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Contact information

Cambridge Journal of International and Comparative Law

Faculty of Law, 10 West Road

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United Kingdom

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Editorial

Barry Solaiman* and Catherine Gascoigne**

1 Introduction

The second issue of the fifth volume of the *Cambridge Journal of International and Comparative Law* (CJICL) brings together varied, thought-provoking and illuminating articles from our open Call for Papers and the Young Scholar's Lecture. The first three articles analyse energy and climate issues covering the institutions of the World Bank, the United Nations and the European Union (EU). These are followed by two comparative articles covering the integration of blind persons in the judiciaries of the United Kingdom, the United States and Israel, and an analysis of the way in which the federal-type polities of Canada and the EU have addressed the tension between State sovereignty and federalism. The next two articles that consider unconstitutional constitutional amendments and the civil liability imposed on credit rating agencies. The second issue concludes with a book review.

We are very grateful to all of our contributors for their articles. We also wish to thank our Managing Editors, Michael Dafel, Darren Harvey, Massimo Lando, Lan Nguyen, Niall O'Connor and Stefan Theil. The Managing Editors and their teams of editors have contributed a significant amount of time and effort in reviewing, copy-editing and liaising with authors to produce this issue. This issue would not have been possible without their hard work and dedication. We are also grateful for the generosity and support of the Cambridge Law Journal, the Lauterpacht Centre for International Law and the Centre for European Legal Studies at the University of Cambridge.

2 Overview of Issue 5(2)

The issue begins with an article by Danae Azaria. This year we were fortunate to continue the tradition of hosting the CJICL Young Scholar's Lecture at the Lauterpacht Centre for International Law. This event was initiated by our

* PhD Candidate, Magdalene College, University of Cambridge.

** PhD Candidate, Gonville and Caius College, University of Cambridge.

predecessors, Naomi Hart and Ana Júlia Maurício, and has all the hallmarks of becoming a celebrated annual event for the Journal, as it provides a platform for an early-career academic to present and publish his or her research. This year, the Journal was very honoured to welcome Dr Danae Azaria, a Lecturer at University College London, to present. We are delighted that Dr Azaria's well-acclaimed and highly stimulating piece, 'State Responsibility and Community Interest in International Energy Law: A European Perspective' has been published in this issue in modified form. Dr Azaria's piece surveys the landscape of obligations between EU Member States and third states in relation to the energy sector.

We are also grateful to Marie-Claire Cordonier Segger for her article which considers the recent Paris Agreement. The Paris Agreement was concluded in December 2016 with the aim of strengthening the global response to the threat of climate change. The author outlines the important measures of the Paris Agreement and discusses sustainable development principles. She outlines the international context for implementation and analyses emerging legal issues. Finally, 'climate justice' concerns are considered, and legal and governance obstacles for effective participation are highlighted. This includes a consideration of the opportunities for effective implementation of the new regime. The author argues that, ultimately, new legal research, education, awareness, capacity-building and technical assistance will be essential to ensuring the success of the Paris Agreement.

The third article, by Wei-Chung Lin, discusses the role of the World Bank Inspection Panel in upholding non-economic values in relation to the activities of the World Bank. The World Bank Inspection Panel is a review mechanism by which private individuals affected by the World Bank's financed projects can challenge the legitimacy of the Bank's lending decisions. To that end, the article examines the way in which the World Bank Inspection Panel has drawn on Multilateral Environmental Agreements in order to ensure that Bank-funded projects comply with environmental obligations. Wei-Chung Lin argues that the World Bank Inspection Panel not only enhances the accountability of the World Bank to the people it affects most, but that it also plays an important role in interpreting and enforcing social and environmental norms in the context of project finance.

Doron Dorfman then analyses the progress made by the Anglo-American judicial system in integrating blind persons into the judiciary. The integration of blind persons has received little academic attention and the author makes a valuable contribution to the understanding of this important issue through his comparative analysis. He achieves this by providing a historical account of the appointment

of blind persons in the United Kingdom and the United States to the judiciary. That analysis is supplemented by an examination of the symbolic importance of blindness in the legal system. These elements are drawn together by a consideration of the potential of integrating blind persons into the judiciary of Israel.

Next, Thomas Verrellen examines how the federal-type polities of Canada and the EU have addressed the tension between the value of State sovereignty and the value of federalism. The author argues that in both polities, federalism is largely put ‘on hold’ with regard to foreign affairs. He notes that the authority to act internationally in Canada is mainly controlled by the order of government recognised as a sovereign state. This is in contrast to the EU, where the dominance of the sovereign state in the area of EU foreign affairs is liable to spill over into the EU’s domestic constitution. The author calls for a recalibration of the federal balance in Europe’s foreign affairs constitution via a critical appraisal of the use of the technique of mixity.

The sixth article, by Reijer Passchier and Maarten Stremmer, considers the issue of unconstitutional constitutional amendments. They analyse whether there are limitations of amendability that exist with regard to the EU Treaties and whether the Court of Justice of the European Union (CJEU) has the competence to enforce such limits. The authors determine the extent to which arguments used to justify a doctrine of unconstitutional constitutional amendments in national systems can justify the same doctrine in EU law. They argue that EU Treaty amendments may be deemed to be a violation of the Treaties in some cases. Further, they contend that the CJEU may review amendments to the EU Treaties where Member States put forward questionable revisions.

The issue of the effectiveness of credit rating agencies (CRAs) as gatekeepers has received much attention following the global financial crisis in 2008. Nicholas Hoggard analyses CRAs from a distinct angle by considering Regulation (EU) 462/2013 in the seventh article of this issue. The Regulation imposes civil liability on credit rating agencies who intentionally or negligently infringe regulatory requirements, thus causing loss to investors. The author argues that the Regulation replicates the UK’s existing law on deceit—though it is more restrictive for claimants. He also analyses the potential harm caused by such duplication when considering harmonisation measures, and contends that the Regulation is another example of an ill-defined and inconsistent private liability.

This issue concludes with Valentin Jeutner’s review of the monograph, *Strategically Created Treaty Conflicts and the Politics of International Law*

(Cambridge University Press 2014) by Surabhi Ranganathan. Jeutner's review provides an overview of the main thesis of Ranganathan's book and situates it in the surrounding literature.

3 Future Developments for the Journal

Finally, we conclude this Editorial by announcing exciting future developments for the Journal. The CJICL was established in 2011 by postgraduate students in the Faculty of Law at the University of Cambridge. Since then, the Journal has grown under the stewardship of previous Editors-in-Chief, supported by the hard work of postgraduate student editors and our esteemed Academic Review Board. Thanks to their hard work, the Journal has spurred a thriving community for collaboration between young and senior academics and practitioners, as evidenced by the publications in these issues and the Journal's strongly attended annual conference. As such, the Journal is now ready to develop further, to grow its audience and become more specialised. To that end, Edward Elgar Publishing has agreed to publish the Journal from Volume 6 onwards on a long-term basis.¹

Edward Elgar is committed to publishing high quality, original scholarship in the field of International Law and their aim clearly mirrors the aims of the Journal. The Journal will narrow its focus to publishing pieces concerning International Law only, and the name of the Journal will change accordingly to the *Cambridge International Law Journal* (CILJ). Further consolidating our strong links with the Lauterpacht Centre for International Law at Cambridge, Whewell Professor of International Law, Eyal Benvenisti, will become the Honorary Editor-in-Chief of the Journal in future years. Importantly, the Journal will continue the traditions of the past by providing a forum for collaboration between young and senior academics and practitioners, and for providing the same opportunities for postgraduate students at the Faculty of Law to develop essential editing skills. Ultimately, we believe that the partnership between Edward Elgar and the Journal will provide more opportunities for the International Law community and support our aim of publishing high quality and original scholarship.

1 Barry Solaiman and Catherine Gascoigne, 'Edward Elgar to publish the Cambridge International Law Journal' (*University of Cambridge, Faculty of Law*, 7 September 2016) <<http://www.law.cam.ac.uk/press/news/2016/09/edward-elgar-publish-cambridge-international-law-journal>> accessed 21 September 2016.

State Responsibility and Community Interest in International Energy Law: A European Perspective

Danae Azaria*

Abstract

Treaties dominate international energy law, meaning the rules of public international law that govern energy activities and their effects. This raises the question about the relationship of treaties, and particularly those on energy trade, with the law of international responsibility. This article uses a European angle to contextualise the importance of this question. EU Member States are major oil and gas importers from third states. The EU and Member States are party to treaties with third states that apply to energy trade, carriage and investment. Whether treaty obligations, undertaken and owed to the EU and/or Member States vis-à-vis third states, are of bilateral, interdependent or community interest nature determines whether the EU and/or a Member State have standing to invoke the responsibility of a third state for a breach of an energy-related obligation as well as their remedial rights and the means by which they may implement responsibility. At the same time, because energy access is vital for states, suspending compliance with obligations in the energy sector is often preferred as a permissible response to wrongfulness carrying significant effects and persuasiveness. The nature of obligations of international energy law may determine whether suspending compliance with such obligations can be a lawful countermeasure either by the EU and/or Member States against a third state, or by a third state against the EU and/or Member States.

Keywords

State responsibility, international energy law, World Trade Organization, pipeline treaties, human rights

1 Introduction

The European Union (EU) Member States are major oil and gas importers. The EU imports 90 per cent of the oil and 66 per cent of the gas that it consumes.¹

* Lecturer in Law, Faculty of Laws, University College London (UCL), email: d.azaria@ucl.ac.uk. An earlier draft of this article was presented at the CJICL Young Scholar's Lecture at the Lauterpacht Centre for International Law, University of Cambridge. This article is based on the author's research for the monograph, *Treaties on Transit of Energy via Pipelines and Countermeasures* (OUP 2015).

1 See generally 'Energy Security Strategy' (European Commission) <<https://ec.europa.eu/energy/en/topics/energy-strategy/energy-security-strategy>> accessed 28 September 2016.

The dependence of EU Member States on imports of different energy sources has, to varying degrees, existed for decades. The exporting and transit states of these sources of energy have also changed over time.² Despite this dependence, it was not until the Treaty for the Functioning of the European Union (TFEU), that a new Title on Energy was added.³ The Title comprises only one provision—Article 194—which operates as a separate basis for energy-related EU legislation. However, even before the insertion of this provision, EU energy law had been expanding mainly with a view to creating an internal energy market and securing oil and gas supplies,⁴ with further developments to be expected as the European Commission has made a new proposal for an ‘Energy Union’.⁵

Given the need for energy imports, the relationship of the EU and Member States with third states in the energy sector has been perceived as critical for the development of the internal energy market, as well as for securing supply.⁶ The modern significance of this relationship is illustrated by the effects of the 2009 gas crisis on the European gas market that occurred owing to a dispute concerning exports of gas from Russia to Ukraine and being transited through Ukraine.⁷ In terms of factual effects, industrial and household consumers were left without gas for days.⁸ In terms of legal impact, the conduct of third states triggered the

2 Sanam Salem Haghighi, *Energy Security: The External Legal Relations of the European Union with Major Oil and Gas Supplying Countries* (Hart 2007) 38–64.

3 Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C115/47 (TFEU); For the reasons behind the reluctance of Member States to have a common energy policy, see Haghighi (n 2) 46–53, 56–62.

4 Until the insertion of this provision, EU energy-related legislation was adopted mainly on the environmental and internal market bases and mainly through harmonisation. See generally Christopher Jones (ed), *EU Energy Law*, vol 1 (4th edn, Claeys & Casteels Publishing 2016) 1–9; Angus Johnston and Guy Block, *EU Energy Law* (OUP 2012) 4–6.

5 See Commission, ‘A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy’ COM (2015) 80 final.

6 Haghighi (n 2) 63.

7 Dan Bilefsky and Andrew E Kramer, ‘Deal to End Russia’s Cutoff of Gas Remains Uncertain’ *The New York Times* (New York, 9 January 2009) <<http://www.nytimes.com/2009/01/10/world/europe/10gazprom.html>> accessed 28 September 2016; For an analysis of the 2009 dispute between Ukraine and Russia, see Danae Azaria, *Treaties on Transit of Energy via Pipelines and Countermeasures* (OUP 2015) 4–5, 90–93.

8 For different effects on each Member State and third states in the Balkan region, see European Commission, ‘Member State General Situation According to Significance of Impact, Memo/09/3’ (9 January 2009) <<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/3&type=HTML>> accessed 28 September 2016.

development of EU secondary legislation—the 2009 crisis led to the adoption of the 2010 Gas Security of Supply Regulation.⁹

The relationship with third states is governed by international law. The EU and Member States are party to treaties with third states that apply to energy trade and investment, and Member States conclude treaties with third states so as to diversify sources and routes of supply. This treaty practice—partly driven by an effort to secure uninterrupted energy supply—raises a number of legal questions.¹⁰ This study analyses the relationship between treaties concerning energy activities and the law of international responsibility. More specifically, the study focuses on the treaties that regulate the trade of energy. It explains that the nature of treaty obligations, which are undertaken and owed to the EU and/or Member States vis-à-vis third states, determines whether the EU and/or a Member State has standing to implement the responsibility of a third state for a breach of an energy-related obligation. It also determines which remedial rights they have and by which means they can implement the responsibility of a third state. At the same time, because access to energy is vital for states—their economies and the survival of their populations depend on it¹¹—suspending compliance with obligations in the energy sector rank highly among the permissible responses to wrongfulness carrying significant persuasiveness. The nature of obligations of international energy law, meaning the rules of public international law that govern energy activities and their effects,¹² may determine whether suspending compliance with such obligations can be a lawful countermeasure. Such countermeasure may be taken either by the EU and/or Member States against a third responsible state, or by a third state against the EU and/or Member States.

These issues are of exceptional practical importance to the EU, its Member States and its neighbourhood, as they lie at the heart of energy security considerations. Which Contracting Parties to the Energy Charter Treaty (ECT) or Members of the World Trade Organization (WTO), for example, were entitled

9 Council Directive (EU) 994/2010 of 12 November 2010 concerning measures to safeguard security of gas supply and repealing Council Directive (EC) 2004/67 [2010] OJ L295/1 recitals 26–27.

10 Questions that fall beyond the scope of this study include the allocation of external competence in relation to energy trade, the compatibility of EU law with treaties between Member States and third states, and the relationship between these treaties and customary international law.

11 Case 72/83 *Campus Oil Limited and Others v Minister for Industry and Energy and Others* [1984] ECR 2727, para 34.

12 Catherine Redgwell, 'International Regulation of Energy Activities' in Martha Roggenkamp and others (eds), *Energy Law in Europe* (3rd edn, OUP 2016) 16.

to resort to dispute settlement under the ECT or the WTO Agreement against Ukraine or Russia in relation to the 2009 incident alleging breaches of transit or export obligations (respectively)?¹³ Would Ukraine have been able lawfully to suspend compliance with its transit obligations under the WTO or the ECT in response to Russia's unlawful annexation of Crimea with consequences for the EU and its Member States? Can a Member State, which is party to a bespoke pipeline treaty with a third state, suspend energy flows via the pipeline in response to a breach of an obligation owed to it by that third state?

The following analysis will first determine the nature of some primary obligations of international energy law that are of relevance to EU and/or Member States. Second, it will examine how secondary rules on energy-related countermeasures take into account the nature of primary obligations.¹⁴ The analysis will place international energy law and the energy security concerns of the EU and Member States within the broader field of public international law. The European angle is a context that assists in better understanding the application of international responsibility in the context of international energy law.

2 From Bilateralism to Community Interest in International Energy Law: Treaties of European Concern

In early January 2009, the transit and export of gas to EU Member States were interrupted arguably contrary to Ukraine's transit obligations (under the WTO Agreement and the ECT) and Russia's export obligations (under the ECT). Yet, there

13 Energy Charter Treaty (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 (ECT); Marrakesh Agreement establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3. The EU and Member States were ECT Contracting Parties and WTO Members, as was Ukraine. Russia was provisionally bound by the ECT at the time of the dispute, but Russia was not a WTO Member. Russia acceded to the WTO Agreement on 22 August 2012. Russia's provisional application of the ECT ceased to be in effect since 19 October 2009 (pursuant to ECT art 45(3)(a)). On 20 August 2009, Russia expressed its intention not to become a party to the ECT. For Russia's provisional application of ECT, see *Yukos Universal Limited (Isle of Man) v The Russian Federation*, PCA Case AA227, Interim Award on Jurisdiction and Admissibility, 30 November 2009, para 394.

14 Primary rules determine the conduct of a state, while secondary rules deal with the consequences of the breach of primary rules. For an explanation of the distinction between the two, see ILC, 'Report of the International Law Commission on the Work of its Twenty-second Session' (4 May–10 July 1970) UN Doc A/8010/Rev 1, 306, para 66.c.

is no evidence that the EU or Member States formally invoked the responsibility of either of the two states by requesting cessation of the wrongful act or reparation, by resorting to dispute settlement or by resorting to countermeasures.¹⁵ Rather, on 10 January 2009, Russia, Ukraine and the European Commission signed the Agreement on Monitoring of Natural Gas through Ukraine, pursuant to which international monitoring staff (with strictly fact-finding competence) were dispatched to metering stations at the Russia-Ukraine border in Ukraine and Russia.¹⁶ However, the fact that responsibility was not invoked does not perforce mean that responsibility has not been engaged; nor does it necessarily mean that the EU and/or Member States lacked standing to invoke responsibility. Invoking international responsibility is discretionary.¹⁷

In 2001, the International Law Commission (ILC) adopted the Articles on the Responsibility of States for Internationally Wrongful Acts (ASR)¹⁸ and submitted them to the General Assembly that commended them to the governments.¹⁹ The ASR generally represents customary international law concerning the entitlement to invoke responsibility.²⁰ Standing to invoke responsibility is premised on a tripartite classification of primary obligations. International obligations are classified on the basis of the question 'to whom are these obligations owed?'

- 15 Invoking responsibility involves claims of 'relative formality', such as recourse to dispute settlement or countermeasures. ILC, 'Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries Thereto' (23 April–1 June and 2 July–10 August 2001) UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2), 117.
- 16 On 19 January 2009, Gazprom and Naftogaz signed 10-year supply and transit contracts. The EU and Member States were informed of the agreement, without participating in negotiations. On 20 January 2009, supplies to, and transit via, Ukraine began. See José Manuel Durão Barroso, 'Statement of President Barroso on the resolution of the Ukraine-Russia Dispute' (European Commission, 20 January 2009) <<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/12&format=HTML&aged=0&language=EN&guiLanguage=en>> accessed 28 September 2016. On 22 January 2009, gas flows to all importing states returned to the levels before the interruption.
- 17 For possible reasons relating to the legal architecture of WTO and ECT dispute settlement mechanisms, see Azaria (n 7) 168–72, 177–84.
- 18 ILC (n 15) 26–30.
- 19 UNGA Res 56/83 (28 January 2002) UN Doc A/RES/56/83.
- 20 ILC (n 15) 117–19, 126–28; The ICJ has followed the ASR's position concerning standing to invoke responsibility for breaches of erga omnes partes obligations in *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 2012, paras 67–70.

First, some obligations are 'bilateral'. These obligations are owed in pairs between the parties. When they are grounded in multilateral norms, such as a multilateral treaty, they may be called 'bilateralisable'.²¹ In the latter case, the multilateral norm creates bundles of bilateral relationships.²¹ An example is that of innocent passage through the territorial sea.²² In case of a breach, the individually injured state may invoke responsibility, including by recourse to countermeasures.²³

Second, other obligations are 'interdependent', meaning obligations owed to a group of states collectively but premised on 'global reciprocity'.²⁴ Non-performance by one permits everyone else not to perform—a paradigmatic example is obligations of disarmament. Under the ASR, breaches of a certain character may change radically the position of all other states to whom this type of obligation is owed with respect to the further performance by those other states of the obligation.²⁵ Accordingly, the breach allows all other states to which the obligation is owed to invoke responsibility, as injured states, including by recourse to countermeasures.²⁶

Third, community interest obligations, which are obligations owed indivisibly to all states for the protection of a collective interest (*erga omnes* obligations) or to a group of states established for the protection of a collective interest of the group (or even for a wider common interest) above the individual interests of the group (*erga omnes partes* obligations).²⁷ These are genuinely multilateral obligations.²⁸ In case of a breach, the specially affected state is the injured state and may invoke responsibility, including by recourse to countermeasures.²⁹ States other than the injured state may claim cessation of the wrongful act and assurances and guarantees

21 Bruno Simma, 'Bilateralism and Community Interest in the Law of State Responsibility' in Yoram Dinstein (ed), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff Publishers 1989) 822–23.

22 James Crawford, 'Multilateral Rights and Obligations in International Law' (2006) 319 *Recueil des Cours* 325.

23 ILC (n 15) arts 42(a), 49.

24 Linos-Alexander Sicilianos, 'The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility' (2002) 13 *EJIL* 1127, 1134–36; ILC (n 15) 117–18, note 669.

25 ILC (n 15) art 42(b)(ii).

26 *ibid* art 49.

27 ILC (n 15) 126.

28 Simma (n 21) 822–23.

29 ILC (n 15) arts 42(b)(i), 49.

of non-repetition.³⁰ As a matter of progressive development, the ASR suggest that a state other than the injured state may claim reparation in the interest of the injured state, assuming that an injured state exists.³¹ It is questionable whether states other than the injured state may resort to countermeasures.³²

According to the ILC Commentary to the ASR, the determination of the nature of the obligation takes place by interpreting the primary rule.³³ In the absence of a reasonable alternative, it is logical to argue that, at least in relation to treaty obligations, the customary rules on treaty interpretation set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) are to be used.³⁴ Furthermore, international case law has placed emphasis on the treaty's object and purpose in order to identify the nature of treaty obligations,³⁵ and scholars have suggested that inter se modifications are prohibited in cases of treaties that establish community interest obligations.³⁶

Reciprocity dominates economic activities in the energy sector. Prior to the rise of multilateral treaties that either specifically deal with energy trade (eg ECT) or also apply to energy trade (eg GATT annexed to the WTO Agreement), energy trade had fallen within the scope of bilateral treaties on friendship, navigation and

30 *ibid* art 48(2)(a).

31 *ibid* art 48(2)(b).

32 *ibid* art 54. See also ILC (n 15) 129, 137, 139; For an argument that countermeasures of states other than the injured state are permitted under *lex lata*, see Linos-Alexandre Sicilianos, 'Countermeasures in Response to Grave Violations of Obligations Owed to the International Community' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 1146–48.

33 ILC (n 15) 118; Special Rapporteur Fitzmaurice in his work on the law of treaties had similarly suggested that the nature of treaties is determined by the 'correct interpretation of the treaty according to its terms': ILC, 'Fourth Report on the Law of Treaties' (1959) UN Doc A/CN.4/120 para 18.

34 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

35 *S.S. Wimbledon (United Kingdom, France, Italy and Japan v Germany)* (Judgment) [1923] PCIJ Rep Series A No 1; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 2012; In relation to the EU founding treaties, see Case 26/62 *NV Algemene Transport—en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECR 1, 12.

36 Individual Opinion by M. Anzilotti, *Customs Regime between Germany and Austria* (Advisory Opinion) (1931) PCIJ Rep Series A/B No 41, 64; Separate Opinion of Judge van Eysinga, *The Oscar Chinn Case (United Kingdom v Belgium)* (Judgment) (1934) PCIJ Rep Series A/B No 63, 131.

commerce. A case concerning the breach of such obligations that found its way to the International Court of Justice (ICJ) was the *Oil Platforms case* which was couched in terms of energy commerce.³⁷ However, treaty obligations in this area of international law may protect the community interests of treaty parties. The following analysis classifies obligations relevant to energy activities in treaties to which either the EU and/or Member States are parties along with third states. These are examined in the following sequence: the WTO Agreement, the ECT, and bespoke pipeline treaties: the Nabucco Pipeline Agreement³⁸ (Nabucco Agreement), the Trans-Adriatic Pipeline Treaty³⁹ (TAP Treaty) and the bilateral treaties for the South Stream pipeline.⁴⁰

37 *Oil Platforms (Islamic Republic of Iran v United States of America)* (Preliminary Objection, Judgment) [1996] ICJ Rep 1996, 817, para 38; *Oil Platforms (Islamic Republic of Iran v United States of America)* (Judgment) ICJ Rep 2003, 161 paras 23–84.

38 Agreement among the Republic of Austria, the Republic of Bulgaria, the Republic of Hungary, Romania and the Republic of Turkey Regarding the Nabucco Project (signed 13 July 2009) <https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2010_III_57/COO_2026_100_2_605048.pdf> accessed 28 September 2016.

39 Agreement among the Republic of Albania, the Hellenic Republic and the Italian Republic relating to the Trans Adriatic Pipeline Project (signed 13 February 2013, entered into force 5 January 2014) <<http://nomoi.info/ΦΕΚ-A-267-2013-σελ-93.html>> accessed 28 September 2016.

40 Treaties for the South Stream pipeline between Russia and EU Member States (abbreviated): Intergovernmental Agreement between the Government of the Republic of Bulgaria and the Government of the Russian Federation on Cooperation in the Construction and Operation of the Gas Pipeline in the Territory of Bulgaria (signed 18 January 2008); Intergovernmental Agreement between the Government of the Republic of Hungary and the Government of the Russian Federation on Cooperation in the Construction and Operation of the Gas Pipeline in the Territory of Hungary (signed 28 February 2008); Agreement between Government of the Hellenic Republic and the Government of the Russian Federation on Cooperation in the Construction and Operation of the Gas Pipeline in the Territory of the Hellenic Republic (signed 29 April 2008); Intergovernmental Agreement between the Republic of Slovenia and the Government of the Russian Federation on Cooperation in the Construction and Operation of the Gas Pipeline in the Territory of the Republic of Slovenia (signed 14 November 2009); Intergovernmental Agreement between the Government of the Republic of Austria and the Government of the Russian Federation on Cooperation in the Construction and Operation of the Gas Pipeline in the Territory of the Republic of Austria (signed 24 April 2010); Intergovernmental Agreement between the Government of the Republic of Croatia and the Government of the Russian Federation on Cooperation in the Construction and Operation of the Gas Pipeline in the Territory of the Republic of Croatia (signed 2 March 2010) (Croatia was not an EU Member State when it concluded this treaty with Russia).

2.1 The WTO Agreement and Trade in Energy Goods

Under the 1947 General Agreement on Tariffs and Trade (1947 GATT)⁴¹ disputes concerning energy trade were not prominent.⁴² There is no agreement specifically dedicated to energy trade annexed to the WTO Agreement. In the first two decades since the entry into force of the WTO Agreement, disputes concerning energy trade did not give rise to proceedings under the Dispute Settlement Understanding (DSU).⁴³ However, the scope of application of the WTO Agreement, including its annexes, such as the 1994 General Agreement on Tariffs and Trade (GATT),⁴⁴ encompasses some aspects of the energy sector. For example, freedom of transit (GATT Article V) and the prohibition of import and export restrictions (GATT Article XI) apply to oil and gas products.⁴⁵ Furthermore, disputes relating to the energy (or mineral resources) sector are increasingly brought under the WTO DSU.⁴⁶ Given the interconnection of energy markets, standing to invoke responsibility for breaches of trade obligations in the energy sector is important in relation to energy-related disputes.

