-259, available at: https://bit.ly/2vDJkon (accessed 30 May 2019).

Second, while substantive norms in the Charter are generally drafted in positive terms, which means obligation to act in order to guarantee or pursue certain goals and values; there are also provisions with negative obligations explicitly or impliedly embedded. Such provisions advance the duty to take no action(s) which would have the effect of violating or eviscerating protected values.[67] For example, Art. 8(1) obliges states to "eliminate all forms of discrimination". The provision accurately implies a states' duty to abstain from employing discriminatory measures,[68] and thus one point should be added to a total count of the IQLP.

In turn, Art. 9(2) of the Charter on "fostering popular participation and partnership with civil society organizations" contains a norm which satisfies neither of the two conditions. First of all, the obligation is determined only by a nebulous verb referring to the conduct required. In particular, there are countless ways to *foster* citizens' participation.[69] For example, it may be argued that a mere declaratory acknowledgment of the role played by civil organizations[70] suffices to comply with the treaty. Therefore, as the norm does not establish any specific parameters of the conduct required, the scope of reasonable interpretation is nearly unlimited. Second, if attempts are made to define "popular participation" it emerges as a principle encompassing several more specific goals, namely basic education, freedom of association, representation of citizens in national bodies etc.[71] Therefore, the principle has no autonomous standard-setting capacity and serves only for the systematization of the international discourse, for the progressive development of international law, and for guiding the interpretation of more specific pertinent rules. Consequently, even if the provision implies a negative obligation (i.e. to not hamper citizens' participation), it has to be decoded against the background of the more specific norms of international law and not in the light of Art. 9(2) of the Charter itself. In this case, as the pattern of a necessary behaviour is not established with a precision that realistically allows one to understand what is required, no point is added to a total count of the IQLP.

Accordingly, upon analysis of the 81 substantive units of the Charter, 34 of them (41.9 per cent) have been categorized as not providing any guidance on how to reach an established goal.[72]

[67] *E.g.* ACHPR, *Association of Victims of Post Electoral Violence & Interights v. Cameroon* (App. No. 272/03), Decision, 25 November 2009, para. 88.

[68] *E.g.* ACtHPR, *ACHPR v. Republic of Kenya* (App. 006/2012), Judgment, 26 May 2017, paras. 138-146.

[69] *See generally* K. Callahan, *Citizen Participation: Models and Methods*, 30 International Journal of Public Administration 1179 (2007).

[70] *E.g. President embraces civil society*, The Herald, 06.02.2018, available at: https://www.herald.co.zw/president-embraces-civil-society/ (accessed 30 May 2019).

[71] *E.g.* UN Economic and Social Council, Economic Commission for Africa, *Progress in the Promotion of Popular Participation and Governance in Africa*, UN Doc. E/ECA/CGPP/3/3.

[72] Art. 4(1) ("to promote democracy"); Art. 10(1) ("entrench the principle of the supremacy of the constitution in the political organization of the State"); Art. 12(1) ("promote good governance"); Art. 12(2) ("strengthen political institutions"); Art. 12(3) ("create conducive conditions"); Art. 13 ("shall take meas-

1.3.3. Character of legal obligations

The last variable is based on the observation that international obligations are implemented in various ways. In particular, there are two main types of undertakings, i.e. obligations of conduct and obligations of result.

The former requires states to adopt a particular course of action notwithstanding the outcome. For example, under Art. 6(1) of the African Charter on Maritime Security and Safety and Development in Africa[73] every state undertakes "to provide assistance to other States Parties and third States as may be required." Under this provision a state does not incur responsibility because the objective of the assistance needed (that is prevention and combating a crime at sea) is not achieved in a particular case.[74] Instead, a state may be held responsible for a breach if it refuses to provide the prescribed assistance irrespective of whether the assistance prevents or combats a crime at sea.

Conversely, obligations of result are focused on the realization of particular changes of facts (e.g., on the "elimination of all forms of discrimination" within the meaning of Art. 8(1) of the Charter), and not on how states should act in order to accomplish such change.[75] Therefore states entail international responsibility when a situation is, at a given relevant time, different than that prescribed.

However, international practice justifies distinguishing another category beyond the strict lines drawn above.[76] For example, Art. 39 of the Charter provides that states "shall promote a culture of respect, compromise, consensus and tolerance as a means to mitigate conflicts." On one hand, considering that no particular desired result is specified, the provision appears to be an obligation of conduct. On the other hand, a state party is not obliged to carry out a specific and accurately described conduct (such as, e.g., the cooperation prescribed under Art. 14 of the Charter in order to prosecute

ures to ensure and maintain political and social dialogue"; Art. 14(3) ("shall cooperate"); Art. 16 ("shall cooperate at regional and continental levels"); Art. 27(1) ("strengthening the capacity of parliaments"); Art. 27(2) ("fostering popular participation"); Art. 27(4) ("improving public sector management"); Art. 27(5) ("improving efficiency and effectiveness"); Art. 27(6) ("promoting the development"); Art. 27(7) ("development and utilisation"); Art. 27(8) ("promoting freedom of expression"); Art. 27(9) ("harnessing the democratic values"); Art. 28 ("shall ensure and promote strong partnerships and dialogue"); Art. 30 ("shall promote"); Art. 31(1) ("shall promote participation"); Art. 32(1)-(8) ("to institutionalize good political governance"); Art. 33 (1) ("effective and efficient public sector management"); Art. 33(2) ("promoting transparency in public finance management"); Art. 33(4) ("efficient management of public debt"); Art. 33(5) ("prudent and sustainable utilization of public resources"); Art. 33(7) ("poverty alleviation"); Art. 33(9) ("providing a conducive environment for foreign capital inflows"); and Art. 39 ("shall promote a culture of respect, compromise, consensus and tolerance").

[73] Adopted 15 October 2016, not in force at the time of writing.

[74] *E.g.* ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Merits, Judgment, 26 February 2007, ICJ Rep 2007, para. 430.

[75] *E.g.* ICJ, *Legality of the Threat or Use Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep 1996, para. 99.

[76] *See generally* R. Wolfrum, *Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations*, in: M.H. Arsanjani et al. (eds.), *Essays on International Law in Honor of W. Michael Reisman*, Martinus Nijhoff Publishers, Leiden, Boston: 2011, pp. 365-383.

a person organizing coup d'état) but rather to undertake indefinite actions towards a direction roughly sketched out by a desired goal.[77] Therefore, the ensuing obligation falls outside the established dichotomy. Where the goal of the conduct is the sole parameter of what is actually needed, one should distinguish another category, i.e. that of the goal-orientated obligations.[78] Such undertakings refer to the evolutionary realization of certain aspirations in the indefinite future, and while "not bereft of legal content", they are of a "broad and general nature"[79] to an extent that significantly undermines their standard-setting capacity. Consequently, goal-oriented obligations constitute less apt measures for changing states' behaviour than obligations of result or obligations of conduct, and provisions of the Charter identified as belonging in this category receive no point to the total count of the IQLP. Otherwise, one point is added.

Accordingly, the Charter has been surveyed in search for goal-oriented obligations, that is obligations "focused on an objective without requesting a specifically defined or definable result to be achieved and without requiring a particular procedure to be set up."[80] Having examined 81 substantive units of the Charter, 21 of them (25.9 per cent) have been classified as lacking a sufficiently defined result to be achieved or requiring a particular procedure to be set up.[81]

1.3.4. Conclusions to section 1

Before proceeding with a discussion of the IQLP distribution throughout the document, two methodological caveats are warranted. First, bearing in mind that the three variables have been identified as influencing the standard-setting capacity of the treaty provisions, the value of the IQLP ranges from 0 (in case of highly imprecise, hortatory provisions possessing a very limited standard-setting quality) to 3 (that is, stipulations revealing significant standard-setting attributes). The relatively narrow range between the minimum and the maximum value means that the IQLP serves as an elementary tool suitable for detecting and confirming particularly clear features in the text. Further,

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[77] *Ibidem*, p. 368.

[78] *Ibidem*, pp. 376-378.

[79] ICJ, *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, 4 June 2008, ICJ Rep. 2008, para. 104.

[80] Wolfrum, *supra* note 76, p. 368.

[81] Art. 4(1) ("shall commit themselves to promote democracy"); Art. 5 ("shall take all appropriate measures to ensure constitutional rule"), Art. 7 ("shall take all necessary measures to strengthen the Organs of the Union"); Art. 12(2) ("strengthen political institutions to entrench a culture of democracy and peace"); Art. 13 ("shall take measures to ensure and maintain political and social dialogue"); Art. 27(1)-(9) (obligations to advance political, economic and social governance described as, e.g., "strengthening", "fostering" and "improving"); Art. 30 ("shall promote citizen participation in the development process"); Art. 33(2) ("promoting transparency in public finance management"); Art. 35 ("shall strive to find appropriate ways and means to increase [...] integration and effectiveness [of traditional authorities]"); Art. 36 ("shall promote and deepen democratic governance by implementing the principles and core values of the NEPAD Declaration"); Art. 38(1) ("shall promote peace, security and stability"); Art. 39 ("shall promote a culture of respect, compromise, consensus and tolerance"); Art. 43(1) ("shall endeavour to provide free and compulsory basic education").

for the sake of simplicity, the variables have been applied in the binary mode, i.e. only 0 and 1 have been used to represent the relevant attributes of an examined stipulation. A side effect is thereby produced where the binary count cannot reflect a more nuanced reality.[82] As a result, one must discuss the map of the IQLP distribution in the text adjusting for these caveats. Hence, to minimize their impact on the final findings, a particular emphasis is placed on the distribution of provisions revealing extreme IQLP values, that is 0 or 3. In this way, the intrinsic imprecision of the research instrument has been taken into consideration and its impact on observations and final findings has been reduced.

There are four principal observations on the distribution of substantive provisions possessing extreme IQLP values. First, stipulations attaining the maximum value (IQLP=3) are predominant in chapter 6 (six out of eight, that is 75 per cent of the provisions on "Democratic Institutions")[83] and in chapter 7 (all five substantive units on "Democratic Elections").[84] Neither of them includes any units where IQLP=0, and the arithmetical mean values of these chapters are 2.6 and 3 respectively. Further, stipulations resulting in IQLP=3 are also present, although to a lesser extent, in chapter 4 (7 out of 12, i.e. 58.3 per cent of the provisions on "Democracy, Rule of Law and Human Rights");[85] and in chapter 9 (16 out of 50, that is 32 per cent of the provisions on "Political, Economic and Social Governance").[86] These parts of the treaty also include provisions with an IQLP=0, that is one (out of 12, i.e. 8.3 per cent),[87] and five (out of 50, i.e. 10 per cent)[88] respectively. The arithmetical mean values of these chapters are 2.41 and 1.8 respectively. Next, chapter 5 on "The Culture of Democracy and Peace" contains no unit attaining a maximum IQLP and includes two provisions with IQLP=0 (out of six, i.e. 33.3 per cent).[89] The arithmetical mean value of the chapter is 1.0. Finally, eight provisions of the Charter (9.8 per cent) attained an IQLP=0 and 34 provisions of the treaty (41.9 per cent) attained an IQLP=3. Thus the arithmetical mean values of the substantive provisions of the Charter is 2.0.

The above observations warrant the conclusion that the treaty cannot be categorized as a hortatory international instrument. On the contrary, a considerable part of its substantive stipulations display a relatively high standard-setting capacity. The distri-

[82] *E.g.* Art. 12(1) provides that states "shall promote good governance by ensuring transparent and accountable administration." The provision has scored no point under the second variable because the action required, described by the verb ("to ensure") and by the object ("transparent and accountable administration"), has been categorized as not defined with sufficient precision. However, this assessment is saddled with a certain amount of subjectivity necessitated by the binary mode of counting, which overlooks the complexity involved.

[83] Arts. 14(1)-(2), 15(1)-(4).

[84] Arts. 17(1)-(4), 22.

[85] Arts. 4(2), 6, 8(1)-(3); 10(2)-(3).

[86] Arts. 27(10), 29(2)-(3), 31(2), 33(3), 33(6), 33(8), 33(10)-(13), 34, 38(2), 40, 41 and 42.

[87] Art. 4(1).

[88] Arts. 27(1)-(2), 27(9), 30 and 39.

[89] Arts. 12(2) and 13.

bution of the provisions attaining IQLP=3 shows that robust and precise standards of behaviour have been established to prevent unconstitutional changes of governments; to establish institutional instruments supporting the constitutional transfer of power (chapter 6); and to ensure fair elections (chapter 7). At the same time, the parts of the Charter dealing with the promotion of democracy and peace (chapter 5) as well as advancing good governance (chapter 9) are on the other side of the range. Their provisions, though formally binding, are largely vague, indeterminate, and general to the extent of "depriving them of the character of hard law in any meaningful sense,"[90] hence nullifying their standard-setting capacity. While chapter 9 includes several stipulations attaining an IQLP=3, this should not be overestimated in the present context. In particular, their autonomous role as original minimum standard-setting matrixes is limited insofar as they mostly corroborate equally detailed or more detailed obligations under other regional treaties.[91] Against this background, only four isolated units of the chapter stand out as establishing particular duties – i.e. those regarding development of the private sector, encouragement of investments, and transparent tax systems.[92]

2. THE EXOGENOUS LIMITS OF THE CHARTER

A state bound by the Charter is obliged to implement relevant commitments and ensure that the state practice at the national level corresponds to the agreed standards. In particular, states should bring their laws and regulations into conformity with the treaty.[93] Against this backdrop, it is argued that the capacity of the treaty to produce tangible progress in democratic governance is constrained by factors originating from its application in practice. The three such issues examined in this section are: ratification challenges; problems in the application of the Charter before domestic courts; and securing compliance at the international level.

[90] Boyle, Chinkin, *supra* note 51, p. 220.

[91] Art. 29(2)-(3) on the role women in democracy reaffirms already existing obligations under Art. 9 of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 1 July 2003, entered into force 25 November 2005; Art. 33(3) on combating corruption generally recapitulates detailed obligations expressed under African Union Convention on Preventing and Combating Corruption, adopted 1 July 2003, entered into force 5 August 2006; Art. 34 on the decentralization of power encapsulates duties imposed under African Charter on the Values and Principles of Decentralisation, Local Governance and Local Development, adopted 27 June 2014, not in force at the time of writing. Several provisions of the Charter refer to commitments already established under the HR Charter. In particular, Art. 33(6) of the Charter on equitable allocation of natural resources mirrors Art. 21 of the HR Charter; Art. 27(10) of the Charter on prevention and combating diseases reflects general obligation under Art. 16 of the HR Charter; Art. 40 of the Charter dealing with employment, diseases, poverty and illiteracy corresponds to Arts. 15, 16 and 17 of the HR Charter; and Art. 42 of the Charter on protection of environment affirms stipulations of Art. 24 of the HR Charter.

[92] Arts. 33(8), 33(10), 33(12) and 33 (13).

[93] Art. 44(1).

2.1. Ratification challenges

The standard-setting role of a treaty is inherently restricted by its subjective scope and by the geographical scope of its application.

The parameters of the former are established according to a fundamental axiom that a treaty must be performed by the parties only. Although international agreements may, under certain conditions, produce effects influencing non-parties and actually modifying their behaviour these issues, although relevant, will not be discussed here as they are either negligible in the present context[94] or obviously exceed the scope of the research.[95] Therefore, it is assumed that a lack of ratification practically nullifies the role of a treaty in shaping conduct of a non-party state. The parameters of the latter are established pursuant to Art. 29 of the VCLT, which states that "[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory." In the case of the Charter under discussion, this norm has to be considered taking into account that no intention to allow exceptions to the general rule can be inferred either from the *travaux préparatoires,* the text of the treaty, nor from the subsequent practice of the parties. Therefore, the treaty is binding upon each party in respect of its entire territory.

Against the presented normative background, this subsection depicts the ratification status of the Charter in order to determine the territorial range of its standard-setting impact seen in the context of the democratic governance deficit. The goal of the subsection is to identify a specific non-ratification pattern which, if proven, evidences another limit of the Charter. Namely, if the pattern reveals that states with poor democracy and human rights records are over-represented among non-parties, the value of the treaty in the accomplishment of tangible progress in terms of democratic governance is significantly restricted.

The Charter has not been applied provisionally and the progress of the ratification process has been perceived by the AU as a key factor in promoting adherence to the values of democracy.[96] This concern has been justified, as the statistics demonstrate general restraint on the part of the African states in ratification of multilateral agreements adopted under the OAU/AU aegis. The policy organs of the OAU and the AU have adopted 60 treaties, but only half of them have entered into force as of May 2018.[97] The Charter has been opened for signature, ratification, and accession by all member states of the AU.[98] The treaty entered into force on 15 February 2012, i.e. five years

[94] This includes: the third-party effect based on consent, *see e.g.* PCIJ, *Free Zones of Upper Savoy and the District of Gex (France v. Switzerland),* Judgment, 7 June 1932, PCIJ Publications, Series A/B, No. 46, p. 49; the third-party effect of most-favoured-nation clauses, *see e.g.* ICJ, *Anglo-Iranian Oil Co. (United Kingdom v. Iran),* Judgment, 22 July 1952, ICJ Rep. 1952, pp. 18-20); and the third-party effect envisaged in Art. 75 of the VCLT.

[95] Art. 44(2)(B)(a) of the Charter explicitly encourages "adherence" to the treaty by non-party states.

[96] *See e.g.* Assembly/AU/Dec.585(XXV), para. 4; EX.CL/Dec.627(XVIII), para. 3(vi); EX.CL/Dec.685(XX), para. 7(iii).

[97] Records available at https://au.int/en/treaties.

[98] Art. 47(1).

after its adoption and 30 days following Cameroon becoming the 15th member state to complete its ratification.[99] The pace of the process must be deemed moderate bearing in mind that 18 out of 29 regionally binding treaties under consideration (62 per cent) have taken less time to enter into force. At the time of this writing, the Charter has been ratified by 30 of the 55 members of the AU, thus being ranked 17th – based on the number of ratifications – out of the total number of regionally binding treaties.

The fact that the standard-setting effect of the treaty has been excluded in relation to territories constituting more than 45 per cent of the African states should be further examined taking into account the actual deficits in democratic governance. One can ascertain the geographical limits of the Charter's impact bearing in mind where tangible progress in democratization is particularly needed. To do this, the 2017 Ibrahim Index of African Governance (IIAG) has been applied[100] in order to prove (or disprove) the non-ratification pattern. The instrument, providing an evaluation of 54 African States (except for the Sahrawi Arab Democratic Republic) for the years 2000-2016, has been chosen as a credible and advanced apparatus already used in scientific researches.[101] The IIAG defines "Safety & Rule of Law" and "Participation & Human Rights" as key components of good governance. The index of "Safety & Rule of Law" is based on 26 indicators combined to form four sub-categories (Rule of Law, Accountability, Personal Safety, and National Security). The Index of "Participation & Human Rights" is based on 19 indicators combined to form three sub-categories (Participation, Rights, Gender). The results, referring separately to both indexes, are classified into three main types: score, rank, and trend.[102]

Seven out of the bottom ten states in the category of "Safety & Rule of Law" have not ratified the Charter.[103] The same number of non-party states have been classified in the top ten most deteriorated countries in the period 2012-2016.[104] On the other hand, four non-party states reached the top ten states[105] and four non-party states have been classified in the top ten most improved countries in the period 2012-2016.[106] With respect to the average score in this category in 2016,[107] 13 non-party states received scores below the average, while 12 non-party states received scores above the average.[108] Furthermore, an average deterioration trend has been observed in the period 2012-2016, with 18 non-party states performing better than the average trend and seven non-party states performing worse than the average trend.[109]

[99] Art. 48.

[100] Available at http://mo.ibrahim.foundation/iiag/.

[101] *See* S.O. Afolabi, *Interrogating the Credibility of Elections in Africa: Implications for Democracy, Good Governance and Peace?*, 10(1) Journal of Pan African Studies 3 (2017), pp. 14-18.

[102] 2017 IIAG Report, pp. 9-12.

[103] Equatorial Guinea, Eritrea, DRC, Burundi, Libya, CAR, Somalia (*ibidem*, p. 99).

[104] Burundi, Libya, Gambia, Mozambique, CAR, Eritrea and Congo (*ibidem*).

[105] Mauritius, Botswana, Cabo Verde and Senegal (*ibidem*).

[106] Kenya, Tanzania, Zimbabwe, Senegal (*ibidem*).

[107] *Ibidem*, p. 104.

[108] *Ibidem*, pp. 106-161.

[109] *Ibidem*, pp. 104-161.

In the category of "Participation & Human Rights", seven out of the bottom ten states have not ratified the Charter[110] and six non-party states have been classified in the ten most deteriorated countries in the period 2012-2016.[111] On the other hand, five non-party states reached the top ten in that category[112] and two non-party states have been classified in the top ten most improved countries in the period 2012-2016.[113] With respect to the average score in this category in 2016, 15 non-party states received scores below the average and ten non-party states received scores above the average. Furthermore, an average improvement trend has been observed in the period 2012-2016[114] with only three non-party states (Morocco, Tunisia and Zimbabwe) performing better than the average trend and as many as 22 non-party states performing worse than the average trend.[115]

The data warrant three observations. First, the non-party states statistically perform worse than the states bound by the Charter. Notably, the former constitute the majority of the bottom scores and the majority of the most deteriorated countries in both categories. At the same time, they never form the majority of the top scores and the majority of the most improved countries. Furthermore, most of the non-party states received scores below the average in both categories. Second, when classifying the bottom scoring and the most deteriorated countries in both categories the percentage ratio of the non-party states to the state parties is 70-30 and 60-40 respectively. When categorizing the top scoring and the most improved countries in both categories the percentage ratio of the non-party states to the state parties is 50-50 and 20-80 respectively. Third, the average trends vary drastically between both categories. While the majority of the non-party states (72 per cent) perform better than the African average trend in the category "Safety & Rule of Law", as many as 88 per cent of them perform worse than the average continental trend in the category "Participation & Human Rights".

In conclusion, the particularly high ratio of non-party states performing worse than the average continental trend in the category "Participation & Human Rights" may suggest that non-ratification and poor records with respect to the participatory aspects of good governance in a democratic society (e.g., civil and political participation, free and fair elections, legitimacy of the political process, and civil liberties) are interrelated. Therefore, the role of the treaty in the attainment of tangible progress for societies in need (that is, the societies in states with a poor record) is significantly restricted.

2.2. The Charter in domestic legal systems

The treaty needs to be implemented at the national level in order to actually influence the state practice with respect to various aspects of democratic governance. Its implementation is a multi-faceted process involving, e.g., accommodation of interna-

[110] DRC, Libya, Egypt, Swaziland, Equatorial Guinea, Eritrea, Somalia (*ibidem*, p. 100).

[111] Libya, Egypt, Burundi, Swaziland, DRC, Cabo Verde (*ibidem*).

[112] Cabo Verde, Mauritius, Tunisia, Senegal and Botswana (*ibidem*).

[113] Tunisia and Zimbabwe (*ibidem*).

[114] *Ibidem*, p. 104.

[115] *Ibidem*, pp. 106-161.

tional standards into national strategies, undertaking legislative actions to bring national laws into conformity with the international agreement, and the introduction of amendments to education curricula. However, under certain circumstances a lack of good will or a range of political hurdles practically disable the executive and the legislative branches of a government as vehicles of implementation of the treaty. In such cases, the independent judiciary remains the only channel for streamlining domestic practice according to the agreed-upon international standards. This subsection briefly presents constitutional provisions of the African states in order to identify patterns of relevant limits preventing domestic courts from the direct application of the Charter. Given that nearly every domestic system contains provisions for the making, ratification, and application of treaties by the judiciary, the following analysis separately deals with two fundamental and distinguishable approaches to the issue.

The analysis proves that a combination of various factors prevents domestic courts in Africa from direct application of the Charter, thus radically impairing the role of the judiciary in shaping domestic practice pursuant to the international standards contained in the treaty.

2.2.1. The dualist approach

The so-called "dualist approach" to international law has been followed in the constitutional regulations of the former British-influenced territories. If their constitutions refer to the problem,[116] they establish a principle that the consent expressed by a state to be bound by treaties at the international level does not transform relevant commitments into the law of the land.[117] As a result, domestic courts cannot apply treaties directly[118] unless the process of incorporation is completed,[119] and in general they refrain from doing so. Not surprisingly, there are only isolated reported judgments of domestic courts applying norms contained inhuman rights treaties as rules of decision.[120] It follows that the adoption of this approach makes the process of implementation of the Charter entirely dependent on the political reality and readiness of non-judicial branches of government to incorporate the treaty into law.

2.2.2. The monist approach

Other African states roughly follow the so-called "monist approach" as reflected in Art. 55 of the Constitution of 1958 of the French Republic providing that once a treaty

[116] Several acts do not regulate the issue explicitly, *see e.g.* The Constitution of Botswana of 1966. Texts of all constitutions cited in the subsection from The African Library, available at: http://www.africanlaw library.net (accessed 30 May 2019).

[117] *E.g.* Art. 12(1) of the Constitution of the Federal Republic of Nigeria of 1999.

[118] *E.g.* The Court of Appeal (Swaziland), *Ray Gwebu and Lucky Nhlanhla Bhembe v. Rex*, Judgment, 22 November 2002, African Human Rights Law Reports 229 (2002), para. 17.

[119] It is difficult to discuss the progress of incorporation as parties has not submitted periodic reports on the legislative measures taken to give effect to the treaty under art. 49(1) of the Charter. By the time of writing, only one report has been submitted by Togo, AU, Press Release, 27 March 2017, No. 044/2017.

[120] *E.g.* High Court of Zambia, *Longwe v. Intercontinental Hotels*, Judgment, 4 November 1992, 4 Law Reports of the Commonwealth [HC] (Zam.) 1992.

has been ratified it becomes a part of domestic law. Similar provisions were adopted in constitutions of various African states: Francophone,[121] Lusophone,[122] Arabophone[123] and others (e.g. Ethiopia).[124]

Intuitively it would appear that the monist states are potentially more propitious in terms of the influence of the Charter than the dualist states. However, this intuition is not supported by the general survey on the reception of international agreements.[125] It can be observed that references to human rights treaties are scant in the relatively slim reported case law of domestic courts.[126] This fact may be explained with reference to three principal factors. First, in numerous states a treaty that enters into force internationally lacks domestic legal force until the executive branch publishes or promulgates the treaty.[127] However, the relevant practice has not been homogenous in this respect. For example, the HR Charter was either promulgated together with a pertinent act of ratification,[128] promulgated separately,[129] or has not been promulgated at all – thus preventing its application by domestic courts.[130] Second, although the constitutions of the monist states do not explicitly introduce a self-executing principle of direct application, domestic courts do so in practice by checking whether treaties' provisions possess a mandatory quality to be applied in the absence of domestic legislation (the *Habré Case*). Against this backdrop, there is considerable uncertainty concerning self-executing character of all the norms contained in the Charter. In particular, Art. 44(1)(a) of the treaty stipulates that states "shall initiate appropriate measures including legislative, executive and administrative actions to bring (...) national laws and regulations into conformity with this Charter." It may be argued that as the provision clearly requires specific acts of a state to implement the treaty, its norms are not self-executing and cannot operate as domestic law. Finally, direct application of the Charter by domestic courts may be restricted by a confluence of several political factors. In particular, there is a growing

[121] *E.g.* Art. 147 of the Constitution de la République du Bénin of 1990.

[122] *E.g.* Art. 13(2) of the Constituição da República de Angola of 2010.

[123] *E.g.* Art. 80 of the Constitution de la République Islamique de Mauritanie of 2006.

[124] Art. 9(4) of the Constitution of the Federal Democratic Republic of Ethiopia of 1994.

[125] *See generally* F. Viljoen, *Application of the African Charter on Human and Peoples' Rights by Domestic Courts in Africa*, 43(1) Journal of African Law 1 (1999); M. Killander (ed.), *International Law and Domestic Human Rights Litigation in Africa*, Pretoria University Law Press, Pretoria: 2010; F. Viljoen, *International Human Rights Law in Africa*, Oxford University Press, Oxford: 2012, pp. 517 *et seq.*

[126] *But cf.* Constitutional Court of *Benin, Okpeitcha Case*, Judgment, 17 August 2001, African Human Rights Law Reports 33 (2002), paras. 8-11.

[127] *E.g.* Constitutional Court of Benin, *Contrôle de constitutionnalité l'arrêté no. 175/MFPTRA/DC/DACAD/SAD de 24 juillet 2002*, Judgment, 19 February 2003, available at: http://www.cour-constitutionnelle-benin.org/doss_decisions/03029.pdf (accessed 30 May 2019).

[128] Décret no 87–37 du 3 février 1987, 6 Journal Officiel de la République Algerienne (1987), p. 126.

[129] Décret no 82–232 du 8 novembre 1982, Journal Officiel de la République Togolaise, 1er Janvier (1983), p. 2.

[130] In the Mauritanian practice, the act of ratification of 14 June 1986 was published in 664–665 Journal Officiel de la République Islamique de Mauritanie, p. 299. However, the text of the HR Charter has not been promulgated thereafter.

tendency in West and Central Africa to establish presidential systems with a dominant position reserved for the head of state. It is not infrequent that a head of state is empowered to apply disciplinary measures against members of constitutional courts or influence the election of judges.[131] As a result, the judges tend to refrain from referring to treaties to delineate the scope of states' obligations with respect to democratic governance. At the same time, one must not underestimate the negative effect of the lack of a professional background as impairing the application of international law. Domestic judges who are not familiar with international law are not inclined to decide pending cases applying norms contained in international agreements. This, in turn, influences other lawyers appearing before such domestic courts, who must take into consideration the limited practical effectiveness of arguments referring to international law.[132]

2.3. Enforcement at the international level

Any act incompatible with international obligations of a state entails state responsibility.[133] This means that a wrongful act gives rise to certain legal consequences including, above all, the duty to cease the breach and to offer appropriate assurances and guarantees of non-repetition in order to "wipe out all the consequences" of the violation.[134] Yet, given the decentralized nature of the international community of sovereign states, neither fact-finding bodies (necessary to establish a violation) nor effective enforcement are universally guaranteed. As a result, the system of international responsibility does not always entrench compliance with relevant obligations.

The starting point for this section refers to the theoretical assumption that where the implementation of international responsibility is governed by regulatory regimes established under applicable treaties, the process becomes institutionalized and hence more robust than in the absence of relevant procedural norms. In this way, such regimes potentially strengthen enforcement of treaties by, *inter alia*, facilitating fact-finding, assessment of compliance, reactions, and streamlining international dispute resolution.[135] The typology of the relevant mechanisms presented in this subsection distinguishes between modes explicitly envisaged in the Charter and the judicial control exercised by the ACtHPR under the Protocol to the HR Charter on the Establishment of the African Court on Human and Peoples' Rights (Protocol to the ACtHPR).[136]

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[131] *See* S.D. Kamga, *An assessment of the possibilities for impact litigation in Francophone African countries*, 14(2) African Human Rights Law Journal 449 (2014), pp. 455–462.

[132] *See* Republic of Rwanda – Ministry of Justice, *The 9th & 10th Periodic Report of the Republic of Rwanda (2005–2009)*, available at: http://www.achpr.org/states/rwanda/reports/9th-10th-2005-2009/ (accessed 30 May 2019), para. 21; M. Killander, H. Adjolohoun, *International law and domestic human rights litigation in Africa: An introduction*, in: Killander (ed.), *supra* note 125, p. 18.

[133] *E.g.* PCIJ, *Phosphates in Morocco*, Judgment, 14 June 1938, PCIJ Publications, Series A/B, No. 74, p. 28.

[134] PCIJ, *Factory at Chorzów (Germany v. Poland)*, Merits, Judgment, 13 September 1928, PCIJ Publications, Series A, No. 17, p. 47.

[135] *E.g.* R.O. Keohane, *Cooperation and Discord in the World Political Economy. After Hegemony*, Princeton University Press, New Jersey: 1984, p. 244.

[136] Adopted 10 June 1998, entered into force 25 January 2004.

2.3.1. Enforcement under the Charter

The treaty envisages two sets of international mechanisms in order to ensure compliance. One of them is established on the continental level and the second is based on regional cooperation. Moreover, the Charter also provides additional guarantees to prevent an unconstitutional change of government.

On the continental level, the AU Commission is positioned as the central coordinating body (Art. 45(a)). In particular, it is entitled to develop benchmarks for the implementation of the commitments under the Charter and to evaluate compliance by the states (Art. 44(2)(a)), as they are required to submit reports every two years on measures taken to meet the obligations under the treaty (Art. 49(1)). In turn, two other organs, i.e. the Assembly and the Peace and Security Council, are vested with a mandate to determine the appropriate measures to be imposed on any state party that violates the Charter (Art. 46). The practice shows that neither the requirement of state reports nor the sanctions mechanism have been applied as fully fledged instruments advancing enforcement. As to the former, at the time of this writing as many as 23 state parties have never presented their reports due, with Togo being the only member state in compliance with this obligation. Yet, considering that the guidelines for the reports were adopted only in January 2016,[137] the realization of the reporting duty became practically viable only after that date. Unsurprisingly, the AU recognizes the mechanism as "developing",[138] and has never decided on measures to be taken against states violating the self-reporting obligation. Instead, the organization merely has urged them to submit their reports.[139] As to the latter, Art. 46 of the Charter stipulates that disciplinary measures will be imposed on states in breach of the treaty. However, given that the treaty does not specify relevant sanctions in cases not involving an unconstitutional change of government (Arts. 24-26), it is argued that the resulting ambiguity undermines the enforcement mechanism and hence indirectly promotes non-compliance.[140] The practice supports this view, as so far the AU organs have never applied disciplinary measures under Art. 46 outside of the context of an unconstitutional change of government.

At the regional level, the Charter merely envisages, once again very vaguely, cooperation between the AU and RECs to monitor its implementation (Art. 44(2)(b)). Recent examples of the AU and RECs providing mediation and good offices in order to ameliorate crises of governance in Mali, Burundi, CAR, or Guinea Bissau[141] demonstrate that the political cooperation between the continental and regional organizations in 2017 has been undertaken on an *ad hoc* basis, and not under Art. 44(2)(b) of the Charter. Therefore, the treaty has not evidenced any significant practical insti-

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[137] R. Nassuna, *The State Reporting Mechanism under ACDEG*, 4(1) African Governance Newsletter 19 (2017), p. 20.

[138] AU, *Annual Report on the Activities of the African Union and its Organs (2017)*, EX.CL/1061(XXXII), p. 11.

[139] *E.g.* Assembly/AU/Dec.645(XXIX), para. 10.

[140] Elvy, *supra* note 35, pp. 103-104.

[141] *Annual Report*, *supra* note 138, pp. 12-13.

tutionalizing effect and cannot be regarded as actually bolstering enforcement through regional structures.[142]

The provisions of the Charter addressing the issue of unconstitutional change of government, defined under Art. 23, are more detailed than those discussed in the context of general enforcement of the treaty. The measures provided are directed against both states experiencing, instigating or supporting an unconstitutional change of government, as well as against individuals involved. The enforcement against states is established with reference to provisions of other treaties constituting the AU and supplementing the Charter. Accordingly, a state experiencing an unconstitutional change of government faces mandatory suspension – decided upon by the AU Peace and Security Council – from participation in the activities of the AU if "diplomatic initiatives have failed."[143] Other forms of sanctions may also be imposed by the AU Assembly. These include visa restrictions and interruption of communication links as well as economic or political relations.[144] The research on strategies employed by the AU in the period 2000-2015 shows that suspension from the AU was decided in 92 per cent of cases,[145] thus evidencing a considerable consistency in the AU's political approach towards unconstitutional changes of government. Moreover, in 2014 the AU Peace and Security Council underlined the principal role of the Charter's regime in dealing with an unconstitutional change of government upon lifting Egypt's suspension, which had been decided upon earlier, following the overthrow of the first democratically-elected president by a military coup.[146] The organ stressed that the decision to resume the state's participation in the activities of the AU does not constitute a precedent in terms of adherence to the relevant provisions of the Charter, which states in Art. 25(4) that perpetrators of unconstitutional changes of governments cannot participate in the elections held to restore constitutional order.[147] Given that Egypt has not been a party to the Charter, the decision obviously does not constitute subsequent practice in the application of the

[142] Certainly, this finding refers solely to the position of the Charter as the instrument potentially institutionalizing enforcement through RECs and does not apply to the African peace and security architecture as a whole. RECs were also involved in the conflict resolution process in, e.g., Gambia, Guinea-Bissau, Chad Lake Basin and Lesotho. *See* the Institute for Peace and Security Studies, *APSA Impact Report 2016*, Addis Ababa University: 2017, pp. 26-31.

[143] Art. 25(1) of the Charter in conjunction with Art. 30 of the Constitutive Act and Art. 7(g) of the Protocol Relating to the Establishment of the Peace and Security Council of the AU, adopted 9 July 2002, entered into force 26 December 2003; *see also* PSC/PR/Comm.(CLIV), para. 3.

[144] Art. 25(6)(7) of the Charter in conjunction with Art. 23 of the Constitutive Act and Art. 37(5) of the Rules of Procedure of the Assembly of the Union, ASS/AU/2(I)-a. A prominent example of the AU practice in this respect constitutes decision of the Peace and Security Council PSC/PR/COMM.(DLXV) passed on 17 December 2015 in the context of the election crisis in Burundi. Given that the Charter was not applicable to the non-party state, the treaty was not invoked in the text of the decision.

[145] L. Nathan, *Trends in mediating in Africa coups 2000-2015* (paper presented at the International Studies Association Annual Convention, Atlanta, 16-19 March 2016), p. 8, available at: https://bit.ly/2Ws7UV5 (accessed 30 May 2019).

[146] PSC/PR/COMM.(CCCLXXXIV).

[147] PSC/PR/COMM.2(CDXLII).

treaty. Yet the pronouncement indicates that the AU Peace and Security Council treats Arts. 25-26 of the Charter as a reference standard for dealing with unconstitutional changes of government in the non-party states. Finally, the responsibility of states for unconstitutional changes of government under the Charter is further complemented with the individual responsibility of perpetrators. The Charter provides that they may be tried before the competent court of the AU,[148] and this provision has prefigured Art. 22E of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights.[149] However, the Protocol has not entered into force and the snail's pace of its ratification procedure seems ominous for actual activation of the mechanism.

2.3.2. Judicial control exercised by the ACtHPR

The ACtHPR is entitled to give final and binding judgments, enforceable by the organs of the AU. If it finds that there has been a breach of an international obligation, it shall issue appropriate orders to remedy the violation, including the payment of fair compensation or reparations.[150] At the time of writing, 20 states to the Charter are within the jurisdiction of the ACtHPR and the Court has already found that it has *ratione materiae* jurisdiction to interpret and to apply the Charter. However, the potential contribution of the Court to generate a tangible shift in democratic governance seems to be significantly diminished due to the ratification challenges and impediments concerning the execution of judgments.

First, there are two ways to access the Court in contentious cases, i.e. automatic and optional. Under the former, a case may be submitted to the ACtHPR by five entities: the ACHPR, a state party which has lodged a complaint to the ACHPR, a state party against which the complaint has been lodged at the ACHPR, a state party whose citizen is a victim of human rights violation, and an African intergovernmental organization.[151] A non-governmental organization with observer status before the ACHPR and/or an individual have access to the ACtHPR only if a state party has made an optional declaration to this effect under Art. 34(6) of the Protocol to the ACtHPR.[152] In the formative period of the Court it was expected that cases reaching its docket would begin as communications to the ACHPR,[153] but this turn out to not be the case. In February 2017 the ACtHPR finalized 33 cases and took seizure of 95 other litigations in contentious matters. Notably, in all but three cases NGOs and individuals (and not the ACHPR, states or intergovernmental organizations) sought judicial protection in the ACtHPR. In ten out of 32 finalized cases (approximately 30 per cent) the Court

[148] Art. 25(5).

[149] Adopted 27 June 2014, not in force at the time of writing.

[150] Art. 27 of the Protocol to the ACtHPR.

[151] *Ibidem*, Art. 5(1).

[152] *Ibidem*, Art. 5(3).

[153] F. Viljoen, *A Human Rights Court for Africa, and Africans*, 30(1) The Brooklyn Journal of International Law 1 (2004), p. 23.

decided individual applications inadmissible as respondent states had not deposited optional declarations. The ACHPR acted as the applicant in only three cases, which makes the optional declarations the principal basis of ACtHPR jurisdiction, even though at the time of writing only seven states have deposited their declarations to the AU Commission: Benin, Burkina Faso, Côte d'Ivoire, Ghana, Malawi, Mali, and Tanzania (however the latter is not a party to the Charter). This fact constitutes a major practical limitation of the positive impact the ACtHPR could have upon enforcement of the Charter.

Second, judgments of the Court are binding,[154] with the AU positioned as their guardian and guarantor. However, the relevant prerogatives of AU are put in very general terms, with the AU Executive Council performing the monitoring function.[155] Moreover, the monitoring activities of this organ are formally limited to the information provided by interested states.[156] Therefore if a state neglects the obligation to inform the Executive Council on steps taken to comply with a judgment, the only alternative sources of information are victims, entities acting on their behalf, or civil society. Additionally, the Protocol on the ACtHPR does not specify the consequences of non-compliance. In practice, the AU resorts solely to ineffective diplomatic measures, repeatedly calling upon states to respect their obligations.[157]

CONCLUSIONS

This article has explored the capacity of the Charter to nudge African states towards desired patterns of behaviour and thus to produce the desired tangible shifts in democratic governance on the continent. Beginning with the character of the Charter, the contribution has shown that terminology used in the instrument and in the subsequent practice of AU confirms the legally binding nature of the document at the most elementary level. As a result, the Charter stands out as the first Pan-African treaty to comprehensively entrench fundamental principles on democracy and good governance. However, a more detailed analysis of the Charter leads to the identification of certain factors impairing the legal quality of the text. These factors refer to the (lack of) clarity of goals and precision of measures required, and the character of legal obligations under the Charter. The quantity and particular distribution of the factors evidence that the number of precise and applicable standards set by the treaty is limited. Such matrixes are established mainly to prevent unconstitutional changes of government, to introduce institutional instruments supporting the constitutional transfer of power, and to ensure fair elections. On the other hand, the provisions concerning the promotion of

[154] Art. 30 of the Protocol to the ACtHPR.

[155] *Ibidem*, Art. 29(2).

[156] ACtHPR, *Activity Report of the African Court on Human and Peoples' Rights for the Period 1 January to 31 December 2015*, EX.CL/939(XXVIII), paras. 1-21.

[157] *E.g.* AU Doc. EX.CL/Dec.903(XXVIII) Rev.1, para. 6.

democracy and peace as well as advancing good governance are substantively nebulous, imprecise, and general to an extent nullifying their standard-setting capacity. Therefore, from this perspective the treaty amounts to a one-dimensional document addressing merely a selected part of the overall governance deficit.

Furthermore, the analysis proves that the implementation of the Charter on the national plane and its enforcement on the international level are significantly constrained by three crucial issues rooted outside its text and beyond the legal nature of the document. First, building on a comparison between the ratification status of the Charter and data provided by IIAG, the paper has shown that the non-ratification pattern and the poor record pattern are symmetrical. In particular, non-party states statistically perform worse than states bound by the Charter. As a result, the value of the document adopted to address the democratic governance shortfall may be significantly restricted by the low ratio of ratifications. Second, the impact of the Charter on the domestic practice of state parties is politically double-conditioned. Once the treaty is ratified, application of the relevant standards still depends on their domestication by politically motivated organs of the executive and the legislative branches of government. Faced with the prevailing lack of domestication, domestic courts in Africa generally refrain from direct application of the Charter and abstain from referring to the treaty in delineating the scope of states' obligations with respect to democratic governance. Finally, the rudimentary framework for the international enforcement of the Charter is hardly conducive to international actions. Unsurprisingly, the AU political bodies responsible for its international enforcement predominantly adopt a passive stance and overlook cases of non-compliance. The relatively uniform practice of suspending members from the AU in cases of unconstitutional changes of government forms an isolated exception.

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LAW-SECURED NARRATIVES OF THE PAST IN POLAND IN LIGHT OF INTERNATIONAL HUMAN RIGHTS LAW STANDARDS

Abstract:
Given the whole spectrum of doubts and controversies that arise in discussions about laws affecting historical memory (and their subcategory of memory laws), the question of assessing them in the context of international standards of human rights protection – and in particular the European system of human rights protection – is often overlooked. Thus this article focuses on the implications and conditions for introducing memory laws in light of international human rights standards using selected examples of various types of recently-adopted Polish memory laws as case studies. The authors begin with a brief description of the phenomenon of memory laws and the most significant threats that they pose to the protection of international human rights standards. The following sections analyse selected Polish laws affecting historical memory vis-à-vis these standards. The analysis covers non-binding declaratory laws affecting historical memory, and acts that include criminal law sanctions. The article attempts to sketch the circumstances linking laws affecting historical memory with the human rights protection standards, including those entailed both in binding treaties and other instruments of international law.

Keywords: laws affecting historical memory, memory laws, human rights law, European Court of Human Rights

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INTRODUCTION

Comparative research demonstrates that there has been a proliferation and expansion of laws affecting historical memory in Europe since 2000,[1] mirrored by a parallel explosion of objections to them, often on the grounds of both domestic constitutional as well as international human rights law.[2] There is no official, binding definition of "memory law" in either international law, the law of the European Union, nor in the Polish domestic law. However, the Council of Europe has adopted working definition of memory laws, as those that:

> enshrine state-approved interpretations of crucial historical events and promote certain narratives about the past, by banning, for example, the propagation of totalitarian ideologies or criminalising expressions which deny, grossly minimise, approve or justify acts constituting genocide or crimes against humanity, as defined by international law.[3]

Originally, the term *lois mémorielles* (English *memory laws*, German *Erinnerungsgesetze*, Polish *prawa pamięci*) referred to the French legislator's successful attempts to use criminal law to respond to deliberate falsifications and distortions of historical facts – especially those concerning the Holocaust and other forms of genocide denial. The French discussion on *les lois mémorielles* also included declaratory laws, notably those recognizing historical crimes as genocide, and laws introducing an official narrative of the French colonial history.[4] Since the 2010s, a broad conventional use of the term *memory laws* can be observed. The term is applied to a variety of state-orchestrated laws, often without an obvious common denominator: from the Fundamental Law of Hungary[5] to Ukraine's "decommunization" laws[6] and even to the whole of the US legal system.[7] Necessary conceptual clarifications naturally followed in the scholarly literature, which distinguish between a wider category of "laws affecting historical memory", and a narrower category of "memory laws" included therein. This article understands these terms as follows.

According to Eric Heinze, the term "laws affecting historical memory" encapsulates normative acts which give preference, or "an expressive weight", to a narrative about

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[1] N. Koposov, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, Cambridge University Press, Cambridge: 2017, p. 8.

[2] R. Kahn, *Free Speech, Official History and Nationalist Politics: Toward a Typology of Objections to Memory Laws*, University of St. Thomas Legal Studies Research Paper No. 25 (2018).

[3] Council of Europe, *Memory Laws and Freedom of Expression. Thematic Factsheet*, July 2018, available at: https://bit.ly/2Xu2glX (accessed 30 May 2019).

[4] S. Garibian, *Pour une lecture juridique des quatre lois «mémorielles»*, 2 Esprit 158 (2006); F. Hamon, *Le Conseil constitutionnel et les lois mémorielles*, 2 Revue française de droit administrative 7 (2012).

[5] M. Könczöl, *Dealing with the Past in and around the Fundamental Law of Hungary*, in: U. Belavusau, A. Gliszczynska-Grabias (eds.), *Law and Memory: Towards Legal Governance of History*, Cambridge University Press, Cambridge: 2017, pp. 246-262.

[6] M. Malksoo, *Decommunization in Times of War: Ukraine's Militant Democracy Problem*, Verfassungsblog 9 January 2018, available at: https://bit.ly/2GNbZ1X (accessed 30 May 2019).

[7] R. Kahn, *Charlottesville, Ferguson and Laws Affecting Memory in the United States*, available at SSRN: https://bit.ly/2BVejzO (accessed 30 May 2019).

the past, irrespective of its substantive weight. [8] Such laws indicate that the legislator pronounces a particular evaluation on certain historical events or elements of the national past, thus establishing the official position of the state about a particular historical issue. According to Heinze, laws affecting historical memory do not have to explicitly disfavour other, competing narratives; they are instruments used by the state in the process of constructing, disseminating, promoting, and also ordering public knowledge about the past.

"Memory laws" are a subcategory of "laws affecting historical memory." The term refers to a normative legal act which prohibits the expression of a particular view about the past. Some memory laws are punitive and impose sanctions for publicly endorsing narratives which diverge from the official state-approved version. Marta Bucholc argues that the specific characteristic distinguishing "memory laws'" lies not in providing criminal penalties, but in limiting the freedom of expression of individuals, including the expression of memories, thus posing the risk of eliminating certain narratives about the past from circulation,[9] a goal which can also be achieved without recourse to criminal sanctions. Other scholars underscore the element of criminal sanctions as essential to memory laws. Notably, the leading scholar on memory laws Nikolai Koposov defines "memory laws *per se*" as "laws criminalizing certain statements about the past."[10]

This article scrutinizes two different forms of laws affecting historical memory, ranging from declaratory to punitive memory laws and demonstrates how they impact on the rights and freedoms of individuals through varied sanctions, notably symbolic and criminal. In particular, this article discusses two recent laws affecting historical memory adopted in Poland: 1) a genocide-focused parliamentary resolution; 2) a state and national defamation law, which is a memory law in the narrow sense of the term. The juxtaposition of these two laws affecting historical memory highlights the range, scope, and degree of the legislator's interference with the rights and freedoms of individuals and makes it possible to measure them against international human rights law standards, in particular those of the Council of Europe's monitoring body, the European Court of Human Rights (ECtHR).

1. GENOCIDE-FOCUSED DECLARATIVE LAW AFFECTING HISTORICAL MEMORY

Poland's 2018 amendments to the Institute of National Remembrance Act (INRA)[11] gained world-wide attention – and were widely criticized – mainly because

[8] E. Heinze, *Epilogue: Beyond 'Memory Laws': Towards a General Theory of Law and Historical Discourse*, in: Belavusau, Gliszczynska-Grabias, *supra* note 5, pp. 413-434.

[9] M. Bucholc, *Commemorative Lawmaking: Memory Frames of the Democratic Backsliding in Poland After 2015*, 11(1) Hague Journal on the Rule of Law 85 (2019).

[10] Koposov, *supra* note 1, p. 25.

[11] *See* the contributions in the previous volume of the Polish Yearbook of International Law on the INRA: K. Wierczyńska, *Act of 18 December 1998 on the Institute of National remembrance – Commission for*

of the possibilities they offered to criminalize statements concerning the involvement of Poles in crimes committed against Jews during the Second World War.[12] The Polish parliament repealed this aspect of the INRA amendments just a few months after their passage, in June 2018, but the amendments also expanded the list of crimes covered by the INRA to include "crimes of Ukrainian nationalists and members of Ukrainian formations collaborating with the German Third Reich" (Art. 1a).[13] The law further labelled as genocide crimes committed by "Ukrainian nationalists" against Polish citizens on the territory of Volhynia and eastern Lesser Poland (Art. 2). In January 2019 the Constitutional Tribunal declared the formulation "Ukrainian nationalists" unconstitutional,[14] but the part concerning genocide remains in the law.

The 2018 amendments to INRA had been preceded by a parliamentary resolution in 2016, in which the events in Volhynia were characterized as genocide.[15] Parliamentary resolutions, as acts adopted by the highest legislative body in a state, are the most significant form of declaratory memory laws. Eric Heinze divides memory laws into non-regulatory, declarative acts in which no government action is authorized; and regulatory acts, when government action is authorized.[16] Such declarative memory laws are particularly frequently used by legislators in the context of qualifying certain crimes as genocide, as will be shown in the following subsection. Nikolay Koposov described the 1991 Soviet Law "On the Rehabilitation of the Repressed People", which characterized Stalin's deportations of entire peoples as acts of genocide, as one the first of the "genocide-focused declarative memory laws."[17] Since then, this practice has become more prevalent, of which the Polish 2016 resolution is an example. While declarative memory laws are often labelled benign, they can introduce a concept into the legal discourse and eventually lead to punitive memory laws.

the Prosecution of Crimes Against the Polish Nation as a Ground for Prosecution of Crimes Against Humanity, War Crimes, and Crimes Against Peace, 37 Polish Yearbook of International Law 275 (2018); P. Grzebyk, *Amendments of January 2018 to the Act on the Institute of National Remembrance – Commission for the Prosecution of Crimes Against the Polish Nation in Light of International Law*, 37 Polish Yearbook of International Law 288 (2018). *See also* U. Belavusau, A. Wójcik, *La criminalisation de l'expression historique en Pologne : la loi mémorielle de 2018*, 40 Archives de politique criminelle 175 (2018).

[12] A. Gliszczyńska-Grabias, W. Kozłowski, *Calling Murders by Their Names as a Criminal Offence – A Risk of Statutory Negotionism in Poland*, Verfassungsblog, 1 February 2018, available at: https://bit.ly/2XsZzBq; N. Kebranian, *Poland's 'holocaust law' redefines hate speech*, Open Democracy Net, 9 April 2018, available at: https://bit.ly/2PaHmUv (both accessed 30 May 2019).

[13] All translations from Polish into English are by the authors unless otherwise noted.

[14] Constitutional Tribunal Judgment of 17 January 2019, K 1/18.

[15] Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 22 lipca 2016 r. w sprawie oddania hołdu ofiarom ludobójstwa dokonanego przez nacjonalistów ukraińskich na obywatelach II Rzeczypospolitej Polskiej w latach 1943–1945 [Resolution of the Sejm of the Republic of Poland of 22 July 2016 on paying tribute to the victims of the genocide perpetrated by Ukrainian nationalists on citizens of the II Polish Republic in the years 1943-1945].

[16] Heinze, *supra* note 8, p. 418.

[17] Koposov, *supra* note 1, p. 222.

Genocide, as a legal term, is clearly defined in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948.[18] Nevertheless, in recent years some scholars have advanced a more inclusive and less legalistic definition of the crime of genocide.[19] Similarly, parliaments have adopted declarative memory laws without regard to the conventional definition. It is clear that parliamentary political initiatives to call a historical event "genocide" signify a desire to recognize it as the worst possible crime and attract attention to its memory. Such declarative memory laws have a substantial symbolic significance and may lead to international tension[20] and influence the creation of punitive memory laws.

A major part of such parliamentary resolutions concern the Armenian genocide.[21] This is an effect of the efforts of the Armenian diaspora to recognize what happened to the Armenians as genocide, which is a response to the official policy of denial of the Turkish state.[22] This has undoubtedly contributed to the spreading of genocide-focused declarative memory laws. Many national parliaments, including the Polish parliament as well as the European Parliament, have adopted resolutions on the Armenian genocide.[23] Genocide-focused parliamentary resolutions have also concerned Bosnia, Rwanda and the Holodomor in Ukraine.[24]

The Polish parliament has so far adopted three resolutions that qualified certain situations as genocide, labelled in their respective titles: in 2005 on the Armenian genocide;[25] in 2014 on the genocide by ISIS on Christians, Yazidis, Kurds and other religious and ethnic minorities in Iraq and Syria;[26] and in 2016 in the "Volhynia genocide" resolution.[27]

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[18] 78 UNTS 277.

[19] *E.g.* M. Shaw, *Genocide and International Relations: Changing Patterns in the Upheavals of the Late Modern World*, Cambridge University Press, Cambridge: 2013; A. Jones, *Genocide: A Comprehensive Introduction*, Routledge, New York: 2011.

[20] For more with respect to how memory laws have led to extreme tension between countries, *see* Koposov *supra* note 1.

[21] *Ibidem*, p. 101.

[22] S. Bayraktar, *The Politics of Denial and Recognition: Turkey, Armenia and the EU*, in: D. Alexis (ed.), *The Armenian Genocide*, Palgrave Macmillan, New York: 2016.

[23] European Parliament resolution of 15 April 2015 on the Centenary of the Armenian Genocide.

[24] With respect to Ukrainian initiatives aimed at recognizing the Holodomor as genocide, *see* Koposov, *supra* note 1, p. 185.

[25] Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 19 kwietnia 2005 r. w 90. rocznicę ludobójstwa popełnionego na ludności ormiańskiej w Turcji podczas I Wojny Światowej [Resolution of the Sejm of the Republic of Poland of 19 April 2005 on the anniversary of the genocide on the Armenian population in Turkey during the First World War].

[26] Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 26 września 2014 r. w sprawie ludobójstwa dokonywanego na chrześcijanach, jazydach, Kurdach oraz przedstawicielach innych mniejszości religijnych i etnicznych przez organizację terrorystyczną Państwo Islamskie na obszarze północnego Iraku i Syrii [Resolution of the Sejm of the Republic of Poland of 26 September 2014 on the genocide on Christians, Yazidis, Kurds and representatives of other religious and ethnic minorities by the terrorist organizations Islamic State on the territory of Northern Iraq and Syria].

[27] Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 22 lipca 2016 r. w sprawie oddania hołdu ofiarom ludobójstwa dokonanego przez nacjonalistów ukraińskich na obywatelach II Rzeczypospolitej Polskiej w

The events, which the 2016 resolution – and subsequently the relevant 2018 amendments to INRA – relate to, took place between 1943 and 1945, when a number of Ukrainian organizations killed an estimated up to 100,000 Polish civilians in the so-called "Polish Eastern Borderlands". The actions were part of an ethnic cleansing operation carried out by the Ukrainian Insurgent Army (UPA), and took place predominantly in Volhynia (present day north-western part of Ukraine), as well as in Eastern Galicia (presently partly in Poland and in Ukraine). The crimes are most frequently described in Polish as the "Volhynia slaughter" (Polish *rzeź wołyńska*), and are regarded by many Polish historians as genocide.[28] The massacres in Volhynia have been previously mentioned many times in the Polish Sejm, and have also been included in parliamentary resolutions, however without qualifying them as genocide.[29] Prosecutors of the Polish Institute of National Remembrance – Commission for Investigation of Crimes Against the Polish Nation (*Instytut Pamięci Narodowej – Komisja Ścigania Zbrodni Przeciw Narodowi Polskiemu*, INR) stated that the massacres have all the traits of genocide listed in the 1948 UN Convention, and have qualified the events as genocide. They are currently investigating 32 crimes related to the massacres, all of which have been recognized as genocide.[30]

As already mentioned, before the 2016 resolution the Polish parliament had twice qualified certain events as genocide. While the 2005 and 2014 resolution were merely qualifying the genocides and calling for remembrance (Armenian genocide) and an urgent intervention (massacres carried out by ISIS), the Volhynia resolution is one-and-a-half pages long. It contains a historical introduction and specifically states who committed the genocide on whom, stating also that retaliatory actions on Ukrainian villages should not be relativized. The resolution voices appreciation to those who helped the victims and those who kept a remembrance of the massacres over the decades. It further expresses solidarity with present-day Ukraine, which is fighting against foreign aggression for its territorial integrity.

The 2016 resolution stated that "the mass murders have not been called genocide in accordance with historical truth." Since INR prosecutors have in fact repeatedly called

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latach 1943–1945 [Resolution of the Sejm of the Republic of Poland of 22 July 2016 on paying tribute to the victims of the genocide perpetrated by Ukrainian nationalists on citizens of the II Polish Republic in the years 1943-1945].

[28] For more on the events and the different perspectives as to their characterization, *see* G. Motyka, *Od rzezi wołyńskiej do akcji „Wisła". Konflikt polsko-ukraiński 1943–1947* [From the Volhyna slaughter to the Operation Vistula. Polish-Ukrainian conflict 1943-1947], Wydawnictwo Literackie, Kraków: 2011 and W. Siemaszko, E. Siemaszko, *Ludobójstwo dokonane przez nacjonalistów ukraińskich na ludności polskiej Wołynia 1939–1945* [Genocide on the Polish population in Volhyn commeited by Ukrainian nationalists in 1939-1945], Wydawnictwo 'von Borowiecky', Warszawa: 2000.

[29] Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 12 lipca 2013 r. w sprawie uczczenia 70. rocznicy Zbrodni Wołyńskiej i oddania hołdu Jej ofiarom [Resolution of the Sejm of the Republic of Poland of 12 July 2013 on commemorating the 70th anniversary of the Wołyń Crime and paying tribute to the victims]. In 2013 the Sejm adopted a resolution on Volhynia, defining the UPA crimes as "an ethnic cleansing with signs of genocide."

[30] *See* the webpage of the Institute on the Volhynia crimes in English: http://volhyniamassacre.eu/ (accessed 30 May 2019).

the massacres genocide, what the drafters of the resolution probably intended to change was that the events are not considered genocide on the international level.

The resolution appeals to "historical truth", a concept inherently connected with the "right to truth", which is gaining importance in international human rights law. It relates to the obligation of the state to provide information about the circumstances surrounding serious violations of human rights. While the concept of the "right to truth" raises questions as to its scope and implementation,[31] as stated by Patricia Naftali the right to truth has gained momentum in UN human rights bodies, which accommodate a maximalist vision of the concept.[32] This is visible in various UN-adopted documents.[33] However, the ECtHR has been more reluctant to recognize the right to truth,[34] and has specifically stated that procedural obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) do not include inquiries carried out for the purpose of establishing a historical truth.[35] While both the UN and the ECtHR recognize the collective dimension of the right to truth, this concerns the right of society in general to know the truth about past events concerning heinous crimes, as well as circumstances and reasons that led to massive or systemic violations related to those crimes, and not the *qualification* of crimes.[36] However parliamentary resolutions qualifying certain events as genocide are not in violation of international human rights standards, as countries are free to shape their own memory politics, as long as they do not violate human rights. As the following section shows, the situation is different for punitive memory laws: they need to be carefully assessed in the context of international human rights law.

2. STATE AND NATION DEFAMATION LAWS AFFECTING HISTORICAL MEMORY

Now that more than a year has passed since an amended version of the INRA was made part of Poland's legal system, the time is ripe for taking a stock of the legal land-

[31] J.E. Mendez, F.J. Bariffi, *Right to truth*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press: 2012. On right to truth and memory laws see: G. Baranowska, A. Gliszczyńska-Grabias, *"Right to truth" and Memory Laws: General Rules and Practical Implications*, 47 Polish Political Science Yearbook 97 (2018).

[32] P. Naftali, *The 'Right to Truth' in International Law: the 'Last Utopia'?* in: Belavusau and Gliszczyńska-Grabias, *supra* note 5, p. 84.

[33] 2005 Updated Set of principles for the protection and promotion of human rights through action to combat impunity

[34] Naftali, *supra* note 32, pp. 81-84.

[35] ECtHR, *Janowiec and Others v. Russia* (App. No. 55508/07 and 29520/09), Grand Chamber, 21 October 2013, para. 143.

[36] *See* principles 2 and 4 of the Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1; ECtHR, *El-Masri v. the Former Yugoslav Republic of Macedonia* (App. No. 39630/09), 13 December 2012, para. 191.

scape it created.[37] The very passage of the unconstitutional legislation should be criticised. However, the same law was flying in the face of international standards of human rights protection, even after its most problematic provisions were eventually jettisoned.[38] Simultaneously, what is still left of the January 2018 INRA amendment (after its June 2018 sudden review), may cause a chilling effect and unlawful restriction of rights and freedoms of individuals a real possibility. In the analysis that follows we look at the consistency – or rather inconsistency – of the selected provisions of the amended INRA with the standards of freedom of speech prevailing in the European system of human rights protection. We are focusing here mainly at the original version of this legislation, enacted in January 2018, to better present the dangers inherent in attempts to foist upon the public a memory of the past preferred by the powers that be.

The assessment of INRA most problematic provision in the light of international law has already been, at least partly, addressed, also on the pages of the Polish Yearbook of International Law.[39] However, some of the core aspects of the troubling legislation still need to be raised. To start with an explanatory arrangement, the full quote from the most controversial provision of INRA seems to be desirable:

> Article 55a.
> 1. Anyone who publicly and falsely attributes responsibility or co-responsibility to the Polish Nation or the Polish State for the crimes committed by the German Third Reich, as specified in Article 6 of the Charter of the International Military Court – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis, signed in London on 8 August 1945 (Journal of Laws of 1947, item 367), or for any other crimes that are crimes against peace, crimes against humanity or war crimes, or who otherwise glaringly trivialises the responsibility of their actual perpetrators, shall be subject to a fine or the penalty of imprisonment of up to 3 years. The sentence shall be made public.

Any legal analysis of the provision quoted above should balance judiciously two fundamental aspects that have a bearing on their effectiveness: (1) measures which are desirable for attaining the objective pursued and (2) measures which are proportional and can be implemented by the Polish law. The legal standards of responding to statements described in point 1 must be compatible not only with the Polish Constitution, but also with the relevant norms of international law, especially the ECHR. This compatibility

[37] Ustawa z dnia 26 stycznia 2018 r. o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu, ustawy o grobach i cmentarzach wojennych, ustawy o muzeach oraz ustawy o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary [Law of 26 January 2018 to amend the Act on the Institute of National Remembrance – Commission for Investigation of Crimes Against Polish Nation, the Military Graves and Cemeteries Act, the Museums Act and the Corporate Liability for Proscribed Punishable Conduct Act], O.J. 2018, item 369.

[38] Ustawa z dnia 27 czerwca 2018 r. o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu [The Law of 27 June 2018 to amend the Act on the Institute of National Remembrance – Commission for Investigation of Crimes Against Polish Nation and the Corporate Liability for Proscribed Punishable Conduct Act], O.J. 2018, item 1277.

[39] *See* Grzebyk, *supra* note 11; Wierczyńska, *supra* note 11.

must be ensured for the protection of dignity and reputation on the one hand, and the protection of freedom of expression and research, on the other. As such and for the purpose of this article, we will examine the INRA January 2018 amendment in terms of the ECHR, including the case law of the ECtHR.

As a starting point, we should emphasise that in the numerous Holocaust denial cases, being invoked as a point of reference by the authors of the INRA January 2018 amendment, the ECtHR has always found as inadmissible applications from the convicted Holocaust deniers. In some of those cases, the ECtHR has found state interference with Art. 10 rights to be "necessary in a democratic society" (*Schimanek v. Austria*, *Witzsch v. Germany*, *Gollnisch v. France*).[40] On other times, it relied on Art. 17 (which prohibits the abuse of rights to undermine the values and essence of the ECHR) to find that applicants' complaints are incompatible *ratione materiae* with the provisions of the ECHR (*Garaudy v. France*).[41] However, in all of these cases, the applicants were charged with Holocaust denial or trivialisation, and not with the attribution of responsibility for the Holocaust to other states than those that should be held liable for those crimes. The ECtHR summarised this category of cases by saying that they "equally concerned statements that variously denied the existence of the gas chambers; described them as a "sham" and the Holocaust as a "myth"; called their depiction the "Shoah business", "mystifications for political ends" or "propaganda"; or called into question the number of dead and in ambiguous terms expressed the view that the gas chambers were a matter for the historians" (*Perincek v. Switzerland*, 210).[42] Clearly, none of the examples in which the ECtHR found the criminal conviction for denial to be compatible with the ECHR concerned the attribution of responsibility or co-responsibility to another state. Also, when characterising Holocaust denial convictions, the ECtHR described the denial statements as ones "almost invariably emanating from persons professing Nazi-like views or linked with Nazi-inspired movements."[43] This is highly unlikely to be the case with those expressing the views defined by Art. 55a. Accordingly, the ECtHR, which looks favourably on criminal convictions for denial, would almost certainly refuse to take the same approach in cases under Art. 55a.

The ECtHR made its view on denial penalisation very clear when it said that,

> the justification for making its denial a criminal offence lies not so much in that it is a clearly established historical fact but in that (...) its denial, even if dressed up as impartial historical research, must invariably be seen as connoting an antidemocratic ideology and anti-Semitism. Holocaust denial is thus doubly dangerous, especially in States which have experienced the Nazi horrors, and which may be regarded as having a special moral responsibility to distance themselves from the mass atrocities (...) by, among other things, outlawing their denial.[44]

[40] ECtHR, *Schimanek v. Austria* (App. No. 32307/96), 1 February 2000; *Witzsch v. Germany* (App. No. 7485/03), 4 February 2003; *Gollnisch v. France* (App. No. 48135/08), 7 June 2011.

[41] ECtHR, *Garaudy v. France* (App. No. 65831/01), 24 June 2003.

[42] ECtHR, *Perincek v. Switzerland* (App. No. 27510/08), Grand Chamber, 15 October 2015.

[43] *Ibidem*, para. 209.

[44] *Ibidem*, para. 243.

Clearly, Art. 55a did not offer the *ratio legis*, which the ECtHR considers to be justified in legislation criminalising Holocaust denial. The justification that it finds to be of key importance is the obligation of a state to punish the deniers, and not the implicit obligation of a state that is not guilty of the Holocaust to punish anyone who denies the identity of the guilty persons (or states). Whatever our assessment of the ECtHR's views and the logical coherence or otherwise of the denial judgments with the Court's judicial decisions in other criminal liability cases concerning the use of defective memory codes, it seems legitimate to conclude that ECtHR would have decided that its denial judgments are unrelated to the criminal sanctions defined in the disputed amendment to INRA.

Moving on to the broader issue of criminalising opinions or statements (other than those concerning denial), the ECtHR has made it repeatedly clear that criminal sanctions are exceptional and generally incompatible with Art. 10 ECHR. Relying on its own relevant case law, the ECtHR held that a criminal conviction was a serious sanction, having regard to the existence of other means of legal intervention, particularly through civil remedies.[45] In that particular judgment, the ECtHR noted that what matters is not so much the severity of the sentence but the very fact that Perincek was criminally convicted, "which is one of the most serious forms of interference with the right to freedom of expression."[46] The ECtHR characterised the underlying legal problem as one of balancing two of the ECHR's rights: the right to freedom of expression (Art. 10) and the right to respect for private life (Art. 8).

Given the ECtHR's jurisprudence to date, it may be assumed that any Art. 55a case before that Court would have become subject to a very strict review, and that the ECtHR would have found the criminal sanction under Art. 55a to be incompatible with Art. 10 of the ECHR. This is exactly how the ECtHR assessed Art. 261bis of the Swiss Criminal Code under which Perincek was convicted. *Perincek* is given serious consideration here as it was one of the judgments used to justify the disputed amendment to INRA.[47] However, it does not seem to be quite an adequate basis to argue that Art. 55a was in any way compatible with the ECHR. As they could be related to a hypothetical criminal conviction under Art. 55a, it is very instructive to quote in full the key passage in which the ECtHR summaries its earlier argumentation and lists all the major reasons why the criminal sanction was not "necessary":

> Taking into account all the elements analysed above – that the applicant's statements bore on a matter of public interest and did not amount to a call for hatred or intolerance, that the context in which they were made was not marked by heightened tensions or special historical overtones in Switzerland, that the statements cannot be regarded as affecting the dignity of the members of the Armenian community to the point of requiring

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[45] *Ibidem*, para. 273.

[46] *Ibidem*.

[47] Poselski projekt ustawy o zmianie ustawy o Instytucie Pamięci Narodowej – Komisji Ścigania Zbrodni przeciwko Narodowi Polskiemu, Druk sejmowy nr 771 [Parliamentary project of the Act amending the Act on the Institute of National Remembrance, parliamentary document item 771].

> a criminal law response in Switzerland, that there is no international law obligation for Switzerland to criminalise such statements, that the Swiss courts appear to have censured the applicant for voicing an opinion that diverged from the established ones in Switzerland, and that the interference took the serious form of a criminal conviction – the Court concludes that it was not necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the present case.[48]

This extensive quote sets out all key elements that need to be taken into account to find whether a criminal conviction for statements (relating to historical claims and judgments) may be considered a "necessary" interference with the right arising from Art. 10 ECHR. The following considerations are of key importance:

(1) Does a statement bear on a matter of public interest? If yes, it is very unlikely a criminal conviction could be justified as a necessary sanction. For the purposes of Art. 55a, we were clearly dealing with statements, which bear on matters of public interest.
(2) Can a statement be thought of as a call for hatred or intolerance? That would make the case for a criminal sanction stronger. For the purposes of Art. 55a, it is rather unlikely that the relevant statements would be interpreted in this way.
(3) Is the context of a statement marked by heightened tensions? This was not the case with Art. 55a statements.
(4) Is the context of a statement pregnant in "special historical overtones"? Perhaps this element could have found for Art. 55a purposes in the delicate matter of Polish-Jewish relationships.
(5) Could any Art. 55a statement be regarded as affecting the dignity of those affected by it? Perhaps, but we need to note the special argumentative role in the ECtHR's judgment of the fact that that those affected are members of a "minority". This is what determines their specific position and the need for special protection.
(6) Is there any international law obligation to criminalise a statement? For the purposes of Art. 55a, there is not.
(7) Is a criminal conviction based on a critical assessment of a statement that was considered to diverge from established opinions? If yes, the ECtHR would take a negative view of it and this is what would undoubtedly have happened with an Art. 55a conviction.
(8) Did the interference take the form of a criminal conviction? This was the case with Art. 55a.

As is clear, out of the eight factors which the ECtHR relies on to decide whether a criminal sanction was necessary in relation to statements that (for the sake of argument) could be considered analogous to those defined in Art. 55a, only one (element 4) or perhaps two (including element 5) could be said to support the "necessity" requirement

[48] *Perincek v. Switzerland*, para. 280.

of a sanction. In terms of balancing the values enshrined in Art. 10 and Art. 8 against each other, the ECtHR considered that Art. 8 justified the protection of "identity, and thus the dignity of present-day Armenians."[49] At the same time, it rejected that argument concerning the dignity of the victims themselves. A similar argument would likely have been raised in respect of Art. 55a but it is arguable whether argumentation of that nature could be applied to those making Art. 55a statements, that is to say, whether those statements seriously impugn dignity understood as an element of the identity of Poles. In the Armenians' case, what is of fundamental importance is that they are a minority in many the countries in which they live (especially in Turkey) and that the fact of their genocide is denied in Turkey. The Armenians' minority status is what determines their delicate and sensitive situation. A person committing a crime under Art. 55a could have impugned the dignity of many Poles, but it could hardly be said that he or she would thereby impugn their sense of identity, and obviously this would not affect a minority group.

In a sudden about-face, the regulations just discussed were struck from the INRA, in a procedure that took just a single day in June 2018, crowned with a highly controversial joint declaration presented by the Prime Ministers of Poland and Israel.[50] This did not signal however the complete abandonment by the Polish authorities of their intent to counteract certain statements about history, as they did not remove from the INRA's amendment the civil liability provisions:

> Article 53o. The relevant provisions of the Civil Code Act of 23 April 1964 (Journal of Laws of 2016, items 380 and 585) concerning the protection of personal rights shall apply to the protection of the good name of the Republic of Poland and the Polish Nation. An action for the protection of the good name of the Republic of Poland and the Polish Nation may be filed by a non-governmental organisation acting in accordance with its statutory objects. Damages, whether special or general, shall be awarded to the State Treasury.

In principle, the international law standards applicable to human rights protection and the case law of the ECtHR do not preclude the applicability of civil remedies to the protection of personal rights, including the good name and reputation of individuals and legal persons. The limitation clauses found in Art. 10 ECHR (as well as in Art. 19 of the International Covenant on Civil and Political Rights and in Art. 54 of the Polish Constitution), stipulate that the exercise of the freedom of expression might be subject to certain restrictions, which should be clearly provided for in the legislation, and which are necessary, among others, to ensure that the rights and the good name of others are respected. Specifically, there is established case law of the ECtHR concerning cases where the good name of legal entities, such as NGOs, trade unions, etc., was tarnished, and where the application at the national level of civil remedies for the purpose of personal

[49] *Ibidem*, para. 156.

[50] Joint declaration of prime ministers of the State of Israel and the Republic of Poland, 27 June 2018, available at: https://bit.ly/2MqJs0U (accessed 30 May 2019).

rights protection has never been challenged.[51] Moreover, the previous jurisprudence on assessing the compatibility of memory laws, among which the INRA provisions at issue could be included, pertained only to their criminal law aspects and was criticized in that regard. It was precisely the criminalization of statements on historical subjects, particularly the Second World War and the Holocaust, which persuaded its critics to view such laws as falling short of the freedom of expression standard enshrined in the relevant provisions of the ECHR. Thus, it should be emphasized that the ECtHR has not yet examined an application pertaining to the use of civil remedies in an action to protect the good name of a state or nation.

However, even if a state does not criminalize, for example, defamatory statements or statements damaging the good name of others, freedom of expression still might be endangered by disproportionate legal measures. Such a situation might occur, for example, when a journalist, as a result of losing a civil lawsuit, is ordered to pay a large sum of money in damages. In such cases, the amount of damages as such might be found to be in breach of the principle of proportionality.[52]

While the consequences of civil liability may not seem as harsh as those of criminal liability, the risk of violations of individual rights and freedoms remains high. We will probably have to wait for a judgment from the ECtHR before we can definitively state whether or not the law currently in force in Poland is consistent with the standards embraced in the ECHR, but we should not wait that long with expressing the doubts raised in this article. The most important concern to note when considering the principal question we posed here, is that the Polish legislator, by drafting and adopting the amendments to the INRA, chose to ignore the key issue of consistency of the domestic regulations with the international standards of freedom of speech. This omission of the requirements arising from Poland's participation in the Strasbourg human rights protection system, should perhaps serve as a 'warning sign', heralding a more systemic and dangerous policy of shifting the legislator's perspective from the rights'-oriented to the political interest – driven one.

CONCLUDING REMARKS

The emerging trend of proliferation of laws affecting historical memory, including memory laws, in domestic jurisdictions goes hand in hand with reactions towards them which are visible in international law and in the jurisprudence of the international monitoring bodies, and the ECtHR in particular. The often obvious political motivation behind the introduction of laws affecting historical memory – including the intention to whitewash a nation's own history – clashes with the standards of international

[51] *See e.g.* the judgments: ECtHR, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (App. No. 17224/11), 7 June 2016; *Cicad v. Switzerland* (App. No. 17676/09), 7 June 2016.

[52] *See* the judgments: ECtHR, *Ungváry and Irodalom KfT v. Hungary* (App. No. 64520/10), 3 December 2013; *Tolstoy Miroslavsky v. United Kingdom* (App. No. 18139/91), 19 July 1995.

human rights law, most often in the context of free speech and other guarantees of fundamental rights and freedoms. A significant development can be observed: in the case of Polish laws affecting historical memory, the often visible contradiction between the international and national legal regulations leads this new field of governing the past to fall within the remit of the tools of law. However, what distinguishes these cases from other situations of conflicting norms and standards is precisely the strong ideological background of memory laws. Their compliance with international law standards is thus often secondary to their compliance with the current political will and the deemed social necessities. Considering the general political nature of memory laws, alternative ways of securing narratives about the past should be considered. Maria Mälksoo argues that in lieu of attempts to outlaw certain ways of remembrance, "a radically democratic, agonistic memory politics would be in order." While she calls for a "politics of memory between plural equals", she also states that the adoption of such a model is farfetched with respect to Eastern Europe.[53] Our contribution supports that claim: instead of *moving away* from regulating memory, the Polish legislator has been increasingly imposing new laws affecting historical memory, causing controversies and leading to negative impacts, both within the purely legal sphere and beyond.

[53] M. Mälksoo, *'Memory Must Be Defended': Beyond the Politics of Mnemonical Security*, 46(3) Security Dialogue 221 (2015).

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SUMMARY PROCEDURE BEFORE THE STRASBOURG COURT UNDER ARTICLE 28(1)b OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: JUDICIAL ECONOMY UNDER SCRUTINY

Abstract:
This article critically evaluates the summary procedure introduced by Protocol No. 14 to the European Convention on Human Rights, adopted within the reform of the European Court of Human Rights system. The summary procedure, now set out in Art. 28(1)b of the Convention, was instituted in order to facilitate expediency and to reduce the case load of the Court. This article argues that while judicial economy is a legitimate goal, the summary procedure under Art. 28(1)b has considerable deficiencies that undermine some of the systemic goals and core values of ECHR law. There is a manifest lack of remedies vis-à-vis the choice of the procedure, choice of applicable law, and no appeals against final decisions rendered in the course of the summary procedure. Notably, the concept of "well-established case-law" seems to be neither clear nor reliable, as evidenced in the cases analysed in the article. These cases, which involve the issue of socially-owned property in Serbia, serve to demonstrate some of the significant errors in interpretation and decision-making which can result from application of the summary procedure.

Keywords: reform of the European Court of Human Rights, summary procedure, judicial economy, Article 28(1)b of the ECHR, legal remedies, socially-owned property

INTRODUCTION

Recent reforms of the Strasbourg human rights system were mainly aimed at achieving efficiency in order to resolve the problem of the ever-increasing case load of the European Court of Human Rights (ECtHR or Court).[1] As a result, efficiency and

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[1] Reforms introduced by Protocol 14, adopted in 2004, entered into force on 1 June 2010 (Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the

judicial economy have come to the forefront of the Court's reforms – reforms that have resulted in some novel procedural concepts. One procedure that was devised with the purpose of accelerating ECtHR decision-making is that established in Art. 28(1)b of the European Convention on Human Rights (ECHR or Convention)[2] which, for the first time, vests the Court's Committees, three-judge formations, with the competence to render a judgment on the merits "if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court." This procedure will hereinafter be referred to as the summary procedure. Such a procedure, as will be illustrated, offers limited remedies against the choice of the procedure itself and the choice of relevant well-established case-law. Pursuant to Art. 43 of the Convention, referral to the Grand Chamber is limited to judgments of the Chambers only, which leaves judgments of the Committees without any appellate remedy. In this sense it renders them similar to judgments of the Grand Chamber.

The purpose of this article is to highlight some strengths and weaknesses of the Court's recently-introduced summary procedure. The authors explore not only the reasons for introducing a summary procedure and the inherent lack of remedies under Art. 28(1)b of the Convention, but also how the Court defines and distils its "well-established case-law." The problems of both the summary character of the procedure and of the doctrine of well-established case-law as applied by Committees will be further discussed on the basis of the Court's case-law, with special reference to cases involving the Republic of

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control system of the Convention, opened for signature on 13 May 2004, C.E.T.S. No. 194). However, there was a provisional application of Protocol 14 on the basis of Protocol 14*bis* adopted in May 2009 (Protocol No. 14*bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms, 27 May 2009, C.E.T.S. No. 204). Once Protocol 14 entered into force, Protocol 14*bis* ceased to be operative.

Similar reforms are on the way, as announced by Protocols 15 and 16: Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on 24 June 2013, C.E.T.S. No. 213 (2013), not yet in force; and Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on 2 October 2013, C.E.T.S. No. 214 (2013), entered into force on 1 August 2018. Each of these three Protocols have added new conditions governing access to the Court.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950, entered into force on 3 September 1953) E.T.S. No. 005. Art. 28 (Competence of Committees) provides:

1. In respect of an application submitted under Article 34, a committee may, by a unanimous vote,

(a) declare it inadmissible or strike it out of its list of cases, where such decision can be taken without further examination; or

(b) declare it admissible and render at the same time a judgment on the merits, if the underlying question in the case, concerning the interpretation or the application of the Convention or the Protocols thereto, is already the subject of well-established case-law of the Court.

2. Decisions and judgments under paragraph 1 shall be final.

3. If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1(b).

Serbia, given the number of cases resolved under the heading of Art. 28(1)b. As an illustration, out of 194 judgments rendered against Republic of Serbia until February 2019, as many as 49 of them were handed down in a summary procedure, and all 49 were exclusively about social property issues. In other words, circa one quarter of the cases involving Serbia – all of which found the state responsible – were processed using the summary procedure. Even more importantly, there are around 900 applications pending against Serbia in relation to debts of socially-owned companies.[3]

The cases upon which we focus have exclusively dealt with the socially-owned companies and the state responsibility of Serbia under the ECHR in relation to such companies. This article attempts to demonstrate some misunderstandings manifested by the Court in its rather obscure conclusions on the relationship between social property and state responsibility in these cases. The authors argue that the differences between the cases on social property, as well as some inconsistencies found in these judgments, should not have allowed the Court to treat these decisions as "well-established case-law" triggering the summary procedure under Art. 28(1)b of the Convention. These arguments demonstrate the unreliability of the concept of "well-established case-law" and simultaneously expose the downsides of the summary procedure, but also the detrimental and irreversible effect of the inherent lack of remedies to contest both the choice of the procedure and the choice of the leading cases.

The authors' position is that despite the efficiency of a summary procedure there are disadvantages that have surfaced in the Court's case law, as reflected in the cases regarding Serbia. The aim of this article is to clarify the issues discussed in selected cases as well as to open a discussion about the benefits and pitfalls of the procedure under Art. 28(1)b of the Convention, which seem to have largely gone unnoticed so far.

The article begins with an overview of the Art. 28(1)b procedure, together with statistics on the use of this procedure before the Court. This is followed by an analysis of the (lack of) remedies inherent to the summary procedure. The ECtHR cases against Serbia involving social property issues should serve as an illustration of the deficiencies of the summary procedure, and will be focused on the concept of "well-established case-law", which serves as the main principle of Art. 28(1)b of the Convention.

1. INTRODUCING ART. 28(1)B TO THE SYSTEM OF THE CONVENTION

It has become almost a kind of mantra that the ECtHR is "a victim of its own success",[4] resulting in an overwhelming inflow of applications, currently reaching the

[3] Press country profile: Serbia, European Court of Human Rights, at 5, available at: http://www.echr.coe.int/Documents/CP_Serbia_ENG.pdf (accessed 30 May 2019).