- 41 General Agreement on Tariffs and Trade (adopted 30 October 1947, provisionally applicable 1 January 1948) 55 UNTS 194. The provisional application of 1947 GATT was terminated one year after the entry into force of the WTO Agreement, pursuant to the Decision of 8 December 1994 adopted by the Preparatory Committee for the WTO and the Contracting Parties to GATT 1947 on “Transitional Co-existence of the GATT 1947 and the WTO Agreement” (PC/12, L/7583).
- 42 The only 1947 GATT case that dealt with energy activities was *Report of the Panel on US—Taxes on Petroleum and Certain Imported Substances* (1987) GATT BISD 34S/136.
- 43 Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to the Agreement establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 401.
- 44 General Agreement on Tariffs and Trade, Annex IA to the Agreement establishing the World Trade Organization (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 3; annexes to the WTO Agreement expressly constitute an integral part of the WTO Agreement (Article II, paragraph 2 of the WTO Agreement); GATT is legally distinct from 1947 GATT, pursuant to Article II(4) of the WTO Agreement.
- 45 Azaria (n 7) 30–35.
- 46 WTO, *Canada: Certain Measures Affecting the Renewable Energy Generation Sector—Report of the Appellate Body* (6 May 2013) WT/DS412/AB/R; WTO, *Appellate Body Report, China: Measures Related to the Exportation of Various Raw Materials—Report of the Appellate Body* (22 February 2012) WT/DS394/AB/R, WT/DS395/AB/R and WT/DS398/AB/R; WTO, *China: Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum—Report of the Appellate Body* (26 March 2014) WT/DS431/R. Indicative pending cases: WTO, *European Union and its Member States—Certain Measures Relating to the Energy Sector—Request for Consultation by the Russian Federation* (8 May 2014) WT/DS476/1; WTO, *European Union*

The nature of WTO obligations has been considered by a Panel in *EC—Bananas*⁴⁷ and by an Arbitrator in *US—Tax Treatment for Foreign Sales Corporations*.⁴⁸ *EC—Bananas* dealt with standing to bring a claim under the WTO DSU for a breach of the GATT. In its reasoning, the Panel did not expressly make a finding that the GATT obligations are bilateralisable, erga omnes partes, or interdependent.⁴⁹ Rather, its reasoning was based on the factual interconnectedness of international markets ('interdependence of global economy') and the risk of economic impact, including in the form of supplies and prices, faced by any other WTO member in cases where violations of GATT occur. In support of its findings, the Panel cited the Judgment of the Permanent Court of International Justice (PCIJ) in *S.S. Wimbledon*,⁵⁰ as well as the provisionally adopted ILC Draft Articles on State Responsibility (1996),⁵¹ particularly Article 40(e) and (f), which encompass bilateral, interdependent, erga omnes and erga omnes partes obligations respectively. By referring to community interest obligations without distinguishing among these bases, the Panel opened the debate about whether GATT obligations are erga omnes partes.⁵² However, the fact that the Panel cited the page of the *S.S. Wimbledon* Judgment where the PCIJ addressed the issue of jurisdiction (and, by implication, standing),⁵³ rather than the judgment's operative part, which touches implicitly on the nature of the primary obligations in question, offers support to the view that rules on standing in the WTO Agreement, including its Annexes, may be generous and unconnected to the nature of the primary obligations therein.

and Certain Member States—Certain Measures on the Importation and Marketing of Biodiesel and Measures Supporting the Biodiesel Industry—Requests for Consultation by Argentina (23 May 2013) WT/DS459/1.

47 WTO, *European Communities: Regime for the Importation, Sale and Distribution of Bananas—Complaint by the United States* (22 May 1997) WT/DS27/R/USA, as modified by the Report of the Appellate Body (25 September 1997).

48 WTO, *United States—Tax Treatment for Foreign Sales Corporations—Recourse to Arbitration by the US under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement—Decision of the Arbitrator* (30 August 2002) WT/DS108/ARB.

49 WTO, *European Communities* (n 47) para 7.50.

50 *S.S. Wimbledon* (n 35).

51 ILC, 'Report of the International Law Commission on the Work of its 48th Session' (6 May–26 July 1996) UN Doc A/51/10, 58.

52 WTO, *European Communities* (n 47) para 7.50.

53 Jurisdiction and standing are two different issues, but they come up in international courts and tribunals as preliminary objections. On the distinction between jurisdiction and admissibility, see *Hochtief AG v the Argentine Republic* ICSID Case ARB/07/31, Decision on Jurisdiction, 24 October 2011, paras 90–96.

In *US—Tax Treatment for ‘Foreign Sales Corporations’*, the Arbitrator did not deal with standing, but with the quantitative amount of the countermeasure agreed between the parties to the dispute. He explained that the prohibition of the subsidy under the Agreement on Subsidies and Countervailing Measures (SCM Agreement) was an erga omnes obligation.⁵⁴ Presumably, the Arbitrator meant erga omnes partes given that the obligations are binding only on WTO members. However, his reasoning does not support the suggestion that WTO obligations in general (or obligations arising from the SCM Agreement specifically) are erga omnes partes. He substantiated his finding by reference to the effects of the measure in question, rather than the obligation’s nature and the treaty’s object and purpose: ‘once such a measure is in operation, its real world effects cannot be separated from the inherent uncertainty that is created by the very existence of such an export subsidy’.⁵⁵

Therefore, GATT obligations may be better classified as bilateralisable, while the rules on standing, as developed under the DSU, permit any WTO member to resort to the DSU in case of breach of a WTO obligation.⁵⁶ This is fitting for international and regional energy markets given the factual interdependence of oil, gas, and electricity prices as well as of producers and consumers. Having examined WTO Agreement obligations that may apply to energy trade, the following section discusses the obligations under the ECT.

2.2 The Energy Charter Treaty

The ECT is the first sector-specific multilateral treaty governing numerous aspects of the energy sector: eg trade in Articles 5 and 29; transit in Article 7; protection of foreign investment in Part III; protection of the environment in Article 19 and

54 WTO, *United States—Tax Treatment* (n 48) para 6.10.

55 *ibid* para 6.8.

56 Tarcisio Gazzini, ‘The Legal Nature of WTO Obligations and the Consequences of their Violation’ (2006) 17 EJIL 723; Joost Pauwelyn, ‘A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?’ (2003) 14 EJIL 907; Crawford (n 22) 451; Azaria (n 7) 126–130; In opposition, see Chios Carmody, ‘WTO Obligations as Collective’ (2006) 17 2 EJIL 419. Although the causes of action provided in GATT Article XXIII(1) include ‘violations’, ‘non-violations’, and ‘other situations’, only standing for breaches of the GATT have been examined here.

competition in Article 6.⁵⁷ The ECT has 51 Contracting Parties, including the EU and Member States (with the exception of Italy, since 1 January 2016).⁵⁸

The nature of ECT obligations has yet to be addressed in the publicly available ECT case law. The following sections examine some ECT obligations separately. They demonstrate that ECT obligations vary in terms of their nature. This difference in nature has implications for standing to invoke responsibility either by recourse to ECT dispute settlement procedures, or by recourse to countermeasures, where the latter are not excluded by *lex specialis* in the ECT.⁵⁹

2.2.1 Investment Protection Obligations

The ECT investment obligations in Part III and the dispute settlement provisions of Article 26 apply solely in relation to investors bearing the nationality of an ECT Contracting Party in relation to an investment in the Area of another (host) ECT Contracting Party. They do not apply (by virtue of the ECT) to foreign investors who do not bear the nationality of an ECT Contracting Party. They also do not apply to investors that are nationals of an ECT Contracting Party in relation to investment made in the Area of that ECT Contracting Party. It could be argued that the manner in which the protection of investors of another Contracting Party is widened because the definition of ‘investment’ (ECT Article 1(6)(b)) requires the host Contracting Party to treat locally incorporated companies in conformity with ECT investment obligations, thus leading to the multilateralisation of the investment obligations.⁶⁰ However, the purpose of such a provision is not to treat foreign and domestic investors in the same manner, with a view to protecting corporate entities *per se*; but to protect the interests of as many investors of each Contracting Party as possible. It could also be argued that the manner in which the most-favoured nation (MFN) treatment works in practice means that the investors of numerous Contracting Parties may be affected by a breach of the investment obligations and that this could mean that investment obligations should be considered *erga omnes partes*.⁶¹ However, the MFN treatment obligation is characterised by an exchange of

57 *ibid.*

58 Italy submitted a notification of withdrawal from the ECT to the Depository on 31 December 2014. Its withdrawal took effect on 1 January 2016, pursuant to ECT art 47(2).

59 Azaria (n 7) 173–84.

60 See also Stephen W Schill, *The Multilateralization of International Investment Law* (CUP 2010) 202.

61 See also Schill (n 60) 218–19.

treatment, and reflects predominantly the individual interest of each Contracting Party to see its own nationals protected abroad, rather than a community interest that involves the protection of all commercial entities within a Contracting Party's jurisdiction.

Seen through these lenses, the ECT investment obligations rest on foreign nationality (that of another Contracting Party) and on a predominantly individual interest of each ECT Contracting Party to see their nationals protected abroad. They may be better classified as bilateralisable.⁶²

2.2.2 Trade and Transit Obligations

There is no evidence that the ECT trade and transit obligations are not bilateralisable.⁶³ Given that trade and transit, as a general matter, are based on reciprocal exchanges between treaty parties (unless there is evidence to the contrary), it is arguable that they are owed in pairs between ECT Contracting Parties.

Incidents have come up where violations of ECT obligations concerning transit (Article 7) and exports (Article 29) have either occurred or the lawfulness of the measures taken by the transit and exporter/importer ECT Contracting Party could at least have been challenged. However, since on none of these occasions did Contracting Parties make any claims of 'relatively formal form' for the cessation of an internationally wrongful act, no concrete conclusions can be drawn from their practice as to the nature of the trade and transit obligations.⁶⁴

Subsequent agreements between some ECT Contracting Parties provide evidence that priority is given to the ECT in the case of conflict between ECT provisions and the provisions of subsequent agreements. This practice of ECT Contracting Parties may support the view that the trade and transit provisions of the ECT are of integral nature. For instance, all Nabucco Agreement parties and TAP Treaty parties are ECT Contracting Parties. The Nabucco Agreement explicitly does not derogate from the ECT and the founding EU treaties⁶⁵ and

62 Giorgio Gaja, 'The Concept of an Injured State' in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2010) 944.

63 ECT (n 13) arts 5, 7, 29.

64 Azaria (n 7) 89–94: the 2004 Belarus–Russia gas export/transit dispute; the 2006 and 2009 Ukraine–Russia gas transit/export disputes; the 2007 Belarus–Russia oil transit/export dispute; the 2010 interruption of gas transit by Belarus.

65 Nabucco Agreement (n 38) art 3.1.

the TAP Treaty is in furtherance of the ECT.⁶⁶ All these provisions may indicate that parties do not intend to depart from their ECT obligations. However, it is unclear that they included such treaty provisions specifically owing to the *erga omnes partes* nature of the ECT trade and transit obligations. In light of the lack of evidence to the contrary, it is better to argue that ECT trade and transit obligations are bilateralisable.

2.2.3 Environmental Obligations

Article 19 on 'Environmental Aspects' sets out *erga omnes partes* obligations.⁶⁷ Article 19 of the ECT comprises three paragraphs.⁶⁸ Paragraph 1 consists of a *chapeau*, containing framework obligations, and a (non-exhaustive) list of obligations specifying the obligations in the *chapeau*. The *chapeau* establishes an obligation on Contracting Parties to 'strive to minimize in an economically efficient manner harmful Environmental Impacts occurring either within or outside its Area from all operations within the Energy Cycle in its Area'.⁶⁹ Unlike the Convention on the Law of the Sea (UNCLOS), where the term 'Area' defines a space beyond national jurisdiction, the term 'Area' in the ECT expressly means spaces within national jurisdiction.⁷⁰ Additionally, contrary to customary international law, which only requires that states prevent significant transboundary harm,⁷¹ Article 19 deals with

66 TAP Treaty (n 39) Preamble.

67 ECT (n 13) art 19.

68 For an overview of ECT (n 13) art 19, see Clare Shine, 'Environmental Protection under the Energy Charter Treaty' in Thomas Walde (ed), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (Kluwer Law International 1996) 520.

69 ECT (n 13) art 19(1). The wording 'shall strive' does not affect the normative character of the rule. The obligation is one of conduct, and the question is about the manner in which, and the time at which, such obligation is to be breached.

70 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS). Compare UNCLOS art 1(1) and ECT (n 13) art 1(10).

71 Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, OUP 2009) 137, 167; In opposition, see Phillippe Sands and Jacqueline Peel with Adriana Fabra and Ruth MacKenzie, *Principles of International Environmental Law* (3rd edn, CUP 2012) 201; International case law has only found violations of the obligation not to cause (and subsequently to prevent) transboundary harm (or harm in the context of a shared resource), not of harm to the environment within one state's jurisdiction. See *Trail Smelter Case (United States v Canada)* (1941) 3 RIAA, 1965; *Corfu Channel Case (UK v Albania)* (Merits, Judgment) [1949] ICJ Rep 4; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996]

any environmental harm occurring outside the jurisdiction of the Contracting Party where the harmful energy activity takes place, as well as with environmental harm occurring within the jurisdiction of the Contracting Party, in whose jurisdiction the harmful energy activity takes place. In the absence of a requirement connecting jurisdiction and harm, there is no evidence that the obligation in Article 19(1) is based on a bilateral relationship between Contracting Parties, whose environment would be affected by a harmful energy activity in another Contracting Party. Rather, the obligation protects a community interest—the environment per se. It is better classified as an obligation erga omnes partes.

2.2.4 Dispute Settlement Provisions and Standing

The ECT contains numerous dispute settlement mechanisms—a general inter-Contracting Party arbitration mechanism in Article 27; an investor-Contracting Party arbitration provision in Article 26; a special transit conciliation procedure in Article 7(7); a special provision for the settlement of environmental disputes in Article 19(2) and a special procedure for settling trade disputes concerning Articles 5 and 29 in Annex D. Since none of these provisions contains detailed rules concerning standing, standing to resort to ECT dispute settlement depends on the nature of each obligation breached.

Given that the transit obligations under Article 7 are bilateralisable, only individually injured Contracting Parties can resort to conciliation or to general inter-Contracting Party dispute resolution.⁷² Similarly, as the investment obligations in Part III are bilateralisable, only individually injured Contracting Parties may resort to general inter-Contracting Party dispute settlement.⁷³ Since trade obligations under Articles 5 and 29 are bilateralisable, standing to resort to Annex

ICJ Rep 226, 242 para 29; *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, para 101; Cf *Iron Rhine 'IJZEREN RIJN' Railway (Belgium v Netherlands)* (2005) 27 RIAA para 59. However, the relevant passage in the latter award could be interpreted as recognising an obligation to prevent environmental harm generally only by taking the tribunal's reasoning out of the dispute's context: the harm at issue would be caused by activities of one state (Belgium) taking place in the territory of another state (the Netherlands).

72 ECT (n 13) art 27.

73 Pursuant to ECT (n 13) art 27(2) the inter-Contracting Parties arbitral tribunal has jurisdiction over disputes concerning the application and interpretation of all provisions in Part III on Investment Promotion and Protection. However, art 27(2) expressly excludes from the tribunal's jurisdiction disputes concerning the application and interpretation of the last sentence of art 10(1) and only for Contracting Parties listed in Annex IA.

D should be available only to individually injured Contracting Parties. However, although Annex D does not specifically provide for standing, it is arguable that, given the effort of the negotiating parties of the ECT to parallelise Annex D to the WTO DSU, Annex D may be interpreted as affording generous standing to all Contracting Parties.⁷⁴ Finally, given that environmental obligations are *erga omnes partes*, any Contracting Party may resort to dispute resolution under Article 19(2).

2.3 Bespoke Pipeline Treaties between EU Member States and Third States

In the post-Cold War period, the trend to conclude bespoke pipeline treaties has been increasing. A number of reasons may have prompted this trend, but this question falls beyond the scope of this study.⁷⁵ This treaty practice is by no means unique to Europe. Numerous such treaties have been concluded in relation to cross-border and transit pipelines in the Middle East, Central Asia, and Africa.⁷⁶

However, the treaty practice involving EU Member States is of interest because of the context in which it is taking place. First, it can be seen as a reaction to the need to diversify routes and sources in the aftermath of the 2009 gas crisis that occurred in Europe owing to the gas transit and export dispute between Russia and Ukraine. Second, it will continue to be observed—if not to increase—as many of these projects are eligible for funding by the EU, when characterised as ‘projects of common interest’ under Decision No 1364/2006⁷⁷ or as ‘priority corridors’ under

74 No subsequent practice of Contracting Parties supports this interpretation as yet.

75 Azaria (n 7) 7, 58.

76 For instance, see Treaty on the West African Gas Pipeline Project between Benin, Ghana, Nigeria, and Togo (31 January 2003) <http://www.wagpa.org/Treaty_on_WAGP_Project.pdf> accessed 28 September 2016; Agreement among Azerbaijan, Georgia and Turkey Relating to the Transportation of Petroleum via the Territories of Azerbaijan, Georgia and Turkey Through Baku-Tbilisi-Ceyhan Main Export Pipeline (signed 18 November 1999, entered into force 9 October 2000) <<http://subsites.bp.com/caspian/BTC/Eng/agmt4/agmt4.pdf>> accessed 28 September 2016; Agreement between Kazakhstan and China on cooperation in the construction and operation of gas pipeline Kazakhstan-China (signed 18 August 2007), Kazakhstan OJ No 218-IV; Agreement between Qatar and the United Arab Emirates Relating to the Transmission of Gas by Pipeline Between Qatar and the United Arab Emirates (signed 26 September 2004, entered into force 9 July 2005) <<http://www.almeezan.qa/AgreementsPage.aspx?id=1483&language=en>> accessed 28 September 2016.

77 Decision No 1364/2006/EC [2006] OJ L262/1 of the European Parliament and of the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC.

Regulation 347/2013,⁷⁸ with a view to reinforcing the security of energy supplies by strengthening relations with third countries.⁷⁹ Third, the compatibility with EU law, especially competition law and the internal energy market legislation, of the treaties and other arrangements for these projects has been a matter of concern for the European Commission.⁸⁰ From the point of view of public international law, EU Member States may conclude treaties with third states, but they remain obliged to comply with their existing EU law obligations. If there is an incompatibility between treaty provisions with third parties and EU law provisions, the treaty with the third states will be the applicable legal standard between them and the third state, while the applicable legal standard in their relationship with EU Member States will be EU law.⁸¹ EU Member States will incur responsibility for the breach of EU law obligations.⁸² A possible solution may be to withdraw from the treaties with a third state, which can take place either in accordance with the relevant provisions of these treaties or in the absence of such provisions, by reference to extraneous grounds under custom or the VCLT, where applicable;⁸³ or to pursue the amendment of these treaties with a view to ensuring compatibility with EU law.⁸⁴ However, both choices are politically and procedurally cumbersome. For states that became EU Member States after the conclusion of treaties with third

78 Regulation (EU) No 347/2013 [2013] OJ L115/39 of the European Parliament and of the Council of 17 April 2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulations (EC) No 713/2009, (EC) No 714/2009 and (EC) No 715/2009. This Regulation includes a list of 'priority corridors' that are eligible for EU financial aid (art 6(3)).

79 The Nabucco Pipeline was listed in Annex III of Decision No 1364/2006/EC (n 77) as a project of common interest, and was eligible for EU financial aid (art 6(3)); Regulation (EU) No 347/2013 (n 78) included a list of priority corridors that include all EU Member States in whose territory the Nabucco pipeline would be constructed; the Trans-Adriatic Pipeline has been listed since 2006 in Annex III of Decision 1364/2006/EC (n 77) as a project of common interest and is eligible for EU financial aid (art 6(3) and s 9.25, Annex III).

80 European Commission, 'Proposal for a Decision of the European Parliament and of the Council on establishing an information exchange mechanism with regard to intergovernmental agreements and non-binding instruments between Member States and third countries in the field of energy and repealing Decision No 994/2012/EU COM (2016) 53 final (Commission's Proposal for Regulation repealing Decision No 994) para 4.

81 VCLT (n 34) art 30(4)(b).

82 *ibid* art 30(5).

83 None of the grounds for termination under the VCLT and custom permit termination on the ground that one or more of the treaty parties are obliged to comply with other conflicting international obligations.

84 VCLT (n 34) art 40.

states that are incompatible with EU law (eg Croatia concluded a bilateral treaty with Russia concerning the South Stream pipeline prior to its accession to the EU), TFEU Article 351 provides that the TFEU does not affect such treaties.⁸⁵ However, to the extent that they are incompatible with the TFEU, the Member States(s) are obliged to 'take all appropriate steps to eliminate the incompatibilities established'.⁸⁶ EU Member States are thus obliged under EU law either to amend treaties with third states or to withdraw from them.

Fourth, in February 2016, the European Commission proposed amending Decision No 994/2012.⁸⁷ Under the proposed amendment, EU Member States would be obliged to abstain from expressing consent to be bound by treaties with third states in the energy sector (including bespoke pipeline treaties) before the European Commission has made an assessment as to the compatibility of such treaties with EU law. Member States would also be obliged to 'take (into) utmost account' the European Commission's assessment when concluding the negotiation of such treaties.⁸⁸ Fifth, existing EU law and the proposal of the Commission to amend existing EU law favours multilateral treaties with third states. This express preference implies that the Commission may not favour bilateral energy-related treaties.⁸⁹

Against this background, it is valuable to examine bespoke pipeline treaties between EU Member States and third states: two plurilateral treaties (the Nabucco Agreement and the TAP Treaty), and the bilateral treaties for the South Stream pipeline. The term 'plurilateral bespoke pipeline treaties' is to be contrasted with 'bilateral bespoke pipeline treaties', and with 'multilateral treaties' (eg the WTO Agreement and the ECT),⁹⁰ which are not tailor-made for a particular pipeline. The

85 TFEU (n 3) art 351; Case 812/79 *Attorney General v Juan C Burgoa* [1980] ECR 2787, para 8; Case C-84/98 *Commission v Portugal* [2000] ECR I-5215, para 53; For an overview of TFEU art 351, see Piet Eeckhout, *EU External Relations Law* (OUP 2011) 396–436.

86 TFEU (n 3) art 351; where necessary, the Member States must assist each other with a view to eliminating the incompatibilities established and must adopt, where appropriate, a common attitude. '[T]he Commission (...) may facilitate mutual assistance between the Member States concerned and their adoption of a common attitude'. Case C-205/06 *Commission v Republic of Austria* [2009] ECR I-1301, para 44.

87 Decision No 994/2012/EU [2012] OJ L299/13 of the European Parliament and of the Council of 25 October 2012 establishing an information exchange mechanism with regard to intergovernmental agreements between Member States and third countries in the field of energy.

88 Commission's Proposal for Regulation Repealing Decision No 994 (n 80) art 5(4).

89 *ibid* art 9(d); Decision No 994/2012/EU (n 87) art 7.

90 WTO Agreement (n 13); ECT (n 13).

use of the term 'plurilateral' here is only descriptive of the treaties' form (which is multilateral) and does not entail legal consequences under the law of treaties in relation to the topic discussed here. Each treaty and each treaty obligation has to be interpreted separately. The following analysis focuses on obligations concerning uninterrupted energy flows via the pipelines.

2.3.1 Plurilateral Bespoke Pipeline Treaties

The Nabucco Agreement requires treaty parties 'not to permit or require the Interruption of gas transportation in the Nabucco (pipeline).'⁹¹ The treaty's object and purpose is to ensure the 'security of supply (since) this is necessary for the welfare and security of each citizen and (...) States Parties are therefore determined to act in a spirit of solidarity *to achieve collective energy security*'.⁹² The TAP Treaty requires parties not to interrupt flows of gas through the pipeline.⁹³ The Preamble of the Treaty states that the Treaty forms part of an effort to promote cooperation in ensuring the reliable supply of gas from states in Central Asia to the EU, none of which is party to the Treaty, and 'to create *uniform (...) conditions and standards* for the (...) construction, and operation of (the Pipeline)'.⁹⁴ Additionally, the Treaty categorically prohibits unilateral denunciations and inter se modifications.⁹⁵

The obligations not to interrupt transportation of energy via an integral pipeline system, which crosses the territory of numerous states, could be classified as 'interdependent obligations'. What connects interdependent obligations is their negative nature: they require states, for instance, not to acquire arms or not to acquire nuclear weapons. As in relation to interdependent obligations, parties to bespoke pipeline treaties have a strong interest in cessation of the international wrongful act pertaining to the interruption of energy carriage, restitution and assurances of non-repetition rather than in compensation. Their interest is to guarantee the 'regime' by re-establishing energy flows. Owing to these features, this could be seen as the natural classification of obligations concerning energy transportation via pipelines in the context of multilateral bespoke pipeline treaties unless there is evidence to the contrary, which is the case for the Nabucco Agreement and the TAP

91 Nabucco Agreement (n 38) art 7.

92 *ibid* art 1.2 (emphasis added).

93 TAP Treaty (n 39) art 7.

94 *ibid* Preamble (emphasis added).

95 *ibid* art 12.

Treaty. The features of the Nabucco Agreement and the TAP Treaty demonstrated above support the proposition that the obligations concerning uninterrupted energy flows therein are *erga omnes partes*. They are established primarily for a common interest (collective energy security), including a wider common interest of states beyond the treaty parties, and they are intended to set uniform standards for a regional project.

This section has shown that two plurilateral bespoke pipeline treaties that EU Member States have concluded with third states establish obligations *erga omnes partes* and thus all treaty parties have standing to invoke responsibility (although it is questionable whether those other than the injured state may resort to countermeasures).⁹⁶ The following section touches on the bilateral treaties that EU Member States and third states in the Balkan region have concluded with Russia concerning the South Stream pipeline.

2.3.2 Bilateral Bespoke Pipeline Treaties

In addition to multilateral treaties governing the construction and operation of one physically indivisible pipeline that crosses the territory of numerous states, the practice of states also reveals compounds of bilateral treaties concluded for such projects. A paradigmatic example of European interest is the bilateral treaties concluded between Russia, a gas exporting state, on the one hand, and each transit and importing state for the South Stream pipeline on the other hand, some of which are EU Member States.⁹⁷ These include provisions concerning the construction and operation of the pipeline, including an obligation not to interrupt energy carriage.

Owing to the vehicle used to establish such obligations (bilateral treaties), the obligations under each treaty are bilateral and are owed between the parties to them. There is no evidence in the treaties that EU Member States have concluded with Russia or in the circumstances of their conclusion that there is an intention to establish rights (eg concerning uninterrupted transportation) for third states through whose territory the pipeline will be constructed or for a wider group of states.⁹⁸

96 See (n 24–32).

97 See (n 40). For compatibility of the provisions in these treaties with EU law provisions, see analysis in section 2.3 above.

98 VCLT (n 34) art 36.

2.4 Interim Conclusions

Within the ambit of international energy law, community interest obligations appear in the treaty practice of Member States (eg obligations in bespoke pipeline treaties with third states, such as the Nabucco Agreement and the TAP Treaty) and in some multilateral treaties to which the EU is itself a party (eg ECT environmental obligations). However, the EU and Member States have also undertaken bilateral or bilateralisable obligations in the energy sector. WTO obligations apply to energy trade and are bilateralisable; but generous standing has been afforded to all WTO members to invoke responsibility for breaches of WTO obligations under the DSU. The ECT contains some bilateralisable obligations, such as those concerning trade, transit and investment. Furthermore, EU Member States conclude bilateral treaties with third states in the energy sector (eg with Russia for the South Stream pipeline). This section has explained that community interest obligations appear along with bilateral and bilateralisable obligations within the scope of international energy law that are of particular interest for the EU and Member States, and how this determines standing to implement the responsibility for a breach of these obligations. The following section examines whether lawful countermeasures, as a means of implementing international responsibility, can take the form of suspending compliance with energy-related obligations.

3 Suspending Compliance with Community Interest Obligations in International Energy Law

This section examines energy-related countermeasures. Countermeasures are a means of implementing international responsibility.⁹⁹ They involve the suspension of compliance with an international obligation, but because they are taken in response to a previously internationally wrongful act, countermeasures are one of the circumstances that preclude wrongfulness.¹⁰⁰ The following analysis assesses whether, and if so how, the community interest nature of obligations plays a role in determining the lawfulness of a countermeasure in the form of suspending compliance with treaty obligations relating to the energy sector. This analysis is important because resorting to energy-related countermeasures may be preferred

99 ILC (n 15) Part III arts 49–53.

100 *ibid* Part I art 22.

among the available responses to wrongfulness in the UN era, given their significant effects on the responsible state and their corresponding persuasiveness.