[4] L. Turnbull, *A Victim of its Own Success: The Reform of the European Court of Human Rights*, 1(2) European Public Law 215 (1995); P.L. McKaskle, *The European Court of Human Rights: What It Is, How It Works, and Its Future*, 40(1) University of San Francisco Law Review 1 (2005), at 58; J.A. Carillo Salcedo,

number of 100,000 per year. The main reason for its massive popularity is certainly its success in protecting human rights, undoubtedly making the ECtHR the most effective mechanism for the protection of human rights worldwide. At the same time the reasons for the increase of applications are many: from the increase of the number of Member States and potential applicants during the 1990s to the fact that ECtHR has become a well-known institution in Europe, one that Member States' citizens can resort to when in need, and free of any charge.[5] Strasbourg has thus become a popular destination for all those wishing to challenge acts of states, and there is a high success rate if applications pass the admissibility test.[6] While around 95 per cent of applications are declared inadmissible at an early stage,[7] those that pass the admissibility test have an 85 per cent chance on the merits.[8] These statistics amply illustrate that while the Court has developed its own protective mechanisms, the chances for applicants' success are quite promising once the Court decides to deal with an application on the merits.

One of the issues that came to the forefront in 2000[9] was how to efficiently handle the "ever-increasing volume of applications".[10] The political decision of the European Ministerial Conference to solve this problem was followed by a number of other political documents, drafted mainly by the Committee of Ministers and other Council of

The European Convention of Human Rights, in: F. Gómez Isa, K. de Feyter (eds.), *International Protection of Human Rights: Achievements and Challenges*, University of Deusto, Bilbao: 2006, at 397; L.R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19(1) European Journal of International Law 125 (2008), at 126; K. Boyle, *European Experience: The European Convention on Human Rights*, 40(1) Victoria University of Wellington Law Review 167 (2009-2010), at 173; G. de Beco, *Non-Judicial Mechanisms for the Implementation of Human Rights in European States*, Bruylant, Brussels: 2010, at 29; L. Wildhaber, *Rethinking the European Court of Human Rights*, in: J. Christoffersen, M.R. Madsen (eds.), *The European Court of Human Rights Between Law and Politics*, Oxford University Press, Oxford: 2011, at 229. The same expression has been used by the Council of Europe: e.g. Council of Europe, *Belgium and the European Court of Human Rights*, available at: http://www.coe.int/en/web/portal/belgianchairmanship-echr (accessed 30 May 2019).

[5] A.Q. Mertsch, *The Reform Measures of ECHR Protocol No. 14 and the Provisional Application of Treaties*, in: P. Merkouris, M. Fitzmaurice (eds.), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications*, Martinus Nijhoff Publishers, Leiden: 2013, 36.

[6] B. Ohms, *The Coming into Force of Protocol No. 14 and the Short but Very Successful Life of Protocol No. 14bis to the ECHR*, European Yearbook on Human Rights 207 (2010).

[7] *Reforming the European Convention on Human Rights, A Work in Progress*, 148, available at: http://www.echr.coe.int/librarydocs/dg2/isbn/coe-2009-en-9789287166043.pdf (accessed 30 May 2019).

[8] Of the total number of judgments delivered in 2017, the Court found at least one violation of the Convention by the respondent state in 85 per cent of the cases. *The ECHR in facts & figures* – 2017, at 4, available at: https://www.echr.coe.int/Documents/Facts_Figures_2017_ENG.pdf (accessed 30 May 2019).

[9] The European Ministerial Conference on Human Rights, held in Rome in November 2000, resulted in the Declaration of the Rome Ministerial Conference on Human Rights: "The European Convention on Human Rights at 50: what future for the protection of human rights in Europe?" available at: http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/dh_gdr/Declaration-Rome_en.pdf (accessed 30 May 2019).

[10] European Ministerial Conference on Human Rights, held in Rome, Resolution I "Institutional and functional arrangements for the protection of human rights at national and European level" (CM(2000)172), para. 16.

Europe working bodies charged with developing the original idea.[11] One rationale for this undertaking was the estimation that around 70 per cent of admissible cases belong to the group of repetitive cases.[12]

The solution for repetitive cases resulted in two different mechanisms. The first was in the form of a judgment that would serve as the grounds for resolving future cases raising the same issues (so-called "pilot judgments"). The pilot judgment procedure was engineered by the Court in 2004[13] and inserted in its Rules in 2011.[14] According to Art. 61(1) of the Rules of the ECtHR: "The Court may initiate a pilot-judgment procedure and adopt a pilot judgment where the facts of an application reveal in the Contracting Party concerned the existence of a structural or systemic problem or other similar dysfunction which has given rise or may give rise to similar applications." This procedure enables the Court to resolve a class of applications by deciding just one case with the same structural or systemic problem.[15] The flexibility of this procedure lies in the possibility for the Court to freeze all related cases for a certain period of time so that the state can provide the structural remedy at the national level.[16] This means that states are expected to set up a system for redress at the national level. Once the Court is satisfied with the way this system functions in practice it may decide to close the pilot judgment

[11] *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, Strasbourg, Council of Europe, 27 September 2001, available at: https://bit.ly/2W7t9ve. The *Report of the Reflection Group on the Reinforcement of the Human Rights Protection Mechanism* is included in Appendix IV to the Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights. *The Court of Human Rights for Europe*, Committee of Minister's Declaration adopted at its 111th session (6-7 November 2002), available at: https://bit.ly/2ZtxKtE. Final activity report of the CDDH *Guaranteeing the long-term effectiveness of the European Court of Human Rights – Implementation of the declaration adopted by the Committee of Ministers at its 112th session* (14-15 May 2003), available at: https://bit.ly/2DuK0Ax. Declaration of the Committee of Ministers: *Ensuring the effectiveness of the implementation of the European Convention on Human Rights at national and European levels* (12 May 2004), available at: https://bit.ly/2XxeoSC (all accessed 30 May 2019).

[12] Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly on the Draft Protocol No. 14*bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms, 28 April 2009, Doc 11879, p. 5, para 6. available at: https://bit.ly/2ZtmsWd (accessed 30 May 2019).

[13] ECtHR, *Broniowski v. Poland* (App. No. 31443/96), Grand Chamber, 22 June 2004. In *Broniowski* the Court, after having found a breach of the Convention in that the applicant did receive compensatory property, also found a structural deficiency in the Polish legal order that denied the same right to a whole class of applicants in the same position. The Court requested that Poland adopt appropriate legal and administrative measures to provide the persons in the same position with an equivalent remedy.

[14] Art. 61 of the Rules of the Court as amended on 21 February 2011.

[15] "The way in which the procedure operates is that when the Court receives a significant number of applications deriving from the same root cause, it may decide to select one or more of them for priority treatment. In dealing with the selected case or cases, it will seek to achieve a solution that extends beyond the particular case or cases so as to cover all similar cases raising the same issue. The resulting judgment will be a pilot judgment" (The Pilot-Judgment Procedure, Information issued by the Registrar of the Court, para. 2, available at: https://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf (accessed 30 May 2019)).

[16] *See generally* D. Haider, *The Pilot-Judgment Procedure of the European Court of Human Rights*, Martinus Nijhoff Publishers, Hague: 2013.

procedure. Therefore, the Court sets up the leading (pilot) judgment with a suggested remedy for the respondent government to apply to the remaining applications. The second solution for repetitive applications was the summary procedure, designed to be used once the judgment of the Court on similar issues is already in place. This is the procedure discussed in this article.

Therefore, the quest for judicial economy and efficacy of the Court was the background against which Protocol 14 was adopted, as expressly stated in the Protocol 14 preamble:

> Considering the urgent need to amend certain provisions of the Convention in order to maintain and improve the efficiency of the control system for the long term, mainly in the light of the continuing increase in the workload of the European Court of Human Rights and the Committee of Ministers of the Council of Europe;
> Considering, in particular, the need to ensure that the Court can continue to play its preeminent role in protecting human rights in Europe.

An explanatory report to Protocol 14[17] equally makes it clear that structural solutions for repetitive cases was seen as one of the keys for maintaining the effectiveness of the Court system.[18] The Final Activity Report of the CDDH,[19] which was transmitted to Ministers' Deputies a few days before the adoption of Protocol 14, affirms that one of the purposes of Protocol 14 was to introduce "a considerably simplified procedure for dealing with repetitive cases."[20] The result was Art. 28, which extended the competence of Committees to decide repetitive cases on the merits on the basis of well-established case-law.[21] The view was expressed that "[o]f all the debated reform proposals, the introduction of the single-judge formation and the new summary procedure for three-judge Committees are considered to have the greatest and most immediate effect in increasing the Court's case processing capacity."[22]

Debates and discussions preceding the adoption of Protocol 14 and its turbulent entry into force[23] were mainly concerned with the Court's efficacy, and warned of

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[17] *Explanatory Report to Protocol No. 14,* C.E.T.S. 194 (2004), available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d380f (accessed 30 May 2019).

[18] *Ibidem,* para. 7.

[19] *Final activity report of the CDDH, supra* note 11.

[20] *Ibidem,* para. 17.

[21] "The competence of the committees of three judges is extended to cover repetitive cases. They are empowered to rule, in a simplified procedure, not only on the admissibility but also on the merits of an application, if the underlying question in the case is already the subject of well-established case-law of the Court" (*Explanatory Report to Protocol No. 14, supra* note 17, para. 40).

[22] H. Keller, A. Fischer, D. Kühne, *Debating the Future of the European Court of Human Rights after the Interlaken Conference: Two Innovative Proposals,* 21 European Journal of International Law 1025 (2010), 1034.

[23] The idea for reform that was born in 2000 (Ministerial Conference on Human Rights held in Rome, Resolution I, "Institutional and functional arrangements for the protection of human rights at national and European level" (CM (2000) 172)) resulted in the adoption of Protocol 14 on 13 May 2004, which did not enter into force until 1 June 2010. The reason for this delay was the condition envisaged in Art. 19 of the Protocol 14, which required ratification of all Member States for its entry into force. It was the Russian

dramatic and sombre prospects for the Court if urgent reforms were not undertaken. The amendments brought about by Protocol 14 were mainly aimed at reducing access to the Court with the alleged purpose of preserving its functionality: a new admissibility criterion was introduced, and more options were created for dealing with applications at an early stage. Protocol 14 could thus be seen as the result of forces which had supported the so-called "constitutional character" of the Court even at the expense of individual justice.[24] Even those voices that challenged the reforms of the Court as inherently detrimental to its role in meting out individual justice did not much discuss the perils of the newly established procedure in Art. 28, nor the fact that the new provisions left parties without a remedy to challenge decisions adopted by a three-judge formation on the basis of well-established case-law of the Court. In addition, there was no discussion on the meaning of the term "well-established case-law" or the standard to be applied, nor whether there would be any avenues to correct errors made in the course of its application. Given the estimation that as much as 70 per cent of admissible cases are of a repetitive character, there should have been at least an appreciation of the possibility that errors are bound to happen simply due to the huge number of applications that would be decided within the newly-tailored mechanism.

2. STATISTICS

As of 12 February 2019, according to the Court's database[25] there have been 2,645 cases in which the Art. 28(1)b procedure was employed, i.e. in which Committees resolved applications on the merits in the course of the summary procedure. In 2,588 of these cases at least one violation was found, i.e. in roughly 99 per cent of cases a breach was established in the course of the summary procedure. Since this procedural tool has been in use since 22 December 2009,[26] this means that so far

Federation that resisted ratification for a long time. In order to accelerate reform of the Court, the Council of Europe moved to adopt Protocol 14*bis* that enabled application of mechanisms set forth in Protocol 14 (namely new competences of a single judge and of a three-judge formation) under more flexible terms for its entry into force: Art. 6 of Protocol 14*bis* required only three ratifications for its entry into force, and Art. 7 allowed for provisional application, i.e. allowed for its application by Member States even without ratification. The whole arrangement was manifestly of a provisional character, given that it ceased to exist after Protocol 14 entered into force, according to its Art. 9 and following the long-awaited Russian ratification.

[24] For more on the discussion concerning the constitutional vs. individual justice role of the Court with regard to the reform under Protocol 14, *see* R. Harmsen, *The Reform of the Convention System: Institutional Restructuring and the (Geo-)Politics of Human Rights*, in: J. Christoffersen, M.R. Madsen (eds.), *The European Court Of Human Rights Between Law And Politics*, Oxford University Press, Oxford: 2011, 126-130.

[25] Available at: https://bit.ly/2ITGLpV (accessed 30 May 2019).

[26] The first batch of judgments under Art. 28(1)b were ECtHR Committee, *Kressin v. Germany* (App. No. 21061/06), 22 December 2009; *Jesse v. Germany*, (App. No. 10053/08), 22 December 2009. The procedure itself became available after Protocol No. 14*bis*, adopted on 19 May 2009, had entered into force on 1 October 2009.

on average 260 "judgments without procedure" are issued annually. The distribution among countries has not been even: Ukraine, Russia, Greece, Hungary and Turkey have split nearly 1,000 such judgments among themselves. As for the Republic of Serbia, there have been 49 decisions (with multiple applicants) where the summary procedure led to state responsibility under the Convention in relation to socially-owned companies.[27]

Additionally, the database reveals that as of 12 February 2019 there were 8,027 decisions in which Committees declared applications inadmissible for various reasons on the basis of Art. 28(1)a. While the jurisdiction of Committees to decide on the admissibility of applications has been present in the system even before the reform undertaken by Protocol no. 11,[28] the difference now is that Committees' competence has been expanded to include deciding issues on the merits. The Committees' decisions on admissibility have always been without the right of appeal, and this feature has been transferred to decisions on the merits in the summary procedure as well.

What is not discernible in the database of the Court is whether the right of the respondent state to contest the concept of "well-established case-law" has been effective. This right is granted by Art. 28(3) to states, but is withheld from applicants. While a number of the Committees' judgments on the merits disclose that states contested the chosen procedure, there is no reliable data that could show the success rate of such contestations.[29]

3. REMEDIES UNDER ART. 28(1)B OF THE CONVENTION

The role and relevance of remedies have been well established in both international and national law.[30] They ensure the correctability of a decision and the participation of those whose rights and obligations are at stake at either the national or international level. The role they play has earned them the position of not only a human right,[31] but

[27] As of 12 February 2019, there have been total of 194 judgments and Committees' decisions rendered involving the Republic of Serbia as the respondent.

[28] "The committees fulfil the role within the Convention system of disposing of the weakest cases. For example, in 1996 the committees (then of the Commission rather than the Court) dealt with 2,108 of the 2,776 cases declared inadmissible" (*cf.* P. Leach, *Taking a Case to the European Court of Human Rights*, Blackstone Press Limited, London: 2001, at 30).

[29] It seems that it was challenged in approximately one third of cases and that in all of them the challenge was unsuccessful, available at: https://bit.ly/2DsLdZq (accessed 30 May 2019).

[30] There is a vast body of literature on this subject. Here we shall refer only to a few: D. Shelton, *Remedies in International Human Rights Law*, Oxford University Press, Oxford: 2015; Ch.F. Amerasinghe, *Local Remedies in International Law*, Cambridge University Press, Cambridge: 2004; Ch.D. Gray, *Judicial Remedies in International Law*, Oxford University Press, Oxford: 1990.

[31] "In order for a remedy to be effective, a victim must have practical and meaningful access to a procedure that is capable of ending and repairing the effects of the violation" (Amnesty International, *Injustice Incorporated*, 2014, 17, available at: https://www.amnesty.org/download/Documents/8000/pol300012014en.pdf (accessed 30 May 2019)).

also that of a general principle of law.[32] While no remedy can guarantee that a decision will be altered or annulled, their existence ensures procedural justice and certainly contributes to transparency and the accuracy of decision-making.[33]

The issue of remedies is equally relevant with respect to the summary procedure. While a concern for efficiency led to the creation of a summary procedure, the question is whether this procedural goal is sufficient to outweigh the right to challenge the choice of the Court to opt for the summary procedure. The concept of challenging decisions has usually been addressed within the human rights context and as such is reserved for potential claimants. However, the issue should not be restricted to human rights, given that all parties should equally be entitled to challenge judicial decisions (as is the case with Art. 43(1) of the Convention),[34] thus the right to challenge should

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As a human right, the right to remedy has been widely recognised across different international human rights instruments: Art. 8 of the 1948 Universal Declaration of Human Rights; Art. 13 of the 1950 European Convention on Human Rights; Art. 6 of the 1965 Convention on the Elimination of Racial Discrimination; Article 2 of the 1966 International Covenant on Civil and Political Rights; Art. 25 of the 1969 American Convention on Human Rights; Art. 1 of the 1980 African Charter on Human and Peoples' Rights; Art. 14 of the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Art. 39 of the 1989 Convention on the Rights of the Child; and Art. 24 of the 2010 International Convention for the Protection of All Persons from Enforced Disappearance.

"A bedrock principle of contemporary international human rights law is that victims of violations have a right to an 'effective remedy'. Courts have largely treated this requirement as an absolute one and have adopted a set of strong specific remedial rules to implement it in particular situations." (S. Starr, *Rethinking 'Effective Remedies': Remedial Deterrence in International Courts*, 83(3) New York University Law Review 693 (2008), at 694).

[32] Given the widely accepted definition of the general principles of the law: "For instance, in the arbitration between France and Venezuela in the Antoine Fabiani Case the arbitrator said that he would apply 'the general principles of the law of nations on the denial of justice' and defined those principles as 'the rules common to most legislations or taught by doctrines.'" (G. Gaja, *General Principles of Law*, in: *Max Planck Encyclopedia of Public International Law* (2013), para. 1 (references omitted)).

It is arguable that the right to appeal a judicial decision is strongly embedded in almost all national legal systems and should be binding as a general principle of law on the international plane, unless specifically excluded.

There has been a suggestion to the effect that general procedural principles do exist for international adjudication: R. Kolb, *General Principles of Procedural Law*, in: A. Zimmermann, Ch. Tomuschat, K. Oellers-Frahm, Ch. Tams, T. Thienel (eds.), *The Statute of the International Court of Justice: A Commentary*, Oxford University Press, Oxford: 2006, 793-835.

As for the EU legal system, see: Case 222/84 *Johnston v Royal Ulster Constabulary* [1986] ECR 1651.

[33] "The final aspect of neutrality is correctability. The possibility of review of a chamber judgment by the Grand Chamber is a positive point in that sense. Another approach to correctability might be the need to leave room for exceptions. Balancing rights and competing interests may involve generalizations in the underlying assumptions. However, individuals to whom the underlying assumption does not apply may – if no exception is made for their case – remain unsatisfied, not only with respect to the participation aspect of procedural justice, but also with respect to accuracy." (E. Brems, L. Lavrysen, *Procedural Justice in Human Rights Adjudication*, 35(1) Human Rights Quarterly 176 (2013), at 187).

[34] Art. 43 (Referral to the Grand Chamber) provides: "1. Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber."

also be addressed from the perspective of respondent states. Needless to say, adequate procedural justice for all fosters the legitimacy of institutions.[35] This is why we shall now turn to the remedial options available to both parties to the summary proceedings in order to see whether the remedial structure of the summary procedure meets the minimum requirements of procedural justice.

3.1. Remedies against the selection of the Art. 28(1)b procedure

According to the wording of Art. 28(3) of the ECHR, it is only the High Contracting Party that can contest a summary procedure on the merits for which the Committee has opted.[36] The remedial options for two parties in the proceeding are thus quite limited: the applicant does not have any available redress at its disposal, while respondent states do have a remedy but one with an imprecise and limited effect. The option that is at disposal of respondent states is "contestation". There seems to be an understanding that even the respondent state cannot challenge the summary procedure as such, but rather the concept of "well-established case-law".[37] It is not a plea of inadmissibility as envisaged in Rule 55 of the Rules of Court.[38] Neither the Rules nor the Convention clarify the effect of contestation under Art. 28(3). What transpires from the silence of the provisions of applicable procedural rules is that such contestation does not lead to a separate and adversarial procedure. As mentioned above, the available data does not fully disclose the efficiency of this remedial option. If the respondent government contests the choice of the proceeding, the Committee may invite a national judge to sit on the case.[39] However, this is left to the discretion of the Committee – according to the Explanatory Report the respondent government "may never veto the use of this procedure, which lies within the committee's sole competence."[40]

[35] "Procedural fairness ensures the effectiveness of legal proceedings, increases their perceived legitimacy and signals their accuracy and acceptability." (F. Fontanelli, P. Busco, *The Function of Procedural Justice in International Adjudication*, 15(1) Law and Practice of International Courts and Tribunals 1 (2016), at 10).

[36] The relevant part of Art. 28(3) reads: "... whether that Party has contested the application of the procedure under paragraph 1(b)."

[37] "However, if this modification precludes the defendant State from paralysing, by its opposition, the exercise of the competence *de qua* by the three-judge Committee, it does not prevent, on the contrary, that State from contesting, in addition to the admissibility in general of the application, the existence of 'well-established' case-law pertaining to the case, thus resulting in the Chamber dealing with the case if the contestation convinces at least one of the three judges." (V. Starace, *Modifications Provided by Protocol No. 14 Concerning Proceedings Before the European Court of Human Rights*, 5(1) The Law and Practice of International Courts and Tribunals 183 (2006), at 187).

Also: "A Member State may only contest that the case is covered by well-established case-law, but not the applicability of the procedure itself." (C. Mayer, H. Wutscher, *Are Austrian Courts Obliged to Consider the Jurisprudence of the European Court of Human Rights when Interpreting the ECHR?*, 8(2) Vienna Journal on International Constitutional Law 201 (2014), at 204).

[38] Rule 55 (Pleas of inadmissibility) provides: "[a]ny plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its written or oral observations on the admissibility of the application submitted as provided in Rule 51 or 54, as the case may be."

[39] Explanatory Report, *supra* note 17, para. 71. *See also* Art. 28(3) of the Convention.

[40] *Ibidem,* para. 69.

While limiting the remedies could be legitimised by the overall aim of the reform to enhance judicial economy, it is still difficult to reconcile the quite strict and unequal limitation of the right to challenge the choice of a summary procedure – which may result in a judgment on the merits – by the principle of efficacy. This aspect of the reform was tackled by Amnesty International, which suggested that both parties should be "provided with sufficient time and opportunity to comment on the admissibility and merits of the case prior to its determination by a three-judge Committee."[41]

3.2. Remedies for challenging the choice of "well-established case-law"

While the Explanatory Report argues that "Parties may, of course, contest the 'well-established' character of case-law before the committee",[42] what remains unanswered is *how* this contestation is to be pursued. Even if the contestation can presumably be raised in the first response to the Court on its initiative to apply the Art. 28(1)b procedure, it seems that such contestation does not automatically change the exclusive right of the Committee to decide on opting for a summary procedure:

> The respondent Party may contest the application of Article 28, paragraph 1.b, for example, if it considers that domestic remedies have not been exhausted or that the case at issue differs from the applications which have resulted in the well-established case-law. However, it may never veto the use of this procedure, which lies within the committee's sole competence.[43]

Although Committees refer to Art. 28(1) contestations as "objections"[44] it seems that these objections are merely suggestions to the Committees. Decisions under review do not disclose why the Committees dismissed contestations raised by respondent governments.[45] The only effective tool for removing the Art. 28(1)b procedure altogether is a lack of consensus among the three judges, something which is beyond the reach of parties to the proceeding, or which at best may be the result of persuasive arguments that can only be put forward by the respondent, but not by the applicant.[46] Applicants

[41] *Amnesty International's Comments on the Interim Activity Report: Guaranteeing the Long-term Effectiveness of the European Court of Human Rights*, 1 February 2004, at 21, available at: https://www.amnesty.org/en/documents/ior61/005/2004/en/ (accessed 30 May 2019).

[42] Explanatory Report, *supra* note 17, para. 68.

[43] *Ibidem,* para. 69.

[44] *See e.g.* "The Government objected to the examination of the applications by a Committee. After having considered this objection, the Court rejects it" (ECtHR Committee, *Rakić and Sarvan v Serbia* (App. Nos. 47939/11 and 56912/11), 20 October 2015, para. 4). This is a typical phrase used in judgments adopted under the Art. 28 procedure.

[45] The reasons are never given, as exemplified in the case cited above (*ibidem*).

[46] "Even when the committee initially intends to apply the procedure provided for in Article 28, paragraph 1.b, it may declare an application inadmissible under Article 28, paragraph 1.a. This may happen, for example, if the respondent Party has persuaded the committee that domestic remedies have not been exhausted" (Explanatory Report, *supra* note 17, para. 69).

"The cases are communicated to the government by the President of the Section (often in groups) on the basis of a very succinct statement of facts with a view to reaching a friendly settlement. The Court does not ask for observations in such cases, but governments retain the right to file observations in appropriate cases.

are fully excluded from influencing the decision to adopt the Art. 28(1)b procedure, including the choice of which decisions constitute "well-established case-law". Despite this serious procedural drawback, the Committee was still of the opinion that the new procedure "preserves the adversarial character of proceedings."[47]

3.3. Remedies against final decisions rendered under Art. 28(1)b

What is fundamentally different with respect to Committees' judgments on the merits, as opposed to such judgments adopted by Chambers, is that the former cannot be challenged via the remedies available under Art. 43 of the Convention, which provides that "[w]ithin a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber." The finality of Committee's judgments under Art. 28(2) of the Convention puts them on the same footing as judgments of the Grand Chamber, both of which become final without a further remedy.[48] However, the Grand Chamber, unlike a Committee, is a judicial formation of last resort, essentially entrusted with maintaining the uniformity of interpretations,[49] so the finality of its judgments seems to be quite a normal way to end a judicial procedure. Therefore, judgments under Art. 28 are final and as such directly forwarded to the Committee of Ministers for further monitoring of their enforcement.

Interestingly, Art. 44 of the ECHR, titled "Final judgments", refers only to final judgments of the Grand Chamber and Chambers,[50] but fails to mention the final judgments of Committees. This obviously does not change the fact that the latter are equally final and as enforceable as the former, but it remains unclear why they were not placed in the same provision with other final judgments.

3.4. Some final observations on remedies

There are no genuine remedies for challenging the selection of a summary procedure or Committees' final decisions, which in turn casts some doubt on the rationale of this legislative reform. Protecting human rights by an outright exclusion of remedies can hardly be reconciled with the object and purpose of the Convention or the concept of procedural fairness.[51] Participants carry an additional burden as they cannot dispute

Where observations are received, they are submitted to the applicant for information only." (D. Harris et al., *Law of the European Convention on Human Rights*, Oxford University Press, New York: 2018, p. 128).

[47] Explanatory Report, *supra* note 17, para. 69.

[48] Art. 44(1) of the ECHR.

[49] Arts. 30 and 43 of the ECHR.

[50] Art. 44 of the ECHR (Final judgments) provides:

1. The judgment of the Grand Chamber shall be final.

2. The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43. 3. The final judgment shall be published.

[51] "As a supranational body, the ECtHR needs to address procedural justice at two closely connected levels. First, the Court should be a champion of procedural justice in its own proceedings and judgments.

the Committee's understanding of the issues and/or their nexus to "well-established case-law".

There was undoubtedly a dire risk that case overload would endanger the functioning of the Court and the system. However, the question is whether the total exclusion of remedies – for all three aspects of the summary procedure (i.e. against the selection of the procedure; choice of applicable law; and finality of the decision) – is proportional to the legitimate goal, or eventually puts at risk the legitimacy of the system it aims to preserve. While the drafters of the reform were certainly inspired by the urgent need for judicial economy, the question is whether it should trump even the minimum of procedural justice?

4. ECTHR CASES UNDER SCRUTINY: SOCIALLY-OWNED PROPERTY AND CASES AGAINST SERBIA

The judgments selected for review in this article involve cases against the Republic of Serbia where the issue was the state's responsibility for the debts of socially-owned companies, including those cases in which the ECtHR judgments on socially-owned companies were deemed, under Art. 28(1)b, as falling within the "well-established case-law" concept for a summary procedure in cases involving debts of privately-owned companies.

4.1. Background to socially-owned property

Socially-owned property was a dominant ownership concept in the former socialist Yugoslavia and was closely connected to the model of self-management, i.e. a socialist form of management by employees.[52] Socially-owned companies had a separate legal personality and were independently responsible for debts incurred in the course of their business. The character of this kind of ownership was specific in many respects. It seems that it indeed possessed a *sui generis* character because socially-owned or social property was neither private nor state property,[53] as has been well explained in the academic literature, for example as follows:

> In sum, the cumulated prerogatives of the user of a social property do not exactly correspond to a traditional ownership [n]or, for that matter, to any other known right (tenancy, trusteeship... etc.). It may be tempting [to categorize it as] a regular freehold

The Court should deliver procedural justice in order to improve applicants' satisfaction and self-worth, gain compliance, and strengthen its legitimacy. This is all the more important because one can presume that the legitimacy of the Court – the most visible human rights actor in Europe – is inextricably linked to the legitimacy of human rights in Europe." (Brems et al., *supra* note 33, at 185).

[52] M.E. Coronna, *Self-Management in Yugoslavia*, 8 Kingston Law Review 18 (1978).

[53] "UNMIK realized that socially owned property was a legal category of its own nature located somewhere between state and private ownership." (R. Muharremi, *The Role of the United Nations and the European Union in the Privatization of Kosovo's Socially-Owned Enterprises*, 14(7) German Law Journal 889 (2013), at 898).

stripped of the "bare" property (*nuda proprietas* i.e., right of disposal), but the hypothesis of a curtailed ownership must also be set aside: the user of a social property [both enjoys and lacks rights] in every feature of ownership.[54]

One of its key features is that while socially-owned property existed only in the former SFRY, its features have lingered on in certain former republics, such as Serbia, for some time. The European Court of Human Rights expressly recognised this feature:

71. Socially-owned companies, hereinafter "SOC", as well as "social capital", are a relict of the former Yugoslav brand of communism and "self-management".
72. Their current legal status in Serbia is primarily defined by: (i) Articles 392-400v and Article 421a of the Corporations Act 1996 (*Zakon o preduzećima*; published in OG FRY nos. 29/96, 33/96, 29/97, 59/98, 74/99, 9/01 and 36/02); (ii) Articles 1, 3, 14 and 41b of the Privatisation Act (*Zakon o privatizaciji*; published in OG RS nos. 38/01, 18/03 and 45/05); and (iii) Article 456 of the Corporations Act 2004 (*Zakon o privrednim društvima*; published in OG RS no. 125/04).
73. Based on this legislation, SOC are only those companies which are entirely comprised of social capital (*preduzeća koja u celini posluju društvenim kapitalom*). They are also independent legal entities which are both owned and run by their own employees and can be subjected to regular insolvency proceedings.[55]

This *sui generis* nature of socially-owned property may explain the difficulties with which foreign and international courts have dealt with issues regarding such property. However, it is hard to deny that it has a distinctive character compared to other forms of property. This has been confirmed by former SFRY republics in the course of state succession negotiations and in the *Agreement on Succession Issues between the Five Successor States of the Former State of Yugoslavia* (SIA).[56] The SIA deals with both state and private property but does not tackle socially-owned property, which remained outside the scope of the SIA as recommended by the Arbitration Commission within the International Conference on the Former Yugoslavia, as follows:

As for 'social ownership', it was held for the most part by 'associated labour organisations' – bodies with their own legal personality, operating in a single republic and coming within its exclusive jurisdiction. Their property, debts and archives are not to be divided for purposes of state succession: each successor State exercises its sovereign powers in respect of them.[57]

After the demise of socialism all former SFRY Republics undertook some form of property transformation[58] in order to extinguish the so-called "social property" through

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[54] K. Medjad, *The Fate of the Yugoslav Model: A Case against Legal Conformity*, 52(1) American Journal of Comparative Law 287 (2004), at 292.

[55] ECtHR, *Kačapor and Others v. Serbia*, (App. No. 2269/06), 15 January 2008, paras. 71-73.

[56] Agreement on Succession Issues between the Five Successor States of the Former State of Yugoslavia, adopted on 29 June 2001, 41(1) ILM (2002), 3-36.

[57] International Conference on the Former Yugoslavia, Arbitration Commission, "Opinion No. 14", 32(6) ILM (1993), 1587-1598, at 1594.

[58] *See* K. Halverson, *Privatization in the Yugoslav Republics*, 25(6) Journal of World Trade 43 (1991).

"a combination of modalities, including sale by open tender, more restricted purchase by voucher, and restitution of older properties to their pre-nationalisation owners."[59] In the case of Serbia the process of privatisation was conducted under a series of privatisation laws, and the one currently in force is the Privatisation Act adopted in 2014.[60] The income received through the privatisation has been primarily used to cover the debts of former socially-owned companies towards private creditors,[61] while the amount exceeding the debt becomes public revenue.

4.2. The ECtHR and socially-owned property – a misunderstanding from the very beginning: *Kačapor v. Serbia*

Within the ECtHR context, the problem of debts of socially-owned companies and socially-owned property in Serbia has been raised in a number of cases.[62] One of these issues concerned the responsibility of the state for failure to ensure the enforcement of final judgments rendered in favour of employees – on the basis of unpaid salaries and social contributions – after these socially-owned companies went bankrupt.

The first of these cases was *Kačapor and Others v. Serbia*. Six applicants argued that they were victims of a breach of Art. 6 of the ECHR and of Art. 1 of Protocol I to the ECHR. The reason for their claim was their inability to secure enforcement of final judgments. Domestic judgments were rendered due to the inability of their former employer, a socially-owned company, to pay mandatory social benefits. The non-enforcement of these judgments was the result of several factors: lack of funds in the accounts of the debtor as well as an insolvency proceeding where their claims were inconsistently treated, being confirmed in some instances, challenged in others, and disjoined from the proceeding in others.[63] The ECtHR concluded that "the Serbian authorities have failed to take necessary measures in order to enforce the judgments in question."[64] This case thus revolved around the enforcement of final judgments and the insolvency procedure. The rationale of the judgment was that the burden placed on the applicants in the course of the insolvency procedure was too heavy because the applicants were not given sufficient procedural guarantees in these proceedings.[65] While

[59] R.C. Williams, *Property*, 41 Studies of Transnational Legal Policy 363 (2010), at 383.

[60] Official Journal of Republic of Serbia, nos. 83/2014, 46/2015, 112/2015, 20/2016.

[61] Art. 41b of the Privatisation Act that was in force 2001-2014 [Zakon o privatizaciji], Official Journal of Republic of Serbia, nos. 38/01, 18/03, 45/05, 123/07, 123/07 i 30/10; Art. 94 of the Privatisation Act in force since 2014, Official Journal of Republic of Serbia, nos. 83/2014, 46/2015, 112/2015, 20/2016.

Arts. 22 and 23 of the Decree on Settlement of Debts of Subjects of Privatisations Toward Creditors [Uredba o načinu i uslovima izmirivanja obaveza subjekata privatizacije prema poveriocima], Official Journal of Republic of Serbia, nos. 45/2007, 108/2007, 127/2007, 60/2008 (Decree on Settlement of Debts).

[62] As of 12 February 2019 there have been 156 decisions of the ECtHR directly or indirectly involving issues of, or referring to, socially-owned property and socially-owned companies, available at: https://bit.ly/2IAZ97T (accessed 30 May 2019).

[63] *Kačapor and Others v. Serbia*, paras. 34-55.

[64] *Ibidem*, para. 116.

[65] *Ibidem*, paras. 109-116.

the emphasis in the judgment was that "irrespective of whether a debtor is a private or a state-controlled actor, it is up to the state to take all necessary steps to enforce a final court judgment, as well as to, in so doing, ensure the effective participation of its entire apparatus,"[66] the Court noted in passing – within its discussion on admissibility and the *ratione personae* context – that the state should be held responsible for debts of socially-owned companies.[67]

It is not clear from the Court's reasoning whether such responsibility is limited to insolvency proceedings involving socially-owned companies or can be extended to all liabilities of socially-owned companies. The Court's conclusions suffer from ambiguity for a variety of reasons. First, the Court easily resolved the important issue of attribution, but did so within the admissibility context rather than a judgment on the merits; and secondly it did not provide reasons for departing from the general rule of international law regarding attribution. The first error made by the Court seems to be in drawing a parallel between social and state property. However, even taking state property as a starting assumption does not resolve the issue of attribution that easily. Under general international law state ownership as such, without evidence of direct control over the entity with an instruction to not perform international obligations, cannot serve as the grounds for attribution.[68]

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[66] *Ibidem,* para. 108.

[67] "96. The issue arises therefore whether the State is liable for the outstanding obligations of the debtor, in particular whether it can be held responsible for the non-enforcement of the final judgments rendered in favour of the applicants.

97. The Court notes, in this respect, that the debtor is currently owned by a holding company predominantly comprised of social capital (*see* para. 56 above) and that, as such, it is closely controlled by the Privatisation Agency, itself a State body, as well as the Government (*see* para. 75 above), irrespective of whether any formal privatisation had been attempted in the past.

98. The Court therefore considers that the debtor, despite the fact that it is a separate legal entity, does not enjoy "sufficient institutional and operational independence from the State" to absolve the latter from its responsibility under the Convention (*see, mutatis mutandis,* ECtHR, *Mykhaylenky and Others v. Ukraine* (App. Nos. 35091/02, 35196/02, 35201/02, 35204/02, 35945/02, 35949/02, 35953/02, 36800/02, 38296/02 and 42814/02), 30 November 2004, para. 44).

99. "Accordingly, the Court finds that the applicants' complaints are compatible *ratione personae* with the provisions of the Convention, and dismisses the Government's objection in this respect" (*ibidem,* paras. 96-98).

[68] "The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital, or, more generally, in the ownership of its assets, the fact that it is not subject to executive control – these are not decisive criteria for the purpose of attribution of the entity's conduct to the State" (Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 5, in: *Report of the International Law Commission on the Work of Its Fifty-third Session*, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), reprinted in: J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge: 2002, at 100, para. 3).

"The fact that the State initially establishes a corporate entity, whether by a special law or otherwise, is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, prima facie their conduct in carrying out their activities is not attributable to the State unless

The only legal authority on which the Court relies in *Kačapor* is the *Mykhaylenky v. Ukraine* case, where the issue was quite different. It involved a state-owned company (not socially-owned) for nuclear energy, where the applicants negotiated and were in communication with the Ukrainian Ministry throughout, and where the enforcement proceeding failed because the Ukrainian Ministry refused to issue a specific authorization to the applicants.[69] Furthermore, in another case the Court clarified its *Mykhaylenky* rationale as follows:

> Factors taken into consideration by the Court include the rights conferred on the company, that is, whether those rights are normally reserved for public authorities (see, for instance, *Cooperativa Agricola*, cited above, §§ 18-19, where some State functions were delegated to the debtor company), the nature of its activity, that is, whether the legal entity exercises a public function or is a typical business, and the context in which it is carried out. (...) For instance, in *Mykhalenky and Others* the Court observed that the company had operated in the highly regulated sphere of nuclear energy and conducted its activities in the Chernobyl zone of compulsory evacuation, which is placed under strict governmental control, in that case extending, *inter alia*, to the applicants' terms of employment.[70]

This context could possibly have given rise to state responsibility, but none of these elements existed in *Kačapor* – neither ownership nor any contact with state authorities other than the Central Bank, which is normally involved in all insolvency proceedings when the collection of claims is sought to be done from the accounts of legal entities.

The *Kačapor* case presumably brings together the socially-owned character of the capital of debtors and the malfunctioning of the enforcement and insolvency proceedings so as to create a new ground for state responsibility. Had it been only for the malfunctioning of the procedural system for collecting claims on the basis of final and enforceable judgments, the Court's reference to the functional and structural independence of socially-owned companies[71] and the general authority of the Privatisation Agency over them[72] (that was not tested against the facts nor was it argued that Privatisation Agency intervened in any manner in the particular case) would be redundant and superfluous, and reliance on *Mykhaylenky* misplaced.

It must be noted that the conditions for attribution to the state of debts of companies in insolvency proceedings have been refined since *Kačapor*, at least with respect to other

they are exercising elements of governmental authority within the meaning of article 5." (Draft Articles on Responsibility of States for Internationally Wrongful Acts, Art. 8, p. 112, para. 6).

"In broad synthesis, tribunals have normally given effect to the separate legal personality of separate entities, and recognized that the mere fact that a State has created a separate entity, that it is its owner, or exercises a certain measure of general control over it (for instance by appointing its officers), is normally insufficient in and of itself to justify the attribution of its conduct." (S. Olleson, *Attribution in Investment Treaty Arbitration*, 31(2) ICSID Review – Foreign Investment Law Journal 457 (2016), at 472 (citing various decisions of international tribunals)).

[69] ECtHR, *Mykhaylenky and Others v. Ukraine* (App. Nos. 35091/02 et al.), 30 November 2004.

[70] ECtHR, *Liseytseva and Maslov v. Russia* (App. Nos. 39483/05 and 40527/10), 9 October 2014.

[71] *Kačapor v. Serbia*, paras. 96-98.

[72] *Ibidem*, paras. 71-76.

countries. In *Liseytseva v. Russia*, the Court set out the following conditions for state-owned companies in bankruptcy proceedings:

> In assessing whether a company enjoyed sufficient operational and institutional independence from the State, the Court has taken into account a wide range of factors, none of which is determinative on its own. The key criteria used to determine whether the State was indeed responsible for such debts were as follows: the company's legal status (under public or private law); the nature of its activity (a public function or an ordinary commercial business); the context of its operation (such as a monopoly or heavily regulated business); its institutional independence (the extent of State ownership); and its operational independence (the extent of State supervision and control).[73]

Arguably, both *Mykhaylenky* and *Liseytseva* follow the general international law rule on attribution, where "state ownership is only one of the relevant elements in a relatively restrictive test."[74] In *Liseytseva* the Court was quite sensitive to the general international law test and the criteria that needed to be assessed:

> The Court will assess the degree of the State or municipal authorities' actual involvement in the management of the enterprises' assets, including – but not limited to – disposal of the assets, the authorities' conduct in the liquidation and restructuring proceedings, giving binding instructions or other circumstances evidencing the actual degree of State control in a particular case in order to determine the issue of State responsibility for the debts of unitary enterprises. In other words, in order to determine the issue of State responsibility for the debts of unitary enterprises the Court must examine whether and how the extensive powers of control provided for in the domestic law were actually exercised by the authorities in a given case.[75]

Put differently, the discussion of control needs to be not only contextualised but scrutinised in order to assess whether the state used its ownership as a vehicle to effectuate a particular internationally unlawful act. None of these considerations were taken into account in *Kačapor*; therefore there was no search for evidence of the actual degree of state control in the particular case in order to determine the state responsibility for the debts of the enterprise in question.

While the reasons provided in *Kačapor* are regrettably obscure and vague (with only two paragraphs devoted to the Art. 1 of Protocol I analysis leading to its violation),[76] and not fully conclusive as to the relevance of property to attribution, the *Kačapor* decision has been used by the Court as the legal authority for subsequent cases.[77] The legitimate

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[73] *Liseytseva v. Russia*, para. 187 (references omitted).

[74] B. Mayert, M. Rajavuor, *National Fossil Fuel Companies and Climate Change Mitigation under International Law*, 44(1) Syracuse Journal of International Law 55 (2016), at 84 (making this conclusion against the *Mykhaylenky* and *Liseytseva* judgments).

[75] *Liseytseva v. Russia* (references omitted).

[76] *Kačapor v. Serbia*, paras. 119, 120.

[77] *E.g.* ECtHR, *Marčić and 16 Others v. Serbia* (App. No. 17556/05 et al.), 30 October 2007; *Crnišanin and Others v. Serbia* (App. No. 35835/05 et al.), 13 January 2009; *Rašković and Milunović v. Serbia* (App. Nos. 1789/07 and 28058/07), 31 May 2011; *Adamović v. Serbia* (App. No. 41703/06), 2 October

grounds for State responsibility in *Kačapor* was the malfunctioning of the insolvency proceeding, where creditors' claims were indeed unjustifiably challenged despite the fact that they were confirmed by courts' decisions in the form of *res judicata*.[78] However, this is where the relevance of *Kačapor* ends, because the property structure of the debtor in the insolvency proceeding did not seem to be an issue at all. It only creeped in as an *obiter dictum* that would pervade in later cases where the malfunctioning of insolvency proceedings would not be an issue.

Therefore, it is difficult to reconcile *Kačapor* with both general international law and the Court's own case-law on state property, with which it tends to equalise the concept of socially-owned property.

4.3. Kačapor as the "well-established case-law" and summary procedure progenies

Despite these innate deficiencies, *Kačapor* as such was still supposed to be read according to its own terms: debts of socially-owned companies were attributable to the state because of the operational and institutional control of the Privatisation Agency over the socially-owned company, coupled with the length and inefficiency of the insolvency procedure. Accordingly, in the absence of control by the Privatisation Agency or any other state agency directly involved, the *Kačapor* "precedent" would not be applicable. Also, a transformation of a socially-owned to a privately-owned company would equally remove responsibility under the *Kačapor* terms. If the Privatisation Agency was not in control nor was company socially-owned, that would make *Kačapor* even less persuasive as authority.

Yet *Kačapor* served as the "well-established case-law" for the Court to launch the Art. 28(1)b summary procedure in the cases that followed, even though these cases differed from *Kačapor*. For example, in *Klikovac and Others v. Serbia*, the first summary procedure case which relied on *Kačapor* as its basis, the applicants – unlike the applicants in *Kačapor* – did manage to enforce their claims before domestic courts, even if only in part: "[t]he [municipal] court ordered the partial settlement of all creditors in proportion to their claims and the amount obtained through the sale."[79] This is not an unusual result for any bankruptcy proceeding, where creditors are usually entitled to settlement of their claims in proportion to the amount obtained through the sale of debtor's property. In addition, in *Klikovac* the proceedings before the Constitutional Court were still pending. Despite the fact that local remedies were not exhausted and that applicants were partially settled as other creditors, contrary to the facts and rationale of *Kačapor* the Committee nevertheless relied on *Kačapor* to establish state responsibility and order the respondent state to "pay the outstanding debt owed to the applicants under the final judgment."[80] In the next summary procedure case on socially-owned companies,

2011; *Marinković v. Serbia* (App. No. 5353/11), 22 October 2013; *Petrović v. Serbia* (App. No 40485/08), 15 October 2014.

[78] *Kačapor v. Serbia*, paras. 44-55.

[79] ECtHR Committee, *Klikovac and Others v. Serbia* (App. No. 24291/08), 5 March 2013, para. 11.

[80] *Ibidem*, para. 24.

Stojilković and Others v. Serbia, the claims of the applicants based on domestic judgments were actually fully enforced in domestic proceedings, but the Committee still awarded damages for non-pecuniary loss due to the delayed enforcement procedure (enforcement lasted six years).[81] This Committee's judgment was also based solely on *Kačapor*.

Andjelić, the third case in line, involved 167 applicants. The Committee here relied again on *Kačapor* to find Serbia responsible for the debts of socially-owned companies with the following conclusion:

> The Court observes that the judgement at issue concerns the debtor's liabilities incurred in the period between 1 July 2001 and 13 July 2003, when the debtor was a socially-owned company. It is further observed that the privatisation of the debtor was annulled on 8 April 2008, and that the debtor is now completely owned by the State.[82]

It seems that it was both who incurred the debt and the status of the debtor at the time of the Committee's judgment that mattered in terms of its reliance on *Kačapor*. However, in the *Andjelić* case there was another relevant factor distinguishing it from the previous cases – privatisation. It seems that the Committee tried to go around the privatisation in order to distinguish the debt that was susceptible to attribution, while at the same time clarifying the criteria of attribution in cases of privatisation. It is arguable though that privatisation as such, i.e. transformation to private property owned by a private legal person, made the case sufficiently distinguishable to depart from *Kačapor*. Still, the Committee made an effort to circumvent privatisation and focus on the debt incurred by socially-owned company in order to follow the *Kačapor* line of cases.

4.4. Kačapor revisited and extended to private debts: a new summary procedure

In the *Marinković v. Serbia* Chamber judgment, adopted several months after *Andjelić*, the Court adopted different criteria:

> The Court is aware that the debtor is no longer a State-controlled entity. What is crucial however is that the domestic judgments rendered in the applicant's favour became final in September 2007 when the debtor operated as a State-controlled entity. In view of that and the Court's case law cited above, the Court finds that the respondent State is directly responsible for the enforcement of the domestic judgements under consideration in this case.[83]

In *Marinković* case it was the applicant's former employer who owed him salaries and certain social benefits, as confirmed by final judgments. The employer was a socially-owned company that was privatised in 2002 and in private ownership until 2007, when the agreement was terminated due to the default of the buyer.[84] The debt that was

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[81] ECtHR Committee, *Stojilković and Others v. Serbia* (App. No. 36274/08), 5 March 2013.

[82] ECtHR Committee, *Anđelić and Others v. Serbia* (App. No. 57611/10 et al.), 28 May 2013, para. 32.

[83] *Marinković v. Serbia*, para. 40.

[84] *Ibidem*, paras. 25-27.

incurred originated from the period of the private ownership of the company, but the judgments were rendered and became final during the second period of socially-owned capital of the employer and just before the shares of the employer were again sold to a private company.[85] More precisely, the Privatisation Agreement was terminated on 17 July 2007 "because the buyer in question had failed to fulfil his contractual obligations,"[86] whereas the judgments became final on 11, 20 and 22 September 2007 respectively.[87] The Court again relied on *Kačapor* and concluded as follows: "in such cases the State is directly liable for the debts of State-controlled companies irrespective of the fact whether the company at issue at one point operated as a private entity."[88]

Therefore, the Court continued to rely on *Kačapor* even in cases where debts were incurred by privately-owned companies during their private ownership of capital. After rendering just one further Chamber judgment – in the *Jovičić and Others v. Serbia* case[89] – the Court promptly moved again to the summary procedure under Art. 28(1)b.

In *Jovičić and Others v. Serbia* eight applicants claimed damages for violations of Arts. 6 and 13 of the Convention, and Art. 1 of Protocol No. 1 due to the fact that they could not collect the full amount of their claims in insolvency proceedings. They all had enforceable judgments in their favour for unpaid salaries and social contributions that were due to them by the socially-owned company. The local company went through several ownership transformations: before 2002 it was socially-owned, but was privatised at the end of that year. From December 2002 to 17 July 2007 it was a privately-owned company.[90] During this period of five years – in which its capital was private – the local company performed its activities and executed transactions with full independence and acquired private profit from business transactions. The privatisation was cancelled due to the breach of contractual provisions of the Privatisation Agreement.[91] In other words, during the period of five years there was a contractual relationship between the private person and the Privatisation Agency, which is distinct from operational or institutional control. Following the cancellation of the contract, the majority of the capital reverted to socially-owned status.[92] The capital that was socially-owned was sold again by the Privatisation Agency in December 2008, when the company again became fully privately-owned.[93] Thus the company was in an ownership status other than private for only approximately a year and a half. Then the shares of the company were sold at the stock market and the company thus reverted back to private ownership again.

The majority of the unenforced judgments that constituted the cause of action before the European Court of Human Rights were rendered in the period June-

[85] *Ibidem*, para. 28.
[86] *Ibidem*, para. 26.
[87] *Ibidem*, paras. 10, 14, 18.
[88] *Ibidem*, para. 39.
[89] ECtHR, *Jovičić v Serbia* (App. No. 37270/11), 13 January 2015.
[90] *Ibidem*, paras. 15-16.
[91] *Ibidem*, para. 16.
[92] *Ibidem*, para. 17.
[93] *Ibidem*, para. 18.

September 2006,[94] i.e. during the period of private ownership. More precisely, as each of the applicants had two or three judgments in their favour, there were a total of 21 judgments that constituted the claim for breach of the Convention.[95] Out of the 21 judgments, 16 were handed down between June and September 2006, while out of the remaining five there were only two that became final in 2008 before the shares were sold to private company; while three became final in 2009 after sale of the company's shares on the stock market. In July 2010 an insolvency proceeding was opened against the (privately owned) debtor,[96] which was still ongoing at the time the ECtHR judgment was handed down.[97]

The question arises: How did *Kačapor* and subsequent cases fit the factual matrix of *Jovičić*. If the *Marinković* criterion is applied, i.e. the ownership of the debtor at the time of finality of the domestic judgments, it turns out that only two out of 21 judgments became final during the social ownership of the company, while 19 were rendered when it was privately-owned. In addition, the dates of the judgments (2006) and their description demonstrate that the debts which constituted the cause of action before domestic courts were incurred by the private company, which failed to pay its employees. This factual scenario is thus contrary to the rationale relied upon by the Court in the *Kačapor* and *Andjelić* cases. Finally, at the time of rendering the ECtHR judgment in 2015, the company was again private. In other words, whatever the criteria that were adopted (ownership at the time of domestic judgments, at the time of the ECtHR judgment, or the origin of the debt) they could not lead to state responsibility in *Jovičić* case. It is difficult to square the previous case law of the ECtHR, even on the basis of an extensive reading of *Kačapor* (and its successive progenies) and general rules of international law with the findings of the Court that the respondent state in this case was held responsible for all the debts of a private company.

What seems to be the crucial difference between, on the one hand, *Kačapor* and the line of cases that followed – which dealt solely with the debts of socially-owned companies – and on the other *Marinković* and *Jovičić*, where there was a private debt, is the fact that in the latter cases there was privatisation. The intervening fact of finalised privatisations should be qualified as a matter that distinguishes between the *Kačapor* line of cases and *Jovičić*, because it is the contract-based privatisation which transformed the position of the creditors and excluded the control of the state. The Court simply disregarded the contractual relationship between the buyer and the state, as well as the domestic legal framework and the possibility for creditors to collect their claims from both their company and the buyer (ignoring the fact that in certain cases some debts were fully settled).[98] For the sake of clarification, it was an upper threshold liability that

[94] *Ibidem,* Appendix to the Judgment.

[95] *Ibidem.*

[96] *Ibidem*, para. 8.

[97] *Ibidem,* para. 14.

[98] According to the Decree on Settlement of Debts of Subjects of Privatisation Towards Creditors [Uredba o načinu i uslovima izmirivanja obaveza subjekata privatizacije prema poveriocima], Official Journal of

was applied to the state, as it was held responsible not only for the procedural guarantees applicable in the course of any insolvency proceeding, but for the full amounts granted by the judgments.[99]

It seems that in *Jovičić* the Court too easily and too lightly mixed a very different factual matrix with the one in *Kačapor*, which was distinct from the former in many aspects. While *Kačapor* is itself open to criticism and discussion, the errors made in *Jovičić* can hardly be justified at all – neither by reference to the Court's case law, and even less by reliance on general international law or national law. The policy repercussions are grave: failed privatisations in which private owners incurred huge debts now loom as a potential public debt, even if the company becomes re-privatised.[100] The Court did not spend much ink on explaining why this should be the case.

This however is not the only repercussion of *Jovičić*, because it turned out that the case which made the questionable link between private debts and state responsibility also served as the "well-established case-law" for the purpose of Art. 28(1)b. In consequence all similar cases were diverted to a summary procedure, which ultimately made this and other rulings permanently irreversible due to the manifest lack of remedies against judgments delivered under Art. 28(1)b.[101]

Republic of Serbia, nos. 45/2007, 108/2007, 127/2007, 60/2008 (Decree on Settlement of Debts) all creditors were entitled to either register their monetary claims before the privatisation in order to collect them from the purchase price, or alternatively from private creditors; or to abstain from registration of the claims (debt write-off toward the company and the buyer) and submit it later after the privatisation to the privatised company in order to enter into a contract for settlement of the debt. According to the Privatisation Act and the Decree on Settlement of Debts there are two types of creditors: state creditors; and other creditors (Art. 2 of the Decree the on Settlement of Debts). Other creditors include all natural and legal persons other than state creditors who may write-off their claims preceding privatisation in order to collect their claims from the purchase price (Art. 2(4) of the Decree on Settlement of Debts). State creditors have to release their claims and can collect them only from the purchase price (Art. 2(3)). The settlement of released debt will be finalised only up to the price received from privatisation and proportionally to other claims (Art. 17(5)).

[99] "Referring to the given institutional and operational dependence of the (predominantly) socially owned companies from the State, the Court found in R. Kačapor and others v. Serbia that the State should be held liable not only for the nonenforcement of judgments that had been rendered against companies (predominantly) comprised of socially owned capital, under Article 6(1) of the Convention, but also for the outstanding obligations of these debtors, under Article 1, Protocol 1 of the Convention. As a result, the Court awards nonpecuniary damages for the failure of State to enforce its final judgments, and at the same time it orders the State to pay from its own funds the sums awarded to the applicants by the given judgments." (D. Popović, T. Marinković, *Serbia: The emergence of the human rights protection in Serbia under the European Convention on Human Rights: The experience of the first ten years*, in: I. Motoc, I. Ziemele (eds.), *The Impact of the ECHR on Democratic Change in Central and Eastern Europe*, Cambridge University Press, Cambridge: 2016), at 381.

[100] "In 2010, there were approximately 3,570 domestic judgments rendered against socially-owned enterprises in this respect, with an aggregate amount of approximately 2.7 billion RSD (costs and interest not included)." (Serbia Judicial Functional Review, Multi-Donor Trust Fund for Justice Sector Support in Serbia, Report No. 94014-YF World Bank, 2014, at 140, para. 62, available at: http://www.vk.sud.rs/sites/default/files/attachments/Serbia%20Judicial%20Functional%20Review-Full%20Report.pdf (accessed 30 May 2019)

[101] So far there have been six cases, involving 40 applicants, decided on the basis of *Jovičić* where the issue was the debt of a private company: ECtHR Committee, *Rakić and Sarvan v. Serbia* (App. Nos. 47939/11

5. THE CONCEPT OF "WELL-ESTABLISHED CASE-LAW": DO WE KNOW IT WHEN WE SEE IT? LESSONS LEARNED FROM SERBIAN CASES

The cases discussed above, such as *Kačapor* and *Jovičić*, demonstrate the unreliability of the concept of "well-established case-law". In order to understand how the Court decides to rely on a particular case in order to move to the summary procedure, we first need to start with Protocol 14.

In the Explanatory Report to Protocol 14 there is a definition of the "well-established case-law" for the purpose of Art. 28:

> 'Well-established case-law' normally means case-law which has been consistently applied by a Chamber. Exceptionally, however, it is conceivable that a single judgment on a question of principle may constitute 'well-established case-law', particularly when the Grand Chamber has rendered it.[102]

While this approach seems to imply that consistency should be coupled with several decisions adopted by a Chamber to result in a settled jurisprudence capable of bearing the name of "well-established case-law", it is nevertheless true that this will be a matter of interpretation.[103] On the other hand, the Court has used the concept of "well-established case-law" or "established case-law" in various decisions, without any further clarifications.[104] It seems that, at least for the Court, it is a self-evident concept.

Another approach to classifying the Court's case law for the purpose of Art. 28(1)b of the Convention could be carried out on the basis of the Court's database (HUDOC). According to the classification offered therein, judgments could be grouped according

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and 56912/11), 20 October 2015; *Tomović and 18 Others v. Serbia*, (App. No. 5327/11 et al.), 24 February 2015; *Gavović v. Serbia*, (App. No. 13339/11), 24 February 2015; *Lučić v. Serbia* (App. No. 13344/11), 24 February 2015; *Stoković and 17 Others v. Serbia* (App. No. 75879/14 et al.), 8 March 2016. The total amount of damages awarded on the account of responsibility of state for private debts so far has been around 80,000 EUR with respect to non-pecuniary damage, costs and expenses, which is in addition to amounts that the state was ordered to pay on the basis of national judgments that remained unenforced.

In other cases where *Jovičić* also served as a leading case for summary procedure, such as: ECtHR Committee, *Milenković and Veljković v. Serbia* (App. Nos. 7786/13 and 47972/13), 20 October 2015; *Šerifović and 2 Others v. Serbia* (App. No. 5928/13 et al.), 20 October 2015); *Blagojević and 14 Others v. Serbia* (App. Nos. 61604/10), 20 October 2015, *Koka Hybro Komerc DOO Broyler v. Serbia* (App. No. 59341/0), 14 March 2017, there were ongoing bankruptcy proceedings at the time the ECtHR delivered its judgments. It turned out that in three out of four cases (*Milenković, Blagojević, Koka Hybro Komerc DOO Broyler v. Serbia*), the bankruptcy proceedings were successfully finalised (available at: for *Blagojević* (http://www.priv.rs/Arhiva/9534/Prodata-imovina-leskovackih-stecajnih-duznika.shtml), for *Milenković* (http://www.priv.rs/Arhiva/11561/Odrzana-prodaja-imovine-stecajnih-duznika-DP-PK.shtml; for *Koka Hybro Komerc DOO Broyler* (https://bit.ly/2XgtpN0) (all accessed 30 May 2019).

[102] Explanatory Report, *supra* note 17, para. 68.

[103] "Whether case law is well-established or not is obviously a matter of interpretation." (Keller et al., *supra* note 22, at 1034).

[104] The Court has used the phrase "well-established case-law" in 559 judgments and the expression "established case law" in 1,947 cases. See: https://bit.ly/2VgXGJR (accessed 30 May 2019).

to their importance in order to be ranked on one of three levels.[105] The question is which group of decisions might possibly serve as unquestionable rules for future cases. Since level one gathers most important decisions, it could be seen as an instinctive choice, since these decisions "make a significant contribution to the development, clarification or modification of its case-law, either generally or in relation to a particular State."[106] However, this still does not represent judgments which resulted from continuous and consistent practice – this seems to be reserved for decisions in the third group, which apply to "existing case-law".[107] Returning to the case law that was surveyed and analysed above, according to the HUDOC database neither the *Kačapor* nor *Jovičić* cases belong to level one (high importance) decisions. Interestingly, *Kačapor* was classified as a level three (low importance) decision, even though it is arguably the first one which dealt with the debts of socially-owned companies. *Jovičić* also belongs to the same group. Yet both these cases have triggered the Art. 28(1)b procedure, so presumably they are deemed to represent "well-established case-law".

The purpose of the review of case law involving Serbia and socially-owned companies has been not only to discuss discrepancies in the Court's reasoning, but also to illustrate inconsistencies which are incompatible with the concept of "well-established case-law". Yet both the *Kačapor* and *Jovičić* decisions have served as grounds for introducing the summary procedure. While we have disputed the link between *Kačapor* and *Jovičić* due to the character of ownership and the date of finality of judgments in light of the *Marinković* case, the Court nevertheless has proceeded and used both cases as the benchmarks for "well-established case-law". The problem with this set of cases – which may indicate the risks inherent in the summary procedure itself – is that the choice of the procedure and choice of the relevant case-law is difficult, if not impossible, to challenge or refute.

CONCLUSIONS

Reforms of the ECtHR system were needed in order to save it from the collapse that was imminent due to the growing number of incoming applications. The system deserves salvation due to its unique success and reputation, as it has managed to provide

[105] 1 = High importance – judgments which the Court considers make a significant contribution to the development, clarification or modification of its case-law, either generally or in relation to a particular state.

2 = Medium importance – judgments which do not make a significant contribution to the case-law but nevertheless do not merely apply existing case-law.

3 = Low importance – judgments with little legal interest: those applying existing case-law, friendly settlements and striking-out judgments (unless these have a particular point of interest).

Short Survey of the Main Judgments and Decisions Delivered by the in 2009: *Annual Report 2009 of the European Court of Human Rights* 73, available at: http://www.echr.coe.int/Documents/Short_Survey_2009_ENG.pdf (accessed 30 May 2019).

[106] *Ibidem.*

[107] *Ibidem.*

effective protection of human rights all across Europe. At the same time however, its salvation should not compromise the basic constitutional principles of the Court's system. In particular, the reforms should not gravely affect the procedural fairness which the system itself wishes to promote. The goal cannot always justify the means employed, especially when sensitive issues of human rights, procedural fairness, and public interest are at stake.

The authors have tried to expose the innate weaknesses of the Court's jurisprudence on socially-owned property in order to illustrate how a low ranking judgment (or two) can easily be transformed into the "well-established case-law", leading to summary procedures without a genuine procedure on the merits and without remedies. Debts of socially-owned companies have thus become a public debt contrary to the general rules of international law and even the Court's own jurisprudence on public and private property. The case law that was borne out of the Art. 28 procedure, as illustrated in the cases involving Serbian socially-owned companies and their debts, demonstrates the risks inherent in the lack of remedies against the choice of relevant law for the case at hand, which can further lead to some significant errors in interpretation and decision-making. This in turn proves that the lack of procedural safeguards can indeed lead to substantive deficiencies.

One of the possible ideas for future reforms of the Court could be the introduction of some form of review mechanism for summary procedures, bearing in mind the importance of having settled jurisprudence, both for the Court and for effective national implementation of the Convention. Given that the Grand Chamber has been vested with power to review judgments of Chambers where the consistency of interpretation might be at stake, it seems appropriate to open the door for a new competence of the Grand Chamber to review Committees' judgments on precisely the same grounds, in order to remedy inconsistencies in interpreting "well-established case-law".

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THE METHOD OF NEW POSITIVISM AS ELABORATED BY LUDWIK EHRLICH

Abstract:
This article is an attempt to identify the essence of new positivism, described by Ludwik Ehrlich as a method of interpretation of international law. The evolution of his views on international law is examined with respect to the place of this method from the beginning of 1920s until his retirement in 1961. The article expounds on both the theoretical and methodological aspects of new positivism, according to which judicial decisions should be taken into account in addition to international treaties and customs for the determination of international law. The question of the obligatory force of international law is discussed as being related to the principle of good faith, which is at the core of Ehrlich's views on international law. The article offers suggestions on how the method of new positivism might be used and what tasks it can fulfil today. It also makes an attempt to critically analyse Ehrlich's method and to characterize it both in general and in the context of the theory of international law.

Keywords: Ludwik Ehrlich, Polish science of international law, principle of good faith, new positivism, case law, international responsibility

INTRODUCTION

Despite the fact that the science of international law emerged almost a half-millennium ago, so far there are still a lot of discussions among scholars about whether international law is "law" in the narrow sense and what is the most effective way of understanding it. The theoretical significance of these issues is apparent, and one cannot deny that their consideration also affects the manner in which relations between states are regulated in general. On one hand, the sharp contradictions between naturalists and positivists in the past do not seem so relevant from the standpoint of the present state of affairs in international law. Nevertheless legal positivism still remains a rather

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meaningful concept, which is given a particular meaning and role by each scholar. Actually, this article is devoted to the method of "new positivism" elaborated by Ludwik Ehrlich, whose personality and achievements most probably do not require introduction to the readers of the present journal devoted to international law. Although the name of his method might seem at first glance to constitute a variation of legal positivism, after thoroughly scrutinizing its theoretical aspects such a presumption might be put in doubt.

Several important issues for the science of international law are considered in the present study. Their relevance is determined in large measure by the need for the development of the system of international law as a body of norms, striving to ensure order and security in international relations and relying on existing ideals. At the same time, the international legal doctrine serves as an important – if not the most important – basis for recognizing such ideals. What's more, it facilitates bringing them into effect. In fact, both in the past as well as today many writers have tried to discover and disclose the nature of international law in general, leading to making a distinction between the two classic approaches mentioned above as early as in the 17th century. These approaches have gone through many different modifications and interpretations since then. There are also plenty of recent works on the methodology of international law which have deepened its theoretical foundations taking in account the present situation.[1] In general positivism, which is one of the theoretical foundations, encompasses a number of different theories that understand law in the way in which it exists, while naturalism encompasses a search for the ideal way. From the methodological point of view, a positivist approach relies on two key elements: dogmatism ("the law in force is undisputedly taken for granted"); and formalism ("legal phenomena are limited to the texts of sources of law").[2] The research of Jianming Shen even contained an explanation of so-called 'neo-positivism' as a contemporary doctrine, although it differed slightly from the 'new positivism' which is the focus of this article.[3] At the same time, a number of features of Ehrlich's method, as well as his approach to international law in general, have not been described before in the legal science, and their appraisal against the background of the 20th century international law scholarship has not been appropriately formulated. In particular, the scope of the research undertaken in this article also deals with the issue of court decisions as sources of international law. Although the jurisprudence of the International Court of Justice (ICJ) cannot, by any means, be seen as a primary source according to Art. 38 of its Statute, there are fewer and fewer doubts about the fact that the ICJ does affect the future of interstate relations. It is worth mentioning

[1] *E.g.* A. Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking*, Oxford University Press, Oxford: 2017; J. D'Aspremont, J. Kammerhofer (eds.), *International Legal Positivism in a Post-Modern World*, Cambridge University Press, Cambridge: 2014.

[2] O. Merezhko, *Введение в философию международного права. Гносеология международного права* [Introduction to the philosophy of international law. Gnoseology of international law], Юстиниан, Киев: 2002, p. 21.

[3] J. Shen, *The Basis of International Law: Why Nations Observe*, 17 Penn State International Law Review 287 (1999), pp. 330-333.

that scholars representing the various existing groups of legal systems have contributed to this discussion in recent years.[4]

Ehrlich's way of legal thinking was very specific. After being educated in the traditions of the civil law system he moved to Oxford, collaborating there with Paul Vinogradoff, whose concept of law had been expanded by the common law usage of legal precedents.[5] Afterwards, Ehrlich worked at the University of California (Berkeley), but his works there were dedicated more to political questions than legal ones. Thus, his establishment as a scholar during the 1913-1920 period was determined by common law concepts. Moreover, he was not just a brilliant theoretician, publishing one of the best textbooks on international law in Eastern Europe, but also a distinguished practitioner, with experience in carrying out the duties of a judge in the proceedings of the Permanent Court of Justice.

The personality of Ehrlich is gaining more and more interest among not only contemporary Polish but also contemporary Ukrainian scholars. Adam Redzik conducted a study in order to determine the circumstances in which the Faculty of Law at the Jan Kazimierz University developed throughout the second quarter of the 20th century.[6] Moreover, he presented the idea of diplomatic studies, initiated by Ehrlich in 1930.[7] Based on LRSA materials,[8] he put much effort into making both some biographical data as well as the scientific contributions of Ehrlich available to the public. In addition, Redzik was the author of the first biographical note on Ehrlich in the Ukrainian language.[9] Tomasz Pugacewicz, another modern Polish scholar, has been deeply engaged in exploring Ehrlich's heritage. He showed Ehrlich's life path and achievements in more detail, assessing his remarkable contribution to the development of both the Polish and European science of international relations.[10] Owing to unfortunate historical circum-

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[4] *See* A. Von Bogdandy, I. Venzke (eds.), *International Judicial Lawmaking: On Public Authority and Democratic Legitimation in Global Governance*, Springer, Heidelberg: 2012; A. Von Bogdandy, I. Venzke, *In Whose Name? A Public Law Theory of International Adjudication*, Oxford University Press, Oxford: 2014; P. Webb, *International Judicial Integration and Fragmentation*, Oxford University Press, Oxford: 2013; K. Alter, L. Helfer, M. Madsen (eds.), *International Court Authority*, Oxford University Press, Oxford: 2018.

[5] *See* P. Vinogradoff, *Common Sense in Law*, Henry Holt and Company, New York: 1914.

[6] *See generally* A. Redzik, *Wydział Prawa Uniwersytetu Lwowskiego w latach 1939–*1946 [The Faculty of Law of the Lviv University in 1939-1946], Towarzystwo Naukowe KUL, Lublin: 2016.

[7] A. Redzik, *Lwowska szkoła dyplomatyczna. Zarys historii Studium Dyplomatycznego przy Wydziale Prawa Uniwersytetu Jana Kazimierza we Lwowie (1930–1939)* [Diplomatic school of Lviv. The outline of the history of the Diplomatic Studies at the Faculty of Law of Jan Kazimierz University in Lviv], 5 Polski Przegląd Dyplomatyczny 121 (2006).

[8] LRSA stands for the Lviv Region State Archive, where one can find archival materials related to Ehrlich's study and work at Jan Kazimierz University.

[9] A. Redzik, *Ерліх (Ehrlich) Людвік* [Ehrlich Ludwik], in: O. Vakarchuk et al. (eds.), *Encyclopedia. Львівський національний університет імені Івана Франка: в 2 т. Т. 1.: А – К* [Encyclopedia. Lviv National Ivan Franko University, in two volumes. Vol. 1: A – K], ЛНУ імені Івана Франка, Львів: 2011, p. 482.

[10] T. Pugacewicz, *Dorobek badawczy i organizacyjny Ludwika Ehrlicha na tle rozwoju nauki o stosunkach międzynarodowych w Polsce do 1950 roku* [Scientific heritage and organizational achievements of Ludwik Ehrlich against the background of the development of the science of international relations in Poland after

stances, the Polish science of international law still has many blank spots concerning the first half of the 20th century. But one recent study in the form of a monograph has shed some light on the past of international law within the confines of the University of Lviv.[11] Ihor Zeman is one of the few Ukrainian scholars who works at this university and draws attention to the history of the science of international law therein. He dedicated a part of his monograph to the formulation of Ehrlich's school of international law (as he called it). The research interests of this school include the theory of international law, international justice, the law of international security, the subjects of international law, human rights protection, the law of international treaties, and air law.[12] Moreover, the personality of Ehrlich was mentioned in the articles on the history of the Polish science of international law by such Ukrainian writers as Oleksandr Merezhko,[13] Myroslav Kurtynets,[14] and Volodymyr Lysyk.[15] Some of his theoretical concepts have also been described by the author of the present article.[16] It should be added that the number of works related to the heritage of Ehrlich will increase in the near future due

1950], 1 Przeszłość – Teraźniejszość – Przyszłość. Problemy badawcze młodych politologów 133 (2010); T. Pugacewicz, *Ludwik Ehrlich (1889-1968): prekursor nauki o stosunkach międzynarodowych w Polsce* [Ludwik Ehrlich (1889-1968) as a precursor of the science of international relations in Poland], 3 Politeja: Pismo Wydziału Studiów Międzynarodowych i Politycznych Uniwersytetu Jagiellońskiego 173 (2011); T. Pugacewicz, *Nauka o stosunkach międzynarodowych w koncepcji Ludwika Ehrlicha* [The science of international relations in the concept of Ludwik Ehrlich], 54 Stosunki Międzynarodowe 231 (2018).

[11] I. Zeman, *Наука міжнародного права у Львівському університеті* [The science of international law in the University of Lviv], *ЛНУ імені Івана Франка*, Львів: 2015.

[12] *Ibidem*, pp. 166-204.

[13] A. Merezhko, *Польская наука международного права: история и современность* [The Polish science of international law: its history and the present state], 3 *Альманах международного права* 111 (2011).

[14] M. Kurtynets. *Зародження сучасної науки міжнародного права у Польщі в міжвоєнний період* [The emergence of the modern Polish science of international law in the interwar period], 3 Форум права 234 (2010).

[15] V. Lysyk, I. Zeman. Развитие науки международного права в Львовском университете [The development of the science of international law in the University of Lviv], 3 Альманах международного права 78 (2011).

[16] A. Hachkevych, *Теорія природного договору як підстава обов'язкової сили норм міжнародного права (на основі поглядів Людвіка Ейрліха)* [The theory of social contract as the basic obligatory force of international law norms (based on the views of Ludwik Ehrlich], 3 *Право України* 120 (2009); A. Hachkevych, *Теорія «протилежних течій» у міжнародному праві* [The theory of fundamental differences in international law], 38 *Актуальні проблеми політики* 392 (2009); A. Hachkevych, *Основні права та обов'язки держав: концепція Л. Ейрліха* [Fundamental rights and the duties of states in the concept of L. Ehrlich], 2 Проблеми міжнародних відносин 54 (2011); A. Hachkevych, *К вопросу о правосубъектности вольного города Гданьска (на примере трудов Л. Эрлиха)* [The Free City of Gdansk: the question of legal personality in the works of L. Ehrlich], 18 Humanities and Social Sciences 41 (2013); A. Hachkevych, *Ludwika Ehrlicha koncepcja podmiotowości prawnomiędzynarodowej (wybrane aspekty)* [Selected issues on the concept of Ludwik Ehrlich of international legal personality], 5 Prawo i Polityka 138 (2014); A. Hachkevych, *Життєвий шлях і наукова спадщина Людвіка Ерліха* [The life and scientific heritage of Ludwik Ehrlich], 1 *Порівняльно-правові дослідження* 74 (2014); A. Hachkevych, *Ludwik Ehrlich. Krakow Period of His Life (1940-1968),* 22 Humanities and Social Sciences 85 (2017).

to the outcomes of scientific events honouring his legacy.[17] This in no way seeks to diminish the value of the studies associated with the name of Ehrlich conducted in the second half of the 20th century.

1. THE FOUNDATIONS FOR THE DEVELOPMENT OF NEW POSITIVISM IN EHRLICH'S EARLY STUDIES

The formation of Ehrlich as a scholar was shaped by the traditions of both civil law and common law academic institutes in the process of his studies in Lviv (1907-1912), Halle (1912-1913), Berlin (1913) and Oxford (1913-1915). A list of the subjects he was lectured on at Jan Kazimierz University includes the most important branches of law and some rather theoretical disciplines related to the science of law. During academic courses students were encouraged to learn textbooks by heart and to obtain knowledge of the provisions of legal acts, whereas hardly any attention was paid to court decisions. Considering his development in political sciences and administrative law following his graduation, it would seem unexpected that Ehrlich became an international lawyer. In this regard one fact is worth pointing out. For half a year in 1912 he edited a monthly students' journal called "Prawnik", where the article "Żywe prawo ludów Bukowiny" – written by another famous Ehrlich (Eugen) – was published in a Polish translation.[18] In Germany (1912-1913) he attended courses by the renowned German scholars Edgar Loening and Gerhard Anschutz, who specialized in administrative and constitutional law, respectively. There was an interesting interconnection between them, because Loening was a mentor of Anschutz and a student of Johann Kaspar Bluntschli, an internationally-recognized Swiss scholar in the field of international law.[19] Moreover, the primary fields of Ehrlich's research covered issues of academic management along with the structure of the University of Oxford,[20] the constitution of the Halych elderships[21],

[17] By virtue of persistent efforts on the part of the Institute of International Relations at the University of Warsaw, The Polish Institute of International Affairs, and the Faculty of International Relations at the University of Lviv, a conference "The force of law instead of the law of force. Ehrlich's school of the science of international relations and international law" ("Siła prawa zamiast prawa siły. Ehrlichowska szkoła nauki o stosunkach międzynarodowych oraz prawa międzynarodowego") was held at Lviv and Sanok from 17-19 May 2018. In addition, Ehrlich's contributions to the science of international law have been discussed at several conferences since the beginning of the 21st century, including one organized by the Leipzig Centre for the History and Culture of East-Central Europe and the Ivan Franko National University of Lviv (26-29 August 2015).

[18] E. Ehrlich, *Żywe prawo ludów Bukowiny* [The living law of Bukovina's people], 5 Prawnik. Miesięcznik wydawany przez Bibliotekę słuchaczów prawa we Lwowie 155 (1912); E. Ehrlich, *Żywe prawo ludów Bukowiny (Dokończenie)* [The living law of Bukovina's people (Conclusion)], 6 Prawnik. Miesięcznik wydawany przez Bibliotekę słuchaczów prawa we Lwowie 191 (1912).

[19] M. Stolleis, *Public Law in Germany 1800-1914*, Berghahn Books, New York: 2001, pp. 275, 332.

[20] L. Ehrlich, *Zarys organizacyi uniwersytetu w Oxfordzie* [Outline of the organizational structure of Oxford University], II Prawnik. Miesięcznik wydawany przez Bibliotekę słuchaczów prawa we Lwowie 463 (1914).

[21] L. Ehrlich, *Starostwa w Halickiem w stosunku do starostwa Lwowskiego w wiekach średnich (1390-1501)* [Relationships between the Halych Elderships and the Lviv Eldership in the Middle Ages (1390-1501)], Towarzystwo dla Popierania Nauki Polskiej, Lwów: 1914.

Polish cultural identity,[22] the history of the Slavic people,[23] etc. In the course of the First World War he became interested in its impact on political science[24] and the effect of British wartime legislation.[25] His first scientific paper generalizing the consideration of case law was presented in collaboration with Paul Vinogradoff (in two volumes).[26] They summarized the jurisprudence of the period of the reign of Edward II and provided the translation of judicial decisions from Latin or French into English. Ehrlich also made great efforts to contribute to the shaping of the powers of the new Polish state by calibrating the principles of distribution of power and separation of powers to the then-present day circumstances.[27] At the beginning of the 1920s he supported the idea of applying the theory of precedents to Polish public law.[28] Ehrlich stated that the principle of uniformity, by which he most probably meant recognition of the law-making function of the judge, was opposite to the principle according to which "the judge was nothing but a blind machine for automatically announcing the consequences of an actual situation as determined by law."[29]

His earliest views on international law emerged under circumstances which were favourable toward increasing its role both in Poland and the rest of the world. Firstly, the regaining of Polish independence posed the need to seek legal ways to protect its national interests on the international arena, using all available means. Secondly, consequences of the First World War highlighted the need for a special regime – one established by the international society – to ensure international justice and to avoid further wars. At that time Ehrlich was not sufficiently acquainted with international law as a science, as his previous scope of research had encompassed very different issues. At the same time, he was given a great impetus toward international law by the experience of his teachers Oswald Balzer and Stanislaw Starzynski, along with the international recognition of his close relative Shymon Rundstein (who was deemed to be one of the most outstanding lawyers in Europe and regarded as a comprehensively educated

[22] L. Ehrlich, *Poland, Prussia and Culture*, Oxford University Press, Oxford: 1914; L. Ehrlich, *Modern Poland*, The University of Berkeley, Berkeley: 1917.

[23] L. Ehrlich, *The Slavs, Past and Present,* 19 University of California Chronicle 418 (1917).

[24] L. Ehrlich, *The War and Political Theory,* 6 California Law Review 418 (1918); L. Ehrlich, *The War and Political Theory*, 7 California Law Review 33 (1918).

[25] L. Ehrlich, *British Emergency Legislation during the Present War,* 5 California Law Review 433 (1917); L. Ehrlich, *The War and the English Constitution*, 19 University of California Chronicle 250 (1917).

[26] P. Vinogradoff, L. Ehrlich (eds.), *Year Books of Edward II: Volume XIII. 6 Edward II. A.D. 1312-1313,* Quaritch, London: 1918; P. Vinogradoff, L. Ehrlich (eds.), *Year Books of Edward II: Volume XIV. Part I. 6 Edward II. A.D. 1312-1313,* Quaritch, London: 1921.

[27] L. Ehrlich, *Podział władz i rozdział władzy. Uwagi z okazyi obrad nad Konstytucyą* [The separation of powers and the distribution of power. Some notes on the discussions of the Constitution], 1 Przegląd Prawa i Administracji 39 (1921).

[28] L. Ehrlich, *Jednostajność w orzecznictwie Najwyższego Trybunału Administracyjnego. Uwagi z powodu nowego regulaminu NTA* [Uniformity in the jurisprudence of the Highest Administrative Tribunal of Poland. Some notes on the Rules of HAT], 1 Przegląd Prawa i Administracji 253 (1923).

[29] *Ibidem,* p. 262.

legist[30]). Shortly after Ehrlich started work at Jan Kazimierz University, he published an article in one of the most authoritative local journals related to the current situation in the evolution of international law.[31] Attaching particular importance to the judicial practice in international law, he took the provisions of Art. 38 of the Statute of the Permanent Court of International Justice as a basis for implementation the practices of the Great Britain, United States, and France concerning the legal recognition of national court decisions as generally binding in the system of international law. Additionally, he found a meaningful provision in the 1921 Treaty of Arbitration and Conciliation between the Swiss Confederation and German Reich. He posited that when legal gaps were observed, the tribunal was obliged to resolve a dispute applying legal principles which were expected to be considered as norms of international law, as derived from both doctrine and judicial practice.[32]

Ehrlich claimed that:

> The law of nations develops in a normal way not only through the codification of abstract ideas or principles, but also through the derivation of legal norms from events and relations.[33]

He warned that a lawyer who believed in the supreme power of legislation and rejected the necessity to apply legal precedents should change his perceptions; otherwise there was a threat of being excluded from the list of experts in international law.[34] We can assume that Ehrlich took into account the case-based approach to international law that prevailed in the legal science of the United States and the United Kingdom, in this way trying to undermine the belief of many continental lawyers that the principle of *stare decisis* was not binding.

2. THEORETICAL ASPECTS OF EHRLICH'S NEW POSITIVISM

It is important to note that the essence of a *method* of international law is connected with the notion of a *theory* of international law, and acquires radically different meanings in the various scholarship sources concerning international law. Steven R. Ratner and Anne-Marie Slaughter explained this interconnection as follows:

> The link between a legal theory and a legal method is thus one between the abstract and the applied. By organizing a symposium on method, we seek to provide a greater grasp of the major theories of international law currently shared by scholars, but to view these

[30] K. Kuźmicz, *Immanuel Kant jako inspirator polskiej teorii i filozofii prawa w latach 1918-1950* [Immanuel Kant as an inspirer of the Polish theory and philosophy of law in 1918-1950], Termida 2, Białystok: 2009, pp. 131-140.

[31] L. Ehrlich, *Chwila obecna w ewolucji prawa narodów* [The current moment and the evolution of international law], 1 Przegląd Prawa i Administracji 105 (1924).

[32] *Ibidem*, pp. 110-111.

[33] *Ibidem*, p. 111.

[34] *Ibidem*.

theories in the most direct way – by seeing how they establish what the law is, where it might be going, what it should be, why it is the way it is, where the scholar and practitioner fit in, how to construct law-based options for the future, and whether it even matters to ask those questions. A method used by a writer on international law may correspond to one theory of international law or to more than one if an author chooses to apply different theories.[35]

For the purposes of this research, a method of international law refers to the manner in which a scholar applies a theory (or theories) addressing actual issues.