Section 3.1 examines whether countermeasures in the form of suspending compliance with treaty obligations in the energy sector are unavailable. Section 3.2 examines whether countermeasures in the form of suspending compliance with obligations in the energy sector may not meet the conditions of lawfulness of countermeasures to the extent that the latter take into account community interest obligations.

3.1 Displacing Countermeasures as Circumstances Precluding Wrongfulness

The argument that countermeasures as circumstances precluding wrongfulness may be displaced by *lex specialis* is founded on two separate bases—treaty language that displaces countermeasures, as circumstances precluding wrongfulness; and the nature of the obligations whose performance is to be suspended implicitly displaces countermeasures. First, some treaties concerning energy trade and investment contain security exceptions—for instance, GATT Article XXI and ECT Article 24. The relationship between security exceptions and circumstances precluding wrongfulness under the law of state responsibility has been the focus of a series of investor-state arbitrations against Argentina on the basis of bilateral investment treaties to which Argentina is party. While a number of arbitral tribunals have dealt with this issue differently,¹⁰¹ the more persuasive position is that when the language used in a security exception is (or resembles substantially) ‘nothing shall prevent the parties from’, as is the language used in GATT Article XXI and ECT Article 24, such language suggests that the exception delineates the scope of primary treaty obligations. Conduct within the scope of the exceptions is not in breach of the treaty obligations. In contrast, circumstances precluding wrongfulness are part of secondary rules and preclude the wrongfulness of a conduct that would otherwise be wrongful: meaning conduct that would not fall within the scope of

101 Treaty exceptions are *lex specialis* and supersede the customary circumstances precluding wrongfulness: *LG&E v Argentine Republic* (Decision on Liability) (ICSID Case No ARB/02/1) 3 October 2006, paras 245–61; *Patrick Mitchell v Democratic Republic of the Congo* (Decision on the Application for Annulment of the Award) (ICSID Case No ARB/99/7) 1 November 2006, para 55; interpreting treaty exceptions through VCLT (n 33) art 31(3)(c) to incorporate conditions from secondary rules under custom: *CMS Gas Transmission Company v Argentine Republic* (Award of the Tribunal) (ICSID Case No ARB/01/8) 12 May 2005, paras 315–82.

such security exceptions.¹⁰² This was also the reasoning of the PCIJ in the *Railway Traffic Advisory Opinion* (1931).¹⁰³

Most bespoke pipeline treaties do not contain security exception provisions, as is the case of those examined here. However, some contain other language that may displace countermeasures, as circumstances precluding wrongfulness. The TAP Treaty permits non-performance of treaty obligations only by prior consent of all parties. This rule is located in a provision that deals with the treaty's operation that is separate from the provisions requiring states not to interrupt energy flows.¹⁰⁴ The argument could be made that this treaty provision displaces countermeasures under the law of international responsibility taken in this particular form (meaning in the form of interrupting energy flows). The provision overlaps with countermeasures in that they both relate to suspension of performance of obligations, but it deviates from countermeasures, which are unilateral and are not premised on prior consent by the responsible state or any other state. Such interpretation would entail the displacement of any unilaterally operational circumstance precluding wrongfulness.

Second, as a separate argument, the community interest nature of some obligations of international energy law could be seen as entailing ipso facto non-susceptibility to unilateral countermeasures. In his work on state responsibility, ILC Special Rapporteur Arangio-Ruiz suggested that, owing to their indivisible nature, erga omnes partes obligations may not be susceptible to countermeasures.¹⁰⁵ However, his proposal was not taken up by the ILC—it was rather changed into a clause that severs the preclusion of wrongfulness towards the responsible state from the non-preclusion of wrongfulness towards the non-responsible affected states.¹⁰⁶ The approach of the ASR in relation to this issue may cast some doubt on the argument that countermeasures in the form of suspending performance of erga omnes partes obligations are displaced owing to the indivisible nature of such obligations.

102 ILC (n 15) 7; *CMS Gas Transmission Company v Argentine Republic* (Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic) (ICSID Case No ARB/01/8) 25 September 2007, paras 129–35; *Sempra Energy International v Argentine Republic* (Ad hoc Committee, Decision on the Argentine Republic's Request for Annulment of the Award) (ICSID Case No ARB/02/16) 29 June 2010, paras 200–04.

103 *Railway Traffic between Lithuania and Poland (Railway Sector Landwarów-Kaisiadorys)* (Advisory Opinion) PCIJ Rep Series A/B, No 39, 107.

104 TAP Treaty (n 39) art 12.

105 Special Rapporteur Arangio-Ruiz, 'Fourth Report on State Responsibility' (1992) II ILCYB; UN Doc A/CN.4/SER.A/1992/Add.1 (Part 1) paras 92–93.

106 ILC (n 15) 130 and art 49.

The following section examines whether suspending performance of energy-related obligations meets the conditions of lawfulness of countermeasures under custom, assuming that countermeasures are not displaced by *lex specialis*.

3.2 Conditions of Lawfulness of Countermeasures under Customary International Law

Countermeasures, in order to be lawful, have to meet a number of conditions under customary international law.¹⁰⁷ One of these conditions is that a countermeasure has to be targeted against the responsible state.¹⁰⁸ This condition—according to the ILC—is based on the ‘relative preclusion of wrongfulness’.¹⁰⁹ The wrongfulness of the countermeasure is precluded vis-à-vis the responsible state, but not vis-à-vis a third non-responsible state. For instance, if Ukraine suspends compliance with transit obligations that it owes to Russia as a countermeasure for the latter’s internationally wrongful act, while at the same time it owes a transit obligation to the EU and/or Member States (eg GATT Article V or ECT Article 7), the wrongfulness of interrupting transit vis-à-vis Russia may be precluded, but it will not be precluded vis-à-vis the EU and Member States simply owing to Russia’s wrongful conduct. In such situations, reacting states are faced with a dilemma. They may respond against the responsible state, but they will have to make reparations to third (not responsible) states; or they may abstain from resorting to countermeasures against the responsible state (at least in this particular form), owing to the burden of having to make reparations to third states.

On the other hand, other conditions of lawfulness of countermeasures may be attuned to the community interest nature of international obligations. Some reflect the need to protect community interests per se; others may coincidentally allow the consideration of the community interest nature of a primary obligation when assessing the lawfulness of a countermeasure. Two conditions of the lawfulness of countermeasures are discussed in the following sequence—that countermeasures shall not affect fundamental human rights obligations and that they have to be proportionate to the injury suffered.¹¹⁰

107 ILC (n 15) arts 49–53.

108 *ibid* art 49(1).

109 *ibid* 130.

110 *ibid* arts 50–51.

3.2.1 Prohibition of an Effect on Fundamental Human Rights Obligations

If individuals are deprived of sufficient heating, water, sanitation and medical assistance or the use of medical equipment in hospitals or at home due to interruptions to the supply of electricity, oil and gas, there may be loss of life, or individuals may be subject to degrading treatment or their health may be put at risk. This is far from an academic discussion. During the 2009 gas crisis in Europe, deaths were reported in Poland and Bulgaria.¹¹¹

The rule that countermeasures shall not ‘affect obligations for the protection of fundamental human rights’¹¹² covers two situations: where the state resorting to the countermeasure suspends compliance with its human rights obligations per se; and where the state resorting to the countermeasure suspends compliance with other international obligations and in so doing affects its human rights obligations. It is this second situation that relates to countermeasures in the form of energy-trade restrictions.

However, this prohibition faces numerous limitations. The following analysis touches on two of these limitations:¹¹³ the extraterritorial application of human rights obligations, and the effect on human rights.

3.2.1.1 Extraterritorial Application of Human Rights

Human rights obligations apply within the territory of the state resorting to countermeasures (‘reacting state’), and extraterritorially, where the reacting state exercises control. Unlike situations where state organs are present in areas outside the state’s territory and exercise control over a particular area¹¹⁴ or over a

111 Bilefsky and Kramer (n 7).

112 ILC (n 15) art 50.

113 Another limitation is that ASR art 50 (n 15) refers to ‘*fundamental* human rights’, which implies a smaller group of obligations within human rights generally. The term cannot mean only human rights that are found in jus cogens norms; such requirement would be superfluous, since the requirement that countermeasures do not affect obligations jus cogens is a separate condition for lawfulness (ASR art 50(1)(d)); the term ‘fundamental human rights’ was proposed by Rapporteur Arangio-Ruiz based on the distinction adopted at the time between ‘core’ or ‘basic’ human rights and ‘other’ human rights. Special Rapporteur Arangio-Ruiz (n 105) para 80; For further analysis: Azaria (n 7) 234–36.

114 *Loizidou v Turkey (Preliminary Objections)* (1995) Series A no 310, para 62; In relation to full and exclusive control over a prison or a ship respectively, see *Al-Saadoon and Mufdhi v United Kingdom* App No 61498/08 (ECtHR, 30 June 2009) paras 86–89; *Medvedyev and others v France* App No 3394/03 (ECtHR, 20 March 2010) para 67.

particular individual,¹¹⁵ interrupting energy exports or transit involves conduct in the territory of the reacting state that produces effects on individuals located in the territory of the responsible state ('targeted state').

The case law of the European Court of Human Rights (ECtHR) concerning territorial conduct, which has extraterritorial effects, is limited. However, the ECtHR has considered that individuals fall within the 'jurisdiction' of a state within the meaning of Article 1 of the European Convention on Human Rights (ECHR),¹¹⁶ in circumstances where its organs are located within its own territory (or where the state exercises effective control) but are in close vicinity to the victims that are located in another state and there is a direct and immediate causal link between their conduct and the effect on the individual concerned.¹¹⁷

Interruptions of energy exports or transit may in certain circumstances fulfill the vicinity and the causation link criteria, for instance, where the importing state is wholly dependent on established energy flows from the exporter or the transit route. Such instances include Belarus' dependence on Russia's exports of gas, and the dependence of Moldova on gas transiting through Ukraine and gas exports from Russia.¹¹⁸ However, the case law where such a threshold has been established is confined to obligations to abstain from interfering with the enjoyment of rights.¹¹⁹ States are obliged not to kill, not to subject individuals to degrading treatment, and not to put at risk the health of individuals that are located in the territory of another state. By contrast, it is doubtful that obligations to take positive measures

115 *Öcalan v Turkey* App No 46221/99 (ECtHR, 12 May 2005) para 91.

116 Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953, amended by Protocols Nos 3, 5, 8 and 11) 213 UNTS 222 (ECHR).

117 *Andreou v Turkey* App no 45653/99 (ECtHR, 3 June 2008), section A.3(c); Additional support for the Court's reasoning in this respect can be drawn from *Nada v Switzerland* App no 10593/08 (ECtHR, 12 September 2012). The claimant resided in an Italian enclave surrounded by Switzerland. The ECtHR presumed that the individual fell within Switzerland's 'jurisdiction' without giving reasons (para 122). It found that, by prohibiting the claimant from entering or transiting through its territory, Switzerland violated his right to private life. Neither Switzerland nor any intervening state objected on the grounds that Nada was outside Switzerland's 'jurisdiction'. The exceptional situation, which involved an enclave of 1.6 square kilometres of Italian territory, where the claimant resided, may have prompted the Court's reasoning, but Switzerland's conduct was conduct that took place within its own territory albeit that it produced extraterritorial effects.

118 See n 8.

119 *Andreou v Turkey* App no 45653/99 (ECtHR, 3 June 2008); *Nada v Switzerland* App no 10593/08 (ECtHR, 12 September 2012).

to protect the right to life, freedom from degrading treatment or the right to health by providing energy apply in such an extraterritorial manner. No case law or state practice as yet supports (albeit it does not preclude) the view that obligations to take positive measures to protect human rights apply in such manner.¹²⁰

3.2.1.2 'Effect' on Human Rights Obligations

Even assuming *arguendo* that the 'jurisdiction' threshold was to be fulfilled,¹²¹ it would have to be proven that the *effect* on the human rights of individuals in the targeted state is the result of the countermeasure. Such a link depends on the facts, and may not be easily identified. Furthermore, the reacting state may argue against the existence of such a link because the targeted state has not taken the necessary measures to protect the human rights of individuals within its own territory. For example, the reacting state could have mitigated the effects of an energy crisis by taking pre-emptive or other measures such as storage or entering into energy sharing mechanisms like the International Energy Agency mechanism of oil stockpiling and demand restraints or the EU Gas Security mechanism.¹²² Hence, in the current state of international law, the rule that countermeasures cannot affect human rights obligations is unlikely to result in countermeasures in the form of interrupting energy flows being unlawful.

3.2.2 Proportionality

Under customary international law, countermeasures have to be proportionate to the injury suffered, taking into account the rights in question.¹²³ The following sections explain how the condition of proportionality of countermeasures accommodates community interest obligations. First, the effects on human rights

120 For counterarguments that may support the extraterritorial application of obligations and the conduct discussed here, see Azaria (n 7) 243–44.

121 As a separate matter, there is no evidence that a stricter jurisdictional link is required for the customary right to life and freedom from inhuman treatment, or the right to health (assuming that it attains customary status) other than the one applicable to human rights treaties.

122 Agreement on an International Energy Program (concluded 18 November 1974, entered into force 19 January 1976) 1040 UNTS 271, arts 2–3; Council and Parliament Regulation (EU) 994/2010 (n 9).

123 ILC (n 15) art 51; *Gabčvkovo–Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, para 85.

obligations of the targeted state will be discussed, and second, how the condition of proportionality takes into account the community interest nature of obligations whose performance is suspended as a countermeasure. In relation to the former issue, the question as to the existence of a human right to energy will be touched on. The analysis is put in the context of treaties to which all EU Member States are party (as at 28 September 2016): the ECHR and the European Social Charter (ESC).¹²⁴

3.2.2.1 Effects on Human Rights Obligations of the Targeted State: A Human Right to Energy?

Countermeasures in the form of suspending compliance with exports or transit of energy can affect the ability of the targeted state to perform its own human rights obligations vis-à-vis individuals within its own territory. These include obligations to respect human rights by abstention and obligations to protect human rights by positive action. A countermeasure that has such an effect is likely to be disproportionate to the injury suffered, taking into account the rights in question. Since this criterion covers the rights of the injured and responsible states,¹²⁵ the argument can be made that it also covers the ability of the targeted state to comply with its human rights obligations.

It is in this context that the question arises as to whether there is a 'human right to energy'. There is no human rights treaty specifically establishing the right to energy, or referring to energy in connection with the rights established in the treaty.¹²⁶ However, the interpretation of existing treaties may establish obligations not to arbitrarily deprive access to energy in relation to vulnerable individuals (especially those dependent on the state) and especially in cases where such deprivation has no connection to the conduct of the individuals in question (eg non-payment of utility bills). Such an argument can also be made in relation to customary human rights law, where available.

124 European Social Charter (adopted 18 October 1961, entered into force 26 February 1965) 529 UNTS 89.

125 ILC (n 15) 135.

126 The only exception is Article 14(2) of the Convention on the Elimination of Discrimination against Women (adopted 19 December 1979, entered into force 3 September 1981) 1249 UNTS 13. The Article obliges parties to take all appropriate measures to eliminate discrimination against women in rural areas and, in particular, to ensure their right to enjoy adequate living conditions, particularly in relation to *electricity*. This provision is limited in scope of beneficiaries ('women in rural areas') and purpose ('elimination of discrimination').

Access to energy (oil, gas or electricity) is central for heating, cooking, use of medical equipment at home and hospitals, and for ensuring access to water, including for the purposes of sanitation. In light of this, it may be argued that when states arbitrarily deprive individuals of access to energy they may violate their obligation not to employ degrading treatment, their obligation to protect the right to life, their obligation to respect individuals' right to health, and the right to housing under human rights treaties (and customary international law, where available), such as the ECHR and the ESC.

The question has far-reaching implications for states—would such a right include only access to electricity or also gas and oil; or does it require states to provide uninterrupted energy or ensure the uninterrupted provision of energy by private entities (in cases other than non-payment of utility bills), and under which conditions (for free, on payment and if so, what would be the charges)? These issues fall beyond the scope of this study which examines a different issue—access to energy in situations where individuals already have access to energy, and where provision of energy is interrupted for reasons that do not have to do with the human right-holder.

In relation to degrading treatment, in 1991, the European Commission on Human Rights rejected the admissibility of a complaint which argued that Belgium violated ECHR Article 3 because '*in the case at issue*, the cutting off or the threat of cutting off electricity did not reach the level of humiliation or debasement needed for there to be inhuman or degrading treatment'.¹²⁷ This decision does not rule out the possibility that interfering with access to electricity may meet the threshold of treatment that would be inhuman or degrading. However, the decision did not provide detailed reasoning. Subsequent case law of the ECtHR has taken into account a number of the conditions present in the case of the applicant in this case, when it has accepted that a breach of ECHR Article 3 has taken place. The conditions that the European Commission on Human Rights could have considered include the applicant's economic conditions, her mental and physical state (she suffered from depression and respiratory problems), the duration of the lack of electricity and the weather conditions during which it took place, and the fact that the facilities in her residence allowed for no alternative energy sources.¹²⁸

127 *Francine van Volsem v Belgium* App No 14641/89 (Commission Decision, 9 May 1990) 3 (emphasis added).

128 Antonio Cassese, 'Can the Notion of Inhuman and Degrading Treatment Be Applied to Socio-Economic Conditions?' (1991) 2 EJIL 141, 141–45.

Additionally, subsequent ECtHR case law has clarified that the ‘absence of (...) a purpose (to humiliate) cannot conclusively rule out a finding of a violation of Article 3’.¹²⁹ Moreover, a breach of Article 3 may occur ‘in circumstances (where the individual is) wholly dependent on State support, (and is) faced with official indifference when in a situation of serious deprivation or incompatible with human dignity’.¹³⁰ Interruption of access to energy for heating, sanitation, light, cooking or the use of essential medical equipment to individuals dependent on the state may amount to a violation of their right to be free from degrading treatment under ECHR Article 3. They may also amount to a breach of the right to health, as part of the right to private life.¹³¹ Moreover, in relation to the ESC, the European Committee of Social Rights has recognised in its long-standing case law that the right to adequate housing under ESC Article 31(1) includes a dwelling with ‘all basic amenities such as water, heating (...) and electricity (...)’.¹³² In relation to vulnerable individuals dependent on the state, interruption of energy for heating, sanitation, and cooking and medical support may constitute degrading treatment, a breach of the right to health, or a breach of the right to adequate housing.

To some extent, EU secondary legislation (incidentally) is compatible with the obligations of EU Member States under the ECHR: Article 3(3) of Directive 2009/73/EC concerning common rules for the internal market in natural gas requires EU Member States to:

take appropriate measures to protect final customers, [and] in particular, [to] ensure that there are adequate safeguards to protect vulnerable customers. [E]ach Member State shall define the concept of vulnerable customers which may refer to energy poverty and, inter alia, to the prohibition of disconnection of gas to such customers in critical times.¹³³

129 *Valašinas v Lithuania* App No 44558/98 (ECtHR, 24 July 2001) para 101.

130 *MSS v Belgium and Greece* App No 30696/09 (ECtHR, 21 January 2011) para 253.

131 ECHR (n 116) art 8; *Nada v Switzerland* (n 117) para 151; *Glor v Switzerland* App No 13444/04 (ECtHR, 30 April 2009) para 54.

132 *Centre on Housing Rights and Evictions (COHRE) v Italy*, Complaint No 58/2009 (ECSR, 25 June 2010) para 54.

133 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94; In relation to electricity, see similar provisions in Article 3, Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC [2009] OJ L211/55.

However, the ECHR (and other international obligations of EU Member States) may require further measures vis-à-vis vulnerable individuals, and the protection of a wider group of individuals than those protected by Directive 2009/73.¹³⁴

In extreme situations, where the targeted state is placed in a position where it cannot comply with its negative and positive obligations concerning the right to life, the right to be free from degrading treatment, and the right to health,¹³⁵ owing to an interruption of energy exports or transit by a reacting state, such countermeasure would be disproportionate.

3.2.2.2 In Relation to Targeting Community Interest Obligations

As a separate matter, targeting community interest obligations may not meet the condition of proportionality. The reasoning of the ICJ in *Gabčvkovo-Nagymaros* supports this interpretation. Hungary had violated a bilateral treaty with Slovakia, which required both States to construct works for energy development on a part of the River Danube crossing the two States. Slovakia unilaterally responded by diverting a part of the river and by constructing alternative works along the course of the diversion. Slovakia claimed that its conduct was a lawful countermeasure against Hungary's prior breach. The ICJ found that '[t]he effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question'.¹³⁶

The Court did not explain the criteria by which it assessed proportionality. It could be argued that the Court's criterion was the aim pursued by Slovakia when resorting to the alleged countermeasure. Factually, Slovakia's measures meant that the adverse effects of Hungary's conduct were wiped out and Slovakia managed to

134 First, the term 'vulnerable customers' within Directive 2009/73 (and Directive 2009/72 concerning electricity) is to be determined by each EU Member State and, in any event, it does not necessarily coincide with the definition of vulnerable individuals as referred to in the case law of the ECtHR. Second, Directives 2009/73 and 2009/72 seem to require that disconnection from gas or electricity respectively cannot take place, but there is no equivalent obligation under EU law concerning oil.

135 The right to life and the right to be free from degrading treatment would qualify as 'fundamental human rights' within the meaning of the ASR. See ILC (n 15) art 50(1)(b); Special Rapporteur Arangio-Ruiz (n 105) paras 80–83; Given the close connection between the right to health and the right to life and freedom from degrading treatment, it may be argued that the right to health is also covered by the term 'fundamental human rights'; See also Azaria (n 7) 236.

136 *Gabčvkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7, para 85.

enjoy unilaterally the benefits it would have enjoyed had Hungary performed its treaty obligations.¹³⁷ Thus, the measure's aim was not to induce Hungary to comply with its obligations but rather an attempt to benefit from non-compliance.

Although this interpretation is defensible, especially in light of the facts, the Court's reasoning in paragraph 85 of the Judgment allows for a different interpretation. The ICJ alluded to the findings of the PCIJ in *River Oder* concerning the creation of a 'community of interest on a navigable river [which] becomes the basis for a common legal right' (of navigation) of riparian states on international rivers.¹³⁸ Although it did not specifically link the community interest nature of those obligations to the assessment of the lawfulness of the countermeasure in question, it made an analogy between the common legal right of navigation and the modern developments of international law concerning non-navigational uses of international watercourses. This reasoning allows for the argument that the community interest and hence indivisible nature of the obligation whose performance is being suspended as a countermeasure may be a qualitative criterion for measuring proportionality.¹³⁹ For instance, given that the obligations concerning the protection of the environment in ECT Article 19 and the obligations concerning uninterrupted energy flows under the Nabucco Agreement and the TAP Treaty are *erga omnes partes*, suspending their performance would not constitute a lawful countermeasure because it would not meet the condition of proportionality.

4 Conclusion

Reciprocity and the making of bilateral or bilateralisable obligations dominate international rules concerning the energy sector. While multilateral treaties that apply to energy trade (eg WTO Agreement) or specific to the energy sector (eg ECT) have been concluded since the end of the Cold War, the rise of multilateralism has not necessarily brought about community interest obligations in this field. For instance, GATT obligations and ECT obligations concerning trade and investment are bilateralisable.

137 Enzo Cannizzaro, 'The Role of Proportionality in the Law of International Countermeasures' (2001) 12 EJIL 889, 898–99.

138 *Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder* (Judgment) PCIJ Rep Series A No 23, 5.

139 According to the ILC, the criteria for proportionality in the framework of the ASR are quantitative and qualitative. ILC (n 15) 134–35.

However, to suggest that this is the whole picture would be misleading. The EU founding treaties and, by implication, the secondary sectoral legislation on energy do not establish reciprocal undertakings between EU Member States according to *Van Gend Loos*.¹⁴⁰ But, even outside EU law, as a species of international law, contemporary treaty practice is growing in the form of 'plurilateral' bespoke pipeline treaties, and EU Member States have participated in this development. Some of these treaties contain obligations *erga omnes partes* concerning uninterrupted energy flows.

At the same time, the community interest nature of international obligations may be relevant in determining whether suspending compliance with them can be a lawful countermeasure. Some conditions of lawfulness of countermeasures protect community interests *per se*; others incidentally allow the consideration of the community interest nature of a primary obligation when assessing whether the conditions of lawfulness of a countermeasure have been met. The condition that countermeasures cannot affect fundamental human rights obligations is unlikely to render unlawful countermeasures in the form of interrupting energy supplies to the responsible state, because the human rights obligations of the state taking such countermeasures are unlikely to apply in such extraterritorial situations. However, the condition that countermeasures must be proportionate to the injury suffered may not be met in two cases. First, if the energy-related obligation, performance of which is suspended, is of a community interest nature, this nature is a criterion for measuring proportionality. Second, countermeasures in the form of interrupting energy flows may curtail the ability of the targeted state to comply with its own human rights obligations.

140 *NV Algemene Transport* (n 35).

Advancing the Paris Agreement on Climate Change for Sustainable Development

*Marie-Claire Cordonier Segger**

Abstract

This article introduces and analyses the sustainable development dimensions of the Paris Agreement on climate change. After nearly seventeen years of deadlock, 197 Parties to the UN Framework Convention on Climate Change (UNFCCC) concluded a new international agreement at the 21st Conference of the Parties to the UNFCCC (COP21) in Paris on 12 December 2015. The Treaty aims to strengthen the global response to the threat of climate change in the context of sustainable development and efforts to eradicate poverty. This article reviews the provisions and principles of the accord, focusing on its potential contributions to sustainable development, and on the opportunities for domestic legal and institutional reform.

Keywords

Climate Change, Paris Agreement, United Nations Framework Convention on Climate Change, Sustainable Development, Human Rights

1 Introduction

After nearly seventeen years of deadlock, 197 Parties to the UN Framework Convention on Climate Change (UNFCCC) concluded a new international agreement on climate change at the 21st Conference of the Parties to the UNFCCC (COP21) in Paris on 12 December 2015. The Treaty aims to strengthen the global response to the threat of climate change in the context of sustainable development and efforts to eradicate poverty. Parties seek to hold increases in global temperatures to well below 2°C, pursuing efforts toward a 1.5°C limit; to increase adaptation to climate impacts and foster resilience; and to harness finance flows for low

* Senior Director, CISDL; Fellow, C-EENRG & Affiliated Fellow, LCIL, University of Cambridge; Full Professor of Law, University of Waterloo, Canada; Executive Secretary, CLGI; and Senior Legal Advisor, UNFCCC COP22 Presidency. Special thanks and full acknowledgements are due to the GLGI, especially Ayman Cherkaoui, Christopher Campbell-Durufié and Katherine Lofts, for their insightful and excellent research collaboration.

greenhouse gas (GHG) emissions and climate-resilient development. The Paris Agreement sets a 'high ambition' framework for climate mitigation, adaptation and finance commitments by countries, backed by measures for inter-governmental cooperation on loss and damage, forests and land management, technology development and transfer, education and capacity-building, with a fit-to-purpose framework of transparency, peer review, stocktaking and compliance support. Adopting a 'bottom up' approach, it builds on submissions of climate action plans to the UNFCCC by 188 countries up to December 2016, as Nationally Determined Contributions (NDCs) to the global response to climate change.

The climate Agreement is desperately needed, and only a first step. Climate change poses crucial challenges for sustainable development. The impacts of climate change threaten to undermine decades of social and economic development, to severely constrain efforts to protect the environment, and to affect a wide range of human rights, such as the rights to life, health, water, food, shelter, and an adequate standard of living.¹ As the Intergovernmental Panel on Climate Change (IPCC) has noted, from 1880 to 2012, average global temperatures increased by 0.85°C.² Global emissions of carbon dioxide (CO₂) have increased by almost 50 per cent since 1990, and emissions grew more quickly between 2000 and 2010 than in each of the three previous decades.³ Given current concentrations and on-going GHG emissions, it is likely that by the end of this century, the increase in global temperature will exceed 1.5°C compared to the 1850–1900 period.⁴

- 1 UNCHR Res 7/23 (2008) UN Doc A/HRC/RES/7/23; UNGA Res 63/32 (26 November 2008) UN Doc A/RES/63/32; UNCHR Res 10/4 (2009) UN Doc A/HRC/RES/10/4; UNGA Res 63/281 (3 June 2009) UN Doc A/RES/63/281; Report of the Secretary-General 'Climate Change and its Possible Security Implications' (2009) UN Doc A/64/350; UNSC Presidential Statement (2011) UN Doc S/PRST/2011/15; UNCHR Res 18/22 (2011) UN Doc A/HRC/RES/18/22.
- 2 Intergovernmental Panel on Climate Change, 'Climate Change 2014 Synthesis Report' (Summary for Policy Makers (SPM) Geneva 2015) <www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf> accessed 3 June 2016, Section SPM 1.1, 2 (IPCC 2014 Report).
- 3 *ibid.*
- 4 It should be noted that a 1.5°C increase only constitutes the most certain scenario, with other outcomes carrying considerable percentages of likelihood as well. See IPCC 2014 Report (n 2) Section E1, 20 which shows that global surface temperature change for the end of the 21st century is likely to exceed 1.5°C relative to 1850–1900 for all RCP scenarios except RCP2.6. It is likely to exceed 2°C for RCP6.0 and RCP8.5, and more likely than not to exceed 2°C for RCP4.5.

Such changes have already led to serious repercussions and give rise to significant further risks worldwide. For example, food security is increasingly threatened. For each degree of temperature increase, grain yields decline by about 5 per cent. Oceans have warmed, with snow and ice diminishing and sea levels rising. The extent of Arctic sea ice has decreased since 1979, with 1.07 million km² of ice loss every decade.⁵ From 1901–2010, the global average sea level rose by 19cm as ice melted and oceans expanded, with a further rise predicted of 24–30cm by 2065 and 40–63cm by 2100.⁶ At the same time, studies comparing 88 recent forest ‘die-offs’ show that increases in drought and heat stress are fundamentally altering forests in many regions, with a rise in tree mortality associated with climate-induced stress, insect outbreaks and wildfire.⁷ Recent reports suggest that the costs of climate change adaptation will reach between USD 70 and USD 100 billion a year by 2050.⁸

Most effects of climate change will persist for many centuries even if emissions were halted immediately. Perhaps most troubling, current regulatory and financial regimes guiding development continue to privilege carbon-intensive, unsustainable options, rather than promoting sustainable development, and making finance flows consistent with a pathway towards low GHG and climate-resilient alternatives, as sought by the 2015 Paris Agreement. However, as this article argues, it is still possible, using a wide array of legal and institutional measures, to limit the increase in global mean temperature to well below 2°C above pre-industrial levels. Major regulatory, institutional, economic and technological transformations, if carried out promptly, offer the world a chance to limit dangerous consequences to below this threshold.

The UNFCCC was concluded in 1992 and is the central framework for global efforts to avoid the dangers of climate change.⁹ While the Treaty itself does not contain binding GHG emission limits or enforcement mechanisms, it does provide a framework for the negotiation of further protocols and instruments. The Kyoto

5 IPCC 2014 Report (n 2).

6 *ibid.*

7 Craig D Allen and others, ‘A Global Overview of Drought and Heat-induced Tree Mortality Reveals Emerging Climate Change Risks for Forests’ (2010) 259 *Forest Ecology and Management* 660.

8 Muyeye Chambwera and others, ‘Economics of Adaptation’ in Christopher B Field and others (eds), *Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2014) 945, 959.

9 United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

Protocol¹⁰ includes binding emissions reduction targets for Parties, and is based on the principle of common but differentiated responsibilities and respective capabilities (CBDRRC).¹¹ The first commitment period under the Protocol ended in 2012, and a second commitment period, known as the Doha Amendment, runs to 2020.¹² However, these efforts have fallen short of what is needed to mitigate and adapt to dangerous climate change. Indeed, only 74 countries had accepted binding targets under the second commitment period of the Kyoto Protocol by December 2016, and current projections for average global temperature rise by the end of the century place warming well above the 1.5°–2°C limit necessary to avoid dangerous climate change.

Failure to achieve the action plan agreed in Bali at the 13th Conference of the Parties (COP) to the UNFCCC in 2007 made it impossible to reach a new agreement at COP15 in Copenhagen in 2009, and negotiations through a new process known as the Durban Platform for Enhanced Action (ADP) for a post-2020 agreement were initiated at COP17 in Durban in 2011. From 25 February 2015, when the first draft text was made available, to the eighth part of the second session of the Ad Hoc Working Group on the ADP in Geneva on 8–15 February 2015, to the Bonn inter-sessional meeting (ADP 2–9), held from 1–11 June 2015, aspects were streamlined and consolidated. Further streamlined negotiating texts were released on 24 July 2015, 5 October 2015, and 6 November 2015, and intense negotiations continued throughout COP21 in Paris from 1–12 December 2015, for a Paris Agreement that was finally adopted by the COP21 on 12 December 2015.¹³ The Agreement entered rapidly into force upon ratification by 55 countries or more, representing 55 per cent of the world's emissions on 4 November 2016. In order to develop the initial 'rulebook' for the implementation of the Paris Agreement, an Ad Hoc Working Group on the Paris Agreement (APA) was established at the 44th UNFCCC Subsidiary Bodies meeting in Bonn, Germany in May 2016. With over 114 ratifications by December 2016, the work of this APA proceeds alongside

- 10 Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 148 (Kyoto Protocol).
- 11 Sandrine Maljean-Dubois and Pilar Moraga Sariego, 'Le Principe des Responsabilités Communes Mais Différenciées dans le Régime International du Climat' (2014) 55 *Cahiers de Droit* 83.
- 12 In accordance with arts 20 and 21 of the Kyoto Protocol, ratification by 75% of the Parties present and voting at the meeting is necessary for the Doha Amendment to come into force (144 Parties), which has not yet materialised.
- 13 Paris Agreement (adopted 12 December 2015) UN Doc FCCC/CP/2015/L.9/Rev.1.

the First Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement, known as the CMA, working to develop the 'Paris Rulebook' to implement the Agreement. The Treaty¹⁴ and its Adoption Decision¹⁵ aim to achieve climate mitigation, adaptation and finance through a series of cooperative frameworks and mechanisms, each of which establishes different legal rights and obligations for Parties, and explicitly makes provision for the needs of developing country Parties, especially the most vulnerable.

A focus on sustainable development is relevant for the leading high ambition countries, for emerging economies and for the most vulnerable countries of the world that are otherwise often excluded from international law-making. Indeed, in September 2016, Centre for International Sustainable Development Law (CISDL) legal research revealed that, out of 187 countries with intended Nationally Determined Contributions (iNDCs) published online by the UNFCCC registry, 156 countries explicitly prioritise an intention to undertake legal and institutional reforms.¹⁶ Further, 120 countries are calling on support from the international community in their iNDCs, with 51 stressing specifically the need for legal and institutional capacity-building.¹⁷ Building on the work of the Climate Law and Governance Initiative,¹⁸ this article, to be followed by a series of legal working papers and a new edited volume for Cambridge University Press as part of its *Implementing Treaties on Sustainable Development Series*, provides an overview of the Paris Agreement, discusses how the provisions of the Treaty reflect the principles

14 While a certain ambiguity may exist on this point, the Paris Agreement can be seen as a Treaty in the sense of art 2(a) of the Vienna Convention on the Law of Treaties (adopted May 1969, entered into force January 1980) 1155 UNTS 331. One indication is the need for ratification for its entry into force. It is a Treaty under the UNFCCC, however.

15 Conference on the Adoption of the Paris Agreement (12 December 2015, opened for signature 21 April 2016) UN Doc FCCC/CP/2015/L.9/Rev.1.

16 Marie-Claire Cordonier Segger, Mirjam Reiner and Alexandra Scott, 'Countries Stress Importance of Legal and Institutional Reforms in their iNDCs' (Climate Law and Governance Initiative September 2016) 4 <<http://www.climatelawgovernance.org/knowledge-centre.html>> accessed 7 September 2016.

17 *ibid* 5.

18 Climate Law and Governance Initiative partners include CISDL and McGill University Faculty of Law, C-EENRG and LCIL at University of Cambridge, IREDIES of La Sorbonne/Panthéon Faculty of Law in Paris, GEM at Yale University and University of Toronto, CR2 at University of Chile Faculty of Law, Ateneo School of Governance, University of Zambia Faculty of Law, and CASELAP at the University of Nairobi Faculty of Law, among others, in collaboration with IDLO, UNDP, UNEP, CIFOR, ILA, and the IUCN World Commission for Environmental Law. For details, see <<http://www.climatelawgovernance.org/>> accessed 10 November 2016.

of international law on sustainable development, and considers the challenges and opportunities that it presents for domestic legal reform for sustainable development.

2 Overview of the Paris Agreement on Climate Change

The Paris Agreement aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, by holding the increase in the global average temperature to ‘well below 2°C above pre-industrial levels’ and pursuing efforts to limit the temperature increase to 1.5°C; by increasing the ability to adapt to the adverse impacts of climate change as well as foster climate resilience and low GHG emissions development; and by making finance flows consistent with a pathway towards low GHG emissions and climate resilient development.¹⁹ The international regime developed in an interactional manner over decades,²⁰ as countries sought to address climate challenges domestically while also struggling to find an appropriate international cooperative framework.

In essence, the Paris Agreement presents a core triangle of obligations:

- (i) countries must take nationally determined, quantifiable and progressive action for climate mitigation and adaptation;
- (ii) these actions are incentivised by changes in financial flows and related technology transfer, capacity-building, education and other cooperative measures; and
- (iii) enforcement is achieved through transparency and reporting, peer review, periodic stocktaking, public participation and compliance mechanisms.

The Paris Agreement seeks to enhance implementation of the UNFCCC, which sets out its ultimate objective at Article 2 as being the ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system (...) within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to *enable economic development to proceed*

19 Paris Agreement (n 13) art 2.

20 Jutta Brunnee and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010).

in a sustainable manner.²¹ Specifically, the Paris Agreement aims to implement the commitments in Article 4 UNFCCC in accordance with the principles reflected in Article 3 UNFCCC.²²

Article 2 of the Paris Agreement further specifies that the agreement will be implemented to 'reflect equity and the principle of [CBDRRC], in the light of different national circumstances'.²³ The legal obligations of developing countries under the Paris Agreement are thus variable in order to equitably reflect their historical, economic, and social circumstances in comparison with that of other states. Article 3 of the Paris Agreement underscores that all Parties will undertake and communicate ambitious efforts (as defined in Articles 4, 7, 9, 10, 11 and 13) to achieve the aim of the agreement through NDCs to the global response to climate change. In doing so, it recognises, the efforts of all Parties will progress over time, and there is a need to support developing country Parties for effective implementation.

The Paris Agreement aims to achieve climate mitigation, adaptation and finance through a series of cooperative frameworks and mechanisms, each of which establishes different legal rights and obligations for Parties, and explicitly makes provision for the needs of developing country Parties, especially the most vulnerable. These are intended to: (1) achieve NDCs to mitigation and adaptation, through (2) mobilisation of resources, (3) transparency, global stocktaking, review and facilitative dialogue, (4) a sustainable development mechanism and non-market approaches, (5) technology transfer, and (6) further implementation measures, such as capacity-building, education, and a compliance mechanism.

21 UNFCCC (n 9) (emphasis added); While there is an unequivocal link between the Paris Agreement and the UNFCCC, the Agreement remains silent on the actual nature of the relationship between the two documents. The Paris Agreement could be said to constitute a *de facto* Protocol under the UNFCCC but may also be characterised as a subsequent agreement. The latter option would give more room for an interpretation of the terms of the Paris Agreement independent of the meaning contained in the UNFCCC. See in that regard, Annalisa Savaresi, 'The Paris Agreement: A Rejoinder' (EJIL: *Talk!* 16 February 2016) <www.ejiltalk.org/the-paris-agreement-a-rejoinder/> accessed 12 June 2016.

22 The principles in art 3 UNFCCC (n 9) include intergenerational and intra-generational equity, common but differentiated responsibility, precaution, right to sustainable development, and non-discrimination.

23 Note the broadening of differentiation from the simple CBDR adopted by the UNFCCC (n 9).

2.1 Nationally Determined Contributions to Climate Mitigation and Adaptation

One of the central aspects of the Paris Agreement is its 'bottom-up' approach. Paragraph 2(b) of Decision 1/CP.19 invited all Parties to communicate to the UNFCCC Secretariat NDCs for GHG emissions reductions. By COP22, 188 countries had submitted NDCs or iNDCs. Under Article 3 of the Paris Agreement, Parties commit that they 'shall prepare, communicate and maintain' successive NDCs and pursue domestic mitigation measures to achieve their commitments. Rather than setting out specific mitigation or adaptation targets for each country, the Paris Agreement commits Parties to nationally determine and transparently communicate their own objectives, to inform the international community of the progress in implementing and achieving them, and to participate in periodic global stocktaking to inform progressively higher ambition. Paragraph 13 of the Paris Agreement Adoption Decision recalls this invitation for Parties who have not done so already, for the pre-2020 period.

2.2 GHG Emission Mitigation, Low Carbon GHG Emission Development Strategies and GHG Sinks and Reservoirs

In Article 4 of the Paris Agreement, the Parties aim to reach global peaking of GHG emissions as soon as possible (recognising that this will take longer for developing country Parties) and to undertake rapid reductions thereafter in accordance with the best available science, so as to balance emissions by sources and removals by sinks in the second half of this century (Article 4.1). The notion of balancing emissions and removals can be understood as an objective of 'net zero' emissions, whereby any residual anthropogenic GHG emissions would be annulled by activities removing GHG from the atmosphere. Such a sequestration of GHG could occur through expansion of the activities of natural carbon sinks and reservoirs, such as forests or oceans, or through the deployment of carbon capture technologies.²⁴

24 The utilisation of both carbon sinks (including afforestation) and carbon dioxide capture and storage (CCS) as well as bioenergy with carbon dioxide capture and storage (BECCS) feature prominently in several of the mitigation scenarios developed by the UNFCCC. This applies not only to overshoot scenarios (where the declared targets are exceeded for certain periods) but also to compensate for industries in which mitigation is more costly. However, there are

The NDCs are communicated every five years (ie 2020, 2025, 2030, etc.). A Party may at any time adjust its existing NDC to enhance its level of ambition (Article 4.3, Article 4.11). These NDCs, once submitted by the government of a country, shall be recorded in a public registry maintained by the UNFCCC Secretariat. The information that must be included in the communication of NDCs, so as to facilitate clarity, transparency and understanding, is explained in paragraph 27 of the Adoption Decision (see also Decision 1/CP.20 paragraph 14). Furthermore, Parties shall account for their NDCs and, in accounting for GHG emissions and removals corresponding to the NDCs, Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and avoid double-counting in accordance with guidance from Parties in the CMA (Article 4.13).

Among other sustainable development provisions, Article 4 of the Paris Agreement recognises that developed countries should take the lead by undertaking economy-wide absolute emission reduction targets, while developing countries should continue enhancing mitigation efforts, moving over time towards economy-wide targets (Article 4.4, see also Preamble paragraph 16). Support shall also be provided to developing country Parties for the implementation of mitigation efforts, recognising that enhanced support for developing country Parties will allow for higher ambition in their actions (Article 4.5, see also Articles 9, 10 and 11). The least developed countries (LDCs) and small island developing States (SIDS) may prepare strategies that reflect their special circumstances (Article 4.6). Parties shall take into consideration in the implementation of the Agreement the concerns of Parties with economies most affected by the impacts of response measures, particularly developing country Parties (Article 4.15). Further, over and above their NDCs, all Parties should strive to formulate and communicate Long-term Low-GHG Emission Development Strategies (LEDS), taking into account CBDRRRC, in light of different national circumstances (Article 4.19).

In the Paris Agreement, Parties also agree that they should take action to conserve and enhance GHG sinks and reservoirs as described in UNFCCC Article 4.1(d), including forests.²⁵ They are encouraged to take action to implement and support the existing framework as set out in related guidance and decisions already

also concerns associated with the deployment of CCS and BECCS. See IPCC 2014 Report (n 2) SPM 3.4, as well as Full IPCC Report, Box 3.3 'Carbon Dioxide Removal and Solar Radiation Management Geoengineering Technologies—Possible Roles, Options, Risks and Status' 89.

25 See Bruno Locatelli and others, 'Forests and Climate Change in Latin America: Linking Adaptation and Mitigation' (2011) 2 *Forests* 431.

agreed under the UNFCCC, in order to reduce emissions from deforestation and forest degradation (REDD+ framework), including through results-based payments.²⁶ The role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries, but also alternative policy approaches such as joint mitigation and adaptation approaches for integral and sustainable management of forests, is emphasised, while the importance of incentivising non-carbon co-benefits is also reaffirmed (Article 5.2). These simple provisions arguably highlight and integrate many existing decisions and guidance for collaboration, including those established or strengthened in recent years.

2.3 Adaptation Goal and Communications, and Efforts to Address Loss and Damage

By virtue of Article 7, a global goal on adaptation is established, to enhance adaptive capacity, strengthen resilience and reduce vulnerability to climate change, with a view to contributing to sustainable development and ensuring an adequate adaptation response (Article 7.1). Each Party should submit and periodically update an Adaptation Communication, which may include a national adaptation plan, priorities, implementation and support needs, plans and actions, without creating additional burdens for developing country Parties (Article 7.10, Article 7.11). The Adaptation Communications shall be recorded in a public registry maintained by the UNFCCC Secretariat (Article 7.12).

Among sustainable development aspects of Article 7, the Treaty provides that adaptation is recognised as a global challenge faced by all with multiple dimensions, taking into account the urgent and immediate needs of those developing country Parties that are particularly vulnerable to the adverse effects of climate change (Article 7.1). The adaptation efforts of developing country Parties shall be recognised, in accordance with the modalities adopted by the first CMA meeting of the Paris Agreement Parties (Article 7.3), and Adaptation Committee

26 Ingrid Visseren-Hamakers and others, 'Trade-offs, Co-benefits and Safeguards: Current Debates on the Breadth of REDD+' (2012) 4 *Current Opinion in Environmental Sustainability* 646; Peter J Kanowski, Constance L McDermott and Benjamin W Cashore, 'Implementing REDD+: Lessons from Analysis of Forest Governance' (2011) 14 *Environmental Science and Policy* 111; Antonio G M La Viña and Alaya de Leon, 'Two Global Challenges, One Solution: International Cooperation to Combat Climate Change and Tropical Deforestation' (2014) CGD Climate and Forest Paper Series no 14 Working Paper 388.

and the Least Developed Countries Expert Group (LEG) should be involved in this process (Adoption Decision paragraph 42). The Green Climate Fund is to expedite support for the least developed countries and other developing country Parties for the formulation of National Adaptation Plans (Adoption Decision paragraph 47).

Parties should strengthen their cooperation on enhancing action on adaptation, taking into account the Cancun Adaptation Framework (Article 7.7), and the global stocktake shall recognise and enhance these efforts, reviewing the adequacy and effectiveness of adaptation and support for it, and overall progress (Article 7.14, also Article 14). Continuous and enhanced international support shall be provided to developing country Parties for the implementation of commitments to enhance action on adaptation, to engage in adaptation planning, and to prepare, submit and periodically update their Adaptation Communications (Article 7.13, also Articles 7.7, 7.9, 7.10 and 7.11). The Paris Agreement recognises the importance of averting, minimising and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events as well as slow onset events, specifically highlighting the importance of sustainable development in reducing risks of loss and damage (Article 8.1). The Paris Agreement also addresses the Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts, noting that this shall be subject to the authority and the guidance of the CMA, and that Parties should enhance understanding, action and support, on a cooperative and facilitative basis with respect to loss and damage associated with the adverse effects of climate change (Article 8.3, also Article 8.2).

Certain key priorities for cooperation and facilitation are identified in the Paris Agreement, such as early warning systems, emergency preparedness, slow onset events, events that may involve irreversible and permanent loss and damage, comprehensive risk assessment and management, risk insurance facilities, climate risk pooling and other insurance solutions, non-economic losses, as well as resilience of communities, livelihoods and ecosystems (Article 8.4). In the Treaty, Parties agree to ensure that the Warsaw International Mechanism (WIM) collaborates with existing bodies and expert groups, as well as relevant actors outside the Agreement (Article 8.5). They do not go further to define, deny or designate liability or compensation. In the Adoption Decision, while a new clearinghouse for risk transfer is established to serve as a repository for information on insurance and risk transfer to facilitate Parties' efforts to develop and implement comprehensive risk management strategies (Adoption Decision paragraph 49), it is simply stated that Article 8 of the Treaty does not involve or provide a basis for any liability or

compensation (Adoption Decision paragraph 52). In essence, the Treaty neither confirms nor denies whether liability exists, or compensation should be provided, a stalemate in legal terms.

2.4 Mobilisation and Direction of Climate Finance

Under Article 9 of the Paris Agreement, developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation, in continuation of their existing UNFCCC obligations (Article 9.1), while other Parties are encouraged to provide financial support voluntarily (Article 9.2). At the same time, all Parties should increase their efforts in mobilising climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, and taking into account the priorities and needs of developing country Parties, with the greater onus being on developed country Parties which shall take the lead (Article 9.3).

Prior to 2025, the COP shall set a new collective quantified goal from a floor of USD 100 billion per year, taking into account the needs and priorities of developing countries (Adoption Decision paragraph 54). Developed country Parties are strongly urged to scale up their level of financial support, with a concrete roadmap to achieve this goal by 2020 for mitigation and adaptation (significantly increasing adaptation finance) and to provide appropriate technology and capacity-building support (Adoption Decision paragraph 115). Developed country Parties shall biennially communicate indicative quantitative and qualitative information related to scaling up and mobilising financial resources, including as to the balance between adaptation and mitigation (as per Articles 9.1 and 9.3), as applicable. The financial mechanism of the UNFCCC serves as the mechanism for the Paris Agreement.

The provision of scaled-up financial resources should attempt to balance the provision of mitigation and adaptation resources and take into account country-driven strategies and the priorities and needs of developing country Parties, especially those particularly vulnerable to climate change with significant capacity constraints, such as LDCs and SIDS, and considering the need for public and grant-based resources for adaptation (Article 9.4). The balance between mitigation and adaptation, and careful attention to opportunities for sustainable development, are key for global implementation of the Paris Agreement.

2.5 Transparency, Global Stocktaking and Peer Review

By virtue of Article 13, in addition to reporting on mitigation and adaptation, Parties should also regularly provide Communications on a national inventory report of GHG emissions by sources and removals by sinks, prepared using good practice methodologies accepted by the IPCC (Article 13.7(a)), and the information necessary to track progress made in implementing and achieving NDCs (Article 13.7(b)). They should also provide information regarding climate change impacts and adaptation (Article 13.8).

Of particular interest for sustainable development, Article 13 mandates further transparency. For developing country Parties, information may be presented on financial, technological and capacity-building support needed and received under Article 9 on climate finance, Article 10 on technology transfer and Article 11 on capacity-building (Article 13.10). For developing country Parties, information may be presented on progress made on implementing capacity-building plans, policies, actions or measures to implement the Paris Agreement (Article 11.4). The LDCs and SIDS may submit the information required at their discretion (Adoption Decision paragraph 91).

As elements of pledge and review, the national inventory reports on GHG emissions by sources and removals by sinks, and the information for tracking progress, as well as the level of support, will be the object of a technical expert review and also of a multilateral consideration of progress (Article 13.11, Article 13.12, Article 13.13). The review process shall pay particular attention to the respective national capabilities and circumstances of developing country Parties. Support shall be provided to developing countries for the implementation of their transparency frameworks (Article 13.14), and for building capacity to participate in the process, on a continuous basis (Article 13.15). The 'enhanced transparency framework' shall build on the transparency arrangements under the UNFCCC (including monitoring, reporting and verification measures) and be implemented with common modalities, guidelines and procedures in a manner that is facilitative, non-intrusive, non-punitive, respectful of national sovereignty, and avoids placing undue burdens on Parties (Article 13.3). It shall supersede existing guidance (Adoption Decision paragraph 88).

As a further ambition/transparency measure, the Paris Agreement stipulates that its Meetings of the Parties shall periodically take stock of the Treaty's implementation, to assess collective progress towards achieving the Treaty's purpose and long-term goals—referred to as the 'global stocktake'. Stocktaking

will be comprehensive and facilitative, considering mitigation, adaptation and the means of implementation and support, in the light of equity and the best available science (Article 14.1). The first global stocktake is planned for 2023 and every five years thereafter (Article 14.2), and the outcome of the global stocktake shall inform Parties in updating and enhancing their actions and support, as well as in enhancing international cooperation for climate action (Article 14.3). The reviews, in essence, take place on many levels, engaging all aspects.

2.6 Sustainable Development Market Mechanism and Non-Market Approaches

Under Article 6, Parties may engage in ‘international transfers of mitigation outcomes’ towards their NDCs, through voluntary cooperation, to allow for ‘higher ambition in their mitigation and adaptation actions’ (Article 6.1). When using internationally transferred mitigation outcomes, Parties shall promote sustainable development and ensure environmental integrity and transparency, applying robust accounting and governance to avoid double-counting, consistent with guidance to be adopted by the CMA (Article 6.2).²⁷

Further, a ‘sustainable development mechanism’ is established to promote mitigation of GHG emissions while fostering sustainable development; to incentivise and facilitate GHG mitigation by authorised public and private entities; to contribute to the reduction of emission levels in the host Party, which will benefit from mitigation activities resulting in emission reductions that can also be used by another Party to fulfil its NDC; and to deliver overall mitigation of global emissions (Article 6.4). It is established under the authority of the CMA, for use by the Parties on a voluntary basis, and is to be supervised by a body designated by the CMA (Article 6.4). Rules, modalities and procedures for its operation should be forthcoming (Article 6.7). The new mechanism might draw upon certain experience accumulated through the Clean Development Mechanism (CDM) under the Kyoto Protocol. However, a key question is how this mechanism will

27 See Kishan Khoday, ‘Mobilizing Market Forces to Combat Global Environmental Change: Lessons from UN-Private Sector Partnerships in China’ (2007) 16 *Rev Euro Comm & Int’l Env’t* 173; Steven Bernstein and others, ‘A Tale of Two Copenhagens: Carbon Markets and Climate Governance’ (2010) 39 *Millenn J Int Stud* 161; Christina Voigt ‘WTO Law and International Emissions Trading: Is there Potential for Conflict?’ (2008) 2 *CCLR* 54.

work in a world of NDCs, where developing countries (as potential hosts) also have agreed baselines and/or reference levels.

Provisions of interest to vulnerable developing countries include a commitment that a share of proceeds from the mechanism shall be dedicated to cover administrative expenses and to assist developing country Parties particularly vulnerable to climate change to meet adaptation costs (Article 6.7). There is also recognition of the importance of non-market approaches, and the definition of a framework to promote them, including public and private sector participation and coordination across instruments and relevant institutional arrangements (Article 6.8 and 6.9). It is not enough, perhaps many would argue, but provides a platform to build on.