Before discussing the essence of Erlich's method, it may be useful to explain the criteria he defined which should be met in order to make a method scientific. He was invited to deliver a lecture about the new positivism in international law at the University of London in 1937. It was printed the next year in Lviv as the first scientific paper on this method[36] (it should be noted however that he had already published two editions of a textbook on international law, wherein he presented his ideas on some relevant issues[37]). He did not describe the requirements which were mandatory to all methods related to research in different areas, including objectivity, comprehensiveness, and scientific validity. Instead he formulated the principal postulates that led to the expediency of application of his new positivism.

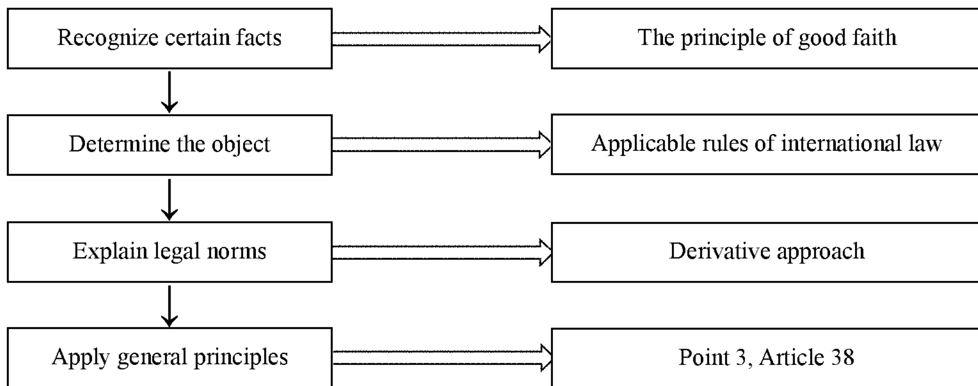

Figure 1: Overview of Ehrlich's principal postulates set out as criteria to apply new positivism

Firstly, he explained the nature of good faith in international law, which was derived from the co-existence of fully sovereign and absolutely independent states:

Start with certain facts of international relations which are the social background of international law. Such is the fact of the co-existence in the modern world of sovereign

[35] S. Ratner, A.M. Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers,* 93 The American Journal of International Law 291 (1999), pp. 292-293.

[36] L. Ehrlich, *The new positivism in international law,* Institute of Constitutional and International Law John Casimir University, Lwów: 1938.

[37] L. Ehrlich, *Prawo narodów* [Law of nations], K.S. Jakubowski, Lwów: 1927. L. Ehrlich, *Prawo narodów* [Law of nations], K.S. Jakubowski, Lwów: 1932.

> States and, consequently, the conceptions of the State and of sovereignty. Such is, again, the metaphysical conception of the will of the State. Such is, finally, the conception of good faith which in international law can mean neither more nor less than that each sovereign State is bound in its relations with other States only by its own will, but that by its own will it is fully bound.[38]

Secondly, he identified the object of research interest as "the rules of international law which are applied whether we find them applied in judicial decisions or in other acts of international practice."[39] Thirdly, he used an approach that can be called "derivative", which considered the body of international law to be a logical system, whereby one element (a certain legal norm) is derived from another. Moreover, he stated that:

> The derivation of a rule from some other rule or fundamental principle on which the law is based leads us to the statement of this more fundamental rule which is in itself again a phenomenon to be investigated. We thus arrive at a system which is both inductive because our inferences based on judicial decisions and other precedents, and deductive because we can and indeed must, derive from established principles and rules the consequences to which they lead, although our reasoning is inductive again because we must test the truth of our deductions with the help of precedents.[40]

Such an explanation resembles the positions of scholars representing the "neo-positivist" school, also known as the "Vienna school of jurisprudence".[41] For Hans Kelsen, its founder, law was a kind of hierarchy, whereby the binding force of any norm resulted from the obligatory character of the most important norm (the fulfilment of which is the aim of the whole established system). Kelsen's approach is widely known as normativism.

Finally, Ehrlich insisted on the application of the general principles of law recognized by civilized nations. In his international law textbook he understood general principles as the foundation of legal reasoning, expected to be applied in international law as well as in other systems of law, and he gave examples of some of them: *nemo plus juris in alium transferre potest quam ipse habet; nemo potest commodum capere de injuria sua propria; lex specialis derogat generali.*[42]

The entire method is founded on the key idea of the positivistic approach. According to this idea the will of a state was the reason for any norm to be binding in relations with other states, assuming mutual consent had been reached. Therefore, it seems obvious, that:

> The New Positivism ... recognizes the binding force of the will of states as expressed in treaties, as well as in regulations issued by virtue of authority conferred by treaties.[43]

[38] Ehrlich, *supra* note 36, p. 12.

[39] *Ibidem.*

[40] *Ibidem,* pp. 12-13.

[41] *See* Shen, *supra* note 3, pp. 330-334.

[42] L. Ehrlich, *Międzynarodowe prawo* [International law], Wydawnictwo Prawnicze, Warszawa: 1958, p. 24.

[43] *Ibidem,* p. 13.

But according to Ehrlich, international treaties were not the only mode by which states could limit their behaviour. He made an unexpected observation that a common law existed in international relations and it could be found in existing documentary evidence of international practice, especially in judicial decisions.[44] What's more, he suggested that that common law was a part of the body of international law that was found by courts and by legal scholars (writers):

In other words the body of international law consists of:

1. Enacted rules (*règles constituées*), i. e. treaties and regulations.
2. Common law (*règles constatées*) as found:
   a) by international courts (primarily the Permanent Court of International Justice, courts of arbitration of high standing, other international courts) as well as certain State courts; the rules are established by precedent, or by the practice (custom) accepted as law;
   b) by writers.[45]

He added that the nature of each rule was very important and it might be explained by usage of the rule mentioned above. Such a statement and approach built bridges between the theory of Ehrlich and the anchor of normativism. A further detailed explanation was provided by Ehrlich at the beginning of 1960s, while preparing an article published in 1962 in a distinguished legal journal.[46] He described three periods in the history of the science of international law: the canonistic period; the period of naturalists and positivists; and the transition period. He pointed out that international law was in the stage of neo-postivism at the (then-)observed moment. This stage began after the adoption of the Convent of the League of Nations and the establishment of its judicial body, which was granted some law-making functions. He turned to the works of Carl Baron Kaltenborn von Stachau,[47] who was not very widely known in the field of international law but had been – according to Erlich – ahead of his times:

> In 1847 Carl von Kaltenborn characterized the sources of international law in a way which was far ahead of actual conditions and anticipated developments which resulted in the formulation of art. 38 of the Statute of the Permanent Court of International Justice.[48]

Moreover, while representing continental law Kaltenborn stated that the permanent application of a particular legal rule by courts led to the establishment of an international custom. Consequently, the assessment of the role of court decisions from the angle of sources of international law also became one of the most controversial methods in Ehrlich's study. One may ask: Were those decisions used as auxiliary sources exclusively

[44] *Ibidem.*

[45] *Ibidem,* pp. 13-14.

[46] L. Ehrlich, *The development of international law as a science*, 105 Académie de droit international public. Recueil des cours 173 (1962).

[47] *See* M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960,* Oxford University Press, Oxford: 2001, pp. 24-27.

[48] Ehrlich, *supra* note 46, pp. 246-247.

for the establishment of customary norms as formally provided by Art. 38? Or did they really lay down rules mandatory for states to be used in the future, and, thus, generated kinds of precedents? These issues are considered below.

On one hand, Ehrlich did not fully agree that the functions of a judge were limited to the confirmation of the existence of a customary norm. Courts were capable of going beyond the recognition of international customs, evidenced by current practices.[49] He expressed doubt whether the suggestion of Kaltenborn ("judicial decisions consistent as to a rule of law may ultimately lead to giving that rule the force of customary law"[50]) was still proper and comprehensive following the adoption of the Statute of the Permanent Court of International Justice. Moreover, Art. 38 became the legal grounds for Ehrlich's point of view that court decisions were considered somehow equal to legal precedents:

> The Court may rely on a previous decision as a basis for the application of a rule of law found applicable in that previous decision. This opens the door for the application in international law of the principle of stare decisis as now prevailing in some countries, and in particular in Anglo-American law ... Whereas in the nineteenth century and up to the organization of the Permanent Court of International Justice textbooks laid down what their authors or the latters precursors thought the law to be, and mentions of arbitral decisions were made comparatively infrequently, the two Courts have applied certain principles which later have been followed in practice but for which it would have been most difficult to obtain the assent of all or most of the states in an international conference ... It may be claimed that international law to-day, in addition to conventions binding on smaller or larger numbers of countries, and to general practice accepted as law and evidenced, for instance, by consistent decisions of national courts of various countries, consists of rules which are applied as international law by the International Court of Justice.[51]

On the other hand, by recognizing the subsidiary character of court decisions he denied the mandatory effect of a rule established and applied in the course of a legal proceeding. A court, in his opinion, was entitled to refuse the application of relevant norms in the future if it came to a conclusion that their establishment was no longer grounded or they were not obligatory.[52] In addition, in his textbook Ehrlich explained that both the decisions of international tribunals and the teachings of scholars could not constitute indisputable evidence that a state had expressed its consent – of a mandatory nature – to a particular norm, although under certain circumstances they could be recognized as assertions of the presumed approval of a state.[53]

The theoretical background of Ehrlich's new positivism leads us to the foundations of the American legal realism that emerged after the First World War, a school considered

[49] *Ibidem*, p. 255.

[50] *Ibidem*.

[51] *Ibidem*, pp. 255-256.

[52] L. Ehrlich, *Suwerenność a morze w prawie międzynarodowym* [The sovereignty and the sea in international law], Wydawnictwo Prawnicze, Warszawa: 1961, p. 73.

[53] Ehrlich, *supra* note 42, p. 27.

as being contrary to the traditional positivistic approach. The realists did not perceive law as consistent and rationally defined. They thought that the circumstances of a case were more important for a judge than the provisions of legal acts, which was the reason why the study of law should be based on cases. The essence of American legal realism seems to be inapplicable to the way of thinking of European lawyers. Nevertheless, it still draws attention from scholars,[54] even in the field of international law.[55] Karl Llewellyn, who was widely considered as one of the founders of American legal realist school, paid his respect to Eugen Ehrlich, whose his ideas he considered as progressive and valuable.[56] Realists did not absolutely support either the positivist or naturalist approaches. Instead, their legal ideals might be regarded within a "social legal theory", which explained law as a phenomenon of practical application. Nowadays, realism is even considered as a third pillar of jurisprudence, alongside natural law and legal positivism. This is has been described by B. Tamanaha as follows:

> This third theoretical stream constitutes a long-standing and coherent alternative to natural law and legal positivism and the theoretical discussion of law will benefit from recognizing it as such. Recognition of this third branch of jurisprudence will create a framework that facilitates the incorporation of insights currently at the margins of discussions of the nature of law, including insights about legal institutions, legal functions, legal efficacy, legal change, legal practices, legal development, legal pluralism, legal culture, and more. This jurisprudential tradition, labeled "social legal theory" for reasons that will become evident, is characterized by a consummately social view of the nature of law.[57]

3. A PRACTICAL APPLICATION OF NEW POSITIVISM IN THE WORKS OF EHRLICH

Ehrlich applied the method of new positivism in order to deliberate on topical issues related to the domain of international responsibility. Undoubtedly, for a long time has been considered problematic with regard to ensuring an effective international legal order in the face of a lack of an effective and comprehensive normative legal framework which – despite the adoption of the Articles on Responsibility of States for Internationally Wrongful Acts by the International Law Commission – is still questioned today. With the help of judicial practice Ehrlich determined several important legal rules long before 2001, when the Articles were submitted to the General Assembly. He contributed to the development of the theory of international responsibility, as its rules had evolved

[54] *E.g.* M. Green, *Legal Realism as Theory of Law,* 46 William & Mary Law Review 1915 (2005); F. Leeuw, *American Legal Realism: Research Programme and Policy Impact,* 13 Utrecht Law Review 28 (2017).

[55] G. Shaffer, *The New Legal Realist Approach to International Law,* 28 Leiden Journal of International Law 189 (2015).

[56] *See* M. Hertogh, *Living Law: Reconsidering Eugen Ehrlich,* Hart Publishing, Oxford: 2009.

[57] B. Tamanaha, *The Third Pillar of Jurisprudence: Social Legal Theory*, 56 William & Mary Law Review 2235 (2015), pp. 2237-2238.

in all four editions of his textbook on international law. He also made a great effort to facilitate international judges' decision-making in disputes concerning internationally wrongful acts of states. One may only surmise how much Ehrlich would have done for the science of international law with regard to the responsibility of international organizations had he lived a half a century later!

Ehrlich took an extremely practical approach to the study of international responsibility for a clear reason. He represented Poland as the Permanent Court of Justice's *ad hoc* judge in the legal proceedings concerning reparation for the illegal expropriation of the factory in Chorzów in 1927, in the course of which Poland's obligations and liability were discussed. Ehrlich attached two dissenting opinions.[58] The *Chorzów Factory* case was taken as a framework for the study of the peculiarities of international responsibility. First of all, the fundamental principle that underpinned the relations between states in cases of international wrongdoings, which was proven by the practice of international courts, was introduced:

> The essential principle contained in the actual notion of an illegal act – a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in. all probability, have existed if that act had not been committed.[59]

Moreover, it was decided that the indemnity for an internationally wrongful act could be carried out in such forms as restitution in kind, payment of a sum equal to restitution in kind, or compensation for damages in another way. For the purpose of estimation of the value of both material and non-material losses, Ehrlich suggested to calculate their actual or the most likely value, assessed by a state against which such an act had been directed, but at the same time that state was forbidden to be enriched by the process.[60]

In cases when damage was caused by delayed payments, adequate reimbursement could have been calculated by the means of a calculated value, for example, interest on arrears. This question was raised in the course of a judicial process initiated by Russia against Turkey, known as the *Russian Claim for Interest on Indemnities*. It was settled by the Permanent Court of Arbitration after Russia had appealed in order to obtain compensation for the damages caused by Turkey during 1877-1878 war. The decision reiterated the obligation and commitment of a state to be responsible for a delay in payment of a sum due, "unless the existence of a contrary international custom" was established.[61]

[58] PCIJ, *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction) (Germany v. Poland),* Judgement, 26 July 1927, 1927 PCIJ Series A, No. 9, p. 35; PCIJ, *Case Concerning the Factory at Chorzów (Merits) (Germany v. Poland),* Judgement, 13 September 1928, 1928 PCIJ Series A, No. 17, p. 75.

[59] PCIJ, *Case Concerning the Factory at Chorzów (Merits)*, p. 47.

[60] Ehrlich, *supra* note 42, pp. 649-650.

[61] *Russian Claim for Interest on Indemnities (Damages Claimed by Russia for Delay in Payment of Compensation Owed to Russians Injured During the War of 1877-1878), Award of the Tribunal (Unofficial English Translation),* available at: https://bit.ly/2QxNA2t (accessed 30 May 2019), p. 10.

Ehrlich provided solid grounds for the conclusion that a sum of money which was expected to be paid due to an indemnity claim must be paid in the currency of the delinquent state, unless otherwise provided by the consent of the interested states.[62] That rule was reaffirmed in the Pious Fund Case 1902 between the United States of America and Mexico, decided by the Permanent Court of Arbitration.[63] This judgment was related to the question of annuities accrued in the Mexican currency for the period of 1869-1902, a period during which the Mexican Government had refused to pay an award in favour of the United States confirmed by the arbitral sentence of Edward Thornton in 1875.[64] But Ehrlich found an exception to the above-mentioned legal principle in the case of the S.S. "Wimbledon", resolved by the Permanent Court of International Justice in 1923. That case dealt with a prohibition against passage by a British steamship through the Kiel Canal.[65] Although Germany was adjudicated as a delinquent because of its unlawful prohibition, the compensation was required to be paid in the French currency. There was also a necessity to identify the moment from which Germany was obliged to pay interest. After having analysed judicial practice, Ehrlich outlined three possible actions to consider: formulation of a requirement; determining that a wrongdoing had been committed; and issuing a decision.[66] He explained why the proceedings listed above were so significant, as follows:

> The case of the *Pious Fund of the Californians*, the *Russian Indemnity* case and so forth could similarly be quoted among many others as laying down numerous rules which have been applied in later practice. Moreover it is instructive to contrast the various principles applied by the Permanent Court of International Justice in the *Chorzów* cases and later adapted by the science of international law, with the unsuccessful attempts of the Hague codification Conference of 1930 to formulate rules concerning the responsibility of a State for damage illegally suffered in its territory by foreigners.[67]

CONCLUSIONS

Ehrlich's elaboration of his method was guided by the need to understand what international law was and where it came from. He described new positivism from the methodological point of view at the end of the 1930s, and applied it consistently in his textbooks on international law, first and foremost explaining the peculiarities of

[62] Ehrlich, *supra* note 42, p. 652.

[63] *See* H. Levie, *Final Settlement of the Pious Fund Case*, 63 The American Journal of International Law 791 (1969).

[64] *The Pious Fund Case (United States of America v. Mexico), 14 October 1902,* IX Reports of International Arbitral Awards 1 (2006).

[65] PCIJ, *Case of the S.S. Wimbledon (United Kingdom, France, Italy & Japan v. Germany),* Judgement, 17 August 1923, 1923 PCIJ Series A, No. 1, p. 15.

[66] Ehrlich, *supra* note 42, p. 651.

[67] Ehrlich, *supra* note 36, p. 15.

international responsibility. He saw the essence of the method in the examination of judicial practice, and associated it with the evolution of international law. Although his theoretical concept was based on the recognition of states' consent as the fundamental premise for the obligatory force of international law (the principle of good faith), according to the core of new positivism courts, and especially international tribunals, possess some law-making functions. Furthermore, these functions "go beyond" the existence of customary law (in cases of both national courts' and international tribunals' judgments). He denied that these judgments had the force of precedents, but at the same time he found some real rules (in the terms of American legal realism) therein. When considering the works of Ehrlich, one can come to the conclusion that his attitude towards international law was not homogeneous seen through the lenses of legal philosophy. He built his own paradigm for understanding international law, which combined elements of the "three major pillars of jurisprudence", especially positivism and social legal theory.

The arguments of Ehrlich the scholar were ahead of his times (just like Kaltenborn's suggestion) and might be regarded as being grounded more in the present state of affairs in most of the continental European states, which is very likely intrinsic to international law as well. Although judicial precedent does not belong to the list of sources of law – neither in the international law (in terms of Art. 38) nor in the civil law system states (a few exceptions to this rule have occurred) – court decisions have been ever more often making impacts on the development of domestic and international legal orders.

But in fairness, Ehrlich should not be unquestionably recognized as the creator of the method which he called "new positivism". A thorough analysis of this method's theoretical aspects leads us to the core ideas of American legal realism, which in a broader sense resembles a sociological approach to law. In addition, Ehrlich did not go against the spirit of positivism, finding obligatory rules in traditional sources of international law. It is important to note that Ehrlich made an effort to substantiate the need to apply previous court decisions in a manner corresponding to the legal values of the civil law system. For this purpose, he relied on written evidence and used logical arguments like lawyers from the Romano-Germanic legal family had done in order to explain what the law was. But the approach, which he supported, was the product of the common law system and lawyers therein had not bothered to look for detailed explanations *why* a rule settled by a precedent existed. They merely took it at face value. These distinctions might be helpful in considering the provisions of Ehrlich's method not as contradictory, but rather holistic.

As he declared: "[i]f I am told that this method is utopian and cannot be applied, my reply will be that it must be applied because it corresponds best with the nature of international law as we know it."[68]

[68] Ehrlich, *supra* note 36, p. 17.

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A BRAVE, NEW, INTERNATIONAL INVESTMENT COURT IN CONTEXT. TOWARDS A PARADIGM SHIFT OF THE ISDS

Abstract:
The idea of a Multilateral Investment Court seems to be one of the most prominent initiatives of the "multilateralization" of international investment law during this century. The creation of a new international, permanent court concentrated on settling investor – state disputes is an extraordinary challenge. Possible problems relate not only to the negotiations concerning the organizational and procedural aspects necessary to ensure the efficient operation of this type of body. It is also necessary to take into account the dynamics of the functioning of international adjudication as such, as well as the controversies surrounding the international legal protection of foreign investments.

Keywords: investment arbitration, multilateral investment court, international investment law

INTRODUCTION

The idea of a Multilateral Investment Court (MIC) seems to be one of the most prominent initiatives of the "multilateralization" of international investment law during this century. Not so long ago Christopher Schreuer pointed out that "at present there is no substitute for investment arbitration. Despite its undeniable weaknesses, it is currently the only functioning system for the orderly settlement of the numerous disputes arising from foreign investments."[1] In this context, the MIC project, which has

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[1] C. Schreuer, *Do We Need Investment Arbitration?*, in: J.E. Kalicki, A. Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System Journeys for the 21st Century*, Brill Nijhoff, Leiden-Boston: 2015, pp. 889, 879-890.

recently emerged, can be considered as an effort to create a new institutional by-pass of the current Investor-State Dispute Settlement (ISDS) mechanism.[2]

Until now this "multilateralization" of international investment law has not been a success story.[3] Initiatives in this regard have been undertaken within the framework of the Organization of Economic Cooperation and Development[4] and the World Trade Organization (WTO),[5] but so far have been unsuccessful.

The MIC idea follows the model of "multilateralization" of procedures over substance, i.e. a method of the Washington Convention.[6] In view of the lack of consensus within the international community, this approach towards a complex investment treaty was based on the presumption that significant improvement could be achieved by limiting the ambitions of any new instrument only to the ISDS. Such a *prima facie* modest tactic turned out to be, according to Rudolf Dolzer and Christopher Schreuer, the "boldest innovative step in the modern history of international cooperation concerning the role and protection of foreign investment."[7]

The MIC proposal follows the same idea by regulating, at a multilateral level, a system of dispute settlement – *i.e.* a procedure without getting into substantive norms. However, 50 years have elapsed since the Washington Convention was signed, and the

[2] M. Mota Prado, S.J. Hoffman, *The Concept of an International Institutional Bypass*, 111 AJIL Unbound 231 (2017), pp. 231-232, 231-235.

[3] These concerns are adequately presented by UNCTAD, which considers "multilateral engagement" as only one of ten reform options. *See* UNCTAD, 2017 World Investment Report 131, table III.5; For a different view, *see* Stephan Schill, who argues that "international investment law is evolving towards a multilateral system of investment protection based on bilateral treaties"; S. Schill, *Multilateralization: An Ordering Paradigm for International Investment Law*, in: M. Bungenberg, J. Griebel, S. Hobe, A. Reinisch (eds.), *International Investment Law – A Handbook*, Beck-Hart-Nomos: 2015, pp. 1835, 1817-38; *see also* S. Schill, *The Multilateralization of International Investment Law*, Cambridge University Press, Cambridge: 2009.

[4] In this context two initiatives should be borne in mind. Firstly, the 1967 Draft convention on the protection of foreign property; and secondly the 1998 Multilateral Agreement on Investment (MAI). With regard to the latter one cannot forget that at that time the ISDS had already created harsh controversies and "the MAI text on dispute settlement remained in limbo, and only reached the status of a proposal of the chairman of the MAI working group on dispute settlement" (J. Karl, *The Negotiations on the OECD Multilateral Agreement on Investment*, in: Bungenberg et al., *supra* note 3, pp. 351-353, 342-360); *see also* A.P. Newcombe, L. Paradell, *Law and Practice of Investment Treaties*, Kluwer, Alphen aan den Rijn: 2009, p. 30.

[5] The 2001 WTO Doha Round was supposed to cover negotiations on international investment, however this idea was abandoned at the WTO Ministerial Meeting in Cancun in 2003. The Decision adopted by the WTO General Council on 1 August 2004 states: "[r]elationship between Trade and Investment, Interaction between Trade and Competition Policy and Transparency in Government Procurement: the Council agrees that these issues, mentioned in the Doha Ministerial Declaration in paragraphs 20-22, 23-25 and 26 respectively, will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round" (WT/L/579).

[6] Convention on the Settlement of Investment Disputes between States and Nationals of Other States signed on 18 March 1965, 575 UNTS 159.

[7] R. Dolzer, C. Schreuer, *Principles of International Investment Law*, Oxford University Press, Oxford: 2008, p. 20; for criticism concerning the practical consequences of this approach, *see* A.A. Ghouri, *Interaction and Conflict of Treaties in Investment Arbitration*, Kluwer, Alphen aan den Rijn: 2015, pp. 39-40.

landscape of international investment law is much more complex than it was at the beginning of the 1960s. First of all, foreign investment disputes cause high political, legal, social and economic tensions nowadays due to their scale, the amounts of compensation claimed, and their influence on regulatory competences.[8] As a result, states are much more aware of the risks flowing from international investment law. Most have already formulated their "position" towards the ISDS.[9] These views stretch from a model of complete resignation from the ISDS[10] to a revolutionary model,[11] a modest reform model,[12] and through to acceptance of the classical model.[13] Until recently these positions did not envisage any possibility of creating a multilateral court.[14]

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[8] As a result, there are also opinions that the "procedure before the substance" model is not appropriate: "[w]hile such institutional change is necessary, it is not sufficient to achieve reform. What is also needed is an express transformation of substantive norms of international investment law to a more socially and environmentally acceptable set of rules and principles" (K. Miles, *The Origins of International Investment Law – Empire, Environment and the Safeguarding of Capital*, Cambridge University Press, Cambridge: 2013, pp. 380-381).

[9] A. Roberts, *Incremental, systemic, and paradigmatic reform of investor-state arbitration*, 112(3) American Journal of International Law 410 (2018), pp. 410-415.

[10] The Brazil model of cooperation and facilitation investment agreement of 2014 envisages a dispute prevention mechanism and only a state-state arbitration procedure: *see* N. Bernasconi-Osterwalder, M.D. Brauch, *Comparative Commentary to Brazil's Cooperation and Investment Facilitation Agreements (CIFAs) with Mozambique, Angola, Mexico, and Malawi*, 2 TDM 2016; *see also* the judgment of the Court of Justice from 6 March 2018 in case C-284/16 *Achmea BV*, in which the Court stated: "Articles 267 and 344 TFEU must be interpreted as precluding a provision in an international agreement concluded between Member States, such as Article 8 of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal whose jurisdiction that Member State has undertaken to accept."

[11] The India new model BIT from 2015 contains the requirement of exhaustion of local remedies before bringing a claim to an arbitral tribunal. The United States-Mexico-Canada Agreement follows the same approach in US-Mexico relations, when the investor does not have a specific government contract. The ISDS model contained in the EU draft of Transatlantic Trade and Investment Partnership (TTIP) investment chapter should be also considered as revolutionary: "[t]he European Commission's proposal does not suggest that the practice of international adjudication in investment law can find sufficient support in the functional logic of investment protection. The recent developments rather suggest, and this merits emphasis, that nothing can ultimately carry public authority – including the judicial authority under TTIP – other than peoples and citizens" (I. Venzke, *Investor-State Dispute Settlement in TTIP from the Perspective of a Public Law Theory of International Adjudication*, 17 Journal of World Investment & Trade 374 (2016)).

[12] The US model BIT 2012 and Trans-Pacific Partnership (TPP) from 2016. According to Jose Alvarez, "[t]he TPP's investment chapter is in the "reform it, don't end it" mode that has been followed by the US for the past 20 years, as the promises and hazards of ISDS have become clearer." (p. 16); and "[t]he TPP's investment chapter pursues a reform path within the existing international investment regime that many other states, including the US, support" (p. 42), J.E. Alvarez, *Is the Trans-Pacific Partnership's Investment Chapter the New "Gold Standard"?*, IILJ Working Paper 2016/3.

[13] *See e.g.* the Agreement between Japan and the State of Israel for the liberalization, promotion and protection of investment signed on 1 February 2017.

[14] Provisions on pursuing a multilateral investment tribunal can be found in the EU's latest trade and investment agreements: EU-Canada CETA (Art. 8.29); EU-Singapore investment protection agreement (Art. 3.12), draft; and the EU-Vietnam FTA (Art. 8.15).

This article aims to present the MIC initiative by examining its roots, planned structure, and functions, whilst taking into account the potential legal hitches that can appear during the realization of this project. It is also submitted that the prospects for creating the MIC should be evaluated taking into account important social factors permeating current international relations, such as the harsh criticism of international investment law and some trends resulting from a backlash against international courts in general. Finally, the article aims to demonstrate that the MIC project could be considered as a signal of a paradigm shift in international investment law.

1.1. History of the permanent international investment court

The idea of creating a permanent court for settlement of investment disputes is quite a new one.[15] As stated by Jose Alvarez in 2016: "[s]tanding international courts devoted to considering and awarding to private parties what may be substantial monetary awards against states for unknown prospective claims have not existed."[16] Past proposals for establishing a multilateral investment regime in general did not envisage the creation of a permanent judicial body. The two notable exceptions were the International Law Association Draft Statute of the Foreign Investment Court and the Arab Investment Court.

Already in 1948 the International Law Association (ILA) published Draft Statutes of the Arbitral Tribunal for Foreign Investment and the Foreign Investment Court (FIC).[17] With regard to the latter, the ILA project envisaged that "the Party against which the claim is made has declared that it accepts the jurisdiction of the Court in respect of claims by nationals of one or more Parties, including the Party concerned" (Art. III(1) of the draft). The FIC was supposed to consist of 15 judges, chosen for nine years with the possibility of re-election by Parties to the instrument establishing this Court (Arts. V and X). Persons elected as judges should have "recognized competence in international law or are persons of recognized competence in international economic life" (Art. IV). Finally, Art. XXIII ensured, following the (International Court of Justice) ICJ model,

[15] "An international investment court could be multilateral, regional, or bilateral. It could be a full court or an appellate body court that would hear appeals from decisions made in the first instance by arbitrators. It could be an autonomous entity or housed within existing institutions. It could be staffed by dedicated judges or via a roster of jurists who sit on domestic courts. Ultimately, it is not so important to arrive at a specific design for an international investment court that suits all states or all commentators (...) The critical point is that alternatives should be measured against the criteria of judging in public law, especially the related concepts of openness and independence" (G. Van Harten, *A Case for an International Investment Court,* 22 Society of International Economic Law (SIEL) Inaugural Conference 2008 Paper, Online Proceedings, pp. 30-31); UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap – Special issue for the Multilateral Dialogue on Investment*, 2 IIA Issues Note, 9 (2013); O.E. García-Bolívar, *Permanent Investment Tribunals: The Momentum is Building Up*, in: Kalicki, Joubin-Bret (eds.), *supra* note 1, pp. 397, 394-402).

[16] J.E. Alvarez, *To Court or Not to Court?*, IILJ Working Paper 2016/2. According to Alvarez "the ECHR and Inter-American Court of Human Rights (...) are, like the UN human rights treaty bodies, more intent on correcting states' obligations to their citizens – and not creating insurmountable financial obstacles to achieving that end" (p. 3).

[17] UNCTAD, *International Investment Instruments: A Compendium*, Vol. III, New York and Geneva: 1996, pp. 267-272.

that "[j]udges of the nationality of each of the Parties shall retain their right to sit in the case before the Court." In practice, of the two proposals presented by the ILA in 1948 only one related to arbitral tribunals and was pursued in international discussions. This was exemplified in particular in the 1959 Draft Convention on Investments Abroad (Abs-Shawcross Draft Convention),[18] the 1967 OECD Draft Convention on the Protection of Foreign Property,[19] and the practice (from 1968) of inserting arbitration clauses into treaties encouraging the promotion and reciprocal protection of investment.[20]

The Arab Investment Court was created in accordance with the Unified Agreement for the Investment of Arab Capital, which was signed on 26 November 1980 in Amman, Jordan, by 21 states and entered into force on 7 September 1981.[21] The significance of the Arab Investment Court is limited as in accordance with the Unified Agreement it has no compulsory jurisdiction with regard to disputes arising from the application of the Agreement. This flows from the fact that parties to the dispute can choose arbitration instead of litigating before the Court. Nonetheless it is useful to note the structure of this Court. According to Art. 28(2):

> The Court shall be composed of at least five judges and several reserve members, each having a different Arab nationality, who shall be chosen by the Council from a list of Arab legal specialists drawn up specifically for such purpose, two of whom are to be nominated by each State Party from amongst those having the academic and moral qualifications to assume high-ranking legal positions. The Council shall appoint the chairman of the Court from amongst the members of the Court.

Members of the Court are chosen for a three-year term, which may be renewed. The Court has jurisdiction to settle inter-state disputes, investor-state disputes, and disputes "between the public institutions and organizations of more than one State Party." Its judgments are final and not subject to appeal. Furthermore, in accordance with Art. 34(3), a judgment of the Court shall be enforceable in the same manner as a final enforceable judgment delivered by the courts of States Parties.

Evaluation of the design of the Arab Investment Court is hampered by the fact that this theory has not been put into significant practice. To date, this Court has only settled one case.[22]

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[18] According to Art. VII(2) of the draft Convention "A national of one of the Parties claiming that he has been injured by measures in breach of this Convention may institute proceedings against the Party responsible for such measures before the Arbitral Tribunal…" (UNCTAD, *International Investment Instruments: A Compendium*, Vol. V, New York and Geneva: 2000, pp. 301-305).

[19] Art. 7 (b) of the OECD Draft Convention provides that "a national of a Party claiming that he has been injured by measures in breach of this Convention may institute proceedings against any other Party responsible for such measures before the Arbitral Tribunal," available at: https://bit.ly/2Pq7hvH (accessed 30 May 2019).

[20] Newcombe, Paradell, *supra* note 4, pp. 44-45.

[21] The text of this agreement is available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/2394 (accessed 30 May 2019).

[22] W.B. Hamida, *The First Arab Investment Court Decision*, 5 Journal of World Investment & Trade 699 (2006), pp. 699-721.

With reference to more current practice, it has to be noted that the draft MAI, negotiated under the auspices of the OECD, had already installed provisions for an arbitration mechanism. Although this method was already firmly established at the time in treaty practice, some delegations participating in the negotiations raised concerns relating to its suitability and legitimacy. In any case the Norwegian proposal for creating an international investment tribunal did not meet with any interest.[23] Simultaneously, proposals were raised for creating a dispute settlement mechanism similar to the one existing in the WTO.[24]

Owing to both the practice of states and the academic literature, for a long time there was no recognition of either the necessity nor the possibility of creating a standing judicial investment institution. Discussions on these matters were rather concentrated on duplicating the WTO dispute settlement procedures, in particular by creating an appellate mechanism.[25] Already in 2004, the ICSID Secretariat suggested that an Appeal Facility "might be established and operate under a set of ICSID Appeals Facility Rules adopted by the Administrative Council of ICSID."[26] Nevertheless, ultimately this proposal was considered as premature and was not pursued.[27]

1.2. The debate on reforming the ISDS

The issue of the necessity to reform the ISDS is raised every year, in particular taking into account the number and importance of claims brought to the arbitral tribunal. In total, for the last 30 years during which this practice has been conducted 831 investment cases were registered, including disputes initiated before the International Center for Settlement of Investment Disputes (ICSID) and other applicable forums.[28]

Criticism of the ISDS as a system has concentrated on its three main institutional pillars.[29] Firstly, there is a lack of an appellate mechanism, which does not allow for the

[23] *Ibidem*, p. 699.

[24] UNCTAD, *Lessons from the MAI*, New York and Geneva 1999, p. 19.

[25] S.D. Amarasinha, J. Kokott, *Multilateral Investment Rules Revisited*, in: P. Muchlinski, F. Ortino, C. Schreuer (eds.), *The Oxford Handbook of International Investment Law*, Oxford University Press, Oxford: 2008, pp. 149-150, 120-150.

[26] ICSID Secretariat Discussion Paper, *Possible improvements of the framework for ICSID arbitration*, 22 October 2004, annex pt 1.

[27] "The members of the Administrative Council and others who provided comments on the Discussion Paper expressed appreciation for the initiative to review the framework for ICSID arbitration and identify possible improvements. There was general agreement that, if international appellate procedures were to be introduced for investment treaty arbitrations, then this might best be done through a single ICSID mechanism rather than by different mechanisms established under each treaty concerned. Most, however, considered that it would be premature to attempt to establish such an ICSID mechanism at this stage, particularly in view of the difficult technical and policy issues raised in the Discussion Paper" (Working Paper of the ICSID Secretariat, *Suggested Changes to the ICSID Rules and Regulations*, 12 May 2005, pt 4).

[28] M. Langford, D. Behn, R. Hilleren Lie, *The Revolving Door in International Investment Arbitration*, 20 Journal of International Economic Law 301 (2017), p. 307.

[29] S.W. Schill, *The European Commission's Proposal of an "Investment Court System" for TTIP: Stepping Stone or Stumbling Block for Multilateralizing International Investment Law*, 9 ASIL Insights (2016);

correction of legal errors made in the first instance and makes the creation of a coherent body of law difficult.[30] Secondly, there is a lack of institutionally guaranteed impartiality of the arbitrators, which in consequence has led to the so-called "revolving door" and "double hat" phenomena, i.e. a "situation when individuals act sequentially and even simultaneously as arbitrator, legal counsel, expert witness, or tribunal secretary."[31] Such situations can create doubts as to the impartiality or independence of the arbitrators. A thorough study in this regard by M. Langford, D. Behn, and R. Hilleren Lie has led to the conclusion that:

> In terms of double hatting, we find that the practice continues to exist. In reality, it is a very small group but it is constituted by highly influential, and well-known individuals. In other words, double hatting is not a common or widespread practice across the entire network of cases (i.e., breadth), it is practiced so consistently by a highly visible and powerful core of some of the most influential actors in the system (i.e. depth). Given that critiques of double hatting focus on the perceived bias and lack of impartiality, independence and legitimacy that such a practice can have on the reasonable outside observer, its prevalence amongst influential actors is questionable even if there is a debate on its actual effects on independence.[32]

Thirdly, *ad hoc*, party-appointed arbitrators cannot adequately resolve public law disputes against states.[33] As pointed out by Gus van Harten: "[p]rivate contractors rather than tenured judges are left to manage the legal construction of the public sphere, without rigorous supervision by courts. The ultimate authority to determine what juridical sovereignty means is itself privatized."[34] This is linked to the assumption that ISDS as

S.W. Schill, *The Sixth Path: Reforming Investment Law from Within*, SIEL Online Proceedings Working Paper 02/2014, p. 11.

[30] J. Ketcheson, *Investment Arbitration: Learning from Experience,* in: S. Hindelang, M. Krajewski (eds.), *Shifting Paradigms in International Investment Law*, Oxford University Press, Oxford: 2016, p. 118; E. Young Park, *Appellate Review in Investor-State Arbitration* in: Kalicki, Joubin-Bret (eds.), *supra* note 1, pp. 443-454; G. Bottini, *Reform of the Investor-State Arbitration Regime: The Appeal Proposal,* in: *id*, pp. 455-473. As was pointed out by Schill: "[o]nly the creation of a multilateral investment court would be able to ensure cross-treaty consistency and predictability in international investment law more generally" (Schill (*The European Commission's Proposal*), *supra* note 30).

[31] Langford, Behn, Hilleren Lie, *supra* note 28, p. 301; *see also* R. Berzero, G.J. Horvath, *Arbitrator & Counsel: the Double-Hat Dilemma*, 4 TDM (2013); M. Lalonde, *Quo Vadis Disqualification?,* in: M. Kinnear et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID*, Kluwer, Alphen aan den Rijn: 2015, pp. 640-653.

[32] Langford, Behn, Hilleren Lie, *supra* note 28, p. 328.

[33] G. Van Harten, *Investment Treaty Arbitration and Public Law*, Oxford University Press, Oxford: 2007, pp. 152-183.

[34] G. Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims against the State*, 56(2) International and Comparative Law Quarterly 371 (2007), p. 393. For a different view, *see* Jose Alvarez, who states that: "[t]hose who claim that investment arbitration is distinguishably 'public' have not offered a consistent rationale for the distinction, even though such a rationale appears crucial to the ten public law prescriptions that allegedly follow from it" – J.E. Alvarez, *Is Investor-State Arbitration "Public"?*, 6 IILJ Working Paper, 9, 3-43, (2016); and "[s]o, is ISDS 'public'? Too often the answer has been that it is exclusively public. The answer to the titular question presented here is more nuanced:

a mechanism is to a large extent derived from commercial arbitration[35] and thus is not suitable for the assessment of regulatory state policies.[36]

Other concerns regarding ISDS, which were intensively debated during the first session of the UNCITRAL working group Investor-State Dispute Settlement Reform, were related to issues concerning the duration of proceedings and their costs.[37] These problems will be presented in the following sections in the context of structuring a new international investment court (the proposed MIC).

1.3. Backlashes against international adjudication

Beyond the controversies related to ISDS, another discernible recent trend in international practice which can influence the fate of the MIC project is that of a general, sometimes selective, backlash against international courts and tribunals.[38] This process can be considered as a form of "natural resistance" on the part of some States which are "uncomfortable" with the "Age of Adjudication".[39] The backlash against international courts and tribunals can be observed in different fields and at different levels. One of the most prominent examples in this regard is the situation of the International

Since it is not clear what we mean by 'public', and that description threatens to be circular and produce problematic prescriptions, ISDS is more accurately described as a 'hybrid'" (p. 43). *See also* the opinion of the Eric De Brabandere, who states that: "[t]he characterization of investment treaty arbitration as having a 'hybrid' foundation, coupled with the claim that neither international commercial arbitration, nor private law, nor public international law are adequate legal paradigms to apply in these situations, tends to overlook the effective characterization of the underlying legal relations between foreign investors and host states when claims are brought against the latter for violations of an applicable investment agreement." (E. De Brabandere, *Investment Treaty Arbitration as Public International Law – Procedural Aspects and Implications*, Cambridge University Press, Cambridge: 2014, p. 202).

[35] European Commission, Government of Canada, *The case for creating a multilateral investment dispute settlement mechanism, Informal ministerial meeting*, World Economic Forum, 20 January 2017, para. 9.

[36] According to the Malcolm Langford and Daniel Behn, "[i]t is developed states that are the beneficiaries of the large drop in claimant/investor success rates; less developed states have only registered marginal benefits. (…) The investment treaty arbitration system has been able to enhance effectively its respect for state sovereignty (and partly regulatory autonomy), but some states are more equal than others." (M. Langford, D. Behn, *Managing Backlash: The Evolving Investment Treaty Arbitrator*, 29(2) European Journal of International Law 551 (2018), p. 580).

[37] "29. The Working Group took note of analyses based on limited available information suggesting that 80 to 90 per cent of costs in ISDS were associated with fees for legal representation and for experts and that the amount of costs per proceeding averaged US$ 8 million. 30. It was widely felt that lengthy and costly ISDS proceedings under some approaches raised concerns and practical challenges to respondent States as well as to claimant investors." (Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November-1 December 2017), Part I, A/CN.9/930).

[38] J. Chaisse, M. Vaccaro-Incisa, *The EU investment court: challenges on the path ahead*, Columbia FDI Perspectives, No. 219, 12 February 2018, p. 2.

[39] This name for the period of development of international law following the end of the cold war was coined by Christopher Greenwood (http://legal.un.org/avl/ls/Greenwood_CT.html); *see also* E.A. Posner, J.C. Yoo, *Judicial Independence in International Tribunals*, 93(1) California Law Review 1 (2005).

Criminal Court (ICC), which faces harsh criticism both from some of the states-parties and from non-party states.[40]

This trend also relates to the courts of African sub-regional organizations, many of which have been subjected to pressure from some members of these organizations. This was a consequence of judicial decisions concerning those members, based on individual applications. Leaders in these backlashes included: Gambia with regard to the Court of Justice of the Economic Community of West African States (ECOWAS); Kenya with regard to the East African Court of Justice (EACJ); and Zimbabwe with regard to the Tribunal of the Southern African Development Community (SADC).[41] They made every effort to eliminate the particular court in question, or at least to narrow its jurisdiction. Zimbabwe succeeded with regard to the SADC Tribunal, whose jurisdiction in 2014 was restricted to hearing inter-state disputes only.[42]

Limiting the competence of international courts when actions at an international level seem to be not plausible can also be achieved by creating specific domestic procedures for evaluation of the suitability of international decisions. The most prominent recent example is legislation enacted by the Russian Federation concerning international bodies on the protection of human rights and freedoms. Russian Constitutional Law concerning the Constitutional Court allows it to express a legal opinion on the impossibility of execution of a particular judgment of the European Court of Human Rights (ECtHR).[43] In this context, it was stated that:

> (...) Russian law does not simply concern the relationship between the Strasbourg Court and the domestic courts (...) It goes much further than that – by denying the enforceability of ECtHR judgments as regards the Russian state altogether, thereby purporting to extinguish the effect of Art. 46 of the ECHR. This is therefore unprecedented in the history of the European human rights regime.[44]

With respect to international arbitration, it is striking that despite the criticism of ISDS arbitration is still considered by some as being a growing phenomenon and a "new

[40] C.R. Rossi, *Hauntings, Hegemony, and the Threatened African Exodus from the International Criminal Court*, 2 Human Rights Quarterly 369 (2018); M.W. Mutua, *The International Criminal Court: Promise and Politics*, 109 Proceedings of the ASIL Annual Meeting 269 (2015).

[41] K.J. Alter, J.T. Gathi, L.R. Helfer, *Backlash against International Courts in West, East and Southern Africa: Causes and Consequences*, 27(2) European Journal of International Law 296 (2016).

[42] E. de Wet, *The Rise and Fall of the Tribunal of the Southern African Development Community: Implications for Dispute Settlement in Southern Africa*, 3 ICSID Review 1 (2013).

[43] Federal Law of the Russian Federation no. 7-KFZ introducing amendments to the Federal Constitutional Law no. 1-FKZ of 21 July 1994 on the Constitutional Court of the Russian Federation, entered into force on 15 December 2015. For a complex opinion in this regard, *see* the Final Opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court by the European Commission for Democracy Through Law (Venice Commission), Strasbourg, 13 June 2016, Opinion no. 832/2015, CDL-AD (2016)016.

[44] P. Leach, A. Donald, *Russia Defies Strasbourg: Is Contagion Spreading?*, EJIL Talk, 19 December 2015, available at: https://www.ejiltalk.org/russia-defies-strasbourg-is-contagion-spreading/ (accessed 30 May 2019).

generation of international adjudication."[45] This assessment however underestimates several important indicators which suggest that in fact international arbitrations share the fate of permanent courts. In this sense, a strong scepticism, or a backlash, real or perceived, relates to both permanent courts and arbitration, even if one excludes ISDS from this analysis. Several facts validate this assertion.

The first concerns recent inter-state arbitrations against Russia[46] and China,[47] where both states decided not to participate in the proceeding, thus ignoring this mechanism. This restrained approach to international arbitration was implicitly indicated by those states in the Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law of 25 July 2016. The longest point of the declaration relates to the peaceful settlement of disputes and declares, *inter alia*, that: "all dispute settlement means and mechanisms are based on consent and used in good faith and in the spirit of cooperation, and their purposes shall not be undermined by abusive practices."[48]

Secondly, the Croatia – Slovenia proceedings related to their maritime and land boundary has shown that interstate international arbitration, similarly as ISDS, is not immune from problems of independence. After Serbian newspapers published transcripts of a communication between a Slovenian arbitrator on the bench and a Slovenian agent, they both resigned from participation in the case and Croatia announced that it would no longer participate in the case.[49] Against this background Philippe Sands stated that:

> It is not entirely unusual for an agent in an inter-state case to share a conversation that he or she has had with a person sitting on a court or tribunal, a fact that causes (or should cause) a tremendous ethical difficulty. Under most rules of professional conduct, counsel should not be privy to such information, and they should not want to hear such stuff or know what is going on. Other rules of professional conduct may have a different standard, and this raises a serious question about the ethical standards for the international bar.[50]

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[45] S.W. Schill, *The Overlooked Role of Arbitration in International Adjudication Theory*, 2 ESIL Reflections 1 (2015), p. 3; *see also* G. Born, *A New Generation of International Adjudication*, 4 Duke Law Journal 785 (2012).

[46] The Arctic Sunrise Arbitration (*Netherlands v. Russia*), The Russian Federation by Note Verbale dated 27 February 2014 addressed to the Permanent Court of Arbitration indicated its "refusal to take part in this arbitration", available at: https://pca-cpa.org/en/cases/21/ (accessed 30 May 2019).

[47] The South China Sea Arbitration (*The Republic of Philippines v. The People's Republic of China*), The People's Republic of China in a Note Verbale to the PCA on 1 August 2013, and throughout the arbitration proceedings, reiterated "its position that it does not accept the arbitration initiated by the Philippines"; available at: https://pca-cpa.org/en/cases/7/ (accessed 30 May 2019).

[48] The Declaration of the Russian Federation and the People's Republic of China on the Promotion of International Law, 25 June 2016, available at: http://www.mid.ru/en/foreign_policy/position_word_order/-/asset_publisher/6S4RuXfeYlKr/content/id/2331698 (accessed 30 May 2019).

[49] *See also* "what was revealed – last summer is like an Exocet missile that goes to the heart of the system that we are all involved and care about, a system that we wish to see succeed and improve" (P. Sands, *Reflections on International Judicialization*, 27(4) European Journal of International Law 885 (2016), p. 896).

[50] *Ibidem*, p. 898, *see also* "[t]he claim that there is no reason to worry about bias when we are dealing with an epistemic community of investment experts drawn from large law firms, generally specialized in

Thirdly, the arbitration mechanism inserted into the 2017 Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting has gained little support. As of 30 May 2019, the Convention was signed by 88 States, but only 27 have accepted arbitration between an individual and a state.[51]

Fourthly, the controversies over the functioning of the Appellate Body of the WTO, as expressed by the United States in its opposition to the selection of new arbitrators, has resulted in four vacancies in the seven-member body.[52] As a consequence, this dispute settlement procedure, which until recently was considered "one of the most effective dispute settlement systems in international law,"[53] has reached a critical juncture.

Furthermore, a practice of ignoring obligations deriving from BITs also exists. This practice was applied by the Russian Federation regarding claims invoked on the basis of the Ukraine–Russia BIT as a consequence of Crimea's annexation by the Russian Federation in 2014.[54]

These developments indicate that any effort towards creating a permanent MIC is at present particularly challenging. Although in general the "machinery" of transnational adjudications works well, there are significant signals that the development of an international judiciary is not a one-way road lined with progressively growing support. Conversely, the increase in activities of international courts and tribunals also increases the awareness of states about some of the negative consequences of subjecting disputes to the compulsory jurisdiction of such organs, thus making the acceptance of any new "organ" much more difficult. In this context, arguments for the MIC project should be based not on the novelty of the creation of another international court, but rather on

providing services for MNCs, complemented by academic experts closely aligned with them, is not convincing" (M. Kumm, *An Empire of Capital? Transatlantic Investment Protection as the Institutionalization of Unjustified Privilege*, 3 ESIL Reflections (2015), p. 5).

[51] *See* the status of signature and ratification of the Convention and the status of acceptance of the arbitration chapter: https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf (accessed 30 May 2019).

[52] "The year-long impasse on the process for appointing AB Members is debilitating the Body. Its reduced strength is undermining the collegiality of our deliberations, and the lack of proper geographical representation threatens its legitimacy." Statement by Appellate Body chair, Ujal Singh Bhatia, of 22 June 2018, available at: https://www.wto.org/english/news_e/news18_e/ab_22jun18_e.htm; *see also* https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (both accessed 30 May 2019).

[53] Inter-Pacific Bar Association, Kuala Lumpur, plenary session: "Embracing change: forging global trade partnerships" Remarks by Director-General Roberto Azevêdo; 14 April 2016.

[54] The Russian Federation takes the position that Ukraine–Russia BIT cannot serve as a basis for composing an arbitral tribunal to settle claims of Ukrainian investors and that it does not recognize the jurisdiction of an international arbitral tribunal in this regard; *see Stabil LLC and Others v. Russian Federation*, UNCITRAL, PCA Case no. 2015-35; *Aeroport Belbek LLC and Mr. Igor Valerievich Kolomoisky v. The Russian Federation*, PCA Case No. 2014-30; *PJSC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation*, PCA Case No. 2015-21; *Everest Estate LLC et al. v. The Russian Federation*, PCA Case No. 2015-36; PJSC CB *PrivatBank and Finance Company Finilon LLC v. The Russian Federation*, PCA Case No. 2015-21; *NJSC Naftogaz of Ukraine, PJSC State Joint Stock Company Chornomornaftogaz, PJSC Ukrtransgaz, Subsidiary Company Likvo, PJSC Ukrgasvydobuvannya, PJSC Ukrtransnafta, and Subsidiary Company Gaz Ukraiiny v. The Russian Federation* (all available at: www.ita.law.com, accessed 30 May 2019).

the need for replacement of the currently existing and binding international mechanism of adjudication (ISDS) by a new more predictable, economical, and transparent institution.

2. ESTABLISHMENT OF THE MIC

A doctrinal proposition of how to structure the MIC was presented by Gabrielle Kaufmann Kohler and Michele Potestà in an analysis prepared for the UNCITRAL.[55] The main idea of these authors is to follow the model of the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, adopted by the U.N. General Assembly on 10 December 2014 (also known as the Mauritius Convention).[56] This approach entails the possibility of importing provisions "into the fragmented treaty-by-treaty regime by way of one single multilateral instrument. Moreover, it achieves this importation by sidestepping the need for amending the 3,000 existing IIAs."[57]

In this context, examples of the limitations of the Mauritius Convention need to be noted. This treaty was of a merely supplementary character. It provided for the possibility of applying a new version of the UNCITRAL Transparency rules, which themselves were only mentioned in the texts of BITs. Conversely, a convention creating the MIC would have to go much further – its provision would have to replace the BITs' provisions. Thus, the question arises as to what the proper extent of the "carve out" should be. Another element of the Mauritius Convention that does not seem to be suitable in the context of the MIC is the number of ratifications required for the Convention to come into force. Any convention, which would create a new, standing international institution, should undoubtedly have a higher threshold in this regard. Finally, other potentially problematic issues would include the adaptation of the MIC to multilateral treaties such as NAFTA or the Energy Charter Treaty.[58]

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[55] G. Kaufmann-Kohler, M. Potestà, *Can the Mauritius Convention serve as a model for the reform of investor-State arbitration in connection with the introduction of a permanent investment tribunal or an appeal mechanism?, Analysis and roadmap*, CIDS Research Paper, 3 June 2016; G. Kaufmann-Kohler, M. Potestà, *Challenges on the road toward a multilateral investment court*, Columbia FDI Perspectives, No. 201, 5 June 2017. *See also Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS), Note by the Secretariat*, 20 April 2017, A/CN.9/917.

[56] *See also* M. Bungenberg, A. Reinisch, *From Bilateral Arbitral Tribunals and Investment Courts to a Multilateral Investment Court: Options Regarding the Institutionalization of Investor-State Dispute Settlement*, European Yearbook of International Economic Law (2018), p. 202.

[57] Kaufmann-Kohler, Potestà (*Can the Mauritius Convention*), *supra* note 55, para. 68.

[58] "In the case of multilateral agreements, the Convention should allow two or more Parties to such an agreement to agree to submit disputes under the multilateral agreement to the jurisdiction of the multilateral court." (Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, Brussels, 20 March 2018, 12981/17, para. 8). For more on the difficulties with regard to establishing such a multilateral court, *see* C. Titi, *Procedural Multilateralism and Multilateral Investment Court*, in: E. Fahey (ed.), *Institutionalisation beyond the Nation State*, Springer, Berlin-Heidelberg: 2018, pp. 160-162, 149-164.

3. FUNCTIONING OF THE MIC

The establishment of a MIC requires decisions on a number of specific aspects regarding the functioning of an international court. These include, *inter alia*, issues of the admissibility of complaints and jurisdiction; the issue of the selection of judges; and the procedure or rules for lodging appeals. These questions will be presented in turn.

3.1. Admissibility and Jurisdiction

3.1.1. Cooling off period

The issue of admissibility of claims requires an agreement as to whether the provisions of BITs apply in this respect, or whether they will be entirely superseded by an instrument creating a MIC. A typical BIT includes a waiting period ("cooling off period") that is aimed at giving the parties time to reach an amicable dispute settlement. The CETA adds additional limitations in this regard, as it stipulates that consultations have to be initiated within three years at the latest after becoming aware of the particular treatment alleged to be a breach of the pertinent provisions, or within two years after the investor ceases to pursue local remedies.[59]

Thus, there is the question as to whether to standardize the "cooling off period" or to leave it untouched by a MIC statute. If the former option is chosen, the language used should be very clear. Those drafting the treaty should consider whether a "cooling off period" is an aspirational, procedural, or jurisdictional requirement, as this issue is a point of controversy in investment arbitration.[60]

3.1.2. Jurisdiction *ratione personae*

Jurisdiction of the MIC should be analogical to the jurisdiction of arbitral tribunals under a particular BIT. Thus, in principle it should cover both ISDS and State to State dispute settlement. Limiting the scope of competence of the MIC only to ISDS would create unsustainable situations, whereby the MIC would interpret a particular BIT in ISDS cases, while a typical arbitral tribunal could still interpret this instrument differently in a possible State to State dispute.[61] Allowing the MIC to also hear inter-state disputes would undoubtedly contribute to coherence in the interpretation of a

[59] Art. 8.19(6) CETA. Furthermore, CETA bars the initiation of consultations 10 years after the investor acquired or should have acquired knowledge of the alleged breach and knowledge of the incurred loss or damage thereby (Art. 8.19(6) letter b). Identical provisions in this regard are contained in the EU-Singapore investment protection agreement (Art. 3.3).

[60] A. Ganesh, *Cooling Off Period (Investment Arbitration)*, Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law Working Paper Series (2017).

[61] However, it has to be noted in this context that the EU, in its first investment treaty with Singapore, clearly separated the ISDS from inter-state dispute settlement procedures. While the former implies double-instance proceedings under the heading of the Investment Court System (Art. 3.9-3.10), the latter is drafted as a classical one-instance arbitration (Arts. 3.28-3.29).

particular BIT.[62] Simultaneously, the interstate mode would be applicable only to those investment treaties which allow for such a mechanism.[63]

3.1.3. Jurisdiction *ratione materiae*

Jurisdiction *ratione materiae* of the MIC, although at first sight obvious and undebatable, can nevertheless lead to some controversies. This has been the experience of the functioning of the *ratione materiae* jurisdiction of the ICSID Convention, which has created tension as to whether the conventional term "investment" has some autonomous meaning, different from the definition contained in a particular BIT, thus allowing for the use of the ICSID procedure.[64] This controversy was present in, *inter alia*, the case of the Malaysian Historical Salvors versus Malaysia, in which the tribunal indicated that in order to constitute an "investment" under the ICSID Convention, the contract must have made a significant contribution to the economic development of the respondent state.[65] This decision was harshly criticized by an ICSID Annulment Committee, which emphasized that so called "Salini criteria" cannot be used strictly for mandatory jurisdiction requirements.[66]

Thus, the MIC Statute should deal with this issue in a more detailed manner. Several options are possible. Firstly, the MIC statute can provide for the definition of an investment as used in a particular BIT when such BIT is applicable. Therefore there would not be a need for any search into the autonomous meaning of the term investment under the MIC statute. Secondly, the MIC statute could indicate that apart from the definition contained in a particular BIT, some additional requirements have to be fulfilled. This method is discernible within EU treaty practice, which inserts into the definition of "investment" additional elements originating from investment tribunals jurisprudence. Thus, CETA indicates that "investment means every kind of asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, which includes a certain duration and other characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk (…)."

[62] Kaufmann-Kohler, Potestà (*Can the Mauritius Convention*), *supra* note 55, para. 182; C.M. Brown, *A Multilateral Mechanism for the Settlement of Investment Disputes. Some Preliminary Sketches*, 3 ICSID Review 673 (2017), p. 689.

[63] M. Potestà, *State-to-State Dispute Settlement Pursuant to Bilateral Investment Treaties: Is There Potential*, in: N. Boschiero et al. (eds.), *International Courts and the Development of International Law*, Springer, Berlin-Heidelberg: 2013, pp. 753-768, 753-770; N. Bernasconi-Osterwalder, *State–State Dispute Settlement in Investment Treaties*, IISD Best Practices Series 2014, available at: https://bit.ly/2JuRo3z (accessed 30 May 2019).

[64] *See* "[m]ore fundamentally, however, a progressive harmonization appears to take place towards the recognition of an objective requirement under Art. 25 of the ICSID Convention and the necessity of autonomously ensuring a tribunal's jurisdiction under that provision. Likewise, the case law is progressively evolving towards a greater recognition of the Salini criteria and an economic, as opposed to a purely legal, conception of investment – in fact, the ordinary meaning of the word" (E. Gaillard, Y. Banifatemi, *The Long March Towards a Jurisprudence Constante on the Notion of Investment*, in: Kinnear et al. (eds.), *supra* note 31, p. 123).

[65] Award on jurisdiction of 17 May 2007, ICSID Case No. ARB/05/10.

[66] *Malaysian Historical Salvors SDN BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the application for annulment of 16 April 2009, paras. 62-79.

However, when taking such an approach one has to bear in mind that it can be criticized as a step back from the position of only dealing with the dispute settlement mechanism, i.e. without going into the reform of substantive rules.[67]

3.1.4. Jurisdiction *ratione temporis*

Another important consideration in this regard is the *ratione temporis* jurisdiction, in particular whether the jurisdiction of the MIC would also cover the pre-establishment phase, or would only be limited to an established investment. The proper approach in this regard would be to recognize that the "substantive norm" of a particular investment treaty applies.

3.2. Judges

Substituting *ad hoc* arbitrators with permanent judges is one of the crucial elements of change proposed for the establishment of the MIC.[68] This flows from the conviction that giving disputing parties the right to individually choose their adjudicators may create doubts about the objectivity of a decision, and can also have some systemic impacts for the ISDS.[69] This also relates to resignation from the system of remuneration on a case-by-case basis, a practice which may, in light of the other professional activities of arbitrators, create risks of a conflict of interest.[70] As pointed out by G. Kaufmann-Kohler and M. Potestà, "[i]n an asymmetric setting such as investor-State dispute settlement, the shift from an *ad hoc* to a permanent setting means that one category of disputing parties loses control over the selection process, which remains entirely in the hands of the other because the latter is at the same time a treaty party."[71]

The proposal for a MIC has raised a certain opposition concentrated on the unique features of the current system,[72] as well as on the bias of judges chosen by states alone.

[67] "Whilst a multilateral reform of the substantive standards is difficult to envisage at this moment in time, the process could also lead to discussion of further reforms of the international investment regime, beyond the question of dispute settlement, if governments so decide. Working on procedural issues should not preclude at the appropriate moment work on the substantive issues and the final result of any process on procedure should leave room for any future substantive rules to use the multilateral dispute settlement mechanism" (European Commission, Government of Canada, *supra* note 35, para. 65).

[68] The idea is that the Multilateral Investment Court would "(...) have tenured, highly qualified judges, obliged to adhere to the strictest ethical standards", available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608 (accessed 30 May 2019).

[69] European Commission, Government of Canada, *supra* note 35, para. 11. What is striking is that such an opinion was also expressed by some arbitrators, *see* J. Paulsson, *The Idea of Arbitration*, Oxford University Press, Oxford: 2013, pp. 147-173.

[70] S. Puig, A. Strezhnev, *Affiliation Bias in Arbitration: An Experimental Approac*h, 46(2) The Journal of Legal Studies 371 (2017).

[71] G. Kaufmann-Kohler, M. Potestà, *The Composition of a Multilateral Investment Court and of an Appeal Mechanism for Investment Awards,* CIDS Supplemental Report, 15 November 2017, p. 15.

[72] *See e.g.* Heinz-Bockstiegel, who states that: "[s]ome have suggested that all three arbitrators should be appointed by an institution. I do not agree with that proposal. One of the major reasons for the parties to agree on arbitration is that they have an influence to select judges of their own confidence. This cannot

This criticism is difficult to reconcile with the basic facts regarding the mechanics of international adjudication. There are a large number of international courts which can hear individual disputes against states, even though the judges are chosen by the states. An illustrative example in this regard are regional human rights courts and courts of regional or sub-regional organizations. This approach finds support in Anathea Roberts' theory of the dual role of states (treaty parties and disputing parties).[73] Joost Pauwelyn seems to be pointing in the same direction when stating that "what is needed from ICSID adjudicators is not so much (or only) technical expertise and experience to fill gaps in domestic court systems, but representativeness, inclusiveness and trust by governments and other stakeholders so as to justify ISDS's intrusion in the domestic legal process."[74]

Nevertheless, voices can also be heard that the method of appointing judges should involve stakeholders other than states to a greater degree.[75] Although, such proposals could have some merits, the main example invoked by its supporters *i.e.* judges of the European Court of Human Rights (ECtHR) chosen by the Council of Europe General Assembly (PACE) would be very difficult, if not impossible, to transplant into the MIC. The MIC, in contrast to the ECtHR, is not planned to be structurally connected to any existing international organizations equipped with a body of a similar nature to PACE. Thus, although there is some tendency, in particular with respect to European courts, to engage some advisory panels or selection committees (which are called upon to evaluate the candidates put forward by the governments), one has to keep in mind that this is still a rather unique and not universal practice.[76]

be replaced by an institution which cannot have the same detailed knowledge of all relevant circumstances of the particular case at hand at the beginning of the procedure"; and "in international arbitration, the parties, their counsel and the institutions make many efforts to find the best candidates for their selection of arbitrators. It is hard to see how a permanent tribunal could be composed of even better judges. Probably those who would find it attractive to accept to spend all their work time on such a permanent appointment would be those who are not in the first row of candidates considered by the parties and institutions" (K. Heinz-Bockstiegel, *The Future of International Investment Law, in International Investment Law – A Handbook*, C.H. Beck, Hart, Nomos: 2015, pp. 1867 and 1870). With regard to the former it is striking however that no such an opinion is presented with regard to the members of the ICSID Annulment Committees, which in accordance with Art. 52(3) are appointed by the Chairman of the Administrative Council from the Panel of Arbitrators.

[73] A. Roberts, *Would a Multilateral Investment Court be Biased? Shifting to a Treaty Party Framework of Analysis*, EJIL Talk, 28 April 2017, available at: https://bit.ly/2pdTvgX (accessed 30 May 2019). *See also* A. Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States*, 104 American Journal of International Law 179 (2010), p. 179.

[74] J. Pauwelyn, *The Rule of Law without the Rule of Lawyers? Why Investment Arbitrators are from Mars, Trade Adjudicators from Venus*, 109(4) American Journal of International Law 761 (2015), pp. 804-805.

[75] Investment Treaty Working Group, *Task Force Report on the Investment Court System Proposal Initial Task Force Discussion Paper Investment Treaty Working Group of the International Arbitration Committee*, American Bar Association Section on International Law, 14 October 2016, Discussion Paper, p. 26.

[76] For example this practice does not exist in the election procedures for judges to the ICJ, ICC or ITLOS. Simultaneously, one has to note that these bodies do not adjudicate claims of individuals against states. *See also* M. Bobek, *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts*, Oxford University Press, Oxford: 2015.

An important question which still remains concerns the number of judges.[77] In this regard two main tendencies can be discerned. The first is a limited number of judges, strictly regulated in an appropriate instrument and not proportional to the number of states accepting the jurisdiction of such a Court. This pattern can be observed in global international courts such as the ICJ, the ICC, and the International Tribunal for the Law of the Sea. The second model is based on the principle that every state has the right to choose a judge, a notion that is applied in several courts with the competence of adjudicating individual applications, such as regional human rights courts, and regional and sub-regional courts.[78] So which model should be applied for a global court with the competence of judging individual investment complaints? There is no straightforward answer to this question. Several factors should be taken into account including, *inter alia*, the financial aspect (the greater the number of judges the higher the costs) and also the number of complaints (the more complaints filed the greater the number of judges needed). A third proposal that can be made is that the number of judges would be fixed, but when a State party to a case before the MIC does not have a judge of its nationality on the bench it could choose a person to sit as judge *ad hoc* in that specific case.

Another question that should be evaluated is the length of judges' tenure. In this regard the proposal of the Institut de Droit Internacional (IDI) seems to be a good starting point. Art. 2(1) of the IDI Resolution from 2012 states that "in order to strengthen the independence of judges, it would be desirable that they be appointed for long terms of office, ranging between nine and twelve years. Such terms of office should not be renewable."[79] Long terms of office should, at least in theory, ensure that the judicial experience gained by judges in the early years of their tenure will be used by the court in later years. Furthermore, a lack of renewability limits the potentially negative impact of the fact that a judge may wish to position him/herself to remain on the court for subsequent terms, a factor which may, more or less consciously, influence his or her decisions on the bench.[80]

Furthermore, recent controversies regarding the appointments of members of the WTO Appellate Body suggest, *inter alia*, the need to ensure clarity as to whether a judge assigned to a given case, whose term of office expires during the time of its processing,

[77] "Different methods of appointment of the Members of the Court should be explored including, for example, the possibility that all Parties to the Convention are entitled to appoint a Member of the Court, or the possibility that Members of the Court are appointed through other methods inspired by existing international courts such as the International Court of Justice or the International Criminal Court, taking into account, inter alia, the expected size of the Court and the need to ensure effectiveness and cost-efficiency" (*Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes*, Brussels, 20 March 2018, 12981/17, para. 11).

[78] However, it has been noted that "[n]o global court or tribunal follows this composition model" (Kaufmann-Kohler, Potestà, *supra* note 71, p. 18).

[79] Institut de Droit International, Resolution: The Position of the International Judge, Session de Rhodes, 9 September 2011, Rapporteur: M. Gilbert Guillaume.

[80] In this regard, "Protocol 14 to ECHR from 2004 introduced increasing of the terms of office and prohibited the renewability of judges to reinforce their independence and impartiality", Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, para. 50

should have the right to continue to adjudicate the case until its final completion, or alternatively adjudicate in the case only to a particular stage of proceedings at the end of their term.[81]

With regard to the issue of representativeness in the appointment of the judges, it seems most appropriate to draw comparative patterns with the mechanism of the ICC, particularly as regards ensuring diversity of both gender and region.[82] Such an approach is particularly necessary as it would be in direct opposition to the current situation in the ISDS, which is dominated by men from western states.[83]

3.3. Procedure

Creating a new international investment court would also require the establishment of a detailed procedure, inasmuch as the UNCITRAL Rules or the ICSID Convention would not be automatically applicable. Nevertheless one can assume that the basic concepts contained in these instruments would be followed,[84] with appropriate alterations taking into account the different character of the process of dispute settlement.[85] Simultaneously, some margin of appreciation has to be assigned to the Tribunal to craft its own rules.

3.4. Length of a proceeding

There is a strong practice based on the WTO Dispute Settlement Understanding (DSU) to expressly indicate what is a planned time schedule for first and second instance proceedings. According to Art. 20 of the DSU, "the period from the date of establishment of the panel by the DSB [Dispute Settlement Body] until the date the DSB considers the panel or appellate report for adoption shall as a general rule not exceed nine months where the panel report is not appealed, or 12 months where the report is appealed." Following this model, CETA and IPA Singapore provided for 18 months for a first instance proceeding and an additional 180 days for the appellate procedure (Arts. 28(6) and 29(3) CETA and Arts. 3.18(4) and 3.19(4) IPA). Current

[81] "In the U.S. view, we cannot consider a decision launching a selection process when a person to be replaced continues to serve and decide appeals after the expiry of their term" (U.S. Statements at the 22 November 2017 DSB Meeting).

[82] According to the Art. 36(8) of the 2002 Rome Statute: "The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: (i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation; and (iii) A fair representation of female and male judges" (2187 UNTS 3).

[83] Langford, Behn, Hilleren Lie, *supra* note 28, pp. 309-311; *see also* S. Puig, *Social Capital in the Arbitration Market*, 25 European Journal of International Law 387 (2014), pp. 418-419; Bungenberg, Reinisch, *supra* note 56, pp. 32-33.

[84] A similar approach was applied when the procedural rules of Iran-US Claims Tribunal were crafted. *See* D. Caron, L. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, Oxford University Press, Oxford: 2012, p. 5.

[85] S. Baker, M. Davis, *The UNCITRAL Arbitration Rules in Practice: The Experience of the Iran – US Claims Tribunal*, Springer Netherlands/Kluwer, Alphen aan den Rijn: 1992, p. 2.

arbitral practice shows that complying with such a time frame could be difficult,[86] although it should be taken into account that the length of current proceedings can also be a consequence of the fact that arbitrators engage simultaneously in several cases.[87] In this regard having judges focused only on a particular case could contribute to speeding up the process of resolving cases.

Compliance with a concrete time frame is especially challenging in cases of bifurcations. CETA for example allows a respondent to file a preliminary objection to the Tribunal when the claim is alleged to be manifestly without legal merit (Art. 8.33). In such a situation, a proceeding on the merits is suspended until the preliminary objection is resolved. Further delays can occur if there is a remand of the case by the appellate court to the first instance court. While such a procedure, which is not practiced by international courts, may seem not to be very plausible, particularly from the perspective of the length of proceedings, nevertheless the EU considers the possibility of a "remand" to be an important element of a planned MIC.[88]

An important aspect which affects the speed of proceedings is also the time allowed for lodging an appeal. Therefore it seems necessary to indicate a period that does not excessively prolong proceedings. In this respect, the solution contained in the Washington Convention regarding annulment procedures (120-days) or in EU agreements (90-days in CETA, IPA Singapore Art. 3.18(4)) is excessive. The 60-day period (applicable in WTO law) seems to be sufficient, especially given the fact that most national systems provide for an even shorter period for lodging an appeal.[89]

3.5. The appellate mechanism

An appellate mechanism is not often employed in international law. Apart from some special regimes such as WTO law[90] or EU law, it functions only in criminal courts. Such a situation results from objections relating to the length of proceedings and the costs of double instance proceedings. As regards the time frame, although at first sight the ISDS seems to be simple, fast, and a single instance mechanism, the reality is much more complicated. One of the reasons for this is the possibility of the furcation of proceedings into a jurisdictional and a merits phase; or a merits and liability phase (bifurcation),

[86] "The nineteen awards issued in 2012 came on average thirteen months after the hearing (or the last hearing, in cases with more than one). These included the award in *Daimler Financial Services AG v. Argentina*, which was rendered more than 32 months after the hearing and nearly two years after the last written submissions. The fastest award came five and a half months after the hearing." (J. Lee, *Introduction of an Appellate Review Mechanism for International Investment Disputes: Expected Benefits and Remaining Tasks*, in: Kalicki, Joubin-Bret (eds.), *supra* note 1, pp. 692-693).

[87] *Ibidem*, p. 694.

[88] Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, Brussels, 20 March 2018, 12981/17, para. 10.

[89] Lee, *supra* note 86, p. 700.

[90] The WTO example shows that the appellate procedure is used very often used in practice. The percentage of Panel Reports appealed between 1996 and 2014 was 68 per cent. *See* https://www.wto.org/english/tratop_e/dispu_e/stats_e.htm (accessed 30 May 2019).

and sometimes even on jurisdictional, merits, and damages phases (trifurcation). The analysis of almost 100 arbitration investment cases between 2011 and 2014 showed that 43 per cent were furcated.[91] Another reason is the use of the annulment procedure that is applicable under the ICSID Convention, which in fact creates a double instance proceeding. As a result, the same analysis has indicated that the average time of the arbitration proceedings in the cases analysed was 48.9 months.[92]

One of the most important elements regarding double instance procedures is delimiting the grounds for an appeal. CETA (Art. 8.28(2)) and the IPA Singapore (Art. 3.19) provide for narrow grounds, which are based on annulment prerequisites from the ICSID Convention[93] and supplemented by two additional elements: an error of law and manifest error in findings of fact.[94] This approach assumes that an appellate review mechanism covers both factual and legal issues. Limiting appeals to legal issues alone (errors of law) enables faster proceedings, however such a limitation creates controversies with respect to separating legal and factual issues as they are sometimes closely intertwined.[95] In any case, use of a wide range of grounds for revocation makes it unclear what is the purpose of granting an appellate court the possibility of remand.

3.6. Costs

The issue of costs was traditionally an argument against creating a permanent international court. Already in 1960, during the ILA discussions, Seidl-Hohenveldern stated that: "[a]n Arbitral Tribunal would be preferable to a Permanent Foreign Investments Court, especially in view of the costs involved in the latter case."[96] This evaluation has changed dramatically however with the development of investment arbitration. It is currently estimated that the average arbitration case costs between USD 8[97] to 11.5[98] million, including fees and expenses for party representatives and expert witnesses, costs

[91] D. Behn, *Legitimacy, evolution, and growth in investment treaty arbitration: Empirically evaluating the state-of-the-art*, 46 Georgetown Journal of International Law 363 (2015), p. 377.

[92] *Ibidem*, p. 376.

[93] Art. 52(1) provides that: "Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds: (a) that the Tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its powers; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based."

[94] Identical requirements are contained in the EU-Vietnam FTA, Art. 28(1).

[95] Lee, *supra* note 87, pp. 486-487.

[96] Juridical Aspects of Nationalization and Foreign Property, International Law Association Reports Conference 1960, vol. 49, p. 176.

[97] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017), Part I, 19 December 2017 A/CN.9/930/Rev.1, para. 36; D. Gaukrodger, K. Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD Working Papers on International Investment, 2012/03, p. 19.

[98] S. Hindelang, T.M. Hagemeyer, *In pursuit of an international investment court recently negotiated investment chapters in EU comprehensive free trade agreements in comparative perspective*, July 2017, paper requested by the European Parliament's Committee on International Trade, p. 20.

for arbitrators. and the cost of the arbitration institution. Thus, today high costs are currently recognized as one of the main arguments against investment arbitration.

In addition, it is submitted that creating a standing court with an appellate mechanism does not automatically increase the costs of proceedings. Specific delineation of the time frames for proceedings in the first and second instance may result in a situation where even two-instance Court proceedings could be faster than a single instance arbitration proceeding. Secondly, a standing court can create much more predictable jurisprudence than arbitration tribunals.[99] In this regard, Taylor St. John and Yulia Chernykh state that "while a court has higher standing costs, it may generate lower costs per case, because counsel will not spend time on arbitrator selection and because, if precedent operates, counsel will be able to consider certain questions of law as settled."[100]

3.7. Enforcement

Creating rules on enforcement from scratch is necessary, as it is difficult to see how the New York Convention could be applied in this instance, and almost certainly it will not be. The proposed Multilateral Investment Court would seem to go much further than an investment court system contained in CETA or the EU-Singapore investment agreement, which expressly indicate that the New York convention applies.[101] In this context, Art. 54(1) of the Washington Convention seems to provide the most suitable

[99] *See* the EU position: "This lack of consistency brings significant cost. This is problematic because there is a lack of predictability when analyzing the potential legislative or regulatory activities. This also engenders disputes because it is very often the case that one or the other party in a potential dispute can point to at least one instance in which an interpretation that suits them has been adopted and therefore they are tempted to seek to bring a case when it might not be necessary. In our view, there are differences [among the treaties], but these differences should not be exaggerated." (A. Roberts, Z. Bouraoui, *UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counterclaims*, EJIL Talk, 6 June 2018, https://bit.ly/2PiFsSo (accessed 30 May 2019).

[100] T.St. John, Y. Chernykh, *Déjà vu? Investment Court Proposals from 1960 and Today*, 15 May 2018, available at: https://bit.ly/2QfES8y (accessed 30 May 2019).

[101] Nevertheless this assumption has created uncertainties as to whether the New York Convention can be applicable to the dispute settlement procedure provided by those treaties. *See* American Bar Association Section on International Law, *Task Force Report on the Investment Court System Proposal*, 14 October 2016, Discussion Paper, pp. 98-108; Kaufmann-Kohler, Potestà (*Can the Mauritius Convention*), *supra* note 55, pp. 54-60; S. Nappert, *Escaping from Freedom? The Dilemma of an Improved ISDS Mechanism*, 2015 EFILA Inaugural Lecture (26 November 2015), p. 8. *See* however N.J. Calamita: "[r]egardless of the nomenclature used in the EU model, and in spite of the method of selection of the members of the standing tribunals, it seems that what counts for the purpose of enforcement under the New York Convention is that there is the agreement of the parties to settle their dispute before the particular tribunal. As a result, while the new EU model departs from classic international commercial arbitral practice in some respects, this should not be a significant issue for the effectiveness of the EU model with respect to the New York Convention." (N.J. Calamita, *The (In)Compatibility of Appellate Mechanisms with Existing Instruments of the Investment Treaty Regime*, 18(4) Journal of World Investment & Trade 585 (2017), p. 620; A. Reinisch, *Will the EU's Proposal Concerning an Investment Court System for CETA and TTIP Lead to Enforceable Awards? – The Limits of Modifying the ICSID Convention and the Nature of Investment Arbitration*, 19 Journal of International Economic Law 761 (2016), pp. 782-83).

model for the enforcement of the decisions of a new permanent investment court: "[e]ach Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."

It is submitted that the efficiency of the MIC may be dependent on the actual ability of the investors to enforce MIC decision with regard to the property of a state that failed to comply with MIC decision. As a result it seems necessary to link this issue with the number of ratifications required for entry into force of a treaty constituting the MIC. Only ratification of such a treaty by an appropriate number of countries can give a guarantee that the rules for enforcing the decisions of this court will not be illusory. In this regard one should search for an equilibrium between the 20 ratifications needed for the entry into force of the ICSID Convention, and the 60 ratifications required by the ICC Statute.

3.8. Consistency

According to the European Union, "[p]ermanent bodies, by their very permanency, deliver predictability and consistency and manage the fact that multiple disputes arise, since they can elaborate and refine the understanding of a particular set of norms over time and ensure their effective and consistent application. This is particularly relevant when the norms are relatively indeterminate."[102] This position is highlighted by the practice of investment arbitral tribunals, which extensively rely on previous decisions based on different BITs, often without scrutinizing them as to whether the clauses in question are identical.[103] Such an approach does not take into account the possible differences coming from the context of particular treaties, and creates an expectation that the existence of a non-identical substantive norm will nevertheless create identical or almost identical results.[104] As a consequence, "by importing standards from one investment

[102] A/CN.9/WG.III/WP.145 12 December 2017 United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform) Thirty-fifth session New York, 23–27 April 2018. Possible reform of investor-State dispute settlement (ISDS) Submission from the European Union, para. 7.

[103] *See e.g.* the confusing logic of the *Saipem* tribunal, which seems to favour an artificial "duty to seek to contribute to the harmonious development of investment law" over interpretation of a treaty in accordance with international law: "The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of states and investors towards certainty of the rule of law" (*Saipem SpA v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, para. 67).

[104] Similarly, *see* Robert Howse, "[t]he advantage of multilateralism is the greater number of disputes that can be decided in a given time period given the number of countries who are parties to the system (...) this can lead to a rather rapid development of a significant body of precedent, stabilizing expectations (...)" (R. Howse, *International Investment Law and Arbitration: A Conceptual Framework*, IILJ Working

instrument into another one at the discretion of an appeals facility, this facility would turn into a powerful self-styled and lawmaker void of checks and balances."[105] A similar opinion is held by Ingo Venzke, according to whom the introduction of a new court with an appellate mechanism is "likely to usher in a new dynamic of judicial lawmaking."[106] The latter conclusion seems to find support in the EU-Canada position that "conflicting rulings on identical or on very similar treaty provisions should also be avoided."[107]

In conclusion, one must be careful in anticipating the degree of consistency of adjudication that the MIC is presumed to guarantee. It is justifiable to seriously take into account the existing differences in "substantive" standards, as well as their legal context. Adopting such a cautious approach will be conducive to the MIC's legitimacy, even if it does not always lead to overall consistency. A contrary attitude, i.e. making an effort to hammer out some uniform substantive multilateral norm, can lead to a backlash and to opposition similar to that currently faced by an investment arbitral tribunal.

4. SUBSTANCE FOLLOWS PROCEDURE

As already mentioned, the genesis of the ICSID can be traced back to the political advocacy of the then-General Counsel of the World Bank, Aron Broches, who, faced with failed international negotiations concerning applicable material law, advanced the programmatic formula "procedure before substance". The substance, he argued, would follow in the practice of adjudication.[108]

Initiating reform of a solely procedural nature is a difficult process, taking into account the fact that procedural and substantive norms sometimes influence one another. As has already been mentioned, such a problem relates to, *inter alia*, the definition of investment. Another necessary material element that needs to be introduced to the MIC Statue is an indication of the non-applicability of the BIT MFN clause to dispute settlement provisions. Such an option would ensure that the decision of a state adhering to the MIC Statute would not be bypassed through MFN provisions due to the fact that not all BIT partners of a particular state decided to adhere to the MIC.[109]

Paper 2017/1, p. 61); *see also* "The bundle of bilateral rights and duties between two States hardly ever resembles the bundle of bilateral rights and duties of two other States. Hence, provisions are interpreted and cases are adjudicated in different bilateral legal contexts." (Directorate-General for External Policies Policy Department, *In Pursuit of an International Investment Court – Recently Negotiated Investment Chapters in EU Comprehensive Free Trade Agreements in Comparative Perspective*, July 2017, p. 205).

[105] Directorate-General for External Policies Policy Department, *supra* note 104, p. 175.

[106] I. Venzke, *Investor-state dispute settlement in TTIP from the perspective of a public law theory of international adjudication*, ACIL Research Paper 2016, p. 14.

[107] European Commission, Government of Canada, *supra* note 35, para. 13.

[108] A. von Bogdandy, I. Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23(1) European Journal of International Law 7 (2012), p. 9.