2.7 Technology Mechanism

The Technology Mechanism established under the UNFCCC shall also serve the Paris Agreement (Article 10.3). Parties recognise the importance of technology for the implementation of mitigation and adaptation actions under the Paris Agreement, and commit to strengthening cooperative action on technology development and transfer (Article 10.2). They also establish a framework to guide the operation of the Technology Mechanism (Article 10.4). Of interest for sustainable development, Parties agree to focus on collaborative approaches to research and development, and on facilitating access to technology, in particular for early stages of the technology cycle, for developing country Parties (Article 10.5). Support, including financial support, shall be provided to developing country Parties, including for strengthening cooperative action on technology development and transfer at different stages of the technology cycle.

2.8 Further Measures for Implementation of the Agreement

2.8.1 Cooperation for Capacity-Building

Capacity-building under the Paris Agreement, according to Article 11, should enhance the capacity and ability of developing country Parties to take effective climate action, particularly 'countries with the least capacity, such as the least developed countries, and those that are particularly vulnerable to the adverse

effects of climate change' (Article 11.1). All countries should cooperate to achieve this, and there is a specific provision that developed country Parties should enhance support for capacity-building actions in developing country Parties (Article 11.3). Capacity-building should be country-driven, responsive to national needs, and foster country ownership of Parties, including at the national, subnational and local levels, in particular for developing country Parties (Article 11.2). In essence, an effective, iterative process is called for—one that is participatory, cross-cutting and gender-responsive (Article 11.2). Capacity-building should be guided by lessons learned, including those from previous activities under the UNFCCC. There will be regular communication by all Parties that support capacity-building about their actions and measures (including the capacity-building done under regional, bilateral and multilateral approaches). Capacity-building will not just assist with technical capacity for implementing adaptation and mitigation actions, the facilitation of technology development, dissemination and deployment, and access to climate finance, but it will also support education, training and public awareness, and the transparent, timely and accurate communication of information (Article 11.1, Article 11.4, see also Article 13.15).

The Paris Agreement calls for capacity-building activities to be enhanced through appropriate institutional arrangements, to be created in the APA, and followed up in the CMA (Article 11.5). The Paris Committee on Capacity-Building is also created, with the aim of addressing gaps and needs in implementing capacity-building in developing country Parties and further enhancing capacity-building efforts, including with regard to coherence and coordination in capacity-building activities under the Convention (Adoption Decision paragraph 72). Further, a Capacity-Building Initiative for Transparency is created by the Adoption Decision, in order to build institutional and technical capacity, both pre and post-2020. This initiative will support developing country Parties, upon request, in meeting enhanced transparency requirements as defined in Article 13 of the Agreement in a timely manner (Adoption Decision paragraph 85).

2.8.2 Education and Public Awareness

The Paris Agreement affirms that Parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognising the importance of these steps with respect to enhancing actions under the Agreement (Article 12).

2.8.3 Implementation and Compliance Mechanism

A mechanism to facilitate implementation of the agreement and to promote compliance is established (Article 15.1). This mechanism is structured as an expert-based and facilitative committee, and operates on a transparent, non-adversarial, and non-punitive way, according to procedures to be defined by the first CMA. The Compliance Committee shall pay particular attention to the respective national capabilities and circumstances of Parties. The Committee shall consist of 12 members with recognised competence in relevant scientific, technical, socio-economic or legal fields, to be elected by the COP on the basis of equitable geographical representation, with two members each from the five regional groups of the United Nations and one member each from the SIDS and the LDCs, taking gender balance into account (Adoption Decision paragraph 103).

2.8.4 Governance and Dispute Settlement

The Paris Agreement adopts the UNFCCC Rules of Procedure and Secretariat (Article 16 and Article 17); its governance structure, including the subsidiary body for scientific and technological advice (UNFCCC Article 9) and the subsidiary body for implementation (UNFCCC Article 10), the arrangements for voting and observer participation (Article 18 and Article 19), and its dispute settlement mechanism (Article 24, see also UNFCCC Article 14). The Agreement opened for signature from 22 April 2016 to 21 April 2017, and thereafter for accession (Article 20.1). It entered into force 30 days after 55 Parties to the UNFCCC—accounting for at least 55 per cent of global GHG emissions—joined (Article 21.1), which was 4 November 2016, a significant achievement demonstrating very high political momentum.

3 Sustainable Development Dimensions of the Paris Agreement

3.1 Sustainable Development as a Purpose of the Paris Agreement

In 2015, through ‘Transforming our World: The 2030 Agenda for Sustainable Development’, the UN and its member States agreed on 17 Sustainable Development Goals (SDGs) for the world, identifying time-bound targets and implementation

methods.²⁸ Legal reviews reveal that these SDGs can be found in the object and purpose of many important international treaties.²⁹ Achieving SDG 13 to take urgent action to combat climate change and its impacts will be implemented in part through the Paris Agreement. Indeed, SDG 13 itself acknowledges that the UNFCCC is the primary international, intergovernmental forum for negotiating the global response to climate change. Other SDGs, for instance, on energy, water, hunger, poverty, biodiversity and innovation, are also highly relevant to the Treaty's objectives.

While all Parties, including those with the least historical contributions to global emissions, begin to play a role in emissions reduction, they also benefit from new investment and collaboration for low GHG pathways for sustainable development and poverty eradication. As an important instrument in the climate regime, the Paris Agreement holds all the hallmarks of a sustainable development accord.³⁰

The Paris Agreement is predicated upon an expectation that, if NDCs can be shaped and supported by peer review and public awareness, new scientific data on risks, actual impacts, and greater political attention will lead to ever-higher ambition from all levels of governments, along with non-State actors in the private sector and civil society. Some hope that countries, perhaps in groups with higher ambition, can move towards setting and achieving absolute emissions reduction targets, diversified enhanced mitigation actions, or arrangements among donors and beneficiaries to address key sectors. The former would seek to bind Parties to attain net zero emissions levels over the long-term through a quantifiable standard. The latter would set higher ambition, whether or not remaining recalcitrant countries also accept such actions as obligatory.

28 UNGA Res 70/1 (25 September 2015) UN Doc A/RES/70/1.

29 See Marie-Claire Cordonier Segger and Elizabeth Mrema (eds), 'The Contribution of International Law, Policy and Governance to the Sustainable Development Goals' (Issue Briefs, CISDL-UNEP 2016) <<http://cisdl.org/research-publications-events/legal-briefs-reports-working-papers.html>>.

30 Marie-Claire Cordonier Segger and Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects* (OUP 2004); Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (BRILL 2009).

3.2 Commitments to Sustainable Development in the Adoption Decision

A commitment to sustainable development permeates the Paris Agreement and its Adoption Decision. Indeed, the Decision begins by welcoming UNGA Res 70/1 on the global SDGs, particularly Goal 13,³¹ and acknowledging that climate change is a common concern of humankind. The Adoption Decision also recognises that, when taking action on climate change, States must respect, promote and consider their human rights obligations; the right to development; the rights of indigenous peoples, children and others in vulnerable situations; gender equality and empowerment; and inter-generational equity. It acknowledges the need to promote universal access to sustainable energy in developing countries, alongside the deployment of renewables, especially in Africa. Important sustainable development principles such as transparency and public participation, integration of environmental concerns and human rights into economic decision-making, good governance, precaution, inter-generational equity, CBDRRC, and sustainable use of natural resources such as energy, are reflected in the Preamble to the Adoption Decision.³²

Operationally, the Adoption Decision also clarifies that the Subsidiary Body for Scientific and Technological Advice will undertake a work programme under the framework for non-market approaches to sustainable development referred to in Article 6 of the Paris Agreement (paragraph 40); invites all UN agencies and financial institutions to provide information on how their development assistance and climate finance programmes incorporate climate-proofing and climate resilience measures (paragraph 44); recognises the link between adequate and predictable financial resources and sustainable management of forests (paragraph 55); recognises the co-benefits of voluntary mitigation actions for adaptation, health and sustainable development (paragraph 109); recognises the importance of taking national sustainable development priorities into account in the existing technical examination process on mitigation (paragraph 110(a)) and encourages Parties to make effective use of the Climate Technology Centre and Network to obtain assistance to develop economically, environmentally and socially viable

31 SDG 13 requires 'urgent action to combat climate change and its impacts, acknowledging that the UNFCCC is the primary international, intergovernmental forum for negotiating the global response to climate change'. See UNGA Res 70/1 (n 27) 14.

32 See John H Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 *Harv Envtl L Rev* 477; John H Knox, 'Climate Change and Human Rights Law' (2009) 50 *Va J Int'l L* 163.

project proposals in the high mitigation potential areas identified in the process (paragraph 110(d)), among other measures of note.

3.3 Principles of Sustainable Development in the Paris Agreement and its Adoption Decision

States and legal scholars have long sought to identify principles of international law on sustainable development.³³ In 2002, the International Law Association's (ILA) Committee on the Legal Aspects of Sustainable Development, after ten years of study, drew the outcomes of these global policy discussions together in its New Delhi ILA Declaration on Principles of International Law relating to Sustainable Development as a Resolution of its 70th Conference.³⁴ The New Delhi Declaration notes that:

sustainable development is now widely accepted as a global objective and [...] the concept has been amply recognised in various international and national legal instruments, including treaty law and jurisprudence at international and national levels.

In the New Delhi Declaration, seven principles of international law are highlighted which characterise treaties related to sustainable development³⁵ and are reflected in decisions of international courts and tribunals.³⁶ The Declaration suggests that States

33 Marie-Claire Cordonier Segger, 'Significant Developments in Sustainable Development Law and Governance: A Proposal' (2004) 28 *Natural Resources Forum* 61; Marie-Claire Cordonier Segger and others, 'Prospects for Principles of International Sustainable Development Law after the WSSD: Common but Differentiated Responsibilities, Precaution and Participation' (2003) 12 *RECIEL* 54.

34 International Law Association, 'New Delhi Declaration on the Principles of International Law Related to Sustainable Development' Resolution 3/2002; Nico Schrijver and Friedl Weiss (eds), *International Law and Sustainable Development: Principles and Practice* (Martinus Nijhoff 2004) 1–152, 699–706; Cordonier Segger and Khalfan (n 30) 95–191; Duncan French, *International Law and Policy of Sustainable Development* (MUP 2005); See also 7 CISDL Legal Working Papers detailing the meaning, scope and existing status in international law of each proposed ILA New Delhi Declaration Principle, online: <http://cisdl.org/public/docs/new_delhi_declaration.pdf> accessed 12 June 2016.

35 Marie-Claire Cordonier Segger and C J Weeramantry (eds), *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Martinus Nijhoff 2005) 561–92; Cordonier Segger and Khalfan (n 30).

36 Marie-Claire Cordonier Segger with C J Weeramantry, *Sustainable Development in International Courts and Tribunals* (Routledge 2017) (forthcoming).

respect the following principles: 1) sustainable use of natural resources whereby States have sovereign rights over their natural resources, and a corresponding duty not to cause, or allow, undue damage to the environment of other States in the use of these resources; 2) inter and intra-generational equity and the eradication of poverty; 3) common but differentiated responsibilities and respective capabilities; 4) the precautionary approach to human health, natural resources and ecosystems, transferring the burden of proving lack of significant harm from an undertaking to the proponent, in cases of scientific uncertainty; 5) public participation, backed by access to information and justice; 6) good governance, with measures to support rule of law, coherence and anti-corruption; and perhaps most telling, 7) integration and interrelationship of human rights and social, economic and environmental objectives.

As has been noted elsewhere, this last principle may sometimes be called—in short-hand—a ‘principle of sustainable development’, holding that States must take into account the environmental and social (including human rights) aspects of economic plans or projects, integrating related measures and costs, to promote more *sustainable* development.³⁷

These non-exhaustive ‘sustainable development principles’ are gaining certain recognition by States and other actors in international law. Some are not yet recognised as binding rules of customary international law, and in some cases, they might never be. However, they are increasingly reflected and made operational in binding international treaties, forming part of international law and policy in the field of sustainable development.³⁸ Indeed, each is reflected in the Paris Agreement in different ways:

3.3.1 The duty of States to ensure sustainable use of natural resources

In the Paris Agreement, atmospheric and carbon resources are framed as key resources to be managed in a sustainable manner, one which avoids dangerous climate change, as noted in the Treaty preamble and in the substantive sections on mitigation. For example, in Article 2, Parties recognise that limiting the temperature increase to 1.5°C above pre-industrial levels would significantly reduce the risks and impacts of climate change. Parties are encouraged to take

37 Marie-Claire Cordonier Segger, ‘Sustainable Development in International Law’ in David Armstrong (ed), *Routledge Handbook on International Law* (Routledge 2009) 355.

38 *ibid.*

action on sustainable management of forests as a key natural resource and carbon sink (Article 5, Adoption Decision paragraph 55), including through REDD+ and alternative policy frameworks such as joint mitigation and adaptation approaches for the integral and sustainable management of forests. The protection of ecosystems, biodiversity, and oceans is also prioritised in the Paris Agreement (Preamble paragraph 13), alongside the need to build the resilience of socio-economic and ecological systems, including through sustainable management of natural resources (Article 7.9(e) on adaptation).

3.3.2 The principle of equity and the eradication of poverty

The notion of equity arises frequently in the Paris Agreement, as was posited prior to the conclusion of the Treaty by leading legal scholars.³⁹ In the Preamble of the Treaty, there are two references to equity and intergenerational equity, which also appear in the Preamble of the Adoption Decision. In the operational provisions of the Paris Agreement, it is noted that Parties should protect the climate on the basis of equity and the principle of CBDRRC (Articles 2 and 4). The importance of efforts to eradicate poverty are also highlighted (Preamble paragraphs 8 and 9), in the statement of the general objective of the Agreement (Article 2), and in relation to cooperation to implement NDCs (Article 6).

3.3.3 The principle of common but differentiated responsibilities and respective capacities

The Paris Agreement will be implemented to reflect the principle of CBDRRC, in light of different national circumstances (Article 2). Each Party's successive NDC will represent a progression beyond their earlier one, with its highest possible ambition, reflecting its CDDRR (Article 4.3). Each Party will also strive to formulate and communicate long-term low GHG development strategies, mindful of CBDRRC (Article 4.19, Preamble paragraph 3). The Paris Agreement, to reflect CBDRRC, also commits to the provision and the mobilisation of financial assistance (Articles 9.1–3), assistance in adaptation efforts (Article 7.7(d)), facilitation of technology transfer (Article 10.6), and capacity-building (Article 11.1–3).

39 Christina Voigt, 'Equity in the 2015 Climate Agreement' (2014) 4 *Climate Law* 50.

3.3.4 The principle of the precautionary approach to human health, natural resources and ecosystems

The Treaty recognises an urgent 'threat' of climate change (Preamble paragraph 4) and the need to strengthen global response to the threat of climate change and to significantly reduce the risks of climate change (Article 2.1). In essence, while references could be more explicit, the Paris Agreement and the UNFCCC are founded on the precautionary principle. In order to stabilise GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system and in order to allow ecosystems to adapt naturally to climate change, so as to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner, mitigation and adaptation actions must be taken even in the event of scientific uncertainty as to the exact contours of the challenge. As asserted in several places in the Paris Agreement, action on climate change should also be guided by the best available scientific knowledge (Preamble paragraph 4). While not detracting from the precautionary nature of the Agreement, the emphasis on continuing to advance scientific knowledge is recognised in the long-term goal (Article 4.1), in provisions on adaptation (Articles 7.5 and 7.7(c)), and in plans for the global stocktake (Article 14.1), with specific reference to the work of IPCC. Such 'best available scientific knowledge', however, evolves over time, and precaution is still required when the science is uncertain, under the Convention itself (Article 3.3, UNFCCC).

3.3.5 The principle of public participation and access to information and justice

As noted in the Adoption Decision (Paragraphs 83, 84 and 110), and in the Paris Agreement (Preamble para 14), public participation and access to information are crucial for global responses to climate change, and for the success of the framework established by the Paris Agreement itself. The importance of public participation is emphasised throughout the Paris Agreement, including in provisions on mitigation (Article 4), adaptation (Article 7) and on the Sustainable Development Mechanism and non-market approaches (Article 6), which aim to enhance public and private sector participation in the implementation of NDCs. Further, Parties shall enhance education, training, public awareness, public participation and public access to information, recognising their importance in enhancing actions under the Agreement (Article 12). In essence, the Treaty depends on public engagement, informed by the information that is made available through the

national communications that are submitted to international registries, the global stocktake, the peer review, and other measures, to assist Parties progressively to intensify their contributions to mitigation, adaptation, finance and other aspects of the global response to climate change. There is an unprecedented recognition of the importance (for some) of 'climate justice' in taking action to address climate change, in the Preamble at paragraph 13. As explained in *Sustainable Justice*, climate change is the justice challenge of this century, both in terms of its causes, and who is disproportionately affected by its impacts.⁴⁰ As explained during negotiations by the Mary Robinson Foundation for Climate Justice, the UN Rapporteur on Human Rights and the Environment Professor John Knox, and also by the International Bar Association, there is a need to 'ensure communities, individuals and governments have substantive legal and procedural rights relating to the enjoyment of a safe, clean, healthy and sustainable environment and the means to take or cause measures to be taken within their national legislative and judicial systems and, where necessary, at regional and international levels, to mitigate sources of climate change and provide for adaptation to its effects in a manner that respects human rights'.⁴¹ Although 'access to justice' may not be expressly mentioned in the Agreement, Parties intended to access the same dispute settlement measures as the UNFCCC (Article 24).

3.3.6 The principle of good governance

Good governance is essential in the context of the Paris Agreement, particularly for the cooperative approaches that involve the use of internationally transferred mitigation outcomes towards NDCs. Indeed, transparency and robust accounting are required in the measurement of such outcomes (Article 6). In the establishment of the Capacity-Building Initiative for Transparency (Adoption Decision paragraph 74(a), (b) and (h)), Parties seek to build institutional and technical capacity with regard to the transparency requirements defined in Article 13 of the Paris Agreement (Articles 85–99). Further, they are committed to ensuring transparency of action and also support, including the provision of climate finance (Adoption Decision paragraph 93(c)) among other measures.

40 Cordonier Segger and Weeramantry, *Sustainable Justice* (n 35).

41 International Bar Association, *Climate Change Justice and Human Rights Task Force 'Achieving Justice and Human Rights in an Era of Climate Disruption'* (IBA 2014).

3.3.7 The principle of integration and interrelationship, in relation to human rights and social, economic and environmental objectives

By recognising the far-reaching nature of climate change across environmental, social and economic domains, as well as the need to act in a timely and effective manner in order to prevent detrimental impacts, the principle of integration of environmental and social/human rights considerations into economic decision-making permeates the Paris Agreement. The integration of economic and environmental concerns is found in the reference to 'climate-resilient development' (Article 2.1(c)), and in the linking of economic growth and sustainable development in the context of technology transfers (Article 10.5). Integration is also apparent in the references to economic diversification and sustainable resource management in the context of adaptation (Article 7.9(e)), which also highlights the resilience of socio-economic and ecological systems, underlining the need for adaptation measures to integrate all three objectives. The Paris Agreement supports the integration of environmental considerations into economic and social development, while ensuring that climate change actions are economically viable and respect human rights, as noted in the Adoption Decision (Preamble paragraph 7) and in the Paris Agreement Preamble (paragraph 11). This principle is also reflected in references to safeguarding food security, as noted in the Paris Agreement (Preamble paragraph 9), and to respect for human rights, gender equality, indigenous rights, and the integrity of Mother Earth (Preamble paragraph 13).

4 National Legal Priorities for Implementation of the Paris Agreement

Key aspects of the Paris Agreement respond to international legal obligations and are very likely to require domestic legislation for effective implementation.

4.1 Nationally Determined Contributions and Mitigation Mechanisms

- (i) *Nationally Determined Contributions*: Parties' NDCs represent the emissions reductions and other actions that each country will contribute to global efforts to respond to climate change. In order to make their contribution, participate in peer review, and engage in the global stocktake

process, Parties can implement changes across various sectors of public policy to reduce GHG emissions, to support the development of sinks and reservoirs (including forests), and to institute processes for collection, compilation and verification of information. In many cases, this requires domestic legislation in sectors such as energy, forests, water, land and other natural resources; also transportation, agriculture, finance, industry, trade, construction; in addition to environment, health and waste management; as well as adaptation, disaster risk reduction, resilience and natural disaster response.

- (ii) *Mitigation Mechanisms*: The Sustainable Development Mechanism (SDM) and REDD+ are examples of mitigation mechanisms included in the Paris Agreement. Such mechanisms may also require legislation to implement—for example, in bringing various sectors into harmony or clarifying land tenure in order to support the establishment of REDD+, or in guiding the mandates and operations of the designated national authorities for the SDM.
- (iii) *Incentives for Mitigation Technologies*: Best practices may be leveraged to incentivise mitigation technologies, including in the areas of cap and trade, carbon taxes and hybrid systems, both within subnational jurisdictions, among subnational jurisdictions, and among countries. The removal of perverse subsidies and the implementation of incentives for the development of clean technologies may also be key.

4.2 Adaptation, Resilience, Loss and Damage

- (i) *Disaster Risk Reduction*: Disaster Risk Reduction (DRR) planning at the national level can be integrated with climate adaptation planning, in line with the Sendai Framework for Disaster Risk Reduction, and related regulations.
- (ii) *Disaster Response/Internal Climate Migration and Displacement*: In addition to DRR planning, a legal framework for disaster response may be needed to assist those who are impacted by both slow and rapid onset climate disasters, including those internally displaced by climate change.
- (iii) *Incentives for Adaptation Technologies*: As with mitigation technologies, the development and implementation of adaptation technologies—for

example, to prevent coastal erosion and flooding—can be incentivised domestically and internationally.

- (iv) *Legal Rules of Adaptation Funds*: Adaptation funds such as the Adaptation Fund, the Global Environment Facility Trust Fund, the Green Climate Fund and others, may require clear legal rules governing transparency, accountability, and effectiveness, and incorporating safeguards for human rights, the environment and other priorities.
- (v) *Loss and Damage*: Legal approaches to address loss and damage, including investment in early warning systems, pooling of risk and insurance mechanisms among other measures, can be explored and piloted, informing global efforts to implement the Warsaw Mechanism.

4.3 Climate Finance

- (i) *Laws Governing Finance*: Climate finance benefits from predictability and sustainability. In addition, full transparency in the way that financial resources are used for mitigation and adaptation activities can be key. To this end, effective rules, institutions and systems are important for the transparency, accountability and effectiveness of climate finance.
- (ii) *Laws Governing Incentives, Including Subsidies*: Certain agricultural and industrial subsidies—for example, in the areas of fossil fuels, GHG emissions-intensive energy, mining and transportation—may need to be eliminated, while new subsidies may be created, including for renewable energy and clean technology, at the national level in order to stimulate a shift towards sustainable practices and in accordance with international trade rules.⁴²

42 Thomas Cottier, Olga Nartova and Sadeq Z Bigdeli (eds), *International Trade Regulation and the Mitigation of Climate Change: World Trade Forum* (CUP 2009); Thomas Cottier, Olga Nartova and Anirudh Shingal, 'The Potential of Tariff Policy for Climate Change Mitigation: Legal and Economic Analysis' (2014) 48 *JWT* 1007; Kateryna Holzer and Thomas Cottier, 'Addressing Climate Change under Preferential Trade Agreements: Towards Alignment of Carbon Standards under the Transatlantic Trade and Investment Partnership' (2015) 35 *Global Environmental Change* 514; Thomas Cottier, 'Renewable Energy and WTO Law: More Policy Space or Enhanced Disciplines?' (2014) 5 *RELP* 40.

4.4 Transparency, Communication, Peer Review and Global Stocktake

- (i) *Monitoring, Reporting and Verification (MRV)*: Necessary elements of transparency, including collection of national communications and related data, and ensuring its public availability, are key for the successful implementation of the Paris Agreement, and may require new laws, institutions and guidelines or standards to be adopted at national levels and internationally.
- (ii) *Social and Environmental Impact Assessments*: Laws relating to the requirements for social and environmental impact assessments may be required for actions relating to new projects and policies on agriculture, infrastructure, transportation, industry, energy and natural resources, vis-à-vis their potential climate-related impacts. Such rules may also be strengthened to apply to climate change mitigation and adaptation projects, for example, CDM or REDD+, in order to minimise any negative human rights, social and environmental effects.

4.5 Human Rights and Equity

- (i) *Respect for Human Rights*: Following the Cancun Agreements, which recognised the importance of respecting human rights in all climate related actions, the Paris Agreement also contains several references to respect for human rights. Human rights considerations—arising from the effects of climate change itself, as well as from Parties' climate change response measures—shall be taken into account at the national level. At its latest session, the Human Rights Council reaffirmed the importance of respect for human rights in the efforts to address climate change, building on previous statements to the same effect.⁴³ In addition, as observed by the Office of the United Nations High Commissioner for Human Rights, respect for the right to public participation and access to information are guaranteed

43 UNCHR Draft Res (2015) UN Doc A/HRC/29/L.21; UNCHR Res 7/23 (2008) UN Doc A/HRC/7/78; UNCHR Res 10/4 (2009) UN Doc A/HRC/10/L.11.

under international human rights law and, along with other fundamental rights, are critical to the success of efforts to address climate change.⁴⁴

- (ii) *Recognition of Indigenous Peoples' Rights, Including Free, Prior and Informed Consent (FPIC)*: Climate response measures can recognise the specific rights of Indigenous peoples, as affirmed in the UN Declaration on the Rights of Indigenous Peoples⁴⁵ and other binding international human rights treaties. Indigenous peoples can be included in participatory processes relating to climate change. The principle of FPIC may also be applicable in climate-related projects that affect the lands of indigenous peoples, and the traditional knowledge of indigenous peoples and local communities can be key for climate actions at the domestic level.
- (iii) *Climate Justice*: As the Office of the United Nations High Commissioner for Human Rights has noted, the 'effects of climate change will be felt most acutely by those segments of the population who are already in vulnerable situations due to factors such as poverty, gender, age, minority status, and disability'.⁴⁶ Parties can adopt new measures to mainstream consideration for the right to non-discrimination of historically vulnerable groups across their climate policies and climate-related legislation, and take the necessary affirmative actions to ensure that climate change harms and climate response measures do not impact on substantive equality.
- (iv) *Climate Disputes, Arbitration and Litigation Strategies*: Alongside the new Agreement, and building on the *Urgenda* decision in the Dutch Courts and other current cases,⁴⁷ as well as recent legal scholarship and advocacy for a Draft Climate Compensation Act at national and local levels in key

44 OHCHR (2009) UN Doc A/HRC/10/61 paras 78–79; See also OHCHR (2011) UN Doc A/HRC/19/34; See also Sumudu Atapattu, 'Climate Change, Human Rights and Forced Migration: Implications for International Law' (2009) 27 Wis Int'l LJ 607; Sumudu Atapattu, 'Global Climate Change: Can Human Rights (and Human Beings) Survive this Onslaught?' (2008) 20 Colo J Int Environ Law Policy 35.

45 UNGA Res 61/295 (13 September 2007) UN Doc A/61/PV.107.

46 OHCHR (2009) UN Doc A/HRC/10/61 para 42.

47 Kai Purnhagen, 'Climate Law: Dutch Decision Raises Bar' (2015) 523 Nature 410; For discussion, see David Estrin, 'Limiting Dangerous Climate Change: The Critical Role of Citizen Suits and Domestic Courts—Despite the Paris Agreement' CIGI Paper Series 101 (CIGI 2016) <<https://www.cigionline.org/publications/limiting-dangerous-climate-change-critical-role-citizen-suits-and-domestic-courts>> accessed 26 September 2016; See also Climate Justice Programme (2016) <<http://climatejustice.org.au>> accessed 10 November 2016.

jurisdictions,⁴⁸ it is likely that climate-related litigation strategies will continue to be advanced. Legislation relating to liability, response action and compensation for loss and damage due to climate change—including with regards to health, property, infrastructure, and industry—may be needed at the domestic level, in addition to provisions for related issues such as climate-induced displacement and migration. The facilitation of access to justice to existing judicial mechanisms or the establishment of new claims processes or tribunals may be important, along with good governance assurances in compensation mechanisms.⁴⁹

5 The Paris Agreement in its International Legal Context

The Parties have sought, in drafting the Agreement, to make it compatible with other relevant treaty obligations across international law on human rights, environment, trade, investment and finance, demonstrating synergies, and co-benefits for all three pillars of sustainable development.

5.1 Human Rights Instruments

Of relevance to the new Agreement are the obligations contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention to Eliminate All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), among other international and regional human rights instruments. Among regional instruments, recognition of the rights to private and family life, for instance under the European Convention on Human Rights, and to the right to culture and right to property for indigenous people under the Inter-American system of human rights, are particularly significant.

48 Andrew Gage and Margaretha Wewerinke, 'Taking Climate Justice into our own Hands: A Model Climate Compensation Act' (WCEL/VELA 2015).

49 See Sumudu Atapattu, 'Climate Change, Differentiated Responsibilities and State Responsibility: Devising Novel Legal Strategies for Damage Caused by Climate Change' in Benjamin J Richardson and others (eds), *Climate Law and Developing Countries: Legal and Policy Challenges for The World Economy* (EEP 2009) 37; Christina Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 *Nordic J Int'l L* 1.

The Paris Agreement, in its Preamble, calls for Parties to implement their obligations in a manner that ensures the full respect for human rights. In particular, after intensive discussions in Paris, Parties agreed in the Preamble to acknowledge that climate change is a common concern of humankind and to respect, promote and consider their respective obligations on human rights when taking action to address climate change. As such, Parties may need to implement new domestic legal and institutional reforms to ensure mitigation action sufficient to safeguard the substantive human rights enshrined in fundamental accords such as the ICESCR, the ICCPR, and the CRC. These include the right to life, adequate food, the highest attainable standard of health, adequate housing, and access to safe drinking water and sanitation. Procedural rights of key importance to climate change which are recognised in the Aarhus Convention also include access to information, public participation, and access to justice.⁵⁰ Special attention can also be directed to gender equality and the full and effective participation of women; the recognition and respect for indigenous peoples' rights in all climate actions and decision-making and the recognition and protection of the rights of those displaced by climate change (climate migrants).

5.2 Environmental Agreements

A number of multilateral environmental agreements are relevant to the implementation of the Paris Agreement. Examples include treaties on water, such as the Ramsar Convention on Wetlands, the Helsinki Water Convention and the New York Watercourses Convention; treaties on biodiversity such as the Convention on Biological Diversity (CBD) with its Cartagena Protocol on Biosafety and Nagoya Protocol on Access and Benefit Sharing (ABS), which also touch on sustainable development matters, the Convention on International Trade in Endangered Species (CITES), and the Convention on Migratory Species (CMS); treaties on chemicals, such as the Stockholm Convention on Persistent Organic Pollutants (POPs), the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides (PICs), the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal;

50 International Law Association Committee on the Legal Principles Relating to Climate Change, 'Legal Principles Relating to Climate Change' (ILA 2014) 35; See also Expert Group on Global Climate Obligations, 'Oslo Principles on Global Obligations to Reduce Climate Change' (adopted 1 March 2015).

and also treaties on air and atmosphere, such as the Vienna Convention and its Montreal Protocol on Substances that Deplete the Ozone Layer and the Convention on Long-Range Transboundary Air Pollution (CLRTAP).

To achieve synergies and co-benefits, the Paris Agreement may need to establish climate change mitigation ambition that is sufficient to ensure that Member States fulfil their undertakings under other instruments to protect natural environments and ecosystems.⁵¹ For example, mitigation ambition and procedures for the monitoring, reporting and verification of States' emissions reductions commitments can help to minimise environmental impacts, such as the loss of wetlands due to sea level rise, coral die-off due to warming sea temperature and ocean acidification, increases in drought and desertification, and biodiversity loss to the greatest extent possible, taking account of the precautionary principle. Further, the information gathered and best practices developed under different multilateral environmental agreements may assist in refining the rules and implementing the Paris Agreement.

5.3 Economic Instruments

Trade, investment and financial instruments can support action on climate change, including action on mitigation, adaptation, and clean technology. Parties are seeking ways to harness international economic law to foster more efficient responses to climate change, and sustainable low carbon development pathways through negotiations in the World Trade Organization under its international treaties (the WTO Agreements); particular provisions on the environment, human rights or climate change, including renewable energy, forests, and environmental goods and services in regional trade agreements (RTAs); initial awareness in international investment agreements (IIAs); cooperation in specialised instruments, such as the agreements establishing the International Energy Agency, the International Renewable Energy Agency (IRENA), and the Energy Charter Treaty; changes in the interpretation of the mandates of international financial institutions (IFIs) and other means.⁵²

51 The objective of promoting 'synergies and coherence' between environmental treaties was explicitly affirmed in UNGA Res 66/288 (27 July 2012) UN Doc A/RES/66/288 para 79.

52 See also Antonio G M La Viña, Joanne C Dulce and Naderev Saño, 'National and Global Energy Governance: Issues, Linkages and Challenges in the Philippines' (2011) 2 Global Policy 80; Pilar Moraga (ed), *Energía, Cambio Climático y Sustentabilidad: Una Mirada desde el Derecho* (Thomson Reuters 2013).

As one example, the WTO has undertaken efforts to reduce perverse subsidies and to promote trade in environmental goods and services, such as the launch of plurilateral 'green goods' negotiations.⁵³ Other efforts by trading nations have resulted in new models of investment agreements and regional trade agreements that may seek to be mindful of green procurement schemes, emissions trading systems, carbon taxes and other GHG reduction mechanisms. Further, there are opportunities to promote renewable energy cooperation and other climate-compatible economic development objectives, among other climate and sustainable development measures, in a new generation of RTAs. Initial examples include the EU-Peru-Colombia, EU-South Korea, Canada-EU and Japan-Switzerland accords, though arguably a great deal more can be done to ensure that trade, investment and financial instruments foster rather than frustrate achievement of the world's SDGs.⁵⁴

The various international treaties described above, but especially accords such as the UN Convention on the Law of the Sea (UNCLOS) and its Regional Seas Conventions, also integrated agreements on sustainable development, such as the UN Convention to Combat Desertification (UNCCD), and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), will be very important in international efforts to support implementation of the Paris Agreement. In essence, while three dimensions of sustainable development are reflected in the new climate agreement, many other global, regional and bilateral instruments exist to address related challenges. For Parties' commitments to be effectively implemented to avoid dangerous climate change, intersections of these inter-actional regimes are practically inevitable.

53 See WTO, 'Azevêdo welcomes launch of plurilateral environmental goods negotiations' <www.wto.org/english/news_e/news14_e/envir_08jul14_e.htm> accessed 6 June 2016. Fourteen WTO members launched plurilateral negotiations for an Environmental Goods Agreement on 8 July 2014 at the WTO. These members said the talks will promote green growth and sustainable development while providing impetus for the conclusion of the Doha Round.

54 Markus W Gehring and others, 'Climate Change and Sustainable Energy Measures in Regional Trade Agreements (RTAs)' ICTSD Global Platform on Climate Change, Trade and Sustainable Energy Issue Paper No 3 August 2013 <www.ictsd.org/downloads/2013/08/climate-change-and-sustainable-energy-measures-in-regional-trade-agreements-rtas.pdf> accessed 12 June 2016; See also Marie-Claire Cordonier Segger, Markus Gehring and Andrew Newcombe (eds), *Sustainable Development in World Investment Law* (Kluwer Law International 2011); and Markus Gehring and Marie-Claire Cordonier Segger (eds), *Sustainable Development in World Trade Law* (Kluwer Law International 2005).

6 Conclusion

Given available scientific findings, there can be no sustainable development if the worst-case scenarios for climate change are not averted. Compliance with the Paris Agreement, with due consideration of the applicable principles of international law, is crucial to achieve all global SDGs.⁵⁵ In this article, key international and domestic law and governance issues raised in the Paris Agreement have been identified and discussed to assist Parties and key institutions in their preparations to implement new climate change commitments. The negotiation of the Paris Agreement occurred in an environment characterised by the emergence of new forms of international governance, and its eventual implementation will be influenced by this reality. The fragmentation of international law into increasingly specialised regimes; polycentricism and multi-level action in rule-making and implementation; experimentalism and revisability of legal obligations; increased participation of non-State actors; increased recourse to non-binding standards; among other influences, are reshaping the context for compliance, and indeed the evolution of international law itself.⁵⁶ These developments have transformed and informed the roles and engagement of all the actors involved in the UNFCCC process, including State delegations, non-State observers from civil society, academia and the private sector among others, and intergovernmental organisations. Jurists, legal institutes and associations, law schools, judges' networks, decision-makers, advocates and other members of the law and governance community worldwide have long sought legal and institutional reforms on multiple levels, including international, regional, national and sub-national level, to facilitate, incentivise and mandate effective action on climate change.⁵⁷ Indeed, the International Bar Association has

55 Marie-Claire Cordonier Segger and Elizabeth Mrema (eds), 'Contributions of International Law to Implementing the Sustainable Development Goals' (CISDL/UNEP 2016); See also Usha Natarajan and Kishan Khoday, 'Locating Nature: Making and Unmaking International Law' (2014) 27 LJIL 573.

56 See, eg, Kenneth W Abbott and Duncan Snidal, 'Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) Vand J Transnat'l L 501; Matthew Hoffmann, *Climate Governance at the Crossroads: Experimenting with a Global Response after Kyoto* (OUP 2011); Harriet Bulkeley and others, *Transnational Climate Change Governance* (CUP 2014). Christopher Campbell-Durufle is recognised and thanked for excellent insights on these points.

57 Kelly Levin and others, 'Overcoming the Tragedy of Super Wicked Problems: Constraining our Future Selves to Ameliorate Global Climate Change' (2012) 45 Policy Sciences 123.

highlighted '[t]he need for climate change justice is (...) apparent in the unequal geographic distribution of its environmental effects'.⁵⁸

As the ILA Climate Change Principles affirm, States have an obligation 'to employ due diligence efforts to mitigate climate change impacts' in the design of any social and economic development plan which may result in significant emissions of GHGs (paragraph 5).⁵⁹ The ILA's Committee on International Law on Sustainable Development, and its follow-up Committee on International Law relating to Sustainable Natural Resources Management, are further working to illuminate the principles and good practices of international law which guide efforts in this field.⁶⁰

After a series of international symposia and conferences, backed by independent research and analysis, a consortium of law faculties from leading universities, together with key research institutes, inter-governmental agencies, law associations, judges' networks, experts commissions and others, launched the inaugural Climate Law and Governance Day on 4 December 2015 at the Paris COP21, opening a special forum for informed dialogue between experts, practising jurists, and decision-makers.⁶¹

For effective responses to climate change under international law, inter-actional forms of international law-making under framework treaties are proving essential.⁶² Many countries plan to reform their laws and institutions across diverse economic, environmental and social sectors in order to respond to the challenges of climate mitigation, resilience, technology, finance and accountability.⁶³ Indeed,

58 IBA Climate Change Justice and Human Rights Task Force (n 41) 45.

59 ILA, 'Legal Principles Relating to Climate Change' (n 50); See also Expert Group on Global Climate Obligations, 'Oslo Principles on Global Obligations to Reduce Climate Change' (n 50).

60 ILA, 'New Delhi Declaration of Principles of International Law Relating to Sustainable Development' (n 34). See also Committee on the Legal Principles Relating to Climate Change, 'International Law on Sustainable Development' (ILA 2012).

61 Report from Climate Law and Governance Day, La Sorbonne Faculty of Law, Pantheon-Sorbonne University, Paris, 4 December 2015 (CISDL/LCIL/IREDIIES/IDLO/CIFOR/UNEP/UNDP Paris 2015); Report from Climate Law and Governance Official Side Event to the UNFCCC COP21 in Paris, 11 December 2014 (CISDL/NCCSD/ASOG, Paris 2015) <www.climatelawgovernance.org> accessed 1 October 2016.

62 Toope and Brunnee (n 29).

63 See, eg, Robert Kibugi, 'Mainstreaming Climate Change into Public Policy Functions: Legal Options to Reinforce Sustainable Development of Kenya' (2012) 8 Fla A & M UL Rev 205; Robert Kibugi, 'Legal Options for Mainstreaming Climate Change Disaster Risk Reduction in Governance for Kenya', in K O H Kheng-Lian (ed), *Adaptation to Climate Change, ASEAN and Comparative Experiences* (WSPC 2015) 409; Jose Ramon T Villarin, Ma Antonia Y Loyzaga

as noted above, 156 countries explicitly state their intention to undertake legal and institutional reforms, out of 187 countries with 'intended Nationally Determined Contributions' (iNDC) published online by the UNFCCC registry, and 51 stress specifically the need for legal and institutional capacity-building in order to achieve their iNDCs.⁶⁴ There is a pressing need for innovative legal knowledge, expertise and capacity-building to address the climate law and governance issues signalled in this article, in order to ensure a strengthened agenda for the implementation of the Paris Agreement and the broader global SDGs.

As countries seek to implement the Paris Agreement, including through the presentation of new and more ambitious NDCs and the adoption of domestic laws designing their transition to a low carbon economy, a profound comprehension of sustainable development, its principles, and parameters will be essential. As recognised in the Agreement itself, new legal research, education, awareness, capacity-building and technical assistance, especially in LDCs and SIDS, but also in high per capita emission countries, will also be necessary to ensure the success of the commitments undertaken in Paris, the avoidance of climate change's most dangerous consequences, and the transformation of the world's economies, societies and ecosystems towards sustainability.

and Antonio G M La Viña, 'In the Eye of the Perfect Storm: What the Philippines Should Do About Climate Change' (SCJ Professorial Lecture Working Paper July 2008) <http://ohm.ecce.admu.edu.ph/wiki/pub/Main/EandEMaterials/SCJ_doc.pdf> accessed 14 June 2016.

64 Cordonier Segger, Reiner and Scott, 'Countries stress importance of legal and institutional reforms in their iNDCs' (n 16).

Implementing Environmental Treaty Obligations in Project Finance Activities through an Accountability Mechanism: An Analysis of the World Bank Inspection Panel

*Wei-Chung Lin**

Abstract

The establishment of the World Bank Inspection Panel is a crucial development in handling the negative social and environmental impacts of Bank-financed projects. It allows affected people to seek redress for the harms resulting from projects, by questioning the legitimacy of the Bank's lending decisions. The Panel has the mandate to examine whether the Bank has complied with its own safeguard policies in specific projects. Even though the substantive rules applicable in the Panel's investigation process (ie, the World Bank's Operational Policies and Bank Procedures) refer to multilateral environmental agreements (MEAs); the Panel has considered the borrowers' environmental treaty commitments extensively in its investigations on a few occasions. This paper examines the extent to which the World Bank Inspection Panel—as an accountability mechanism—has employed different MEAs to address environmental issues resulting from Bank-funded projects, thereby ensuring compliance with environmental treaty obligations in project finance activities.

Keywords

World Bank Inspection Panel, Project Finance Activities, Multilateral Environmental Agreements

1 Introduction

In recent years, the World Bank Group has increasingly opened its doors to civil society in order to be more responsive to those who may be affected by its

* Assistant Professor, Macau University of Science and Technology Faculty of Law. Ph.D., LL.M., University of Nottingham; LL.M., LL.B., National Chung Cheng University, Taiwan. E-mail: wei.chung.lin.tw@gmail.com.

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operations.¹ The World Bank Inspection Panel (herein, Panel or Inspection Panel) is a classic example of addressing public concerns about the social and environmental impacts of Bank-financed projects. This citizen-driven accountability mechanism allows those who are affected by projects supported by the International Bank for Reconstruction and Development (IBRD) or the International Development Association (IDA) to file claims before it. The Inspection Panel has the mandate to examine whether the Bank's lending decisions have complied with its own safeguard policies.

Legal scholarship has focused on the role of this kind of complaint and grievance mechanism in enhancing the public accountability of multilateral development banks (MDBs). However, a particular strength of the Panel that promotes the implementation of multilateral environmental agreements (MEAs) in project finance has not been explored. This strength relates to the proactive role played by the Inspection Panel in examining the project's compliance with MEA obligations through its investigatory mandate. In the substantive rules applicable in the Inspection Panel's investigation process, MEAs are referred to only on a few occasions. In practice, however, the borrowing governments' MEA obligations have been examined in a manner that is far more extensive than those explicitly stipulated in the Bank's safeguard policies by the Panel. This paper seeks to explore the extent to which the Panel, as a non-judicial mechanism, has employed MEAs to address environmental issues arising from Bank-funded projects, thereby ensuring compliance with environmental treaty obligations in the course of project finance activities.

After this introduction, the second section discusses the institutional aspect of the Inspection Panel. This section initially identifies the Inspection Panel's composition and the rules to safeguard its independence. It then evaluates the accessibility of civil society organisations to the Panel. This involves examining the requirements which an eligible requester and request have to satisfy when making complaints. It also discusses the Panel's investigation process and the procedural reform in recent years. The third section examines the substantive rules applicable in determining environmental issues before the Inspection Panel. It illustrates the World Bank's environment-related safeguard policies, and explores the relationship between, and the cross-fertilisation of, these rules and MEAs. This section also

1 See Sabine Schlemmer-Schulte, 'The Impact of Civil Society on the World Bank, the International Monetary Fund and the World Trade Organization: The Case of the World Bank' (2000) 7 *ILSA J Intl & Comparative L* 399.

considers the influences that these rules may have on different stakeholders. The fourth section analyses how the Panel has treated MEAs in addressing private complaints about environmental impacts arising from Bank-financed projects. Drawing upon the recent practice of the Inspection Panel, this section examines the implications of the Panel's findings for the implementation of MEA obligations in the context of project finance.

2 The Institutional Aspect of the World Bank Inspection Panel

2.1 The Composition of the Inspection Panel

The Inspection Panel comprises three inspectors of different nationalities. They are nominated by the World Bank's President after consultation with the Bank's Board of Executive Directors² and are appointed by the Board.³ Panel members must meet certain criteria, including being able to address the requests thoroughly and fairly, having integrity and independence from Bank Management⁴ and understanding the development issues in, and the living conditions of, developing countries.⁵

To ensure that the Inspection Panel can exercise its investigatory power towards the conduct of the management department in the same institution impartially, safeguarding the Panel's independence is of pressing importance. Five requirements, especially post-employment restrictions, have thus been set out. First, Panel members serve a non-renewable five-year term of office and cannot be re-elected.⁶ Only the Board of Executive Directors can remove them from office.⁷

2 The World Bank's Board of the Executive Directors consists of the Bank's President and 25 Executive Directors. It is responsible for general operations of the Bank and exercises the powers delegated to it by the Boards of Governors under the Articles of Agreement.

3 The Inspection Panel for the International Bank for Reconstruction and Development, International Development Association: Annex I, Resolution No. 93-10, Resolution IDA No. 93-6 (adopted 22 September 1993) (1995) 34 ILM 520, para 2 [hereinafter 'Resolution Establishing the Inspection Panel'].

4 The term 'Bank Management' refers to the 'World Bank as an institution involved in the design, appraisal and/or implementation of Bank-financed projects, as distinct from the Board of Executive Directors'. See *Operating Procedures of the World Bank Inspection Panel* (revised April 2014) 9 <[http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014 Updated Operating Procedures.pdf](http://ewebapps.worldbank.org/apps/ip/PanelMandateDocuments/2014%20Updated%20Operating%20Procedures.pdf)> accessed 28 July 2016 [hereinafter 'Operating Procedures'].

5 Resolution Establishing the Inspection Panel (n 3) para 4.

6 *ibid* para 3.

7 *ibid* para 8.

Second, ex-Bank staff cannot serve as Panel members within two years following the end of their service in the World Bank Group.⁸ Third, Panel members cannot participate in the hearing and investigation of any request in which they have a personal interest or a significant involvement in any capacity.⁹ Fourth, they cannot serve in any other position in the World Bank Group after their service for the Panel.¹⁰ Fifth, Panel members are considered to be the World Bank's officials when performing their duties, so they enjoy the privileges and immunities granted to Bank officials.¹¹

2.2 The Eligibility Requirements

According to the Resolution Establishing the Inspection Panel adopted by the IBRD and IDA¹² and the Clarifications adopted in the first review of the Panel in 1996,¹³ any two or more persons who share some common interests or concerns in the borrower's territory can make a request.¹⁴ This includes a community of persons, such as an organisation, association, society or other grouping of individuals, or the local representatives of such an affected party.¹⁵

However, a single individual cannot file a request. The limitation to two or more affected persons to submit a request is due to the concern that if a single individual is allowed to make the request, the Inspection Panel would be flooded

8 *ibid* para 5.

9 *ibid* para 6.

10 *ibid* para 10.

11 *ibid*; For these privileges and immunities, see Articles of Agreement of the International Bank for Reconstruction and Development (IBRD) (entered into force 27 December 1945) art VIII, sec 8 <http://siteresources.worldbank.org/BODINT/Resources/278027-1215526322295/IBRDArticlesOfAgreement_English.pdf> accessed 28 July 2016; See also, Articles of Agreement of the International Development Association (IDA) (entered into force 24 September 1960) art VIII, sec 8 <<http://siteresources.worldbank.org/BODINT/Resources/278027-1215526322295/IDAArticlesOfAgreementEnglish.pdf>> accessed 28 July 2016.

12 Resolution Establishing the Inspection Panel (n 3) para 12.

13 The first review of the Inspection Panel, which resulted in the issuance of the 1996 Clarifications, was required by the Resolution Establishing the Inspection Panel after two years of its establishment. See Resolution Establishing the Inspection Panel (n 3) para 27.

14 *Review of the Resolution Establishing the Inspection Panel: Clarification of Certain Aspects of the Resolution* (17 October 1996) in David Freestone, *The World Bank and Sustainable Development* (Martinus Nijhoff 2012) 293–307 [hereinafter '1996 Clarifications'].

15 Resolution Establishing the Inspection Panel (n 3) para 12.

with complaints and it would overburden its capacity to investigate. It is also to be expected that the negative impacts of project activities would not only affect a single individual.¹⁶ When appropriate local representation of such affected parties is not available, the Board of Executive Directors may allow requests from non-local representatives.¹⁷

In contrast, a proposal from Non-Governmental Organisations (NGOs) during the 1996 Review of the Inspection Panel, to the effect that foreign and local NGOs whose rights or interests were not affected by projects should also be allowed to file requests, was rejected.¹⁸ This reflects the continuing concern that foreign NGOs may use the Inspection Panel to intervene in the domestic affairs of borrowing countries.¹⁹ The same rationale is also reflected by the fact that there should be a direct link between affected parties and the rights or interests for which they claim to be affected by project activities. In cases where representatives bring requests on behalf of affected parties they should provide evidence that they have been duly entrusted to do so.²⁰ Finally, the complaint may also be submitted by entities other than the affected parties. According to the Resolution Establishing the Inspection Panel, in special cases of serious alleged violations of Bank policies and procedures,²¹ any Executive Director may ask the Inspection Panel for an investigation. Also, the Executive Directors acting as a Board may instruct the Panel to conduct an investigation.²² However, to date this provision has never been utilised.

Several requirements must be met to initiate the investigation. First, the requester has to demonstrate that its rights or interests have been, or will potentially be, affected by acts or omissions of the Bank.²³ Second, the alleged damage should result from the Bank's failure to follow its policies and procedures in respect of the project's design, appraisal and/or implementation. Such a failure should also

16 Ibrahim F I Shihata, *The World Bank Inspection Panel: In Practice* (2nd edn, OUP 2000) 59–61.

17 Resolution Establishing the Inspection Panel (n 3) para 12.

18 Shihata (n 16) 166–69.

19 *ibid* 64–66.

20 Resolution Establishing the Inspection Panel (n 3) para 12.

21 A serious violation of the Bank's policies and procedures means that such violation has, or is likely to have, a material adverse effect. See Conclusions of the Board's Second Review of the Inspection Panel (6 November 1997) para 9(b) [hereinafter '1999 Clarifications'] <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/090224b08231aada.pdf>> accessed 28 July 2016.

22 Resolution Establishing the Inspection Panel (n 3) para 12.

23 *ibid*.

have had, or threaten to have, a material adverse effect on the requester.²⁴ Third, the requester must demonstrate that the subject matter of the request has been submitted to Bank Management before making the request to the Inspection Panel, and that Bank Management has failed to establish that it has followed, or is taking adequate steps to follow, the Bank's safeguard policies.²⁵

2.3 The Investigation Process

The Inspection Panel's investigation process has two phases—the eligibility phase and the investigation phase. During the eligibility phase, the Inspection Panel ascertains whether the request is admissible. According to the Operating Procedures, revised April 2014, the Panel will not register a request if: (i) the request is frivolous, absurd or anonymous; (ii) the request does not involve the project which is supported or is being considered for support by the Bank; (iii) the subject matter of the request cannot be plausibly linked to the alleged harm; (iv) the disbursement of the loan is closed or is more than 95% by the date of receipt of the request;²⁶ (v) the matter is related to procurement; or (vi) the subject matter of the request has been dealt with in a prior request, unless there is new evidence or circumstances not known at the time of the prior request.²⁷

Regarding the eligibility phase, the Inspection Panel has piloted a new approach with a view to reaching early solutions for issues of alleged harm without recourse to a full investigation. According to the revised Operating Procedures, the Inspection Panel will postpone its decision on registration of the request, which would otherwise be an eligible request, to offer additional opportunities for Bank Management and the requester to address the issues raised in the request.²⁸ This optional approach is adopted on a case-by-case basis and depends on the willingness of Bank Management and the consent of the requester.²⁹

24 *ibid.*

25 *ibid* para 13.

26 For the appropriateness of the cut-off point for filing claims, see Suresh Nanwani, 'Holding Multilateral Development Banks to Account: Gateways and Barriers' (2008) 10 *Intl Community L Rev* 199, 213–14.

27 Operating Procedures (n 4) para 25.

28 *ibid* Annex 1, para 2.

29 *ibid* para 3.

After the 1999 Review of the Inspection Panel, as will be illustrated below, the Board of Executive Directors' discretionary authority on whether an investigation should be undertaken has to a large extent been shifted to the Inspection Panel. The new pilot approach for early problem-solving through dialogue between different stakeholders further strengthens the Panel's independence from the Board. The adoption of this pilot approach does not affect the Inspection Panel's discretion to recommend a full investigation in light of Management's and the borrower's efforts to address the requester's concerns.

After the registration, Bank Management should submit its response to the request to the Inspection Panel.³⁰ Once it has received Management's response, the Panel conducts a preliminary review to determine whether to recommend an investigation to the Board of Executive Directors. In this phase, the Panel assesses whether: (i) there is a plausible causal link between the alleged harm and the project; (ii) the alleged harm and possible non-compliance with Bank policies and procedures are of a serious character; (iii) Bank Management has dealt appropriately with the issues raised in the request, and has clearly shown that it has followed the required safeguard policies, or Management has acknowledged that it did not adhere to relevant policies and procedures; and (iv) remedial actions proposed by Management are adequate.³¹ The Board then makes a final decision.³²

In addition to the abovementioned requirements, which constitute the basis for the Panel not to recommend the request to the Board for authorising the investigation, in recent years the Panel has also deferred its decision on whether to recommend an investigation in order to provide additional time for Bank Management and the requester to seek solutions. In several cases this has resulted in the Panel not recommending full investigations to the Board.³³

The Board of Executive Directors used to have considerable discretion in deciding whether to authorise an investigation. In the first five years of the Inspection Panel's operation (ie, from its establishment to the second review of the Inspection Panel in 1999) the Board often turned down the Panel's recommendations. During this period, the Board rejected four out of the six requests recommended by the

30 *ibid* paras 33–35.

31 *ibid* para 43.

32 *ibid* paras 49–50.