[109] "Whether MFN clauses are to encompass dispute settlement provisions is ultimately up to the States that negotiate such clauses. Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise the matter will be left to dispute settlement tribunals to

Finally, one should also consider introducing some other important and non-controversial substantive elements into the MIC Statute. For example, it should not raise any objections to insert into the MIC Statute some preambular provisions contained in the G20 Guiding Principles for Global Investment Policymaking, in particular the confirmation of the right to regulate.[110]

5. HEADING TOWARDS A PARADIGM CHANGE?

The creation of a new international, permanent court concentrated on settling investor – state disputes is undoubtedly an extraordinary challenge. As indicated, possible problems relate not only to the negotiations concerning the organizational and procedural aspects necessary to ensure the efficient operation of this type of body. It is also necessary to take into account the dynamics of the functioning of international adjudication as such, as well as the controversies surrounding the international legal protection of foreign investments.

In pursuing this endeavour, it has to be borne in mind that it will not be easy to make strict delimitations between procedural and substantive law. However, the problems found in investment tribunals' jurisprudence with respect to application of the definition of an investment or the MFN clause clearly show that such delimitation should be effected.

As with any other form of international adjudication, permanent courts should not be idealized.[111] As happens in an imperfect world, new institutions do solve some problems, but at the same time tend to create others. Nevertheless, due to the "undeniable weakness" of the existing system there are convincing arguments for such an institution. Undoubtedly, the creation of a MIC would significantly change the current situation of ISDS "users". This should not be viewed however as a one-way pro-state reform. As the functioning of regional human rights courts shows, permanent courts can still ensure a significant protection of individuals' rights. Furthermore, the lack of a requirement to exhaust domestic remedies, entailed in the most BITs, would result in the lack of a possibility for domestic courts to review some issues before they are evaluated by the MIC, which can also create tensions between its jurisprudence and the regulatory competences of states. With respect to the appellate mechanism, this element seems to be beneficial for all stakeholders, particularly taking into account the planned reduc-

interpret MFN clauses on a case-by-case basis" (Final Report of the Study Group on the Most-Favoured, -Nation clause 2015, para. 216); *see also* S.W. Schill, *Maffezini v. Plama: Reflections on the Jurisprudential Schism in the Application of Most-Favored-Nation Clauses to Matters of Dispute Settlement*, in: Kinnear et al. (eds.), *supra* note 31, pp. 252-265.

[110] UNCTAD, *World Investment Report 2017*, pp. 118 and 141-142.

[111] Good example of such an idealization is Speech by European Commissioner for Trade Cecilia Malmström "A Multilateral Investment Court: a contribution to the conversation about reform of investment dispute settlement, Brussels, 22 November 2018, available at: https://bit.ly/2ziAChx (accessed 30 May 2019).

tion in the length of the proceedings thanks to the substitution of *ad hoc* arbitrators by permanent judges. Last, but not least, with respect to the EU – which is in the forefront of the proposal to establish the MIC – the issue of the acceptance of its jurisdiction by the CJEU can lead to controversies in and of itself.[112] Finally, whether a reform aimed at changing procedures without changing the substantive rules can create a significantly greater coherence of jurisprudence is a serious question that remains to be answered.

Nevertheless, the establishment of such a Court and its acceptance by an appropriate number of states would constitute an important step towards a significant (and very much needed) transformation of international investment law, i.e. a departure from arbitration as a method of resolving disputes, at the same time depriving investors of the right to appoint their members of the tribunal.

In this respect, the procedural reforms in international investment law presented in this article would fit in within the paradigm shift in this area. At the same time, this also encompasses issues of the reorientation of this branch of law as regards the right to regulate and specify substantive law in new investment treaties, as well as with respect to the limits on judiciary discretion.

[112] C. Titi, *The European Union's Proposal for an International Investment Court: Significance, Innovations and Challenges Ahead*, 1 TDM (2017), pp. 37-41.

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PROTECTION OF POLISH INVESTORS UNDER THE CHINA-POLAND BILATERAL INVESTMENT TREATY

Abstract:
This article explores investment protection under Chinese international investment agreements (IIAs), particularly under the China-Poland bilateral investment treaty (BIT). As a state that both imports and exports foreign direct investment, China currently promotes balanced and safeguarded BITs that protect its increasing overseas investments and preserves the necessary space to regulate in the public interest. The Chinese government remains reluctant to be directly involved in investment arbitration as a respondent, while Chinese investors are active in taking advantage of the IIAs' regime. When compared to China's recent treaty practice and new developments in global investment governance, the China-Poland BIT is relatively outdated in terms of investment protection, promotion, social clauses, and dispute settlement. In terms of the investment protection effects of BITs, China is seemingly in a more urgent position to update the China-Poland BIT. However, if we evaluate the overall effects of a modernized BIT on investment promotion, regulation, and dispute settlement, an updated China-Poland BIT will fit the interests of both the Polish and Chinese governments. Notwithstanding the on-going negotiation between the EU and China, this article aims, along with presenting the Chinese practice regarding BITs, to describe de lege lata the state of protection offered to Chinese and Polish investors under the China-Poland BIT.

Keywords: China-Poland BIT, investment protection, investment arbitration

INTRODUCTION

In view of the great Chinese project of the new Silk Road, which for Poland can be a chance not only for investments in infrastructure (e.g. railways and harbours)[1] but

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[1] National Development and Reform Commission, Ministry of Foreign Affairs and Ministry of Commerce of China, 推动共建丝绸之路经济带和21世纪海上丝绸之路的愿景与行动 [Vision and Ac-

may also galvanize Chinese investments in various Polish sectors,[2] the question may be raised as to what level of protection is granted under international law, especially international investment law, for Chinese investors in Poland, and correspondingly for Polish investors in China.[3]

Notwithstanding the on-going negotiations between the EU and China regarding a new investment treaty, the results of those negotiations are still far from being concluded. Even though this process attracts a lot of attention,[4] there is no certainty that the treaty will be negotiated and signed in the near future. Therefore the aim of this article is to present what protection is granted to investors under the China-Poland Bilateral Investment Treaty (BIT) *de lege lata*, and then to briefly present three possible paths of future development.

The Chinese policy towards the protection of investments changed radically during the 20th century, as it moved away from a more restricted and sovereignty–oriented model.[5] Commencing with Deng Xiaoping's "Open Door" policy in 1978, China has made considerable efforts to regulate its trade and investment relations and become more open. This promotes inward foreign direct investments from external sources[6] and also encourages more Chinese investments in foreign states under the governmental strategy of "Going Abroad" since 1998.[7] A similar pattern can be observed also in the Chinese policy concerning the ratification of investment treaties since 1982.[8] Today China has concluded more than 140 investment treaties, most of them BITs, which amounts

tions on Jointly Building the Silk Road Economic Belt and 21st-Century Maritime Silk Road] (BRI Vision and Actions), May 2015, available at: https://eng.yidaiyilu.gov.cn/qwyw/qwfb/1084.htm. This is widely viewed as the first official masterplan for the BRI. Leading Group on the Construction of the Belt and Road of China, 共建"一带一路"：理念、实践与中国的贡献 [Building the Belt and Road: Concept, Practice and China's Contribution] (the Building Practice) (10 May 2017) available at: https://eng.yidaiyilu.gov.cn/wcm.files/upload/CMSydylyw/201705/201705110537027.pdf (both accessed 30 May 2019).

[2] Poland is very active toward attracting Chinese investments, e.g. by creating the Special Economic Zone Koszalin City, the so-called "first Chinese industrial park in Europe" (*see* I. Alon, M. Fetscherin, P. Gugler (eds.), *Chinese International Investments*, Palgrave Macmillan, New York: 2012, p. 167).

[3] *See* M. Du Point, *Foreign Direct Investment in Transitional Economies: A Case Study of China and Poland*, Macmillan Press, London: 2000.

[4] *See* the information about negotiations at the European Commission website, available at: http://ec.europa.eu/trade/policy/countries-and-regions/countries/china/ (accessed 30 May 2019).

[5] *See* N. Gallagher, *Role of China in Investment: BITs, SOEs, Private Enterprises, and Evolution of Policy*, 31(1) ICSID Review – Foreign Investment Law Journal 88 (2016); W. Kidane, W. Zhu, *China-African Investment Treaties: Old Rules, New Challenges*, 37 Fordham International Law Journal 1035 (2014); W. Kidane, *China's and India's Differing Investment Treaty and Dispute Settlement Experiences and Implications for Africa*, 49 Loyola of Chicago Law Journal 406 (2018); W. Kidane, *The Culture of International Arbitration*, Oxford University Press, Oxford: 2017.

[6] K. Davies, *Inward FDI in China and Its Policy in Context*, 10(1) China International Journal 62 (2012), pp. 62-74.

[7] N. Gallagher, W. Shan, *Chinese Investment Treaties: Policies and Practices*, Oxford University Press, Oxford: 2009, pp. 12-13.

[8] Y. Bian, *A Revisit to China's Foreign Investment Law: With Special Reference to Foreign Investment Protection*, 8 Journal of East Asia and International Law 447 (2015), p. 448.

to an extensive network of investment agreements that is second only to Germany.[9] Of course, the content of those treaties has evolved over time, varying from the first generation of concise and concentrated European-style BITs concluded in the 1980s to the recent complex and detailed Americanized BITs.[10]

Traditionally, since the beginning of their existence BITs have been used as a tool by investment-exporting countries to protect their outbound investments,[11] primarily in developing countries.[12] For investment exporting countries, the protection function of BITs is decisive, specifying standards of treatment in favour of investors and equipping the investors with direct access to a depoliticized investor-state dispute settlement (ISDS) mechanism. For host countries however, the picture is more mixed. On one hand, their main interest is to attract FDI from developed states by committing themselves to onerous international obligations (the Grand Bargain theory).[13] On the other hand, host states emphasize the defence function of BITs, as they are inclined to narrow the scope and extent of investment protection obligations in order to leave as much power as possible to the discretion of a state (e.g. regarding the application of regulatory measures), and thereby avoid the interventions of international arbitrators.[14] The implicit understanding is that the protection of investors/investments granted by BITs should be theoretically reciprocal. However, such factors as the unequal relationship between the rich and influential developed states and the developing states – which existed during the period of creation of the first BITs – and also the actual practice, whereby very few or no investors from developing countries have invested in the developed country, may result, as observed by scholars,[15] in an imbalance that favours investors of the developed world in the developing world.

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[9] According to UNCTAD, 129 BITs were concluded (110 in force) and 20 TIPs (18 in force). All of the investment treaties, especially bilateral investment treaties invoked in this article can be find in this database: http://investmentpolicyhub.unctad.org/IIA/CountryBits/42#iiaInnerMenu (accessed 30 May 2019).

[10] Note that most authors understand these notions, as they are commonly used in the literature. Thus "European style BIT" should be understood as a conservative treaty, with rather plain and concise text, which commonly incorporates only basic substantive protection provisions including, *inter alia*, the duty to compensate the investor in case of an expropriation, compensation for damages and losses, fair and equitable treatment, and most-favoured nation treatment standards. This is opposed to "American style BIT", which should be understood as a treaty with much more complex and detailed text, usually containing more rights for investors, such as, e.g., including full ISDS mechanisms in BITs. *See* Gallagher, Shan, *supra* note 7, pp. 35-41.

[11] W. Shan, *Toward a Multilateral or Plurilateral Framework on Investment*, E15 Initiative Think Pierce, 2015, p. 5.

[12] *See e.g.* the practice of the United States, a party to forty-seven BITs with states, almost all of which can be classified as developing, available at: http://investmentpolicyhub.unctad.org/IIA/CountryBits/223#iiaInnerMenu (accessed 30 May 2019).

[13] J.W. Salacuse, *The Law of Investment Treaties*, Oxford University Press, New York: 2010, p. 111.

[14] *See* M. Żenkiewicz, *Compensable vs. Non-compensable States' Measures. Blurred Picture and Changing Borderlines Under Investment Law* (November 19, 2018), Society of International Economic Law (SIEL), Sixth Biennial Global Conference, available at:: https://ssrn.com/abstract=3287271 (accessed 30 May 2019).

[15] J.W. Salacuse, *The Emerging Global Regime for Investment*, 51(2) Harvard International Law Journal 427 (2010), p. 464.

When initiating its BIT programs in the 1980s, China was an investment importing country, and understandably took a defensive and conservative position in BITs. Times have changed. China and other emerging economies[16] have become, to various degrees, dual-role states as both major importers and exporters of capital. Like other major economies, China can seek protection for its investments abroad under BITs, while at the same time finding itself confronted by claims of foreign investors in China. Therefore, it is foreseeable that within its BITs and the possible updates, China will need to find the proper balance between the protection of incoming and outgoing foreign investment.[17]

This article mainly presents the protections offered under the China-Poland BIT, i.e. the protection *de lege lata*. This situation may change drastically if the on-going negotiations between the EU and China regarding an investment treaty would be concluded. If so, the China-Poland BIT would be substituted by the EU-China BIT. However, the negotiations have proven to be difficult and there is no guarantee that they will be concluded any time soon. After 19 rounds of negotiations there are still issues regarding, for example, Fair and Equitable Treatment (FET) or National Treatment (NT), which are in the initial stage of discussion.[18]

This article is structured as follows: In Part 1 it briefly summarizes the evolution of Chinese BITs, exploring how the content of such treaties has changed since the first BIT was concluded in 1982. Part 2 presents the arbitral awards involving China and draws some general conclusions about Chinese arbitral practice. Part 3 proceeds to evaluate the China-Poland BIT in a new context. Part 4 presents some concluding remarks regarding the protections under the BIT and comments on possible future developments.

1. THE EVOLUTION OF CHINESE BITS

It is not an easy task to make a concise periodisation of Chinese BITs. However, from the general trend it seems discernible that Chinese BITs have experienced a shift from a conservative model to one of managed liberalization.[19] Since 1982, when China

[16] C. Cai, A. Roberts, *Introduction to the Symposium on the BRICS Approach to the Investment Treaty System*, 112 AJIL Unbound 187 (2018); C. Cai, *Balanced Investment Treaties and the BRICS*, 112 AJIL Unbound 217 (2018).

[17] W. Kidane, *China's Bilateral Investment Treaties with African States in Comparative Context*, 49 Cornell International Law Journal 141 (2016), at 175. In contrast, Cai has rightly pointed out that some BRICS countries, e.g. India, South Africa, and to some extent Brazil, have shifted from an imbalanced BIT in favour of investors to one in favour of host states (Cai, *supra* note 16).

[18] *See* European Commission, Report of the 19th round of negotiations for the EU-China Investment Agreement, Brussels, 13 November 2018, available at: http://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157495.._.pdf (accessed 30 May 2019).

[19] Managed liberalisation is used to describe the delicate balance between liberalisation and regulation in international investment policymaking, namely the simultaneous moves to liberalise and promote

signed its first BIT with Sweden, the Chinese attitudes toward FDI and BITs have been informed by a change in posturing towards a policy away from protectionism towards a more liberal model.[20] That change of attitude is reflected in the gradual embrace of national treatment and full ISDS mechanisms in BITs.

In terms of ISDS mechanisms, Chinese BITs can be divided into two categories, namely: the first generation of BITs before 1997 with a limited ISDS mechanisms, covering disputes concerning the amount of compensation for expropriation; and the second generation of BITs after 1997 with a full ISDS mechanism, covering all investment disputes.[21] Taking into account that China signed the ICSID Convention in 1990,[22] the first generation of Chinese BITs can be further divided into two subcategories – those referring to ICSID arbitration and those referring only to *ad hoc* arbitration.

The Chinese BIT programme was initiated at the request of investors from developed countries in the early 1980s. When China commenced its Open Door policy in the late 1970s, foreign investors in China were rather under-protected under Chinese laws and regulations, because of the absence of a modern legal system based on a market economy. In order to assure foreign investors, China initiated new measures at both the national and international levels. China passed the Law of the People's Republic of China on Chinese-foreign Equity Joint Ventures in 1979. BIT negotiations were initiated very quickly with Germany, the US, and Japan in 1980, and then with the UK, France, Sweden and Switzerland.[23] As most of the investors in the early 1980s were from European countries, it is not a surprise that China's early BIT practices were strongly influenced by European BITs.

The first generation of Chinese BITs were rather conservative. They incorporated basic substantive protection provisions, *inter alia,* the duty to compensate the investor in case of expropriation, compensation for damages and losses, FET and most favoured nation (MFN) standards. However, all of those rights and substantive protections are

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investment (still the mainstream) and to regulate and restrict it (on the rise). *See* J. Zhan, *G20 Guiding Principles for Global Investment Policymaking: A Facilitator's Perspective, E15 Initiative Think Piece*, Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, December 2016, pp. 1-2.

[20] L. Markert, *Arbitration under China's Investment Treaties – Does It Really Work?*. 5 Contemporary Asia Arbitration Journal 205 (2012), p. 208.

[21] Such a classification seems to be prevalent, *see* S. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15(1) Cardozzo Journal of International and Comparative Law 73 (2007), pp. 89-94; M. Huth, J. Zeng, *China and ICSID Arbitration. Can the ICSID arbitration regime serve as a suitable tool for dispute resolution in investment contracts with Chinese governmental authorities?* 18 Zeitschrift fur Chinesisches Recht 186 (2011), pp. 189-190; L. Markert, *supra* note 20, p. 211.

[22] Convention on the settlement of investment disputes between States and nationals of other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159, signed by the People's Republic of China on 9 February 1990, entered into force on 6 February 1993.

[23] X. Liu (ed.), 对外开放起始录 [The Beginning of China's Opening Up], Economy & Management Publishing House, Beijing: 2008, p. 160.

meaningless if there is no effective investor-state arbitration clause in BITs. Basically, the following stipulations regarding the dispute settlement mechanism can be found in the first generation of Chinese BITs: (a) the BIT does not include arbitration clauses that would allow investors to bring a claim against the host state (e.g., China – Sweden BIT 1982; China – Denmark BIT 1985; China – Norway BIT 1987); (b) the BIT includes arbitration clauses, but limited only to disputes regarding the interpretation or application of the investment treaty; and/or (c) the BIT includes arbitration clauses limited only to disputes over the amount of compensation to be paid in cases of expropriation measures (e.g. China – Singapore BIT 1985).

It is interesting to note that China has conducted a very active policy regarding BITs with both developed and developing countries. It is believed that Chinese BITs concluded with Eastern European states (as well as with developing states) were primarily aimed at forming or strengthening diplomatic alliances,[24] because the "Chinese economy was not strong enough to invest abroad."[25] Some scholars argue that Chinese BITs in the early 1990s were also driven by securing international partners in a difficult domestic and international context.[26]

The next two key events in the development of Chinese BITs were the announcement of building a Market Economy with Chinese Characteristics in 1994, and the Going Out Policy in 1998.[27] During this period China ratified the ICSID Convention and gradually embraced full ISDS mechanisms for all investment disputes. Meanwhile, China explored different modes for granting national treatment subject to various conditions (grandfather clauses, national law and regulations, etc.) to foreign investors on post-establishment matters. This change in the Chinese attitude can be connected with, *inter alia*, the rapid increase of FDI (both inward and outward), and the need to protect its own investors and investments in African countries.[28] Generally, it is accepted that Chinese BITs around this period of time provide a higher level of investment protection, which is no longer different than the protection offered by Western European states' BITs. It is enough to mention that these treaties include a broad definition of "investment", which ensures that all essential rights and interests necessary for engaging in economic activities, including indirect investments, are covered by the treaty (e.g. China – Germany BIT 2003). Furthermore, these BITs allow for arbitration of all investor-state disputes under the treaty, without any restrictions as to the subject matter of the dispute and the choice between, *inter alia,* ISCID or UNCITRAL arbitration

[24] G.M. Vaccaro-Incisa, *The Evolution of China's Policy and Treaty Practice in International Investment Law: An Outline*, 4 Bocconi Legal Papers 89 (2014), p. 105.

[25] Ch. Brown, *Commentaries on Selected Model Investment Treaties,* Oxford University Press, Oxford: 2013, p. 132.

[26] T. Cohen, D. Schneiderman, *The Political Economy of Chinese Bilateral Investment Treaty Policy*, 5(1) The Chinese Journal of Comparative Law 110 (2018).

[27] Gallagher, Shan, *supra* note 7, pp. 7-8.

[28] Regarding Chinese investments in Africa, *see* the official website of the Forum on China-Africa Cooperation (FOCAC), available at: http://www.focac.org/eng/ (accessed 30 May 2019); *see also* Kidane, *supra* note 17.

(e.g. China – Barbados BIT 1998; China – Netherlands BIT 2001; China – Finland BIT 2004).

After 1998, Chinese BITs no longer significantly differed from the practice of its European counter parties. The European-styled BITs were streamlined in Chinese practices[29] until 2012, when China negotiated and signed investment treaties with Canada, Japan and South Korea. The China – Canada BIT and the China – Japan – Korea investment agreement are exceptionally detailed and comprehensive compared to earlier Chinese BIT practices. Chinese moves towards the Americanized BITs were further enhanced with the negotiations of the China – US BIT. In particular, China accepted the policy of pre-establishment of national treatment with a negative list, which served as a basis for Chinese negotiations with both the US and the EU. Some innovations are also included in recent Chinese BITs and in negotiations to address the manifested legitimacy concerns, both substantively and procedurally. Therefore, some scholars argue that a Chinese BIT 4.0 is taking shape.[30]

In conclusion, Chinese BITs have been subject to an evolution of inclusive and managed liberalization. Firstly, Chinese BITs are adaptive and responsive to better suit the the needs of various treaty partners.[31] Although there is a model BIT[32] for treaty negotiations in a given period, there can be, and indeed are, BITs of different generations coexisting in a given period. Secondly, Chinese BITs are closely managed and correlated with the domestic dynamics of reform and legislation. On one hand, in Chinese treaty practice investment protection remains the primary goal of BITs, while investment promotion and admission were largely regulated by national legislation until 2013, when China began to address investment admission in BITs. On the other hand, China gradually liberalized its BITs in correlation with the Chinese domestic reform and tended to make institutional try-outs for major breakthroughs in BIT arrangements. China tries to strike a balanced BIT for protecting its increasing oversea investments while safeguarding the necessary space for regulating in the public interest.

2. THE ARBITRAL PRACTICES UNDER CHINESE BITS

Compared to the number of treaties concluded and to the amount of inward and outward Chinese FDI, the State is surprisingly rarely challenged before international

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[29] Gallagher, Shan, *supra* note 7, pp. 35-41.

[30] W. Shan and H. Chen, *China-US BIT Negotiation and the Emerging Chinese BIT 4.0*, in: C.L. Lim (ed.), *Alternative Visions of the International Law on Foreign Investment*, Cambridge University Press, Cambridge: 2016.

[31] S. Li, *Bilateral Investment Promotion and Protection Agreements: Practice of the People's Republic of China*, in: P. Waart, P. Peters, E. Denters (eds.), *International Law and Development*, Martinus Nijhoff Publisher, Dordrecht: 1988, pp. 179-180.

[32] The main differences in generations of Chinese Model BITs are reflected in the national treatment and dispute settlement provisions. For more, *see* the text of several Chinese Model BITs on the UNCTAD Investment Policy Hub (available at: https://investmentpolicyhub.unctad.org/IIA), and Gallagher, Shan, *supra* note 7, pp. 423-440.

investment tribunals. There have been only six arbitral cases (concluded, settled, or pending) in which Chinese investors took actions against the host state, and only three cases when foreign investors turned to international arbitration in disputes with China. In the first part of this section, these cases will be briefly mentioned, without their description and analysis. The second part will discuss the most important problems raised in those cases where China was a respondent.

2.1. The Chinese experience of investment arbitration

As mentioned, the Chinese experience in investment arbitration is limited to only nine cases so far. China acted as a Host State only in three proceedings. The first ISDS case against China, namely *Ekran v China* (2011),[33] arose out of the revocation of the claimant's subsidiary's rights to leasehold land by the Chinese provincial governments of Hainan due to an alleged failure to develop the land as stipulated under the local legislation. This case was settled and the ICSID proceeding was thus discontinued.[34] The second ISDS arbitration case against China, *Ansung Housing v. China* (2014), related to the provincial government's alleged actions in relation to Ansung's investment in the Jiangsu province,[35] was decided in favour of China.[36] The third case, *Hela Schwarz GmbH v. China* (2017)[37] relates to a housing expropriation decision by the Jinan Municipal Government, which was challenged by the investor.[38] The case is pending and no additional information on the arguments of both parties is currently available.

Chinese investors are more active in ISDS. So far there have been six arbitral cases involving China as a home state. The first ISDS cases – *Tza Yap Shum v Peru* (2007)[39] – arose out of the seizure of the bank account of the claimant's enterprise due to tax debt and other alleged actions undertaken by the Peruvian tax authorities, which resulted in a substantial deprivation of the claimant's investment. The case touched upon issues such as the application of Chinese BITs to a Hong Kong resident, and also the limitation of the Tribunal's jurisdiction to disputes involving the amount of compensation.[40] The issue on the applicability of China's BITs to the Hong Kong and Ma-

[33] *Ekran Berhad v. People's Republic of China*, ICSID Case No. ARB/11/15.

[34] Order taking note of the discontinuance of the proceeding issued by the Secretary-General dated 16 May 2013, pursuant to ICSID Arbitration Rule 43(1).

[35] J. Fei, B. Horrigan, T. Furlong, *China sued by South Korean property developer at ICSID* (Herbert Smith Freehills Dispute Resolution, 10 November 2014), available at: http://hsfnotes.com/arbitration/2014/11/10/china-sued-by-south-korean-property-developer-at-icsid/ (accessed: 30 May 2019).

[36] *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017.

[37] *Hela Schwarz GmbH v. People's Republic of China*, ICSID Case No. ARB/17/19.

[38] *Ibidem*, Procedural Order No. 2, 10 August 2018, para. 39.

[39] *Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 12 February 2007.

[40] *Ibidem*, para. 151. *See also* Award of July 7, 2011, and the Decision on Annulment of 15 February 2015.

cao Special Administrative Regions was also encountered in *Sanum Investments v. Laos* (2013).[41]

In *China Heilongjiang v. Mongolia* (2010),[42] Chinese investors lodged an arbitration against Mongolia under the China – Mongolia BIT (1991) over the cancellation of licenses held by the claimants in the Tumurtei iron ore mine in 2012. Similarly, in *Beijing Urban Construction v. Yemen* (2014),[43] the claims under the China – Yemen BIT (1998) arose out of the alleged forced deprivation of the claimant's assets and a contract.

The claims in *Ping An v. Belgium* (2012)[44] arose out of Belgian Government's bailout in the context of the 2008 financial crisis, and subsequent nationalization and sale to a third party of the Belgian-Dutch financial institution Fortis, in which the claimants had invested. The core issue was the temporal application of jurisdictional provisions, particularly whether the BIT between China and Belgium which entered into force on 1 December 2009 covered disputes which arose before that date, but were not then under a judicial or arbitral process.[45] The Tribunal confirmed that the 2009 BIT does not cover disputes notified before the 2009 BIT.[46]

The claims in *Philip Morris v. Australia* (2012)[47] arose out of the enactment and enforcement by the Australian Government of the Tobacco Plain Packaging Act 2011 and its alleged effect on investments in Australia owned or controlled by the claimant. The Tribunal issued a jurisdictional decision in favour of Australia and held that the dispute was both foreseeable and actually foreseen when Philip Morris acquired its investment in Australia in February 2011, and therefore the corporate restructuring constitutes an abuse of a right or abuse of process.[48]

2.2. Features of investment arbitration involving China

From the brief review above, it is clear that as a matter of fact Chinese investors are active in taking advantage of the IIA regime, while the Chinese government remains reluctant to be directly involved in ISDS as a respondent. As a matter of law, several issues

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[41] *Sanum Investments Limited v. Lao Peoples Democratic Republic*, UNCITRAL, PCA Case No. 2013-13, Award on Jurisdiction, 13 December 2013; The High Court of the Republic of Singapore, *Judgment in the matter of Order 69A of the Rules of Court (Cap 322, R 5,2006 Rev Ed) between Government of the Lao People's Democratic Republic and Sanum Investment Ltd.*, [2015] SGHC 15; *Sanum Investment Ltd. v. Government of the Lao People's Democratic Republic* [2016] SGCA 57, paras. 104, 113.

[42] *Beijing Shougang Mining Investment Company Ltd., China Heilongjiang International Economic & Technical Cooperative Corp., and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. v. Mongolia*, PCA Case No. 2010-20, Award, 30 June 2017.

[43] *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30.

[44] *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company, Limited v. The Government of Belgium*, ICSID Case No. ARB/12/29, Award, 30 April 2015.

[45] *See also* Q. Ren, *Ping An v Belgium: Temporal Jurisdiction of Successive BITs*, 31(1) ICSID Review 129 (2016).

[46] *Ping An v. Belgium*, paras. 223–31.

[47] *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA, Case No. 2012-12, Decision on Jurisdiction and Admissibility (17 December 2015).

[48] *Ibidem*, pp. 585-587.

revealed in China's participation in ISDS regime deserve further in-depth analysis. Some issues are unique ones which are deeply embedded in China's policy, while some are common ones which foreign investors would encounter under almost each and every IIA. These three issues are: (1) the Special Administrative Region (SAR) issue, relating to territorial and personal jurisdiction under China's IIAs;[49] (2) the expropriation issue, relating to the interpretation of the jurisdictional scope of ISDS for disputes involving the amount of compensation for expropriation; and (3) the enforcement of ISDS awards in China.

2.2.1. The Special Administrative Region issue

The most special feature in China-related ISDS practices is the applicability of China's BITs in the SAR, namely whether investors in the SAR can invoke IIAs signed by the Chinese central government. On the surface, the SAR issue relates to the commonly-discussed nationality of investors. However, its deeper nature intertwines the issue of the intra-national distribution of regulatory power in the investment law context, namely the Central-Local Government relations in China, and especially the *One Country Two Systems* Principle.[50]

Normally, the *ratione personae* jurisdiction of ISDS tribunals is based on a twofold nationality requirement: a positive one, i.e. that the investor(s) must have the nationality of a contracting state; and a negative one, that the investors must not be nationals of the host state.[51] However, according to Art. 42 of the ICSID Convention, the law governing disputes does not govern determination of the nationality of individuals,[52] and therefore the ICSID Convention does not *per se* provide a precise criterion for the determination of a qualified, and therefore protected, investor.[53]

Regarding a natural person, most Chinese BITs stipulate that a natural person qualifies as a Chinese investor as long the person has the nationality of the PRC according to its laws.[54] Pursuant to the Nationality Law of the People's Republic of China (1980), any person born in China whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality.[55] According to Art. 18 of

[49] SAR are a type of provincial-level administrative divisions of China which enjoy the highest degree of autonomy. There are two existing SARs in China: Hong Kong and Macau. The main issue regarding the Hong Kong SAR and investment law is whether a foreign investor in the Hong Kong SAR is entitled to invoke the BIT signed by the Chinese Central Government when there is a BIT signed by Hong Kong SAR as the home state of the investor.

[50] *See* O.G. Repousis, *On Territoriality and International Investment Law: Applying China's Investment Treaties to Hong Kong and Macao*, 37(1) Michigan Journal of International Law 113 (2015); J. Husa, *Accurately, Completely, and Solemnly: One Country, Two Systems and an Uneven Constitutional Equilibrium*, 5(2) The Chinese Journal of Comparative Law 231 (2017).

[51] ICSID Convention, Art. 25(1).

[52] *Ibidem*, Art. 42.

[53] Ren, *supra* note 45, p. 136.

[54] UK – China BIT, Art.1(c)(ii), Peru – China BIT, Art.1(2)(a), Netherland – China BIT, Art.1(2)(a),

[55] Standing Committee of the National People's Congress, 中华人民共和国国籍法 [Nationality Law of China], Art. 4, enacted on 10 September 1980, available at: http://www.npc.gov.cn/wxzl/gongbao/2000-12/11/content_5004393.htm (in Chinese) (accessed 30 May 2019).

Hong Kong Basic Law and Annex III[56] to the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, the Nationality Law of the People's Republic of China shall be applied in the Hong Kong Special Administrative Region from 1 July 1997.[57] In particular, where a Hong Kong resident is of Chinese descent and was born in the Chinese territories (including Hong Kong), or where a person satisfies the criteria laid down in the Nationality Law of the People's Republic of China for having Chinese nationality, he or she is a Chinese national. Therefore it is safe to conclude that a Hong Kong resident holding a Chinese passport or equivalent identification qualifies as a protected investor under Chinese IIAs. In other words, natural persons of Hong Kong are entitled to initiate ISDS proceedings as claimants under China's IIAs. There is a possibility that a natural person of Hong Kong may have dual remedies as an investor under both China's and Hong Kong's IIAs. In such a hypothetical scenario, the tribunal may refuse the jurisdiction of ISDS under China's IIAs on the basis of Effective Interpretation Principle.

Regarding juridical persons such as corporate investors, the picture is a bit more complex. According to Art. 18 of the Basic Law of the Hong Kong SAR of the People's Republic of China, National Laws, such as corporate laws or company laws of the PRC, are not applicable in the Hong Kong SAR.[58] The relevant legislation of Hong Kong is the exclusive governing law on determination of the nationality of corporate investors of Hong Kong. The most common requirement of nationality for corporate investor in China's IIAs is the so-called Incorporation Standard, which means that only an economic entity constituted or incorporated in accordance with China's Law is a protected corporate investor under China's IIAs.

In this context, could terms such as "China's Law" or "Chinese Law" be interpreted broadly to cover the laws of the Hong Kong or Macao SARs? In the broad sense it may be arguable if the China's IIAs do not include a special application provision to exclude its territorial coverage over an SAR. But in a strict sense this is not logically sound, especially when China's government and the SAR government both entered into IIAs with the same country in which the SAR investors have challenged measures before ISDS tribunals.[59]

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[56] Annex III : National Laws to be Applied in the Hong Kong Special Administrative Region, available at: http://www.basiclaw.gov.hk/en/basiclawtext/annex_3.html (accessed 30 May 2019).

[57] Standing Committee of the National People's Congress, 全国人民代表大会常务委员会关于《中华人民共和国国籍法》在香港特别行政区实施的几个问题的解释 [Explanations of Some Questions by the Standing Committee of the National People's Congress Concerning the Implementation of the Nationality Law of the People's Republic of China in the Hong Kong Special Administrative Region], adopted at the Nineteenth Session of the Standing Committee of the Eighth National People's Congress on 15 May 1996, http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf (in English); http://www.npc.gov.cn/wxzl/wxzl/2001-02/06/content_4661.htm (in Chinese) (both accessed 30 May 2019).

[58] Except for those listed in Annex III, which still need to be confined to those laws relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the SAR. *See* the Hong Kong Basic Law, Art. 18.

[59] In a sample case, in *Sanum v. Laos* the Chinese government expressed its position in a diplomatic note to Laos that "in principle the bilateral investment agreements concluded by the Central People's Government are not applicable to [Macao], unless the opinion of the Special Administrative Region Govern-

The tribunal is very like to adopt the effective interpretation principle to make both IIAs effective and deny the applicability of China's IIAs to juridical persons incorporated in SARs in cases of a parallel existence of an SAR IIA. Therefore it can be concluded that corporate investors in an SAR may invoke China's IIAs if there is no evidence indicating otherwise. Precluding evidence includes, but is not limited to, the existence of parallel SAR IIAs.

2.2.2. Disputes involving the amount of compensation for expropriation

A considerable portion of China's early BITs are still in force. The limited ISDS provision for disputes involving the amount of compensation for expropriation will continue to be contested and interpreted in more cases. Despite the general reference to, and reliance on, the rules of treaty interpretation in the Vienna Convention on Law of Treaties (VCLT),[60] the tribunals have been divided in their interpretation on the issue.

For instance, in *China Heilongjiang v. Mongolia*, the Tribunal rejected the claimant's broad interpretation (extending it to include the existence and lawfulness of the expropriation),[61] and held that its narrower reading would neither deprive the words of any practical meaning (*effet utile),* which would leave investors without a meaningful opportunity to use arbitration before an *ad hoc* tribunal,[62] nor contravene the object and purpose of the Treaty.[63] Singapore's High Court in the *Sanum* case took a similar position, and held that only a dispute relating to the amount of compensation for expropriation can be submitted.[64]

However, tribunals in other cases have tended to evaluate the overall effects of the dispute settlement provision to determine whether a broad or narrow interpretation should be given. The Tribunal in *Tza Yap Shum v Peru* held that the provision should be interpreted as disputes *including rather than exclusively limited to* the amount of compensation,[65] because to "rule otherwise would eviscerate the provision relating to ICSID arbitration since, in accordance with the final sentence of Article 8(3), to have recourse to the host State's tribunals would definitely preclude the possibility to accede to arbitration under the ICSID Convention."[66]

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ment has been sought, and separate arrangements have been made after consultation with the contracting party". *See Government of the Lao People's Democratic Republic v. Sanum Investment Ltd*, para. 40. After the Judgment of the Singapore Court of Appeal in the *Sanum* case, the Ministry of Foreign Affairs of China repeated this position in a press release. Ministry of Foreign Affairs of China, *2016年10月21日外交部发言人华春莹主持例行记者会* [Press Release by Spokesperson of Ministry of the Foreign Affairs of 21 October 2016], available at: http://www.fmprc.gov.cn/web/fyrbt_673021/jzhsl_673025/t1407728.shtml (accessed 30 May 2019).

[60] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[61] *China Heilongjiang v. Mongolia*, para. 262.

[62] *Ibidem*, para. 450.

[63] *Ibidem*, para. 452.

[64] *Government of the Lao People's Democratic Republic v. Sanum Investment Ltd*, para. 128.

[65] *Tza Yap Shum v. Peru*, para. 151.

[66] *Ibidem*, para. 188; *Sanum v. Laos*, para. 341.

In *Sanum Investments v. Laos*, the Tribunal could find no decisive guideline in the literal wording, nor in the object and purpose of the treaty.[67] Therefore it focused more on the context of the provision, namely the existence or absence of fork-in-the-road clauses in the underlying BIT, which might help determine whether investors would be left unprotected and whether the relevant provision would be futile in a practical sense if the investor had to first have recourse to local courts to determine whether an expropriation had actually occurred.[68]

The tribunal in *Beijing Urban Construction v. Yemen* took a similar position, holding that the narrow interpretation (excluding the lawfulness and existence of an expropriation) would trap rather than protect foreign investors, stating that:[69] "the Contracting Parties intended to confer a real choice, not an illusory choice" and that the words "must, in context, be read to include disputes relating to whether or not an expropriation has occurred."[70]

Therefore, in brief it can be concluded that the situation is far from being clear, and no consistent jurisprudence has been developed regarding this issue.

2.2.3 Enforcement of ISDS awards in China

The enforceability of ISDS awards in China also remains unsettled.[71] When signing the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958),[72] China lodged a commercial reservation,[73] i.e. that China would apply the Convention only to "legal relationships, whether contractual or not, which are considered commercial" under the national law of China. Pursuant to interpretations of China's Supreme People's Court, a commercial legal relationship means: "the economic rights and obligations arising from contracts, torts or relevant legal provisions, such as purchase and sale of goods …, except disputes between foreign investors and the host government."[74]

In other words, the enforcement of an award rendered by the arbitral tribunal, even if both States are parties to the New York Convention (1958), will still be subject to China's domestic laws. According to China's Civil Procedural Law, the courts shall

[67] *Sanum v. Laos*, paras. 326-338.

[68] *Ibidem*, para. 340.

[69] *Beijing Urban Construction v. Yemen*, para. 92.

[70] *Ibidem*, para. 87.

[71] J. Ku, *The Enforcement of ICSID Awards in the People's Republic of China*, 6(1) Contemporary Asia Arbitration Journal 31 (2013).

[72] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 38.

[73] China's reservations to New York Arbitration Convention, available at: https://bit.ly/2LxJQ22 (accessed 30 May 2019).

[74] Supreme People's Court of China, 最高人民法院关于执行我国加入的《承认及执行外国仲裁裁决公约》的通知 [Notice of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded to by China], No. 5 [1987] of the Supreme People's Court (4 October 1987), available at: http://www.people.com.cn/zixun/flfgk/item/dwjjf/falv/9/9-1-7-1.html (accessed 30 May 2019).

refuse to enforce an arbitral award on the basis of non-arbitrability.[75] Pursuant to China's Arbitration Law, administrative disputes falling within the jurisdiction of the relevant administrative organs are not allowed to be arbitrated.[76]

ISDS arbitration under the ICSID Convention might be different as the ICSID Convention is a self-contained system and the awards rendered thereunder shall be considered as a "final judgment of a court".[77] However, when signing the ICSID Convention China made a notification on jurisdiction of the Centre that the PRC "would only consider submitting to the jurisdiction of ICSID disputes over compensation resulting from expropriation and nationalization."[78] Such a notification, which cannot be considered as a reservation to the treaty, is normally interpreted in case law for informative purposes only and cannot be considered as a legal obligation to narrow or broaden an otherwise accepted consent to jurisdiction.[79]

To conclude, there is at least some uncertainty as to which law would govern the enforcement of ISDS awards,[80] and there is some possibility that awards enforceable under the New York Convention (1958) or under the ICSID Convention might face problems with enforceability in China.[81]

[75] Standing Committee of the National People's Congress,中华人民共和国民事诉讼法 [Civil Procedural Law of China], Arts. 237, 274, amended on 27 June 2017, available at: http://www.npc.gov.cn/npc/xinwen/2017-06/29/content_2024892.htm (in Chinese) (accessed 30 May 2019).

[76] Standing Committee of the National People's Congress,中华人民共和国仲裁法 [Arbitration Law of China], Article 3, amended on 1 September 2017, available at: http://www.npc.gov.cn/npc/xinwen/2017-09/12/content_2028692.htm (in Chinese) (accessed 30 May 2019).

[77] ICSID Convention, Art. 54.1.

[78] Notifications Concerning a Class or Classes of Disputes Which the Contracting State Would or Would Not Consider Submitting to the Jurisdiction of the Centre (Article 25(4)), 7 January 1993, available at: https://icsid.worldbank.org/en/Pages/about/MembershipStateDetails.aspx?state=ST30 (accessed 30 May 2019).

[79] C. Schreuer, *The ICSID Convention: A Commentary*, Cambridge University Press, Cambridge: 2001, pp. 342-347: "[…] notifications under Art. 25(4) are for purposes of information only and are designed to avoid misunderstanding" (p. 344); *see Tza Yap Shum v. Peru*, paras. 163-165; *Sanum v. Laos*, para. 328.

[80] Vaccaro-Incisa, *supra* note 24, p. 113.

[81] For the sake of comparison, the recognition and enforcement of a foreign arbitration award in Poland is based on the Polish Civil Procedure Code and the New York Convention (1958). Poland signed the New York Convention (1958) with the following reservation: "[w]ith reservation as mentioned in article I, para. 3." The existing regime of enforcement of arbitral awards in Poland is rather clear (although there is no automatic recognition of awards as is provided by the ICSID Convention because Poland is not party to that Convention) and does not raise serious doubts or concern in practice L. Blaszczak, J. Kolber, *Annulment and Enforcement of Arbitral Awards in Poland*, 30(3) ASA Bulletin 564 (2012); A. Remin, *Uznawanie i wykonywanie zagranicznych orzeczeń arbitrażowych w aspekcie porównawczym między Niemcami, Austrią, Polską i Szwajcarią* [Recognition and enforcement of arbitral awards from the comparative perspective of Germany, Austria, Poland and Switzerland] 2(6) ADR 17 (2009); R. Morek, W. Sadowski, *Recognition and Enforcement of Arbitral Awards in Poland*, in: P. Pietkiewicz et al. (eds.), *Arbitration in Poland*, Court of Arbitration at the Polish Chamber of Commerce, Warszawa: 2011, pp. 125-140.

3. CHINA – POLAND BIT IN THE NEW ERA: AN EVALUATION

The Agreement between the Government of the People's Republic of China and the Government of the Polish People's Republic on the Reciprocal Encouragement and Protection of Investments (China – Poland BIT) was signed in Beijing on 7 June 1988, and entered into forced on 8 January 1989.[82] This treaty consists of 11 articles and without doubt can be regarded within the group of China's first-generation BITs. Like other BITs of the first generation, the China – Poland BIT is relatively outdated in terms of investment protection, promotion, social clauses, and dispute settlement compared to China's recent treaty practices and new developments in global investment governance. In this part of the article the most relevant features of the BIT will be briefly discussed.

3.1. Investment protection

3.1.1. Definition of investor and investment

The definition of investment under Art. 1 of the China – Poland BIT can be regarded as a broad asset-based definition, even if, surprisingly and differently to other Chinese BITs, "business concessions" are not enumerated under Art. 1.[83] The definition of investor, who can be a "natural" or a "juridical person/organization/association" seems to be rather narrow, due to the fact that an investor was restrained only to a juridical entity "having its seat in the territory of this Contracting Party."[84] The China – Poland BIT is silent on its application to investors and investment to and from SARs, which will, according to the analysis in part 2.2.1 of this article, likely be interpreted to be applicable.

3.1.2. Fair and Equitable Treatment

The FET provision in the China – Poland BIT is a quite common one ("equitable treatment") configurated with the Full Protection and Security ("enjoy protection"), the MFN provision, and a custom union exception.[85] However, a clarification of the FET standard seems desirable given the inconsistent interpretations of the term in arbitral practices. A good example of a more precise FET provision may be found in other Chinese BITs e.g. in the China – Tanzania BIT, where FET means that "investors of one

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[82] Note that in the literature sometimes this BIT is mistakenly quoted as China – Poland BIT 1998, probably due to the error in the English text of the treaty (1998 instead of 1988) available in. e.g., the database of UNCTAD. *See* A. Chen. *The Voice from China, An Chen on International Economic Law,* Springer, Berlin-Heidelberg: 2013, p. 360.

[83] Brown, *supra* note 25, p. 151: "[w]hilst the list serves to clarify the meaning of 'investment', it is important to bear in mind that the list is merely illustrative, and absence from the list of any particular asset does not necessarily mean that they are excluded from BIT protection."

[84] While some other BITs define the term investor more broadly, using alternatively the criteria of "incorporation", "control" and "seat".

[85] China – Poland BIT, Art. 3.

Contracting Party shall not be denied fair judicial proceedings by the other Contracting Party or be treated with obvious discriminatory or arbitrary measures."[86]

3.1.3. National Treatment

There is no national treatment provision of any kind included in the China – Poland BIT, which is obviously inadequate for the protection of transnational investment between China and Poland. There is thus considerable room for improvement of the China – Poland BIT regarding NT, because China has accepted the full NT standard for post-establishment matters since 1998. China in its practice has adopted various provisions regarding NT, for example, as the most recent EU-style Chinese BIT, the China – Tanzania BIT (2013) provides for NT "without prejudice to its applicable laws and regulations, with respect to the operation, management, maintenance, use, enjoyment, sale or disposition of the investments in its territory",[87] while other Chinese BITs adopt a NT standard subject to like circumstances only.[88]

3.1.4. Expropriation

Art. 4 of the China – Poland BIT provides that nationalization or expropriation may be conducted for security reasons or a public purpose; shall be taken under due process of national law; and shall not be discriminatory.[89] The required compensation shall be equivalent to the value[90] of the expropriated investment assets at the time when the expropriation is proclaimed.[91] In a rather unusual provision, the China – Poland BIT provides that the legality of expropriation can be challenged in and reviewed by a competent domestic court.[92] However, with respect to a loss suffered as a result of war, a state of national emergency, insurrection, riot or other similar events, compensation is not guaranteed, but should be treated no less favourably than that accorded to investors of a third State.[93] Compared to Chinese recent practices, the China – Poland BIT may be improved by an annex clarifying the factors for indirect expropriation and the police power doctrine.[94]

3.2. Investment promotion

The China – Poland BIT refers briefly to investment promotion, namely to "admit such investments in accordance with its laws and regulations."[95] This provision wisely acknowledges the role that national law could play in investment promotion.

[86] China – Tanzania BIT, Art. 5(2).
[87] *Ibidem*, Art. 3(1).
[88] China – Canada BIT, Art. 6(1).
[89] China – Poland BIT, Art. 4(1).
[90] *Cf.* "fair market value" in China – Canada BIT, Art. 10(1).
[91] China – Poland BIT, Art. 4(2).
[92] *Ibidem*, Art. 4(3).
[93] *Ibidem*, Art. 4(4).
[94] *Ibidem*, Art. 6(2)-(4). China – Canada BIT, Annex on Expropriation.
[95] China – Poland BIT, Art. 2.

Traditionally, China has used national laws and policies to positively promote foreign investment with actual incentives, such as taxation reduction,[96] working permits, and housing conditions.[97] The national law in China remains relevant for investment promotion. For example, while pre-establishment national treatment with a negative list is right now only a proposal in the China-US BIT negotiation, it has already been put into practice in China's Pilot Free Trade Zone[98] and is now nation-wide.[99]

If investment promotion is understood broadly to cover investment admission, pre-establishment national treatment may be well covered in future Chinese BITs, especially the US-style BITs. China is negotiating an investment agreement with the European Union and pre-establishment treatment is among the key issues.[100] Another related issue is the national security review of investment admission, which is primarily addressed by the domestic law of China.[101] It is therefore advisable to update the China-Poland BIT in coordination with national legislations and the industrial policies of both China and Poland.

3.3. Social clauses

Social concerns are neither addressed nor covered by the China-Polish BIT. The absence of a social clause for investment regulation is understandable because in their early practices neither China nor Poland realized the potential negative effects of BITs and the associated investment arbitration. With the increasing awareness of the

[96] Standing Committee of National People's Congress, 全国人大常委会关于外商投资企业和外国企业适用增值税、消费税、营业税等税收暂行条例的决定 [Decision of the National People's Congress Standing Committee on the Application of the Interim Regulations on Value Added Tax, Consumption Tax and Business Tax for Foreign-invested Enterprises and Foreign Enterprises], 29 December 1993, available at: http://www.npc.gov.cn/wxzl/wxzl/2000-12/05/content_4610.htm (in Chinese) (accessed 30 May 2019).

[97] The Central People's Government of China, 中华人民共和国外国人入境出境管理条例 [Regulations on the Administration of Foreigners' Entry and Exit of China], 3 July 2013, available at: http://www.gov.cn/flfg/2013-07/22/content_2477673.htm (in Chinese) (accessed 30 May 2019).

[98] Development and Reform Commission, Ministry of Commerce, 自由贸易试验区外商投资准入特别管理措施（负面清单）（*2018*年版） [List for Special Administrative Measures for Admission of Foreign Investment in the Pilot Free Trade Zone (Negative List) (2018 Version)], 30 June 2018, available at: http://images.mofcom.gov.cn/wzs/201806/20180628222647715.pdf (in Chinese) (accessed 30 May 2019).

[99] Development and Reform Commission, Ministry of Commerce, 外商投资准入特别管理措施（负面清单）（*2018*年版） [List for Special Administrative Measures for Admission of Foreign Investment (Negative List) (2018 Version)], 28 June 2018, accessed at: http://www.ndrc.gov.cn/zcfb/zcfbl/201806/W020180628640822720353.pdf (in Chinese) (accessed 30 May 2019).

[100] EU and China agree on scope of the future investment deal, Brussels, 15 January 2016, available at: http://trade.ec.europa.eu/doclib/press/index.cfm?id=1435 (accessed 30 May 2019).

[101] Standing Committee of the National People's Congress, 中华人民共和国国家安全法 [National Security Law of China], Art. 59, 1 July 2015, available at: http://www.npc.gov.cn/npc/xinwen/2015-07/07/content_1941161.htm (in Chinese) (accessed 30 May 2019). 商务部实施外国投资者并购境内企业安全审查制度的规定 [Rules of the Ministry of Commerce on the Implementation of Security Review on Merger of Domestic Enterprise by Foreign Investors], MOFCOM Decree [2011] 53, 25 August 2011, available at: http://www.gov.cn/gzdt/2011-08/26/content_1934046.htm (in Chinese) (accessed 30 May 2019).

potential negative effects of investment and investment arbitration, China has paved the way for the inclusion of social clauses in recent Chinese BITs, which could be served as a blueprint for a possible update of the China-Poland BIT.

Social clauses are generally introduced for two reasons, namely rebalancing for the host state's legitimate regulatory power and promoting inclusive and sustainable development. First, the right to regulate is increasingly and expressly recognized in Chinese BITs, for example "respecting the economic sovereignty of both states" in the preamble,[102] in the police power doctrine for expropriation,[103] in a taxation exception,[104] and in a balance of payments difficulty exception to freedom of transfers.[105] Secondly, both the China – Tanzania and the China – Canada BITs specifically refer to sustainable development in the preamble. The China – Tanzania BIT further expressly encourages investors to respect corporate social responsibilities in the preamble and includes one provision on health, safety and environmental measures to prohibit the regulatory race to bottom.[106]

3.4. Dispute settlement

Regarding the dispute settlement mechanism, the China – Poland BIT is more generous than other Chinese first-generation BITs. But still, comparing it to BITs worldwide the Chinese mechanism is obviously far from being generous overall. Under Art. 9 disputes regarding the interpretation or application of the investment treaty may be submitted to an *ad hoc* arbitral tribunal if a dispute cannot be settled within six months through diplomatic channels. This dispute settlement mechanism is available for state-to-state disputes regarding only the BIT's interpretation and application. Also, under Art. 10 the investor can submit a dispute over the amount of compensation to be paid in case of an expropriation measure to the *ad hoc* international arbitral tribunal, if the competent authority of the Contracting Party taking the expropriation measure to whom the investor filed a complaint fails to resolve the dispute within one year.

Therefore, the ISDS arbitration on an *ad hoc* basis is available in the China – Poland BIT only for disputes concerning the amount of compensation for expropriation. ICSID arbitration is not included in the BIT as China and Poland were not parties to the ICSID Convention at the time of concluding the BIT.[107] The cooling-off period is rather long – one year after a complaint is filed.[108] Recourse to the domestic court is also available for settling the dispute and there is no fork-in-the-road provision.[109]

The limited ISDS mechanism in the China – Poland BIT is obviously not sufficient for the protection of transnational FDI between China and Poland. It is possible that

[102] China – Tanzania BIT, Preamble.

[103] *Ibidem*, Art. 6(3); China – Canada BIT, Annex on Expropriation.

[104] China – Canada BIT, Art. 14.

[105] China – Tanzania BIT, Art. 8(4); China – Canada BIT, Art. 12.

[106] China – Tanzania BIT, Art. 10.

[107] Note that Poland still remains the only European state not to sign the ICSID Convention.

[108] *Cf.* 6 months in the China – Tanzania BIT, Art. 13(2); and in the China – Canada BIT, Art. 21(2)(2).

[109] China – Poland BIT, Art. 10.

an arbitral tribunal might take a restrictive interpretation in disputes concerning the amount of compensation for an expropriation, severely restraining the availability of ISDS for investors. And as there is no fork-in-the-road provision[110] it is necessary for investors to first resort to the domestic court to settle the legality of an expropriation and then proceed to international arbitration for determination of the amount of compensation due.

3.5. Most favoured nation

Another relevant issue is the application of the MFN provision. This provision in the China – Poland BIT is drafted in a brief but broad manner.[111] Recent Chinese BITs tend to limit the application of MFN in various manners, for example, to like circumstances,[112] or in the territory of the host state,[113] or by excluding procedural manners.[114] It can be concluded that the MFN clause in the China – Poland BIT applies to substantive matters, but uncertainty remains as to its applicability to procedural issues.

As a general matter there is no conceptual reason why an MFN clause should be limited to substantive guarantees and rule out procedural protections.[115] The potential application of an MFN clause to procedural protections has been accepted by investment tribunals.[116] However, it has also been confirmed by various arbitral tribunals that the application of MFN clauses depends on the precise wording of the clause included in the treaty,[117] has to be decided on a case-by-case basis, and that it is not possible to establish a general rule that an MFN clause applies or does not apply to jurisdictional issues.[118]

Luckily, the clear text of the China – Poland BIT should leave no doubts regarding the scope of application of the MFN clause. Art. 3(1) states that "investments and activities associated with investments of investors of either Contracting Party shall be accorded equitable treatment and shall enjoy protection in the territory of the other Contracting Party." The MFN clause has been articulated under para. 2, which states that: "the treatment and protection referred to in Paragraph 1 of this Article shall not be less favourable than that accorded to investments and activities associated with invest-

[110] *Ibidem*, Art. 10.

[111] *Ibidem*, Art. 3(2).

[112] China – Tanzania BIT, Art. 4(1).

[113] China – Canada BIT, Art. 5(1).

[114] China – Tanzania, Art. 4(1). China – Canada BIT, Art. 5(3).

[115] *RosInvestCo UK Ltd. v. Russian Federation*, SCC Case No. Abr. V 079/2005, Award on Jurisdiction, 5 October 2007, paras. 130-132; *Australian Airlines v. Slovak Republic*, UNCITRAL, Final Award, 9 October 2009, para. 124.

[116] *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Decision on Objections to Jurisdiction, 25 January 2000, paras. 54-56; *Siemens A. G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, para. 32; *Gas Natural SDG, S.A v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision on Jurisdiction, 17 July 2005, paras. 24-30.

[117] *Quasar de Valors SICAV S.A. et al. (Formerly Renta 4 S.V.S.A et al.) v. Russian Federation*, SCC Case No. 24/2007, Award on Preliminary Objections, 20 March 2009, para. 119.

[118] *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of Professor Brigitte Stern, 21 June 2011, paras. 28-29, 37-38.

ments of investors of any third State." Thus the text of the treaty leaves no doubt that it refers only to the standard of protection awarded under Art. 3 para. 1 (FET).

This problem was addressed in the case *TzaYapShun v. Peru*, when the question of the MFN clause was raised. The Arbitral Tribunal under the China – Peru BIT, which contains the same stipulation as Art. 3(2) of the China – Poland BIT, stated that the MFN clause included in the treaty is applicable only to the content of Art. 3 (FET) and cannot be interpreted as applicable to the procedural issues – especially arbitration clauses. Therefore, following the standpoint of the scholars[119] and the jurisprudence, the MFN clause of the China – Poland BIT should be interpreted restrictively, and the evolution of Chinese BITs (second generation) which contain more generous arbitration clauses cannot affect and change the scope of protection of the China – Poland BIT.

4. FINAL OBSERVATIONS

The international investment law regime is undergoing a fundamental transition, and a more nuanced generation of Chinese BITs is taking shape.[120] The China – Poland BIT, signed in the late 1980s, is insufficient and needs updating in terms of investment protection, promotion, regulation, and dispute settlement. The challenging question is how to do this.

4.1. Concluding remarks regarding state of investment protection de lege lata

In terms of the investment protection effects of BITs, it seems that China should be more interested in updating the China – Poland BIT than Poland. It can be observed that with some states China has – instead of amending the old first generation of BITs – signed and concluded new BITs with wider substantive protection of investment and broader dispute settlement clauses.[121] This has not happened in the case of Poland. Obviously, from the standpoint of a Polish investor wishing to invest or already investing in China, a new modern BIT would be *prima facie* more desirable, because in case of any infringement of investor rights the investor would have the possibility to have recourse to international arbitration. However, as already pointed out a Polish investor, even with an arbitral award rendered in his favour, would still face hurdles under the Chinese system, e.g. regarding the enforcement of such an award. At the end of the day, an investor's position still depends more on a positive Chinese attitude and its willingness to reach an agreement than on the international arbitral system.

[119] *See e.g.* N. Eliasson, *Investor-State Arbitration and Chinese Investors, Recent Developments in Light of the Decision on Jurisdiction on the Case Mr. Tza Yap Shum v. The Republic of Peru*, 2 Contemporary Asia Arbitration Journal 347 (2009), p. 361.

[120] Shan, Chen, *supra* note 30, p. 223.

[121] *E.g.* with the Czech Republic, France, Finland, Germany, the Netherlands, the Russian Federation, Spain, and Switzerland.

In assessing the need for a modern BIT with China, the Polish government has to take into account the reciprocity of the investment protection granted. A new modern BIT would grant broader protection not only for Polish investors in China, but more importantly for Chinese investors in Poland. Therefore, by granting such a protection the Polish government would weaken its position *vis-à-vis* Chinese investors in Poland, allowing them to sue Poland under international investment law before international arbitral tribunals. Taking into account that there is certainly more Chinese investment in Poland than Polish investments in China, and also that Chinese investors would not face the same problems with the enforceability of favourable arbitral awards as Polish investors would, it seems that a modern BIT would be more beneficial for Chinese investors than for Polish ones. It seems this would particularly be the case because China increasingly regards BITs as a tool for protecting its oversea investments, and is actively expanding and deepening its BIT networks through mega-negotiations with the EU, the US, and the Regional Comprehensive Economic Partnership.[122]

Without a doubt, China is still among those states which would prefer not to leave the solution of a dispute in the hands of international arbitration, but would rather resolve it *via* diplomatic channels and bilaterally reached agreements. Very few of those agreements are fully disclosed. As an illustrative example, the dispute between the General Director for National Roads and Motorways in Poland and the Chinese investor COVEC may be instructive. This dispute arose in 2011 when the Chinese investor, who had previously won a contract for a motorway's construction, abandoned his investment, leaving a lot of unpaid obligations in his on-going building project. The Polish agency faced problems even recovering bank guarantees for this contract. The dispute was settled by an agreement of 19 May 2017 between the interested parties.[123] However, it goes without saying that such an agreement was a result of the decisions taken during the visit of the Polish Prime Minister in China in May 2017. The public was informed only about the existence of the agreement and that both States were satisfied. The precise content of the agreement was not disclosed.

Therefore, the first reasonable step for an investor whose rights are allegedly infringed would be to turn to the government for help. On the intergovernmental level China enjoys a stronger bargaining position and possible leverage over the Polish government, which puts Chinese investors in a relatively better position *vis-à-vis* their Polish counterparts. However, it cannot be taken for granted that the result of a Polish claim *via* diplomatic channels would be preordained to be ineffective, because without doubt China is concerned to project an image of being a fair and friendly host State to foreign investors.

Some scholars have raised some doubts regarding the reliability of China's judicial system, which is believed to fail to enforce contractual obligations, and about the lack

[122] *See* Gallagher, *supra* note 5.

[123] *See* Official Statement of the General Director for National Roads and Motorways available at: https://www.gddkia.gov.pl/pl/a/26149/Ugoda-pomiedzy-GDDKiA-a-firma-COVEC-zawarta (accessed 30 May 2019).

of transparency and uniformity in the application of the regulatory regime governing investments.[124] Therefore, the initiation of an ISDS proceeding in the face of opposition on the part of the Chinese government is a risky move for foreign investors, especially Polish ones, who are protected by the first-generation BIT. In many cases the primary, and sadly sometimes the only recourse, is a negotiated settlement with the Chinese government. Viewed in this light, the renegotiation of the China – Poland BIT does not seem to be an urgent need for the Polish government because, in the light of the presented arguments, a modern China – Poland BIT would be more desirable and beneficial for Chinese than for Polish investors. However, if we evaluate the overall effects of a modernized BIT on investment promotion, regulations, and dispute settlement, an updated China – Poland BIT would fit the interests of both the Polish and Chinese Governments. As both an FDI importing and exporting state, China currently pursues balanced and safeguarded BITs aimed at protecting its increasing oversea investments and safeguarding the necessary space to regulate in the public interest. An updated BIT should be viewed as an overall structure for transnational investment governance, rather than simply a tool to protect the investments of investment-exporting countries. First, a China – Poland BIT with pre-establishment treatment would stimulate the transnational FDI flow among the two countries, perhaps more for Chinese investors investing in Poland. Second, an updated BIT would likely include a social clause which would recognize the regulatory power of the host state and promote inclusive and sustainable development. Third, both China and Poland would like to recalibrate the ISDS mechanism, to reinforce the safeguard mechanism for the participation of contracting states and therefore to better guide the arbitral tribunals. This may be particularly relevant for Poland, as it has been sued in at least 26 cases, while China has only been sued in three cases so far.[125]

4.2. Where to from here? Three possible scenarios for the future

To conclude this article, some brief remarks regarding possible future developments are appropriate. Basically there are three possible scenarios for future Chinese – Polish relations in terms of investments. The first situation assumes that the negotiations over an EU – China BIT will not bear fruit in the near future. Therefore the status quo will be preserved and the investor will be only covered by the China-Poland BIT from 1989. This situation, namely the status of *the lege lata* of the regulations regarding the protection of the investors was mainly addressed throughout all parts of this article and concluded in sub-part 4.1 above. The second scenario would take place when the EU – China negotiations are finally concluded. The China – Poland BIT should be updated by the EU – China investment agreement, assuming it is successfully concluded and fits the interests of both Poland and China. On one hand, the EU has to take the concerns

[124] Vaccaro-Incisa, *supra* note 24, p. 114.

[125] More information on the cases against Poland and China can be found in the UNCTAD Investment Policy Hub Investment Dispute Settlement Navigator, http://investmentpolicyhub.unctad.org/ISDS (assessed 30 May 2019).

and interests of all Member States into consideration and may not fully satisfy the particular demands of Poland in its negotiations with China. On the other hand, the EU as a whole will be in a better bargaining position during such negotiations. In such a situation, obviously the protection of Polish and Chinese investors would be amended and updated, especially in comparison with the protection granted under the China – Poland BIT (1989). However, any detailed scrutiny of the possible content of an EU – China investment agreement falls outside of the scope of this article.[126]

The third scenario would arise if the EU – China negotiations would be futile. and what's more that Poland would be allowed to negotiate an agreement on its own with China. BIT protection in the EU after the Lisbon Treaty lies within the exclusive competence of the EU, not in the competence of the Member States. Therefore, Poland could only renegotiate the treaty with China if it were granted permission by the EU Commission under a so-called "grandfather regulation."[127] If these two variables were fulfilled, updating the China – Poland BIT at the national level remains a viable option. Poland is an important partner for China in the Belt and Road Initiative, and it should be possible for China and Poland to work together to promote a tailor-made Belt and Road Investment Agreement.

[126] For more on the EU-China Investment Treaty, *see* I. Ewert, *The EU–China Bilateral Investment Agreement: Between High Hopes and Real Challenges*, Security Policy Brief No. 68, February 2016, available at: https://core.ac.uk/download/pdf/148912339.pdf (accessed 30 May 2019).

[127] Regulation EU No. 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transnational arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L 351.

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ARTICLE 7 TEU: A COMMENTARY ON A MUCH TALKED-ABOUT "DEAD" PROVISION

Abstract:
This article contributes to the growing literature on Art. 7 TEU by showcasing the strong and weak points of this provision in the context of the on-going rule of law backsliding in Hungary and Poland – backsliding which threatens the very fabric of EU constitutionalism. The article presents the general context of the EU's institutional reactions to the so-called "reforms" in Poland and Hungary, which are aimed at hijacking the state machinery by the political parties in charge. Next it introduces the background of Art. 7 TEU and the hopes the provision was endowed with by its drafters before moving on to analysis of its scope and all the mechanisms made available through this instrument, including the key procedural rules governing their use. The author posits that it may be necessary to put our hopes in alternative instruments and policies to combat the current rule of law backsliding, and the article concludes by outlining three possible scenarios to reverse the backsliding, none of which are (necessarily) connected with Art. 7 as such.

Keywords: Rule of Law, backsliding, EU values, Article 7

"Article 7 is dead. The European Commission lost."
Polish Minister of Foreign Affairs on the National TV in December 2018[1]

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[1] *Artykuł 7 jest martwy; Komisja Europejska przegrała* [Article 7 is dead; the European Commission has lost], PolsatNews, 11 December 2018, available at: https://bit.ly/2IHo3Cy (accessed 30 May 2019).

INTRODUCTION

What is the situation with the rule of law in the European Union (EU) today? Is the Minister responsible for undermining Polish constitutionalism right? Looking at the most dramatic examples, Poland[2] has now joined Hungary,[3] and following the apt description of what is going on provided by Pech and Scheppele, it is possible to characterize the on-going troubles in the EU as "rule of law backsliding", which is deemed to be a "process through which elected public authorities deliberately implement governmental blueprints which aim to systematically weaken, annihilate or capture internal checks on power with the view of dismantling the liberal democratic state and entrenching the long-term rule of the dominant party."[4] Considering that more states could follow this approach, the EU's position is, apparently, very weak. Instead of solving the problems at hand new soft law of questionable quality has been produced by each of its institutions.[5]

[2] European Commission, Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland – Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law [2017] (COM(2017) 835 final. *Cf.* most importantly: W. Sadurski, *Poland's Constitutional Breakdown*, Oxford University Press: Oxford, 2019; W. Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, Sydney Law School Research Paper No. 18/01; A. Bodnar, *Protection of Human Rights after the Constitutional Crisis in Poland*, 66 Jahrbuch des Öffentlichen Rechts der Gegenwart 639 (2018); T.T. Koncewicz, *The Capture of the Polish Constitutional Tribunal and Beyond: Of Institution(s), Fidelities and the Rule of Law in Flux*, 43 Review of Central and East European Law 116 (2018); L. Pech, S. Platon, *Menace systémique envers l'État de droit en Pologne. Entre action et procrastination, Fondation Robert Schuman Policy Paper no. 451, 13 November 2017;* T.T. Koncewicz, *Of Institutions, Democracy, Constitutional Self-defence*, 53 Common Market Law Review 1753 (2016). *See also* The Venice Commission for Democracy through Law, Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, CDL-AD(2016)001, Venice, 11 March 2016, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD%282016%29001-e (accessed 30 May 2019).

[3] European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)). *Cf.* most importantly, Z. Szente, *Challenging the Basic Values – The Problems with the Rule of Law in Hungary and the EU's Failure to Tackle Them*, in: A. Jakab, D. Kochenov (eds.), *The Enforcement of EU Law and Values*, Oxford University Press, Oxford: 2017, at 456; M. Varju, M. Papp, *The Crisis, National Particularism and EU Law: What Can We Learn from the Hungarian Case?*, 53 Common Market Law Review 1647 (2016); K.L. Scheppele, *Understanding Hungary's Constitutional Revolution*, in: A. von Bogdandy, P. Sonnevend (eds.), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania*, Hart Publishing, Portland: 2015; L. Sólyom, *The Rise and Decline of Constitutional Culture in Hungary*, in: von Bogdandy, Sonnevend (eds.), *supra*; P.-A. Collot, *Difficulté contre-majoritaire et usage impérieux du pouvoir constituent dérivé au regard de la quatrième revision de la loi fondamentale de Hongrie*, RFDC 2013/14, at 789; G.A. Toth (ed.), *Constitution for a Disunited Nation*, CEU Press, Budapest: 2012; M. Bánkuti, G. Halmai, K.L. Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 Journal of Democracy 138 (2012).

[4] L. Pech, K.L. Scheppele, *Illiberalism Within: Rule of Law Backsliding in the EU*, 19 Cambridge Yearbook of European Legal Studies 3 (2017), p. 8.

[5] Council of the EU Press Release no. 16936/14, 3362nd Council meeting, General Affairs, [2014] 20-21; European Commission, *A New EU Framework to Strengthen the Rule of Law* [2014] COM(2014)158;

The Treaties contain a special provision to deal specifically with situations of rule of law backsliding: Art. 7 of the Treaty on European Union (TEU), which however has not emerged as a particularly effective instrument to solve the outstanding problems the Union is facing. Thus the picture is grim, notwithstanding even the belated activation of the Art. 7(1) TEU mechanism against both countries in question.[6] This activation *per se* is obviously somewhat misplaced, as we will see, since Art. 7(1) TEU is about "threats" to values, and the assault on the values in Poland and Hungary are way beyond the "threat" point, thus begging the question of how appropriate the legal basis chosen actually is.[7] Indeed, the situation would seem to be evolving extremely fast and mainly – almost uniquely – in the direction of the deterioration of the rule of law and abuses by the executive of independent national institutions. The EU's ability to effectively intervene and bring about significant change, although discussed quite extensively in the literature, has failed to materialize on the ground.[8] Most worryingly, it seems that

European Parliament, *Report with Recommendations to the Commission on the Establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights* [2016] (2015/2254(INL)). For a comparison of all these instruments, *see* D. Kochenov, A. Magen, L. Pech (eds.), *The Great Rule of Law Debate in the European Union (2016 symposium)*, 54(5) Journal of Common Market Studies (2016); D. Kochenov, L. Pech, *Better Late Than Never? On the Commission's Rule of Law Framework and Its First Activation*, 24 Journal of Common Market Studies 1062 (2016); P. Oliver, J. Stefanelli, *Strengthening the Rule of Law in the EU: The Council's Inaction*, 24 Journal of Common Market Studies 1075 (2016); *but see* E. Hirsch Ballin, *Mutual Trust: The Virtue of Reciprocity – Strengthening the Acceptance of the Rule of Law through Peer Review*, in: C. Closa, D. Kochenov (eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge University Press, Cambridge: 2016; D. Kochenov, L. Pech, S. Platon, *Ni panacée, ni gadget: le nouveau cadre de l'Union européenne pour renforcer l'État de droit*, RTD eur, 2015, 689; D. Kochenov, L. Pech, *Renforcer le respect de l'État de droit dans l'UE: Regards critiques sur les noubeaux mécanismes proposes par la Commission et le Conseil*, Fondation Robert Schuman Policy Paper no. 356/2015. This is not to say that soft law, when designed and applied wisely, cannot enjoy a significant potential to promote change: O. Ştefan, *Soft Law and the Enforcement of EU Law*, in: Jakab and Kochenov (eds.), *supra* note 3.

[6] European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (2017/2131(INL)); European Commission, R*easoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland – Proposal for a Council Decision on the Determination of a Clear Risk of a Serious Breach by the Republic of Poland of the Rule of Law*, [2017] (COM(2017) 835 final. K.L. Scheppele, L. Pech, *Poland and the European Commission (Parts I, II, and III)*, Verfassungsblog, 3 January, 6 January, and 3 March 2017, available at: http://verfassungsblog.de/author/laurent-pech/ (accessed 30 May 2019).

[7] D. Kochenov, *Article 7 TEU*, in: M. Kellerbauer, M. Klamert, J. Tomkin (eds.), *The Treaties and the Charter of Fundamental Rights – A Commentary*, Oxford University Press, Oxford: 2019, p. 88.

[8] M. Waelbroek, P. Oliver, *La crise de l'État de droit dans l'Union Européenne: Que faire?*, 2 Cahiers de droit européenne 299 (2017); Jakab, Kochenov (eds.), *supra* note 3; Pech and Scheppele, *supra* note 4; von Bogdandy, Sonnevend (eds.), *supra* note 3; Closa, Kochenov (eds.), *supra* note 5; P Mori, *Strumenti giuridici e strumenti politici di controlle del rispetto dei diritti fondamentali da parte degli Stati membri dell'Unione europea*, in: A. Tizzano (ed.), *Verso 60 anni dai Trattati di Roma: stato e prospettive dell'Unione europea*, Giapichelli, Torino: 2016, p. 204; U. Sedelmeier, *Anchoring Democracy from Above? The European Union and Democratic Backsliding in Hungary and Romania after Accession*, 52(1) Journal of Common Market Studies 105 (2014); J.-W. Müller, *The EU as a Militant Democracy, or: Are There Limits to Constitutional Mutations within the Member States*, 165 Revista de Estudios Políticos 141 (2014).

there is total disagreement among essentially all the actors involved concerning what should be done, and the political will to sort out the current impasse is lacking at the level of the Member States too.

The goal of this contribution is to contribute to the growing Art. 7 TEU literature[9] by showcasing the strong and weak points of this provision in the context of the on-going rule of law backsliding in Hungary and Poland, which is threatening the very fabric of EU constitutionalism. This is done by presenting the general context of the institutional reactions to the so-called "reforms" in Poland and Hungary aimed at hijacking the state machinery by the political parties in charge; introducing the background of Art. 7 TEU and the hopes of the drafters the provision was endowed with; then moving on to an analysis of its scope and all the procedures made available through this instrument as well as the key procedural rules in place. The conclusion restates the necessity of putting our hopes in alternative instruments for combatting rule of law backsliding, outlining three possible scenatios of this, which are not (necessarily) connected to Art. 7 as such.

1. A BRIEF CONTEXT OF COPING WITH RULE OF LAW BACKSLIDING

Art. 7 TEU, whatever sanctions it contains, cannot be a panacea. Blokker has been absolutely correct in constantly reminding us of the need to deal with the deeper roots of soft totalitarianism and populist turns.[10] At issue is the phenomenon characterized by Scheppele as "autocratic legalism", which has deep implications for the very fabric of the societies in question, potentially making the return to liberal democracy difficult.[11]

[9] On Art. 7 TEU *see*, most importantly, L.F.M. Besselink, *The Bite, the Bark and the Howl: Article 7 TEU and the Rule of Law Initiatives*, in: Jakab, Kochenov (eds.), *supra* note 3. *See also* C. Blumann, *Le mécanisme des sanctions de l'article 7 du Traité sur l'Union européenne: pourquoi tant d'inefficacité?*, in: *Mélanges en l'honneur du Professeur Frédéric Sudre*, LexisNexis (2018); G. Wilms, *Protecting Fundamental Values in the European Union through the Rule of Law*, EUI, Florence: 2017; Waelbroek, Oliver, *supra* note 8, pp. 313–319; B. Bugarič, *Protecting Democracy inside the EU: On Article 7 TEU and the Hungarian Turn to Authoritarianism*, in: Closa, Kochenov (eds.), *supra* note 5; C. Hillion, *Overseeing the Rule of Law in the EU: Legal Mandate and Means*, in: Closa, Kochenov (eds.), *supra* note 5; R. Bieber, F. Maiani, *Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?*, 51(4) Common Market Law Review 1057 (2014); W. Sadurski, *Adding Bite to a Bark: The Story of Article 7, EU Enlargement, and Jörg Haider*, 16 Columbia Journal of European Law 385 (2009-2010); H. Schmidt von Sydow, *Liberté, démocratie, droits fondamentaux et état de droit. Analyse de l'Article 7 du Traité UE*, 2 Revue de droit de l'Union Européenne 285 (2001).

[10] P. Blokker, *EU Democratic Oversight and Domestic Deviation from the Rule of Law: Sociological Reflections*, in: Closa, Kochenov (eds.), *supra* note 5; P. Blokker, *Populist Constitutionalism and Meaningful Popular Engagement*, The Foundation for Law, Justice and Society, Centre for Socio-Legal Studies and Wolfson College, Oxford: 2018.

[11] K.L. Scheppele, *Autocratic Legalism*, 85 The University of Chicago Law Review 545 (2018). *See also* T.T. Koncewicz, *Understanding the Politics of Resentment: Of the Principles, Institutions, Counter-Strategies, Normative Change and the Habits of Heart*, 27(2) Indiana Journal of Global Legal Studies 1 (2019).

Moreover, the problem of "democratic decay", "backsliding" and populism seems to be a global one,[12] rather than confined to some EU Member States *per se*. In the EU, just as elsewhere in the world – from Venezuela to Turkey – "sociological legitimacy"[13] is crucially important and cannot be ignored. The core issue is how to ensure that the EU's own rule of law is meticulously and consistently upheld, while enjoying, crucially, solid legitimacy? The issue of societal internalization of the core principles of Art. 2 TEU in the face of a populist wave is fundamental here. Framed in this way, the problem clearly emerges as too ambitious for the EU institutions to digest.

The Council is the most guilty of all the institutions in terms of downplaying the importance of the rule of law backsliding and even presenting key moves by other institutions to tackle it as potentially illegal. The Council Legal Service has been negative – with no solid arguments for its position[14] – about the Commission's "pre-Article 7 proposal".[15] It similarly dismissed the attempts to cut the EU funding of the backsliding states.[16] Topping the list, however, is the position of the Council Legal Service on the proposal to invite MEP Judith Sargentini to present in Council her report that triggered the request from the Parliament to start Art. 7(1) procedure against Hungary: the Council does not want to listen to Miss Sargentini in person. Its position is based on legal advice which has been given "orally", with the arguments not disclosed, which however does not shield the Council's position from criticism. The "Standard Modalities for Hearings Referred to in Article 7(1) TEU" designed by the General Secretariat of the Council thus openly discriminate between different institutions, since in all the cases where Article 7(1) TEU procedure is initiated by the Commission the latter is given 20 minutes to make its case, while the European Parliament, when it initiates the procedure, is not automatically invited (10641/19). A more absurd move could only be to support Hungary in front of the Court, where it has argued – not convincingly – that the Parliament managed to violate its own rules of procedure in adopting the Sargentini Report under Art. 7(1) TEU.[17]

The explanation behind the Council's unwillingness to act could be an obvious one: since the Internal Market is an emanation of deep economic interpenetration, aimed at making outright hostilities between the Member States impossible – precisely the

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[12] T. Daly, *Democratic Decay: Conceptualizing the Emerging Research Field*, 11(1) The Hague Journal of the Rule of Law 9 (2019); M. Anselmi, *Populism: An Introduction* (L. Fano Morrisey, trans.), Routledge, London: 2018.

[13] P. Blokker, *Response to "Public Law and Populism"*, 20(2) German Law Journal 284 (2019).

[14] D. Kochenov, L. Pech, *Monitoring and Enforcement of the Rule of Law in the European Union: Rhetoric and Reality*, 11 European Constitutional Law Review 512 (2015).

[15] Council of the European Union, *Opinion of the Legal Service 10296/14*, 14 May 2014, esp. para. 28.

[16] R.D. Kelemen, L. Pech, K.L. Scheppele, *Never Missing an Opportunity to Miss an Opportunity: The Council Legal Service Opinion on the Commission's EU Budget-Related Rule of Law Mechanism*, Verfassungsblog, 12 November 2018, available at: https://bit.ly/2PwVEy6 (accessed 30 May 2019).

[17] Case C-650/18, *Hungary v. European Parliament* (pending at time of writing). *Cf.* D. Kochenov, *Article 354 TFEU*, in: Kellerbauer, Klamert, Tomkin (eds.), *supra* note 7, p. 2082.

reason behind picking economic tools to achieve the goal of peace[18] – it has shaped the day-to-day reality of European integration, leaving no room for Art. 7 TEU. The very logic of the provision, which is both deeply politicized and deeply confrontational, contradicts the logic of the Internal Market and the rich Member States potentially stand to lose a lot as a result of taking a principled value-laden position on rule of law backsliding. This is why expecting too much of the Council – and, by extension, of Art. 7 TEU – would be naïve. Unless something truly terrible happens in a backsliding Member State,[19] the Internal Market, after all, functions as designed.[20]

When the Council is naturally ill-inclined and other EU institutions are profoundly ineffective, the ECJ, like in Andersen's tale, *de facto* plays the role of the last soldier standing. It "stands" by gradually learning from own mistakes and from the significant missteps of the Commission – especially in the "age-discrimination" cases, where the hijacking of the Hungarian judiciary went unnoticed[21] – bringing about a radically more robust result in *Commission v. Poland* on virtually identical facts in the context of an attempted assault on the Supreme Court (more on this in the last section).[22]

Undoubtedly however, the Court cannot solve the outstanding problems alone, even when helped by the national judiciaries. A much more concerted effort is required of all the actors involved in order to get the EU out of the current impasse. In the meantime, the supranational political party groups, instead of helping, seem to aggravate the situation.[23] This inaction – or even attempts to hinder positive change – on the part of the political institutions helps the powers of the backsliding Member States consolidate their assault upon EU values even further, undermining the truly heroic efforts of the Court of Justice and the national courts in Poland,[24] Ireland,[25] and elsewhere in the Union. The "stone-by-stone" approach of the

[18] This is exactly why the objective of peace has proven to be unexportable: A. Williams, *The Ethos of* Europe, Cambridge University Press, Cambridge: 2009. *Cf.* D. Kochenov, E. Basheska, *ENP's Values Conditionality from Enlargements to Post-Crimea*, in: S. Poli (ed.), *The EU and Its Values in the Neighbourhood*, Routledge, London: 2016, p. 145.

[19] *But see* Hirsch Ballin, *supra* note 5.

[20] For a number of divergent perspectives, *see* F. Amtenbrink et al. (eds), *The Internal Market and the Future of European Integration*, Cambridge University Press, Cambridge: 2019.

[21] Case C–286/12 *Commission v. Hungary* [2012] ECLI:EU:C:2012:687 (compulsory retirement of judges); *cf.* U. Belavusau, *Case C-286/12 Commission v. Hungary*, 50 Common Market Law Review 1145 (2013).

[22] Case C–619/18 R *Commission v. Poland*, Order ex parte of 19 October 2018 EU:C:2018:852 and Order of 17 December 2018, EU:C:2018:1021; *cf.* Editorial comment, *2019 Shaping up as a Challenging Year for the Union, not Least as a Community of Values*, 56(1) Common Market Law Review 3 (2019). *Cf.* D. Kochenov, P. Bárd, *The Last Soldier Standing? Courts v. Politicians and the Rule of Law Crisis in the New Member States of the EU*, 1 European Yearbook of Constitutional Law (2019).

[23] R.D. Kelemen, *Europe's Other Democratic Deficit: National Authoritarianism in Europe's Democratic Union*, 52 Government and Opposition 211 (2017).

[24] S. Biernat, M. Kawczyńska, *Why the Polish Supreme Court's Reference on Judicial Independence to the ECJ is Admissible after All*, Varfassungsblog, 23 August 2018, available at: https://bit.ly/2IQxBvc (accessed 30 May 2019).

[25] *See* the whole saga surrounding Case C-216/18 PPU LM EU:C:2018:586.

ECJ,[26] although unable to solve the outstanding problems by itself, nevertheless gives reason for optimism and could amount to one of the key legacies of the Lenaerts Court.

The inventiveness of the autocrats, populist voting, and the weakness of the EU's track record and current position on values are no doubt among the large variety of factors that have produced a previously unimaginable situation; whereby the EU harbours Member States which, besides obviously not qualifying for Union membership if they were to apply today (even the EU's usual "window dressing" of rule of law conditionality notwithstanding)[27] are working hard to undermine key principles the EU was created to safeguard and promote: democracy, the rule of law, and the protection of fundamental rights.[28] The underlying issue is the creation of a *modus vivendi* where the EU's own instrumentalist understanding of the rule of law, including principles such as mutual trust or the autonomy of EU law, reinforces rather than jeopardises the respect for values enshrined in Art. 2 TEU.[29]

The claims that little to nothing can be done under the current legal framework – which are heard with remarkable regularity – are entirely baseless, as Hillion, Besselink and other scholars have consistently pointed out.[30] In making such claims the Commission and other institutions point to the fact that the powerlessness is not caused by an absolute lack of Treaty instruments that would warrant intervention. Rather, the instruments that are available are, apparently, *too strong*, or to put it differently, *too toxic* to be used. The EU has a "nuclear: option, we are told: Art. 7 TEU, which should not be used too easily. Indeed, the institutions observed the deterioration of the Rule of Law in Hungary and Poland while embroiled in a clearly useless commotion of constantly inventing new rules instead of using the tools at hand. Art. 7 TEU was only activated at the end of 2018, offering too little too late.[31]

[26] As explained by President Lenaerts in the context of the EU citizenship law field: K. Lenaerts, *EU Citizensihp and the European Court of Justice's "Stone-by-Stone" Approach*, 1(1) International Comparative Jurisprudence 1 (2015), 1. *Cf.* E.Dubout, *Integration through the Rule of Law? La judiciarisation de l'État de droit dans l'Union européenne*, Revue de affiares européens (2019).

[27] E. De Ridder, D. Kochenov, *Democratic Conditionality in Eastern Enlargement: Ambitious Window Dressing*, 16(5) European Foreign Affairs Review 589 (2011); D. Kochenov, *EU Enlargement and the Failure of Conditionality*, Kluwer Law International, Alphen aan den Rijn: 2007.

[28] As well as other values expressed in Art. 2 TEU; V. Réveillère, *L'État de droit: Le concept du travail en droit de l'Union européenne*, Revue de affiares européens (2019); J. Rideau, *Les valeurs de l'Union européenne*, RAE 2012, 329; L. Pech, *"A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law*, 6 EU Constitutional Law Review 359 (2010); D. Kochenov, *The Acquis and Its Principles: The Enforcement of the "Law" Versus the Enforcement of "Values" in the EU*, in: Jakab, Kochenov (eds.), *supra* note 3. *Cf.* E. Carpano, *État de droit et droits européens – l'évolution du modèle de l'État de droit dans le carde de l'européanisation des systèmes juridiques*, L'Harmattan, Paris: 2005.

[29] M. Klamert, D. Kochenov, *Article 2*, in: Kellerbauer, Klamert, Tomkin (eds.), *supra* note 7; R. Baratta, *La communauté des valeurs dans l'ordre juridique de l'Union européenne*, 1 Revue des affaires européennes 81 (2018).

[30] Hillion, *supra* note 9; Besselink, *supra* note 9; K.L. Scheppele, *Enforcing the Basic Principles of EU Law through the Systemic Infringement Procedure*, in: Closa, Kochenov (eds.), *supra* note 5.

[31] D. Kochenov, L. Pech, K.L. Scheppele, *The European Commission's Activation of Article 7 TEU*, Verfassungsblog, 23 December 2017, https://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never/ (accessed 30 May 2019).

The talk of the legal difficulties surrounding the provision seems to be triggered by two considerations. Firstly, the Member States and the institutions alike apparently lack a strong and unreserved political commitment to throw their full weight behind the defence of the Rule of Law. Secondly – and most importantly – Art. 7 TEU does not *per se* guarantee any successes in the fight. Its effectiveness is highly doubtful. Such doubts stem from two considerations. The first, as already mentioned, is the very logic of the internal market – created to socialise and intertwine the Member States' economies to ensure a lasting peace and common prosperity, the internal market logic is poorly equipped to deal with the backsliding states due to the overwhelming economic costs any serious intervention is prone to generate. These costs will be, to a large extent, external to the backsliding Member State. For example, in order to ensure regime change in Poland one needs to come up with really stinging measures, which however will unquestionably hamper the success of German, Dutch and British businesses in Warsaw, Cracow and other places. The second consideration relates to the EU's very nature: as it stands it is not necessarily well positioned to lecture the Member States on democracy and the Rule of Law – an argument we have to take into account notwithstanding how urgent and pressing we think the need for action might be.[32] These two elements explaining why Art. 7 TEU was only activated so late are unquestionably related. If one is asked to trigger a legal mechanism which does offer any guarantees of success of the intervention – knowing that the activation will harm businesses across Europe and is bound to bring about new scrutiny of the EU's own track-record – the doubts appear not so irrational anymore.

2. BACKGROUND OF ART. 7 TEU

The initial versions of the Treaties relied on the presumption of compliance by the Member States with the – then non-codified – values of the Communities, expressed in the Schuman Declaration[33] and the unwritten founding values of the Union,[34] which gradually crystallised in the context of its enlargements.[35] The enforcement of compliance was strictly confined to the scope of the *acquis*, via what are now Arts. 258 and 259 of the Treaty on the functioning of the European Union (TFEU) (later

[32] J.H.H. Weiler, *Living in a Glass House: Europe, Democracy and the Rule of Law*, in: Closa, Kochenov (eds.), *supra* note 5; D. Kochenov, *EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?*, 34(1) Yearbook of European Law 74 (2015).

[33] J.H.H. Weiler, *The Schuman Declaration as a Manifesto of Political Messianism*, in: J. Dickson, P. Eleftheriadis (eds.), *Philosophical Foundations of European Union Law*, Oxford University Press, Oxford: 2012.

[34] V. Perju, *On Uses and Misuses of Human Rights in European Constitutionalism*, in: S. Vöneky, G.L. Neuman (eds.), *Human Rights, Democracy, and Legitimacy in a World in Disorder*, Cambridge University Press, Cambridge: 2018.

[35] D. Kochenov, *EU Enlargement Law: History and Recent Developments – Treaty-Custom Concubinage?*, 9(6) European Integration Online Papers 1 (2005).

reinforced by Art. 260 TFEU).[36] This initial design created an unbalanced picture, where compliance with the rules of EU law was strictly enforced while the enforcement of the core principles on which all the law in question rested remained seemingly out of reach for the supranational institutions in a situation where, ironically, the legal nature of the core principles of EU law in terms of their enforceability and contents remained and remains largely unclear.[37] What this configuration made obvious, however, was that the *acquis* did not necessarily include the key values. So Poland, the crucial example of the aberration of constitutionalism in Europe, is also the only "Developed Market"[38] in Central and Eastern Europe, while Hungary, the second key example of aberration of constitutionalism, is the only "Partly Free"[39] regime in the history of the EU. Thus, respecting the *acquis* and Art. 2 TEU values do not seem to correlate. As a consequence, once one turns to the issue of enforcement, the enforcement of the *acquis* and the enforcement of values cannot be regarded as one and the same thing.[40]

Given the importance of the duties of loyalty and mutual trust, which lie at the foundation of EU law, the articulation of supranational policing of compliance with the values was only a matter of time.[41] This was particularly so because the diversity of the Member States has been increasing with the numerous successive rounds of enlargement, incorporating a large number of newly-democratised and post-totalitarian states seeking democracy, the rule of law, and political stability in the Union.[42] From the incorporation of Greece, Spain and Portugal on to the former republics and satellite states of the USSR, the issue of enforcing the values of the EU in cases of eventual breaches was becoming more and more acute: the tradition of a democratic rule of law-based state in these new Member States, so engrained as the basis of EU law, was largely lacking. Art. 7 TEU now attempts to bridge the gap between the presumptions of the

[36] M. Schmidt, P. Bogdanowicz, *The Infringement Procedure in the Rule of Law Crisis: How to Make Effective Use of Article 258 TFEU*, 55(4) Common Market Law Review 1061 (2018); L.W. Gormley, *Infringement Proceedings*, in: Jakab and Kochenov (eds.), *supra* note 3; P. Wennerås, *Making Effective Use of Article 260*, in: Jakab, Kochenov (eds.), *supra* note 3.

[37] D. Kochenov, *The EU and the Rule of Law – Naiveté or a Grand Design?*, in: M. Adams, A. Meuwese, E. Hirsch Ballin (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge University Press, Cambridge: 2017.

[38] M. Day, *Poland Becomes the First Country from Former Soviet Bloc to Be Ranked a "Developed Market"*, The Telegraph, 24 September 2018, available at: https://www.telegraph.co.uk/business/2018/09/24/poland-becomes-first-country-former-soviet-bloc-ranked-developed/ (accessed 30 May 2019).

[39] Z. Simon, *Hungary Becomes First "Partly Free" EU Nation in Democracy Gauge,* Bloomberg News, 5 February 2019, available at: https://www.bloomberg.com/news/articles/2019-02-05/hungary-becomes-first-partly-free-eu-nation-in-democracy-gauge (accessed 30 May 2019).

[40] Kochenov, *supra* note 28.

[41] C. Closa, *Reinforcing the Rule of Law: Normative Arguments, Institutional Proposals and Procedural Limitations*, in: Closa, Kochenov (eds.), *supra* note 5; A. Iliopoulou-Penot, *La justification de l'intervention de l'Union pour la garantie de l'Etat de droit au sein des pays membres*, Revue de affaires européens (2019 forthcoming).

[42] W. Sadurski, *Constitutionalism and Enlargement of Europe*, Oxford University Press, Oxford: 2012.

founding fathers that all the Member States are good enough to achieve the baseline values and the need to enforce the values of the Union should this presumption turn out to be untenable. The scope of this provision, which is, like Arts. 2 and 49 TEU, necessarily broader than what has been conferred on the EU under Art. 5(1) TEU, is key to the understanding of the instruments Art. 7 contains, as will be discussed below under "scope".

The acuteness of the potential problems arising from the discrepancy between the crucial importance of the presumption of compliance of the Member States with the values of the Union and the Union's inability to check whether this indeed is the case – let alone intervene – was quite apparent from early on. Already in 1978 the Commission contemplated a proposal for a sanctions mechanism against the backdrop of Greek accession and the obvious threat of backsliding from democracy and the rule of law in that economically weak, newly-democratised state, fresh from the experience of the colonels' junta rule.[43] It is thus not surprising that the draft EU Treaty prepared by the European Parliament (EP) in 1984 contained such a mechanism.[44]

Since 1991, the EU has included "human rights clauses" in all association and co-operation ("Europe") agreements and incorporated these into the fabric of the pre-accession political conditionality in the areas of democracy, the rule of law, and human rights – which are now at the core of Art. 2 TEU.[45] Deployed in the pre-accession context via the Copenhagen Criteria,[46] the sanctions for non-compliance with the values and the core principles of the Union had only limited implications for the Member States once full membership had been secured, creating the so-called "Copenhagen dilemma". Beyond the so-called Cooperation and Verification Mechanism, which was only applicable post-accession to Bulgaria and Romania, the new Member States were out of reach of values-enforcement, if not for Art. 7 TEU.[47]

The current instrument goes back to the Treaty of Amsterdam – i.e. was adopted in direct anticipation of the "big-bang" Eastern enlargement of the EU – and was explicitly linked to ex Art. 6 TEC, which listed the then "principles" on which the Union is built, which now regrettably came to be recodified as "values" in Art. 2 TEU.[48]

[43] L. Tsoukalis, *The European Community and Its Mediterranean Enlargement*, Allen & Unwin, Sydney: 1981.

[44] Art. 44, Draft Treaty Establishing the European Union (1984) (never entered into force). The Court of Justice was supposed to play the key role in finding a breach. *Cf.* R. Mastroianni, *Stato di diritto o ragion di stato? La difficcile rotta verso un controllo europeo del rispetto dei valori dell'unione negli stati memberi*, in: E. Triggiani et al. (eds.), *Dialoghi con Ugo Villani*, Cacucci editore, Bari: 2017, at 611–612.

[45] Kochenov, *supra* note 27; K. Inglis, *The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation*, 37(5) Common Market Law Review 1173 (2000).

[46] C. Hillion, *The Copenhagen Criteria and Their Progeny*, in: C. Hillion (ed.), *EU Enlargement: A Legal Approach*, Hart Publishing, Portland: 2004.

[47] M.A. Vachudova, A. Spendzharova, *The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession*, European Policy Analysis 1 (SIEPS) (2012).

[48] Pech, *supra* note 28; *cf.* N. Levrat, *L'État de droit est-il une valuer européenne dont l'UE assure la promotion?*, in: D. Sidjanski, F. Saint-Ouen, C. Stephanou (eds.), *Union des valuers? La mise en œuvre des valeurs et des principes fondamentaux de l'Union Européenne*, Global Studies Institute de l'Université de Genève, Genève: 2018, p. 157.

From the very beginning Art. 7 TEU followed the principle of equal treatment of the Member States. Although clearly designed with the new Member States in mind, the instrument was framed from its very inception to apply to all the members, unlike, for instance, the Cooperation and Verification Mechanism.

The initial version of the provision contained only a sanctioning mechanism for a "serious and persistent breach" of values, which made the provision unusable in the event a swift reaction to a breach was necessary, which was exactly the situation in Austria in 2000 as perceived by the majority of the European capitals following the securing of the participation of the extreme-right FPÖ in government in Austria. The reaction to this electoral result came in a series of illegal *ad hoc* "bilateral sanctions" imposed on Austria by the 14 other Member States and orchestrated by the EU institutions, which in addition to not relying on Art. 7 TEU were entirely placed outside of the framework of EU law.[49] Austria has never been accused by the Commission or any other EU institution of violating any of the EU's values and principles. Moreover, the assessment by the "three wise men" of the situation on the ground concluded that *ad hoc* sanctions were introduced for no good reason at all.[50] It is thus beyond any doubt that Austria was mistreated in breach of EU law.[51] The "FPÖ crisis" teaches us, ironically, that the EU *does not need any law* or a formal legal basis if the political will is in place to act – so much for the supranational rule of law, an issue we return to *infra*. The current Hungarian and Polish situations cannot be compared to the former Austrian one, since the Hungarian and Polish situations are long in the state of "constitutional capture", which is well documented both by European institutions and in the academic literature.

The Austrian story had two direct and important consequences. Firstly, it led to a chilling effect, preventing the effective deployment of Art. 7 TEU when problems with values are strongly observable on the ground: Austria was constantly and erroneously cited by the EU institutions as a tale of caution about the momentous implications of the use of Art. 7, even though the provision had not been used then.[52] Secondly, it led to the upgrade of Art. 7 by the Treaty of Nice. The preventive mechanism in Art. 7(1)

[49] The EU Council Presidency of 31 January 2010 formally launched the sanctions against Austria on behalf of all the other Member States.

[50] M. Ahtisaari, J. Frowein, M. Oreja, *Report on the Austrian Government's Commitment to the Common European Values, in Particular Concerning the Rights of Minorities, Refugees and Immigrants, and the Evolution of the Political Nature of the FPÖ (The 'Wise Men Report')*, 40(1) International Legal Materials: Current Documents 102 (2001).

[51] K. Lachmayer, *Questioning the Basic Values – Austria and Jörg Haider*, in: Jakab, Kochenov (eds.), *supra* note 3; Besselink, *supra* note 9; G.N. von Toggenburg, *La crisi austriaca. Delicati equilibrismi sospesi tra molte dimensioni*, 2 Diritto pubblico comparato ed europeo 735 (2001); M. Merlingen, C. Mudde, U. Sedelmeier, *The Right and the Righteous? European Norms, Domestic Politics, and the Sanctions against Austria*, 39(1) Journal of Common Market Studies 59 (2001); E. Bribosia, O. De Schutter, T. Ronse, A. Weyembergh, *Le contrôle par l'Union européenne du respect de la démocratie et des droits de l'homme par ces États membres: à propos de l'Autriche*, 67 Journal de droit européen 61 (2000).

[52] *E.g.* First Vice President Timmermans, *The European Union and the Rule of Law – Keynote Speech (Conference on the Rule of Law*, Tilburg University, 31 August 2015, available at: https://bit.ly/2Vpkg31 (accessed 30 May 2019).

to deal with serious and persistent threats of a breach of values goes back to the Treaty of Nice. Art. 7(5) was changed with the Treaty of Lisbon.

As the provision stands today, it thus incorporates three different procedures which can be deployed to safeguard the values of Art. 2 TEU:

1) a procedure to declare the existence of a "clear risk of a serious breach" of the values referred to in Art. 2 TEU and the adoption of recommendations how to remedy the situation addressed to the Member State in breach (Art. 7(1) TEU);
2) a procedure to state the existence of a serious and persistent breach of values (Art. 7(2) TEU);
3) and a sanctioning mechanism following a finding of a serious and persistent breach (Art. 7(3) TEU).

The above procedures should not be regarded as small steps in a grand chronological order of things. In fact, Art. 7 does not exclude the possibility of starting the procedure laid down in Art. 7(2) TEU directly, i.e. all the three paragraphs of it are not part of one procedure with three steps. This fact is constantly forgotten in the political speeches by the key actors responsible for the operation of Art. 7 TEU.[53] The most popular presentation of Art. 7 TEU today – a consequence of the post-Austria chilling effect – is to refer to it as the "nuclear option".[54] This is based on the assumption that invoking the provision is extremely difficult and the results of its application are too devastating to make it practicable.[55] This view clearly ignores the differences between the three procedures of Art. 7 TEU and is not justifiable from the legal point of view.[56] Moreover, given the overwhelming costs of regime change and our general knowledge – based on countless historical examples – that sanctions are not the most effective way to bring about compliance, the potential effectiveness of Art. 7 TEU is clearly questionable, even if not impossible to attain.

The concerns of the drafters who included Art. 7 TEU into the Treaties have recently been proven entirely justified, as outstanding problems persist in the field of adherence to values. Following the "reforms" of the Fidesz party in Hungary starting with the second Orbán government, which used its constitutional supermajority to provide an overwhelming overhaul of the totality of the legal-political system in the country with a view to building an "illiberal democracy" *à la* Putin, it is clear that the problems Art. 7 was designed to tackle are not at all theoretical.[57] Adding to the situation in Hungary, where according to the Venice Commission the Constitution ended up being turned into a political tool of one-party rule, Poland followed suit after the election of *Prawo*

[53] Besselink, *supra* note 9; Wilms, *supra* note 9.

[54] *E.g.* President Barroso, *State of the Union Address* (Speech/12/596) (European Parliament, Strasbourg, 12 September 2012), available at: http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm (accessed 30 May 2019).

[55] For strong arguments against this view, *see* Besselink, *supra* note 9.

[56] Kochenov, Pech (*Better Late Than Never?*), *supra* note 5; Oliver, Stefanelli, *supra* note 5.

[57] K.L. Scheppele, *Constitutional Coups in EU Law*, in: Adams, Meuwese, Hirsch Ballin (eds.), *supra* note 37; Szente, *supra* note 3, p. 456; G.A. Tóth, *Illiberal Rule of Law: Changing Features of Hungarian Constitutionalism*, in: Adams, Meuwese, Hirsch Ballin (eds.), *supra* note 37.

i Sprawiedliwość (PiS) in 2015.[58] Lacking a super-majority to change the Constitution, the Polish government has simply ignored it, systematically failing to comply with its laws: a situation amply documented by scholars and analysed in detail by the Venice Commission.[59] Democratic- and rule of law-backsliding is thus on the rise in the EU and there is no guarantee that Poland and Hungary will not be joined by more Member States which fail to adhere to the values of Art. 2 TEU.

What Art. 7 has to say about the involvement and jurisdiction of the Court begs the question of whether the provision as largely political in nature. As per Arts. 19 TEU and 269 TFEU, the ECJ only has jurisdiction over procedural issues.[60] The observance of the voting arrangements applying to the EP, the European Council and the Council, as laid down in Art. 354 TFEU, could thus be policed by the Court. Importantly however there is no express exclusion of Art. 7 from the ECJ's jurisdiction, which means that the Court could be called upon to check how the institutions involved used their discretion in a concrete case, broadening judicial involvement somewhat compared with the silence of the provision itself about the Court. Given the limited involvement of the judicial power, as well as the fact that the Commission does not have an exclusive right of initiative, Art. 7 TEU remains a blend of law and politics.[61] It is a fundamental fact, however, that both these components unquestionably play an important role in the functioning of this provision.

3. THE SCOPE OF APPLICATION OF ART. 7 TEU

The scope of application of Art. 7 TEU is necessarily broader that what is implied by the principle of conferral: it is not confined to the scope of the *acquis*. As explained by the Commission, Art. 7 "seeks to secure respect for the conditions of Union membership. There would be something paradoxical about confining the Union's possibilities of action to the areas covered by Union law and asking it to ignore serious breaches in areas of national jurisdiction. If a Member State breaches the fundamental values in a manner sufficiently serious to be caught by Art. 7, this is likely to undermine the very foundations of the Union and the trust between its members, whatever the field in which the breach occurs."[62] This position of the Commission finds overwhelming support in the literature. Only a very broad view of the scope of Art. 7 TEU can make this provision an effective tool for safeguarding the EU's values.

[58] *Cf.* B. Bugarič, *A Crisis of Constitutional Democracy in Central and Eastern Europe: "Lands In-Between" Democracy and Autoritarianism*, 13(1) International Journal of Constitutional Law 219 (2015).

[59] Sadurski, *supra* note 2.

[60] *Cf.* ECJ Case T-337/03 ECR 2004, II-1041– *Luis Bertelli Gálvez v. Commission*; ECJ Case T-280/09 EU:T:2010:28 *Morte Navarro v. Parliament*; Besselink, *supra* note 9, 133.

[61] A. Williams, *The Indifferent Gesture: Article 7 TEU, the Fundamental Rights Agency and the UK's Invasion of Iraq*, 31 European Law Review 27 (2006).

[62] European Commission, *Article 7 of the Treaty on European Union – Respect for and promotion of the values on which the Union is based* (2003) (COM(2003) 606 final), 5.

All in all, as a *lex specialis* with a remarkably broad scope of application, Art. 7 clearly does not preclude the application of Arts. 258, 259 and 260 TFEU in the area of the defence of EU values. While some value violations can clearly fall within or are paralleled by a breach of the *acquis*, a series of systemic *acquis* violations could also amount to a serious breach of values.[63] This is why the Commission insists in its "Rule of Law Mechanism" on approaching Art. 7 and standard infringement proceedings as deployable side by side.[64]

3.1. Clear risk of a serious breach: Procedure No. 1

Out of the three procedures contained in Art. 7 TEU, initiating 7(1) in order to state a clear risk of a serious breach of values of Art. 2 TEU and address recommendations on how to remedy the situation to the relevant Member State can be done by the broadest array of actors: 1/3 of the Member States, the EP, or the European Commission. Compare this with 1/3 of the Member States and the Commission for the initiation of 7(2), and only the Council for the initiation of the actual sanctioning procedure in Art. 7(3) TEU. All the three procedures are in clear deviation from the main principle that the Commission holds the exclusive right of initiative in EU law.

The aim of opening up the procedure to so many possible initiators clearly seems to have been to make it easier to use, compared with other elements of Art. 7. It is undoubtedly true that both under-enforcement and over-enforcement of Art. 2 TEU values could create problems.[65] Yet, given that the 7(1) procedure cannot possibly lead to sanctions, as for the initiation of 7(3) by the Council the statement of a breach under 7(2) is required, the essence of 7(1) seems to lie in pushing the Member States where the breach could occur to engage in dialogue with the EU institutions in order to prevent a possible breach. This is confirmed by the provision's authorization, addressed to the Council, to issue recommendations to the Member State concerned in order to prevent a breach of values from occurring. The same procedure – a 4/5 majority in the members of the Council with the consent of the EP, is used both for the statement finding the existence of a serious risk of breach and for the adoption of the recommendations to be addressed to the Member State on the brink of breaching the values. Moreover, basic requirements of the rule of law have to be observed throughout, i.e. the Member State subjected to the procedure has to be heard. The institutions also have to react to the changes on the ground by regularly verifying whether the grounds behind triggering Art. 7(1) TEU still persist.

With the Commission, the EP, and 1/3 of the Member States are able to initiate the procedure, it is obvious that the prevailing opinion of Art. 7's "nuclear" nature is exceedingly exaggerated. Moreover, the 4/5 majority of the members of the Council is not so difficult to reach, given that the Member State subjected to the procedure will necessarily not be allowed to cast a vote. This threshold, however high it seems to be, is

[63] K.L. Scheppele, *The Case for Systemic Infringement Actions*, in: Closa, Kochenov (eds.), *supra* note 5.

[64] European Commission, *supra* note 5; European Parliament, *supra* note 5.

[65] Wilms, *supra* note 9.

clearly far below the unanimity in the European Council required for a statement of an actual breach under Art. 7(2) TEU. It is notable in this regard that Art. 7, which requires the opinion behind the initiation of 7(1) to be "reasoned", also requires the initiating actors to do their "homework" and prepare the case by collecting and systematising the necessary information and evidence. Such preparatory work is clearly implied in the text of the provision.

Given that the Art. 7(1) procedure is relatively easy to trigger, the arguments to the contrary underlying the Commission's "Rule of Law Mechanism" – a non-binding explanation on how the Commission will prepare its own activation of Art. 7(1) or 7(2) TEU[66] – are hardly convincing. In introducing the mechanism, the Commission aimed at introducing some informal dialogue with the problematic Member State before Art. 7 – the misnamed "nuclear option" – is triggered. The Commission would thus address recommendations to that Member State and receive replies: a procedure criticized by the Council Legal Service; but for very bad reasons, given that as one of the initiators of the 7(1) (and also 7(2)) procedures the Commission clearly has to have internal rules for judging the situation on the ground and the collection of evidence to prepare its Reasoned Opinion.[67] However, the Rule of Law mechanism as introduced looks suspiciously like a double of Art. 7(1) TEU – only with no involvement of other institutions.[68]

The only effect of the mechanism's deployment can be a delay in the triggering of Art. 7 – even though other institutions having the power to trigger Art. 7 clearly are not obliged to wait for the Commission to finish with the non-Treaty mechanism of its own creation. In practice the delay is the least of the evils created by the Commission in order to ultimately *not* trigger Art. 7. When such triggering was needed, it showed three things.[69] Firstly, it showed that the Commission is incapable of being coherent and consistent in managing its own newly-created procedure. The Mechanism has never been triggered against Hungary, even though the situation there was as bad – if not worse – than in Poland, against which the Mechanism was triggered. Secondly, it demonstrated that the Commission is incapable of sticking to the steps of its own procedure: following Poland's de facto refusal to cooperate and following the Commission's recommendation under the Mechanism, the Commission, instead of triggering Art. 7(1) TEU as its own Mechanism required, came up with a new, supposedly *ad hoc* recommendation instead, while the situation with the Rule of Law and democracy in Poland continued to deteriorate at an increasing pace. Thirdly, it demonstrated that triggering Art. 7 and its related mechanisms should be done without committing grave tactical mistakes: having moved against one out of the two current backsliding Member States, the Commission handed the veto power over any serious move under Art. 7(2) TEU against Poland to Hungary, making the deployment of the Treaty provision de facto impossible as a result

[66] European Commission, *supra* note 5; Kochenov, Pech, *supra* note 14.

[67] Council of the European Union, *supra* note 15; Kochenov, Pech, *supra* note 14.

[68] Kochenov, Pech (*Better Late Than Never?*), *supra* note 5.

[69] *Ibidem.*

of its own inventiveness and masking profound indecision. In the event the Rule of Law Mechanism is now regarded as a semi-official step preceding the deployment of Art. 7 TEU – which could be a possibility in practice – the undermining of the *effet utile* of this provision by the Commission would extend even further, creating an unwelcome and dangerous precedent.

The main question that the Rule of Law Mechanism supposedly had to answer is how to decipher a threat of a serious breach of Art. 2 values. In this sense the mechanism is useful in that it builds on the Venice Commission practice (*see* the discussion of Art. 2 TEU) in defining the elements of the rule of law, which could be useful to the institutions in finding a risk of breach under Art. 7(1) TEU. Moreover, the Commission relies on the Venice Commission's opinions in its Rule of Law recommendations.

It is fundamental to keep in mind that a statement finding the existence of a serious risk of breach under Art. 7(1) TEU is not necessary to activate Art. 7(2) TEU. The same applies, of course, to the Commission's Rule of Law Mechanism which, as the Commission itself stated, is not obligatory and not legally binding.[70] Although activated at the time of this writing against both Poland and Hungary, Art. 7(1) TEU is too little too late: both countries are at such a stage of backsliding that only pro-government trolls could benevolently characterise it as a "threat": the capture of the state is a done deal in both countries – and this is absolutely not what Art. 7(1) TEU could in any way remedy. By saying that the provision is "dead", the Polish minister could not be more right, in part: it is both dead *and misused*.

3.2. Stating the existence of a serious breach (Procedure No. 2)

There is a huge difference between a mere "serious threat" of a breach of values and a serious breach of values actually observable in a Member State of the Union. This difference explains the existence of a separate procedure in Art. 7 TEU for finding such a breach, as well as the definitively higher thresholds required by this procedure: unanimity in the European Council and consent of the EP. Unlike Art. 7(1), Art. 7(2) cannot be initiated by the European Parliament, even though the EP can, under its own Rules of Procedure, call on others to act in the context of both paragraphs in question.[71] Even taking into account the fact that unanimity does not imply that each member of the European Council – not counting the representative of the Member State potentially subjected to 7(2), which will not, logically, take part in the vote – has to vote in favour of triggering the procedure,[72] this makes finding the existence of a serious breach procedurally very difficult.

This difficulty is not illogical, since a simple breach of Art. 2 TEU is not enough to activate Art. 7(2) TEU. What is required – and what is meant by "serious" – is presum-

[70] European Commission, *supra* note 5.

[71] Rule 83, European Parliament 'Rule of Procedure' (2014) (10296/14).

[72] Art. 7 TEU does not limit its activation to one Member State at a time, so in a situation where more than one Member State is suspected of a breach of Art. 2 values the activation of Art. 7 against both states is indispensable to avoid the blockage of the Art. 7 procedures by the backsliding Member States supporting each other.

ably the systemic nature of the breach, which means that the institutions of the Member State concerned cannot, on their own, successfully resolve the problem of failing to adhere to EU values.[73] In this context it is only logical to have a procedure in place that makes it extremely difficult to over-police Art. 2 TEU, which is the objective behind the high thresholds contained in Art. 7(2) TEU. The emphasis on "systemic" helps understand why the question of Art. 7(2) has never been raised with regard to some Member States which have manifestly underperformed under Art. 2 – like Berlusconi's Italy with its questionable track-record on media pluralism;[74] or Sarkozy's France deporting EU citizens of Roma origin in violation of EU law.[75] If there is a certain "spectrum of defiance", Art. 7(2) TEU only covers the absolute extremes of such defiance.[76] What is required is the constitutional capture of the Member State's institutions, resulting in the paralysis of the liberal democracy and rendering making it impossible for the State's institutions to make auto-corrections (as were made in Italy and France).[77] Hungary and Poland are cases in point, as they represent an example of ideological defiance: a choice made by the government to reform the Member State institutions (in the case of Poland in direct violation of the Constitution and the decisions of the Constitutional Court[78]) in such a way as to make wholehearted adherence to the values of Art. 2 TEU impossible.

While naming and shaming could be a potent tool for change, in order to be effective the shaming of those Member States which have chosen a path of systemic non-compliance needs to be backed by possible sanctions, as in and of itself it may have little effect on the ground. This is why, while the main outcome of a successful deployment of Art. 7(2) TEU is a statement finding a serious breach by the Member State concerned of the values of Art. 2 TEU, the core significance of the 7(2) procedure seems to lie in the fact that is opens the way to the triggering of the Art. 7(3) procedure by the Council, thus making real sanctions a possibility – unlike in the case of the 7(1) procedure.

3.3. Suspension of rights and revocation of sanctions (Procedure No. 3)

The third procedure is contained in Art. 7(3) TEU, which goes beyond the "shaming" resulting from the deployment of the 7(1) and 7(2) procedures and implies actual sanctioning of a Member State. This procedure is initiated by the Council and requires a reinforced qualified majority voting (QMV), since Art. 354 TFEU makes a reference to

[73] A. v. Bogdandy, M. Ioannidis, *Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done*, 51 Common Market Law Review 59 (2014).

[74] ECJ Case C-380/05 ECR 2008, I-00349 - *Centro Europa 7 S.r.l. Cf.* R. Mastroianni, *Media Pluralism in Centro Europa 7 Srl, or When Your Competitor Sets the Rules*, in: F. Nicola, B. Davies (eds.), *EU Law Stories*, Cambridge University Press, Cambridge: 2017.

[75] S. Carrera, A. Faure Atger, *L'affaire des Roms: A Challenge to the EU's Area of Freedom, Security and Justice*, CEPS, September 2010.

[76] A. Jakab, D. Kochenov, *Introductory Remarks*, in: Jakab, Kochenov (eds.), *supra* note 3, at 3.

[77] J.-W. Müller, *Should the EU Protect Democracy and the Rule of Law inside Member States?*, 21(2) European Law Journal 141 (2015).

[78] Koncewicz, *supra* note 2.

the requirements of Art. 238(3)(b) in this respect, implying the support of at least 72% of participating Council Members comprising 65% of the Union population (again with the representative of the Member State subjected to the procedure not taking part in the vote or affecting any counts towards the vote as per Art. 354 TFEU). Yet the procedural threshold is very high, since Art. 7(3) TEU cannot be initiated without a successful deployment of Art. 7(2) TFEU.

The 7(3) procedure is suitably vague so as to allow the Council to adapt the exact scope of the sanctions as it sees fit with a view of maximizing the likelihood of compliance in the Member State concerned. While the provision speaks of the suspension of "certain rights deriving from the application of the Treaty", it is clear that the sanctions meant to be invoked can be either economic and non-economic in nature. Both access to EU funds and the voting of the Member State in breach in the Council – just to give two examples – can be affected. While the academic literature is sceptical about the effect of the sanctions, in those cases when a Member State is heavily reliant on EU funds and concerned about its prestige in EU institutions these could probably bring about the desired effect, although there is no successful example to cite here since Art. 7(3) TEU has never been invoked.

What is absolutely clear, vagueness notwithstanding, is that Art. 7(3) does not authorise the exclusion of the Member State from the Union: the very issue of membership of the Union cannot be put in question.[79] Only Art. 50 TEU provides guidelines for leaving the Union.[80]

Under Art. 7(4) TEU, the lifting the sanctions is very straightforward: again, a simple QMV in the Council without the participation of the violator state is required. Importantly, the same procedure applies to altering the substance of the sanctions in place, giving the Council sufficient flexibility to react to the changes on the ground in the Member State concerned.

3.4. Procedural requirements specific to Article 7 TEU

Now let us look in some more detail at Art. 354 TFEU, which lays down the rules of the procedural aspects of Art. 7 TEU. There are several significant points of difference compared with the familiar procedures used by the institutions involved, which can be found elsewhere in the Treaties. Firstly – and most importantly – although Art. 354 TFEU refers to a concrete Member State which is to be excluded from voting in such cases, the wording clearly implies that in the cases where several Member States are suspected of failing to adhere to EU values all such Member States should not be given a chance to derail the application of Art. 7 TEU. Should the contrary be the case, all the procedural requirements of Art. 7 TEU, especially those requiring unanimity, would end up being deprived of their intended *effet utile*, given that the backsliding Member States would most likely obstruct the application of sanctions to

[79] Besselink, *supra* note 9, p. 130.

[80] B. Blagoev, *Expulsion of a Member State from the EU after Lisbon: Political Threat or Legal Reality*, 16 Tilburg Law Journal 191 (2011).

each other's cases. Excluding several Member States from voting can thus be deemed as implicitly authorised by Art. 354 TFEU in the context of Art. 7, especially in the context of the Art. 7(2) TEU procedure. It will be up to the Court, when approached by one such Member State under Art. 269 TFEU, to clarify the exact extent of such an exclusion. Options potentially range from requiring the simultaneous consideration of the application of Art. 7(2) TEU to several backsliding Member States already subject to Art. 7(1) TEU procedure, to the default exclusion from the vote in the context of Art. 7 TEU of any state subjected to Art. 7(1) TEU in the context of any proceedings arising under Art. 7 TEU, without necessarily taking into simultaneous consideration the situation regarding the infringement of values in the several Member States.

The QMV required under Art. 354(2) TFEU is of the strictest nature, since the support of at least 72 per cent of participating Council Members comprising 65 per cent of the Union population is required as per direct reference to Art. 238(3)(b). As already mentioned, the Member State subjected to the procedure does not participate. The QMV could be even stricter in practice than its strictest emanation in the Treaties, since while Art. 354 TFEU speaks of excluding the Member State subjected to the procedure from the procedural thresholds concerning the numbers of Member States required to reach Art. 7 TEU decisions by the text of that provision, nothing in Art. 354 TFEU refers to the population threshold counts, which are part of the QMV. This leaves open two possible interpretations of QMV under Art. 354 TFEU: one including and one excluding the population of the Member State subjected to Art. 7 TEU procedure in the 65 per cent of the Union population required. Given that no express reference is made to such an exclusion in Art. 354 TFEU, a strong argument can be made to include the population while excluding the Member State, while the contrary reading (exclusion of both the Member State and its population from the count) is more consistent with the *raison d'être* of the special procedure in question. The obvious lack of absolute clarity on this issue allows for the likelihood that the exact count of QMV thresholds will be the subject of a case in front of the ECJ under Art. 269 TFEU once an Art. 7 TEU procedure is activated. Art. 354 TFEU thus potentially requires the strictest QMV threshold available in the Treaties.

Also, the EP's decision-making procedure deployed in Art. 7 TEU, as specified in Art. 354(4) TFEU, is exceptionally strict. A two-thirds majority of the votes cast representing the majority of component MEPs amounts to a much higher procedural threshold than a similar majority of the EP members present and voting. The votes cast in favour should thus come from at least the majority of the competent members of the House, while also not falling below two-thirds of those present on the day of voting. How to count abstentions is not entirely clear based on the wording of Art. 354(4) TFEU, which posed a problem during the EP vote to activate Art. 7 TEU against Hungary in September 2018. Following the advice of the Directorate of Legislative Acts (the EP service responsible for the procedures), abstentions were not deemed to be "votes cast", which affected the majority required. This reading is consistent with the interpretation of "votes cast" in the context of Art. 231 TFEU and is supported by Rule 178(3) of the EP Rules of

Procedure. Thus by analogy the two-thirds majority of "votes cast" required in the context of Art. 354(4) TFEU is counted disregarding the abstentions.[81] All in all the procedure thus contains two thresholds to be met by the EP, both of which are exceptionally high, especially in the context of the relatively low quorum rules in the EP.

4. (UTOPIAN) SCENARIOS FOR THE FUTURE: NO ROOM FOR ART. 7

Art. 7 TEU is unique in that it establishes the procedures for finding the threat of a breach of EU values by a Member State; the existence of such breach; as well as a possible sanctioning mechanism to bring the recalcitrant Member State(s) back into compliance, while not being confined by the general EU competence scope limitations. Yet, by activating the "naming and shaming" part of Art. 7 TEU, as we have seen with regard to Hungary and Poland, the EU does not and cannot solve any of the outstanding problems: this provision has not been designed to ensure regime change.

Crucially, Art. 7 – and especially 7(2) TEU, which would be most appropriate in the current context – is atypical and difficult to use since it both contradicts the logic of the internal market and makes clear the Union's own vulnerabilities in the field of the Rule of Law and democracy. It is a confrontational provision with a broad mandate for sanctions, which ensures economic losses throughout the internal market at the moment when its sanctions kick in, which is a direct spillover of the logic of economic integration into the sphere of protection of democracy and the rule of law. As a consequence, gathering the necessary political will to activate Art. 7 TEU is both immensely difficult and – ultimately – most likely a pointless exercise: Art. 7 TEU, no matter which procedural aspect of it we are talking about, does not bring with it any guarantee of a change in the regime of the backsliding Member State. Consequently, it is not at all surprising that the only activations of Art. 7 TEU known to us happened only when the Member States in question *de facto* left the ambit of the rule of law world, as Sadurski,[82] Scheppele, Sólyom[83] and other scholars have clearly demonstrated. It seems that such activations, being ultimately entirely inconsequential – while offering one argument in world of mutual recognition of disputes could potentially harm the EU more than the powers that be in Hungary and Poland.

Indeed, it is unfortunately beyond any doubt that the Commission's move to activate 7(1) TEU against Poland in 2018 will *not result in any positive change on the ground in Poland*. The Hungarian case is in no way different. Abundant time has passed to see that PiS and Fidesz do not inhabit a dialogue-friendly universe. The result of the Art. 7(1)

[81] This did not prevent the Hungarian government from attempting to challenge the outcome of the vote in front of the ECJ: Case C-650/18, *Hungary v. European Parliament* (pending at the time of writing).

[82] Sadurski, *supra* note 2.

[83] Scheppele, *supra* note 3; Sólyom, *supra* note 3.

procedure is thus most likely a new flow of insults from Warsaw, which does not help European values and is probably counter-productive in the eyes of ordinary Poles. The Commission and EP's actions are thus unlikely to bring about any positive change, and should be viewed as what they are – symbolic signals. Let us be frank here: the Treaties have failed to avert backsliding disasters in the Member States.

Three scenarios of possible action emerge in this context, *all of them unrelated to Art. 7 TEU.*

a) Thinking short-term – Scenario No. 1: cutting the funds

The preferred outcome of this realistic scenario would be a shake-up of the Polish and Hungarian political life to an extent likely to bring about speedy change – the populist government running out of cash will have to change its course. Unfortunately the amounts flowing into these backsliding states, however significant, are probably not sufficient to bring about the expected result, so they should be scrutinized both with caution and skepticism.[84]

b) Thinking mid-term – Scenario No. 2: overwhelming *ad hoc* political pressure

Leaving aside its timidity with respect to the use of Art. 7, the Haider affair of 2000 has taught the Union a great lesson about how powerful political pressure outside the context of the Treaty framework can be. This aggressive tool, even if lying outside the realm of EU law *sensu stricto*, is sure to topple the PiS or Fidesz governments, triggering speedy change. The questions that arise in this regard are related to the sociological legitimacy of such actions and the powers to replace the autocrats. Blokker urges a lot of caution on this count, and he is most likely right.

c) Thinking long-term – Scenario No. 3: a multi-speed Union

This instrument would require strict political conditionality with respect to any move towards the core. A conditionality-based multi-speed Europe is unavoidable and the incorporation of conditionality techniques into policing each of the integration's concentric circles will be a necessary element of the edifice. As the speed and vectors of integration evolve, Poland and the likes of Poland could find themselves outside the scope of meaningful activity, i.e. behind the door of the integration kitchen. With the growing pressure on the Union's values from a number of countries, this seems like the most realistic way to preserve the EU as a union of values over the long term, while also being sufficiently open towards those states hijacked by Belarus-inspired plutocrats. Before blessing any moves between the concentric circles, a strict quarantine should be applied to the poisonous regimes outside the ambit of the values contained in Art. 2. However here too a voice of caution is in order: since the Commission has failed the conditionality exercise once, there is no guarantee it would succeed the second time round.

[84] *See*, for a meticulous analysis, S. de la Rosa, *La 'sanction budgétaire' risque-telle de faillir? A propos du Règlement portant protection du budget européen en cas de défaillance de l'État de droit*, Revue des affaires européennes (2019).

5. A REALISTIC SCENARIO FOR THE FUTURE: NO ROOM FOR ART. 7

Gradual adaptation of the infringement proceedings to the needs of the current context is the final scenario proposed here for consideration. This scenario gets no number, since it is merely a description of the on-going developments. The Commission, together with the Court of Justice, is gradually pushing for increasing the effectiveness of Arts. 258, 259, 260 and 279 TFEU as well as (at least potentially) the Charter by using the principle of the independence of the judiciary and the EU-level function of the local judicial institutions in the backsliding Member States as the key trigger of jurisdiction. This approach is starting to yield results and is much less utopian that the other three outlined above. In being less utopian, it is also the most incremental and the least political, which endows it with additional legitimacy.

The crises have allowed the judiciaries of the EU to shine, bringing inter-court dialogue to a vital new level and upgrading its substance.[85] At the core of this dialogue are also the fundamental principles of EU law, even those not confined in their entirety to the EU's scope of powers.[86] In particular this includes the independence of the judiciary – interpreted by the ECJ as an EU-law principle and a vital element of the Rule of Law,[87] as opposed to merely issues of validity and the interpretation of EU law *per se*, however broadly conceived.[88] Such an interpretation – a spectacular innovation reshaping the constitutional system of the Union as we speak – has given voice to vertical concerns related to the independence of the judiciary,[89] as well as horizontal rule of law concerns, leading to a significant refinement of the principle of mutual recognition.[90] This has allowed the Court to learn from its past mistakes in dealing with

[85] K. Lenaerts, *The Court of Justice and National Courts: A Dialogue Based on Mutual Trust and Judicial Independence*, Speech of President Lenaerts at the Polish Supreme Court, 19 March 2018, www.nsa.gov.pl (accessed May 1, 2019). Editorial comment, *supra* note 22, at 3; M. Dawson, *Constitutional Dialogue between Courts and Legislatures in the European Union*, 19(2) European Public Law 369 (2013), 371.

[86] For more on the shift of Art. 2 TEU principles from "principles" to "values" without undermining the essence of the former, *see* Pech, *supra* note 28.

[87] Case C–64/16 *Associação sindical dos juízes portugueses* [2018] ECLI:EU:C:2018:117; L. Pech, S. Platon, *Judicial Independence under Threat: The Court of Justice to the Rescue in the* AJSP *Case*, 55 Common Market Law Review 1827 (2018); A. Ciampi, *Can the EU Ensure Respect for the Rule of Law by Its Member States? The Case of Poland*, 3 Osservatorio sulle fonti 1 (2018); S. Adam, P. Van Elsuwege, *L'exigence d'indépendance du juge, paradigme de l'Union européenne comme Union de droit*, JDE 334 (2018); M. Krajewski, *Associação sindical dos juízes portugueses: The Court of Justice and Athena's Dilemma*, 3 European Papers 295 (2018).

[88] For a criticism of the classical inter-court dialogue before the most recent case-law, *see e.g.* D. Kochenov, M. van Wolferen, *The Dialogical Rule of Law and the Breakdown of Dialogue in the EU*, EUI Working Paper, LAW 2018/01.

[89] This allowed the national courts under threat to deploy the preliminary ruling procedure in an innovative way in order to guarantee the preservation of their own independence: Biernat, Kawczyńska, *supra* note 24; *Cf.* M. Broberg, *Preliminary References as a Means of Enforcement of EU Law*, in: Jakab, Kochenov (eds.), *supra* note 3.

[90] *E.g.* Case C-216/18 PPU *LM* EU:C:2018:586; C. Rizcallah, *Arrêt "LM": un risque de violation du droit fondamental à un tribunal indépendant s'oppose-t-il à l'exécution d'un mandate d'arrêt européen?*, 253

assaults on the rule of law.[91] The presumption that the strict enforcement of the *acquis* is sufficient to guarantee adherence to the EU's values is clearly not valid any more.[92] Together with the endowment of Art. 19(1) TEU with a new significance, the on-going crisis of the rule of law has helped open a new chapter of European constitutionalism. The very fact that the current concerns arose, rather than being strictly confined to the national legal orders, demonstrates the actual maturity of the level of supranational law and integration, or at least of its aspirations.[93]

A key element in the ongoing fight for the rule of law is, at the EU level, the principle of the independence of the judiciary. This is derived from Art. 19(1) TEU and regarded as a vital part of the value of the rule of law.[94] Judicial independence has thus emerged as a crucial nexus between EU law and the enforcement of Art. 2 TEU values outside of the scope of the *acquis sensu stricto*,[95] which explains the relative silence over the Charter of Fundamental Rights (CFR) among those who are busy trying to deal hands-on with the ongoing rule of law concerns:[96] Art. 51 CFR still stands, despite all the literature on the need to move on from this competence block.[97] After all, we are learning that Art, 19(1) TEU is good enough.[98] A range of tools from pecuniary[99] to interim measures having retroactive force[100] can now be deployed to freeze at least some attempts on the part of the backsliding governments to undermine the independence of the judiciary even further. This new, more thoughtful approach could definitely have a significant impact of other areas of EU law too. It is marked however by one fundamental aspect: there is no place in it for Art. 7 TEU.

Journal de droit européen 348 (2018). *Cf.* K. *Lenaerts, La vie après l'avis*: *Exploring the Principle of Mutual (Yet not Blind) Trust*, 54 Common Market Law Review 805 (2017).

[91] Compare Case C–286/12 *Commission v. Hungary* with Case C–619/18 R *Commission v. Poland*, Order ex parte of 19 October 2018 and Order of 17 December 2018.

[92] For more on this difference, *see* Kochenov, *supra* note 28.

[93] Even though numerous international organizations around the world facing similar crises are trying to resolve these with varyings degree of success: C. Closa, *Securing Compliance with Democracy in Regional Organizations*, in: Jakab, Kochenov (eds.), *supra* note 3.

[94] Case C–64/16 *Associação sindical dos juízes portugueses*, paras. 36, 37 and 41.

[95] Christophe Hillion predicted this development: Hillion, *supra* note 9.

[96] Pech, Platon, *supra* note 86, 1833–1836.

[97] A. Jakab, *The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States*, in: Closa and Kochenov (eds.), *supra* note 5; A. Jakab, *The Application of the EU Charter in National Courts in Purely Domestic Cases*, in: Jakab, Kochenov (eds.), *supra* note 3. *Cf.* A. von Bogdandy, C. Antpöhler, M. Ioannidis, *Protecting EU Values: Reverse Solange and the Rule of Law Framework*, in: Jakab, Kochenov (eds.), *supra* note 3.

[98] The connection with the Charter is however obvious: Case C–619/18 R *Commission v. Poland*, Order ex parte of 19 October 2018 and Order of 17 December 2018.

[99] Especially when the backsliding Member States attempt to openly defy the Court: Case C–441/17 *Commission v. Poland* [2018] ECLI:EU:C:2018:255, 18 April 2018.

[100] Case C–619/18 R *Commission v. Poland*, Order ex parte of 19 October 2018 and Order of 17 December 2018.

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CONSTITUTIONAL COURTS AND THE IMPLEMENTATION OF EU DIRECTIVES: A COMPARATIVE ANALYSIS

Abstract:
This article concerns constitutional problems related to the implementation of EU directives seen from both the legal and comparative perspectives. The directives are a source of law which share a number of characteristic features that significantly affect and determine the specificity of Member States' constitutional review of the directives as well as the legal acts that implement them. The review of the constitutionality of EU directives is carried out in accordance with the provisions of national implementing acts. Member States' constitutional courts adopt two basic positions in this respect. The first position (adopted by, inter alia, the French Constitutional Council and German Federal Constitutional Court) is based on the assumption of a partial "constitutional immunity" of the act implementing the directive, which results in only a partial control of the constitutionality of the implementing acts, i.e. the acts of national law implementing such directives. The second position, (adopted, explicitly or implicitly by, inter alia, the Austrian Federal Constitutional Court, Czech Constitutional Court, Polish Constitutional Court, Romanian Constitutional Court and Slovak Constitutional Court) concerns the admissibility of a full review of the implementing acts. This leads to the admissibility of an indirect review of the content of the directive if the Court examines the provision as identical in terms of content with an act of EU law. Another issue is related to the application of the EU directives as indirect yardsticks of review. The French Constitutional Council case-law on review of the proper implementation of EU directives represents the canon in this regard. Nonetheless, interesting case studies of further uses of EU directives as indirect yardsticks of review can be found in the case law of other constitutional courts, such as the Belgian Constitutional Court or Spanish Constitutional Court. The research presented in this paper is based on the comparative method. The scope of the analysis covers case law of the constitutional courts of both old and new Member States. It also includes a presentation of recent jurisprudential developments, focusing on the constitutional case-law regarding the Data Retention Directive and the Directive on Combating Terrorism.

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1. IMPLEMENTATION OF EU DIRECTIVES: CONSTITUTIONAL PROBLEMS

EU directives are a source of EU law having a few characteristic features that significantly affect the issues involving review of the constitutionality of the directives themselves and, by extension, the legal acts that implement them. EU directives are addressed to the Member States and, as a general rule, they cannot be treated as a source of the rights and obligations of an individual. The Member States – either all of them or those precisely defined in the provisions – are bound by EU directives in respect of the result that is to be achieved, while the applicable provisions leave it to the discretion of the Member States to select the means and measures of implementation. Directives are therefore an instrument for the harmonization of the laws of the Member States. Directives are implemented into the national legal order by means of national legislation, which is usually done by acts. It is clear from the case-law of the Court of Justice of the European Union (CJEU[1]) that if a directive is not implemented in the national order, or is implemented improperly, an individual may rely on the provisions of this directive against the public authorities of the state, provided that the provisions are "unconditional and clear enough." Moreover, national courts are obliged to give full effect to EU law and to interpret all national legislation in the light of all relevant EU law, regardless of whether a particular provision is of direct effect. EU law does not have to be directly effective in order for it to benefit from the general doctrine of supremacy.[2]

The CJEU has developed ample case-law concerning the constitutional review of EU law (European Constitutional Supremacy: ECS).[3] Ever since the 1960s (*Van Gend en Loos*[4] and *Costa v. ENEL*[5]) this view has not changed a single iota.[6] Two of the strongest CJEU statements in this regards were in the *Foto-Frost* judgment of 22 October 1987, where it explicitly held that the national courts have no jurisdiction themselves to declare that measures taken by EU (then the Community) institutions are invalid;[7] and the *UPA* judgment of 25 July 2002, where the CJEU emphasized that the EU Treaties have established a complete system of legal remedies and procedures designed to ensure

[1] This abbreviation will be applied consistently throughout the text, irrespective of whether the decision was issued before or after the entry into force of the Treaty of Lisbon.

[2] Case C-14/83 *Von Colson and Kamann v. Land Nordrhein –Westfalen*, ECLI:EU:C:1984:153.

[3] *Cf.* M. Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe before and after the Constitutional Treaty*, 11(3) European Law Journal 262 (2005), pp. 262-263.

[4] Case C-26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, ECLI:EU:C:1963:1.

[5] Case C-6/64 *Flaminio Costa v. E.N.E.L.*, ECLI:EU:C:1964:66.

[6] Case C-42/17 *Criminal proceedings against M.A.S. and M.B. (Taricco II)*, ECLI:EU:C:2017:936. This case is considered, at least for now, as the exception that proves the rule.

[7] Case C-314/85 *Foto-Frost v. Hauptzollamt Lübeck-Ost*, ECLI:EU:C:1987:452.

judicial review of the legality of acts of the institutions, and have entrusted such review to the EU courts.[8] Nevertheless some national constitutional courts have not accepted this perspective, or at least accepted it only under certain conditions, which give them the right of the last word (*Kompetenz-Kompetenz*)[9] and does not overturn the National Constitutional Supremacy (NCS).[10] On the other hand, constitutional courts have been becoming more and more aware of their role as European courts. In effect, they have abandoned the strategy of "splendid isolation" and incorporate EU law as yardsticks for constitutional review.[11] Therefore the current way of application of EU law by national constitutional courts can be most accurately described in conceptual frames as (an imperfect phase of) legal pluralism. Both (to some extent inconsistent) factors – lack of acceptance of the CJEU's monopoly to review EU law and an increasing awareness of the constitutional courts' role as European courts – affect two basic constitutional issues regarding EU directives and their implementation. The first is the national constitutional review of EU directives via the review of implementing acts; and the second one is application of the EU directives as indirect yardsticks of review, *inter alia*, while reviewing of the correctness of their implementation.

In relation to the issue of constitutional review, the preliminary hypothesis is that the characteristic features of EU directives result in them being reviewed via a review of the implementing acts, and in this respect constitutional courts can choose one of two basic positions.

The first position is based on the assumption of a partial "constitutional immunity"[12] of the implementing act, which results in only a partial constitutional review of implementing acts (i.e. national legislation implementing EU directives).[13] The consti-

[8] Case C-50/00 *P Unión de Pequeños Agricultores v. Council*, ECLI:EU:C:2002:462, para. 40.

[9] *Cf.* M. Kumm and R.F. Comella, *The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union*, 3(2-3) International Journal of Constitutional Law 473 (2005).

[10] Kumm, *supra* note 3, pp. 262-263.

[11] D. Paris, *Constitutional courts as European Union courts: The current and potential use of EU law as a yardstick for constitutional review*, 24(6) Maastricht Journal of European and Comparative Law 2017.

[12] *Cf.* M. Claes, *The National Courts' Mandate in the European Constitution*, Hart Publishing, Oxford and Portland: 2006, p. 628.

[13] The specificity of the implementation process of EU law in some Member States should be taken into account. For instance in Italy the implementation process is regulated by separate acts, and the implementation of specific directives can be carried out by decree-laws directly, or by means of regulations and other administrative acts, or by means of transitional regulations with the force of law and other acts adopted in accordance with the urgency procedure, as well as by means of legislative acts of the Italian regions and autonomous provinces. *Cf.* K. Doktór-Bindas, *Wpływ prawa Unii Europejskiej na system prawa Republiki Włoskiej* [The Impact of European Union Law on the Law System of the Italian Republic], Wydawnictwo Sejmowe, Warszawa: 2013, pp. 185 et seq. On the other hand, in practice only 10 per cent of EU directives are implemented by means of laws of parliament in France. The implementation of the remaining 90 per cent of directives is carried out with the use of acts within the jurisdiction of the government, i.e. decrees and ordinances. In case of the implementation of the directive by means of an act of the executive powers, the competent body to conduct a review of the legality of such an act is the Council of State, not the Constitutional Council of the French Republic. *Cf.* K. Wójtowicz, *The Constitutional Courts and European Union Law*, E-Wydawnictwo, Prawnicza i Ekonomiczna Biblioteka Cyfrowa, Wrocław: 2014, p. 86.

tutional courts that adopt this thesis in their case-law acknowledge the fact that they are only authorized to review those provisions of the implementation act which are of an executive nature and refer not to the directive's objectives, but to the manner of its implementation. These courts could only exceptionally allow for a review of those provisions of an implementing act which are identical in terms of content with the provisions of the directive. This position means that, as a rule, constitutional courts avoid reviewing (indirectly) EU directives.

The second position involves, whether explicitly or implicitly, the admissibility of a full review of the implementing acts. It is then possible to declare the admissibility of an indirect review of the content of the directive, provided the Court examines a provision which is identical in terms of content with the act of EU law.

The preliminary hypothesis related to second aforementioned constitutional problem (constitutional review of the proper implementation of EU directives) is that the EU directive itself serves as an indirect yardstick of review, and the constitutional court is to decide whether the legislator has failed to implement the directive properly and thus violated its provisions. However, such a ruling may be issued by the constitutional court only if it assumes that a proper implementation of the directive is a constitutional obligation. Therefore, the constitutional provisions are always the direct yardsticks for the constitutional review.

The research presented in this paper is based on the comparative method, and the theoretical conceptualization of the constitutional courts' case-law is purposefully limited. The scope of the analysis covers case law of the constitutional courts of both old and new Member States. It also includes presentation of recent jurisprudential developments, e.g. the constitutional case-law regarding the Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC[14] (the Data Retention Directive); and the Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA[15] (the Directive on Combating Terrorism).

2. NEGATION OF CONSTITUTIONAL REVIEW OF EU DIRECTIVES: A PARTIAL "CONSTITUTIONAL IMMUNITY" OF THE IMPLEMENTING ACTS

The Constitutional Council of the French Republic represents a perfect illustration of a constitutional court which has accepted the partial "constitutional immunity" of implementing acts. and as result refuses to review (indirectly) EU directives. This thesis

[14] Document 32006L0024.

[15] Document 32017L0541.

on the "constitutional immunity" of implementing legislation was formulated in its Decision of 10 June 2004.[16] The Council resolved a case brought before the National Assembly by a group of senators and deputies who had questioned the constitutionality of the French Act on trust in the digital economy. This act was one implementing the Community Directive 2000/31/EC concerning certain legal aspects of information society services, electronic commerce in particular, in the internal market (hereinafter the Directive on e-Commerce).

The Constitutional Council of the French Republic stated that the examined provisions of the French Act, which excluded civil and criminal liability in certain situations, were to lay down only the necessary consequences of the unconditional and precise provision of Art. 14 of the Directive on e-Commerce. At the same time, the Constitutional Council decided that due to the content of Art. 88(1) of the French Constitution, the transposition into national law of an EU directive is a constitutional obligation that may be waived only by an explicit provision of the Constitution. If there is no such provision, only the EU judiciary, through the preliminary ruling procedure, could examine the alignment of a particular directive with the treaty provisions determining the competences of the Community, as well as the alignment of the directive with the fundamental rights guaranteed by Art. 6 TEU. Considering the aforementioned thesis in relation to the contested Act, the Constitutional Council stated that it was not in a position to comment on its constitutionality. In the operative part of its decision, the Constitutional Council stated that the contested statutory regulation was not inconsistent with the Constitution.[17]

The adoption of the thesis on the constitutional and legal nature of the obligation to implement a EU directive leads to the conclusion that acts which are identical in terms of content with the provisions of EU directives should not be subject to constitutional review.[18] However, in its judgment the Constitutional Council of the French Republic included a reservation that allows the Council, in exceptional circumstances, to carry out indirect reviews of the directive itself. The Constitutional Council stipulated that the fulfilment of the constitutional requirement of Community transposition may be waived by an "explicit provision of the Constitution."[19] In such a case, a finding by the

[16] Decision no. 2004-496 DC. *Cf.* J. Bell, *French Constitutional Council and European Law*, 54(3) International & Comparative Law Quarterly 735 (2005), pp. 735-744. F.-X. Millet, *How much lenience for how much cooperation? On the first preliminary reference of the French Constitutional Council to the Court of Justice*, 51(1) Common Market Law Review 195 (2014), p. 204; F.-X. Millet, *The French Constitutional Council and the CJEU: between splendid isolation, communication, and forced dialogue* in *Constitutional Conversations in Europe. Actors, Topics and Procedures*, in: M. Claes et al. (eds.), *Constitutional Conversations in Europe: Actors, Topics and Procedures*, Intersentia, Cambridge: 2012, pp. 254 et seq.

[17] It is also worth emphasizing that in the discussed ruling of the Constitutional Council Art. 88(1) of the Constitution served as a constitutional standard for the first time. Previously, it was considered too general to have specific legal effects.

[18] *Cf.* D. Piqani, *The role of National Constitutional Courts in Issues of Compliance*, in: M. Cremona (ed.), *Compliance and Enforcement of EU law*, Oxford University Press, Oxford: 2012, p. 146.

[19] *Cf.* Millet (*The French Constitutional Council*), *ibidem*, pp. 62 et seq.

Constitutional Council of the unconstitutionality of a provision of an implementing act with identical content to the provisions of the directive would result in an indirect review the directive itself.[20] The logical consequence of finding a contradiction between a directive provision and a clear provision of the French Constitution would be to declare the transposing law unconstitutional. In the case of preventive supervision of the legality of the transposing law, this would mean hindering the promulgation of the act and preventing its coming into force. In the case of an *a posteriori* constitutional review, as introduced in 2008 (*Question prioritaire de constitutionnalité*: a priority preliminary ruling on constitutionality), the outcome would depend on the decision of the Constitutional Council, but would nevertheless result in the fact that the implementing act was no longer in force. The ultimate goal of the implementation of the directive could be achieved only after making an appropriate amendment to the Constitution if such were possible, i.e. if it did not mean an interference with the constitutional identity of the Fifth Republic of France. Nevertheless, it should be emphasized that in its decision of 10 June 2004 the Constitutional Council limited its competence to declare an EU directive unconstitutional only to those cases when its implementation (and the Directive itself) conflicted with an "explicit" provision of the Constitution.[21] Otherwise, it would be up to the national ("ordinary") judge to refer the matter to the CJEU via the preliminary reference procedure.[22] Therefore, the decision should be considered as a finding of a limited scope of constitutional review of EU Directives.

The Constitutional Council confirmed this position in its Decision of 1 July 2004[23] regarding the constitutionality of the Act on electronic communication and audiovisual communication services. This Act transposed the Community Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (the Access Directive).[24] As in the earlier case of 10 June 2004, the Constitutional Council decided that the contested statutory regulation concerned only the laying down of the necessary consequences resulting from an unconditional and clear provision of the Directive, hence the Constitutional Council stated that it was not in a position to comment on its constitutionality.

In its subsequent case-law the Constitutional Council developed the initial concept of an exception in the event of an "explicit" provision of the Constitution.[25] While initially it used the phrase "explicit and specific", in its Decision of 27 July 2006 the Constitutional Council held that the transposition of a directive must not "run counter" to "the constitutional identity of France."[26]

[20] *Ibidem*, pp. 54 et seq.

[21] *Cf.* M. Granger, *France Is Already Back in Europe: The Europeanization of French Courts and the Influence of France in the EU*, 14(3) European Public Law 333 (2008).

[22] *Cf.* M. Neves, *Transconstitutionalism*, Hart Publishing, Oxford: 2013, p. 103.

[23] Decision no 2004-497 DC.

[24] Document 32002L0019.

[25] *Cf.* Granger, *supra* note 21, p. 354.

[26] *Cf.* Neves, *supra* note 22, p. 103.

In conclusion, it should be recognized that the Constitutional Council, as a rule, delimits its review of implementing acts only to those provisions that remain within the scope of the discretionary power of the Member States, and at the same time are not identical in terms of content with the provisions of a directive itself. An exception to this principle, which allows for the creation of only a 'partial constitutional immunity' of implementing acts, concerns a situation in which the provision of an Act identical in terms of content with the provisions of a directive infringes the rules or provisions established for the identification of the constitutional identity of France. In such a case, the Constitutional Council is required to declare the unconstitutionality of the contested regulation. The effects of the application of this concept in practice would require a determination whether a certain unconstitutional norm violates a principle protected within the framework of the EU legal order. If that legal order contained an equivalent protection for a particular rule, the decision of the Constitutional Council could give rise to proceedings before the CJEU and result in or lead to the annulment of the directive itself. In the absence of an equivalent protection in the EU legal order of a value which constitutes an element of the constitutional identity of France, the effect of such a ruling would be to affirm the protection offered by the French Constitution. Such a situation would certainly affect the development of the doctrine that constitutional identity may be an acceptable exception to the principle of priority.

The Federal Constitutional Court of Germany takes a similar position to that taken by the Constitutional Council of the French Republic. The German Court permits a review of the constitutionality of the acts implementing directives, but only to a very limited extent. The Federal Constitutional Court recognizes that it is constitutionally entitled to examine implementing acts only to the extent that the legislator had a margin of flexibility regarding the transposition of a directive. This means that only the manner of achieving the objectives adopted in the directive may be subject to a constitutional review, not the objectives of the directive itself.

For the first time, this view was explicitly expressed by the Federal Constitutional Court in its decision of 13 March 2007[27] in a case regarding the constitutional review of Art. 12 of the Act on the National Allocation Plan for Greenhouse Gas Emission Allowances in the 2005-2007 allocation period. This case was initiated in the context of the abstract review procedure by the German State of Saxony-Anhalt. The Act was an implementation of Directive 2003/87/EC establishing a system for trading greenhouse gas emission allowances within the EU (the Greenhouse Emission Directive).[28] The German Federal Constitutional Court decided that the concept formulated in the *Solange II* case[29] applies to laws implementing EU directives as well. The Federal Constitutional Court pointed out that the consequence of this position should be recognition of the fact that (similarly to the operation of the Community regulation) the provision of the act that transposes the directive should not be (conditionally) subject to control

[27] No 1BvF 1/05, BVerfGE t. 118, pp. 79 et seq.

[28] Document 32003L0087.

[29] Wünsche Handelsgesellschaft decision of 22 October 1986, 2 BvR 197/83, BVerfGE 73, 339.

of its compliance with the fundamental rights guaranteed in the Basic Law in those situations when the Community law does not leave any margin of flexibility and issues only binding guidelines.

This position was reiterated by the Federal Constitutional Court in its judgment of 2 March 2010,[30] in which it clarified the question as to the constitutionality of the telecommunications law and criminal procedure regulations that regulated the preventive storage of telecommunications data by providers of publicly available telecommunications services for a period of six months, as well as the usage of such data. According to the applicants, the contested statutory provisions also infringed Community fundamental rights and Art. 95 of the Treaty establishing the European Community (Art. 95 TEC). The contested norms had been introduced into the German legal order by the law transposing the Data Retention Directive. The case dealt with by the German Federal Constitutional Court had been initiated by lodging tens of thousands of constitutional complaints. It should be noted that some of the complaints included demands for the Federal Constitutional Court to appeal to the CJEU for annulment of the Data Retention Directive, which was alleged to have been adopted *ultra vires*.[31]

The German Federal Constitutional Court decided that the Data Retention Directive allowed the Member States a wide margin of flexibility. The Court also stated that the provisions of the Directive were, as a rule, limited to describing data storage obligations, and did not regulate access to or the use of such data by Member State authorities. In particular, according to the Federal Constitutional Court the provisions of the Data Retention Directive did not harmonize the question of access to the data by the competent national criminal prosecution authorities, nor the use and exchange of such data between these authorities. On the basis of the minimum requirements of the Data Retention Directive, the Federal Constitutional Court stated that it was the responsibility of the Member States to put in place all the necessary security measures to ensure data security, transparency, and legal protection.

The adoption of the above assumptions allowed the Federal Constitutional Court to carry out an extensive review of the constitutionality of the national transposition of the Data Retention Directive. All the following provisions were considered inconsistent with Art. 10(1) of the Basic Law expressing freedom and guaranteeing the privacy of correspondence, posts, and telecommunications: the provisions of Art. 113a and 113b of the German telecommunications law (added under the Act implementing the Data Retention Directive) and Art. 100g of the German Code of Criminal Procedure, which allowed the collection of telecommunications data without the knowledge of the perpetrator and other persons participating in a criminal act.[32]

[30] No 1 BvR 256/08, 1 Bvr 263/08, 1 BvR 586/08.

[31] *See further* K. de Vries et al., *The German Constitutional Court Judgment on Data Retention: Proportionality Overrides Unlimited Surveillance (Doesn't It?)*, in: S. Gutwirth et al. (eds.), *Computers, Privacy and Data Protection: An Element of Choice*, Springer, Dordrecht: 2011, pp. 3–23.

[32] For more on this ruling, *see* A.-B. Kaiser, *German Data Retention Provisions Unconstitutional in Their Present Form; Decision of 2 March 2010*, 6 European Constitutional Law Review 503 (2010).

Simultaneously, the Federal Constitutional Court ruled that the six-month, preventive and unjustified storage of telecommunications data by private service providers, as laid down in the Data Retention Directive, is not as such inconsistent with Art. 10 of the Basic Law.

The judgment of the Federal Constitutional Court of 2 March 2010 demonstrates that when adopting the second position of the two positions mentioned above, the real scope of constitutional courts' jurisdiction when dealing with transposing acts and directives depends largely on the interpretation of the national legislator's margin of flexibility in transposing the directive. As the commentators point out, the judgment of 2 March 2010 may be seen as a ruling in which the Federal Constitutional Court *de facto* reviewed the constitutionality of the Directive itself.[33]

Comparing the decisions of the Federal Constitutional Court and the Constitutional Council, it should be noted that unlike the French Constitutional Council, the German Federal Constitutional Court did not expressly define any criterion that would allow it to go beyond the acceptable scope of a partial review of the implementing act. However, the decisions presented in this article indicate that in practice the precept of the limited jurisdiction of the constitutional court when dealing with the transposing acts is quite loosely interpreted, if not ignored completely. In addition, according to the German legal doctrine the generally-formulated prohibition on violating constitutional identity should be addressed when interpreting implementing acts.[34] This very liberal interpretation of the German Federal Constitutional Court's "limited competences" with respect to constitutional review of implementing acts should be analysed with full awareness of the strictly pragmatic grounds related to the preliminary reference procedure. The principle of supremacy results in the obligation on the part of national courts to lodge a request for a preliminary ruling to the CJEU on the validity of an EU act if the court has doubts about its legality. Until 2014 and the preliminary reference in the *Gauweiler* case,[35] the German Federal Constitutional Court consistently avoided direct dialogue with the CJEU. However, as the reference in *Gauweiler* was more a *threatening reference of appeal*[36] than an average request for a preliminary ruling, it is not very realistic to think that that the Federal Constitutional Court will change its established case-law.

[33] Ch. Möllers, *German Federal Constitutional Court: Constitutional Ultra Vires Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, Honeywell*, 7 European Constitutional Law Review 161 (2011), pp. 161-167.

[34] D. König, *Die Übertragung von Hoheitsrechten im Rahmen des europäischen Integrationsprozesses – Anwendungsbereich und Schranken des Art. 23. des Grundgesetzes*, MohrSiebeck, Berlin: 2000, pp. 417-522 and the literature cited there.

[35] *Cf.* E.J. Lohse, *The German Constitutional Court and Preliminary References. Still a Match not Made in Heaven?* 16(6) German Law Journal 1491 (2015); F. Fabbrini, *After the OMT Case: The Supremacy of EU Law as the Guarantee of the Equality of the Member States*, 16(4) German Law Journal 1003 (2015); A. Pliakos, G. Anagnostaras, *Saving Face? The German Federal Constitutional Court Decides Gauweiler*, 18(1) German Law Journal 213 (2017).

[36] D. Paris, *Carrot and Stick. The Italian Constitutional Court's Preliminary Reference in the Case Taricco,* 37 Questions of International Law 5 (2017), pp. 5-6.

Such a hypothesis seems to be confirmed by the pre-*Gauweiler* judgment of 24 April 2013[37] on the Counter-Terrorism Data Base Act, where the German Constitutional Court avoided in every possible way to acknowledge that the reviewed act was within the scope of the application of EU law and therefore, according to the CJEU's *Åckerberg Fransson* judgment,[38] required compliance with the Charter of Fundamental Rights of the European Union (hereinafter: the Charter).[39] Paradoxically, the more probable scenario is a shift in the French Constitutional Council's case-law (at least in the sphere of fundamental rights protection). The introduction of an *a posteriori* constitutional review in 2008[40] and the first preliminary reference submitted by the Constitutional Council in the case of *Jeremy F.*[41] may affect its case-law regarding the "constitutional immunity" of national legislation implementing EU Directives. This potential change in existing case-law may be forced by the recent Directive on Combating Terrorism. This Directive, as well as other supranational instruments (such as UN Security Council Resolution 2178 of 24 September 2014 and the 2015 Council of Europe Convention on the Prevention of Terrorism – Additional Protocol (Riga Protocol), have received their fair share of criticism, for example because of "vague and over-broad definitions and resulting human rights risks such as arbitrary or discriminatory application of the law [and] the criminalisation of conduct without any direct link to specific terrorist offences."[42] The Directive on Combating Terrorism also states that consulting terrorist websites can be a terrorist crime, and the French Constitutional Council held a similar provision to be unconstitutional on two occasions, most recently on 15 December 2017.[43]

[37] Judgment of the First Senate of 24 April 2013, 1 BvR 1215/07.

[38] The Act on Setting up a Standardised Central Counter-Terrorism Database of Police Authorities and Intelligence Services of the Federal Government and the *Laender*.

[39] D. Thym, *Separation versus Fusion – or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice*, 9(13) European Constitutional Law Review 391 (2013); F. Fontanelli, *Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog: Court of Justice of the European Union: Judgment of 26 February 2013, Case C-617/10 Åklagaren v. Hans Åkerberg Fransson*, 9(2) European Constitutional Law Review 315 (2013).

[40] *See* F. Fabbrini, *Kelsen in Paris: France's Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation*, 9(10) German Law Journal 1297 (2008); O. Pfersmann, *Concrete Review as Indirect Constitutional Complaint in French Constitutional Law. A Comparative Perspective*, 6(2) European Constitutional Law Review 223 (2010).

[41] N. Perlo, F.-X. Millet, *The first preliminary reference of the French Constitutional Court to the European Court of Justice: Révolution de Palais or Revolution in French Constitutional Law?*, 16(6) German Law Journal 1471 (2015).

[42] Ch. Paulussen, *Courts and Counter-Terrorism: the Last Line of Defence?*, Verfassungsblog, 4 May 2018, available at: https://verfassungsblog.de/courts-and-counter-terrorism-the-last-line-of-defense/ (accessed 30 May 2019).

[43] N. Houry, *French Legislators Rebuked for Seeking to Criminalize Online Browsing. Court Ruled Provision Was Too Restrictive of Freedoms*, available at: https://www.hrw.org/news/2017/12/15/french-legislators-rebuked-seeking-criminalize-online-browsing; A. Ollo, *Can we ensure EU terrorism policies respect human rights?*, available at: https://edri.org/can-we-ensure-eu-terrorism-policies-respect-human-rights/ (both accessed 30 May 2019).

3. ACCEPTANCE OF THE CONSTITUTIONAL REVIEW OF EU DIRECTIVES VIA IMPLEMENTING ACTS

The group of constitutional courts who have taken the stance of allowing a full review of the constitutionality of laws transposing directives continues to grow. One of the factors which accelerated the development of such constitutional case-law was the introduction of the aforementioned controversial Data Retention Directive, which after many judgments by national courts[44] was finally declared invalid by the CJEU.[45] The Directive on Combating Terrorism may be another factor encouraging constitutional courts to take a more active role in questioning the compatibility of national laws implementing EU directives with constitutional and human rights obligations.

The Slovak Constitutional Court may serve as the first example of such a position. In its decision of 18 October 2005,[46] the Court examined the case initiated by the government in the abstract review procedure, in which it claimed that Art. 8(8) of the Anti-discrimination Act was inconsistent with the Slovakian Constitution. The Act transposed the Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons, irrespective of racial or ethnic origin.[47] The contested provision stipulated that "in order to ensure equal opportunities in practice and to observe the principle of equal treatment, specific measures may be adopted to compensate for the inconveniences related to racial or ethnic origin.: The wording of the provision of the Act was nearly identical to the content of Art. 5 of the Directive, which declared that: "[i]n order to ensure full equality in practice, the principle of equal treatment shall not stop the Member State from maintaining or adopting specific measures to prevent or compensate for inconveniences related to racial or ethnic origin." At the hearing, a representative of the Slovak National Council applied for suspension of the proceedings and making a preliminary reference to the CJEU regarding the interpretation of Art. 5 of the Directive. The Constitutional Court of Slovakia shared the view of the National Council that the contested provision of the Act was broadly consistent with the wording of Art. 5 of the Directive, but the Court also pointed out that it is clear from the wording of this EU provision that every legislator of a Member State has a wide margin of flexibility to act in order to achieve the objective of the Directive referred to in Art. 1.[48]

[44] Ch. Jones, *National legal challenges to the Data Retention Directive,* 8 April 014, available at: http://eulawanalysis.blogspot.com/2014/04/national-legal-challenges-to-data.html (accessed 30 May 2019).

[45] O. Lynskey, *The Data Retention Directive is incompatible with the rights to privacy and data retention protection and is invalid in its entirety: Digital Rights Ireland,* 51(6) Common Market Law Review 1789 (2014), p. 1799.

[46] Pl. ÚS 8/04 202. *Cf.* B. Havelková, *Burden of proof and positive action in decisions of the Czech and the Slovak Constitutional Courts - milestones or mill-stones for implementation of EC equality law?* 32 European Law Review 686 (2007).

[47] Document 32000L0043.

[48] According to Art. 1 of the Directive, it "aims to provide a framework for combating discrimination based on racial or ethnic origin, and for implementing the principle of equal treatment in the Member States."

The Polish Constitutional Tribunal expressed similar views in its jurisprudence, although they were not so clearly stated. In its judgment of 2 July 2007,[49] the Constitutional Tribunal, referring to the judgment of 27 April 2005 in the EAW case, stated that "the implementation of the secondary law of the European Communities is a requirement under Article 9 of the Constitution; however its implementation does not automatically and in every case ensure the substantive conformity of the provisions of this secondary law and the acts implementing them into national law. The basic systemic function of the Constitutional Tribunal is to examine the constitutionality of legislative acts, and this obligation also applies to the situation in which the allegation of unconstitutionality concerns a part of the act laying down provisions for the implementation of Community law (...)."[50] The Tribunal therefore found that the contested provisions of the Act[51] were, irrespective of the character of their implementation, an admissible subject of its constitutional review.[52]

This position was expressed once more in the Tribunal judgment of 3 December 2009.[53] The Tribunal noted that "the obligation to examine the constitutionality of legislative acts also applies to the situation when the plea alleges the unconstitutionality of that part of the act which regulates the implementation of Community law."[54] In this judgment, the Constitutional Tribunal also stressed that implementing acts may be subject to a preventive review initiated by the President, pursuant to Art. 122(3) of the Constitution.[55]

In its judgment of 30 July 2014,[56] in which the provisions implementing the Data Retention Directive were subject to a review, the Constitutional Tribunal emphasised the specificity of the acts implementing the Directive resulting from the fact that the content of such an act will be determined, to a greater or lesser extent, by legal regulations coming from outside the national legislation system. However, the Tribunal stated that this specificity of the implementing acts did not change the constitutional scope of the Tribunal's tasks and competences, the restriction of which could not be presumed. Therefore, such an act was subject to a review of its constitutionality.[57] Moreover, it should be clearly stated that in the judgment under consideration the Constitutional Tribunal did not *de facto* carry out a more detailed analysis of the scope of the obligation provided for in the CJEU judgment of 8 April 2014 in case *Digital Rights Ireland Ltd*,[58] in which the Data Retention Directive had been annulled. In the opinion of the

[49] K 41/05.

[50] *Ibidem*, para, 3.2.

[51] The Act of 16 November 2000 on counteracting the introduction into financial circulation of property values from illegal or undisclosed sources and on counteracting the financing of terrorism.

[52] *Cf.* para. 3.3. of the judgment.

[53] Kp 8/09.

[54] *Ibidem*, para. 4.

[55] *Cf. ibidem*, para. 4.

[56] K 23/11.

[57] *Cf. ibidem*, para. 7.

[58] Joined cases C-293/12 and C-594/12, ECLI:EU:C:2014:238.

Constitutional Tribunal, the provisions examined in the judgment of K 23/11 did not implement the directive directly.[59]

Analysis of the Polish Constitutional Tribunal case-law regarding the constitutional review of EU directives via implementing acts requires the presentation of one more case, in which the Constitutional Tribunal decided for the first time to refer a preliminary question to the CJEU.[60] Case 61/13, which served as the basis for the reference for a preliminary ruling, was heard by the Polish Constitutional Tribunal upon the application of the Polish Ombudsman (*Rzecznik Praw Obywatelskich*) for a declaration concerning several provisions of the Act of 11 March 2004 on the goods and services tax (VAT Act). The provisions challenged by the Ombudsman determined which goods are taxed at a reduced VAT rate. The reduced rates of 5% and 8% may be applied only to publications that are published in print or on carriers (disks, tapes, etc.) but not to electronic publications, which are subject to the VAT rate of 23%. The Ombudsman held that such a differentiation in the levying of a tax on publications with the same relevant characteristics, namely identical content, violated the principle of tax equality. The challenged provisions of the VAT Act were contained in an act implementing Directive 2006/112/EC,[61] which require application of the base rate of VAT to deliveries of electronically provided books. Taking this into consideration, Polish Constitutional Tribunal in its decision of 7 July 2015 made a preliminary reference to the CJEU and posed two questions concerning the validity of EU law. The first one regarded the validity of point (6) of Annex III to the Directive, and the second one regarded the validity of the Directive itself, i.e. Art. 98(2) of Directive 2006/112/EC, read in conjunction with point (6) of Annex III. The CJEU, in its judgment of 7 March 2017 (case C-390/15 *RPO*) did not share the Ombudsman's reservations and decided that there was no factor of such a kind which would affect the validity of the Directive. Interestingly, in the meantime the arguments raised by the Ombudsman had already been recognized by the European Commission.[62] Following the CJEU judgment the Ombudsman decided to withdraw the application. Consequently, the Polish Constitutional Tribunal, in its decision of 17 May 2017,[63] discontinued the proceedings. Despite the fact that the case was not adjudicated *ad meritum*, it demonstrates the lack of restrictions on the Tribunal's view concerning the constitutional review of EU directives. On the other hand, it also shows the Constitutional Tribunal's awareness of its role as a European court and willingness to engage in direct dialogue with the CJEU.

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[59] *Cf. ibidem*, para. 3.2.3.

[60] *Cf.* A. Kustra, *Reading the Tea Leaves: The Polish Constitutional Tribunal and the Preliminary Ruling Procedure*, 16(6) German Law Journal 1543 (2015).

[61] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, document 32006L0112.

[62] On 7 April 2016, the European Commission presented the Action Plan on Value Added Tax – Towards a Single EU VAT Area. Time for action (document COM (2016) 148 final), the aim of which is to resume discussion on the VAT regulation, and on 1 December 2016 announced a draft amendment providing for the equalization of VAT rates for books and magazines in electronic and paper form.

[63] 38/A/2017.

The position accepting the admissibility of extensive constitutional review of acts implementing EU directives seems also to be taken implicitly by those constitutional courts which, while monitoring the implementation process, have so far failed to establish in their case-law any objections regarding the scope of this kind of review. This category of constitutional courts includes the Austrian Federal Constitutional Court, the Romanian Constitutional Court, and the Czech Constitutional Court.