33 World Bank Inspection Panel, *Accountability at the World Bank: The Inspection Panel at 15 Years* (The World Bank 2009) 51–55 <<http://ewebapps.worldbank.org/apps/ip/IPPublications/InspectionPanelAt15yearsEnglish.pdf>> accessed 28 July 2016.

Inspection Panel for investigation.³⁴ This happened because, after the Panel's recommendation, but before the Board's decision, Bank Management often agreed on an action plan to address the alleged failure with the borrower and submitted it to the Board. However, such action plans were designed without the involvement of the complainant, other people affected by the project and the Inspection Panel. This practice was also not envisaged by the Resolution Establishing the Inspection Panel or the Inspection Panel's Operating Procedures. This often resulted in the Board's disapproval of the Panel's investigation.³⁵

The Board's discretion in authorising the Panel's investigation was restricted following the second review.³⁶ According to the 1999 Clarifications, the Board will authorise an investigation without examining the merits of the request. It can only reject the Panel's recommendations for certain technical eligibility reasons.³⁷ These requirements are exactly the criteria that the Panel has to satisfy itself in deciding whether to recommend an investigation. This reform not only strengthens the Panel's independence in exercising its investigatory mandate, but also increases the possibility for project-affected people to seek redress through the Panel's investigation. The Board has approved every recommendation since the 1999 Clarifications.

If an investigation is authorised, the Inspection Panel has extensive investigatory powers. Panel members can receive information from various sources. They can interview Bank staff involved with the project concerned and access Bank documents for their investigations. They can also visit the country where the project is conducted after having obtained that country's prior consent.³⁸ The Panel can also hold public hearings with the requester during its visits, requesting or

34 These cases are *Brazil: Rondônia Natural Resources Management Project*, Report on Progress Review of Implementation of *Brazil: Rondônia Natural Resources Management Project* (25 March 1997); *Argentina/Paraguay: Yacyretá Hydroelectric Project*, Review of Problems and Assessment of Action Plans (16 September 1997); *Brazil: Itaiparica Resettlement and Irrigation Project*, Report and Recommendation on Request for Inspection (26 June 1997); *India: Ecodevelopment Project*, Report and Recommendation on Request for Inspection (21 October 1998); For an overview of these cases, see Andria Naudé Fourie, *The World Bank Inspection Panel Casebook* (Eleven International Publishing 2014) 29–38; 45–52; 61–66; 79–84.

35 Daniel D Bradlow, 'Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions' (2005) 36 *Georgetown J Intl L* 403, 418–19.

36 For the discussion in the second review of the Inspection Panel, see Shihata (n 16) 173–203.

37 1999 Clarifications (n 21) para 9.

38 Resolution Establishing the Inspection Panel (n 3) para 21; Operating Procedures (n 4) para 54.

receiving information from them, or otherwise from project-affected people and others likely to have relevant information.³⁹

Upon completion of its investigation, the Inspection Panel submits its findings and conclusions to the Board and the Bank's President, indicating whether Bank policies have been violated.⁴⁰ Bank Management should then submit its report and recommendations (MRR) to the Board,⁴¹ which includes an action plan devised through consultation with the complainant and agreed between the Bank and the borrower.⁴² The Board then discusses the Panel's findings and Bank Management's MRR, and makes a final decision on the remedial measures to be taken.⁴³ It may approve Bank Management's action plan as proposed, or it may require changes or additional measures to address harms.⁴⁴

Finally, regarding the implementation of the action plan that the Board may have approved in response to the findings, the Inspection Panel is not tasked with monitoring how remedial measures are implemented. This has resulted in the filing of new complaints by project-affected people regarding the same project before the Panel.⁴⁵ Now the Board often asks Bank Management to submit progress reports to the Panel and requires the latter to follow up on the implementation of the action plan.⁴⁶

3 The Applicable Environmental Rules

The World Bank's operational policies and procedures describe the steps that the Bank's staff should follow during Bank activities to minimise negative social and environmental impacts from Bank-financed projects. These mandatory rules govern the internal activities of the Bank. They become legally binding externally when incorporated into loan agreements between the borrower and the lending institutions. They are also the substantive rules for reviewing the complaints brought by those affected by project finance activities before the Inspection Panel.

39 Operating Procedures (n 4) para 54.

40 Resolution Establishing the Inspection Panel (n 3) para 22.

41 Operating Procedures (n 4) para 67.

42 World Bank Inspection Panel (n 33) paras 41–42.

43 Operating Procedures (n 4) para 71.

44 World Bank Inspection Panel (n 33) paras 42–43.

45 Nanwani (n 26) 217–20.

46 World Bank Inspection Panel (n 33) paras 44–45.

The Bank's safeguard policies are the instruments issued by Bank Management and agreed upon by the Board. The rules were initially adopted as Operational Manual Statements (OMSs) and Operational Policy Notes (OPNs) in the 1970s and 1980s, then converted into Operational Directives (ODs) in 1987. However, since ODs included both binding and non-binding rules, their application caused confusion for Bank staff. To streamline and simplify the practice, Bank Management gradually converted ODs into Operational Policies (OPs) and Bank Procedures (BPs), both of which are mandatory for all Bank staff, and Good Practices, which are non-mandatory.⁴⁷

According to the Resolution Establishing the Inspection Panel, the Bank's safeguard policies include OPs, BPs, ODs and similar documents.⁴⁸ OPs are policy statements that set out the requirements for the Bank's conduct in its operations.⁴⁹ BPs are procedural instructions covering Bank staff requirements for carrying out the policies stipulated in OPs.⁵⁰ ODs have been replaced by OPs and BPs. In the early phases of the Inspection Panel's operation, project-affected people accused the Bank of failure to apply ODs.⁵¹ These ODs were essentially the current OPs and

47 For a description of the evolution of the Bank's operational policies and procedures, see Shihata (n 16) 41–46.

48 Resolution Establishing the Inspection Panel (n 3) para 12.

49 The World Bank, *A Guide to the World Bank: Third Edition* (The World Bank 2011) 61 <<https://openknowledge.worldbank.org/bitstream/handle/10986/2342/638430PUB0Exto00B0x0361527B0PUBLIC0.pdf?sequence=1&isAllowed=y>> accessed 17 August 2016.

50 *ibid.*

51 See, eg, *Nepal: Arun III Hydroelectric Power Project*, Request for Inspection (24 October 1994) <[http://ewebapps.worldbank.org/apps/ip/PanelCases/1-Request for Inspection \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/1-Request%20for%20Inspection%20(English).pdf)> accessed 28 July 2016; *India: NTPC Power Generation Project*, Request for Inspection (1 May 1997) <[http://ewebapps.worldbank.org/apps/ip/PanelCases/10-Request for Inspection \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/10-Request%20for%20Inspection%20(English).pdf)> accessed 28 July 2016; *China: Western Poverty Reduction Project*, Request for Inspection (18 June 1999) <[http://ewebapps.worldbank.org/apps/ip/PanelCases/16-Request for Inspection \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/16-Request%20for%20Inspection%20(English).pdf)> accessed 28 July 2016; *Chad: Petroleum Development and Pipeline Project, Management of the Petroleum Economy Project, and Petroleum Sector Management Capacity Building Project*, Request for Inspection (22 March 2001) <[http://ewebapps.worldbank.org/apps/ip/PanelCases/22-Request for Inspection \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/22-Request%20for%20Inspection%20(English).pdf)> accessed 28 July 2016; *India: Coal Sector Mitigation Project and Coal Sector Rehabilitation Project*, Request for Inspection (21 June 2001) <[http://ewebapps.worldbank.org/apps/ip/PanelCases/23-Request for Inspection \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/23-Request%20for%20Inspection%20(English).pdf)> accessed 28 July 2016; *Cameroon: Petroleum Development and Pipeline Project (Loan No. 7020-CM) and Petroleum Environment Capacity Enhancement (CAPECE) Project (Credit No. 3372-CM)*, Request for Inspection (25 September 2002) <[http://ewebapps.worldbank.org/apps/ip/PanelCases/27-Request for Inspection \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/27-Request%20for%20Inspection%20(English).pdf)> accessed 28 July 2016; *Colombia: Cartagena Water Supply, Sewerage and Environmental Project (Loan No. 4507-CO)*, Request for Inspection (20 April 2004) <[http://ewebapps.worldbank.org/apps/ip/PanelCases/27-Request for Inspection \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/27-Request%20for%20Inspection%20(English).pdf)> accessed 28 July 2016.

BPs, even though their substantive contents may have been revised. The Panel's jurisdiction is limited to investigating the Bank's compliance with these OPs and BPs.

The Bank's safeguard policies address various environment-related issues that may arise during project activities.⁵² These issues include environmental impact assessment (OP/BP 4.01,⁵³ the term 'environmental assessment' is used in Bank policies and procedures), 'Environmental Action Plans' (OP/BP 4.02),⁵⁴ 'Natural Habitats' (OP/BP 4.04),⁵⁵ 'Pest Management' (OP 4.09)⁵⁶ and 'Forests' (OP/BP 4.36).⁵⁷ The Bank should incorporate these requirements into its loan agreements

org/apps/ip/PanelCases/31-Request for Inspection (English).pdf> accessed 28 July 2016; *Pakistan: National Drainage Program Project (Credit No. 2999–PAK)*, Request for Inspection (10 September 2004) <[http://ewebapps.worldbank.org/apps/ip/PanelCases/34-Request for Inspection \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/34-Request for Inspection (English).pdf)> accessed 28 July 2016.

- 52 It has been contended that the Bank's safeguard policies have in many ways reflected international environmental law as stipulated in the Rio Declaration on Environment and Development (adopted 14 June 1992) (1992) 31 ILM 874. Charles E Di Leva, 'International Environmental Law, the World Bank, and International Financial Institutions' in Daniel D Bradlow, David B Hunter (eds), *International Financial Institutions and International Law* (Kluwer Law International 2010) 352–63.
- 53 See The World Bank, Environmental Assessment (January 1999) OP 4.01 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1565&ver=current>> accessed 28 July 2016; The World Bank, Environmental Assessment (January 1999) BP 4.01 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1578&ver=current>> accessed 28 July 2016.
- 54 See The World Bank, Environmental Action Plans (July 2015) OP 4.02 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=3528&ver=current>> accessed 28 July 2016; The World Bank, Environmental Action Plans (July 2015) BP 4.02 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=3529&ver=current>> accessed 28 July 2016.
- 55 See The World Bank, Natural Habitats (April 2013) OP 4.04 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1567&ver=current>> accessed 28 July 2016; The World Bank, Natural Habitats (April 2013) BP 4.04 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1581&ver=current>> accessed 28 July 2016.
- 56 See The World Bank, Pest Management (August 2004) OP 4.09 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1637&ver=current>> accessed 28 July 2016.
- 57 See The World Bank, Forests (April 2013) OP 4.36 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1574&ver=current>> accessed 28 July 2016; The World Bank, Forests (April 2013) BP 4.36 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1585&ver=current>> accessed 28 July 2016.

with the borrower in binding terms and supervise the borrower's implementation of its contractual obligations.⁵⁸

There are several aspects to the relationship between the Bank's environment-related safeguard policies and international environmental law. First, the interpretation of these Bank rules may have to take into account principles and rules of international law, which could extend to environmental norms.⁵⁹ This is especially so when Bank rules explicitly refer to a specific MEA,⁶⁰ 'international environmental treaties and agreements'⁶¹ or 'applicable international environmental agreements'.⁶² These Bank rules (such as OP 4.11, OP/BP 4.01 and OP 4.36) may contribute to the fulfilment of relevant MEA obligations during project activities.⁶³

Second, certain Bank policies require the borrower's national legislation to be adhered to in Bank-financed projects.⁶⁴ Consequently, international commitments that the borrower has undertaken and incorporated into the host country's national legislation would constitute the borrower's obligations throughout all project activities. Bank staff should be aware of the borrower's international undertakings and take them into account during the project's design, appraisal and implementation.⁶⁵ This is important because borrowing states' environmental commitments in other international fora may become their substantive obligations via the Bank's safeguard policies.

58 See Resolution Establishing the Inspection Panel (n 3) para 12; Operating Procedures (n 4) paras 1 and 12(c).

59 Daniel D Bradlow, 'International Organizations and Private Complainants: The Case of the World Bank Inspection Panel' (1994) 34 Virginia J Intl L 553, 608–09.

60 See The World Bank, Physical Cultural Resources (June 2006) OP 4.11, para 3 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1571&ver=current>> accessed 28 July 2016.

61 See The World Bank, Environmental Assessment (January 1999) OP 4.01, para 3 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1565&ver=current>> accessed 28 July 2016; The World Bank, Environmental Assessment (January 1999) BP 4.01, paras 10 and 19 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1578&ver=current>> accessed 28 July 2016.

62 See The World Bank, Forests (April 2013) OP 4.36, para 6 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1574&ver=current>> accessed 28 July 2016.

63 Laurence Boisson de Chazournes, 'Policy Guidance and Compliance: The World Bank Operational Standards' in Dinah Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (OUP 2000) 297.

64 See OP 4.01, Environmental Assessment (n 53) para 3; OP 4.11, Physical Cultural Resources (n 60) para 3.

65 See Operating Procedures (n 4) paras 1 and 12(c).

Although the Bank's safeguard policies are its internal regulations aiming at binding Bank staff in handling project activities, their application can have far-reaching implications for the Bank, the borrowing government and civil society.⁶⁶ In terms of the Bank, since its staff must comply with these standards, their decisions on relevant social and environmental issues constitute the Bank's important practice on project finance operations. Also, by requiring the borrower to meet the requirements of the loan agreement, especially to refrain from contravening its environmental treaty obligations, the Bank plays a crucial role in promoting compliance with MEAs.⁶⁷

In terms of the borrower, while the Bank's safeguard policies are not intended to impose obligations directly on the borrowing government when receiving Bank finance, the borrower has to carry out substantive obligations throughout the project cycle when these rules are incorporated into the loan agreement. If the borrower fails to meet its contractual obligations, the Bank can impose sanctions (such as suspension or cancellation of the loan) on the borrower.⁶⁸ This shows the profound impact that the Bank's safeguard policies can have on the manner in which the borrower conducts its project finance activities.

The external effects of the Bank's safeguard policies are also evident with civil society. As these standards aim to ensure the quality of the Bank's project finance operations, they are not formulated in terms of individuals' rights.⁶⁹ Nevertheless, when these rules are duly implemented, they can protect the rights or interests of local populations in borrowing countries. Project-affected people can use these rules to question the legitimacy of the Bank's lending operations. The Bank's safeguard policies thus constitute an avenue for civil society to oversee the lending institution's activities. Through the Panel's investigation and the Board's remedial measures when non-compliance is found, civil society may seek to protect its welfare through these instruments. Meanwhile, by airing grievances and making arguments through the Panel, civil society may influence the interpretation of Bank policies and the Bank's future operations on project finance.

66 Laurence Boisson de Chazournes (n 63) 191–92.

67 Ibrahim F I Shihata, *The World Bank in a Changing World*, vol 3 (Brill 2000) 514–16.

68 Ibrahim F I Shihata, 'Implementation, Enforcement, and Compliance with International Environmental Agreements—Practical Suggestions in Light of the World Bank's Experience' (1996) 9 *Georgetown Intl Environmental L Rev* 37, 49–51.

69 See Donald K Anton and Dinah L Shelton, *Environmental Protection and Human Rights* (CUP 2011) 808.

As far as Bank policies are concerned, there may be cross-fertilisation between these social and environmental standards and international law.⁷⁰ First, while these rules are not legally binding under international law, it has been argued that through their incorporation into the loan agreement and their constant practice by borrowing countries in their domestic legislation as well as by MDBs in their lending decisions, the substantive contents of these rules may acquire customary status under international law.⁷¹ Second, the Panel may refer to principles and rules of international law when interpreting these social and environmental rules.⁷² More importantly, by promoting the integration of international practice into Bank policies, via private complaints submitted to the Inspection Panel, civil society may contribute to the development of the substantive contents of these rules and their implementation in project finance activities.

4 The Practice of the World Bank Inspection Panel

The Inspection Panel's first ever investigation was *Nepal: Arun III Hydroelectric Power Project* in 1994. Since then, until 2014, the Board of Executive Directors has authorised 31 investigations and the Inspection Panel has completed all of these.⁷³ Almost all of these investigations involve multiple claims in the same case

70 Laurence Boisson de Chazournes (n 63) 297–301; For the discussion of the influences of the Bank's operational standards, see David Freestone, 'The Environmental and Social Safeguard Policies of the World Bank and the Evolving Role of the Inspection Panel' in Alexandre Kiss, Dinah Shelton and Kanami Ishibashi (eds), *Economic Globalization and Compliance with International Environmental Agreements* (Kluwer Law International 2003) 144–45; Benedict Kingsbury, 'Operational Policies of International Institutions as Part of the Law-Making Process: The World Bank and Indigenous Peoples' in Guy S Goodwin-Gill and Stefan Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (OUP 1999) 338–42.

71 David Freestone (n 70) 191–92.

72 See Daniel D Bradlow and Sabine Schlemmer-Schulte, 'The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order' (1994) 54 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 392, 404–05.

73 This excludes *Argentina/Paraguay: Yacyretá Hydroelectric Project* (1996), where the Board, while refusing to approve a full investigation, authorised the Inspection Panel to conduct a review of the existing problems of the project and assessed the adequacy of the action plan as agreed between Management and the two borrowing countries to address the problems. The Inspection Panel, *Argentina/Paraguay: Yacyretá Hydroelectric Project*, Review of Problems and Assessment of Action Plans (16 September 1997) <[http://ewebapps.worldbank.org/apps/ip/PanelCases/7-Review and Assessment \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/7-Review%20and%20Assessment%20(English).pdf)> accessed 28 July 2016.

and alleged violations of the Bank policy on EIA.⁷⁴ Other important environmental issues the Panel has addressed include natural habitats and forests. Using several disputes as case studies, this section examines the extent to which the Inspection Panel has effectively promoted the fulfilment of environmental treaty obligations in project finance activities when addressing environmental issues brought by project-affected people.

4.1 Environmental Impact Assessment (EIA)

To ensure that Bank-financed projects are environmentally sound and sustainable, Bank policies require an EIA to be conducted in the project.⁷⁵ An EIA identifies a project's potential environmental impacts, examines alternatives and offers options for improving project implementation.⁷⁶ The issues that an EIA should consider include natural environment, human health and safety, social aspects,⁷⁷

74 There are certain exceptions in this regard. See, eg, The Inspection Panel, *Albania: Integrated Coastal Zone Management and Clean-Up Project* (IDA Credit No. 4083-ALB), Investigation Report (24 November 2008) <[http://ewebapps.worldbank.org/apps/ip/PanelCases/47-Investigation Report \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/47-Investigation%20Report%20(English).pdf)> accessed 28 July 2016; The Inspection Panel, *Panama: Land Administration Project* (Loan No. 7045-PAN), Investigation Report (16 September 2010) <[http://ewebapps.worldbank.org/apps/ip/PanelCases/53-Investigation Report \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/53-Investigation%20Report%20(English).pdf)> accessed 28 July 2016; The Inspection Panel, *Cambodia: Land Management and Administration Project* (Credit No. 3650-KH), Investigation Report (23 November 2010) <[http://ewebapps.worldbank.org/apps/ip/PanelCases/60-Investigation Report \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/60-Investigation%20Report%20(English).pdf)> accessed 28 July 2016; The Inspection Panel, *Kenya: Natural Resource Management Project*, Investigation Report (22 May 2014) <[http://ewebapps.worldbank.org/apps/ip/PanelCases/84 - Investigation Report \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/84-Investigation%20Report%20(English).pdf)> accessed 6 December 2016.

75 OP 4.01, Environmental Assessment (n 53) para 1.

76 *ibid* para 2.

77 Social aspects include involuntary resettlement, indigenous peoples and physical cultural resources. There are other Bank policies addressing these issues: see The World Bank, *Indigenous Peoples* (July 2005) OP 4.10 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1570&ver=current>> accessed 28 July 2016; The World Bank, *Indigenous Peoples* (July 2005) BP 4.10 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1582&ver=current>> accessed 28 July 2016; *Physical Cultural Resources*, OP/BP 4.11 (n 60); The World Bank, *Involuntary Resettlement* (December 2001) OP 4.12 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1572&ver=current>> accessed 28 July 2016; The World Bank, *Involuntary Resettlement* (December 2001) BP 4.12 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1584&ver=current>> accessed 28 July 2016.

and transboundary and global environmental aspects.⁷⁸ The country's institutional capacities in dealing with EIA-related issues,⁷⁹ its domestic policy framework and legislation, and its obligations regarding project activities under international environmental agreements must also be considered.⁸⁰

The borrower has an obligation to conduct an EIA,⁸¹ though the Bank advises on its EIA requirements and reviews the findings and recommendations of the EIA to determine if it provides an adequate basis for processing the project for Bank financing. When the borrower has completed or partially completed EIA work prior to the Bank's involvement in a project, the Bank also reviews the EIA to ensure that it is consistent with this policy. It may require additional EIA work to be done by the borrower.⁸²

When undertaking an EIA in a proposed project, the first step is environmental screening, ie to decide the appropriate extent and type of analysis to adopt. According to OP 4.01 as revised in 2013, a project should be classified as Category A when it is likely to have 'significant adverse environmental impacts that are sensitive, diverse, or unprecedented'.⁸³ The impact is considered sensitive when it involves issues covered by other Bank policies, such as natural habitats, indigenous peoples, physical cultural resources or involuntary resettlement.

An EIA for a Category A project should examine the project's potential environmental impacts and compare them with those of feasible alternatives. It should also recommend any measures to prevent, minimise, mitigate or compensate for such impacts and improve environmental performance.⁸⁴ Moreover, the borrower should retain independent experts not affiliated with the project to undertake the EIA.⁸⁵ An advisory panel, which comprises independent and internationally recognised environmental specialists, should be appointed to advise on all aspects of the project relevant to the EIA if the project is 'highly risky or contentious or (...) involves serious and multidimensional environmental concerns'.⁸⁶

78 OP 4.01, Environmental Assessment (n 53) para 3.

79 *ibid* para 13.

80 *ibid* para 3.

81 *ibid* para 4.

82 *ibid* para 5.

83 *ibid* para 8(a).

84 *ibid*.

85 *ibid* para 4.

86 *ibid*.

An EIA report for a Category A project has to include an executive summary; a policy, legal and administrative framework; a project description; the baseline data; environmental impacts; an analysis of alternatives; and an environmental management plan.⁸⁷ There are other issues that also have to be addressed, including a potential regional/sectoral EIA⁸⁸ and the institutional capacity of the borrower.⁸⁹

Among other things, an EIA has to examine a project's environmental impacts. The aspects of environmental impacts that should be evaluated for a Category A project include: (i) the project's likely positive and negative impacts; (ii) mitigation measures and any residual impacts that cannot be mitigated; (iii) opportunities for environmental enhancement; and (iv) the extent and quality of available data, key data gaps, and uncertainties associated with those predictions.⁹⁰

4.1.1 DR Congo: Forest-related Operations Project

An inadequate analysis of impacts from the project on the borrower's environmental treaty obligations became a contentious issue in *Democratic Republic of Congo: Transitional Support for Economic Recovery Grant (TESRO) and Emergency Economic and Social Reunification Support Project (EESRSP)* (the 'DR Congo: Forest-related Operations Project').

The dispute involved two inter-related activities. EESRSP included five components to assist the borrowing government's economic reforms. The complaint mainly focused on its institutional element, which included the preparation of a forest zoning plan and the implementation of the new forest concession system.⁹¹

87 OP 4.01, Environmental Assessment, Annex B (Content of an Environmental Assessment Report for a Category A Project) para 2; Each of these items has more detailed stipulations in respective Bank policies. See, eg, Annex B, para 2(c) (Project Description); para 2(d) (Baseline Data); para 2(e) (Environmental Impacts); para 2(f) (Analysis of Alternatives) <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=3902&ver=current>> accessed 17 August 2016.

88 *ibid* para 7, Annex A, paras 7, 9 <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=3901&ver=current>> accessed 17 August 2016.

89 *ibid* para 13.

90 *ibid* Annex B, para 2(e).

91 The Inspection Panel, *Democratic Republic of Congo: Transitional Support for Economic Recovery Grant (TESRO) (IDA Grant No. H 1920–DRC) and Emergency Economic and Social Reunification Support Project (EESRSP) (Credit No. 3824–DRC and Grant No. H 064–DRC)*, Investigation Report (31 August 2007) paras 15–22 <[http://ewebapps.worldbank.org/apps/ip/PanelCases/37-Investigation Report \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/37-Investigation%20Report%20(English).pdf)> accessed 28 July 2016.

Moreover, TESRO was a budget support operation that supported, *inter alia*, an improvement of governance in the natural resources sector. The forest-related prior actions that had to be met before the Board approved its operation were a legal review of forest concessions and an extension of the moratorium on new logging concessions.⁹²

The complaint was brought by indigenous Pygmy organisations and Pygmy support organisations in the DR Congo on their own behalf and on behalf of affected communities. The complainants argued that the forest sector reform activities that the project supported had harmed, and would continue to harm, the forests where these indigenous peoples lived and on which they relied for their livelihood. They contended that the significant adverse social and environmental impacts that may result from the reform programme were one reason why the project should have been assigned a Category A status and an extensive EIA should have been conducted.⁹³

In this case, the Panel not only held that the project had failed to undertake an EIA on the pilot forest zoning⁹⁴ and the logging concession review process,⁹⁵ it also considered the borrower's MEA obligations concerning project activities, although the complainants did not raise this. The Panel held that the DR Congo had obligations under the Convention Concerning the Protection of the World Cultural and Natural Heritage (WHC)⁹⁶ and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);⁹⁷ both to which the DR Congo was a party.⁹⁸

As for the WHC, the Panel found that one of the borrower's natural sites (Salonga National Park), which was included in the List of World Heritage in Danger, appeared to be adjacent to two areas held by concessions.⁹⁹ As for the CITES, the Panel noted that there were high-value species of timber in the borrower's territory. In particular, one of the species, ie the African Teak (*Pericopsis elata*), was listed

92 *ibid* paras 31–36.

93 *ibid*, Request for Inspection (30 October 2005) 7–8.

94 *DR Congo Forest-Related Operations*, Investigation Report (n 91) paras 343–46.

95 *ibid* paras 349–50.

96 Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151 [hereinafter 'WHC'].

97 Convention on International Trade in Endangered Species of Wild Fauna and Flora (adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243 [hereinafter 'CITES'].

98 *DR Congo Forest-Related Operations*, Investigation Report (n 91) para 387.

99 *ibid* paras 388–90.

under CITES Appendix II and had been subject to export control.¹⁰⁰ The Panel stated that if the project's EIA had been conducted in accordance with Bank policy, it should have identified these international obligations and evaluated the project's implications for the pertinent World Heritage Sites and CITES-listed species.¹⁰¹

This was the first time that the Inspection Panel addressed the issue of environmental impact analysis in terms of the borrower's MEA obligations. As for the WHC, for a natural site to be included in the World Heritage List (WHL), it should be of outstanding universal value.¹⁰² According to the WHC, States Parties have to take effective and active measures for the protection, conservation and presentation of cultural and natural properties in their territories.¹⁰³ Also, for the properties included in the List of World Heritage in Danger, major operations are necessary for their conservation, and assistance has been requested under the WHC to protect such sites.¹⁰⁴ As of 2015, the List of World Heritage in Danger has 48 properties, five of which—all natural sites—are in the DR Congo.¹⁰⁵ Although the concession areas in this case were not on the WHL, they were in close proximity to a World Heritage Site. The Inspection Panel thus held that implications for the Site should have been evaluated.

Regarding the CITES, the purpose of the Convention is to protect wildlife listed in its three Appendices through international trade controls.¹⁰⁶ Among other things, Appendix II species are not necessarily threatened with extinction, but they may become so unless trade is controlled.¹⁰⁷ The export of Appendix II species is prohibited unless an export permit is granted under the authorisation of the state of export.¹⁰⁸ The species concerned in this case, ie the African Teak, had been subject to export control at that time.¹⁰⁹ Considering the high economic value of

100 *ibid* paras 391–93.