The Austrian Federal Constitutional Court, in its judgment of 20 June 1998,[64] had the opportunity to formulate its objections regarding the scope of the admissible constitutional review of the acts implementing Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts;[65] and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors,[66] However, in its decision the Austrian Federal Constitutional Court examined the constitutionality of the entire Federal Procurement Act, which was the implementation of the directives. On the basis of an interlocutory procedure for the review of its constitutionality, instigated only by the authority on its own motion when handling an individual complaint, the Federal Constitutional Court concluded that the Act under examination had violated the constitutional standard of the state of law because it did not guarantee that tenderers in public procurement procedures would get adequate judicial protection. The Federal Constitutional Court also claimed that the fact that the law which transposes the directives does not exclude the possibility of reviewing its constitutionality. In order to justify its decision, the Federal Constitutional Court stated that the national legislator was bound by both Community law and constitutional law. At the same time, the Court did not formulate any restrictions as to the scope of such a review. It stressed that the subject of the review was the constitutionality of the Act, and therefore it was not necessary to make a reference for a preliminary ruling to the CJEU. In this judgment, the Austrian Federal Constitutional Court adjudicated that the contested provision of the Act was inconsistent with the Austrian Constitution.[67]

The judgments of the Romanian Constitutional Court of 8 December 2009[68] and the Czech Constitutional Court of 22 March 2011[69] should be interpreted in a similar way. Both concerned the acts implementing the Data Retention Directive. The Roma-

[64] Reference G 22/98.

[65] Document 31992L0050.

[66] Document 31992L0013.

[67] It should be emphasised that the judgment was delivered by a full court. However, five judges gave their dissenting opinions as to the entire content of the judgment, and one judge gave a dissenting opinion as to the reasoning of the judgment. The judges in the minority pointed, *inter alia*, to the fact that the provision of the Act declared unconstitutional was based on Art. 5 of the Directive which, according to the Act itself, was an annex to that very Act.

[68] No. 1258.

[69] Pl. ÚS 24/10.

nian Constitutional Court ruled unconstitutional the entire Act No. 298/2008 transposing this Directive into the Romanian legal system.[70] The Romanian Constitutional Court found that the implementing Act violated Romanian constitutional provisions protecting freedom of movement; the right to intimate, private and family life; secrecy of correspondence; and freedom of expression.[71] The Court also issued delivered a few post-*Digital Rights Ireland Ltd.* decisions declaring the unconstitutionality of other national laws implementing the void Data Retention Directive. In its Decision of 8 July 2014 (no. 440) the Romanian Constitutional Court declared the unconstitutionality of Law No. 82/2012, which was established to transpose the same Data Retention Directive after the Constitutional Court adopted the aforementioned Decision of 8 October 2009, while in the meantime the Directive itself was declared null and void by the judgement of the CJEU of 8 April 2014.[72] Two other decisions are of a similar character: the Decision of 16 September 2014 (no. 461) on the unconstitutionality of the provisions of the Law amending and supplementing the Government Emergency Ordinance No. 111/2011 on electronic communications; and the Decision of 21 January 2015 (no. 17) on the unconstitutionality of the provisions of the Law on the cyber security of Romania.[73]

The Czech Constitutional Court ruled on the unconstitutionality of some provisions of an implementing Act and its implementing Regulation.[74] As regards the Court's opinion, however, it must be pointed out that in its judgment of 8 March 2006 on Sugar Quotas,[75] the Court had already expressed the view that in creating standards for implementing Community law the national legislator is bound by both EU law and the Czech Constitution.[76] This thesis, similar to the position of the Austrian Federal

[70] For more on this ruling, *see* C. Murphy, *Romanian Constitutional Court, Decision No. 1258 of 8 October 2009 regarding the unconstitutionality exception of the provisions of Law No. 298/2008 regarding the retention of the data generated or processed by the public electronic communication service providers or public network providers, as well as for the modification of Law No. 506/2004 regarding the personal data processing and protection of private life in the field of electronic communication area,* 47 Common Market Law Review 933 (2010). Murphy states that the Decision of the Constitutional Court of Romania was essentially a constitutional review of the entire Directive and that the Court, despite such an extensive review, did not decide to make a reference for a preliminary ruling as to the interpretation of the relevant provisions of the Directive (pp. 938 et seq).

[71] Jones, *supra* note 44.

[72] D. Călin, *The Constitutional Court of Romania and European Union Law*, 15(1) International and Comparative Law Review 59 (2015), p. 80.

[73] *Ibidem*, p. 81.

[74] More specifically: Art. 97(3,4) of the Act No. 127/2005 of 31 March 2005 on electronic communication and on the amendment of other acts; and the Regulation of 7 December 2005, No. 485/2005. For more on this judgment, *see* P. Molek, *The Czech Constitutional Court. Unconstitutionality of the Czech Implementation of the Data Retention Directive; Decision of 22 March 2011, Pl. ÚS 24/10*, 8(2) European Constitutional Law Review 383 (2012). As pointed out Molek, the Constitutional Court of the Czech Republic also reviewed (and criticized) the provisions of the Directive itself (p. 351).

[75] Pl. ÚS 50/04.

[76] Quoted in Z. Kühn, *Raport krajowy – Czechy* [The National Report – the Czech Republic], in: J. Barcz (ed.), *Ochrona praw podstawowych w Unii Europejskiej* [Protection of basic rights in the European Union], Beck, Warszawa: 2008, p. 360.

Constitutional Court, led the Czech Constitutional Court to conclude that the national act will be subject to a full constitutional review, even if the principle of the EU law is applied, regardless of whether the EU law grants any margin of flexibility to the national legislature.

4. EU DIRECTIVES AS AN INDIRECT YARDSTICK OF CONSTITUTIONAL REVIEW: JUDICIAL CONTROL OF PROPER DOMESTIC IMPLEMENTATION OF EU LAW AND BEYOND

The second problem analysed in this paper concerns the use of EU directives as an indirect yardstick of review. The central focus of this concept is usually on the conformity of a national law with an international (including EU) norm. However, in case of a conformity review with EU law, the use of EU law as a reference point results in a higher probability of a preliminary reference to the CJEU, mostly regarding the interpretation of the yardstick of review. Therefore, traditionally *Europhile* courts, such as the Belgian Constitutional Court, were among the first to review the conformity of a national act with EU law.[77] In Belgium, indirect reference may be had to all provisions of primary or secondary EU law, including EU directives.[78] This in turn is a consequence of its great openness towards international and EU law.[79]

With regard to the use of EU Directives as the yardstick of a conformity review, the core of the concept is formed by the case-law of the French Constitutional Council, where the implementation of EU directives as has been recognized as a "constitutional obligation".[80] However, the recent case-law of other constitutional courts shows an increasing openness towards applying the EU Directives as yardsticks of review.

The thesis on the constitutional nature of the obligation to implement EU directives has appeared in the jurisprudence of the Constitutional Council of the French Republic, along with the admission of the constitutional review of acts implementing Community directives. It was noted that the review of these acts may be, as was mentioned at the beginning of this article, of a dual nature. It could be either a "simple" review of the constitutionality of the implementing act, or a review of the implementing act in terms of its compliance with the constitutional obligation to properly implement EU directives. In both cases the direct model for the review is the very same Art. 88(1) of

[77] P. Gérard, W. Verrijdt, *Belgian Constitutional Court Adopts National Identity Discourse. Belgian Constitutional Court No. 62/2016, 28 April* 2016, 13(1) European Constitutional Law Review 182 (2017), pp. 190-191; T. Vandamme, *Prochain Arrêt: la Belgique! Explaining Recent preliminary References of the Belgian Constitutional Court,* 4 European Constitutional Law Review 127 (2008).

[78] The Constitutional Court decision no. 55/2011, 6 April 2011 on consumer law. *Cf.* D. Heirbaut, M.E. Storme, *Private Law Codification in Belgium*, in: J.C. Rivera (ed.) *The Scope and the Structure of Civil Codes*, Springer, Dordrecht: 2013, pp. 80-81.

[79] *Cf.* Vandamme, *supra* note 77, pp. 127-148.

[80] *Cf.* D. Piquani, *The role of National Constitutional Courts in Issues of Compliance,* in: M. Cremona (ed.), *Compliance and Enforcement of EU law*, Oxford University Press, Oxford: 2012, pp. 142-143.

the Constitution, which is the provision constituting the basis for the transfer of competences to the benefit of the EU. If the review concerns the alleged violation of the constitutional order by the directive itself, Art. 88(1) of the Constitution will be the regulation that delimits the constitutionally permissible integration of France into the EU.[81] However, when a case considered by the Constitutional Council concerns the issue of the proper implementation of an EU directive by the French legislator, Art. 88(1) will be in this situation the legal basis of the constitutional commitment of the French Republic to ensure the effectiveness of EU law. Thus an improper implementation results in a violation of the constitutional norm.[82] An example of a decision declaring the unconstitutionality of an act which improperly implemented a directive is the Decision of 30 November 2006.[83] The Constitutional Council declared in this judgment that the Act pertaining to the energy sector had obviously violated the objective of EU directives to open up the market to competition, and thus it had violated the constitutional obligation imposed by Art. 88(1) of the French Constitution.[84] It is worth mentioning here that in its justification of the decision, the Constitutional Council specified exactly how to proceed in case an implementing act infringed upon an objective of the Community directive. The Constitutional Council pointed out that if there was a clear breach it should establish, including on its own initiative, a violation of Art. 88(1) of the Constitution and issue a ruling. However, in the event that such a breach is not clear, the common and administrative courts were competent to take action and make a preliminary reference under Art. 267 TFEU.[85] It is worth emphasizing, however, that this thesis was formulated before the reform – including reform of the competences of the Constitutional Council – in 2008, which changed the position of the Constitutional Council as far as its status as a court was concerned, within the meaning of Art. 267(3) TFEU.[86] At present, it should be assumed that also in cases where there is no clear breach of the objective of a directive by the implementing law, the Constitutional Council may be the competent authority to take action, at least in the procedure of *Question prioritaire de constitutionnalité* (QPC). However, it would only be possible for the Constitutional Council to make a preliminary reference if there were no such references made by the court initiating proceedings in the QPC procedure.

The case-law of the aforementioned Belgian Constitutional Court – which is not afraid to show bold judicial activism – proves that constitutional courts can also make

[81] *Cf. ibidem*; J.D. de la Rochère, *French Conseil constitutionnel: Recent Developments*, in: J.M. Beneyto, I. Pernice (eds.), *Europe's Constitutional Challenges in the Light of the Recent Case Law of National Constitutional Courts: Lisbon and Beyond*, Nomos, Baden Baden: 2011, pp. 22-23.

[82] *Cf.* Wójtowicz, *supra* note 13, p. 84.

[83] Reference 2006-543 DC.

[84] *Cf.* Wójtowicz, *supra* note 13, p. 86.

[85] *Cf.* J.F. Colares, *The Reality of EU-conformity Review in France*, 18 Columbia Journal of European Law" 369 (2012), pp. 391 et seq; O. Pollicino, *The Conseil d'Etat and the Relationship between French internal law after Arcelor; Has something really changed?*, 45 Common Market Law Review 1519 (2008), pp. 1524 et seq.

[86] For more on this reform, *see* F. Fabbrini, *Kelsen in Paris: France's Constitutional Reform and the Introduction of a A Posteriori Constitutional Review of Legislation*, 9(10) German Law Journal 1297 (2008).

use of the EU Directives to extend their competences. An excellent illustration of such argumentation can be found in case No. 144/2012[87] on the constitutionality of the decree of the Walloon Parliament of 17 July 2008 which 'ratified' the building permits for various works relating to the Liège-Bierset airport, the Brussels South Charleroi airport, and the Brussels-Charleroi railway, i.e. authorized them in view of the "overriding reasons in the public interest." The compatibility of the decree with EU law and the Aarhus Convention was the subject of the CJEU judgment on 18 October 2011 in the case *Boxus and Others*[88] One of the effects of the decree was that controversial building permits could no longer be contested before the Council of State, but only before the Constitutional Court. However, the possibilities to challenge them before the Constitutional Court were less extensive than before the Council of State. The Constitutional Court had competence only to review the content of the decree, not the procedural aspects. Therefore, the Constitutional Court made reference to the EU Environmental Directive.[89] Next, the Constitutional Court made a preliminary reference to the CJEU and asked for an interpretation of the scope of application of the EU directive.[90] In its judgment of 16 February 2012,[91] the CJEU held that a complete review is not obligatory for legislative decisions, provided that all relevant information was taken into account in an in-depth preparatory procedure. Despite the fact that in general review the parliamentary procedure falls outside the scope of the Constitutional Court's competences, the Court interpreted the CJEU judgment in a way very advantageously for itself and indeed looked into procedural aspects of the legislative process, to determine whether the Directive was applicable to the decree.[92] Based upon the preparatory documents and parliamentary discussions, the Constitutional Court noted that the Parliament had been prohibited from altering, or even investigating, the permits as drawn up by the executive. The Constitutional Court stated that this made the decree a simple 'ratification' of the executive decision and not a proper legislative act. Therefore, the Decree did not satisfy the conditions set out by the CJEU to be considered as a "specific legislative act" that can be exempted from full judicial review. The Belgian Constitu-

[87] CC No. 144/2012, 22 November 2012. A similar reasoning was followed in CC No. 29/2014, 13 February 2014. *Cf.* J. De Jaegere, J. Beyers, P. Popelier, *Exploring the deliberative performance of a constitutional court in a consociational political system. A theoretical and empirical analysis of the Belgian Constitutional Court*, available at: https://ecpr.eu/Filestore/PaperProposal/1c16e505-e983-44c9-9935-8c573f521ab0.pdf (accessed 30 May 2019), p. 17.

[88] Joined cases *Antoine Boxus and Willy Roua* (C-128/09), *Guido Durlet and Others* (C-129/09), *Paul Fastrez and Henriette Fastrez* (C-130/09), *Philippe Daras* (C-131/09), *Association des riverains et habitants des communes proches de l'aéroport BSCA (Brussels South Charleroi Airport) (ARACh)* (C-134/09 and C-135/09), *Bernard Page* (C-134/09) and *Léon L'Hoir and Nadine Dartois* (C-135/09) *v. Région wallonne*, ECLI:EU:C:2011:667.

[89] Council Directive 85/337/EEC of 27 June 1985 (now: Directive 2011/92/EU of the European parliament and of the Council of 13 December 2011) on the assessment of the effects of certain public and private projects on the environment.

[90] No. 30/2010, 30 March 2010.

[91] Case C-182/10, *Marie-Noëlle Solvay and Others v. Région wallonne*, ECLI:EU:C:2012:82

[92] Constitutional Court, no. 144/2012, 22 November 2012.

tional Court decided that in doing so the legislature had infringed upon Arts. 10, 11, and 23 of the Constitution, in combination with the aforementioned provisions of the Aarhus Convention and the EU Environment Directive. The result of the case was that all of the permits concerned could be subjected to full judicial review by the Council of State and that the Council could judge the pending cases.[93]

The recent case-law of the Spanish Constitutional Court presents an interesting stance on the application of non-transposed EU directives as a yardstick of review. In its judgment of 10 March 2017,[94] the Spanish Constitutional Court adopted Art. 7 of the non-transposed Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings[95] as a yardstick of review, which enabled the Constitutional Court to find that the police and a lower court had violated the right to personal freedom of two detainees whose lawyer had not been given access to the arrest file, as provided by the aforementioned provision of the Directive.[96]

The judgment of the Spanish Constitutional Court was based on the thesis that even though EU law is not itself part of the constitutional canon, "both international treaties and agreements, including European secondary legislation, may provide valuable interpretative criteria of the meaning and scope of the rights and freedoms that the Constitution recognizes," taking into account the interpretive decisions rendered "by the bodies of guarantee established under those same international treaties and agreements."[97] In order to justify the thesis on the direct effect of Art. 7 of the Directive, the Spanish Constitutional Court merely invoked the CJEU's general case law on the direct effect of EU directives and concluded that it was binding given that it contains unconditional and sufficiently clear and precise provisions that could be immediately enforced.[98] Controversies concern, *inter alia*, the fact that the Constitutional Court did not refer the case to the CJEU and made no apparent attempt to decide whether it was obliged to submit a reference under Art. 267 TFEU or to apply the criteria established by the CJEU in the *Cilfit* case.[99]

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[93] Cf. L. Lavrysen, *EUFJE 2013 Vienna Conference – Report on Belgium*, available at: https://www.eufje.org/images/docConf/vie2013/BE%20vie2013.pdf (accessed 30 May 2019.), p. 3.

[94] Constitutional Court, no. 51/2017, 10 March 2017.

[95] Document 32012L0013.

[96] In that case, the detainees' public defender had applied to see the materials of the case in order to challenge the arrests. The *Guardia Civil* denied the request and the lawyer filed a *habeas corpus* petition before a court, claiming that the arrests were illegal due to lack of information. The lower-court judge rejected the petition – first on the grounds that although Art. 7 of Directive 2012/13/EU provided for such a right of access, Spain had not yet transposed it into national law; and second on the grounds that in any case the file was not complete because the agents were still preparing the relevant documents. Cf. M. García, *Cautious Openness: The Spanish Constitutional Court's Approach to EU Law in Recent National Case-Law*, available at: http://europeanlawblog.eu/2017/06/07/cautious-openness-the-spanish-constitutional-courts-approach-to-eu-law-in-recent-national-case-law/ (accessed 30 May 2019).

[97] *Ibidem.*

[98] *Ibidem.*

[99] *Ibidem.*

5. FINAL REMARKS

The case-law regarding the first issue analysed in the paper, i.e. the constitutional review of EU directives, proves that the group of constitutional courts which have accepted the concept of a constitutional review of EU directives via their national implementation laws is still growing. One of the decisive factors in the development of this case law is the introduction of EU directives that controversially interfere with fundamental rights and freedoms, such as the Data Retention Directive and the Directive on Combating Terrorism. The ruling of the German Federal Constitutional Court regarding the Data Retention Directive also shows that even courts that do not wish to formally forswear the thesis of the constitutional immunity of laws transposing directives, may in practice circumvent this prohibition. They do so through a very narrow interpretation of the concept of provisions that are identical to the provisions of the EU directives. The adoption of such an interpretation makes it possible to control the constitutionality of almost the entire implementing act, and in practice also means a declaration by the national constitutional court regarding the constitutionality of the directive itself.

The comparative analysis of the second problem presented in this paper, namely the application of EU directives as an indirect yardstick of constitutional review, leads to the conclusion that in recent years there have been significant developments enhancing constitutional jurisdiction in this area. This problem was traditionally analysed only in the context of the French Constitutional Council's thesis regarding the constitutional obligation to transpose directives. Therefore, the use by the French Constitutional Council of an EU directive as an indirect yardstick of review was most often equated with the problem of the correctness of implementation. Nevertheless, the case-law of other constitutional courts regarding the problem is much richer. The example of the Belgian Constitutional Court shows that EU directives can be used by a constitutional court to realistically extend its competences in a specific case. In turn, the recent ruling of the Spanish Constitutional Court has gone so far as to even adopt the provisions of a non-transposed directive as a standard of control.

Many of the cases presented in this paper evoke numerous questions and doubts, both from the perspective of EU law and of national constitutional law. Nevertheless, this review of the case-law demonstrates that constitutional courts are trying to find their place in the changing architecture of European constitutionalism.[100]

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[100] *Cf.* J. Komárek, *The Place of Constitutional Courts in the EU*, 9(3) European Constitutional Law Review 420 (2013).

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PROTECTION OF PERSONAL DATA OF CRIME VICTIMS IN EUROPEAN UNION LAW – LATEST DEVELOPMENTS

Abstract:
In EU law a lot of attention has recently been paid to personal data protection standards. In parallel to the development of the general EU rules on data protection, the Members States also develop cooperation between law enforcement agencies and create new information exchange possibilities, including the processing of personal data of participants in criminal proceedings. The aim of this article is to analyse whether the personal data of victims of crime are safeguarded according to the standards of the Charter of Fundamental Rights. For this purpose, the author analyses two directives: 2012/29/EU, which regulates minimum standards of victims of crime; and 2016/680/EU (also known as the Law Enforcement Directive), which regulates personal data processing for the purpose of combating crime. Based on the example of the Polish legislation implementing both directives, the author comes to the conclusion that the EU legislation is not fully coherent and leaves too much margin of appreciation to the national legislator. This results in a failure to achieve the basic goals of both directives. The author expects the necessary reflection not only from the national legislator, but also from the European Commission, which should check the correctness of the implementation of the directives, as well as from national courts, which should use all possible measures to ensure that the national law is interpreted in the light of the objectives of the directives.

Keywords: personal data protection, police directive, victim of crime, Charter of Fundamental Rights

* Dr. habil., professor at the Kozminski University in Warsaw, email: agrzelak@alk.edu.pl, ORCID: https://orcid.org/0000-0002-5867-8135. This article was partially prepared as part of a project financed by the National Science Centre – decision DEC-2012/07/B/HS5/03908. In the framework of the research the author dealt with, *inter alia*, the emergence of the concept of the right to personal data protection within the right to privacy and the international standard of its protection. For further details, *see* A. Grzelak, *Ochrona danych osobowych we współpracy policyjnej i sądowej w sprawach karnych UE. W stronę standardu europejskiego* [Personal data protection in the field of police and judicial cooperation in criminal matters in the EU. Towards a European standard], SGH, Warszawa: 2015.

INTRODUCTION

The issue of personal data protection has become one of the leading topics in European Union (EU) law recently. This is undoubtedly related to the legislative reform carried out in recent years in this area. The main elements of the reform are Regulation 2016/679 (GDPR),[1] as well as Directive 2016/680/EU[2] (Law Enforcement Directive). At the same time, the area of freedom, security and justice (AFSJ) has become one of the most dynamic EU integration fields in recent years. Since the Treaty of Amsterdam, the mutual recognition procedure has been the main regulatory practice in this policy field. The EU institutions are adopting more and more legislation which governs the exchange of information, including exchange of personal data, between the competent authorities of the Member States involved in the fight against crime. This requires us to consider the coherence and effectiveness of the adopted provisions, as well as their consistency with the fundamental rights protection standards.

The general problem of protection of the rights of victims of crime is analysed in the literature mostly in the context of the provisions of Directive 2012/29/EU[3] and the minimal standards established by this directive. These publications however omit the specific issue of data protection.[4] In turn, the protection of personal data of crime victims has been mostly examined on the basis of the Polish law in 2014[5] and – including the draft law enforcement directive – in 2016.[6] While expiry of the implementation

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119 with corr.

[2] Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA [2016] OJ L 119.

[3] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ L 315.

[4] *See generally* M. Kolendowska-Matejczuk, *Ochrona praw ofiar przestępstw na gruncie przepisów Unii Europejskiej w świetle dyrektywy 2012/29/UE* [Protection of the rights of victims of crime under European Union law in the light of Directive 2012/29/EU], 2 Krakowskie Studia Międzynarodowe 61 (2013). *Cf.* European Parliament, *The Victims' Rights Directive 2012/29/EU: European Implementation Assessment: Study*, 2017; I. Gážiová, J. Kralik, *The New European Network on Victims' Rights*, 16(1) International and Comparative Law Review 83 (2016), S. Buczma, *An overview of legal acts on protection of victims of crime in the view of the adoption of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime in the European Union*, 14(2) ERA Forum 235 (2013).

[5] *See generally* L. Mazowiecka (ed.), *Ochrona danych osobowych i wizerunku ofiary przestępstwa* [Protection of personal data and image of the victim of crime], Wolters Kluwer, Warszawa: 2014.

[6] *See* A. Grzelak, *Ochrona danych osobowych ofiar przestępstw w prawie Unii Europejskiej* [Protection of personal data of victims of crime under EU law], in: D. Kornobis-Romanowska (ed.), *Unia Europejska w roli gwaranta praw podstawowych* [The European Union as guarantor of fundamental rights], Currenda, Sopot: 2016, p. 187.

deadline of the law enforcement directive is therefore the right time to formulate more precise conclusions, nevertheless this article is limited to the issue of protection of data of victims, leaving other problems related to the implementation of Directive 2016/680 for discussion in other studies, in particular the question of the compliance of Polish criminal law procedure with the Law Enforcement Directive.[7]

In 2016 the general conclusion of my article, based on my preliminary research, was that Directive 2012/29/EU (the victim's rights directive) does not pay particular attention to the privacy of a victim – rather it is a part of a general scheme of assistance to victims. Moreover, the article stated that the draft directive was vague and imprecise, so there was a strong need to strengthen guarantees in the soon-to-be adopted final version of the directive. Now, in 2019 we can see that not so much has changed, and a lot still depends on the decisions of the national legislator. The law enforcement directive (Directive 2016/680), which is deliberately imprecise to leave room for the actions on the national level, requires taking into account the special position of victims of crimes. However, the law implementing Directive 2016/680/EU in Poland does not apply to the files of court proceedings conducted on the basis of the provisions of the Code of Criminal Procedure, which is one of the basic problems of the law implementing the Law Enforcement Directive in Poland.[8] Therefore, the preliminary conclusion from 2016 requires reconsideration due to this unexpected and controversial decision of the Polish legislator. It is thus necessary to ask whether the personal data of victims of crimes are properly protected and safeguarded in a manner consistent with the standards stemming from both directives, but most of all with the standards contained in the EU Charter of Fundamental Rights (Charter).

The general aim of this article is to analyse whether the two paths of legislative development in EU law – the stronger protection of victims of crime in criminal proceedings as well as the reform of personal data safeguards – are deliberately parallel and consistent and whether there is a cohesion between these two processes. The scope of the analysis requires concentrating both on the problem of respecting the rights of victims of crimes in general as well as in the context of protection of their personal data. This topic can be also addressed in a broader way, i.e. whether the EU guarantees and promotes the right to protection of personal data in relation to victims of crime as a separate goal, or whether the adoption of legislation in this respect by the EU is the result and side effect of other objectives, such as establishing good cooperation between law enforcement agencies and mutual recognition in criminal matters. The noticeable

[7] For more on Directive 2016/680 *see generally* A. Grzelak (ed.), *Ustawa o ochronie danych osobowych przetwarzanych w związku z zapobieganiem i zwalczaniem przestępczości. Komentarz* [Commentary on the law on the protection of personal data processed in connection with the fight against and prevention of crime], CH Beck, Warszawa: 2019; M. Kusak, *Ochrona danych osobowych w sprawach karnych – rekomendacje na tle transpozycji dyrektywy 2016/680/UE* [Protection of personal data in criminal matters – recommendations based on the transposition of Directive 2016/680/EU], 10 Europejski Przegląd Sądowy 10 (2017).

[8] O.J. 2019, item 125. *See also* A. Grzelak, M. Wróblewski, *Komentarz do art. 3* [Comment on Art. 3], in: Grzelak, *supra* note 7.

differences between Directive 2012/29/EU and the law enforcement directive vis-à-vis the protection of personal data of crime victims are possibly reflected at the level of guarantees and rights granted to the data subject. Therefore, the main research question in this article concerns the level of personal data protection of victims of crime.

This article is divided into several sections. The first section discusses the definition of a victim of a crime contained in EU law and its application, which is limited to natural persons. The second section presents the general standard of data protection derived from the Charter. In the following sections the article focuses on the relevant EU legislation and presents some comments on the imprecise language of the directives and the discretionary powers of the Member States and their consequences for the level of protection of victims in the national legislation.

1. DEFINITION OF A VICTIM OF CRIME IN THE EU LEGISLATION

Any analysis of personal data protection issues should start from clarifying the definition of the notion "victim of a crime". This is necessary in order to determine the correlation between the rights of victims of crime (under Directive 2012/29/EU) and the need to protect their personal data during criminal proceedings (under the Law Enforcement Directive) – the latter aspect being innovative in these considerations.

At present Directive 2012/29/EU is the fundamental EU act that regulates the position of the victim of a crime in any criminal proceeding and defines the concept of a "victim of crime."[9] For the purposes of the directive, the definition of a victim is included in its Art. 2(1). This notion encompasses two ideas: (1) a direct victim, which means "a natural person who has suffered harm, including physical, mental or emotional harm or economic loss which was directly caused by a criminal offence"; and (2) an indirect victim, who is a "family member of a person whose death was directly caused by a criminal offence and who has suffered harm as a result of that person's death."

In the first place this definition clearly indicates that for the purposes of Directive 2012/29/EU only natural persons are considered to be victims of crimes.[10] Apparently the directive fails to consider legal persons as victims. This is consistent with the provisions of the Law Enforcement Directive, which also does not allow legal persons to be considered as victims whose data should be protected under its provisions. Moreover, this is not only in line with the jurisprudence of the Court of Justice,[11] but also with the definition of a victim provided in other international acts, especially in the 1985 UN

[9] This definition has already been described in the author's previous research (*see* Grzelak, *supra,* note 6, p. 189), however without reference to the provisions of Directive 2016/680.

[10] *See generally* S. Walklate (ed.), *Handbook of Victims and Victimology*, Routledge, London: 2018. *See also* S. Buczma, *An overview of the law concerning protection of victims of crime in the view of the adoption of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime in the European Union*, 14(2) ERA Forum 235 (2013).

[11] Case C-205/09, *Criminal proceedings against Emil Eredics and Mária Vassné Sápi*, ECLI:EU:C:2010:623.

Declaration on the basic principles of justice for victims of crime and abuse of power.[12] This declaration confirmed the need to adopt measures, both at the national and international levels, to secure universal and effective recognition of the rights of victims of crime. The declaration defined the concept of a "victim" as a person who, individually or collectively, has suffered harm to his or her physical or mental health, suffered emotional disorders, material damage, or serious breach of their fundamental rights as a result of acts or omissions that were in breach of the criminal law in force in the given country, including laws on the criminal misuse of powers.[13]

Secondly, Directive 2012/29/EU extends the concept of a victim of crime to family members. This – in comparison to an earlier act governing the rights of victims of crime, namely Council framework decision 2001/220/JHA – is an important development.[14] The final decision whether all family members should be considered as victims for the purpose of national criminal proceedings has been left by Directive 2012/29/EU to the national legislator.[15] In turn, the Law Enforcement Directive does not refer directly to the notion of a victim, which means that in this text the notion should be correlated with state law. However, the national legislator is bound by the scope of application of the directive. It should be taken into account that although in Polish criminal law a legal person may be a victim,[16] it is not possible to talk about the protection of personal data of legal persons for the purposes of personal data protection. This is a right vested in natural persons. At the same time, this does not mean that the national legislator cannot grant certain rights to legal persons – only that this is not a requirement under EU law.

To sum up, both Directive 2012/29/EU and Directive 2016/680 use the term "victim of a crime" in a narrower sense than is the case in some national criminal codes.

2. CHARTER'S STANDARD OF PERSONAL DATA PROTECTION

Since the Treaty of Lisbon the right to protection of personal data is a separate fundamental right, although still directly connected with the general right to privacy.[17] Art.

[12] Available at: http://www.un.org/documents/ga/res/40/a40r034.htm (accessed 30 May 2019).

[13] *E.g.* B. Buneci, *The notion of victim in international and European judicial proceedings*, 3(1) Perspectives of Business Law Journal 48 (2014).

[14] For some remarks on the position of the EU institutions with regard to the incorporating a family member into the definition, *see* S. Buczma, R. Kierzynka *Protection of victims of crime in the view of the Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime in the European Union and the Directive 2011/99/EU on the European protection order*, available at: https://www.ja-sr.sk/files/Kierzynka_Buczma_Protection%20of%20victims.pdf (accessed 30 May 2019).

[15] *See* Art. 2(2) of Directive 2012/29/EU.

[16] *See* Art. 49 of the Code of Criminal Procedure, O.J. 2018, item 1987.

[17] *E.g.* G. Gonzalez Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU*, Springer, Cham: 2014, p. 198. The author observes that the coexistence of Arts. 7 and 8 of the Charter might be explained in terms of a compromise between divergent national constitutional approaches (those envisioning privacy as encompassing personal data protection vs. those conceiving of

16 of the Treaty on the Functioning of the EU (TFEU) provided the legal basis for the Commission to initiate a discussion on strengthening the safeguards for the protection of personal data in the EU. At the same time, the Lisbon Treaty not only introduced Art. 16 TFEU but also declared that the Charter is a binding legal instrument. The general standard of data protection in the EU is thus based on both Art. 8 of the Charter, which grants every citizen the right to the protection of personal data concerning him or her, and Art. 16 TFEU. Moreover, they define the minimum rules of data processing, being that the data must be processed fairly for specified purposes and on the basis of the consent of the person concerned, or on some other legitimate basis laid down by law. The structure of Art. 8 of the Charter is typical: it sets forth the general structure and does not deal with the lawful limitations, which are addressed by Art. 52. The three paragraphs of Art. 8 of the Charter together describe the general right to the protection of personal data, formally granted to everybody in Art. 8(1); described in Art. 8(2) as requiring that personal data are processed "fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law" and that "everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified"; as well as encompassing pursuant to Art. 8(3) the existence of an independent supervisory authority. Thus there are six constituent components of the right to data protection: (1) the requirement of fair processing; (2) the requirement of processing for specified purposes; (3) the requirement of a legitimate basis, which can be either a basis laid down by law or based on the consent of the person concerned; (4) the right of access to data; (5) the right to have data rectified; and (6) independent supervision.[18]

Two Declarations annexed to the Lisbon Treaty specifically relate to Art. 16 TFEU, one of which suggests that "specific rules on the protection of personal data and the free movement of such data in the fields of judicial cooperation in criminal matters and police cooperation (...) may prove necessary because of the specific nature of these fields."[19] This decision of the Member States served as an excuse for the Commission – and later on for the EU legislator (the EU Council and the Parliament) – to prepare and adopt Directive 2016/680, which is not only a separate act (separate from the act which generally regulates data protection processing – the GDPR), but which is also different in terms of its application and the results to be achieved. This serves as an explanation behind the introduction of the possibility for Member States to derogate from the general rules on the processing of personal data, which is justified by the need to ensure efficiency

personal data protection as an autonomous fundamental right); but it can also be described, from an EU perspective, as the outcome of an unresolved friction between an established approach and a novel one. *See also* J. Sobczak, *Komentarz do art. 8 Karty Praw Podstawowych* [Commentary on Art. 8 of the Charter of Fundamental Rights], in: A Wróbel (ed.), *Karta Praw Podstawowych Unii Europejskiej. Komentarz* [Charter of Fundamental Rights of the European Union. Commentary], CH Beck, Warszawa: 2013, p. 259.

[18] *See* Gonzalez Fuster, *supra,* note 17, p. 204.

[19] Declaration No. 21 on the protection of personal data in the fields of judicial cooperation in criminal matters and police cooperation.

in criminal proceedings and the admissibility of introducing restrictions to the right to protection of personal data if such is related to the interests of justice.

At the same time, the Treaty of Lisbon has significantly strengthened the powers of the EU in the field of police and judicial cooperation in criminal matters. Art. 82 TFEU states that the fundamental principle in the field of judicial cooperation in criminal matters is the principle of mutual recognition of judgments and judicial decisions, which requires the approximation of the laws and regulations of the Member States. To the extent necessary to facilitate the implementation of this principle, the European Parliament and the Council should be empowered to adopt directives laying down relevant minimum standards, possibly including the rights of individuals in criminal proceedings and the rights of victims of crime. This article of the TFEU was the legal basis for the adoption of Directive 2012/29/EU.

The difficulties in balancing the right to personal data protection and the right to privacy on the one hand, and the obligations of the state to guarantee public security on the other was illustrated by the Court of Justice first in the *Digital Rights Ireland*[20] case, then in the *Tele 2*[21] case, and most recently also in the *Ministerio Fiscal* case.[22] These cases clearly show that there is a growing need to ensure a better balance between security-focused instruments and fundamental rights, especially if there is a special treaty provision devoted to the right to data protection and also a special legal basis to address the growing need to pay attention to the rights of victims of crime. The Court of Justice explained the basic rules and emphasized that the ideas which emerged from Art. 16 TFEU and Art. 8 of the Charter should be a *leitmotiv* for the EU legislator when adopting all secondary legislative acts, as well as for the national legislator when implementing EU law.

The EU measures dedicated to the protection of victims of crime – discussed for several years and finally adopted – consist of not only a few acts regulating victims' rights and position in criminal proceedings, but also specific criminal law instruments for enforcing the protection of victims.

3. MINIMUM STANDARDS ON THE PROTECTION OF VICTIMS OF CRIME IN DIRECTIVE 2012/29/EU

The Treaty of Lisbon has introduced significant changes in the system of police and judicial cooperation in criminal matters. The main changes are related to the decision to transfer this area of cooperation from the intergovernmental level to the supranational system. This is connected not only with changes in the law-making process, but also with regard to the competences of EU institutions (especially the Commission and Court of Justice) with respect to enforcing compliance with the adopted law. The

[20] Joined cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd*, ECLI:EU:C:2014:238.

[21] Joined cases C-203/15 and C-698/15, *Tele2 Sverige AB v. Post- och telestryrelsen i Secretary of State for the Home Department v. Tom Watson and others*, ECLI:EU:C:2016:970.

[22] Case C-207/16, *Proceedings brought by Ministerio Fiscal*, ECLI:EU:C:2018:788.

TFEU also regulates more precisely the EU's competence to legislate in the field of criminal law, including the mutual recognition of judgments in criminal matters. The European Parliament and the Council, on the basis of Art. 82(2)(c) TFEU, have the competence to adopt directives establishing minimum rules which concern the rights of victims of crimes in order to facilitate the mutual recognition of judgments and judicial decisions and to establish police and judicial cooperation in criminal matters having a cross-border dimension.

Acting on the basis of this treaty provision, the European Commission adopted in 2011 the Communication on strengthening victims' rights in the EU[23] and presented a proposal for a directive establishing minimum standards on the rights, support, and protection of victims of crime,[24] which was adopted in 2012 as Directive 2012/29/EU.[25] The Commission identified five areas of victims' needs. They include: respectful treatment and recognition as victims; protection from intimidation, retaliation and further harm by the accused or suspect(s) and from harm during criminal investigations and court proceedings; support, including immediate assistance following a crime; longer-term physical and psychological assistance and practical assistance; and access to justice to ensure that victims are aware of their rights and understand them and are able to participate in proceedings and receive compensation and restoration, whether through financial damages paid by the state or by the offender or through mediation or other form of restorative justice. The directive establishes minimum standards on the rights, support and protection of victims of crime and ensures that persons who have fallen victim to a crime are recognised and treated with respect. They must also receive proper protection, support, and access to justice.

The directive considerably strengthens the rights of victims and their family members to information, support and protection. It further strengthens the victims' procedural rights in criminal proceedings. The directive also requires that EU countries ensure appropriate training on victims' needs for those officials who are likely to come into contact with them. As a result, it is now the most important act of law setting out the basic standards that regulate the situation of victims of crime in the EU. The general opinion is that the directive – even though the text has been weakened during the negotiations in comparison to the original draft – protects the rights of victims of crime better than the replaced Framework Decision 2001/220/JHA.[26] The standard rights,

[23] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Strengthening victims' rights in the EU, COM(2011) 274 final.

[24] Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, COM(2011) 275 final.

[25] Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 2012 OJ L 315.The Directive entered into force on 15 November 2012 and had to be implemented by 16 November 2015.

[26] *See* C. Rasquete, A. Ferreira, F.M. Marques, *Why do we need concrete measures for victims at EU level? A view from the coalface*, 15 ERA Forum 119 (2014).

such as respect and recognition in criminal proceedings, safeguarding the possibility for victims to be heard during proceedings and to supply evidence, should be extended to recognize and safeguard the right to receive information, the right to compensation, mediation, and many other remedies, as well as the right to privacy, including personal data protection.

One of the objectives of the directive is to guarantee the right to respect for private and family life, while observing the right to a fair trial, guaranteed by Art. 47 of the Charter.[27] The right to privacy refers to protections involving access to the victims' personal information. Control over the release of personal information protects victims from being re-victimized during criminal proceedings. Protecting the privacy of a victim should be considered as one of the most important means of preventing secondary victimisation, intimidation, and retaliation. Victims' needs should be considered and addressed in a comprehensive, coordinated manner, avoiding partial or inconsistent solutions likely to give rise to secondary victimisation.[28] As is correctly stated in the preamble of Directive 2012/29/EU, the victim's privacy can be safeguarded through a range of measures, including non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of the victim. However, there might be cases where, exceptionally, the victim can benefit from such disclosure or even the widespread publication of information. Measures to protect the privacy and images of victims and of their family members should always be consistent with the right to a fair trial and freedom of expression, as recognised in Arts. 47 and 11 of the Charter, the meaning and scope of which should – in accordance with Art. 52(3) of the Charter – be the same as those laid down by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

Accordingly, Art. 21 of Directive 2012/29/EU requires

> Member States to ensure that competent authorities may take during the criminal proceedings appropriate measures to protect the privacy, including personal characteristics[29] of the victim taken into account in the individual assessment provided for under Article 22, and images of victims and of their family members. Furthermore, Member States shall

[27] *See* para. 66 of the preamble of Directive 2012/29/EU. For general critical remarks on the directive, especially on Art. 22, which addresses the rights of vulnerable victims, *cf.* R. Lang, E. Schenkel, *Directive UE no 2012/29 établissant des normes minimales concernant les droits, le soutien et la protection des victims de la criminalité: apercu et critique*, 583 Revue de l'Union Européenne 626 (2014). The authors give an overview of the directive and focus on criticism of Art. 22, which provides for specific rights for victims with special protection needs.

[28] For further information on the situation of victims of crime in the EU, *see* the following report by the Fundamental Rights Agency: *Victims of crime in the EU: the extent and nature of support for victims*, FRA 2015, available at: http://fra.europa.eu/sites/default/files/fra-2015-victims-crime-eu-support_en_0.pdf (accessed on 30 May 2019).

[29] According to para. 56 of the preamble to the Directive, individual assessments should take into account the personal characteristics of the victim such as his or her age, gender and gender identity or expression, ethnicity, race, religion, sexual orientation, health, disability, residence status, communication difficulties, relationship to or dependence on the offender and previous experience with crime.

> ensure that competent authorities may take all lawful measures to prevent public dissemination of any information that could lead to the identification of a child victim.

The purpose of this provision was obviously to ensure that when victims have been identified as being vulnerable to further victimisation or intimidation, appropriate measures are taken to help prevent such harm. Such measures should be available throughout the criminal proceedings, whether during the initial investigative or prosecutorial phase or during the trial itself. The necessary measures will vary depending on the stage of proceedings.

As compared to the previously binding Art. 8 of framework decision 2001/220/JHA, the new provisions introduced by Directive 2012/29/EU are not significantly wider. Framework Decision 2001/220/JHA provided in Art. 8[30] that

> each Member State shall ensure a suitable level of protection for victims and, where appropriate, their families or persons in a similar position, particularly as regards their safety and protection of their privacy, where the competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy.

Member States were obliged to guarantee that "it is possible to adopt, if necessary, as part of the court proceedings, appropriate measures to protect the privacy and photographic image of victims and their families or persons in a similar position." Art. 21 of Directive 2012/29/EU is thus slightly more concrete than the replaced Art. 8 of framework decision 2001/220/JHA, which means that the EU legislation in this area has taken a step forward in comparison to the previously binding general obligation to provide "adequate protection" only.

The draft directive contained in document COM(2011)275 final was the subject of an opinion by the European Data Protection Supervisor (EDPS),[31] who criticized the proposal and specifically the wording of Art. 23 of the draft directive (finally adopted as Art. 21).[32] It stated that the only area regulated by this provision were the powers of judicial authorities at the stage of judicial proceedings, whereas privacy should be guaranteed not only in the course of judicial proceedings but also during the investigation and pre-trial stages. These comments were taken into account, and consequently the guaranteed protection is extended beyond the phase of judicial proceedings. Other comments from the EDPS however were not taken into consideration, including remarks regarding the

[30] This provision has been interpreted by the Court of Justice, however in different respects. In joined cases C- 483/09 *Magatte Gueye* and C-1/10 *Valentín Salmerón Sanchez* (ECR 2011, I-08263, para. 69), the Court decided that Art. 8 of the Framework Decision cannot be interpreted in such a way that it restricts the choice by Member States of the criminal penalties they establish in their domestic legal systems.

[31] Opinion of 17 October 2011 on the legislative package on the victims of crime, including a proposal for a Directive establishing minimum standards on the rights, support and protection of the victims of crime and a proposal for a Regulation on mutual recognition of protection measures in civil matters.

[32] According to draft Art. 23(1): Member States shall ensure that judicial authorities may adopt during the court proceedings, appropriate measures to protect the privacy and photographic images of victims and their family members. Art. 23(2): Member States shall encourage the media to pursue self-regulatory measures in order to protect victims' privacy, personal integrity and personal data.

absence of any indication as to the nature of the specific measures that may be adopted by judicial authorities to enforce the victim's right to data protection.[33]

There are also other acts adopted within the framework of the police and judicial cooperation in criminal matters which also, albeit indirectly, refer to the question of protection of personal data of victims of crime. For example, Directive 2011/99/EU on the European protection order[34] should be mentioned. This act establishes an instrument for mutual recognition of specific restrictions and prohibitions imposed upon individuals in criminal proceedings as a means of protection for other persons. These protection measures are listed in Art. 5 of the directive. If such a measure is applied while the victim already resides or intends to go to a Member State other than that in which the court issued such a protection measure, the victim can apply for a European protection order, resulting in the ability to recognize and enforce it in the Member States where the victim resides. A mutual recognition instrument, such as the European protection order, can potentially impact the fundamental rights of both the victims and the offender. These rights include the right to liberty and security, respect for private and family life, protection of personal data, freedom of movement, the right to an effective remedy and to a fair trial, and the principle of legality and proportionality of criminal offences. The impact on these rights and the proportionality of their limitation would depend on the particular type of protection measure to be defined in the legal act which would be subject to mutual recognition. For instance, Member States can impose national protection measures that can result in anything from restrictions on making phone calls to an individual to being barred from a family home. A mutual recognition instrument would result in parallel measures being applied in another Member State to which the victim moves or travels. In such a case, respect for private and family life will be particularly affected. Recognition of the protection order would also require that information on the offender was exchanged between relevant Member States' authorities, which could impact the right to protection of personal data. Such a procedure would also be connected with the flow and processing of personal data of victims of crime.

The specific legislation regulating the standing of victims of particular categories of crime, such as terrorism or organized crime, tackles the problem of the protection of victims in a very general manner. For example, Directive (EU) 2017/541 on combating terrorism[35] requires that Member States should adopt measures of protection, support and

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[33] The example quoted by the EDPS was the recommendation of the Committee of Ministers of the Council of Europe Rec(2006)8, which states that the State shall require all agencies who have contact with victims to adopt clear standards by which they may disclose to third parties the information received from the victim or concerning them only if the victim clearly consented to its disclosure or there is a legal requirement or authorization to disclose it (*see* section 10.8).

[34] Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order [2011] OJ L 338.

[35] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA [2005] OJ L 88.

assistance responding to the specific needs of victims of terrorism, in accordance with Directive 2012/29/EU. That means that privacy of victims should be addressed in the same way as in the case of Directive 2012/29/EU, which has become the main reference point. There are also two other directives which, as regards the protection of the right to privacy of victims of crime, refer directly to the standards set out in the general act on the rights of victims of crime: Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims;[36] and Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography.[37]

The guarantees relating to personal data protection provided for in these acts do not exceed those established by Directive 2012/29/EU itself, and thus it can be concluded that it sets a minimum standard in this area. Despite it being a not particularly high one, the very fact of introducing a standard as such should be assessed positively.

Thus the main responsibility lies with the Member States, which must adopt measures implementing the general directions indicated in Directive 2012/29/EU. However, they must do so in accordance with the ECHR and the Charter. One should also keep in mind that – according to Art. 82(2) TFEU – each Member State can at any time adopt measures that go beyond the minimum standards as set out in Directive 2012/29/EU and guarantee a higher standard of protection for victims of crime.

4. PERSONAL DATA PROTECTION OF VICTIMS OF CRIME IN THE LAW ENFORCEMENT DIRECTIVE

The system of protection of personal data in the EU has recently undergone major changes. In 2016, two legal acts were adopted: the GDPR and the Law Enforcement Directive. The latter, i.e. Directive 2016/680/EU, lays down the rules relating to the protection of natural persons with regard to the processing of their personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including safeguarding against and the prevention of threats to public security. It obliges Member States on one hand to protect the fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data; and on the other hand to ensure that the exchange of personal data by competent authorities within the Union – where such exchange is required by the Union or Member State law – is neither restricted nor prohibited for reasons connected with the protection of natural persons with regard to the processing of personal data. The Law Enforcement Directive replaces

[36] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA [2011] OJ L101.

[37] Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA [2004] OJ L 335 with corr.

the framework decision 2008/977/JHA,[38] which – as the act adopted before the Treaty of Lisbon within the framework of intergovernmental cooperation – was not fully successful. Its weakness was first of all the limited scope of its application, restricted to the transborder transfer of data, and secondly the lack of an enforcement procedure and sanctions for improper implementation.

The adoption of legal acts for the purpose of data protection in instances where data are processed by competent authorities in situations connected with combating crime creates the possibility of re-thinking the framework for the protection of crime victims, particularly in the sphere of their right to privacy. The necessity to give due consideration to the rights of victims of crime was recognized as early as in 2010,[39] when the Commission issued its Communication on a comprehensive approach on personal data protection in the EU[40] and started the intensive process of the general reform of the data protection system in the EU. In para. 2.3 of the Communication, which was dedicated to the revision of data protection rules in the area of police and judicial cooperation in criminal matters, the Commission found that one of the shortcomings of framework decision 2008/977/JHA was the lack of a provision that would permit making a distinction between different categories of various data subjects, such as perpetrators, victims, witnesses, experts and others. Furthermore, the framework decision failed to establish separate safeguards dedicated to the protection of persons other than the perpetrator.

In other words, the Commission's message was that detailed provisions addressing the specific nature of law enforcement measures should be laid down, including the distinction between different categories of data subjects, such as victims, witnesses or suspects. The rights of these different groups may vary in order to ensure on the one hand a high level of data protection and, on the other hand, to facilitate the exchange of data between the relevant authorities. This means that the right balance must be attained between protecting fundamental rights and ensuring security. It should be borne in mind that both the ECHR and the Charter allow for limits on the right to privacy – including the right to protection of personal data – if certain conditions are fulfilled.

The outcome of these considerations of the Commission was reflected in the proposed Art. 5 of the draft directive on data protection for law enforcement purposes,[41] subsequently adopted as Art. 6 of the Law Enforcement Directive. This provision requires distinguishing between different categories of data subjects. According to Art. 6 of the Law Enforcement Directive, Member States shall require the controller – where

[38] Council Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters [2008] OJ L 350.

[39] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: A comprehensive approach on personal data protection in the European Union, COM(2010)609. For further information on this Communication, *see also* R. Jay, *Data protection. Law and practice*, Sweet & Maxwell, London: 2012, pp. 48-50.

[40] COM(2012)9 final.

[41] COM (2012)10 final.

applicable and as far as possible – to make a clear distinction between personal data of different categories of data subjects, such as: (a) persons with regard to whom there are serious grounds for believing that they have committed or are about to commit a criminal offence; (b) persons convicted of a criminal offence; (c) victims of a criminal offence or persons with regard to whom certain facts give rise to reasons for believing that he or she could be the victim of a criminal offence; and (d) other parties to a criminal offence. The EU legislation has not, however, set forth the particular method for enforcing this distinction. Moreover, the enforceability of the provision is restricted by the additional condition, expressed as "where applicable and as far as possible", which definitely softens the obligation imposed on the Member States. According to Art. 29 of the Working Party, "the obligatory distinctions must lead to a gradual regime of different time frames to be envisaged in relation to the different categories of data subjects."[42] This can be seen as establishing an overall framework for how to differentiate and how to provide a special position to crime victims.

Interestingly enough, according to the Commission this is a novelty – such an approach has not been taken in any of the provisions of Directive 95/46/EC or Framework Decision 2008/977/JHA, even though it is endorsed in Recommendation R(87)15 of the Committee of Ministers of the Council of Europe concerning the use of personal data in the police sector.[43] The Commission's assessment in this regard is, however, only partially true, as the same Recommendation R(87)15 does not provide for such an obligation. It only states, in section 3.2, that as far as possible the different categories of data stored should be distinguished in accordance with their degree of accuracy and reliability and, in particular, data based on facts should be distinguished from data based on opinions or personal assessments. Therefore, it requires the differentiation of data only with respect to their reliability.

The key problem relating to this provision is its implementation. It raises doubts, in particular because of its lack of precision in the description of the method and consequences of the proposed distinction. Another issue that may be considered problematic is the use of the phrase "as far as possible", which leaves a large margin of discretion to the Member States. It is worth noting that a similar distinction with regard to the scope and collection and processing of personal data depending on the category of data subjects is also the subject of a Europol regulation[44] as well as of regulation 1725/2018.[45] In the case of Europol, not only is it necessary to distinguish the data, but

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[42] Art. 29 of the Working Party, WP 258, Opinion on some key issues of the Law Enforcement Directive (EU 2016/680).

[43] Recommendation R(87)15 regulating the use of personal data in the police sector; available at: http://www.coe.int/t/dghl/standardsetting/dataprotection/dataprotcompil_en.pdf (accessed 30 May 2019), p. 68.

[44] Regulation (EU) 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA [2016] OJ L 135.

[45] *Cf.* Art. 73 of the Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by

also – according to Art. 30 – there are limitations on the legal processing of personal data of victims. Processing of personal data with respect to victims of a criminal offence, witnesses, or other persons who can provide information concerning criminal offences, or with respect to persons under the age of 18, shall be allowed only if it is strictly necessary and proportionate for preventing or combating a crime that falls within Europol's objectives. Moreover, if personal data of victims are stored for a period exceeding five years, the European Data Protection Supervisor shall be informed accordingly. These rules can serve as an example for the national legislator on how to implement the very imprecise Art. 6 of the Law Enforcement Directive.

Data recognition and the separate treatment of personal details of crime victims from the data of perpetrators of crimes is not the only way to guarantee the rights of victims of crime. In addition to the special provision that requires differentiation in the treatment of personal data of victims of crime, the Law Enforcement Directive also contains general provisions governing the processing of personal data for the purpose of combating crime. These provisions also form the basis for taking into account the special position of victims of crimes when implementing the provisions of the directive into national law. According to the preamble (recital 20), the directive does not preclude Member States from specifying processing operations and procedures in national rules on criminal procedures in relation to the processing of personal data by courts and other judicial authorities, in particular as regards personal data contained in a judicial decision or in the records relating to criminal proceedings. Recital 80 confirms that the directive applies also to the activities of national courts and other judicial authorities. This means that the general rules on the processing of personal data set out in the Law Enforcement Directive must also be applied to court proceedings. Member States may set the rules for data processing in national court proceedings, but these rules have to comply with the provisions of the directive.

In connection with the above, when developing a harmonised approach for identifying victims and the subsequent processing their data, it is necessary to recognise the wide variety of possible situations. The Law Enforcement Directive must regulate the principles in a general way – it is the role of the Member States to clarify them so as to safeguard on one hand the rights of victims of crimes in accordance with Directive 2016/680/EU and 2012/29/EU, but also to ensure effective preparatory and judicial proceedings. The basic principles are defined in Art. 4 of the law enforcement directive (Directive 2016/680/EU). The Member States shall provide for personal data to be processed not only lawfully and fairly, but above all the data must be adequate, relevant and not excessive in relation to the purposes for which they are processed, as well as accurate and, where necessary, kept up to date.

The term "adequate" indicates that data to be processed should be sufficient to fulfil the purpose of its processing.[46] The detection of victims is a crucial element in

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the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC [2018] OJ L 295.

[46] *See also* The Europol Joint Supervisory Body Report, *Victims of trafficking in human beings – a data protection perspective*, available at: https://bit.ly/2JmPf9b (accessed 30 May 2019).

the fight against crime. Identifying victims and the processing of their personal data must be regarded as adequate, not only for operational purposes, but also for ensuring that the victims may profit from the safeguards they are entitled to. For example, the right to information (Art. 13 of the law enforcement directive) may be restricted in order to protect the rights and freedoms of others. This means that the participants' right to be informed during the criminal proceedings may be restricted if necessary to protect the victim. As is correctly identified in the reports, the principle of adequacy should lead to an analysis of what personal data is truly needed to investigate specific cases. The principle of adequacy is also an essential element of the lawful, effective, and accountable activities of law enforcement authorities.[47]

It seems to be quite obvious that investigations by police and judicial authorities are generally focussed on the suspects of crime and finding evidence. When a victim's data are assessed as necessary for detecting and investigating crimes, these data will also be processed and used in the further proceeding. The accuracy principle should be applied taking into account the nature and purpose of the processing concerned; however the specificity of the proceedings does not always allow for processing fully accurate data. In some cases, a victim-centred approach should be introduced, which could be necessary to assess whether the data processing and investigation activities should be further conditioned. To make such an assessment it would be necessary to distinguish between the different phases in a law enforcement proceeding, such as detection, investigation, and prosecution. Application of the principle of accuracy should be directly linked to the data processed in these different phases of an enforcement proceeding. Whether something is accurate depends on the stage of the proceeding – what seems to be accurate at a certain moment might be inconsistent with the findings in the further stages of an investigation. Inaccurate data – even if necessary to be processed in the first phase – might create serious problems in the later phases of an investigation and prosecution. All activities aimed at combating crime, ranging from specific legislation to policies and guidelines, will lead to data processing. Without the processing of personal data of victims, fighting crime cannot be done effectively, which in turn would prevent victims from receiving the necessary protection and assistance.

At this point, it should be emphasized that the Law Enforcement Directive – although general in its content – clearly offers possibilities to ensure the special position of victims of crime. Meanwhile, the new law in Poland – the Act adopted on 14 December 2018 on the protection of personal data processed in connection with the prevention and combating of crime[48] – does not address the issue correctly. First of all, Art. 19 of the Act repeats the wording of Art. 6 of the directive. The Polish legislator did not manage to adapt this provision to the national situation and did not propose anything concrete, leaving the decision to the competent authorities applying the law. Secondly, according to the final provisions (Art. 102(4)), adaptation of the principles of

[47] *Ibidem*, p. 13.

[48] O.J. 2019, item 125.

processing information and personal data in data files created before the date of entry into force of the law to the requirements referred to in Art. 19 shall take place no later than on 6 May 2023.[49] It should be added that this problem has also not been solved properly in either the British law nor in the German legislation.[50] However, this is not an excuse for a lack of effort on the part of the national legislator to properly implement the requirements contained in the directive. Thirdly, a significant problem concerns the exemption introduced in Art. 3(1). Pursuant to this provision, the Act does not apply to personal data processed in files kept on the basis of, among others, the provisions of the Code of Penal Procedure. This means that, in principle, no procedural provisions will be amended, or even analysed, for their compliance with the requirements of the directive. It should be noted that the directive itself did not provide for such an exemption.[51] Therefore, the Law Enforcement Directive, by failing to make it fully clear and precise what are the consequences of differentiation between the personal data of suspects and other persons (in particular victims of crime), can still be wrongly implemented by the Member States by excluding the application of the Act to court procedures. As regards the rights of victims of crimes in the context of the processing of their personal data in Polish law, nothing has changed with the entry into force of the new provisions. This does not mean that the rights of victims of crime are not properly guaranteed in the Polish criminal process in the context of protection of their personal data. This does mean, however, that the Polish legislator made no effort to analyse this situation.

This is clearly illustrated also by the fact that there are no direct provisions which would raise the standard of protection of victims' data in the Act of 28 November 2014 on protection and assistance for the victim and the witness.[52] These provisions not only do not really concern the protection of victims' personal data, but additionally create some threats. There are no regulations that would solve the seemingly trivial issue of the location of documentation regarding the application of aid and protection measures. For obvious reasons, such documentation cannot be an integral part of the case file, neither in the preparatory nor in the judicial proceedings. If that were the case, the parties and other persons[53] could easily read such documentation, which in turn it would not only completely disregard the *ratio legis* of the solution, but also the reasonableness of using such measures at all. Therefore, it is *de facto* the prosecutor and the court that take the decision, where it is registered and where such documentation regarding the application of protection measures is located.. This is only an example of provisions that should be subject to a broader analysis in the context of the implementation of the

[49] This is contrary to Art. 63 of Directive 2016/680.

[50] *Cf.* Part 3, chapter 2, rule 38 of the British Data Protection Act 2018 and Section 72 of the German Act to Adapt Data Protection Law to Regulation (EU) 2016/679 and to Implement Directive (EU) 2016/680 (DSAnpUG-EU) of 30 June 2017.

[51] *See* the opinion of the Ministry of Foreign Affairs of 5 October 2018, attached to the Sejm's paper no. 2989, available at: https://bit.ly/30JmM3W (accessed on 30 May 2019).

[52] O.J. 2015, item 21.

[53] Only using the powers specified in Art. 156 of the Code of Criminal Procedure, but also pursuant to Art. 321 of the Code of Criminal Procedure.

Law Enforcement Directive into the Polish legal order. It is only meant to illustrate the complexity and multiplicity of the problems.

Nevertheless, the introduction of new provisions in the Law Enforcement Directive is a significant step forward, since it is generally meant to apply to police and judicial cooperation in criminal matters and cover domestic processes and all data transfers, introducing harmonised criteria for necessary limitations to an individual's rights. It should be expected that it is very soon the task of the Court of Justice to interpret the provisions of the directives, not only by answering preliminary questions from the national courts, but also by ruling on the basis of the infringement procedure in cases of improper implementation.

5. ARE THE PERSONAL DATA OF VICTIMS OF CRIME PROPERLY PROTECTED? SOME ILLUSTRATIONS

In order to illustrate the necessity to protect personal data of victims of crime, reference should be made to several specific examples of practices which have been discussed in Poland and reflected in the decisions of the courts or the data protection supervisory organ – the General Inspector for Personal Data Protection.[54] The reason for these discussions was the need to balance certain values, especially the right to data protection versus the right to information as well as the transparency of judicial proceedings and access to public information.

One example of a situation in which these rights should be weighed is the issue of disclosing victims' names on the daily case lists on the doors of courtrooms. The question of court case lists was previously governed by the Order of the Minister of Justice of 12 December 2003.[55] Under paras. 23.1 and 2 of the Order, in essence the Secretariat of a Court was required to draw up a list of court hearings and meetings containing the names of the judges, the case reference number, the names of the parties and other persons summoned as well as other information. Such a list was intended for the information of the parties and third parties wishing to take part in the hearing. Although the principle of transparency stems from Art. 45(1) of the Constitution of the Republic of Poland, it is not an absolute right and can be limited for reasons of morality, State security and public order, or for the protection of the private life of the parties or other important personal interests. The above-mentioned regulation on court case lists gave rise to objections from some NGOs, including the Helsinki Foundation for Human Rights, which emphasized the need for change, stressing the problem of stigmatisation of the parties.[56] After a thorough analysis, taking into account the various interests the

[54] From 25 May 2018 the supervisory organ in Poland is called Prezes Urzędu Ochrony Danych Osobowych – The President of the Personal Data Protection Office.

[55] Order of the Minister of Justice on the organization and scope of activities of courts and other departments of the administration of justice (OJ of Minister of Justice No. 5, item 22, as amended).

[56] *See* Letter from the Helsinki Foundation for Human Rights to the General Inspector for Personal Data of 22 October 2012, available at: https://bit.ly/3048Lgz (accessed 30 May 2019).

Minister of Justice undertook legislative work aimed at amending this regulation, the final outcome of which is that sensitive data are no longer available on the daily court lists.[57] Rules of procedure of courts had to be adjusted appropriately and, according to para. 67a(2) it is prescribed that while the parties to the proceedings, as well as witnesses and experts can, in principle, be identified on the daily court list, it is possible that in certain categories of cases some data will be anonymized in order to prevent further victimisation. It seems that these new rules – although still not regulated by an act adopted by the parliament – are generally in accordance with both above-mentioned directives and do not require any further change.

Another interesting example of problems concerning the personal data of victims of crime would be the issue of publishing judgments on websites or in various electronic databases. Such judgments include the personal data of victims as well as of witnesses and other people involved in the proceeding. Similarly to the case of court lists, this context requires the balancing of various interests, such as the right to personal data protection versus free access to public information, and can give rise to the need to anonymise certain data.[58] The names of the parties and other participants in the proceedings, as well as their nicknames, should be removed from the judgment, leaving only the first letter of each name.

The problem of the protection of victims of crime in connection with personal data is also present in cases related to the publication of data on sexual offenders in a register maintained pursuant to the Act of 13 May 2016 on counteracting threats of sexual offenses.[59] The full and unambiguous identification of a person covered by the register of sexual offenders, which is publicly accessible, leads to a situation whereby the name (or names), dates of birth, and also photographs of the perpetrators can eventually lead to identification of a perpetrator's victims, especially when the victim is a family member of the perpetrator. This may result in their unacceptable victimisation.[60] According to the facts of a case reported to the Ombudsman, the inhabitants of one of small villages in Poland published on a social network a photo and data downloaded from the public

[57] For more information on this issue, *see* generally the answer of the Undersecretary of State for the Ministry of Justice to the interpellation no. 26750 on the protection of victims of sexual offences; available at: http://sejm.gov.pl/Sejm7.nsf/InterpelacjaTresc.xsp?key=79D4F51A. *See* also information on the webpage of the General Inspector for Data Protection at: http://www.giodo.gov.pl/347/id_art/1341/j/pl/ (both accessed 30 May 2019).

[58] In 2012 the President of the Supreme Court of Poland issued an ordinance that regulated the issue of the anonymisation of data in decisions published by the Supreme Court. *Cf.* Decree No. 11/2012 of 10 April 2012, available at: http://www.sn.pl/Aktualnosci/SiteAssets/Lists/Aktualnosci/NewForm/Zarz_PP_SN_11_2012.pdf. In 2018 the Court of Justice also decided, in all requests for preliminary rulings brought after 1 July 2018, to replace, in all its public documents, the name of natural persons involved in the case by initials. Similarly, any additional element likely to permit the identification of the persons concerned will be removed, *see* https://bit.ly/2KwoywE (both accessed 30 May 2019).

[59] Ustawa z 13 maja 2016 r. o przeciwdziałaniu zagrożeniom przestępczością na tle seksualnym [Act on combatting threats of sexually motivated crimes], O.J. 2016, item 862 as amended.

[60] *See* the position of the Polish Commissioner for Human Rights (available at: https://bit.ly/2Ix42PT, accessed 30 May 2019) and the case which is described therein.

register of sexual offenders. The offender was well known to the inhabitants of the village. Due to the data from the register it became clear to everybody that his children were his victims. Their data was also indirectly revealed. The Minister of Justice unfortunately has not yet responded to any document presented by the Ombudsman in this matter. The question is whether this should be understood as expressing no inclination or will to make any changes in this act. This situation is obviously contrary to the obligations imposed on the Member States by both Directives 2012/29/EU and 2016/680/EU.

CONCLUSIONS

The EU's legal obligation to ensure that victims of crime are guaranteed the right to protection of their personal data is now an obligation stemming from primary EU law. However, the right to personal data protection in the case of criminal proceedings, which encompasses the victims of crime, can be legally limited. The question is whether Member States, when implementing the required secondary legislation, will fully obey the instructions coming from the jurisprudence of the Court of Justice in this respect. Some examples clearly demonstrate that this might be problematic.

Secondly, the basic standard for the protection of personal data of victims of crime in the EU Member States is currently provided by Directives 2016/680/EU and 2012/29/EU, which correspond with each other. This standard is not satisfactory taking into account that the implementation of one directive was processed independently from the implementation of the other. However, it should be noted that both acts allow for the incorporation of general EU standards into domestic legislation. Member States are also allowed to consider the possibility of strengthening guarantees beyond the strict requirements of the directives. At the moment it seems, however, that some Member States are more interested in limiting the scope of application of these provisions than in their proper implementation, particularly with reference to the standards of human rights protection.

Thirdly, it should be stressed that the necessity to ensure the protection of victims' privacy, especially of those who belong to the category of vulnerable victims, remains insufficiently appreciated. The right to privacy of a victim is regulated in a very general manner, leaving too much space for the national legislator and thus creating the possibility of skewing the balance by giving more weight to security as a legal justification, to the detriment of fundamental rights. Also in the Law Enforcement Directive the needs of victims of crime are too vaguely recognized. There are insufficient means for ensuring a more stringent protection of data in their processing for persons who are not suspects, accused, or convicted. The directive does not specify when such data should be protected, or what the consequences of the introduced distinction should be.

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THE SINGLE RESOLUTION MECHANISM IN ACTION. AN ANALYSIS OF THE DECISION-MAKING PRACTICE OF THE SINGLE RESOLUTION BOARD

Abstract:
The article provides an overview of the supranational bank resolution regime established under the Single Resolution Mechanism framework. Both the substantive rules governing the resolution process and its procedural requirements are explained. The main focus of the article is the decision-making practice of the Single Resolution Board (SRB), an EU agency responsible for the execution of the resolution framework, which has already intervened in a number of cases in which banks were considered "failing or likely to fail" by the European Central Bank. The article analyses the existing decisions on resolution action in order to establish how the substantive rules on resolution are interpreted by the SRB in its decision-making practice.

Keywords: European Union, Banking Union, SRM, SRB, ECB, bank failure, resolution

INTRODUCTION

The year 2019 marks the third anniversary of the Single Resolution Board (SRB) – an agency of the European Union responsible for the execution of the new supranational bank resolution regime established by the European Union. Since it became fully operational on 1 January 2016, the Board has carried out the assessment of the conditions for resolution with respect to five credit institutions deemed failing or likely to fail by the European Central Bank (ECB). However, a resolution action was deemed necessary by the SRB in only one case.

Despite the relatively short history of the Single Resolution Mechanism, there already exists a broad literature on the issues relating to the institutional and legal structure of the resolution framework and its legitimacy and accountability.[1] This article

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[1] *See* D. Bush, *Governance of the European Banking Union's Single Resolution Mechanism*, 9 European Banking Institute Working Paper Series 447 (2017); A. Kern, *European Banking Union – a legal and institutional analysis of the SSM and the SRM*, 40 European Law Review 154 (2015); P.G. Teixeira, *The Legal*

focuses on the operational aspects of the resolution mechanism, namely on the SRB's decision-making with respect to credit institutions deemed "failing or likely to fail". Its main goal is to provide an overview of the existing decisions of the Board in order to determine what factors constitute key drivers for triggering a resolution action. The first chapter provides a summary of the substantive rules on resolution, in particular the conditions for resolution and resolution objectives, established in the Bank Recovery and Resolution Directive[2] (BRRD) and the procedural framework of the Single Resolution Mechanism laid out in the SRM Regulation.[3] The second part of the article analyses the existing decisions on resolution in order to establish how these substantive rules are interpreted by the SRB in its decision-making practice. Finally, the article outlines the potential risk for the effectiveness of the resolution regime resulting from the lack of harmonization of national frameworks governing the winding-up of credit institutions, which was most evident in the cases of Italian banks.

1. THE SUBSTANTIVE RULES ON RESOLUTION

The idea of a supranational bank resolution framework originated shortly after the financial crisis of 2008.[4] Before the crisis no common European regulatory framework for dealing with failing credit institutions had been established.[5] The resolution was conceived as a specialised regime for bank failures, the main objective of which is the preservation of financial stability, the protection of depositors, and the minimisation of resort to bail-outs using public funds.[6] Thus, a resolution covers all:

> measures taken to resolve problems arising from the exposure to insolvency of (mainly, but not exclusively, systemically important) financial firms [...] and avoid an initiation

History of the Banking Union, 18(3) European Business Organization Law Review 535 (2017); G.S. Zavvos, S. Kaltsouni, *The Single Resolution Mechanism in the European Banking Union: Legal Foundation, Governance Structure and Financing*, in: M. Haentjens, B. Wessels (eds.), *Research Handbook on Crisis Management in the Banking Sector*, Edward Elgar Publishing, Cheltenham: 2015.

[2] Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, of the European Parliament and of the Council, [2014] OJ L 173 (BRRD).

[3] Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, [2014] OJ L 225 (SRM Regulation).

[4] European Council, *Towards a Genuine Economic and Monetary Union,* 5 December 2012, p. 4, available at: https://www.consilium.europa.eu/media/23818/134069.pdf (accessed 30 May 2019).

[5] G. Lo Schiavo, *The development of a new bank resolution regime in Europe – fit for purpose?*, 29(11) Journal of International Banking Law & Regulation 689 (2014), p. 690.

[6] C.V. Gortsos, *The Single Resolution Mechanism (SRM) and the Single Resolution Fund (SRF): A Comprehensive Overview of the second main pillar of the European Banking Union* (3rd ed.), 2668653 SSRN Electronic Journal (2017), p. 30.

of liquidation proceedings (thus preventing spillover effects of a bank's failure on the economy) or resort to bail-out measures through public financial assistance facilities.[7]

The BRRD sets out an EU-wide framework for the resolution of financial institutions, which forms the backbone of the SRM Regulation.[8] The BRRD provides for substantive rules on resolution, which are implemented on the EU level by the institutional framework of the Single Resolution Mechanism (SRM). The resolution can be defined, by reference to the resolution objectives set out in Art. 31(2) of the BRRD, as:

> the restructuring of one or more financial institutions with the resolution tools implemented under the BRRD with the aim to ensure the continuity of critical functions, to avoid adverse impact on financial stability, to minimise reliance on public funds, to protect depositors; and to protect client funds and client assets.[9]

While all those objectives are of equal significance,[10] nevertheless recital 71 in the preamble to the BRRD provides that "the protection of covered depositors is one of the most important objectives of resolution." Art. 32 of the BRRD establishes three cumulative conditions for the initiation of a resolution. First, the institution must be deemed by the competent authority to be failing or likely to fail; second, there are no alternative measures that would prevent the failure of the institution within a reasonable time frame; and third, the resolution action is necessary in the public interest.

The first criterion, the failure or the likelihood of failure is defined under Art. 32(4) of the BRRD as a situation whereby one or more of the following circumstances are met: the institution infringes or is likely to infringe the requirements for the continuing authorisation and licensing of its activity; the assets of the institution are or will be, in the near future, less than its liabilities; the institution is or will be, in the near future, unable to pay its debts or other liabilities as they fall due; an extraordinary public financial support is required for the institution. It should be underlined that a resolution is considered to be a special measure of last resort, which is reflected by the second criterion. A resolution can only be initiated when "there is no reasonable prospect that any alternative private sector measures (...), or supervisory action, including early intervention measures or the write down or conversion of relevant capital instruments (...) taken in respect of the institution, would prevent the failure of the institution."[11] With regard to the public interest criterion, it should be stressed that a failing institution "should in principle be liquidated under normal insolvency proceedings."[12] However, a situation may occur in which normal insolvency proceedings could "jeopardise financial stability, interrupt the provision of critical functions, and affect the protection of depositors."[13] In such a

[7] *Ibidem*, p. 29.

[8] European Commission, *Finalising the Banking Union: European Parliament backs Commission's proposals*, Statement/14/119, 15 April 2014.

[9] Lo Schiavo, *supra* note 5, p. 693.

[10] BRRD, Art. 31(3).

[11] *Ibidem*, Art. 32(1)(b).

[12] *Ibidem*, Recital 45.

[13] *Ibidem*.

situation there would be a public interest in placing the institution under resolution instead of resorting to a normal insolvency proceeding. In any case, it is clear that "the winding up of a failing institution through normal insolvency proceedings should always be considered before resolution tools are applied."[14]

The conditions for resolution established in the BRRD grant the national resolution authorities much discretion in assessing whether an institution should be placed under resolution. It can be argued that this level of discretion may generate regulatory competition between resolution authorities,[15] and indeed the diverging regulatory practices in the Member States were one of the reasons cited as a justification for the SRM Regulation.[16]

The resolution criteria formulated in the BRRD are, in substance, identical to the criteria for the initiation of the resolution procedure under the Single Resolution Mechanism, although their procedural aspects differ[17] – in the case of the SRM, the national supervisory authorities are not competent to carry out the assessment of the criteria. When it comes to the first criterion, under Art. 18(1) of the SRM Regulation, in principle only the ECB, after consulting the Single Resolution Board, is competent to determine whether the entity is failing or likely to fail. As an exception to this rule the SRB may, in its executive session, make such an assessment only after informing the ECB of its intention to do so and only if the ECB, within three calendar days of receipt of that information, does not provide its own assessment.[18] With regard to the second criterion – the lack of a reasonable prospect for effective alternative private sector measures or supervisory action taken in respect of the entity – in the context of the SRM an assessment of this condition must be made by the SRB in its executive session, as well as, where applicable, by the national resolution authorities in close cooperation with the ECB.[19] The ECB may also inform the Board or the national resolution authorities concerned that it considers this criterion fulfilled.[20] Finally, in regard to the third criterion for resolution, i.e. the public interest criterion, such an assessment can be made by the SRB, but only:

> if it is necessary for the achievement of, and is proportionate to one or more of the resolution objectives referred to in Article 14 and winding up of the entity under normal insolvency proceedings would not meet those resolution objectives to the same extent.[21]

It should be noted that formally the SRB is not the ultimate arbiter of the public interest criterion, as other institutions participating in the decision-making process under the Single Resolution Mechanism are competent to object to the assessment of public interest made by the Board. Nevertheless, the practicalities of the review procedure do not exactly foster inter-institutional cooperation, in particular due to the very short

[14] *Ibidem*, Recital 46.

[15] Lo Schiavo, *supra* note 5, p. 694.

[16] SRM Regulation, Recital 21.

[17] Gortsos, *supra* note 6, p. 123.

[18] SRM Regulation, Art. 18(1).

[19] *Ibidem*, Art. 18(1).

[20] *Ibidem*.

[21] *Ibidem*, Art. 18(5).

time frame for the assessment to be made by both the Commission and the Council,[22] but also due to the highly technical nature of the resolution decision.[23]

The resolution objectives set out in Art. 14 of the SRM Regulation are, in essence, indistinguishable from those specified in Art. 31(2) of the BRRD – to ensure the continuity of critical functions; to avoid significant adverse effects on financial stability, in particular by preventing contagion, including to market infrastructures by maintaining market discipline; to protect public funds by minimising reliance on extraordinary public financial support; to protect depositors covered by Directive 2014/49/EU[24] and investors covered by Directive 97/9/EC;[25] and finally, to protect client funds and client assets. The fact that the resolution objectives set out in the BRRD were reproduced in the SRM Regulation clearly shows that the BRRD indeed constitutes a Single Rulebook of the second pillar of the Banking Union. The procedural changes introduced in the SRM Regulation, such as the involvement of the ECB in the assessment of the criteria for resolution, are merely a reflection of the supranational character of the Single Resolution Mechanism.[26]

The guidelines adopted by the European Banking Authority[27] on the basis of Art. 32(6) of the BRRD and in accordance with Art. 16 of the Regulation 1093/2010[28] are also relevant to the assessment of the resolution criteria. Although the guidelines are addressed to the competent national authorities "when they assess whether an institution is failing or likely to fail, according to Article 32(1)(a) of Directive 2014/59/EU, or to Article 32(2) respectively"[29] or "to institutions where they determine themselves to be failing or likely to fail, in accordance with Article 81(1) of Directive 2014/59/EU,"[30] they also provide an important input for the assessment of the resolution criteria carried out under Art. 18(1) of the SRM Regulation, given that pursuant to Art. 5(2) of the SRM Regulation the Single Resolution Board, the Council, and the Commission are subject to any guidelines and recommendations issued by the European Banking Authority under Art. 16 of its statutory regulation.

Besides the criteria and the objectives for the resolution explained above, the BRRD also constitutes the substantive backbone for the legal instruments available under the

[22] For a detailed account of this procedure, *see* Section 2 of this article.

[23] *See* M.B. Beroš, *Agencies in European Banking: A Critical Perspective*, Palgrave Macmillan, Cham: 2018, p. 75.

[24] Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes, text with EEA relevance [2014] OJ L 173.

[25] Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes [1997] OJ L 84.

[26] Lo Schiavo, *supra* note 5, p. 699.

[27] European Banking Authority, *Final report: Guidelines on the interpretation of the different circumstances when an institution shall be considered as failing or likely to fail under Article 32(6) of Directive 2014/59/EU*, EBA/GL/2015/07.

[28] Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [2010] OJ L 331.

[29] European Banking Authority, *supra* note 27, p. 11.

[30] *Ibidem.*

Single Resolution Mechanism,[31] in particular for the resolution tools which may be deployed by the SRB in the process of resolution. The resolution tools are included in the SRM Regulation mainly to confer directly to the Single Resolution Board the power to apply them in accordance with the procedure set out in the Art. 18 of the SRM Regulation, and their substantive content corresponds to the resolution tools introduced in the BRRD.[32] The resolution tools include the sale of a business, the creation of bridge institutions, asset separation, and the bail-in tool.[33]

The sale of business tool is the mechanism for effecting a transfer by a resolution authority of the instruments of ownership, such as the shares, assets, and the rights or liabilities to a purchaser that is not a bridge institution.[34] Such transfer may be made without the prior consent of the shareholders,[35] the institution, or any other third parties, but it must be made on "the commercial terms, having regard to the circumstances and the costs and expenses incurred in the resolution process."[36]

The bridge institution tool is the "mechanism for transferring instruments of ownership issued by an institution under resolution, or assets, rights or liabilities of an institution under resolution, to a bridge institution,"[37] which is a legal person/entity that meets the requirements laid down in Art. 41(2) of the BRRD.[38] The bridge institution must be wholly or partially owned by one or more public authorities and is controlled by the resolution authority.[39] Furthermore, it can only be created for the purpose of receiving and holding the shares or the other instruments of ownership, with a view to maintaining access to critical functions and, eventually, selling the institution to a private sector buyer.[40] The bridge institution tool can be used by the resolution authorities only when the sale of business tool could not be deployed.[41]

The asset separation tool is a special resolution tool which can be used "only in conjunction with other tools to prevent an undue competitive advantage for the failing entity."[42] It enables the resolution authorities to transfer the "assets, rights or liabilities of an institution under resolution to an asset management vehicle,"[43] i.e. a special purpose vehicle wholly owned by public authorities, created to manage the transferred assets with a view toward maximising their value through an eventual sale or an orderly wind down.[44]

[31] Lo Schiavo, *supra* note 5, p. 699.

[32] *Ibidem*, p. 700.

[33] SRM Regulation, Art. 22(2).

[34] BRRD, Art. 2(58) and identical Art. 3(30) of the SRM Regulation.

[35] SRM Regulation, Recital 70.

[36] *Ibidem*, Art. 24(2)(b).

[37] BRRD, Art. 2(60) and identical Art. 3(31) of the SRM Regulation.

[38] SRM Regulation, Art. 25(2).

[39] BRRD, Art. 40 (2)(a).

[40] *Ibidem*, Art. 40(2)(b).

[41] Lo Schiavo, *supra* note 5, p. 694.

[42] SRM Regulation, Recital 72.

[43] BRRD, Art. 2(55) and identical Art. 3(32) of the SRM Regulation.

[44] *Ibidem*, Art. 42(3).

Contrary to the resolution tools described above, the asset separation tool is not designed to continue the activities of the institution under resolution.

The harshest resolution tool for an institution placed under resolution is the bail-in tool, the introduction of which was justified by the need to "minimise the costs of the resolution of a failing institution borne by the taxpayers."[45] It aims to resolve the systemically important institutions without jeopardizing the financial stability, by ensuring that "shareholders and creditors of the failing institution suffer appropriate losses and bear an appropriate part of the costs arising from the failure of the institution,"[46] which in turn is supposed to incentivize them to better monitor the health of the institution. The bail-in tool is defined as "the mechanism for effecting the exercise of the write-down and conversion powers in relation to liabilities of an institution under resolution."[47] Art. 27(1) of the SRM Regulation provides that the bail-in may be applied in two cases – either to recapitalise a credit institution established in a participating Member State that meets the conditions for resolution to the extent sufficient to restore its ability to comply with the conditions for authorization (sufficient capital requirements) and to continue to carry out its normal activities in order to sustain sufficient market confidence in the entity; or to convert to equity or reduce the principal amount of claims or debt instruments that are transferred to a bridge institution with a view toward providing capital for that bridge institution or under the sale of business tool or the asset separation tool. In the first case, the bail-in may be applied only if there is a reasonable prospect that the application of that tool, together with other relevant measures, will restore the entity in question to financial soundness and long-term viability.[48] Through the conversion of debt to equity the exercise of the bail-in tool allows for the recapitalization of the credit institution, simultaneously binding the institution, the affected creditors, and the shareholders.[49] This makes the bail-in tool the strongest regulatory instrument, which can help to avoid granting public support to systemically important credit institutions by restructuring their balance sheets, effectively solving the "too-big-to-fail" problem.[50]

2. PROCEDURAL RULES ON RESOLUTION

Having reviewed the substantive rules of the resolution process, the procedural aspects of the EU-wide resolution framework established under the SRM Regulation are now examined. The SRM Regulation follows the distinction between "significant" and "less significant" entities, which was introduced in the SSM Regulation.[51] Similarly to

[45] *Ibidem*, Recital 67 and identical Recital 73 in the preamble to SRM Regulation.

[46] *Ibidem*.

[47] *Ibidem*, Art. 2(57) and identical Art. 3(33) of the SRM Regulation.

[48] SRM Regulation, Art. 27(2).

[49] Lo Schiavo, *supra* note 5, p. 696.

[50] *Ibidem*.

[51] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287 (SSM Regulation).

the division of tasks adopted for the purposes of the Single Resolution Mechanism, only the significant credit institutions are under the remit of the supranational resolution authority – the Single Resolution Board – which is responsible for drawing up the resolution plans and adopting all decisions relating to resolution of those institutions.[52] The SRB's competence is also reserved for those institutions in relation to which the ECB has decided to itself directly exercise its supervisory powers[53] as well as for other cross-border groups.[54] Resolution tasks towards the remaining "less significant" institutions are performed by the national resolution authorities.[55] The only exception to this rule is the situation in which the resolution action requires the use of the Single Resolution Fund – then the SRB is exclusively competent adopt the resolution scheme, regardless of the significance of the entity under resolution.[56]

The resolution procedure is set out in Art. 18 of the SRM Regulation. The first phase of the resolution is triggered once the European Central Bank, acting within its supervisory mandate, signals that a significant credit institution is failing or likely to fail, thus fulfilling the first of the conditions for resolution described above. As was explained, this assessment can also be carried out by the SRB in its executive session, but only after informing the ECB of its intention and only if the ECB, within three calendar days of receipt of such information, does not make its own assessment.[57] In the second phase, the assessment of the remaining two criteria for resolution is performed by the SRB, which in its executive session must establish whether there are no alternative measures that would prevent the failure of the institution within a reasonable time frame and whether the resolution action is necessary in the public interest. It should be noted here that the Board operates in plenary and executive sessions.[58] The latter are responsible for preparing all decisions concerning the resolution procedure and adopting those decisions.[59]

If the resolution conditions are met, the SRB adopts a resolution scheme.[60] The resolution scheme determines the details of the resolution tools to be applied to the institution under resolution, in particular any exclusions from the application of the bail-in tool,[61] and defines the specific amounts and purposes of the Single Resolution Fund to be used in support of the resolution action.[62] The Board enjoys a broad discretion when deciding on the resolution tools to be applied in the process of resolution. In the next step, immediately after the adoption of the resolution scheme, the

[52] SRM Regulation, Art. 7(2)(a).
[53] *Ibidem*, Art. 7(2)(a).
[54] *Ibidem*, Art. 7(2)(b).
[55] *Ibidem*, Art. 7(3).
[56] *Ibidem*.
[57] *Ibidem*, Art. 18(1).
[58] *Ibidem*, Art. 43(5).
[59] *Ibidem*, Recital 33.
[60] *Ibidem*, Art. 18(6).
[61] *Ibidem*, Art. 18(6)(b).
[62] *Ibidem*, Art. 18(6)(c).

Board must transmit it to the Commission,[63] which must review it in a limited time frame.

Within 24 hours from the transmission of the resolution scheme by the SRB, the Commission must either endorse the resolution scheme, or object to it with regard to the discretionary aspects of the scheme.[64] It follows that under the SRM Regulation, the ultimate assessment of SRB's discretion is the responsibility of the Commission. In addition, the Commission may decide, within 12 hours from the transmission of the resolution scheme by the SRB, to involve the Council in the resolution process. The scope of the involvement of the Council is limited – it may object to the resolution scheme on the grounds that the resolution scheme adopted by the Board does not fulfil the criterion of public interest, but only on a proposal from the Commission;[65] or it can be asked by the Commission to approve or object to a material modification of the amount of the Fund provided for in the resolution scheme of the Board.[66] The entire assessment, regardless of the involvement of the Council or the lack thereof, may take no more than 24 hours from the transmission of the resolution scheme by the Board. The resolution scheme proposed by the SRB enters into force if no objection has been expressed by the Council or by the Commission within a period of 24 hours after its transmission by the Board.

If, within 24 hours from the transmission of the resolution scheme by the Board, the Council has approved a proposal of the Commission for modification of the resolution scheme or the Commission has exercised its powers of objection, the Single Resolution Board must, within eight hours, modify the resolution scheme in accordance with the reasons provided for in the objection.[67] It thus follows that the entire procedure may take no more than 32 hours from the moment of transmission of the resolution scheme. If the Council objects to the placing of an institution under resolution on the grounds that the public interest criterion is not fulfilled, the relevant entity is wound up in an orderly manner in accordance with the applicable national law.[68] Once the resolution scheme enters into force, the SRB is responsible for ensuring that the necessary resolution action is taken to carry out the resolution scheme by the relevant national resolution authorities.[69] The resolution scheme is addressed to the relevant national resolution authorities and provides them with instructions on further resolution actions.[70] The national resolution authorities are obliged to take all necessary measures to implement the resolution scheme, acting in accordance with the national law transposing the BRRD.[71] The Board is also competent to issue instructions to the national resolution authorities

[63] *Ibidem*, Art. 18(7).

[64] *Ibidem*.

[65] *Ibidem*.

[66] *Ibidem*.

[67] *Ibidem*.

[68] *Ibidem*, Art. 18(8).

[69] *Ibidem*, Art. 18(9).

[70] *Ibidem*.

[71] *Ibidem*, Art. 29(1).

as to any aspect of the execution of the resolution scheme.[72] Moreover, should the national resolution authority fail to implement the resolution scheme, the SRB may give instructions in the form of decision directly to the institution under the resolution, which override any previous decision(s) adopted by the national resolution authority on the same matter.[73]

3. AN ANALYSIS OF THE EXISTING DECISIONS ON RESOLUTION ACTION TAKEN BY THE SINGLE RESOLUTION BOARD

The resolution framework discussed above was tested for first time in 2017, when the situation in three banks was assessed by the Single Resolution Board pursuant to Art. 18 of the SRM Regulation. Another case was considered by the SRB in early 2018. The decisions taken by the Board in respect to these credit institutions varied and are considered below.

3.1. Banco Popular Español, S.A.

On 7 June 2017, the Single Resolution Board decided to adopt a resolution scheme in respect of Banco Popular Español, S.A.,[74] a Spanish banking group consisting of four credit institutions within the participating Member States: (1) Banco Popular Español, S.A. – the parent undertaking of the group, established in Spain; (2) Banco Pastor, S.A. – established in Spain; (3) Popular Banca Privada, S.A. – established in Spain; and (4) Banco Popular Portugal, S.A. – established in Portugal. The last three credit institutions mentioned were wholly-owned subsidiaries of Banco Popular Español. The Banco Popular group also had a presence in third countries through subsidiaries, branches, and representative offices and participated in a number of joint ventures.

The reason for the Banco Popular's difficulties was "the liquidity situation of the institution, which has deteriorated significantly since October 2016, due to the material cash outflow across all customer segments."[75] As a result, the ECB, in its "failing or likely to fail" assessment transmitted to the SRB on 6 June 2017,[76] decided that the institution "has insufficient options to restore its liquidity position in order to ensure that it will be in a stable position to meet its liabilities as they fall due."[77] Considering

[72] *Ibidem*, Art. 28(2).

[73] *Ibidem*, Art. 29(3).

[74] Single Resolution Board, Decision to take resolution action in respect of Banco Popular Español, S.A. (2017/C 222/05) [2017] OJ C 222.

[75] Decision of the Single Resolution Board in its executive session of 7 June 2017 concerning the adoption of a resolution scheme in respect of Banco Popular Español, S.A., (the "Institution") with a Legal Entity Identifier: 80H66LPTVDLM0P28XF25, Addressed to FROB (SRB/EES/2017/08), Non-confidential version, p. 5.

[76] *Ibidem*, p. 10.

[77] *Ibidem*, p. 5.

the ECB's assessment of the "failing or likely to fail" criterion, the SRB determined that "there are objective elements indicating that the Institution is likely in the near future to be unable to pay its debts or other liabilities as they fall due",[78] and hence that the first condition for resolution was satisfied in respect of Banco Popular.

Regarding the second criterion for resolution, the SRB, in close cooperation with the ECB, concluded that there was no reasonable prospect that any alternative private sector measures could prevent the failure of the institution, as the private sales process had not led to a positive outcome within a timeframe that would allow the institution to be able to pay its liabilities as they fall due.[79] Moreover, it was determined that given the fact that the institution itself recognized that it met the conditions to be deemed "failing or likely to fail", it was unlikely that it would be able to "mobilise sufficient additional liquidity though regular market transactions or central bank operations"[80] or through other contingency funding measures within the necessary timeframe. Furthermore, it was established by the ECB in its "failing or likely to fail" assessment that there were no available supervisory or early intervention measures that could restore the liquidity position of the Banco Popular in an immediate fashion, given the extent and pace of the liquidity deterioration observed.[81] Considering the arguments referred to above, the SRB concluded that the second condition for resolution was satisfied in this case.

With regard to the public interest criterion, the Board carried out its assessment of the circumstances of this case in light of resolution objectives specified in Art. 14(2) of the SRM Regulation. The SRB established that the resolution action carried out through use of the resolution powers was necessary for the achievement of, and was proportionate to, the following two resolution objectives: ensuring the continuity of critical functions and avoiding significant adverse effects on financial stability, in particular by preventing contagion, including to market infrastructures, and by maintaining market discipline.[82] It was determined by the Board that Banco Popular performs activities, services or operations the discontinuance of which would, due to its size, likely lead to the disruption of services that are essential to the real economy of Spain and disrupt the financial stability in Spain.[83] The Banco Popular Group was at that time the sixth largest banking group in Spain, with a network of 1664 branches and 2368 ATMs providing services to around 1.6 million clients.[84] Its market share in the national market for deposit-taking in Spain was estimated to be between 5 and 10 per cent.[85] Given the national reach and size of the institution, any disruption to its

[78] *Ibidem*, p. 10.
[79] *Ibidem*, p. 11.
[80] *Ibidem*.
[81] *Ibidem*.
[82] *Ibidem*, p. 12.
[83] *Ibidem*.
[84] *Ibidem*, p. 13.
[85] *Ibidem*, p. 14.

deposit services could have a material negative impact on its clients and have indirect adverse effects on other stakeholders, in particular through an increase in the costs of funding of comparable banks due to the uncertainty regarding the validity of the Spanish banking sector.[86]

In addition to the adverse effects of a disruption of the deposit-taking function, the SRB also underlined the potential negative impact of any disruption in lending to small and medium-sized enterprises on the Spanish real economy.[87] Banco Popular was a leading bank in lending to this group, with a market share in the range of between 15 and 20 per cent of the total.[88] The SRB also took into consideration the fact that Banco Popular, due to its large number of clients, was intervening in a significant volume of payments. Considering the central role that the payment services function plays in the economy, the Board established, that the interruption of this function could generate financial stability problems.[89] Neither of the market functions of Banco Popular were considered by the SRB to be substitutable,[90] as it found that they "cannot be replaced in an acceptable manner and within a reasonable time frame thereby avoiding systemic problems for the real economy and financial markets."[91]

As regards the objective of avoiding significant adverse effects on financial stability, the Board argued that the size and relevance of Banco Popular, which constituted the parent undertaking of the sixth largest banking group in Spain with total assets amounting to 147 billion euros, made it one of the main market participants in Spain.[92] Thus swift resolution action was necessary and proportionate to avoid the adverse effects that the failure of the institution would have on financial stability.[93] Moreover, it was determined by the SRB that winding up Banco Popular under normal insolvency proceedings would not achieve the above-mentioned resolution objectives to the same extent as the resolution action.[94]

After the assessment of the resolution criteria, the SRB decided that the application of the sale of business tool pursuant to Art. 24 of the SRM Regulation would provide an appropriate, necessary, and proportionate way to meet the resolution objectives.[95] While deciding on the application of the sale of business tool, the SRB took into account the interests of Portugal, where one of the subsidiaries of the institution under resolution operated. The Board noted that the sale of business tool with the purpose of transferring shares to a private purchaser "has as a result that there will be no impact on the Portuguese subsidiary. On the contrary, in the case of insolvency proceedings of

[86] *Ibidem.*
[87] *Ibidem.*
[88] *Ibidem.*
[89] *Ibidem*, p. 16.
[90] *Ibidem*, pp. 14-16.
[91] *Ibidem*, p. 16.
[92] *Ibidem*, p. 17.
[93] *Ibidem*, p. 18.
[94] *Ibidem,* p. 12.
[95] *Ibidem*, p. 19.

the Institution, it is likely that the Portuguese subsidiary would have been negatively impacted."[96] The Board also determined that the application of other resolution tools would not meet the resolution objectives to the same extent in the case at stake. In particular, the SRB considered that the application of the bail-in tool of Article 27(1) of the SRM Regulation (even if combined with the asset separation tool) could not immediately and effectively address the liquidity situation of the institution and that the application of the bridge institution tool would not be proportionate, as the asset separation tool could achieve the same result within a shorter time frame.[97]

In the execution of the resolution scheme, the SRB instructed the Fondo de Resolución Ordenada Bancaria (FROB), which is the Spanish executive resolution authority, to write-down and convert existing capital instruments of Banco Popular pursuant to Art. 21 of the SRM Regulation prior to the transfer of ownership in order to address the shortfall in the market value of the institution. Pursuant to Art. 24(1)(a) of the SRM Regulation, the SRB ordered the newly created shares, including the entire business of Banco Popular and its subsidiaries, to be transferred to Banco Santander S.A. for a purchase price of 1 euro[98] in order to ensure the continuity of the critical functions of the banking group. The resolution scheme for Banco Popular Español S.A. proposed by the Board was transmitted to the Commission on 7 June 2017 in accordance with Art. 18(7) of the SRM Regulation and endorsed by the Commission on the same day.[99] The resolution scheme was duly implemented by FROB by virtue of a Resolution of the FROB Governing Committee.[100]

3.2. Veneto Banca S.p.A.

On 23 June 2017, the Single Resolution Board assessed the conditions for resolution in respect of Veneto Banca S.p.A.,[101] a parent undertaking of the Italian banking group Gruppo Veneto Banca, consisting of four main subsidiaries established in Italy: (1) Banca Apulia S.p.A. – a regional commercial bank, operating in the South-East of Italy; (2) Banca Intermobiliare di Investimento e Gestioni S.p.A. – an institution specialised in private banking, wealth management, and corporate finance; (3) Claris Factor S.p.A.; and (4) Claris Leasing S.p.A. The Group comprised a Croatian subsidiary – Veneto Banka d.d.; an Albanian subsidiary – Veneto Banca sh.a.; and a Moldavian subsidiary – Eximbank d.d. It also operated through branches in Romania.

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[96] *Ibidem*, pp. 18-19.

[97] *Ibidem*, p. 19.

[98] *Ibidem*, p. 22.

[99] Commission Decision (EU) 2017/1246 of 7 June 2017 endorsing the resolution scheme for Banco Popular Español S.A. (notified under document C(2017)4038) [2017] OJ L 178.

[100] Resolution of the FROB Governing Committee adopting the measures required to implement the Decision of the Single Resolution Board in its Extended Executive Session of 7 June 2017 concerning the adoption of the resolution scheme in respect of Banco Popular Español, available at: https://bit.ly/2IbmIBB (accessed 30 May 2019).

[101] Single Resolution Board, Decision concerning the assessment of the conditions for resolution in respect of Veneto Banca SpA (2017/C 242/02) [2017] OJ C 242.

Similar to the case of the Banco Popular, the difficulties of the Italian bank were caused by a substantial deterioration of its liquidity position.[102] On 23 June 2017, the ECB communicated to the SRB its "failing or likely to fail" assessment of Veneto Banca, wherein it noted that the institution "has experienced material capital depletions"[103] and repeatedly breached supervisory capital requirements. Consequently, the ECB concluded that "there is material evidence to conclude that the Institution infringes the requirements for continuing authorisation in a way that would justify the withdrawal of the authorisation by the competent authority."[104] Following the ECB's "failing or likely to fail" assessment, the Board determined that the first condition for resolution was satisfied in respect of Veneto Banca.[105]

With regard to the second criterion for resolution – the lack of alternative measures that would prevent the failure of the institution within a reasonable time frame – the SRB established that there was no reasonable prospect that any alternative private sector measures could prevent the failure of the institution.[106] Moreover, the Board decided that there was "no reasonable prospect that any supervisory action, including early intervention measures could prevent the failure of the Institution,"[107] which was confirmed by the ECB in its "failing or likely to fail" assessment. Accordingly, the SRB concluded that the second condition for resolution was satisfied in the case of Veneto Banca.

Regarding the third condition for resolution, i.e. the public interest criterion, the Board determined that the circumstances of this case did not meet the resolution objectives set out in Art. 14(2) of the SRM Regulation. Firstly, the Board found that the institution did not provide critical functions within the meaning of Art. 2(1)(35) of the BRRD,[108] as "the functions identified by the Institution as critical, i.e. deposit-taking, lending activities and payment services, are provided to a limited number of third parties and can be replaced in an acceptable manner and within a reasonable timeframe by such parties."[109] The SRB explained that a sudden disruption of the deposit-taking function would not have a material negative impact on third parties, as the institution's deteriorating market position resulted partly from reputational damages

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[102] Decision of the Single Resolution Board in its executive session of 23 June 2017 concerning the assessment of the conditions for resolution in respect of Veneto Banca S.p.A. (the "Institution"), with the Legal Entity Identifier 549300W9STRUCJ2DLU64, Addressed to Banca d'Italia in its capacity as National Resolution Authority (SRB/EES/2017/11), Non-confidential version, p. 5.

[103] *Ibidem.*

[104] *Ibidem,* p. 10.

[105] *Ibidem.*

[106] *Ibidem.*

[107] *Ibidem,* p. 11.

[108] According to Art. 2(1)(35) of the BRRD "critical functions" means activities, services or operations the discontinuance of which is likely in one or more Member States, to lead to the disruption of services that are essential to the real economy or to disrupt financial stability due to the size, market share, external and internal interconnectedness, complexity or cross-border activities of an institution or group, with particular regard to the substitutability of those activities, services or operations.

[109] Decision of the Single Resolution Board, *supra* note 102, p. 12.

following allegations of mis-selling.[110] This led to a significant decline of Veneto Banca's systemic relevance, as measured by the group's market share in the national market for deposit-taking, which declined from 1.24 per cent at the end of 2014 to 0.91 per cent at the end of 2016.[111] Moreover, the market had proven itself capable of absorbing the significant deposit outflows from the institution.[112] As regards the lending function of the bank, the Board found that its sudden disruption would not have a material negative impact on the market, due to the declining relevance of the institution, which at the end of 2016 provided lending services to 98,738 households (out of 25.4 million households in Italy), to 42,387 small and medium-sized enterprises (out of 4.4 million small and medium-sized enterprises in Italy), and to 1,276 other enterprises.[113] In any case, the institution had only a limited capacity for granting new loans, so potential clients already needed to find different loan providers.[114] As far as the payments function was concerned, the SRB argued that "market share developments for the deposit-taking function can be regarded as a proxy for the declining relevance of the Institution with regard to payment and cash services."[115] The Board decided that due to the specific circumstances of the case, as presented above, and given the fact that the institution does not provide indirect access to market infrastructures to institutions that are not part of Gruppo Veneto Banca, the payment and cash services provided by Veneto Banca should not be considered to constitute a critical function.[116] The SRB also established that all of the functions identified above should be considered to be substitutable,[117] as they "can be replaced in an acceptable manner and within a reasonable time frame, thereby limiting the potential impact on the real economy and financial markets."[118] Consequently, the resolution objective set out in Art. 14(2)(a) of the SRM Regulation was not satisfied.

Secondly, the Board found that the failure of the institution, on a stand-alone basis, was not likely to result in significant adverse effects on financial stability in Italy.[119] The SRB argued that the institution had been classified by the ECB as a "significant institution" solely on the basis of its size. However, the size of the total assets of Gruppo Veneto Banca declined rapidly and as of December 2016 they measured at 27.9 billion euros,[120] which was already below the 30 billion euros threshold set out in Art. 5(4)

[110] For details of mis-selling allegations see: R. Sanderson, *Once-thriving Veneto becomes heart of Italy's bank crisis*, Financial Times, available at: https://www.ft.com/content/04869eca-b15e-11e6-9c37-5787335499a0 (accessed 30 May 2019).

[111] Decision of the Single Resolution Board, *supra* note 102, p. 12.

[112] *Ibidem*.

[113] *Ibidem*, p. 13.

[114] *Ibidem*.

[115] *Ibidem*, p. 14.

[116] *Ibidem*.

[117] *Ibidem*, pp. 13-14.

[118] *Ibidem*. pp. 14-15.

[119] *Ibidem*, p. 15.

[120] *Ibidem*.

of the SSM Regulation for a credit institution to be qualified as "significant". This decline continued in 2017. Furthermore, Veneto Banca had not been classified as systemically important by Banca d'Italia, which is the national resolution authority of Italy, in either 2015 or 2016.[121] Considering the relatively low financial and operational interconnections with other financial institutions, the Board deemed the probability of both direct and indirect contagion on other financial institutions as highly unlikely.[122] The SRB also determined that although a potential adverse impact on retail customers and small and medium-sized enterprises in certain regions could not be excluded in the case of failure of Veneto Banca, there would be no significant impact at the national level.[123] Consequently, the resolution objective set out in Art. 14(2)(b) of the SRM Regulation was not satisfied.

Thirdly, the SRB found that any pay-out by the deposit guarantee scheme to the covered depositors under the ordinary insolvency proceedings provided for under Italian law (Compulsory Administrative Liquidation) would not qualify as extraordinary public financial support[124] in light of the Commission's Banking Communication.[125] Therefore, the resolution objective of protecting public funds by minimising reliance on extraordinary public financial support set out in Art. 14(2)(c) of the SRM Regulation was not satisfied.

Fourthly, the Board found that the Compulsory Administrative Liquidation proceedings could achieve the resolution objective set out in Art. 14(2)(d) of the SRM Regulation to the same extent as resolution[126] with regard to protecting both depositors covered by the BRRD and investors covered by Directive 97/9/EC. Consequently, the resolution objective set out in Art. 14(2)(c) of the SRM Regulation was not satisfied.

Finally, the Board found that the Italian financial law (Legislative Decree 58/1998) provides specific rules which sufficiently protect client funds and client assets by separating them from the credit institution's own assets, as well as from the assets of other clients.[127] Moreover, the Italian Banking Act (Legislative Decree 385/1993) protects financial instruments belonging to clients in the context of the Compulsory Administrative Liquidation proceedings.[128] Thus, the SRB concluded that given the above, the ordinary insolvency proceedings provided for under Italian law could protect client funds and client assets to the same extent as a resolution action, and therefore the resolution objective set out in Art. 14(2)(e) of the SRM Regulation was not satisfied.

[121] *Ibidem*.

[122] *Ibidem*, pp. 15-16.

[123] *Ibidem*, p. 16.

[124] *Ibidem*, p. 18.

[125] Communication from the Commission on the application, from 1 August 2013, of State aid rules to support measures in favour of banks in the context of the financial crisis (2013/C 216/01) [2013] OJ C 216.

[126] Decision of the Single Resolution Board, *supra* note 102, pp. 18-19.

[127] *Ibidem*, p. 20.

[128] *Ibidem*, p. 21.

Since none of the resolution objectives specified in Art. 14(2) of the SRM Regulation were fulfilled, the Board concluded that although the first two conditions for resolution were satisfied, resolution action in respect of the institution was not necessary in the public interest within the meaning of Art. 18(1)(c) and (5) of the SRM Regulation.[129] Therefore, the SRB decided not to place Veneto Banca under resolution.[130] The decision entered into force on 23 June 2017 at 18:15 CET. As a consequence, the winding up of the bank was carried out under ordinary liquidation proceedings launched by the Italian authorities.

3.3. Banca Popolare di Vicenza S.p.A.

The decision concerning the assessment of the conditions for resolution in respect of Banca Popolare di Vicenza S.p.A.[131] was also issued on 23 June 2017 and entered into force just 30 minutes after the decision concerning Veneto Banca S.p.A.[132] As the matter of fact, the ECB's "failing or likely to fail" assessment was transmitted simultaneously for both Veneto Banca and Banca Popolare di Vicenza.[133] Due to the similar situation of both banks, the decision taken in respect of Banca Popolare di Vicenza should be considered in the context of the decision taken in respect of Veneto Banca.

Banca Popolare di Vicenza S.p.A. was a parent undertaking of the Italian banking group Gruppo Banca Popolare di Vicenza, consisting of the following main subsidiaries established in Italy: (1) Banca Nuova S.p.A.; (2) Farbanca S.p.A.; (3) Prestinuova S.p.A.; (4) NEM SGR S.p.A.; (5) BPVi Multicredito, (6) Servizi Bancari S.c.p.A. and (7) Immobiliare Stampa S.c.p.A. The group had a subsidiary in Ireland – BPV Finance International Plc, and a limited presence in third countries only through representative offices (i.e. China, India, Brazil and Russia).

The assessment of the conditions for resolution in respect of Banca Popolare di Vicenza was substantially the same as in the case of Veneto Banca. There was literally no difference in the Board's considerations regarding the first and the second conditions for resolution.[134] Even in the assessment of the public interest criterion there was very little difference, due to the fact that the market functions provided by both institutions were identical and their market shares were comparable. Nevertheless, some slight discrepancies between both cases existed and are highlighted below.

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[129] *Ibidem*, p. 11.

[130] *Ibidem*, p. 10.

[131] Single Resolution Board, Decision concerning the assessment of the conditions for resolution in respect of Banca Popolare di Vicenza SpA (2017/C 242/03) [2017] OJ C 242.

[132] Decision of the Single Resolution Board in its executive session of 23 June 2017 concerning the assessment of the conditions for resolution in respect of Banca Popolare di Vicenza S.p.A. (the "Institution"), with the Legal Entity Identifier V3AFM0G2D3A6E0QWDG59, Addressed to Banca d'Italia in its capacity as National Resolution Authority (SRB/EES/2017/12), Non-confidential version, p. 21.

[133] European Central Bank, *Press release "ECB deemed Veneto Banca and Banca Popolare di Vicenza failing or likely to fail"*, 23 June 2017, available at: https://bit.ly/2s5ZLpi (accessed 30 May 2019).

[134] Decision of the Single Resolution Board, *supra* note 102, pp. 10-11.

Firstly, it should be noted that there was a minor difference in the market share of both institutions. Due to the allegations of mis-selling which plagued both banks, by the end of 2016 the market share in the national market for deposit-taking of Gruppo Banca Popolare di Vicenza had fallen to 0.9 per cent[135] compared to 0.91 per cent in the case of Gruppo Veneto Banca. A similar decline was also visible in the market share of Gruppo Banca Popolare di Vicenza in the national market for lending, which measured 1.4 per cent at the end of 2016[136] compared to 1.15 per cent in the case of Gruppo Veneto Banca. Regardless of these differences, the analysis of the Board was identical in both cases and hence the SRB established that Banca Popolare di Vicenza did not perform activities, services or operations, the discontinuance of which would be likely to lead to the disruption of services that are essential to the real economy of Italy or the disruption of financial stability in Italy,[137] since all the functions performed by the institution are substitutable.[138] Consequently, the resolution objective set out in Art. 14(2)(a) of the SRM Regulation was not satisfied.

Secondly, the argumentation of the SRB differed in respect of the objective of avoiding significant adverse effects on financial stability. In the case of Banca Popolare di Vicenza, the size of the total assets of its banking group measured at 34.4 billion euros, so it clearly exceeded the size threshold to be considered as a "significant institution". Nevertheless, the Board argued that the total assets of the group "were only slightly above the size threshold (EUR 30 billion)"[139] and that "the business volume of the Institution is rapidly decreasing."[140] Based on these arguments, and on the fact that Banca Popolare di Vicenza had not been classified as systemically important by Banca d'Italia in either 2015 or 2016,[141] the SRB concluded that the failure of the institution, on a stand-alone basis, was not likely to result in significant adverse effects on financial stability in Italy.[142]

It should be pointed out that the Board also considered any potential adverse effects resulting from the simultaneous failure of Banca Popolare di Vicenza and of Veneto Banca. The Board established that "[i]f the Banks were assumed to be perceived by the market as a single entity, the latter would result in Italy's eighth largest bank in terms of total assets"[143] and would score well below the systemic relevance threshold, in particular due to the interconnectedness and complexity of such an entity.[144] The SRB considered that a simultaneous failure of both banks might have an impact on financial stability, but it argued that such impact would likely not be significant.[145] The

[135] *Ibidem*, p. 12.
[136] *Ibidem*, p. 13.
[137] *Ibidem*, p. 12.
[138] *Ibidem*.
[139] *Ibidem*, p. 15.
[140] *Ibidem*.
[141] *Ibidem*.
[142] *Ibidem*.
[143] *Ibidem*, p. 17.
[144] *Ibidem*.
[145] *Ibidem*.

Board argued that due to the low interconnectedness of both banks with other financial institutions, the risk of contagion within the financial system was low.[146] Moreover, it contended that both banks had a highly diversified funding structure and they were of minor importance to the national funding market.[147] Furthermore, the Board stated that the impact of a simultaneous failure of both banks on the real economy would be limited, as a result of their insignificant market share for both lending and deposit-taking, and diminishing credit supply caused by the capital constraints resulting from insufficient operating profitability and low asset quality.[148] The SRB also noted that even in the core region of Veneto, which was the primary venue of both banks' operations, their market had deteriorated without having a measurable impact as evidenced by key economic indicators.[149] Finally, the Board examined the impact of the alleged wide-spread mis-selling of bank bonds to retail customers on the market perception of both banks, finding that it had already contributed to a severe loss of confidence which had already resulted in significant reductions of holdings in bank bonds and massive deposit withdrawals in both banks.[150] Consequently, the Board decided that even in the case of the simultaneous failure of Banca Popolare di Vicenza and of Veneto Banca there would be no significant adverse effects on financial stability, and therefore the resolution objective set out in Art. 14(2)(b) of the SRM Regulation was not satisfied.

The SRB's considerations in respect of the resolution objectives set out in Art. 14(2)(c), 14(2)(d) and 14(2)(e) of the SRM Regulation constituted an exact copy of those included in the decision concerning the assessment of the conditions for resolution in respect of Veneto Banca,[151] so they will not be repeated here. The SRB concluded that none of the resolution objectives specified in Art. 14(2) of the SRM Regulation were fulfilled and thus resolution action was not warranted in the public interest.[152] Thus the SRB decided not to place Banca Popolare di Vicenza under resolution.[153]

3.4. ABLV Bank, AS and ABLV Bank Luxembourg S.A.

On 23 February 2018, the Single Resolution Board assessed the conditions for resolution in respect of ABLV Bank, AS – a credit institution established in Latvia – and its subsidiary ABLV Bank Luxembourg S.A., established in Luxembourg. The resolution proceedings were initiated by the ECB, which determined that "ABLV Bank was failing or likely to fail in accordance with the Single Resolution Mechanism Regulation."[154]

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[146] *Ibidem.*

[147] *Ibidem.*

[148] *Ibidem.*

[149] *Ibidem.*

[150] *Ibidem*, p. 18.

[151] *Ibidem*, pp. 18-21.

[152] *Ibidem*, p. 11.

[153] *Ibidem*, p. 10.

[154] European Central Bank, *Press release "ECB determined ABLV Bank was failing or likely to fail"*, 23 February 2018, available at: https://bit.ly/2YRZrLv (accessed 30 May 2019).

The same determination was also made in respect of ABLV Bank Luxembourg.[155] The reason cited by the ECB in both cases was a significant deterioration of liquidity, due to which the banks were likely to be unable to pay their debts or other liabilities as they fall due.[156] Moreover, the ECB established that the ABLV Bank "did not have sufficient funds which are immediately available to withstand stressed outflows of deposits before the payout procedure of the Latvian deposit guarantee fund starts."[157] The abrupt wave of withdrawal of deposits was caused by the announcement by the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) of a draft measure to name ABLV Bank an institution of primary money laundering concern pursuant to Section 311 of the USA PATRIOT Act.[158] As a result, the bank lost access to US dollar funding. In order to stabilise the outflows from ABLV Bank, on 19 February 2018 the ECB instructed the Latvian supervisory authority, the Financial and Capital Markets Commission (FCMC), to impose a moratorium on the bank,[159] which introduced a prohibition of all payments by ABLV Bank on its financial liabilities.[160] The measure was not sufficient to restore the liquidity position of the bank, which prompted the ECB's "failing or likely to fail" assessment.

Following the "failing or likely to fail" determination, the ECB duly informed the Single Resolution Board, which carried out the assessment of the resolution criteria set out in Art. 18 of the SRM Regulation in respect of both institutions. Since as of time of writing resolution decisions have not been published by the SRB, the analysis of the Board's assessment will be based on the notices summarising the decision taken in respect of both banks.[161] The notices published by the SRB are almost identical, therefore the cases of both the Latvian bank and its subsidiary are considered together.

In both cases the Board did not question the assessment of the 'failing or likely to fail' criterion made by the ECB.[162] With regard to the second condition for resolution, the Board concluded that in both cases there were no alternative private and supervisory actions that could prevent the failure of the bank within a reasonable time frame, although the justification for this conclusion was different in each case. In the case of ABLV Bank, the SRB quoted the bank's inability to implement any available liquidity recovery

[155] *Ibidem.*

[156] *Ibidem.*

[157] *Ibidem.*

[158] Financial Crimes Enforcement Network, *Proposal of Special Measure Against ABLV Bank, AS as a Financial Institution of Primary Money Laundering Concern,* 31 CFR Part 1010, RIN 1506–AB39, available at: https://bit.ly/2HEmKCD (accessed 30 May 2019).

[159] European Central Bank, *Press release "ECB instructs national supervisor to impose moratorium on ABLV Bank"*, 19 February 2018, available at: https://bit.ly/2I28gvD (accessed 30 May 2019).

[160] A memorandum was also imposed on ABLV Bank Luxembourg by the Luxembourg supervisory authority – Commission de Surveillance du Secteur Financier.

[161] Notice summarising the decision taken in respect of ABLV Bank, AS, available at: https://srb.europa.eu/sites/srbsite/files/20180223-summary_decision_-_latvia.pdf, and Notice summarising the decision taken in respect of ABLV Bank Luxembourg S.A., available at: https://srb.europa.eu/sites/srbsite/files/20180223_summary-decision_-_luxembourg.pdf (both accessed 30 May 2019).

[162] *Ibidem.*

options from its 2017 Recovery Plan that could effectively address its situation,[163] while in the case of its Luxembourg subsidiary it cited the bank's inability to obtain financial support from the parent company and the lack of other implementable measures in the group recovery plan.[164] In both cases the absence of available supervisory or early intervention measures that could restore the liquidity position of the Bank and the inability of a write-down and conversion of capital instruments to prevent the failure of the bank were invoked.[165]

The Board's assessment of the third condition for resolution was literally identical in both cases. The SRB concluded that, given the particular characteristics of the banks and their specific financial and economic situation, resolution action was not necessary in the public interest.[166] The Board established that the functions performed by both banks were not critical, since their discontinuance would lead neither to the disruption of services that are essential to the real economy of, respectively, Latvia or Luxembourg; nor to the disruption of financial stability therein or in other Member States.[167] Furthermore, the SRB determined that the failure of either bank was not likely to result in significant adverse effects on financial stability in, respectively, Latvia or Luxembourg, or in other Member States, taking into account, in particular, the low financial and operational interconnections with other financial institutions.[168]

Consequently, the Board concluded that while the conditions for resolution action of Art. 18(1)(a) and (b) of SRM Regulation were met in both cases, the condition of Art. 18(1)(c) was not satisfied in respect of either bank.[169] Therefore it was decided that ABLV Bank and ABLV Bank Luxembourg would not be placed under resolution.[170] As a consequence, the winding up of the banks took place under the laws of Latvia and Luxembourg, respectively.

CONCLUSIONS

While the relatively short history of the operation of the Single Resolution Mechanism – consisting so far of only five decisions of the Single Resolution Board – does not allow for drawing any definitive conclusions regarding the functioning of the supranational resolution framework, so far the Mechanism seems to be operating efficiently. The SRB has proven to be capable of carrying out, in a very short time frame, the assessment of the conditions for resolution in respect of credit institutions deemed failing or likely to fail

[163] Notice summarising the decision taken in respect of ABLV Bank, AS.

[164] Notice summarising the decision taken in respect of ABLV Bank Luxembourg S.A.

[165] Notice summarising the decision taken in respect of ABLV Bank, AS and Notice summarising the decision taken in respect of ABLV Bank Luxembourg S.A.

[166] *Ibidem.*

[167] *Ibidem.*

[168] *Ibidem.*

[169] *Ibidem.*

[170] *Ibidem.*

by the ECB – each decision was adopted on the same day as the "failing or likely to fail" assessment was transmitted. Moreover, in the case of Banco Popular Español, which so far is the only instance where a resolution scheme was adopted by the Board, the Commission managed to review the resolution scheme within the 24-hour period provided for in Art. 18(7) of the SRM Regulation. However, it should be noted that the Council has not yet been involved by the Commission in the decision-making process regarding a resolution, so the efficiency of this aspect of the framework remains to be tested.

From the cases discussed above it is clear that the public interest criterion enshrined in Art. 18(1)(c) of the SRM Regulation is key to enabling any resolution action. In its assessment the SRB focuses on the resolution objectives set out in Art. 14(2) of the SRM Regulation, in particular on the objectives of ensuring the continuity of critical functions and avoiding significant adverse effects on financial stability. The impact of the disruption of market functions provided by a bank on financial stability is considered by the Board in terms of the size and relevance of the institution, as measured by its market share. For instance, in the case of Banco Popular, the market share in the national market for deposit-taking was estimated at between 5 and 10 per cent, combined with a market share in the national market for lending to small and medium-sized enterprises ranging between 15 and 20 per cent, which was considered sufficient to qualify the bank as big enough to significantly impact the financial stability of Spain should the market functions of the bank be disrupted. On the other hand, in the cases of the Italian banks, their combined national market shares of 2.55 per cent for lending and 1.81 per cent for deposit-taking were not considered by the Board to be sufficient to significantly impact the financial stability of Italy in the case of a simultaneous failure of both credit institutions.[171] The precise share of the market captured by the bank in order to deem the classification of its functions as critical for ensuring the financial stability is unclear from the existing body of SRB's decision, although some threshold may be established in the subsequent cases.

Finally, it should be noted that regardless of the effectiveness of the Single Resolution Mechanism framework when it comes to the objective of protection of public funds once the resolution scheme is adopted, in the cases where the Board takes no resolution action the national insolvency regimes often allow for the bail-out of a failing institution. The case of Italian banks – where the SRB left the winding up of the banks to Banca d' Italia under the insolvency proceedings of Italian law, which does not prevent the bail-out of senior creditors – it ended up in a pay-out of almost 17 billion euro in cash injections and state guarantees from the Italian State to Intesa Sanpaolo, Italy's largest retail bank, which offered to buy the healthy assets of the two Veneto banks for the symbolic sum of 1 euro. The measures were meant "to enable the sale of parts of the two banks' activities to Intesa, including the transfer of employees"[172] and "to enable the wind down of the remaining liquidation mass, financed by loans provided by Intesa."[173] The state aid

[171] Decision of the Single Resolution Board, *supra* note 132, p. 17.

[172] European Commission, *Press Release IP/17/1791*, 25 June 2017.

[173] *Ibidem.*

provided by Italy was approved by the Commission, which found the measures to be in line with EU State aid rules, in particular the 2013 Banking Communication.[174] In the press release concerning the Commission's decision, Commissioner Vestager was quoted saying that "Italy considers that State aid is necessary to avoid an economic disturbance in the Veneto region as a result of the liquidation of BPVI and Veneto Banca, who are exiting the market after a long period of serious financial difficulties."[175] It should be noted that the assessment of Italian authorities in this respect runs contrary to the assessment provided by the SRB, which deemed the impact of a simultaneous failure of Veneto Banca and Banca Popolare di Vicenza on financial stability, even in the Veneto region, to be insignificant. The decision of Italian government to shield senior creditors was motivated by political considerations,[176] which trumped over economic concerns. Since a significant amount of the Veneto bank's debt had been mis-sold to retail investors, the government feared a public backslash resulting from the imposition of losses on retail bondholders.[177] As a result, a heavy burden was placed on the Italian taxpayers. The outcome of the cases of Veneto Banca and Banca Popolare di Vicenza provide a compelling argument in favour of harmonising the national frameworks governing the winding-up of credit institutions in a manner which would prevent the national authorities from bailing-out failing banks with taxpayers' money.[178] Indeed, it could be argued that such harmonization is necessary in order to complete the European Banking Union agenda.[179] As long as bank insolvency laws remain unharmonized across the European Union, the national insolvency frameworks can be used by Member States as a door to escape the resolution regime introduced by the BRRD.[180]

Although it can be argued that the establishment of the Single Resolution Board is one of the most significant European banking reforms of recent years,[181] it remains doubtful whether the current state of the Single Resolution Mechanism framework can

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[174] European Commission, *Orderly liquidation of Banca Popolare di Vicenza and Veneto Banca - Liquidation aid* (SA.45664), available at: https://bit.ly/2I0P3tX (accessed 30 May 2019).

[175] European Commission *supra* note 172.

[176] It should be noted here that the potential for political interference from national governments in individual resolution cases settled within the framework of the SRM is somewhat limited in comparison, since the Council may be involved in the decision making-process only at the request of the Commission. Moreover, Art. 18(4) of the SRM Regulation provides that when making decisions within the SRM framework the Council shall act by simple majority, which additionally mitigates the influence of individual Member States. For a broader account of the problem of political interference within the SRM, *see* D. Busch, M. Louisse, M. Rijn, *How Single is the Single Resolution Mechanism?*, European Banking Institute Working Paper Series 30/2019, pp. 11-15; and A. Baglioni, *The European Banking Union: A Critical Assessment*, Palgrave Macmillan, London: 2016, pp. 81-109.

[177] FT Reporters, *Why Italy's €17bn bank rescue deal is making waves across Europe*, Financial Times, available at: https://www.ft.com/content/03a1c7d0-5a61-11e7-b553-e2df1b0c3220 (accessed 30 May 2019).

[178] Gortsos, *supra* note 6, p. 184.

[179] *Ibidem.*

[180] *See* S. Merler, *A tangled tale of bank liquidation in Venice*, Breugel, available at: http://bruegel.org/2017/06/a-tangled-tale-of-bank-liquidation-in-venice (accessed 30 May 2019).

[181] N. Véron, *Bad News and Good News for the Single Resolution Board*, Breugel, available at: http://bruegel.org/2018/01/bad-news-and-good-news-for-the-single-resolution-board (accessed 30 May 2019).

deliver the objective of breaking the vicious cycle between banks and sovereigns that nearly destroyed the Eurozone during the banking crisis of 2011-2012. From the cases reviewed above, it is clear that the SRB is capable of ensuring swift and effective resolution proceedings once it deems the institution in question to satisfy the conditions for such a resolution, but problems may arise when the Board considers the bank to be unfit for a resolution action under the SRM framework. In such a case the bank's difficulties are left to be resolved at the national level. The cases of Italy's Veneto Banca and Banca Popolare di Vicenza show that when it comes to a bail-in, i.e. forcing losses on bank's claimants, the priorities of national authorities may diverge from the principles underlying the BRRD framework. The impact this problem on the financial stability of the entire Eurozone is limited, since only relatively insignificant credit institutions will be left by the SRB to the discretion of the national authorities. However, in the current state of the common resolution framework, the bank-sovereign vicious circle will not be broken in every case.

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THE DUAL/MULTIPLE NATURE OF "PLAIN AND INTELLIGIBLE LANGUAGE" OF UNFAIR TERMS IN CONSUMER CONTRACTS UNDER EUROPEAN LAW AND ITS POLISH TRANSPOSITION

Abstract:
The "plain and intelligible language" requirement performs a dual function within the framework of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. First, it is listed as a requirement for application of the exemption included in Art. 4(2) as regards policing terms relating to the main subject matter of the contract or to the adequacy of the price and remuneration. Second, the "plain and intelligible language" requirement is a general requirement addressed at all consumer contracts executed in writing (Art. 5). This paper examines the boundaries of the precept, and places particular emphasis on the recent developments in both EU and Polish law, where the requirement has been used to imply a host of information duties aimed at enhancing consumers' capacity to foresee the consequences of the terms that they are assenting to. This apparently novel approach, which has been developing in piecemeal fashion in the CJEU's ever-expanding case law, may trigger significant consequences in the field of consumer contract law. In some ways, expansion of the substantive scope of the requirement may be said to be motivated by the fact that courts, under Art. 4(2) of Directive 93/13, are unable to subject the adequacy of the price and remuneration against the services or supply of goods received in exchange to the substantive fairness test under Art. 3(1) (examination of terms through the prism of the notions of good faith and significant imbalance in the parties' rights and obligations to the detriment of the consumer).

Keywords: plain and intelligible language, consumer contracts, unfair terms, substantive unfairness, Directive 93/13/EEC

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1. NATURE AND EMANATIONS OF THE PLAIN AND INTELLIGIBLE LANGUAGE REQUIREMENT

The "plain and intelligible language" requirement performs a dual function within the framework of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.[1] First, it is listed as a requirement for application of the exemption included in Art. 4(2), which prohibits subjecting terms relating to the main subject matter of the contract or to the adequacy of the price and remuneration to the substantive fairness test. Second, it features as a general requirement addressed at all consumer contracts executed in writing (Art. 5).[2] Despite being featured in two distinct provisions, these requirements have the same scope.[3] The transparency standard is a novelty under Directive 93/13, and it has been argued in the academic literature that it was spurred by developments within German consumer contract law (*Transparenzgebot*).[4]

It has been emphasized – which also finds confirmation in recital 20 in the preamble to Directive 93/13 – that the "plain and intelligible language" requirement encompasses the duty of the trader or seller to enable the consumer to actually familiarize himself[5] with all the terms appearing in any pre-drafted contract put before him.[6] Crucially, the consumer must also have an opportunity to discover the consequences of those terms, and those consequences shall include also those going beyond the available legal remedies or, more generally, changes in the sphere of rights and obligations.[7] The

[1] [1993] OJ L 95.

[2] Case C-26/13 *Kásler v OTP Jelzalogbank Zrt* [2014] ECLI:EU:C:2014:282, para. 68; H. Collins, *The Directive on Unfair Contract Terms: Implementation, Effectiveness and Harmonization*, in: H. Collins (ed.), *Standard Contract Terms in Europe: A Basis for and a Challenge to European Contract Law*, Kluwer Law International, Alphen aan den Rijn: 2009, pp. 12-13; P. Nebbia, *Unfair Contract Terms in European Law: A Study in Comparative and EC Law*, Hart Publishing, London: 2007, pp. 135-136; E. Macdonald, R. Atkins, *Koffman & Macdonald's Law of Contract* (8th ed.), Oxford University Press, Oxford: 2014, pp. 245-247; M.B.M. Loos, *Transparency of standard terms under the Unfair Contract Terms Directive and the Proposal for a Common European Sales Law*, 23(2) European Review of Private Law 179 (2015), pp. 179, 182, 185.

[3] C-26/13 *Kásler v OTP Jelzalogbank Zrt*, para. 69.

[4] E. Hondius, *The Reception of the Directive on Unfair Terms in Consumer Contracts by Member States*, 3 European Review of Private Law 241 (1995), pp. 248-249.

[5] The masculine pronoun and its derivatives is used throughout this text, in part because it is used in the CJEU's decisions. Obviously the gender of consumers should encompass both the masculine and feminine forms of pronouns, but for the sake of readability only the masculine form is used.

[6] Case C-472/10 *Nemzeti Fogyasztóvédelmi Hatóság v Invitel Távközlési Zrt* [2012] ECLI:EU:C:2012:242, para. 27. S. Whittaker has written that the recital "suggests that while in general words which are plain and intelligible may nevertheless be ambiguous (that is, they may clearly and comprehensibly have more than one meaning), Article 5 of the Directive should be interpreted as requiring that contract terms should *not* be ambiguous, for otherwise consumers would not know to what they were agreeing." S. Whittaker, *The Language or Languages of Consumer Contracts*, in: J. Bell, C. Kilpatrick (eds.), 8 Cambridge Yearbook of European Legal Studies, *2005-2006*, Hart Publishing, London: 2006, p. 247.

[7] C-26/13 *Kásler v OTP Jelzalogbank Zrt*, para. 67; M. Chen-Wishart, *Regulating Unfair Terms*, in: L. Gullifer, S. Vogenauer (eds.), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale*, Hart Publishing, London: 2014, p. 112.

consumer must also be able to foresee, based upon the meaning and forward-looking wording of the terms he assents to, any amendments to the contract as regards the fundamental elements of performance, such as in particular the amount of fees payable.[8] Furthermore, where a consumer concludes more than one contract with the same seller or supplier as part of a package, more protection will be afforded, as a consumer in such a situation cannot be held to the same standard of vigilance regarding the extent of the risks covered by either contract as he would if he had concluded each contract separately.[9]

The "plain and intelligible language" requirement has laid the groundwork for the creation of certain information duties with respect to unfair terms.[10] The European court has confirmed that informing the consumer prior to the conclusion of a contract of its terms and potential consequences thereto is, per the CJEU's judgment in *RWE Vertrieb*,[11] "of fundamental importance for a consumer."[12] In the context of a term providing for the possibility of altering the charge for a service, the Court has explained that the reason for and method of such an alteration shall be laid out in clear and comprehensible terms, thus allowing the consumer to foresee these alterations.[13] It is insufficient to merely refer to a national provision which determines the rights and obligations of the parties – the content of those provisions must be laid out to the consumer.[14] It is also insufficient to attempt to remedy the absence of such information prior to the

[8] C-472/10 *Invitel*, para. 28. Loos, *supra* note 2, p. 185; B. Keirsbilck, *The Erga Omnes Effect of the Finding of an Unfair Contract Term: Nemzeti*, 50(5) Common Market Law Review 1467 (2013), p. 1472; Micklitz and Reich have generalized: "[t]he Court takes the information rhetoric seriously in that only clear and transparent information allows the consumer to make use of his rights. The Court, however, seems to put great confidence in the individual capacity of the consumer to check the legitimacy of the price increase and to shop for better offers" (*see* H.-W. Micklitz, N. Reich, *The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD)*, 51(3) Common Market Law Review 771 (2014), p. 787).

[9] Case C-96/14 *Van Hove v CNP Assurances SA* [2015] ECLI:EU:C:2015:262, para. 48.

[10] M. Durovic, *European Law on Unfair Commercial Practices and Contract Law*, Hart Publishing, London: 2016, p. 178; A. Metzger, *Data as Counter-Performance: What Rights and Duties for Parties Have*, 8(1) Journal of Intellectual Property, Information Technology and Electronic Commerce Law 2 (2017), p. 5. For more on the relationship between these two aspects in the context of the proposal for a Common European Sales Law, *see* C. Azcárraga Monzonís, *The Mandatory Nature of the Right of Withdrawal*, in: J. Plaza Penades, L.M. Martinez Velencoso (eds.), *European Perspectives on the Common European Sales Law*, Springer, Berlin: 2014, pp. 62-64.

[11] Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV* [2013] ECLI:EU:C:2013:180.

[12] *Ibidem*, para. 44.

[13] *Ibidem*, para. 49. It is unclear, however, whether the consumer shall be only aware of the possibility of introducing amendments or whether he should have a sense as to the type and gravity of potential amendments. M. E. Mendez-Pinedo, *Iceland, the EFTA Court and the Indexation of Credit to Inflation: Operating in Nature Ex-Post but Need to Calculate the Disclose ex-ante. A Law of Contradiction*, 6 Juridical Tribune 7 (2016), pp. 24-25, 28.

[14] C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*, para. 50. *See further* C. Leone, *Transparency revisited – on the role of information in the recent case-law of the CJEU*, 10 European Review of Contract Law 312 (2014), pp. 316-323.

conclusion of the contract by informing the consumer in advance of any variation to the contract, even where a termination right is ensured.[15] The "principal conditions" of the right of unilateral variation a trader reserves for itself must also be specified.[16] In *Andriciuc*,[17] the CJEU made a series of sweeping assertions linking information duties and the so-called substantive prong of transparency. For consumers to be able to estimate the consequences for them of a contract they happen to be entering into (such as the cost of a loan they are taking out), the seller must inform such consumers – for example in the context of a loan denominated in a foreign currency – that they are "exposing [themselves] to a certain foreign exchange risk which will, potentially, be difficult to bear in the event of a fall in the value of the currency in which he receives his income. Second, the seller or supplier, in this case the bank, must be required to set out the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency, particularly where the consumer borrower does not receive his income in that currency."[18]

[15] C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*, para. 51.

[16] *Ibidem*, para. 52. Loos and Luzak have attempted to extrapolate the findings onto other types of exercises of a unilateral right to vary a contract: "[a]lthough all cases so far decided by the CJEU with regard to modification terms pertain to changes of the price or costs charged to the consumer, there does not seem to be a good reason not to apply the same reasoning to other unilateral changes of the contract, in particular, if they would substantially alter the parties' other rights and obligations. In other words, and even though paragraph 1 under (l) of the Annex to the Directive refers only to the change of contractual terms defining the price as potentially unfair, in our opinion, the national courts could apply this provision analogically to a substantial change of other terms and conditions. We expect they will declare the terms allowing for such changes to be unfair if the conditions under which the terms and conditions may be changed are not valid or not specified in the contract or if consumers are not given an opportunity to terminate the contract" (M. Loos, J. Luzak, *Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers*, 39 Journal of Consumer Policy 63 (2016), p. 69).

[17] Case C-186/16 *Andriciuc v Banca Romaneasca SA* [2018] ECLI:EU:C:2017:703.

[18] *Ibidem*, para. 50. *See* wyrok Sądu Najwyższego [judgment of the Supreme Court], 22 January 2016, I CSK 1049/14, 2 Monitor Prawa Bankowego 16 (2017), which offers a fitting illustration of how information duties may be imported into national law as part and parcel of the plain and intelligible language requirement. The judicial panel in that case considered that providing a consumer with an opportunity to familiarize themselves with average exchange rates on the website of the Polish National Bank was compliant with the applicable threshold. Further, the consumer in that case was informed of the meanings of a host of specialist economic terms as well as of the indexation mechanism. Still however the Court, having noted that the bank is in possession of all information relevant to ascertaining the installment amounts payable with respect to outstanding loans, observed that the exchange rates, although made available to consumers at large, fluctuate daily. Therefore, knowledge of a bank consumer of the average applicable rate is of a merely historical character. He is allowed to realize the amount of installments already paid only post factum, in practice – after a certain sum is withdrawn from the bank account dedicated to servicing the consumer's mortgage loan. This, coupled with the fact that the manner of determining exchange rates typically constitutes a bank's proprietary information, was held sufficient to warrant an inference of "information inequality" between the parties, thus falling short of the plain and intelligible language standard. Consumers, the Court surmised, should be made aware of the basic mechanisms governing the indexation of their mortgage loan installment amounts with a view to facilitating them in undertaking precautionary steps aimed at protecting their economic interests in advance and anticipating potential currency rate fluctuations.

2. FACTORS IMPACTING THE JUDICIAL TREATMENT OF PLAIN AND INTELLIGIBLE LANGUAGE

The scope of the obligation to be imposed on the stronger contracting party is predicated upon such factors as the time between the notification of an upcoming amendment and its entry into force; the information provided at the time of that communication; and the cost to be borne and the time necessary to change supplier.[19] The level of plainness and intelligibility may also vary according to the type of goods or services concerned.[20] In *Van Hove*, which concerned a term defining "total incapacity for work" in an insurance contract, the CJEU required that the information which had to be taken into account must include "the specific features of the arrangements for covering the loan repayments payable to the lender in the event of the borrower's total incapacity for work and the relationship between those arrangements and the arrangements laid down in respect of other contractual terms."[21] A common thread appears to be the ability to foresee the economic consequences of a term – although it remains unclear whether the individual circumstances of a given consumer are to be taken into account.[22] I submit that they should be, and, more importantly that this could be accommodated within the paradigm of a "reasonably well informed and reasonably observant and circumspect" consumer. In *Van Hove*, where the claimant was physically handicapped, regard could be had to his economic situation, his prospects, and how this affected his ability to perceive economic reality. In other words, a consumer potentially deprived of, as it was the case in *Van Hove*, insurance coverage in the event of severe injury, may be inclined to accord more weight to economic advantage and subjectively consider financial remuneration as particularly beneficial.[23] Indeed, in that

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[19] C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*, para. 54.

[20] *Ibidem*, para. 51.

[21] *Ibidem*, para. 41.

[22] Note that recital 34 of the Consumer Rights Directive (2011/83/EU) obliges traders to take account of consumer's characteristics in providing certain information under the conditions of a distance or off-premises contract: "The trader should give the consumer clear and comprehensible information before the consumer is bound by a distance or off-premises contract, a contract other than a distance or an off-premises contract, or any corresponding offer. In providing that information, the trader should take into account the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee." (A. Borselli, *Cognosceat emptor: on the insurer's duty to inform the prospective policyholder in Europe*, 2 Insurance Law Review 55 (2012), pp. 63-64; S. Weatherill, *Consumer Rights Directive: How and Why a Quest for Coherence Has (Largely) Failed*, 49(4) Common Market Law Review 1279 (2012), pp. 1293-1295; G. Straetmans, *Misleading practices, the consumer information model and consumer protection*, 5(5) Journal of European Consumer and Market Law 199 (2016), pp. 205-208).

[23] This outlook is merely a reflection of the notion of "vulnerable consumer", which has been gaining ground in EU consumer protection law. A stellar piece of research on the subject is the Vulnerable Consumer Working Group Guidance Document on Vulnerable Consumers, published in November 2013, available at: https://ec.europa.eu/energy/sites/ener/files/documents/20140106_vulnerable_consumer_report_1.pdf (accessed 30 May 2019). *See also* B. Duivenvoorde, *The Protection of Vulnerable Consumers under the Unfair Commercial Practices Directive*, 2(2) Journal of European Consumer and Market Law 69

case, the Court impliedly defined economic wellbeing for the consumers at hand as an ability to meet monthly payments on their loans.[24]

The corollaries from *RWE Vertrieb* have been mostly reiterated in later cases. It is true, however, that the most ground-breaking case in this regard was *Kásler*, closely followed by *Matei*.[25] In the former case, the CJEU made some far-reaching observations concerning the remit of the "plain and intelligible language" requirement, inserting into it a number of information duties aimed at equipping the consumer with the knowledge and data necessary to make informed decisions and ensure adequate consumer choice.[26] Specifically, the contract must transparently set out the specific functioning of the mechanism to which the relevant term relates and the relationship between that mechanism and that provided for by other contractual terms, so that that consumer is in a position to evaluate, on the basis of clear and intelligible criteria, the economic consequences for him which derive from it.[27]

(2013); J. Luzak, *Vulnerable Travellers in the Digital Age*, 5(3) Journal of European Consumer and Market Law 130 (2016). For an American perspective, *see* M.N. Browne, K.B. Clapp, N.K. Kubasek, L. Biksacky, *Protecting Consumers from Themselves: Consumer Law and the Vulnerable Consumer*, 63(1) Drake Law Review 157 (2015), pp. 176-190.

[24] C-96/14 *Van Hove v CNP Assurances SA*, para. 42.

[25] C-143/13 *Matei v SC Volksbank Romania SA* [2015] ECLI:EU:C:2015:127.

[26] *Ibidem*, para. 70, stating that "information, before concluding a contract, on the terms of the contract and the consequences of concluding it is of fundamental importance for a consumer. It is on the basis of that information in particular that he decides whether he wishes to be bound by the terms previously drawn up by the seller or supplier."

[27] C-26/13 *Kásler v OTP Jelzalogbank Zrt*, para. 75. C. Willett has expressed skepticism with regard to this approach: "[h]owever, the need-based viewpoint is that none of this will have much effect: Consumers are unlikely to read standard terms, so 'prominent' and 'transparent' standard terms will do little to inform them. Even if 'prominence' means that charges must be specially highlighted in some way (and (...) this is not clear), consumers are assumed generally to focus on the essential charges, certainly at least on those that are routinely payable, rather than on contingent charges. If they do read about contingent charges, they may find it difficult to assess whether the events triggering these charges are likely to occur – possibly assuming they will not occur. Consumers are therefore unlikely to feel the need to bargain for lower charges (if they did, they are unlikely to have the bargaining power/skill to be successful), or to make comparisons between different businesses' charges – so the charges will often be subject to very limited competitive discipline" (footnotes omitted). C. Willett, *Re-Theorising Consumer Law*, 77(1) Cambridge Law Journal 179 (2018), pp. 204-205. In the Polish literature, *see* M. Romanowski, *Zasada przejrzystości materialnej umowy konsumenckiej* [The principle of substantive transparency of a consumer agreement], in: M. Romanowski (ed.), *Życie umowy konsumenckiej po uznaniu jej postanowienia za nieuczciwe na tle orzecznictwa TSUE* [Sustainment of a consumer agreement following the striking out of unfair terms under the CJEU's jurisprudence], C.H. Beck, Warszawa: 2017, pp. 233-237; M. Sieradzka, *Glosa do wyroku TS z dnia 30 kwietnia 2014 r., C-26/13* [Case comment on the judgment of the CJEU of 30 April 2014, C-26/13], LEX 2014; W. Gontarski, *Przedkontraktowe obowiązki informacyjne banku w przypadku kredytów udzielanych w walucie obcej - glosa do wyroku TS z dnia 3 grudnia 2015 r., C-312/14* [Pre-contractual information duties in the case of loans taken out in a foreign currency - comment on the CJEU's judgment of 3 December 2015, C-312/14], LEX 2016 (contending that the "economic consequences" encompass, within the context of a loan, the entire cost of a loan, taking into account differences in exchange rates); R. Stefanicki, *Wdrażanie dyrektywy 93/13/EWG w świetle ostatniego orzecznictwa Trybunału Sprawiedliwości, cz. II* [Implementation of Directive 93/13/EEC in light of the latest case law of the Court of Justice], 6 Przegląd Prawa Handlowego 5 (2015), pp. 7-9.

In *Kásler*, the requirement that terms be drafted in plain, intelligible language was singled out as a condition for the full and proper transposition of Directive 93/13 into national legal systems.[28] It is insufficient for a scrutinized term to be merely formally and grammatically intelligible (semantically clear). Due to the fact that the protection afforded by Directive 93/13 at large is based on the idea that the consumer is in a position of weakness vis-à-vis the seller or supplier, in particular as regards his or her level of knowledge, the requirement of transparency must be understood in a broad sense.[29] This is specifically the case with regard to terms which allow sellers to calculate the level of monthly repayment instalments in accordance with the selling exchange rate carried by the seller, which ultimately results in increasing the cost of the financial service tendered at the consumer's expense. Thus the CJEU held that "it is of fundamental importance for the purpose of complying with the requirement of transparency, to determine whether the contract sets out transparently the reason for and the particularities of the mechanism for converting the foreign currency and the relationship between that mechanism and the mechanism laid down by other terms relating to the advance of the loan, so that the consumer can foresee, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it."[30] As for the conversion mechanism, it is of paramount importance that the average consumer, defined as reasonably well informed and reasonably observant and circumspect, is (1) aware of the existence of a difference between a selling rate and a buying rate with respect to currency exchange; and (2) able to assess the potentially significant economic consequences caused to his detriment as a result of such a discrepancy.[31]

[28] C-26/13 *Kásler v OTP Jelzalogbank Zrt*, para. 62.

[29] C-26/13 *Kásler v OTP Jelzalogbank Zrt*, paras. 71-72; Case C-96/14 *Van Hove v CNP Assurances SA*, para. 40; Case C-191/15 *Verein fur Konsumenteninformation v Amazon EU Sarl* [2017] ECLI:EU:C:2016:612, para. 68. S. Weatherill, *Empowerment is not the Only Fruit*, in: D. Leczykiewicz, S. Weatherill (eds.), *The Images of the Consumer in EU Law: Legislation, Free Movement and Competition Law*, Hart Publishing, London: 2016, pp. 212-213. It has been questioned whether this sentiment is consistent with the founding principle of Directive 93/13 – minimum harmonization. *See e.g.* N. Reich, *Balancing in Private Law: Experiences and Opportunities*, in: R. Brownsword, H.-W. Micklitz, L. Niglia, S. Weatherill (eds.), *The Foundations of European Private Law*, Hart Publishing, London: 2011, pp. 239-240.

[30] C-26/13 *Kásler v OTP Jelzalogbank Zrt*, para. 73. The passage was affirmed in Case C-143/13 *Matei v SC Volksbank Romania SA*, para. 74. Recently, the CJEU has begun to refer to a "substantive" prong of transparency (Joined Cases C-154/15 and C-307/15 *Francisco Gutiérrez Naranjo v Cajasur Banco SAU et al.* [2017] ECLI:EU:C:2016:980, para. 49), using it to denote those pre-contractual information duties that fall within the ambit of the "intelligibility" requirement. *See also* Case C-348/14 *Maria Bucura v SC Bancpost SA* (unpublished), para. 61: "Failure to mention information relating to the loan repayment terms in question and modification of those terms during the period of the loan are decisive elements in the analysis by a national court of whether a term in a loan agreement which relates to its cost and which does not contain such information is drafted in plain intelligible language within the meaning of Article 4 of Directive [93/13]." For an overview of the relevant case law, *see* paras. 46-50 of Advocate General Mengozzi's Opinion in Joined Cases C-154/15 and C-307/15 *Francisco Gutiérrez Naranjo v Cajasur Banco SAU et al.* [2017] ECLI:EU:C:2016:552.

[31] C-26/13 *Kásler v OTP Jelzalogbank Zrt*, para. 74.

2.1. Foreseeability of economic consequences and the precedence of inquiry

As noted above, an important facet of the plain and intelligible language requirement is that a term in dispute shall be capable of letting a consumer foresee the economic consequences of him agreeing to such a term. This factor has been deemed particularly important in analysing the plainness and intelligibility of terms allowing for variations of interest rates in credit contracts, and the term "significant changes in the money market" was held to be *prima facie* an insufficient indication despite being grammatically intelligible and clear.[32] This approach could potentially be effective in hampering the spread of economically detrimental terms should the CJEU put more emphasis on the overarching requirement of plainness and intelligibility from Art. 5.[33] The requirement is typically invoked in the context of analysing whether a term falls within any of the exemptions under Art. 4(2), with the courts seemingly overlooking the fact that Art. 5 applies to all contract terms. Since "plain and intelligible language" has the same meaning under both provisions,[34] it is difficult to see why it would be unwarranted for the CJEU to use it more expansively to stop the influx of terms whose economic ramifications for consumers, especially in the long term, are hardly foreseeable.[35]

Some evidence, albeit rather limited and tentative, may be offered that the CJEU is ready to strike down terms even before it moves to a substantive enquiry applying the requirements enshrined in Art. 3(1). In *Amazon SARL*, the analysis zeroed in on a clause which mandated that the contract was to be subject to the law of the seller or supplier (on the facts of the case, an operator in an electronic commerce contract based in another Member State). The CJEU concluded that the operator failed to inform the consumer of their rights under the Rome I Regulation, Art. 6(2) of which provides that the choice of applicable law must not have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which would have been applicable in the absence of choice. The insertion of a term in defiance of this rule, without informing the consumer of their true rights (the letter of the Regulation superseding the contract) was considered sufficient grounds to find unfairness.[36]

[32] C-143/13 *Matei v SC Volksbank Romania SA*, para. 76.

[33] Some signs of a bolder approach could be found in a handful of cases where the Court went so far as to list lack of transparency as a chief indicator – next to good faith and imbalance? – of substantive unfairness; *see* Case C-96/14 *Van Hove v CNP Assurances SA*, para. 27.

[34] As confirmed in C-26/13 *Kásler v OTP Jelzalogbank Zrt*, para. 69. *See also* Loos, *supra* note 2, pp. 187-188.

[35] This proposition has been endorsed by R. Sik-Simon, *see* R. Sik-Simon, *Missbräuchliche Klauseln in Fremdwährungskreditverträgen – Klauselersatz durch dispositive nationale Vorschriften, EuGH Rs C-26/13 (Kásler) und Kúria 2/2014. PJE határozata*, 3(4) Journal of European Consumer and Market Law 256 (2014), pp. 259–261.

[36] C-191/15 *Verein fur Konsumenteninformation v Amazon EU Sarl*, para. 71. In the practical sense, in the absence of a reference to the mandatory rules of the consumer's law, the CJEU's decision will result in the following examination: First, it must be assessed which legal system governs the fairness of a term under Rome I. If it is established that a term is unfair according to the applicable law, it must be established whether the use of unfair terms in general conditions will result in unfair competition pursuant to

An interesting example in this connection is *Sebestyen*,[37] where a term was at issue under which, should a dispute arise over the contract or the agreement, exclusive jurisdiction over the dispute would be vested in a panel of three arbitrators. It was introduced into evidence that prior to the execution and signing of the disputed mortgage loan contract, the defendant bank brought to the attention of the claimant certain key differences in procedures before arbitration and in courts.[38] In addition, it was specifically highlighted at the moment of conclusion of the agreement that the arbitration procedure entailed only one "trial procedure" and that a verdict rendered by a panel was not appealable. The claimant was also informed about the attendant costs, which were higher compared to court proceedings. Whilst pre-contractual information relating to the contractual terms and the consequences of concluding the contract is of fundamental importance to the consumer,[39] it cannot be automatically assumed that the provision of information, even in a relatively comprehensive and clear manner, rules out the unfairness of a particular term, including an arbitration clause.[40] Regrettably, the CJEU did not analyse any further whether the volume and depth of information furnished for the benefit of the consumer was sufficient to at least clear the threshold of plain and intelligible language under Art. 5, although this appears to be the case since the Court did proceed to consider the substantive requirements of unfairness under Art. 3(1).[41] I submit that this only goes to show that more could be done to sharpen, as it were,

the applicable legal system after having applied Art. 6(1) Rome II. J. Rutgers, *Judicial Decisions on Private International Law: Court of Justice of the European Union 28 July 2016, Case C-191/15 Verein für Konsumenteninformation v. Amazon EU Sàrl ECLI:EU:C:2016:612*, 64 Netherlands International Law Review 163 (2017), p. 174.

[37] Case C-342/13 *Katalin Sebestyén v Zsolt Csaba Kővári and Others* [2014] ECLI:EU:C:2014:1857.

[38] *Ibidem*, para. 17. The consumer was also informed of the single procedure character of arbitration (no appeals could be brought), and that the costs incurred in commencing and conducting an arbitration procedure tended to be higher than those of ordinary court proceedings.

[39] Case C-226/12, *Constructora Principado SA v José Ignacio Menéndez Álvarez* [2014] ECLI:EU:C:2014:10, para. 25. This becomes all the more important in the context of complex contracts, such as those concerning digital content: "[t]he need for pre-contractual information about digital content is further re-enforced by two of their essential features: the complexity of the technology and the fact that most pieces of digital content are subject to specific licensing conditions that determine the functionality and usability of the digital content. Accordingly, purchasers of digital content have specific information needs. In addition to the more commonly acknowledged facts that consumers must be informed about (such as price, terms of delivery, etc.), they require information on matters such as access and interoperability, the functionality of digital content, the existence of usage restrictions, the licensing conditions, and the privacy-related implications of, e.g., the use of tracing and monitoring technologies, as well as information about the quality of the digital content in question, including the applicability of professional codes of conduct and guidelines (e.g. journalistic codes). N. Helberger, M.B.M. Loos, L. Guibault, C. Mak, L. Pessers, *Digital Content Contracts for Consumers*, 36(1) Journal of Consumer Policy 37 (2013), pp. 47-48.

[40] C-342/13 *Katalin Sebestyén v Zsolt Csaba Kővári and Others*, para. 34.

[41] *Ibidem*, paras. 26-29, 36. On the relationship between transparency and substantive unfairness within the context of Australian law, *see* J. Patterson, *The Australian Unfair Contract Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts*, 33(3) Melbourne University Law Review 934 (2009), pp. 951-956.

the general plainness and intelligibility requirement with a view to applying it to all scrutinized terms, thus treating it as an initial threshold to be cleared before a substantive unfairness exercise is carried out. In fact, the CJEU appeared to tie together the plain and intelligible language requirement and the substantive fairness inquiry by requiring that national courts consider that a pre-contractual disclosure of information to the consumer concerning the nature of arbitration does not, in and of itself, absolve a clause of unfairness.[42] It may be a reasonable expectation on the part of a consumer that a term, within the context of a particular genus of contract (such as an insurance contract or a loan), will have a very similar (or effectively the same) meaning as a corresponding term utilized in national legislation.[43]

The plain and intelligible language requirement could be used in tandem with a purposeful interpretation of exemptions under Art. 4(2) to further strengthen the protection against unfair terms. In asserting that terms which impose burdens on consumers shall, in order to be plan and intelligible, transparently justify the reasons for doing so, the CJEU has demanded that such terms actually do more than that – i.e. that they specify a distinct, additional service that the seller must provide, in addition to the service constituting the main subject matter of the contract at hand, in exchange for such an onerous clause. Where no such service can be pointed out, a plausible inference is that no transparent reasons were furnished, and thus such a term could be struck down as unfair, especially if the seller attempts to skirt applicable legal limitations by manipulating the name or nature of charges imposed in a contract.[44]

2.2. Andriciuc – an unwarranted invasion of information duties or a breath of fresh air?

The most recent case where a reappraisal of the plain and intelligible language requirement has been offered is *Andriciuc*. There, the Court had to scrutinize the plainness and intelligibility of a clause in a mortgage loan agreement denominated in Swiss francs (CHF) that effectively placed the exchange risk on the borrowers (Romanian citizens receiving their remuneration in Romanian leu) by mandating loan repayment

[42] C-342/13 *Katalin Sebestyén v Zsolt Csaba Kővári and Others*, para. 36. This is, I submit, a moot and somewhat self-evident point considering the clear wording and meaning of Art. 3(1), although the literature pre-*Kásler* knows of assertions of clear, hard and fast lines between transparency and substantive control. *See e.g.* M. Träger, *Party Autonomy and Social Justice in Member States and EC Regulation: A Survey of Theory and Practice*, in: Collins (ed.), *supra* note 2, p. 73.

[43] C-96/14 *Van Hove v CNP Assurances SA*, para. 46.

[44] *See* C-143/13 *Matei v SC Volksbank Romania SA*, para. 77. At para. 29 of that judgment it is noted that the defendant bank, in response to new national regulations purportedly banning the use of "risk charges" in credit contracts, attempted to change the name of the charge to a "credit management fee". Interestingly, the technique was employed by American telecommunications giant AT&T which in 2017 imposed "credit management fees" in the amount of 449 dollars on all customers it deemed high-risk (typically having bad credit or being behind in payments). *See* P. Dampier, *AT&T's Service Deposit Becomes Controversial Non-Refundable "Credit Management Fee"*, available at: http://stopthecap.com/2017/10/31/atts-service-deposit-becomes-controversial-non-refundable-credit-management-fee/, 31 October 2017 (accessed 30 May 2019).

in CHF. The CJEU reiterated its pronouncements of the "plain and intelligible" principle from *Kásler*, specifically that the requirement stretches well beyond formal and grammatical intelligibility and legibility, and a broad interpretation must be applied.[45] In the specific context of loans denominated in a foreign currency, the Court held that the borrower must be informed of the attendant risk connected with currency rate fluctuations, and that it may be difficult to bear the exchange risk in the event of a drastic fall in the value of the currency in which the consumer receives his income. The bank must provide details as to the conceivable range of fluctuations with a view to conveying to the consumer the potential risk his financial standing and obligations are exposed to.[46] Banks can satisfy this requirement by including suitable information in their promotional materials.[47] Importantly, the obligation also entails providing the consumer with information concerning the nature of goods or services which comprise the subject matter of the contract.[48]

As noted above, it is generally required, within the so-called substantive prong of transparency, that a term enables the consumer to foresee the consequences, including economic consequences, for him which flow from the term in issue. The "foreseeability" element was not accorded as much weight in the recent judgment of *Andriciuc*, where the CJEU insisted instead on the presentation by a seller or supplier of the specific functioning of the mechanism to which the relevant term relates and the relationship between that mechanism and that provided for by other contractual terms, and the Court found that the seller's measures must accord to the consumer a level of predictive ability which would allow him to "evaluate" the risks.[49] It is perhaps too fine of a distinction to attempt to differentiate between "foresee" and "evaluate", and it certainly remains to be seen whether the CJEU or national courts pick up on this particular aspect with a view to emulating it. I would tentatively suggest that "evaluate" implies a higher standard of knowledge and cognitive ability. If this is true, the swerve would be welcome as it would raise the required level of substantive transparency. The Court in *Andriciuc* itself doubled down and also used the word "estimate", requiring that the consumer is able to *estimate*, on the basis of pre-contractual information, the total cost of their loan.[50] The

[45] C-186/16 *Andriciuc v Banca Romaneasca SA*, para. 44.

[46] *Ibidem*, para. 50.

[47] *Ibidem*, para. 46; Case C-143/13 *Matei v SC Volksbank Romania SA*, para. 75. There is psychological evidence to the effect that this may be insufficient, as a sizable portion of consumers feel, when confronted with promotional material, that they either have too many choices or that there is a dearth of options. Many consumers who signed loans denominated in the Swiss franc were drawn thereto by competitive exchange rates which, coupled with well-documented bullish behavior of banking advisors, could again outweigh and/or overshadow any information concerning the feasibility of their choices. P. Rodik, *The Impact of the Swiss Franc Loans Crisis on Croatian Households*, in: S.M. Değirmencioğlu, C. Walker (eds.), *Social and Psychological Dimensions of Personal Debt and the Debt Industry*, Springer, Berlin: 2015, pp. 71-78.

[48] Case C-186/16 *Andriciuc v Banca Romaneasca SA*, para. 47; C-348/14 *Maria Bucura v SC Bancpost SA*, para. 66.

[49] Case C-186/16 *Andriciuc v Banca Romaneasca SA*, para. 45.

[50] *Ibidem*, para. 47.

variety in terms utilized by the Court is liable to give rise to inconsistencies and confusion, and a degree of consequentiality would be recommended.

3. RELATIONSHIP BETWEEN PLAIN AND INTELLIGIBLE LANGUAGE AND THE SUBSTANTIVE CRITERIA OF FAIRNESS

The requirement that terms shall be expressed in plain and intelligible language corresponds with the substantive requirement of finding a balance between the contractual parties, prescribed in Art. 3(1) of the Directive. For it is in the trader's or supplier's legitimate interest to, for example, prevent against a material change of circumstances following the conclusion of the contract, so that it may tender the goods or services contracted for in accordance with the attendant terms and conditions. On the other hand, the flipside of this coin is that the consumer has a legitimate interest in preparing for and being able to foresee the potential consequences in the event such a change occurs.[51] In particular, the task of preserving a proper balance of rights and obligations may consist in insuring, as it were, the consumer against the potential risk of the contract being altered or even vitiated. This is to be done by means of equipping the consumer with information and data so that he can react most appropriately to any reasonable change of circumstances. *Andriciuc* confirmed the controversial assertion in *Kásler* that this requirement is directly linked to and motivated by the fact that the consumer is in a weaker position as against the trader or supplier. The exact scope of overlap between the plainness and intelligibility of the language (which has come to also encompass, via purposeful judicial interpretation, certain information duties on the part of the trader) and the substantive requirement to level the significant imbalance between the parties' rights and obligations remains uncertain.[52]

As noted above, the requirement does not refer merely to the clarity of information provided, but also to its completeness, which is assessed against the nature and practical application of the contract in issue. Specifically with regard to insurance agreements,

[51] Case C-92/11 *RWE Vertrieb AG v Verbraucherzentrale Nordrhein-Westfalen eV*, para. 53.

[52] It is evident that informing the consumer of the overall economic ramifications of him signing a given consumer contract elevates his position as against the trader, if only at the pre-conclusion stage. *See* D.D. Barnhizer, *Propertization Metaphors for Bargaining Power and Control of the Self in the Information Age*, 54 Cleveland State Law Review 69 (2006), pp. 79-100; A. Choi, G. Triantis, *The Effect of Bargaining Power on Contract Design*, 98(8) Virginia Law Review 1665 (2012). Cabrales et al. have conducted and reported on an experiment whereby competition amongst agents vying for principals to hire them was shown to, first, elevate the latter's bargaining power and, at the same time, diminish the informational monopoly power agents would have wielded had there been a shortage of agents on the market. However, in a scenario where the principals were searching for agents (or were matched upfront with one), not only did the agents feel more confident as regards negotiating the terms of the relationship, but they were able to extract more information regarding their agency contract's financial consequences (i.e. remuneration). These findings could be applied by analogy to consumers. *See* A. Cabrales, G. Charness, M.C. Villeval, *Hidden Information, Bargaining Power, And Efficiency: An Experiment*, 14(2) Experimental Economics 133 (2011).

it has been held by a Polish court that where an insurer attempts to exclude its liability under a policy (i.e. the duty to make a disbursement for the benefit of the insured when a specific contractually stipulated event has occurred), it should clearly specify under what circumstances the payment may be subject to additional conditions.[53] It is insufficient for an insurer to employ wording such as "performance may be rendered in part..." or "costs may be returned under the condition that...". A typical consequence of a failure to use plain and intelligible language is to give the drafter of a disputed term the right to unilaterally interpret or amend the terms of the contract in a binding fashion, and as a consequence, alter the rights and obligations thereunder.[54] One may see here a clear link between typified unfair terms (included in the "grey list" appended to Directive 93/13) and transparency. However, it is difficult to determine the exact nature of this overlap. Its practical result is the wide casting of the substantive fairness net – on one hand a term expressed in plain and intelligible language may nevertheless imply a right of unilateral interpretation, whilst another term could clear the threshold posed by Art. 1(i) or 1(j) of the Annex, yet still fail to be expressed plainly and intelligibly, thus coming under the scrutiny of the substantive requirements of Art. 3(1).

On 3 May 2018, Advocate General Tanchev issued an Opinion in the case of *OTP Bank and OTP Faktoring v Ilyés and Kiss.*[55] On the facts, similarly to the *Kásler* case, the creditor converted the loan from Hungarian forints to Swiss francs, using its own buying rate for the conversion, whilst monthly repayment instalments were fixed according to the bank's selling rate. Another contract term gave the creditor the power to unilaterally change the ordinary interest and management costs. It should be noted that *Kásler* triggered a sea change in Hungarian law and measures were subsequently introduced to declare invalid such clauses in consumer loan contracts which use the buying rate of a foreign currency to determine the loan payment but the selling rate for the purpose of loan repayment. The consequence of such invalidity is the replacement of a given term with a provision providing the official exchange rate for the currency set by the National

[53] Wyrok Sądu Apelacyjnego w Warszawie [Judgment of the Appellate Court for Warsaw], 9 February 2012, LEX no. 1213380.

[54] K. Kohutek, *Klauzula modyfikacyjna: faktyczna ochrona konsumenta czy bezpodstawny formalizm?* [Modification clause: actual protection of the consumer or baseless formalism?], 12 Przegląd Prawa Handlowego 13 (2017), pp. 17-19; P. Gorzko, *Zagadnienia dopuszczalności stosowania oraz abuzywności bankowych klauzul o zmiennym oprocentowaniu* [Questions pertaining to the permissibility as well as possibilities of abuse of variable interest rates], 3 Transformacje Prawa Prywatnego 5 (2012), pp. 20-23; N. Reich, H.-W. Micklitz, *Unfair Terms in the Draft Common Frame of Reference (Comments on the Occasion of the Tartu Conference on Recent Developments in European Private Law)*, 14 Juridica International 58 (2008), pp. 61-62; I. Domurath, *Consumer Vulnerability and Welfare in Mortgage Contracts*, Hart Publishing, London: 2017, p. 93. Micklitz has noted that transparency control often serves as a substitute for the otherwise prohibited control of the main price, the core term. *See* H.-W. Micklitz, *The Proposal on Consumer Rights and the Opportunity for a Reform of European Unfair Terms Legislation in Consumer Contracts*, EUI Working Papers Law 2010/12, European University Institute 2010, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1698703 (accessed 30 May 2019).

[55] Opinion of Advocate General Tanchev in Case C-51/17 *OTP Bank Nyrt. and OTP Faktoring Követeléskezelő Zrt v Teréz Ilyés and Emil Kiss* [2018] ECLI:EU:C:2018:303.

Bank of Hungary to be used for both loan payments and repayments.[56] The Opinion missed an opportunity to engage with the issue of transparency post-*Andriciuc*, with the Advocate General merely expressing satisfaction that explanatory notes to the new legislation issued by the Hungarian legislature are sufficient.[57] One commentator has observed that the issue "whether the fact that the Hungarian legislator imposed the official exchange rate of the Hungarian National Bank could be perceived as invalid, due to lack of transparency of such an exchange rate to consumers or the lack of foreseeability of such a rate determining consumers' obligations at the moment of conclusion of the contract. It is interesting to consider whether the Hungarian legislator should not have at least offered consumers a choice – to have their contractually agreed-upon exchange rate changed into the official exchange rate of the Hungarian National Bank or to remain the contractual one. Whilst the official exchange rate might be more transparent, it won't necessarily be more beneficial to consumers."[58]

The Court in its *OTP Bank* judgment reiterated the crucial passages from *Andriciuc*, particularly that financial lending institutions have an obligation to create conditions sufficient for consumers to become familiarized with the risks inherent in taking out a loan denominated in or indexed to a foreign currency; by providing an adequate level of information "and [this information] should at least encompass the impact on instalments of a severe depreciation of the legal tender of the Member State in which a borrower is domiciled and of an increase of the foreign interest rate."[59] Furthermore, it appears that consumers must be aware that the risk they may choose to incur may be difficult to bear where the currency in which they receive their income depreciates markedly, and "the seller or supplier, in this case the bank, must be required to set out the possible variations in the exchange rate and the risks inherent in taking out a loan in a foreign currency."[60]

4. THE POSITION OF POLISH LAW

The Polish regulation reflects the dual role of the plain and intelligible language standard. Art. 385[1] § 1 stipulates plain and intelligible language as a condition for the application of the exemption from a substantive unfairness inquiry (transposition of

[56] *See* Art. 3 of the Law XXXVIII of 2014 governing specific matters relating to the decision of the Kúria to harmonise the case-law on loan agreements concluded between credit institutions and consumers. The process is described in: M. Józon, *The Methodology of Judicial Cooperation in Unfair Contract Terms Law*, in: F. Cafaggi, S. Law (eds.), *Judicial Cooperation in European Private Law*, Edward Elgar Publishing, Cheltenham: 2017, pp. 137-143.

[57] Decision No 2/2014 of the Kúria, Magyar Közlöny 2014/91, p. 10975 (para. 69 of Advocate General Tanchev's Opinion, C-51/17 *OTP Bank*).

[58] J. Luzak, *Kasler repercussions - AG Tanchev in OTP Bank and OTP Faktoring (C-51/17)*, available at: http://recent-ecl.blogspot.com/2018/05/kasler-repercussions-ag-tanchev-in-otp.html (accessed 30 May 2019).

[59] C-51/17 *OTP Bank*, para. 74.

[60] *Ibidem*, para. 75.

Art. 4(2) of Directive 93/13). On the other hand, Art. 385 § 2 enshrines the overarching requirement that all standard contractual clauses be expressed in plain and intelligible language.[61]

4.1. Transposition of the general requirement under Art. 5 of Directive 93/13

As noted above in relation to the EU jurisprudence, Polish courts have also opined that the plain and intelligible language requirement concerns not only the grammatical intelligibility of a document, but also its meaning and the level of familiarity therewith that can be expected on the part of an average consumer.[62] Attempts have been made to distinguish between form and content, with the Supreme Court holding that transparency consists of "understandability", which applies to both content and form, with "unambiguity" attaching to content only.[63] The transparency requirement is not concerned however with whether the consumer approved of or accepted the content of the clause.[64] The question whether a consumer realized the gravity and meaning of

[61] As a side note, the requirement of plain and intelligible language applies here to all boilerplate clauses, including those not offered to consumers, whilst a *contra proferentem* interpretation is reserved exclusively for consumers.

[62] Wyrok Sądu Apelacyjnego we Wrocławiu [Judgment of the Appellate Court for Wrocław], 16 February 2017, I ACa 1585/16, LEX no. 2340273. The ambit of the principle has been explained by reference to the fact that transparency is perceived as the primary bulwark of protection for consumers, particularly in the context of abstract control proceedings where no reference may be made to the individual facts of the case at hand. See: Wyrok Sądu Apelacyjnego w Warszawie [Judgment of the Appellate Court for Warsaw], 4 July 2017, VI ACa 345/16, LEX no. 2486476.

[63] Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 15 February 2013, I CSK 313/12, 12 Monitor Prawa Bankowego 28 (2013). The Court also posited that "ambiguity" should be interpreted strictly, demanding that contractual clauses shall be drafted so that they have only one plausible interpretation for an average consumer. This has since been confirmed in a resolution by the Supreme Court of 22 April 2015, ref. number I CSK 720/14. W. Popiołek, *Art. 385*, in: K. Pietrzykowski (ed.), *Kodeks cywilny. Komentarz* [Civil Code. Commentary], C.H. Beck, Warszawa: 2013, pp. 1067-1068; K. Pacuła, *Art. 23a*, in: K. Osajda (ed.), *Ustawa o ochronie konkurencji i konsumentów (art. 23a–23d i 99a–99f). Komentarz* [Act on Competition and Consumer Protection (arts. 23a–23d and 99a–99f). Commentary], Legalis 2018; M. Więcko-Tułowiecka, *Ochrona konsumentów w umowach ubezpieczenia* [Protection of consumers under insurance contracts], LexisNexis, Warszawa: 2014, pp. 89-92; P. Mikłaszewicz, *Obowiązki informacyjne w umowach z udziałem konsumentów na tle prawa Unii Europejskiej* [Information duties in consumer contracts in the context of European Union law], Wolters Kluwer Polska, Warszawa: 2008, pp. 176-178; E. Łętowska, *Ustawa o ochronie niektórych praw konsumentów: komentarz* [Act on Protection of Certain Consumer Rights. Commentary], C.H. Beck, Warszawa: 2001, p. 49; E. Wieczorek, in: Z. Brodecki (ed.), *Prawo ubezpieczeń gospodarczych. Komentarz. TOM II. Prawo o kontraktach w ubezpieczeniach. Komentarz do przepisów i wybranych wzorców umów* [Law of business insurance. Commentary. Volume II. Law of insurance contracts. Commentary on statutory provisions and selected model contracts], Wolters Kluwer Polska, Warszawa: 2010, p. 116; F. Zoll, *Potrzeba i kierunek nowelizacji kodeksowego ujęcia problematyki wzorców umownych* [The need for and direction of amendments to the regulation of model contracts under the Civil Code], 1 Przegląd Legislacyjny 59 (1997), p. 91; K. Zagrobelny, in: E. Gniewek (ed.), *Kodeks cywilny. Komentarz* [Civil Code. Commentary], C.H. Beck, Warszawa: 2011, p. 631.

[64] Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 10 July 2014, I CSK 531/13, LEX no. 1537260.

a disputed clause is not decisive. For example, even where a consumer understood the amount of a termination fee or amount of interest to be paid, that is insufficient to save such a clause if the amounts are exorbitant.[65] The requirement of transparency has been tied to a consumer's economic interest in making an informed choice and entering into a transaction with specific content aligned with such interest.[66] Aside from such subjective considerations, consumer terms operating on the market that are transparent and unambiguous strengthen social trust in the law as a whole and is conducive to legal stability and security.[67]

It is established law that it is insufficient for a trader to merely present to a consumer a list of standard contractual terms prior to the conclusion of a contract, e.g. General Insurance Terms and Conditions. A trader must ensure that such terms and the other related documents necessary to conclude an insurance contract are expressed in plain and intelligible language (i.e. so that they are understandable to a person without specialist preparation or education), and it is the trader that bears any and all consequences of failing to do so.[68] It is not completely clear whether it is permissible for a trader to make available to a consumer additional explanations or definitions of terms or formulations used in a consumer contract, or whether the duty requires traders to second-guess, as it were, the level of sophistication of consumers and attempt to furnish plain clauses upfront.[69] Generally, insurance contracts have recently been elevated to the standard of "agreements of special trust", with respect to which the plain and intelligible language requirement has a stronger bite. As such, insurance contracts must be interpreted through the prism of not only their nature, but also their purpose, i.e. the provision of insurance coverage to a consumer. At a bare minimum insurance contracts must clearly specify the risks insured.[70] Standard clauses are interpreted pursuant to general principles

[65] Wyrok Sądu Apelacyjnego we Wrocławiu [Judgment of the Appellate Court for Wrocław], 16 February 2017, I ACa 1585/16, LEX no. 2340273.

[66] E. Łętowska, *Europejskie prawo umów konsumenckich*, C.H. Beck, Warszawa: 2004, p. 263; R. Stefanicki, *Ochrona konsumenta w świetle ustawy o szczególnych warunkach sprzedaży konsumenckiej* [Protection of the consumer under the Act on Special Conditions Applicable to Consumer Sales], Kantor Wydawniczy Zakamycze, Kraków: 2006, pp. 105-108.

[67] R. Stefanicki, *Konstytucjonalizacja ochrony konsumenta na tle standardów prawa wspólnotowego* [Constitutionalization of consumer protection against the backdrop of Community law], 3 Państwo i Prawo 5 (2008), p. 13.

[68] Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 12 January 2007, IV CSK 307/06, LEX no. 238967.

[69] There is some authority implying that definitions could be appended in the form of an annex as long as all provisions are within one document and consumers are not referred to outside documentation. See: wyrok Sądu Apelacyjnego w Łodzi [judgment of the Appellate Court for Łódź], 30 November 2017, I ACa 903/17, LEX no. 2461426; wyrok Sądu Okręgowego w Rzeszowie [judgment of the Rzeszów Regional Court], 19 October 2015, VI GC 271/15, LEX no. 1952094.

[70] Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 14 March 2018, II CSK 445/17, LEX no. 2486131. See: Report of the Ombudsman for the Insured, *Nieprawidłowości w ogólnych warunkach ubezpieczenia* [Irregularities in standard insurance terms], available at: https://bit.ly/2XBQj0K (accessed 30 November 2018); Office of Competition and Consumer Protection, *Raport z Kontroli Wzorców Umownych Stosowanych przez Zakłady Ubezpieczeń* [Report following an inspection of model contracts

of civil law, particularly Art. 65 § 2 which obliges interpreters of a contract to be guided more by the mutual intention of the parties and the contract's purpose rather than its literal wording. A clause cannot be worded so unclearly that a plausible interpretation deprives a consumer of insurance coverage. This principle has been extended to prohibit cases of an insurer's refusal to provide coverage where the insured realized a given risk was not covered by the relevant policy after an accident has occurred, provided however that the wording of the clause was so unclear that to think it covered a particular type of risk constituted a reasonable interpretation.[71]

Exclusions of liability should, as a general rule, be grouped together and not scattered all throughout a contract; they should be easily discoverable for a non-sophisticated contract reader.[72] It is insufficient for a trader to include within general terms and conditions a reference to a statute or regulation, e.g. to the Criminal Code when defining an act that absolves the insurer of liability. Drafters should avoid formulations such as "all forms of crime" or "any and all instances of set-off", and instead attempt to formulate exhaustive, enumerative lists.[73] Factual findings of the court are also pertinent

used by insurance firms], September 2006, available at: https://www.uokik.gov.pl/download.php?id=584 (accessed 28 November 2018); M. Orlicki, *Kilka uwag o technice tworzenia ogólnych warunków ubezpieczenia* [Remarks on the technique of drafting of model insurance contracts], 1 Wiadomości Ubezpieczeniowe 75 (2011), pp. 80-83.

[71] Wyrok Sądu Najwyższego [Judgment of the Supreme Court] 15 January 2016, I CSK 122/15, LEX no. 1977822; wyrok Sądu Najwyższego [judgment of the Supreme Court], 16 September 2016, IV CSK 711/15, LEX no. 2151436 (endorsing *obiter* comments made in the 15 January judgment); R. Trzaskowski, *Art. 385*, in: J. Gudowski (ed.), *Kodeks cywilny. Komentarz. Tom III. Zobowiązania. Część ogólna* [Civil Code. Commentary. Volume III. Obligations. General part], ed. II, LEX 2018, side no. 20; M. Bączyk, *Przegląd orzecznictwa Sądu Najwyższego w sprawach bankowych za okres od lipca do grudnia 2016 r. (cz. I)* [Overview of the Supreme Court's case law in banking matters in the period between July and December 2016 (part I)], 10 Monitor Prawa Bankowego 44 (2017), p. 44; E. Wójtowicz, *Instrumenty kontroli wzorców umownych w obrocie profesjonalnym* [Instruments of control of model contracts in professional trading], 308 Acta Universitatis Wratislaviensis 549 (2009), pp. 550, 565.

[72] Judgment of the Supreme Court of 23 January 2015, ref. number V CSK 217/14; wyrok Sądu Apelacyjnego w Łodzi [judgment of the Appellate Court for Łódź], 16 September 2015, I ACa 524/15, LEX no. 1808670; wyrok Sądu Apelacyjnego w Warszawie [judgment of the Appellate Court for Warsaw], 25 May 2017, VI ACa 145/16, LEX no. 2330650. J. Ostałowski, *Zaniechanie informacyjne banku jako podstawa roszczeń konsumenta dotyczących umowy kredytu denominowanego we franku szwajcarskim* [Information negligence of a bank as a basis of consumer claims under a loan denominated in Swiss francs], 4 Przegląd Prawa Handlowego 27 (2018), p. 35. Also note that exclusion of liability with respect to non-performance or undue performance of a contract and for bodily harm is impermissible under Article 385^3 points 1 and 2 of the Civil Code.

[73] *See e.g.* wyrok Sądu Okręgowego w Łodzi [judgment of the District Court for Łódź], 20 August 2015, III Ca 720/15, LEX no. 2131849; M. Wałachowska, *Wzorce umowne po wejściu w życie nowej ustawy o działalności ubezpieczeniowej i reasekuracyjnej (zagadnienia wybrane)* [Model contracts following the entry into force of the new Act on Insurance and Reinsurance Activity], 3 Wiadomości Ubezpieczeniowe 3 (2016), pp. 6-9. This requirement of exhaustiveness is not, however, unbounded, and it has been held that a failure on the part of a trader to specify all instances of bad weather within a contractual definition of *force majeure* did not fall foul of the transparency principle. See: wyrok Sądu Apelacyjnego w Warszawie [judgment of the Appellate Court for Warsaw], 26 April 2013, VI ACa 1509/12, LEX no. 1322087.

as the judges considered whether the consumer in question was aware of the trader's motives in not formulating a contract clause in a transparent fashion, or contemplated a hypothetical where a consumer would ultimately profit by virtue of opting for a given contractual mechanism which, at least ostensibly and on the surface, appears unfair.[74] When analysing the permissibility of an indexation clause in the context of its transparency, the Supreme Court has put emphasis on whether the consumer was actually aware of the situation on the market and the likelihood of the currency rate of the Swiss franc (in which the loan was indexed) radically appreciating.[75]

It is defensible for a supplementary hospital insurance policy to prescribe a maximum duration of a hospital stay for which a payments under the policy will be disbursed. Such a limit is within the bounds of good faith provided that it clearly delineates the range of circumstances in which the patient is granted coverage.[76] More generally, a reasonable degree of proficiency in literal legal interpretation may be demanded from an average consumer. It has been held that a quote of the relevant statutory provision concerning the civil right of retention[77] is sufficient to satisfy the transparency requirement so long as the provision is featured prominently and without redundant additions aimed at obscuring its reading by the consumer.[78]

4.2. Consequences of a failure to observe the transparency requirement

It has been acknowledged at the highest judicial level that there is no agreement as to the legal consequences of a trader's or seller's failure to formulate a contract clause plainly and intelligibly.[79] There are several schools of thought in this regard – first, that where a clause is ambiguous, an attempt to apply a *contra proferentem* interpreta-

[74] Wyrok Sądu Apelacyjnego w Szczecinie [Judgment of the Appellate Court for Szczecin], 13 June 2016, I ACa 23/15, LEX no. 2121872.

[75] Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 1 March 2017, IV CSK 285/16, LEX no. 2308321. I would submit that it is difficult to reconcile this approach with the prevalent "average consumer" standard. I would suggest that courts should continue to endorse the objective measure instead of delving into the subjectively perceived cognitive skills of a given complainant.

[76] Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 30 September 2015, I CSK 800/14, 9 Orzecznictwo Sądu Najwyższego. Izba Cywilna 105 (2016).

[77] Under Article 461 § 1 of the Polish Civil Code, "A person obliged to release somebody else's thing may retain it until his claims for the reimbursement of expenditures on the thing or claims for the redress of the damage inflicted by the thing are satisfied or secured."

[78] Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 4 March 2016, I CSK 72/15, LEX no. 2036717. The standard is rather high, as the Court insisted that the particular provision in question was drafted in plain and everyday language and that, importantly, there was only one possible interpretation thereof for an average, typical consumer. The Court also remarked that it is too refined of an interpretation to argue that an average consumer knows the definition of retention under the Civil Code, and that the use of the term in the contract clause under dispute was largely consistent with the general common meaning of the notion.

[79] Postanowienie Sądu Najwyższego [Resolution by the Supreme Court], 22 April 2015, I CSK 720/14, LEX no. 1710341. The judgment endorsed the view that a non-transparent clause may be rendered ineffective, noting however a wealth of differing opinions in this regard. *See also* Trzaskowski, *supra* note 71, side no. 29.

tion should be made.[80] It appears that the dominant tendency is to empower judges to render a clause unfair on the sole basis of a failure to proffer a transparent clause to consumers. This approach, just as the previous one, has been endorsed by the Supreme Court[81] which in addition has remarked on one occasion that it is the "most convincing view."[82] This account is shared by a majority of academic writers, some of whom have underscored that it reflects the intention of the Court of Justice of the European Union to a greater extent than any of the other approaches proposed.[83]

In abstract control proceedings, the *contra proferentem* rule does not apply, pursuant to the letter of Art. 385 § 2 of the Civil Code. This could mean that in such cases, where a clause does not have one plausible interpretation, it should by default be struck down as falling afoul of the overarching transparency requirement.[84] This need not be the case however. It is conceivable that judges could select a plausible interpretation that is conducive to the security of trading. As regards cases brought in individual cases, I submit that a combined approach is most fitting in terms of protecting the weaker bargaining party. Therefore, a court should first attempt a *contra proferentem* interpretation, striving to purposively construe a clause so that it increases the rights or decreases the burdens of the consumer. Where this proves futile or excessively difficult, the court should acknowledge that the clause in dispute is so one-sided that its consequences cannot be remedied by reference to the ordinary rules of contractual interpretation prescribed in Art. 65 § 2 of the Civil Code (particularly where there is no conclusive indication of mutual intention), and strike it down as unfair. Importantly, judges should be circumspect about allowing ambiguous clauses when at least one plausible interpretation is inconsistent with the substantive requirements of fairness. Judicial discretion must be retained, and judges will have to make decisions as to whether they pick the more consumer-friendly construction or whether they render the entire clause ineffective. While it might be safer to err on the side of caution, nonetheless the ultimate decision will depend on the circumstances of the particular case at hand. Still, it is worth underscoring that the test should be two-pronged in respect of individual claims – an inquiry as to whether a consumer-friendly interpretation is possible; followed – only where no such alternative exists – by a declaration of unfairness.

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[80] Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 4 March 2016, I CSK 72/15, LEX no. 2036717. M. Bednarek, in: E. Łętowska (ed.), *Prawo zobowiązań - część ogólna. System Prawa Prywatnego. Tom 5* [Law of obligations - general part. System of Private Law. Volume 5], C.H. Beck, Warszawa: 2013, p. 706.

[81] Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 15 February 2013, I CSK 313/12, 12 Monitor Prawa Bankowego 28 (2013).

[82] Postanowienie Sądu Najwyższego [Resolution by the Supreme Court], 22 April 2015, I CSK 720/14, LEX no. 1710341.

[83] P. Mikłaszewicz, *Art. 385*, in: K. Osajda (ed.), *Kodeks cywilny. Komentarz. Zobowiązania. Część ogólna. Tom IIIA* [Civil Code. Commentary. Obligations. General part. Volume IIIA], C.H. Beck, Warszawa: 2017, pp. 260-261; Łętowska, *supra* note 66, p. 322; Popiołek, *supra* note 67, p. 1067.

[84] Wyrok Sądu Najwyższego [Judgment of the Supreme Court], 4 March 2016, I CSK 72/15, LEX no. 2036717.

CONCLUSIONS

The foregoing discussion serves to demonstrate that the requirement that terms in consumer contracts be drafted in plain and intelligible language has been used by the CJEU and national courts to incorporate information duties into the consumer-trader relationship. This relatively recent development should be, on the whole, assessed positively, although it could also be viewed as an attempt to circumvent the limits imposed by the prohibition of assessment of the adequacy of price or remuneration under Art. 4(2) of Directive 93/13. In this sense it appears that the CJEU is seeking to ameliorate the effects of this preclusion by increasing the level of information consumers must be furnished with prior to entering into a consumer contract. Importantly, the most recent pronouncements of the European court suggest that consumers (i.e. average consumers who are reasonably observant and circumspect with respect to their personal finances) must be facilitated in making prudent decisions. The CJEU has been adamant in its restatements of recital 20 to the Directive, under which the consumer should actually be given an opportunity to examine all the terms of the contract.

Although it appears clear that consumers must be able, with reference to an adhesion contract term, to foresee the economic consequences of the term for their financial situation (albeit this has been worded more in terms of the risk posed by such a term), nonetheless a handful of issues pertaining to the practical consequences of the requirement are yet to be resolved. Specifically, scant evidence is available as to whether a court may use the plain and intelligible language threshold to strike down consumer contract terms before moving to a substantive inquiry under Art. 3(1) of Directive 93/13 (Polish courts have shown some inclination to do so). The judiciary overall appears to be moving in this direction, albeit couching its decisions in terms of pre-contractual information, thus proving resistant to potential new breakthroughs in the field of consumer contract law and sticking rather to already established axioms. Furthermore, doubts persist as regards the consequences of a term not being worded in plain and intelligible language within the meaning of Art. 5 of the Directive. As the provision has an open-ended wording and presents itself as a general, overarching requirement of clarity, there may be a temptation to consider it a mere instruction which has no significant ramifications where it is not obeyed. The *contra proferentem* rule is particularly troublesome in this context, and its position within the protective scheme of the Directive is in this regard highly ambiguous.

POLISH PRACTICE

Sylwia Majkowska-Szulc, Arkadiusz Wowerka

Cross-border Transfer of a Seat, Cross-border Conversion or the Coming into Existence of a New Company? Doubts Against the Background of the Court of Justice's Judgment in C-106/16 Polbud – Wykonawstwo Sp. z o.o.

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CROSS-BORDER TRANSFER OF A SEAT, CROSS-BORDER CONVERSION OR THE COMING INTO EXISTENCE OF A NEW COMPANY?

DOUBTS AGAINST THE BACKGROUND OF THE COURT OF JUSTICE'S JUDGMENT IN C-106/16 POLBUD – WYKONAWSTWO SP. Z O.O.

Abstract:
This article focuses on mobility of companies in the European Union in the light of the Court of Justice's judgment in the C-106/16 Polbud – Wykonawstwo sp. z o.o. case.[1] *The Court of Justice has once again interpreted the treaty provisions relating to the EU freedom of establishment in the context of cross-border conversion of companies. The in-depth analysis of the case from the substantive law perspective as well as from the conflict-of-law perspective has raised some doubts with regard to the background of the judgment. Therefore, the article assesses whether the cross-border transfer of a seat took place in the Polbud case or the cross-border conversion, or possibly a new company has come into existence. Most of the analysis is aimed at exposing the risks related to the companies' mobility under the rules adopted in the Polbud judgment, in particular in the absence of respective European and national regulation.*

Keywords: cross-border transfer of seat, cross-border conversion of company, mobility of companies, EU freedom of establishment, conflict-of-laws, statutory seat, real seat, registered office, continuation of legal personality, company's liquidation, protection of creditors, protection of minority shareholders

INTRODUCTION

The subject of this publication falls within the issues surrounding the mobility of companies in the European Union. The Court of Justice has already issued a number of

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[1] Judgment of the Court of Justice of the EU of 25 October 2017 in the case C-106/16 *Polbud – Wykonawstwo sp. z o.o.*, ECLI:EU:C:2017:804.

well-known judgments on cross-border mobility of companies.[2] However, not many areas of EU law arise equally strong feelings in the legal commentariat. At the same time, the legal issues related to the companies' mobility have the development potential. Therefore, taking up further in-depth debate seems to be desirable. In addition, as it has been mentioned by Advocate General J. Kokott in her opinion "it's all been said before, just not by everyone yet."[3] The Court of Justice, in its judgment in C-106/16 *Polbud – Wykonawstwo sp. z o.o.*, covered by the subject of this article, has once again interpreted the treaty provisions relating to the EU freedom of establishment in the context of cross-border conversion of companies. The judgment has been extensively commented on, both in Polish[4] as well as foreign legal writings.[5] Its reception and

[2] Judgments in the following cases: C-81/87 *Daily Mail and General Trust*, EU:C:1988:456; C-212/97 *Centros*, EU:C:1999:126; C-208/00 *Überseering*, EU:C:2002:632; C-167/01 *Inspire Art*, EU:C:2003:512); C-411/03 *SEVIC Systems*, EU:C:2005:762; C-210/06 *Cartesio*, EU:C:2008:723; C-378/10 *VALE Építési kft.*, EU:C:2012:440. While this matter has hardly ever been subject to regulation at the level of secondary legislation, *see* however Directive 2005/56/EC of 26 October 2005 on cross-border mergers of limited liability companies, [2001] OJ L 310, and Regulation (EC) 2157/2001 of 8 October 2001 on the Statute of a European company (SE), [2001] OJ L 294.

[3] Opinion of Advocate General Kokott delivered on 4 May 2017 in case C–106/16 *Polbud — Wykonawstwo sp. z o.o., in liquidation*, ECLI:EU:C:2017:351, para. 4 (quoting Karl Valentin – a Bavarian comedian, cabaret performer and author who coined countless "well-known sayings").

[4] A. Nowacki, *Artykuł 270 pkt 2 k.s.h. a transgraniczne przeniesienie siedziby statutowej spółki* [Article 270(2) CCC and the cross-border transfer of seat of a company], in: A. Olejniczak and T. Sójka (eds.), *Societates et obligationes – tradycja, współczesność, przyszłość. Księga jubileuszowa Profesora Jacka Napierały* [Societas et obligations – tradition, the present, and the future. Liber amicorum for professor Jacek Napierała], UAM, Poznań: 2018; G. Kozieł, *Dopuszczalność i zasady przeniesienia siedziby statutowej polskiej spółki handlowej do innego państwa członkowskiego Unii Europejskiej – glosa do wyroku Trybunału Sprawiedliwości z 25.10.2017 r., C-106/16, Polbud-Wykonawstwo sp. z o.o.* [The permissibility and principles of a cross-border transfer of the registered office of a Polish commercial company or partnership to another EU Member State – commentary on CoJ judgment of 25 October 2017, C-106/16, *Polbud-Wykonawstwo sp. z o.o.*], 2 Europejski Przegląd Sądowy 25 (2018); A. Mucha, *Ochrona wierzycieli w przypadku transgranicznego przeniesienia siedziby polskiej spółki kapitałowej do innego państwa członkowskiego Unii Europejskiej* [Protection of creditors in the outbound cross-border conversion of a Polish company], 1 Transformacje Prawa Prywatnego 113 (2017); A. Mucha, *Transgraniczne przeniesienie siedziby spółki w prawie unijnym. Glosa do wyroku TS z dnia 25 października 2017 r., C-106/16* [Transborder transfer of a company seat in EU law. A commentary on the ECJ judgement of 25 October 2019, C-106/16], 2 Glosa 56 (2018); E. Skibińska, *O zgodności art. 270 pkt 2 i art. 459 pkt 2 k.s.h. z prawem Unii Europejskiej* [On the compatibility of Art. 270(2) and 459(2) CCC with EU law], in: J. Frąckowiak (ed.), *Kodeks spółek handlowych po 15 latach obowiązywania* [The Commercial Companies Code after 15 years in force], Wolters Kluwer, Warszawa: 2018.; A. Guzewicz, *Skutki uchwały o przeniesieniu spółki kapitałowej do innego państwa członkowskiego* [Effects of the resolution on the transfer of a capital company to another Member State], in: K. Bilewska (ed.), *Efektywność zarządzania i nadzoru w spółce handlowej. W poszukiwaniu optymalnego modelu ustroju spółki* [Effectiveness of management and supervision in a commercial company. Searching the optimal model of the company's system], Wolters Kluwer, Warszawa: 2018, p. 375.

[5] S. Frazzani et al., *The Polbud Judgment and the Freedom of Establishment for Companies in the European Union: Problems and Perspectives*, European Parliament, Brussels: 2018; S. McLaughlin, *Unlocking Company Law* (4th ed.) Routledge, London: 2018, pp. 120 et seq.; M. Szydło, *Polbud – Wykonawstwo Sp. z o.o., in Liquidation ('Polbud')*, 55(5) Common Market Law Review 1549 (2018); A. Mucha and K. Oplustil, *Redefining the Freedom of Establishment under EU Law as the Freedom to Choose the Applicable*

assessments range from enthusiastic to very critical, which gives rise to further lively discussion.

This commentary aims at the in-depth analysis of the *Polbud* case from the substantive law perspective, taking into consideration selected essential conflict-of-law elements as well. The conflict-of-law aspects were absent in the judgment of the Court of Justice, but they had been covered by the opinion delivered by Advocate General J. Kokott. On the other hand, the facts of the case adopted by the Court of Justice and its findings on the contents of Polish legislation have been made imprecisely. Consequently, the analysis presented in the opinion of Advocate General J. Kokott is more comprehensive and in addition, it does not raise doubts as to the facts of the case established, as well as to applicable law. The Court of Justice has only partially accepted the proposal submitted by the Advocate General. In the end the text of the judgment does not provide legal certainty as to whether the Court of Justice accurately foresaw all the effects that the *Polbud* judgment may produce. This article examines the *Polbud* case taking into consideration the circumstances which arose after the question had been referred to the Court of Justice for a preliminary ruling. Additionally, the risks related to companies' mobility under the rules adopted in the *Polbud* judgment, in particular in the absence of the relevant national regulation, are referred to as well.

1. THE FACTS OF THE CASE, PRELIMINARY QUESTIONS AND THE JUDGMENT

The case concerned a Polish private limited liability company which intended to assume the legal form of a company governed by Luxembourg law while at the same time retaining its legal identity. To complete the operation in question it was necessary to remove the company from the Polish commercial register. However, removing thereof could not be effected, since in accordance with Polish law, the removal of a company from the register requires a prior liquidation and the winding up of the company.

The Polish Supreme Court (*Sąd Najwyższy*) referred the following three questions to the Court of Justice:

> (1) Do Articles 49 and 54 TFEU preclude the application by a Member State, in which a [private limited liability] company was initially incorporated, of provisions of national law which make removal from the commercial register conditional on the company being wound up after liquidation has been carried out, if the company has been newly established in another Member State pursuant to a shareholders' decision to continue the legal personality acquired in the State of initial incorporation?

If the answer to that question is in the negative:

> (2) Can Articles 49 and 54 TFEU be interpreted as meaning that the requirement under national law that proceedings for the liquidation of the company be carried out – including

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the conclusion of current business, recovery of debts, fulfilment of obligations and sale of company assets, satisfaction or securing of creditors, submission of a financial statement on the conduct of those acts, and indication of the person to whom the books and documents are to be entrusted – which precede the winding-up thereof, which occurs on removal from the commercial register, is a measure which is appropriate, necessary and proportionate to a public interest deserving of protection in the form of safeguarding of creditors, minority shareholders, and employees of the migrant company?

(3) Must Articles 49 and 54 TFEU be interpreted as meaning that restrictions on the freedom of establishment include a situation in which — for the purpose of conversion to a company of another Member State — a company transfers its registered office to that other Member State without changing its principal establishment, which remains in the State of initial incorporation?[6]

The first question came down to determining whether the freedom of establishment precludes Polish regulations under which a company incorporated under Polish law may not be converted into a company governed by the law of another Member State, which in the given case was the law of Luxembourg. Therefore, the question seeks to clarify the scope of application of the EU freedom of establishment, and in particular to determine whether the freedom guarantees to a company incorporated under one Member State's law not only the freedom to choose the location of pursuing its economic activity within the European Union, but irrespective of that the right to make the cross-border change of its legal form.[7]

On one hand, both the Advocate General and Court of Justice decided that the freedom of establishment should apply to the right to carry out the cross-border conversion of the company into a company governed by the law of another Member State. On the other hand, the Advocate General posed additional requirements, including the requirement of an intention to actually pursue an economic activity from the territory of the host state. The Advocate General proposed an answer according to which the freedom of establishment applies to the transfer of the statutory seat of the company, incorporated under the law of one Member State, to the territory of another Member State with the aim of converting it into a company governed by the law of the latter Member State, "in so far as that company actually establishes itself in the other Member State, or intends to do so, for the purpose of pursuing genuine economic activity there."[8] In addition, the Advocate General emphasized that "this does not detract from the power of the latter Member State to define both the connecting factor required of a company if it is to be regarded as incorporated under its [national] law, and the connecting factor required to maintain that status."[9]

Whereas the Court of Justice held that the freedom of establishment was "applicable to the transfer of the registered office of a company formed in accordance with the law

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[6] Opinion of AG Kokott in C-106/16 *Polbud – Wykonawstwo sp. z o.o., in liquidation*, para. 19.

[7] *Ibidem*, paras. 1-3.

[8] *Ibidem*, para. 43.

[9] *Ibidem*.

of one Member State to the territory of another Member State, for the purposes of its conversion, in accordance with the conditions imposed by the legislation of the other Member State, into a company incorporated under the law of the latter Member State, when there is no change in the location of the real head office of that company."[10] In addition, the Court of Justice held that the Polish legislation "which provides that the transfer of the registered office of a company incorporated under the law of one Member State to the territory of another Member State, for the purposes of its conversion into a company incorporated under the law of the latter Member State, in accordance with the conditions imposed by the legislation of that Member State is subject to the liquidation of the first company"[11] was precluded by the EU freedom of establishment.

Taking into account the Court of Justice's ruling on the preliminary reference, the Polish Supreme Court *(Sąd Najwyższy)* has formulated the following theses:

> 1. If the company's connecting factor with the national territory under the law of Luxemburg is satisfied, the EU freedom of establishment covers the Polish company converting itself into a company governed by Luxemburg law. The location where the company pursues an essential portion, or even the whole, of its activity is not relative, as far as it meets the requirements relating to newly establishing [itself] as a legal person of a host State.
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> 2. A registry court is obliged – although the regulations, found by the judgment of the Court of Justice of the European Union of 25 October 2017 as precluding the principle of the freedom of establishment, have not been repealed – to refuse to apply the Polish regulations providing for the completion of the full procedure of the company's liquidation and to interpret the other provisions applying the "EU-compatible" interpretation, breaking the rules of the textual interpretation.[12]

2. TRANSFER OF THE SEAT ABROAD AND CROSS-BORDER CONVERSION

The whole case started with the resolution of shareholders of the [private] limited liability company, governed by Polish Law, to transfer the "the company's seat" to the Grand Duchy of Luxemburg in accordance with Art. 270(2) of the Polish Commercial Companies Code. *(Kodeks Spółek Handlowych)* (CCC).[13] First of all, it should be explained that Art. 270(2) CCC explicitly refers to the "transfer the company's seat" and not to the "conversion", and therefore the provision in question cannot be the legal basis for the cross-border conversion. It should be emphasized that the "conversion" and the "transfer of a seat" should be treated separately in the substantive area. The transfer of the seat is not a *sine qua non* condition for the conversion in the substantive area and

[10] C-106/16 *Proceedings brought by Polbud - Wykonawstwo sp. z o.o.*, para. 1 of the operative part of the judgment.

[11] *Ibidem.*

[12] Decision of the Supreme Court of 25 January 2018, IV CSK 664/14.

[13] Opinion of AG Kokott in C–106/16 *Polbud – Wykonawstwo sp. z o.o., in liquidation*, para. 13.

those concepts should not be equated. Consequently, it is erroneous to claim that the conversion of the company means automatically the transfer of the company's seat. On the other hand, it is also erroneous to claim that the transfer of the seat means, or is automatically associated with, the conversion of the company. Even though the conversions are usually accompanied by the transfer of the seat, both institutions should be treated separately in legal terms. The same refers to Art. 270(2) CCC as well. The transfer of the seat, referred to in the provision in question, relates to the transfer of the seat only and not to the operation of conversion *sensu stricto* and even more, not to the cross-border conversion *sensu stricto*. Therefore, the provision in question is not applicable to the cross-border conversions.[14] In conclusion, no fragment of Art. 270(2) CCC is the legal basis for the transfer of the seat in that sense that a right to transfer the seat could be derived from that provision. It only provides that the resolution to transfer the seat abroad results in winding up the company in the light of that provision. Therefore, Art. 270(2) CCC is only a provision specifying the reason for winding the company up.

Firstly, it should be emphasized that in no regulation thereof does Polish law prevent or preclude the cross-border conversion of a company and undoubtedly the above-mentioned Art. 270(2) does not preclude that. The provision in question applies to the transfer of the company's seat only, and not to the conversion of a company, and therefore cannot preclude the conversion. The provision in question may be applicable, at most, in a situation when, within the framework of the conversion, a resolution to transfer the company's seat is adopted. Nevertheless, also in such a situation the provision in question relates to the transfer of the seat itself and not to the conversion. What is more, it is worth noticing that the resolution to transfer the seat, in itself, cannot be considered the resolution on the company's conversion.

Secondly, the conversion requires to adjust the articles of incorporation of the hitherto company to a new company. The adjustment is processed in accordance with the requirements provided for a new company. It is necessary to draft the "new articles of incorporation", including the indication of the seat required in accordance with those provisions. Any resolution referred to in Art. 270(2) CCC is not covered thereby and is not an act related to adjusting the articles of incorporation. That proves that such a resolution is unnecessary and, undoubtedly, it is not required by law. It can be assumed that such a resolution is treated as a separate act in the meaning of Art. 270(2) CCC not covered by the transformation process since it does not find any teleological justification. Thus, the Supreme Court has erroneously found such a resolution to be the resolution on conversion.

Consequently, in the *Polbud* proceedings the Supreme Court had erroneously identified the transfer of the seat with the conversion of the company and therefore misled the Court of Justice. On this faulty assumption, both the Supreme Court and the Polbud company, as well as the Polish government represented before the Court of Justice, based their deliberations. The facts evidence that the conversion of the company has not taken

[14] Hence aptly, although with different arguments Nowacki, *supra* note 4, pp. 423- 424, 425.

place. There can be no doubt that the possibility to carry out the cross-border conversion is acceptable under the EU freedom of establishment, and it is only the substantive procedure to effect *sensu stricto* conversions, similar to cross-border mergers, that is missing.

3. THE TRANSFER OF THE REGISTERED OFFICE OF THE COMPANY TO ANOTHER MEMBER STATE WITHOUT THE TRANSFER OF THE REAL HEAD OFFICE

The very factual and legal situation established in the case and presented to the Court of Justice by the Polish Supreme Court is doubtful. The Supreme Court emphasized the lack of intention to transfer the real head office of the company[15] and suggested that it was only about the change of the company's registered office. Whereas, it does not result from the resolution of the general meeting of shareholders that the company had directly declared non-transfer of the real head office of the company but only the change of the State of the company's registration. Perhaps this element was added by the Supreme Court following the hearing, and perhaps on its own initiative, in order to remove doubts arising from the heated debates in the legal literature. At the same time, the facts contradict the thesis that the company had not been willing to transfer the real head office, since it was gradually organizing its office in Luxemburg with the aim of pursuing a portion of its activity from the territory of Luxemburg. It should be recalled that the law of Luxembourg, just like the legal systems of all other Member States, requires as the condition of incorporation and continued existence of the companies under the law of Luxemburg, that they have a statutory seat in the national territory. This means that the registration of the company in Luxembourg necessarily entails the transfer of the statutory seat.[16] Finally, the Court of Justice has held that the fact of transferring the real head office bears no relevance to the case, which in turn, happens to be interpreted as the absence of a requirement to carry out genuine activity in the territory of a particular Member State in order to submit the company's activity to the law of the company's registration State.

The conclusion of the Court of Justice presented seems to be too far-reaching in view of the EU law. First of all, the requirement of carrying out [business] activity in a Member State is a condition of exercising the EU freedom which is confirmed by the established case-law of the Court of Justice. At the same time, the position presented by the Court of Justice in *Polbud* remains in confrontation with the view commonly presented in legal literature, according to which an intrinsic or isolated (German

[15] For the purposes of this article the 'real head office' means the place where the management of the company conducts the administration of its interests on a regular basis and which is ascertainable by third parties. This definition also applies to the concept of the real seat of the company in private international law. *See* A. Wowerka, *Pojęcie siedziby spółki w prawie prywatnym międzynarodowym* [The concept of a company's seat in private international law], in: Olejniczak and Sójka (eds.), *supra* note 4, pp. 709-721.

[16] Opinion of AG Kokott in C-106/16 *Polbud – Wykonawstwo sp. z o.o., in liquidation*, para. 21.

„*isolierte Satzungsitzverlegung*" – i.e. not accompanied by the transfer of the real head office) transfer of the registered office is not covered by the scope of application of the freedom of establishment.[17] The Court of Justice has not referred to the arguments put forth in this regard in the legal literature. However, the brief reasoning presented by the Court of Justice in the *Polbud* case raises essential objections in view of the significant matter covered thereby. The grounds presented by the Court of Justice are, in principle, limited to arguments "under its own authority." However, a conclusion, opposite to that presented by the Court of Justice, could be drawn from the judgments which had been referred to by the Court in support of its position.

Moreover, the selectivity of the case-law referred to raises objections. The so far case-law of the Court of Justice clearly shows that the EU freedom of establishment requires the actual connecting factor of the company with the State of incorporation. Just to remind in this regard, for example, the judgments in the *Cadbury Schweppes* and *Vale Építési kft* cases. The Court of Justice expressly pointed out therein that the freedom of establishment assumed the actual establishment of the company in question in the host Member State and the pursuit of a genuine economic activity there.[18] In the light of that case-law it can be assumed that also the conversion of the company should correspond to opening the actual establishment which aims to pursue genuine economic activity in the State of the target form of the company.

Unfortunately, the Court of Justice has not explained why that case-law is not applicable in a case such as the one under discussion. The relevant and compelling comments of Advocate General J. Kokott[19] may be indicated in this place. She found that "[i]f, in contrast, Polbud seeks only to change the company law applicable to it, the freedom of establishment is not relevant. For, although that freedom gives economic operators in the European Union the right to choose the location of their economic activity, it does not give them the right to choose the law applicable to them. Consequently, a cross-border conversion is not caught by the freedom of establishment where it is an end in itself, but only where it is accompanied by actual establishment."[20]

It is worth mentioning that the transfer of the real seat is important from the point of view of Polish law. The real seat constitutes a connecting factor for the determination of the law applicable to the company view to Polish private international law in force which is traditionally based on the real seat theory.[21]

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[17] G. Janisch, *Die grenzüberschreitende Sitzverlegung von Kapitalgesellschaften in der Europäischen Union*, Nomos, Baden Baden: 2015, pp. 54, 64.

[18] *Cf.* para 34 of the judgment in C-378/10 *VALE Építési kft.* and paras. 54 and 66 of the judgment in C-196/04, *Cadbury Schweppes plc.*

[19] Opinion of AG Kokott in C-106/16 *Polbud – Wykonawstwo sp. z o.o., in liquidation*, in particular paras. 32-43.

[20] *Ibidem*, para. 38.

[21] M. Pazdan, *Zagadnienia kolizyjnoprawne w prawie spółek handlowych* [Conflict of laws issues in the commercial companies law], in: A. Szumański (ed.), *Prawo spółek handlowych* [Commercial companies law], C.H. Beck, Warszawa: 2019, vol. 2A, p. 349; A. Wowerka, *Zakres zastosowania statutu personalnego spółki* [The scope of aplication of the law applicable to a company], C.H. Beck, Warszawa:

Notwithstanding the foregoing, a kind of dualism in treatment of an isolated transfer (i.e. without the real head office) of the registered office, from the point of view of EU freedom of establishment, arises in connection with the decision of the Court of Justice in the present case. Thus, it can be reasonably assumed that, under the current interpretation of the Court of Justice, the scope of application of that freedom covers the isolated transfer of the registered office effected within the framework of conversions, including the *sensu stricto* conversion, while the isolated transfer of that seat, not related to conversions, is excluded from the scope of application of that freedom. Although, in the majority of cases the isolated transfer of the registered office will involve conversions, nevertheless, it can also occur without conversions. Could it be that the Court has deliberately decided that in the latter case, the restrictions laid down by the Member States are not subject to assessment from the point of view of compliance with the EU freedom of establishment?

For the sake of accuracy, it should be emphasized that Art. 270(2) CCC does not constitute a legal basis for the shareholders' resolution on the transfer of the registered office abroad. Simultaneously, no part of Art. 270(2) CCC constitutes a legal basis for the transfer of the registered office in the sense that it could be possible to derive the shareholders' right to cross-border transfer of registered office from the provision. The same rules apply to the company itself. An opposite assumption appears to stem from the referring court's findings in the present case. In this respect it should be highlighted that the provision at stake merely provides that the resolution on the transfer of the registered office abroad results in the dissolution of the company in the light of this provision. Therefore, Art. 270(2) CCC exclusively specifies the reason for the dissolution of the company and does not constitute the legal basis for the transfer of the registered office abroad.

4. CONTINUATION OF LEGAL PERSONALITY

As it results from the opinion of Advocate General, the company wished to convert a Polish [private] limited liability company registered at the Polish commercial register *KRS* into the company governed by Luxemburg law while at the same time retaining its "legal identity" (Eng. *legal identity*, Fr. *identité juridique*, germ. *Recht anzunehmen*).[22] The resolution of the shareholders to transfer the "company's seat" to Luxemburg was the basis for applying, by Polbud, to the competent registry court to [enter] initiating the liquidation procedure, which took place on 19 October 2011. Subsequently, on

2019, pp. 122-123; A. Wowerka, *Wyznaczanie statutu personalnego osób prawnych* [Determination of the law applicable to legal persons], 19 Problemy Prawa Prywatnego Międzynarodowego (2016), pp. 52-61; A. Wowerka, *Osoby prawne i inne jednostki organizacyjne* [Legal persons and other organisational units], in: M. Pazdan (ed.), *System prawa prywatnego* [Private law system], vol. 20A: *Prawo prywatne międzynarodowe* [Private international law], C.H. Beck, Warszawa: 2014, pp. 633, 634-637, 670-673.

[22] Opinion of AG Kokott in C-106/16 *Polbud – Wykonawstwo sp. z o.o., in liquidation*, para. 2.

26 October 2011 the initiation of the liquidation procedure was entered into the commercial register and a liquidator was appointed. Approximately two years later, i.e. on 28 May 2013, the meeting of the Polbud's shareholders agreed before a notary in Luxemburg to implement the resolution, on transfer of the seat, passed in September 2011. Thereby, the meeting of shareholders decided to transfer the seat of the company to Luxemburg with effect from that date, without terminating that company's legal personality or forming a new legal person. Moreover, it has been decided to: assume the legal form of a private limited liability company under Luxemburg law, to change the name to Consoil Geotechnik S.à.r.l. (Consoil) and to redraft the company's articles of incorporation. Consequently, on 14 June 2013 Consoil was entered into the register of Luxemburg companies.[23]

Whereas, the only basis for the continuation of a legal personality may be the relevant legislation. No resolution of the shareholders can, in itself, be the legal basis for the continuation of the legal personality, since the legal personality can be imposed by the statute only as it is provided for, e.g., in Art. 33 of the Polish Civil Code. Recognising that the shareholders themselves, acting upon the power of their own actions, for example their own statements, could decide on retaining or terminating the legal personality of the company would lead to absurd conclusions. This applies not only to the original obtaining the legal personality when establishing a particular entity, but also the continuation of that personality in the event of its conversion. However, it is possible to imagine that legislation concerned provides, as a condition of obtaining the legal personality, for passing any possible resolution on that matter. Polish law does not provide for such a requirement. Nor does it result from the *Polbud* case that such a requirement was established in Luxemburgish law. In conclusion, it should be concluded that the shareholders' resolution to continue the legal personality has no legal relevance.

5. THE COMING INTO EXISTENCE OF A NEW COMPANY

Performing by the Polbud company actions, such as assuming a legal form of the [private] limited liability company under Luxemburg law, the change of the company's name and re-drafting of the company's articles of incorporation, should be jointly assessed as incorporation of a company governed by Luxemburg law. It can even be said that there has been the conclusion of the [private] limited liability company's articles of incorporation, governed by Luxemburg law, in which the name has been provided. At the same time, the actions typical of conversion, including among others. drawing up a conversion plan or calling the shareholders to make statements on participation, provided for in the Polish CCC, were not undertaken.

Moreover, the claim that it was not about a conversion, can be supported by a relatively considerably [long] time, in particular as far as the conversion procedure is

[23] *Ibidem*, paras. 14-16.

concerned, from the moment of passing the shareholder's resolution to transfer the company's seat abroad [to] registering the company in Luxemburg and submitting an application for removing the Polbud company in liquidation from the Polish commercial register. In addition, in the shareholders' resolution itself it is only the transfer of the seat that is referred to and not the company's conversion into the company governed by Luxemburg law. In this context, it is also significant that the application for removal has been submitted not by the Luxemburg company, allegedly incorporated as a result of conversion, but by the Polbud company itself. In the light of those circumstances an irresistible impression arises that it was just establishing a separate company, governed by Luxemburg law, that had taken place, whose incorporation seemed to be supposedly applied as a mechanism designed to enable, in some way, retaining the continuance of the company's identity as a legal person in new clothing ("under a new coat").

6. REMOVING THE COMPANY FROM THE COMMERCIAL REGISTER OF THE MEMBER STATE OF ORIGIN

On 24 June 2013, i.e. almost a month after registering the company in Luxemburg, Polbud private limited liability company governed by Polish law filed an application, with the registry court in Poland, to be removed from the commercial register. Polbud failed to carry out the instruction by that court, that it should submit the documents required for that purpose that the company had been wound up and liquidated, but referred to the transfer of the company's seat to Luxemburg and its continued existence under the law of that Member State. The company claims that on the day of its seat transfer to Luxemburg it lost its status as a Polish corporation and became a company under Luxemburg law. In its opinion at that stage the liquidation procedure had ended and the company should have been removed from the Polish register.[24]

However, in Polish legislation there are no bases for a mechanism according to which the registration of a company in another EU Member State means "automatic" removing thereof from the first register. It is not possible even upon the application by the company concerned. In Polish law there is such a provision only in respect of domestic conversions governed by Art. 552 CCC ("A company under conversion shall be the converted company upon the entry of the converted company to the register (the conversion day). At the same time, the registry court removes *ex officio* the company under conversion"). By the way, in passing of the foregoing deliberations, it is worth noticing that Polish legislation and, in particular Art. 552 CCC in question, does not make removing, the company under conversion, from the register conditional upon winding the company up after completing its liquidation. That provision refers to removing the company under conversion after entering thereof to the register as a converted company only. Therefore, the entry is a condition for removal.

[24] *Ibidem*, paras. 16-18.

Thus, according to the Polish CCC in the case of domestic conversions the regulation providing for removing the company *ex officio* has been adopted. The action upon the application is possible, but it is not required. This solution has been adopted on the assumption that there is cooperation between the State authorities as far as the exchange of information is concerned. This provision is not applicable to cross-border conversions, since there is no binding and effective information flow between the registry authorities of particular Member States. Poland so far has not even participated in the European Business Register (EBR) which is a network of National Business Registers and Information Providers from currently 25 European countries. In its current state, in each case of cross-border conversion the application of the parties would be necessary. In addition, under the CCC a principle is that the entry on removing a company from the register is constitutive and therefore the company ceases to exist only upon that moment. In this situation, if there had not been an application by the parties, the company would have continued to exist as an "unconverted" company from the Polish perspective, and in Luxembourg it would have already been existing as a possibly converted company from the perspective of Luxembourg law. Nonetheless, on the basis of conflict-of-law adjustment it could be considered that, in the case of cross-border conversion, such an application is required in the light of Art. 552 CCC. However, it will only be the case if this provision is to be applicable to the conversion procedure at all, which in turn, should be determined on the basis of private international law.

7. THE REQUIREMENT OF COMPANY'S WINDING UP AND LIQUIDATION

The Polish provision of Art. 270 CCC has the potential to restrict the mobility of companies. The Court of Justice, in its previous judgments, held that the companies were not eligible for the migrant freedom of establishment of companies (81/87 *Daily Mail*, C-210/06 *Cartesio*). It was only in the judgment in *Polbud* where the Court of Justice found that such a freedom existed, but it was specific, since migrant conversion was concerned. The change in the settled case law turned out to be quite a surprise, particularly [in view of the fact] that in relation to the transfer of a seat itself (C-210/06 *Cartesio*) the Court of Justice has explicitly confirmed the Daily Mail doctrine stating that the migrant company is not covered by the guarantee scope of the freedom of establishment. This meant that the law of the Member State, as it was decisive of the company's incorporation, could similarly decide on the loss of the personality of the company which intended to transfer its seat abroad. Everyone expected that if a host state could not refuse the personality to an immigrating company (the company transferring the seat to that State) (C-208/00 *Überseering*), all the more so the emigration State of the company (transferring the seat from that State) could not take that personality away. At the same time, in the *Polbud* case the Court of Justice ruled differently with regard to the conversion only, which in turn, could mean that the Daily Mail doctrine continues to apply to

the seat's transfer outside the conversion, and the restrictions on that freedom, provided for by national law, are admissible. In this context, the judgment [issued] by the Court of Justice in the *Polbud* case poses a risk of threatening the cohesion and coherence of EU law. The two situations, although clearly somewhat comparable from the point of view of EU freedom of establishment, are treated in a radically different way. Following this line of reasoning also Art. 270 CCC should be found in compliance with the freedom of establishment, on the erroneous assumption that it is also applicable to conversions.

Irrespectively of any acceptable national restrictions on emigration of companies, it results from the case law of the Court of Justice that the Member States may take measures to prevent the establishment of purely artificial arrangements, independently of the economic reasons, whose objective is to avoid the applicability of national legislation. Establishing a company of an artificial undertaking nature, which actually does not conduct any business activity on the territory of a host Member State – as it is the case particularly in the event of address companies or a "fly-by-night" companies – should be considered as having the characteristics of a purely artificial arrangement.[25] Thus, it follows that such artificial companies are not beneficiaries of EU freedom of establishment; in the area of conflict-of law rules it is possible to apply thereto, fully, Art. 270(2) CCC and regardless of whether that provision applies to the transfer of the company' s seat, or at the same time, to the conversions of the company.

In cases, such as Polbud, which show a relationship with more than one legal system, the essential question on the applicable law, which should apply to such situations, arises. The designation of the applicable law is carried out in accordance with the norms of private international law. In view of doubts, referred to above relating to the facts of the case, the designation of the applicable law in that case is as problematic as the application of Art. 270 CCC; since, depending on the assessment and subsumption of the operation, which is a reference point for the judgment of the Court of Justice, it is possible to apply various conflict-of-law norms concerning the companies, in particular, the basic conflict-of-law norm designing the applicable law for companies on the basis of the seat connecting factor or a conflict-of-law norm designing the conversion status. This complex issue was not considered by the Court of Justice in its judgment under discussion, although it is of a fundamental importance, since the appropriateness of considering the compliance of national substantive law, such as e.g. Art. 270 CCC, with EU law exists only when that law is applicable at all. However, the framework of this publication does not allow for further development of that issue.[26]

[25] *Cf.* judgment in case C-196/04 *Cadbury Schweppes plc*, in particular paras. 51, 55, 57, 61, 68. *Cf.* M. Lutter, W. Bayer, J. Schmidt, *Europäisches Unternehmens- und Kapitalmarktrecht*, 1(1) Zeitschrift für Unternehmens- und Gesellschaftsrecht 118 (2018).

[26] *See* A. Wowerka, *Kolizyjnoprawne transgraniczne przekształcenie spółki a przeniesienie siedziby spółki. Kolizyjnoprawna zasada jednoczesnego stosowania prawa właściwego dla spółki przekształcanej i prawa państwa formy spółki docelowej (zasada kombinacji, zjednoczenia). Przeniesienie siedziby spółki i zmiana statutu personalnego spółki. Glosa do wyroku Trybunału Sprawiedliwości UE z dnia 25 października 2017 r., C-106/16, Polbud* [Comment on the judgment of the Court of Justice of the European Union of 25 October 2017 in Case C-106/16, Polbud. Cross-border transformation of the company and the transfer of the company's seat

8. PROTECTION OF CREDITORS, MINORITY SHAREHOLDERS AND EMPLOYEES

If it was assumed, following the Court of Justice, that in the *Polbud* case the conversion operation was concerned, then regardless of the above issues, it is worth to pay attention to other relevant issues related to such an operation. The aim is to protect creditors of the company, the minority shareholders and workers. Those elements have been aptly addressed by Advocate General Kokott in her opinion. As far as the creditors are concerned "there is a risk, […] that the interests of existing creditors will be adversely affected by the conversion", since "the company might henceforth be subject to less stringent rules in relation to capital protection and liability."[27] Similarly, as far as the minority shareholders are concerned, the conversion might be detrimental to the position of those shareholders who possibly unsuccessfully opposed to the conversion, "[f]or new law applicable to the company may bring about changes to the rights and obligations of those with a holding in the company."[28] Finally, such an operation might have an impact on certain rights enjoyed by workers, in particular, corporate co-determination within an undertaking, i.e. the participation in the management of the undertaking, for the "[t]he company law to which the undertaking will be subject after the conversion may provide less extensive rights of co-determination on the part of employees.[29] The Court of Justice, by adopting a decision on the *Polbud* case, should take into account these elements for the purpose of security of trade in the internal market.

CONCLUSIONS

The heated debate in the legal literature, relating to the judgment under discussion, confirms the significance of the topic in question and perhaps also the astonishment caused by that judgment. In the *Polbud* case the Court of Justice has extended the principle of equivalence to the country of origin, and not only the Member State of destination. In particular, the Court of Justice held that the country of origin could not impose, with respect to a cross-border conversion, the conditions which were more restrictive than those applied to a conversion of the company within that Member State. Such a solution entails serious consequences, including the potential risk of "forum and tax shopping."[30] In addition, at the moment of issuing the judgment in the *Polbud* case

in private international law. The conflict-of-laws principle of simultaneous application of the law applicable to the company being transformed and the law of the form of the target company (the principle of combination, unification). Transfer of the company's seat and the change of the law applicable to the company], 4 Gdańskie Studia Prawnicze. Przegląd Orzecznictwa 53 (2018).

[27] Opinion of AG Kokott in C-106/16 *Polbud – Wykonawstwo sp. z o.o., in liquidation*, paras. 59 and 60.

[28] *Ibidem*, para. 62.

[29] *Ibidem*, para. 64.

[30] Frazzani et al., *supra* note 5, p. 36.

the Member States were not ready to accept unconditional possibility of cross-border transfer of a registered office only.

Looking toward the future the recommendations include, among others, the proposals to exclude the situation of cross-border conversion from the scope of application of the norm of Art. 270(2) CCC or even to repeal immediately the above-mentioned provision. The latter proposal entails a risk of enabling the cross-border conversions from the territory of Poland to the outside of the territory of the European Union or even outside the European Economic Area, which might not be in line with the intention of the Polish legislature.[31] Although those theses are based on the erroneous assumption that Art. 270 CCC is applicable to conversions, nevertheless that fact does not affect the rationality of the claim to repeal the provision concerned and to introduce a regulation in compliance with European Union law. On the other hand, the lack of regulation, in Polish legislation, of the procedure for cross-border re-incorporation of the companies, may result in leaving creditors without protection.[32] Hence, a proposal to introduce additional protective instruments, in the area of protecting the companies' creditors, appears in the legal literature, which includes for example, enabling the company's creditors to obtain security for the claims, as in the case of a division of companies under Polish law in accordance with Art. 546 (2) CCC, or adopting the transparency of the procedure for cross-border transfer of the company's seat, including an obligation to record relevant information in official publications and submitting suitable files to the court register.[33]

Unquestionably, the biggest problem is the lack of substantive legal regulation enabling to carry out the cross-border conversion procedure. Subsequently to the judgment in the *Polbud* case such an admissibility results from the EU freedom of establishment. However, there is no substantive implementation tool to implement that freedom, including regulations that take into account the need to protect shareholders, creditors and workers. The own national regulation could be adopted, however, the uniform EU regulation would be more desirable. The *Polbud* case confirms rather the reasonableness and need to harmonize the cross-border conversions by means of consistent EU law. The model adopted in cross-border mergers could serve as a reference point. However, it should be kept in mind that any possible regulations, covering the companies law and private international law, ought to be followed by coherent solutions in the area of the companies' taxation in the event of cross-border transfer of the registered office of a company.[34]

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[31] A. Guzewicz, *Likwidacja spółki z ograniczoną odpowiedzialnością a zakres zastosowania swobody przedsiębiorczości* [Liquidation of a limited liability company and the extent of the freedom of establishement], in: Frąckowiak (ed.), *supra* note 4, pp. 857-865.

[32] C. Gerner-Beuerle et al., *Cross-Border Reincorporations in the European Union: The Case for Comprehensive Harmonisation*, 18(1) Journal of Corporate Law Studies 1 (2018), pp. 32-33.

[33] Kozieł, *supra* note 4, pp. 31-32.

[34] For more on the need to regulate the taxation aspect of cross-border transfers of a registered office, see: J. Meeusen, *Freedom of Establishment, Conflict of Laws and the Transfer of a Company's Registered Office: Towards Full Cross-Border Corporate Mobility in the Internal Market?*, 13(2) Journal of Private International Law 297 (2017).

BOOK REVIEWS

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Agata Helena Winkiel-Skóra
Piotr Szwedo, *Cross-border Water Trade: Legal and Interdisciplinary Perspectives*

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Andrea Gattini, Attila Tanzi, and Filippo Fontanelli (eds.), *General Principles of Law and International Investment Arbitration*, Brill Nijhoff, Leiden, Boston: 2018

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Although all the sources of international law, as reflected in Art. 38 of the Statute of the International Court of Justice (ICJ), enjoy equal legal force, in practice treaty and customary law are clearly predominant. As for the "the general principles of law recognized by civilized nations" – leaving aside the historical reasons behind such a wording, their popularity seems to match only their vagueness. In terms of normative meaning, "[a]s is well known, the notion of general principles of law is an irksome issue in international law. The question whether that label indicates only general principles of law coming from *in foro domestic* or also principles directly arising in the sphere of international law is a sort of *cause célèbre* in the theory of international law."[1] Application thereof is even more problematic. "Whilst it is difficult to find decisions of international tribunals expressly based upon general principles, such principles often play a significant role as part of the legal reasoning in decisions."[2] As a result, general principles of law have been "demoted" to a subsidiary[3] source of international law.[4] In the Marxist-Leninist tradition of international law it is even argued that general principles should not be confused with specific norms, but rather express *values, interests and guiding ideas*.[5]

If all that was not complicated enough, additional challenges arise in the field of international investment law (IIL). IIL is a relatively new and yet exponentially expanding area of international law.[6] This relates directly to the current legitimacy crisis of investment arbitration.[7] General principles bring a promise of confirming,

[1] A. Gattini, A. Tanzi, F. Fontanelli, *Under the Hood of Investment Arbitration: General Principles of Law*, in: A. Gattini, A. Tanzi, F. Fontanelli (eds.), *General Principles of Law and International Investment Arbitration*, Brill Nijhoff, Leiden, Boston: 2018, p. 2.

[2] I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, Martinus Nijhoff Publishers, The Hague: 1998, p. 23.

[3] P.-M. Dupuy, *Droit international public* (8th ed.), Dalloz, Paris: 2006, p. 343.

[4] C. Rousseau, *Príncipes Généraux du Droit International Public*, A. Pedone, Paris: 1944, p. 895.

[5] C.E. Pino Canales et al., *Temas de derecho internacional público*, La Habana 2009, p. 37.

[6] J. Pauwelyn, *Rational Design or Accidental Evolution? The Emergence of International Investment Law*, in: J.E. Viñuales, J. Pauwelyn, Z. Douglas (eds.), *The Foundations of International Investment Law*, Oxford University Press, Oxford: 2014.

[7] *See e.g.* S.D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73(4) Fordham Law Review 1521 (2005).

correcting, or even filling the body of IIL, mostly procedural norms but occasionally also substantive ones, and vesting it with greater legitimacy.[8, 9] They can do so when an investment treaty in question does not explicitly contract out of general principles.[10]

Accordingly three editors, being conscious of how ambitious the task is, invited an impressive line-up of IIL experts to investigate the relationship between investment law and arbitration and international law, from the perspective of general principles of law. The volume consists of two parts dealing with procedural (Part A) and substantive (Part B) law. Both parts are constructed so that they mirror one another. Hence, we start with general principles of law and arbitral procedure (Section I)/substantive standards (Section III), followed by selected procedural principles of investment arbitration (Section II)/principles of investment law (Section IV). The esthetical rigour of this framework takes us only so far. A closer inspection of the principles instantly raises questions about distinguishing between the procedural and substantive implications. This is reflected in the introductory chapter.[11] Starting with a neat structure, we quickly notice numerous interdependencies/overlaps between the various parts. As a result, even for such renowned editors the volume seems to have been extremely challenging to synthetize in an ordered manner, which may explain why it does not end with some general conclusions. In turn this makes it harder to present an overview of the entire volume within the limited scope of this review. Hence, I refer to just several chapters of the book.

Starting with general principles of law and arbitral procedure, Zeno Crespi Reghizzi reminds us of the all-too-easily overlooked point that – despite the almost automatic reliance by investment tribunals on secondary rules as embodied in the International Law Commission (ILC) *Draft articles on Responsibility of States for Internationally Wrongful Acts* and the Permanent Court of International Justice (PCIJ) judgment in *Factory at Chorzów* – the actual grounds for doing so are questionable.[12] On one hand, the ILC draft was designed for proceedings between equal subjects of law. On the other hand, certain rules on inter-State responsibility – including the principles of full reparation – have been derived from private law concepts, which again do not necessarily fit the characteristics of investment arbitration (namely legitimate public policy concerns). Hence one may ask: If the customary international law on inter-state responsibility does not apply directly to ISDS claims, what should guide a tribunal in determining the proper damages for violation of an investor's substantive rights, and in particular how should the damages be quantified? According to Reghizzi, this should be done in light of the object and purpose of the treaty and general principles of law (the latter allegedly

[8] E.-U. Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, Oxford University Press, Oxford: 2012, pp. 131-135.

[9] M. Menkes, *Book Review: Ernst-Urlich Petersmann, International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods, Hart Publishing: 2012*, 32 Polish Yearbook of International Law 417 (2012).

[10] Gattini, Tanzi, Fontanelli, *supra* note 1, pp. 3-4.

[11] *Ibidem.*

[12] Z.C. Reghizzi, *General Rules and Principles on State Responsibility and Damages in Investment Arbitration: Some Critical Issues*, in: Fontanelli, Tanzi, Gattini (eds.), *supra* note 1.

including principles of domestic administrative law governing compensation to private actors, and the European and American systems of human rights protection). The chapter does not explore these offered solutions, which would be particularly interesting in terms of the normative basis to consider regional human rights property protection standards as a universal ISDS benchmark. However, it does show how seemingly the most fundamental notions become vague upon closer inspection. For example, what is the fair market value in the case of an unlawfully expropriated investment, the value of which appreciated from the time of the expropriation to the moment of the tribunal's decision? Or what is the quantum of damages in case of a violation of the fair and equitable treatment standard: the actual loss, loss of profits, or something else? Are general principles, and even more so valuation methods,[13] tools which bring scientific certainty to the process, or rather argumentative methods harnessed in support of economic assumptions? Reghizzi does not impose any definite conclusions and his paper is limited to two specific case studies, but it certainly prods one to reconsider some intuitive assumptions.

A more systemic approach with respect to the procedural principles of investment arbitration is offered by August Reinisch, who analyses the distinction between jurisdiction and admissibility.[14] Both notions (as well as competence) sound familiar to the lawyer's ear, with all their resemblance to a general-universal principle of law. Yet, "[t]here remains an underlying uneasiness with the elusive concepts of jurisdiction and admissibility."[15] As a result, investment tribunals *tend to avoid the questions as much as possible*.[16] This reluctance to differentiate between ICSID terms of jurisdiction and competence led a leading commentator to conclude that "[i]n practical terms, the distinction is of little consequence. (...) The two terms are frequently used interchangeably."[17] Arguably the most articulate passage – and certainly the most renowned – was that contained in the *Hochtief v. Argentina* award, whereby "jurisdiction is an attribute of a tribunal and not of a claim, whereas admissibility is an attribute of a claim but not of a tribunal."[18] Numerous investment awards can be quoted where this distinction is either supported or discarded. And yet as Reinisch shows, the distinction can have great, if not decisive, importance for an investment claim. We are invited to consider the consequences in terms of waiting-period requirements, of the most favoured nation clause, of mass claims, or with respect to compliance with domestic law and corruption

[13] M. Menkes, *I. Marboe, Calculation of Compensation and Damages in International Investment Law (2nd ed.). Review*, 33(7) Journal of International Banking Law & Regulation 274 (2018).

[14] A. Reinisch, *Jurisdiction and Admissibility in International Investment Law*, in: Gattini, Tanzi, Fontanelli (eds.), *supra* note 1.

[15] *Ibidem*, p. 150.

[16] V. Heiskanen, *Menage a trois? Jurisdiction, Admissibility and Competence in Investment Treaty Arbitration*, 29(1) ICSID Review 231 (2014).

[17] C.H. Schreuer, *The ICSID Convention. A Commentary*, Cambridge University Press, Cambridge: 2001, p. 532.

[18] *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October, 2011, para. 90.

defences. Ultimately, Reinisch juxtaposes these observations against general characteristics of different approaches to the issue of jurisdiction in civil law and common law systems, which leads him to some broader questions concerning the failure to exercise jurisdiction and denial of justice on one hand, and considerations like the integrity of the investment arbitration system in favour of finding a claim – within the tribunal's jurisdiction – as inadmissible on the other.

Compared to Reinisch, a reverse approach is taken by Christina Binder with respect to unjust enrichment as a general principle of law in investment arbitration. She starts with general observations on unjust enrichment, then offers a limited comparative analysis of two civil-law and two common-law jurisdictions to eventually narrow the analysis down to international law, and further to investment arbitration.[19] This reverse framing of the paper – influenced by the underlying publication[20] – may justify the unease which readers are left with. The general introduction to the topic consists of a comprehensive analysis of unjust enrichment under general international and domestic law; it is clear that this part could have been longer and it was limited mainly by editorial guidelines. Against this thorough background, the overview of areas of application of unjust enrichments in investment arbitration (including a political crisis, state succession, expropriation, and unjust enrichment as a defence) lacks a similar specificity. The author points out that the principle sometimes has sometimes been accepted and sometimes not, but without an actual analysis concerning which investment law substantive provisions it interacts with. Expropriation? This seems excluded due to its subsidiarity feature and is not an independent ground for seeking such a remedy.[21] Fair and equitable treatment?[22] Something else? In the end one feels that the overview does not allow for any generalisations. In light of the scarcity of case law and jurisprudence dealing with this topic, this may be a disappointing, albeit entirely justified, conclusion.

The *Nemo auditur propriam turpitudinem allegans* theme of the above chapter is also analysed by Attila Tanzi in relation to the good faith principle,[23] which "can be considered as a constitutional principle of international law, possibly on a par with any legal system."[24] Tanzi's fast narrative guides us from one major topic to another.

[19] Ch. Binder, *Unjust Enrichment as a General Principle of Law in Investment Arbitration*, in: Gattin, Tanzi, Fontanelli, *supra* note 1.

[20] C. Schreuer, C. Binder, *Unjust Enrichment*, in: *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford: 2017.

[21] "How hopelessly open to manipulation a general concept of unjustified enrichment is, detached from specific prescriptions determining its application, is aptly illustrated by its use in the controversy over compensation for expropriated foreign property" (C.H. Schreuer, *Unjustified Enrichment in International Law*, 22(2) The American Journal of Comparative Law 281 (1974), p. 284).

[22] A.T. Vohryzek-Griest, *Unjust Enrichment Unjustly Ignored: Opportunities and Pitfalls in Bringing Unjust Enrichment Claims Under ICSID*, 31 Loyola of Los Angeles International and Comparative Law Review 501 (2009).

[23] A. Tanzi, *The Relevance of the Foreign Investor's Good Faith*, in: Gattini, Tanzi, Fontanelli (eds.), *supra* note 1.

[24] *Ibidem*, p. 193.

The first perspective is good faith and investment legality. As famously stated in *Plama v. Bulgaria,* even if the investment treaty in question does not explicitly require conformity with domestic or international law, such a requirement may be deduced from domestic law.[25] As a result, an illegal investment – stemming from bad faith – can be found to fall outside the *ratione materiae* competence of an investment tribunal (such a claim is procedurally abusive and/or substantively unworthy of protection). However Tanzi casts doubts as to the correctness of such an interpretation, acknowledging that it leads to the otherwise problematic issue of sanctions for a lack of good faith on the part of an investor. This brings him to the heart of the issue of an investor's good faith as an element of reciprocity towards the host state. Tanzi identifies an emerging case law which illustrates several potential consequences of a lack of good faith: lack of jurisdiction *ratione materiae*; inadmissibility of the claim (under the doctrines of *ordre public international*, clean hands, estoppel, abuse of rights/process, *en injuria jus non oritur*); rejection of a claim on merits; or an adjusted calculation of damages and/or reallocation of costs. Although the author warns against generalisations in this respect, an attempt is made to find some overarching trends depending on whether the lack of good faith can be found in the (pre-)investment or post-investment phase. Good faith – and the lack thereof – leads us to the requirements of the "clean hands" doctrine. Upon noting "at the outset (…) that the notion has not established itself with certainty as a general principle of international litigation,"[26] Tanzi indicates the uncertainties surrounding outright bad faith or illegal acts and, as possible defence in this respect, the principle of estoppel. Against this background Tanzi considers the all-or-nothing dilemma (whether a lack of good faith bars any claim or rather influences the quantum of damages) and traces international standards that may be considered as a good-faith normative benchmark for investors. All this leads Tanzi to conclude that while the precise content and scope of the good faith principle as a rule of conduct seems blurred – whether with respect to jurisdiction or admissibility – its function should first and foremost be considered as an interpretative principle. "Rather than an entry-point for arbitrariness, good faith should be considered as a framework of fairness, equity and reasonableness for the proper administration of justice."[27] The composition of this micro-treatise on good faith is certainly most fascinating. Each part addresses a separate matter characterised by utter normative ambiguity. The meticulous structure of analysis is matched with bibliographic guidelines that seem to beg for a fully-fledged analysis. Although he does not develop these separate elements, Tanzi manages to trace certain overarching goals.

The last section of the book tackles principles of investment law, including the noteworthy analysis of police powers by Catherine Titi.[28] A renewed interest in police

[25] *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award of 27 August 2008 para. 138.

[26] Tanzi, *supra* note 23, p. 207.

[27] *Ibidem*, p. 193.

[28] C. Titi, *Police Powers Doctrine and International Investment Law*, in: Gattini, Tanzi, Fontanelli (eds.), *supra* note 1.

powers can be recently observed in, for instance, the highly mediatised disputes concerning tobacco regulation. In *Philip Morris v Uruguay*, the arbitral tribunal unanimously rejected the claim that the challenged measures amounted to expropriation, referring explicitly to the State's police powers. Although some have criticised this judgment,[29] "[t]here can be no doubt that the doctrine (*sic!*) of the police powers is now an integral part of investment law."[30] One would thus be tempted to acknowledge police powers as a well-established element of international investment law, but what does the doctrine denote in terms of sources of public international law? Titi decides to trace the normative grounds of police powers in international investment law as a possible counter-balance to expropriation claims. Unlike other parts, where general principles of (international) law are analysed through the lens of investment law (the trickle-down of general principles), here "[t]he broad cast of existing arbitral interpretations does not allow the assumption that the police powers doctrine will be treated as reflective of customary international law, or as a general principle of law."[31] As a result one may speculate about whether we are witnessing a reverse phenomenon from investment to general international law (a normative trickle-up). By casting the arbitral perception of the police powers doctrine – both in investment case law and in the evolutive approach in investment treaties – against the background of different theories of expropriation (the Hull formula, the Sole Effect Doctrine and Proportionality), Titi is able to cautiously signal a self-contradictory trend. On one hand, tribunals rely upon the police powers doctrine as if it was firmly grounded, while on the other hand the latest investment treaties enshrine the police powers doctrine in the text. Hence, "if the police powers doctrine is a general principle of international law, introducing such provisions may have been otiose (…) at least to the extent that they apply to the expropriation standard."[32] Interestingly, she notes that the latest approach seems to aim for a middle ground between the absolute defence of the *sole effect* and the previously unrestricted application of the police powers doctrine. In the end, Titi raises even more puzzling issues, such as whether police powers are primary or secondary norms; and if the latter, whether they preclude responsibility or wrongfulness.[33]

* * *

Both the entire book and the substantive issues it tackles can be best characterised as elusive. General principles of law seem omnipresent in the international law discourse, and yet it is very difficult to identify their actual normative content, or even draw a

[29] P. Ranjan, *Police Powers, Indirect Expropriation in International Investment Law, and Article 31(3)(c) of the VCLT: A Critique of Philip Morris v. Uruguay*, 9(1) Asian Journal of International Law 98 (2019).

[30] A. Pellet, *Police Powers or the State's Right to Regulate*, in: M. Kinnear et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID*, Wolters Kluwer, Alphen aan den Rijn: 2016, p. 461.

[31] Titi, *supra* note 28, p. 341.

[32] *Ibidem*, p. 339.

[33] Although some argue that general principles, as a subsidiary source of law, fall outside the primary-secondary dichotomy, A. Cassese, *Diritto internazionale*, Il Mulino, Bologna: 2006, p. 271.

firm line between them and customary law.[34, 35] Arguably this may be explained by the reticence on the part of states to invoke such principles out of a fear of excessive restriction of state sovereignty.[36] As a result, the ICJ judge Giorgio Gaja observed that "general principles are only vague and are of little use should one intend to apply what is common to a large number of legal systems."[37] The majority of general principles of law play an auxiliary role for the interpretation and application of substantive norms,[38] which is not to say that they can play only a marginal role in international litigation and arbitration.

Going through subsequent chapters of this volume one repeatedly goes from doubt as to whether it is actually a research-worthy topic; to disbelief that so few analyses have been dedicated to the issue; to scepticism about another topic. One must acknowledge that it is a heterogenous book, whether in terms of research scope or depth of analysis, and certainly one that escapes from any easy encapsulation. At the same time, it is a must-read both for anyone considering international investment law as sub-field of the public (international) legal system and those interested in other areas of public international law, all of whom may wonder why no one has tackled this challenge earlier. Having said that, considerations of general principles of international investment law are a work-in-progress rather than the final word, and one may rightly ask if we are witnessing the treaty-capture of general principles of law. Or is the current situation yet another case of *instant formulation* of general principles, as in the 1980s with respect to human rights?[39]

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[34] Dupuy, *supra* note 3, p. 351.

[35] A. Tanzi, *Introduzione al diritto internazionale contemporaneo* (5th ed.), Wolters Kluwer 2016, p. 112.

[36] Cassese, *supra* note 33, p. 270.

[37] G. Gaja, *General Principles of Law*, in: *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford: 2013.

[38] Tanzi, *supra* note 35, p. 114.

[39] G. Ziccardi Capaldo, *Diritto globale. Il nuovo diritto internazionale*, Giuffre, Milano: 2010, pp. 75-77, 87-102.

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Piotr Szwedo, *Cross-border Water Trade: Legal and Interdisciplinary Perspectives*, Brill Nijhoff, Leiden, Boston: 2018

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Water is indispensable to life on Earth. Even in the regions abundant in water sources, like New Zealand, water has historically been treated in a particular way. In 2014, Māori tribe of Whanganui in the North Island managed to negotiate a treaty in which the Whanganui river, the third biggest in New Zealand, was established as a legal entity, an ancestor of the tribe, which is afforded certain rights. The river is treated as a whole being, that starts at its source and ends in the sea. This approach comes from the Māori belief that they are united with the Universe, and are equal to the seas, the rivers and the mountains. In practice, it translates to affording the river the same legal rights as those attributed to the tribe itself.[1]

Despite the common belief that water and the land grabbing that is tied to water is prevalent only in the areas in which the water is scarce, unfortunately that is not the case.[2] However, it must be noted that in those areas of the world deficient in water, some of which are currently the conflict zones, water trade has been an established practice borne out of the necessity unknown to countries with ample freshwater sources.

Therefore, Piotr Szwedo's complex analysis of water trade in *Cross-border Water Trade. Legal and Interdisciplinary Perspectives* is a noteworthy position that fills important gap in the existing framework on water trade. Right from the beginning the author provides us with a clear and concise structure in which he not only addresses the research problem and formulates hypothesis, but also provides the audience with concise description of the methodological tools adopted for the purpose of his analysis. The answers and conclusions reached by the author are perspicuously explained at the end of the book, leaving the reader with a feeling of satisfaction. The title of the book itself is somewhat misleading, as first and foremost the book tackles the issues of establishing what water is according to the laws of nature, and includes a comprehensive analysis of cross-border freshwater trade – an analysis aimed at reconstructing the norms determining such trade in the fragmented sources of international law. The author conducts a meticulous analysis of the international legal framework, including international law of water resources, international trade law, international environmental law, and international human rights law.

[1] Whanganui River Deed of Settlement Ruruku Whakatupua - Te Mana o Te Awa Tupua, 5 August 2014, available at: https://www.govt.nz/dmsdocument/5947-whanganui-river-deed-of-settlement-ruruku-whakatupua-te-mana-o-te-awa-tupua-5-aug-2014; Ruruku Whakatupua – Te Tānekaha Supplementary Deed, 27 April 2016, available at https://www.govt.nz/dmsdocument/6526-whanganui-iwi-ruruku-whakatupua-te-tanekaha-supplementary-deed (both accessed 30 May 2019); E.A. Roy, *New Zealand river granted same legal rights as human being*, The Guardian, 16 March 2017; E. Hsiao, *Whanganui River Agreement - Indigenous Rights and Rights of Nature*, 42(6) Environmental Policy and Law 371 (2012), pp. 371-372.

[2] J. Franco, L. Metha, G.J. Veldwish, *The Global Politics of Water Grabbing*, in: M. Edelman, C. Oya, S.M. Borras (eds.), *Global land grabs: History, theory and method*, Routledge, London: 2015, p. 139.

The book itself is divided into six chapters. Each chapter concludes with a summary, which contributes to the overall clarity of the book's structure. The first chapter deals with the preliminary questions, in which alongside the issues discussed above the author includes a subchapter on terminology, which affords the reader the comfort of both reading the book with a clear grasp of the terms related to both water and trade, as well as an understanding of how certain terms were developed. "Virtual water", which as author stresses is a comparatively new term, is altogether useful for understanding the subchapter on the trade in virtual water in the World Trade Organization (WTO) practice. The methodology the author proposes is envisaged to establish the "minimum content of natural law", using natural law methodology, so it can later on be used as a basis for the discussion embedded in the legal positivism formal-dogmatic method.

In the second chapter, the author embarks on a search for a regulatory model. He starts with the axiology of water, beginning his analytical journey in philosophy and religion, moving through Roman law, water as an object of ownership, to the liberation and institutionalization of trade in water rights and interstate trade, focusing in this regard mostly on the practices of the United States and Australia, and then moves on to analysis of water conservation and its economic mechanisms. The author discusses the views of the Catholic Church and Islam, both Shia and Sunni, mentions the Talmud only in passing, and forsakes Buddhism and Hinduism altogether. This maneuver leaves the reader wanting for more, as the discussion presented is very engaging. As regards the analysis concerning the approach to water in indigenous and/or aboriginal lands, this is a thread that is woven into and throughout the book, although it would be very helpful to the audience if the author made a reference in each instance to which exact area of the world the discussion relates.

The third chapter examines the WTO practice, starting with analysis of the classification of water as a good or product under the General Agreement on Tariffs and Trade (GATT). It would be beneficial to this part of the book, if the discussion included in footnotes regarding goods and product was to be moved to the main body text of this subchapter. Subsequently, the author moves to the GATT ban on export restrictions, then on to the General Agreement on Trade in Services (GATS), GATT, and the WTO agreement analysis of water supply as a service. The chapter concludes with the aforementioned exploration of trade in virtual water, which includes an interesting discussion on the impact of land-grabbing tied to water trade.

The following fourth chapter is dedicated to the international practice of states concerning water trade. It examines the *secundum-legem practice* in the forms of water export and barter and exchange of water rights, the *praeter legem practice* – both complementary and alternative – and concludes with an analysis of the *contra-legem practice* on persistent and subsequent objectors. The most interesting discussion concerns the persistent objector and its development in the Canadian practice in its relations with United States. This allows the author to reach a conclusion regarding the existence of a persistent objector in the customary norm according to which water is an object of cross-border trade, through the Canadian practice that consistently refuses to treat water as a commodity. Slovakia

also refuses to treat water as an economic good, but in this case the author finds the state practice to be subsequent and as such in violation of international law.

The fifth and last chapter, before the ending notes, discusses the principles and institutions of international law as conditions and restrictions on water trade. It is the longest chapter in the book, consisting of over one hundred pages and divided into four main subchapters, which address: state sovereignty and natural resources; the issue of solidarity; water and ice as a common heritage of mankind; and finally the right to water as a human right. The chapter discusses at lengths the status of water as a commodity. The author concludes that the human right to water places an obstacle to states' freedom in water trade in such a manner that it hinders trading initiatives. Moreover, the author finds that such factors as the "principle of equitable and reasonable use of water resources, the co-operation principle, and the principle of sustainable development" are vague, albeit crucial in delineating the boundaries to managing the water resources, and as such they have a significant impact on states' freedom.

The author is indecisive in determining whether the right to water is a binding norm of international custom. In his deliberations he leans towards affording it such status, while at the same time he states that no state practice can constitute a persistent objector to this right. In this subchapter, as well as in the subchapter discussing the common heritage of mankind in relation to state territory, the discussion would again benefit from moving some of the contents of footnotes into the main text, particularly when discussing the relevant case law. One of the things that should probably be clarified is in how the author sees the human right to water as "anchored" in humanitarian law.

The author delivers on his promise to reconstruct the norm allowing for international water trade in a formal-dogmatic way and establishing its relation to the "minimum content of natural law", and finds that there is "a certain lack of overlap" from which he derives the genesis of conflicts, i.e. in the Middle East and Bolivia. As regards water as a commodity, he reaches the conclusion that it can be both a public good and at the same be an economical good subjected to trade across borders.

The *Cross-border Water Trade. Legal and Interdisciplinary Perspectives* is without doubt a great read for anyone interested in water trade. In addition, it is an interesting position for anyone in water in any aspect, as a natural resource, or a commodity, or in the international practice of states. The book is very well researched and cites an abundance of sources, including French and Arabic literature on the subject, which are illustrated by rich case law. For those who are just embarking on the journey of discovery of the issue of water trade in international law this book may constitute not only interesting but also useful introductory guide.

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