101 *ibid* para 394.

102 WHC (n 96) art 2; United Nations Educational, Scientific and Cultural Organisation, 'Operational Guidelines for the Implementation of the World Heritage Convention' (revised July 2013) WHC 13/01, paras 77–95 <<http://whc.unesco.org/archive/opguide13-en.pdf>> accessed 28 July 2016; For an analysis of the criteria, see Michael Bowman, Peter Davies and Catherine Redgwell, *Lyster's International Wildlife Law* (2nd edn, CUP 2011) 464–70.

103 WHC (n 96) art 5.

104 *ibid* art 11(4).

105 The information is available at UNESCO, 'List of World Heritage in Danger' <<http://whc.unesco.org/pg.cfm?cid=86>> accessed 28 July 2016.

106 CITES (n 97) Preamble.

107 *ibid* art II(2).

108 *ibid* art IV(2).

109 *DR Congo Forest-Related Operations*, Investigation Report (n 91) para 393.

the African Teak as timber assets, the Inspection Panel also held that the impacts of concessions should have been evaluated.

The Inspection Panel's explicit references to the WHC and CITES without the complainants raising them shows how it played an even more active role than the complainants in asserting the borrower's MEA obligations when undertaking the EIA. What is more important is that the Panel has indirectly imposed additional treaty requirements on the Bank, which was not a signatory to either of these MEAs and was not bound by them in a strict sense, in being required to consider the borrower's environmental treaty commitments when deciding to finance projects.

4.1.2 Albania: Power Sector Generation and Restructuring Project

The involvement of project-affected populations and local NGOs in the EIA process is important for the public to better understand the implications of proposed project finance activities. Public consultation with those affected can help to identify, not only potential impacts of projects, but also solutions for such impacts.¹¹⁰

Disclosure of information by the borrower is the prerequisite for public consultation in the EIA. Without knowing about projects and acquiring adequate information about them, affected people cannot meaningfully participate in the EIA process. Therefore, the Bank policy on EIA calls for the borrower to provide relevant project documentation in a timely manner prior to consultation. The information should be in a form and language that is understandable and accessible for those consulted.¹¹¹ For Category A projects, in particular, a summary of the project's objectives, descriptions and its potential impacts should be provided for the initial consultation. A summary of the EIA's conclusions should also be provided once the draft EIA has been prepared. Finally, the borrower should make the draft EIA report available in an accessible place for project-affected people.¹¹²

In addition to information disclosure, the borrower has to consult project-affected people and local NGOs about the environmental aspects of the project and incorporate their opinions. Public consultation should be held as early as

110 The Inspection Panel, *Cambodia: Forest Concession Management and Control Pilot Project* (Credit No. 3365-KH and Trust Fund. 26419-JPN), Investigation Report (30 March 2006) para 255 <[http://ewebapps.worldbank.org/apps/ip/PanelCases/36-Investigation Report \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/36-Investigation%20Report%20(English).pdf)> accessed 28 July 2016.

111 OP 4.01, Environmental Assessment (n 53) para 15.

112 *ibid* para 16.

possible.¹¹³ For Category A projects, in particular, consultations must be conducted at least twice: (i) shortly after environmental screening and before the terms of reference for the EIA have been finalised; and (ii) once a draft EIA report has been prepared. Consultations should be held throughout the project's implementation as is necessary to tackle EIA-related issues affecting such groups.¹¹⁴

The delay in holding public consultations during project preparation and implementation has become a contentious issue in several cases.¹¹⁵ *Albania: Power Sector Generation and Restructuring Project* is the one that deserves discussion because, in finding the borrower's non-compliance, the Inspection Panel considered the former's treaty obligations which had also been referred to in the complaint. The project involved the construction of a thermal power station (Vlora Thermal Plant) in the Vlora area. The Civic Alliance for the Protection of the Bay of Vlora submitted the complaint on behalf of local residents.¹¹⁶

The complainants maintained, amongst others, that there were no adequate public consultations during project preparation. They argued that most public meetings were not properly announced, and that the information provided before the meetings was incomplete. Moreover, the meetings were held only after the location of the power plant had been decided.¹¹⁷ The complainants further stated that a communication regarding the borrowing government's non-compliance with its obligations on public participation and access to information had been

113 *ibid* para 14.

114 *ibid*.

115 See, eg, The Inspection Panel, *Colombia: Cartagena Water Supply, Sewerage and Environmental Project* (Loan No. 4507-CO), Investigation Report (4 June 2005) paras 236–42 <[http://ewebapps.worldbank.org/apps/ip/PanelCases/31-Investigation Report \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/31-Investigation%20Report%20(English).pdf)> accessed 28 July 2016; The Inspection Panel, *Ecuador: Mining Development and Environmental Control Technical Assistance Project* (Loan No. 6355-EC), Investigation Report (23 February 2001) paras 101–08 <[http://ewebapps.worldbank.org/apps/ip/PanelCases/20-Investigation Report \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/20-Investigation%20Report%20(English).pdf)> accessed 28 July 2016; *Cambodia: Forest Concession Management and Control Pilot Project*, Investigation Report (n 110) paras 251–54; The Inspection Panel, *Peru: Lima Urban Transport Project* (Loan 7209-PE), Investigation Report (18 January 2011) paras 100–15 <<http://ewebapps.worldbank.org/apps/ip/Pages/ViewCase.aspx?CaseId=79>> accessed 28 July 2016.

116 The Inspection Panel, *Albania: Power Sector Generation and Restructuring Project* (IDA Credit No.3872-ALB), Request for Inspection (30 April 2007) <[http://ewebapps.worldbank.org/apps/ip/PanelCases/46-Request for Inspection \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/46-Request%20for%20Inspection%20(English).pdf)> accessed 28 July 2016.

117 *ibid*; Investigation Report (7 August 2009) paras 310–11 <[http://ewebapps.worldbank.org/apps/ip/PanelCases/46-Investigation Report \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/46-Investigation%20Report%20(English).pdf)> accessed 28 July 2016.

brought to the Aarhus Convention Compliance Committee, and the latter had found breaches of the relevant obligations.¹¹⁸

In reaching its conclusions, the Inspection Panel extensively considered the findings of the Aarhus Compliance Committee. It firstly held that, despite the Aarhus Committee focusing on the actions of the Albanian Government rather than those of the Bank, the Committee's conclusions were relevant to the Inspection Panel. This was because Bank policy imposed an obligation on the borrower to hold public consultations and required the Bank to ensure the borrower's implementation of this obligation. Also, the requirements of the Aarhus Convention were similar to those under Bank policy.¹¹⁹

The Panel then summarised the Aarhus Committee's investigation and findings.¹²⁰ It then stated that Bank policy required a project's EIA to consider the borrower's international environmental obligations relevant to project activities. It added that the Bank did not finance project activities that would contravene the borrower's international obligations. As Bank Management did not ensure the borrower's fulfilment of its Aarhus obligations, the Panel concluded that the project did not adhere to Bank policy.¹²¹

In addition to its findings on the borrower's violation of its Aarhus obligations, the Inspection Panel found other breaches in this case. It noted that Bank policy required consultation to take place when preparing the EIA. However, the public meetings concerned were held only after the project site had been decided.¹²² The Panel noted that such consultation only provided *post hoc* justification for the site selection, which in essence was not a genuine consultation.¹²³ As for inadequate notification and public participation, the Panel held that, since there was a similarity between the requirements under Bank policy and the Aarhus Convention, and the Panel had also verified the facts that the Aarhus Committee examined, it reached the same conclusion as the Aarhus Committee: the project did not ensure adequate notification and public participation in consultation meetings during project preparation.¹²⁴

118 *ibid* para 312.

119 *ibid* para 323.

120 *ibid* paras 324–29.

121 *ibid* paras 330–32.

122 *ibid* paras 337–41.

123 *ibid* paras 342–43.

124 *ibid* paras 350–52.

This is another example where the Inspection Panel referred to the borrower's treaty obligations relevant to project finance activities. The difference between this case and the *DR Congo Forest-related Operations* case is that here the borrower's Aarhus obligations were raised by the complainants. The Panel in this case found the project to be non-compliant with Bank policy in general terms under OP 4.01, para 3 in light of the Aarhus obligations. It also examined the compatibility of these Aarhus requirements with the public consultation and disclosure requirements under Bank policy, as provided in OP 4.01, paragraphs 14 to 15, and reached the same conclusion as the Aarhus Committee. This shows the importance of civil society, as a complainant, in triggering the Panel's investigation on the borrower's compliance with its treaty obligations when implementing its Bank-funded investment activities. The complainants' reference to the practice under the Aarhus Convention not only had a direct impact on the Panel's findings in this case, it also became an important precedent for considering the requirements under the Aarhus Convention and the Aarhus Committee's decisions in assessing complaints against projects that are implemented by the Aarhus Convention's States Parties in future cases.

4.2 Natural Habitats¹²⁵

The Bank's safeguard policies also regulate other environmental issues arising from Bank-financed investment activities. According to Bank policy as revised in 2013, the Bank does not support projects involving significant conversion¹²⁶ or degradation¹²⁷ of critical natural habitats.¹²⁸ Nor does the Bank support projects involving significant conversion of natural habitats, unless there are no feasible alternatives for the project and its siting, and comprehensive analysis shows that the project's overall benefits substantially outweigh its environmental costs.¹²⁹

125 The term 'natural habitats' is defined as 'land and water areas where (i) the ecosystems' biological communities are formed largely by native plant and animal species, and (ii) human activity has not essentially modified the area's primary ecological functions.' The World Bank, Natural Habitat (June 2001) OP 4.04, Annex A, para 1(a) <<https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=1568&ver=current>> accessed 28 July 2016.

126 For the meaning of 'significant conversion', see *ibid*, Annex A, para 1(c).

127 For the meaning of 'degradation', see *ibid*, Annex A, para 1(d).

128 *ibid* para 4; For the meaning of 'critical natural habitats', see *ibid*, Annex A, para 1(b).

129 *ibid* para 5.

When an EIA finds that the project would significantly convert or degrade natural habitats, mitigation measures, which may involve minimising habitat loss as well as founding and maintaining an ecologically similar protected area, should be included.¹³⁰

The *Pakistan: National Drainage Program (NDP) Project* case involved resolving the waterlogging and salinity problems in the Indus Basin's existing irrigation network. The project included extending the Left Bank Outfall Drain (LBOD) system, the central feature of which was a spinal drain. This spinal drain disposed of saline effluent, generated upstream of the Indus Basin, through the Tidal Link to the Arabian Sea.¹³¹ However, the project underestimated the risk of extreme meteorological events and it lacked appropriate technical measures during the design of the LBOD system and the Tidal Link.¹³² Over time, parts of the structures collapsed. Others suffered damages after being hit by tropical cyclones,¹³³ causing suffering to people and significant changes to the regional ecosystem.¹³⁴

The complaint was filed by several individuals on their own behalf and on behalf of those who lived in the project-affected area. The complainants contended, *inter alia*, that the affected wetlands and interconnected lakes (known as 'dhands') were an important component of international migration routes for many bird species.¹³⁵ In particular, two of the dhands were in the Ramsar Convention List of Wetlands of International Importance, to which the borrowing government was a party. They argued that, according to the Ramsar Convention, the government had to ensure the wise use and conservation of wetlands. Meanwhile, the Bank should not support project activities that would contravene a country's international environmental obligations.¹³⁶

The Inspection Panel found that the chosen route of the major drainage canal—the Tidal Link—ran through the biodiversity-rich and productive dhands. However, because of the structures' failure, the dhands had become part of the Arabian Sea's tidal system. High salinity in the dhands had significantly affected

130 For the meaning of 'Appropriate conservation' and 'mitigation measures', see *ibid*, Annex A, para 1(e).

131 The Inspection Panel, *Pakistan: National Drainage Program Project (Credit No. 2999-PAK)*, Investigation Report (6 July 2006) paras 78–97 <[http://ewebapps.worldbank.org/apps/ip/PanelCases/34-Investigation Report \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/34-Investigation%20Report%20(English).pdf)> accessed 28 July 2016.

132 *ibid* paras 133–53.

133 *ibid* paras 154–69.

134 *ibid* paras 170–94.

135 *ibid*; Request for Inspection (9 September 2004) para 38 <[http://ewebapps.worldbank.org/apps/ip/PanelCases/34-Request for Inspection \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/34-Request%20for%20Inspection%20(English).pdf)> accessed 28 July 2016.

136 *ibid* para 40.

the environment.¹³⁷ The Panel held that the project had focused on evacuating effluents and had somewhat neglected the impacts on, or means to rehabilitate, the dhands as a habitat and ecosystem. It concluded that this did not comply with Bank policy.¹³⁸

The Inspection Panel then mentioned the objectives of the Ramsar Convention. It reiterated the States Parties' obligation to designate suitable wetlands within its territory for inclusion in the Ramsar List and to promote the conservation of wetlands in the List.¹³⁹ It stated that the evidence had shown that the dhands under the Ramsar List had suffered negative impacts as a result of rising salinity and changed water flow, which constituted a 'significant conversion or degradation' in terms of Bank policy.¹⁴⁰

The Inspection Panel held that the Bank had failed to consider the risks of further degrading critical natural habitats adequately, saying that 'these Ramsar-listed sites are the type of critical natural habitat that Bank policy promises not to significantly convert or degrade'.¹⁴¹ It also ruled that actions were not taken to conserve and rehabilitate these degraded natural habitats. The Panel thus concluded that the project did not adhere to Bank policy.¹⁴²

In this case, the complainants stressed the importance of the wetlands on which the project had had a negative effect by identifying their ecological value and status under the Ramsar Convention, to which the borrower was a State Party. However, the complainants did not explicitly argue that these wetlands constituted 'critical natural habitats' because of their Ramsar status.¹⁴³ This aligns with the Bank policy on natural habitats, which also does not define critical natural habitats as areas listed under the Ramsar Convention or other MEAs.¹⁴⁴

137 *ibid*, Investigation Report (n 131) paras 341–45.

138 *ibid* para 346.

139 *ibid* paras 347–48.

140 *ibid* paras 349–54.

141 *ibid* para 357.

142 *ibid* paras 366–69.

143 Unlike the WHC, the Ramsar Convention does not have a screening procedure for including a wetland in the List of International Importance. Instead, the States Parties to the Convention can unilaterally designate wetlands to the List. See the Convention on Wetlands of International Importance especially as Waterfowl Habitat (adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245 art 2(2) [hereinafter 'Ramsar Convention']; See also Bowman, Davies and Redgwell (n 102) 408–11.

144 The Bank policy on natural habitats only refers to areas which meet the criteria under the IUCN classifications and are considered as critical natural habitats. See OP 4.04, Natural Habitat (n 125) Annex A, para 1(b)(i).

In contrast to the complainants' submissions, in assigning the wetlands concerned as critical natural habitats under Bank policy, the Inspection Panel appears to have considered the criteria for the inclusion of wetlands in the Ramsar List.¹⁴⁵ Its holdings were thus beyond what the complainants argued. Therefore, the borrower's commitments under the Ramsar Convention may increase the possibility for a specific area within its territory to be classified as a 'critical natural habitat' under the Bank policy on natural habitats, thereby reinforcing the Bank's duty to refrain from financing project activities that would cause significant conversion or degradation.

In addition, according to the Ramsar Convention, the States Parties have the obligation to promote the conservation and wise use of wetlands, whether they are listed sites or not.¹⁴⁶ It has been suggested that the focus has been on the States Parties' 'wise use of wetlands'.¹⁴⁷ The term 'wise use' refers to '*the maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development*'.¹⁴⁸ In this case, since the project had altered the wetlands' ecological character, the borrowing government's obligation for wise use of wetlands under the Ramsar Convention, as mentioned by the complainants, may have been violated. Since the Inspection Panel also indicated that these 'Ramsar-listed sites are the type of critical natural habitat that Bank policy promises not to significantly convert or degrade',¹⁴⁹ the Panel may consider the practice concerning 'wise use' under the Ramsar Convention in determining compliance with Bank policy in future cases.

4.3 Forests

According to the Bank policy on forests, as revised in 2013, the Bank intends to: (i) 'assist borrowers to harness the potential of forests to reduce poverty in a sustainable manner'; (ii) 'integrate forests effectively into sustainable economic development'; and (iii) 'protect the vital local and global environmental services and values of forests'.¹⁵⁰

145 *Pakistan: National Drainage Program Project*, Investigation Report (n 131) paras 341–42.

146 Ramsar Convention (n 143) arts 3(1), 4(1).

147 Bowman, Davies and Redgwell (n 102) 414–16.

148 *ibid* 417–19 (emphasis added).

149 *Pakistan: National Drainage Program Project*, Investigation Report (n 131) para 357.

150 OP 4.36, Forests (n 62) para 1.

The Bank policy formulations on forests are similar to those for natural habitats in many respects. First, the Bank does not finance projects that would involve significant conversion or degradation of critical forest areas or related critical natural habitats.¹⁵¹ Here, 'critical forest areas' refer to forest areas that qualify as 'critical natural habitats' under the Bank policy on natural habitats.¹⁵² Second, the Bank does not support projects if they would significantly convert or degrade natural forests or related natural habitats, unless there are no feasible alternatives for the project and its siting, and comparative analysis shows that the project's overall benefits substantially outweigh its environmental costs.¹⁵³ Third, the Bank does not support projects that would contravene applicable international environmental agreements.¹⁵⁴

The *Cambodia: Forest Concession Management and Control Pilot Project* case best illustrates how the Inspection Panel has dealt with forest issues in a Bank-financed project in light of international obligations of the borrower. The project involved reforming the regulatory framework for forest concession operations in Cambodia. Its objectives were to improve forest management through effective operational guidelines and to control procedures in forest concessions areas, and to establish forest crime monitoring and prevention capacities.¹⁵⁵

The complaint was brought by a local-based NGO, ie NGO Forum on Cambodia, on behalf of the affected communities living in the concession areas. The complainants stated that the project's flawed design and implementation promoted the interests of logging companies with track records of human rights abuses and illegal logging. They also asserted that social and environmental impacts were inadequately considered, which had harmed forest-dependent communities and would continue to do so.¹⁵⁶

Specifically, regarding the alleged breach of the Bank policy on forests, the complainants contended that the project failed to 'ensure conservation, sustainable use of forests and active participation of local people'.¹⁵⁷ Neither did it consider

151 *ibid* para 5.

152 *ibid*, Annex A, para (c).

153 *ibid* para 5.

154 *ibid* para 6.

155 *Cambodia: Forest Concession Management and Control Pilot Project*, Investigation Report (n 110).

156 *ibid*; Request for Inspection (28 January 2005) 2 <[http://ewebapps.worldbank.org/apps/ip/PanelCases/36-Request for Inspection \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/36-Request%20for%20Inspection%20(English).pdf)> accessed 28 July 2016.

157 Investigation Report (n 110) para 153.

the social, economic and environmental aspects of the forests being considered for concession.¹⁵⁸ In particular, forests of high ecological value, especially the Prey Long forest, were consequently not identified as such. They argued that the Bank financed logging in areas of high ecological value and in doing so caused further degradation.¹⁵⁹ Moreover, extensive illegal logging by concession companies had affected the livelihoods of forest-dependent communities.¹⁶⁰

In this regard, the Inspection Panel noted that forests of high ecological value should have been identified, especially the Prey Long forest. It found that this forest had been included in a listing of tentative natural sites for World Heritage consideration for Cambodia because of its importance for biodiversity conservation. However, the Prey Long area was covered by three concessions and could be subject to industrial logging.¹⁶¹

The Panel considered that the Prey Long forest should be designated a 'forest of high ecological value'.¹⁶² It suggested that even though the Bank did not support logging forests of high ecological value, 'by not raising the Prey Long issue explicitly, there [was] an implicit acknowledgement that logging in the Prey Long area may be acceptable'.¹⁶³ By failing to identify the high ecological value of the forest during the project's early stages, the Panel held that the project did not comply with the Bank policy on forests.¹⁶⁴

In identifying the Prey Long forest as one of the 'forests of high ecological value' under the Bank policy on forests in this case,¹⁶⁵ the Inspection Panel referred to the forest's status under the tentative list for World Heritage consideration for Cambodia without the complainants doing so. This was despite the fact that natural property on the WHL or on the tentative list was not explicitly stated in Bank policy as a factor in determining the nature of a specific forest area.

According to the WHC, the States Parties shall submit to the World Heritage Committee an inventory of property they consider to be of cultural and natural

158 *ibid* para 154.

159 *ibid* para 170.

160 *ibid* para 226.

161 *ibid* paras 173–74.

162 *ibid* xi.

163 *ibid* paras 176–77.

164 *ibid* para 180.

165 According to the Bank policy on forests as revised in 1993, 'In forest areas of high ecological value, the Bank finances only preservation and light, non-extractive use of forest resources.' See Shihata (n 16) 392. This provision no longer exists in the 2013 version.

heritage importance for inscription on the WHL.¹⁶⁶ Nominations to the WHL will not be considered unless the property has been listed on the party's tentative list. The obligation of the States Parties under the WHC applies to all cultural and natural heritage, regardless of whether they have been inscribed on the WHL.¹⁶⁷

In assigning the Prey Long forest as a forest of high ecological value and holding that three concessions under the project would cover that forest area and pose a threat to it, the Inspection Panel evidently considered the status of the Prey Long forest under the World Heritage tentative list. While the original stipulation noting 'forests areas of high ecological value' no longer exists in the Bank policy on forests, as the current Bank policy states that '[t]he Bank does not finance projects that contravene applicable international environmental agreements';¹⁶⁸ natural forest areas that are either on the WHL or tentative lists may still be considered in determining 'critical forest areas'.

5 Conclusion

The creation of the Inspection Panel, as an accountability mechanism within the World Bank, is a crucial development in the international legal system. It allows private individuals affected by the Bank's financed projects, which have traditionally been deemed to benefit borrowing countries, to challenge the legitimacy of the Bank's lending decisions. This shows that the interests between the government and its citizens in project finance activities may not be identical.¹⁶⁹ It also demonstrates the importance of non-economic values, which the World Bank increasingly emphasises, in the pursuit of economic growth through project finance activities.

As an internal accountability mechanism within the World Bank, the Inspection Panel has the mandate to examine whether the Bank's decisions and operations on project finance conform to the Bank's safeguard policies. This is important in securing the rights and interests of those who should be the ultimate beneficiaries of Bank-financed projects. By finding the Bank's non-compliance with its policies and procedures, the Inspection Panel not only enhances the

166 WHC (n 96) art 11(1).

167 Bowman, Davies and Redgwell (n 102) 454.

168 OP/BP 4.36, Forests (n 62) para 6.

169 James Cameron and Ruth Mackenzie, 'Access to Environmental Justice and Procedural Rights in International Institutions' in Michael Anderson and Alan Boyle (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press 1998) 147–49.

accountability of the lending institution to the public, but also performs a significant role in interpreting the applicable social and environmental norms in the context of project finance.

Although the Inspection Panel is not a judicial mechanism, certain institutional arrangements ensure its independence from the organisation that founded it when conducting investigations. This reflects the Panel's ombudsman feature and helps to strengthen its effectiveness in addressing private complaints brought against the Bank.¹⁷⁰ Moreover, while it is not the Inspection Panel's primary mandate to examine the borrower's fulfilment of its treaty obligations pertaining to project activities, this does not preclude the Panel from using international law, including MEAs, to determine whether Bank policies have been implemented.¹⁷¹ As previously noted, the World Bank's operational policies and procedures address different environmental issues, including EIAs, natural habitats and forests. In practice, these rules have become important bases for the Panel to examine the borrowing governments' fulfilment of their treaty obligations relevant to project activities under specific MEAs.

On some occasions, the Inspection Panel has examined the projects' compliance with Bank rules in light of the borrowers' MEA obligations on the basis of the relevant Bank policies' explicit references to international environmental treaties and agreements.¹⁷² On other occasions, the Panel has identified and considered the borrowers' environmental treaty obligations without any particular references to such MEAs in Bank policies.¹⁷³ Save for the Aarhus Convention,¹⁷⁴ the MEAs referred to in these cases (ie CITES, WHC and the Ramsar Convention) have

170 See generally, Ole Kristian Fauchald, 'Hardening the Legal Softness of the World Bank through an Inspection Panel?' (2013) 58 *Scandinavian Studies in Law* 101.

171 Alix Gowlland Gualtieri, 'The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel' (2001) 72 *British YB Intl L* 213, 245–46.

172 See, eg, *DR Congo Forest-Related Operations*, Investigation Report (n 91) paras 388–94 (referring to the CITES and WHC); *Albania: Power Sector Generation and Restructuring Project*, Investigation Report (n 116) paras 323–32, 337–43, 347–52 (referring to the Aarhus Convention).

173 See, eg, *Pakistan: National Drainage Program Project*, Investigation Report (n 131) paras 347–54, 357 (referring to the Ramsar Convention); *Cambodia: Forest Concession Management and Control Pilot Project*, Investigation Report (n 110) (referring to the WHC).

174 As of 20 May 2016, there are 47 parties to the Aarhus Convention. UNECE (Status of Ratification) <<http://www.unece.org/env/pp/ratification.html>> accessed 28 July 2016.

generally been ratified by the majority of states.¹⁷⁵ Also, the borrowing governments concerned in the abovementioned cases were the States Parties to these MEAs. On the one hand, this shows the Panel's willingness to consider those widely accepted MEAs in its investigations, even if such MEAs are not referred to in Bank policies. This also means that both the World Bank and the governments have to be aware of, and comply with, these environmental treaty obligations (especially those that have been ratified by the borrowing governments) in the course of project finance activities. On the other hand, it remains to be seen whether the Panel will examine the project's compliance with Bank policies in light of specific MEAs to which the borrowing governments concerned are not state parties.¹⁷⁶

Moreover, through these Bank policies, civil society organisations can seek to assert their influence on the behaviour of both the World Bank and the borrowing governments in conducting project activities. In practice, civil society organisations have contributed to this by identifying the borrower's international environmental commitments in their complaints.¹⁷⁷ This shows the importance of civil society's arguments in promoting the implementation of MEA obligations

175 As of 2016, there are 182, 192 and 169 parties to CITES, WHC and the Ramsar Convention respectively. CITES (Member countries) <<https://cites.org/eng/disc/parties/index.php>> accessed 28 July 2016; UNESCO (States Parties/Ratification status) <<http://whc.unesco.org/en/statesparties/>> accessed 28 July 2016; The Ramsar Convention Secretariat (Contracting Parties to the Ramsar Convention) <http://www.ramsar.org/sites/default/files/documents/library/annotated_contracting_parties_list_e.pdf> accessed 28 July 2016.

176 The Performance Standards on Environmental and Social Sustainability of the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA) have provided the possibility for the IFC/MIGA Compliance Advisor Ombudsman (CAO) to evaluate the project's compliance with the Performance Standards in light of MEAs to which the home states of private sector clients are not state parties. For example, according to IFC/MIGA Performance Standard 3 (PS3), the transboundary pollutants that the client should avoid, minimise and/or control releasing include those identified in the Convention on Long-Range Transboundary Air Pollution (adopted 13 November 1979; entered into force 11 June 1981) 1302 UNTS 217 (LRTAP). As the majority of the state parties to LRTAP are based in Europe and North America, but IFC/MIGA-supported projects are implemented in developing countries around the world, the reference to LRTAP under PS3 implies the practical effect of this Convention extending beyond the state parties to private sector companies of non-contracting parties. This also allows the CAO to evaluate the project's compliance with the applicable standards in light of an MEA to which neither the IFC/MIGA nor the home state of the private sector client is a party.

177 See, eg, *Albania: Power Sector Generation and Restructuring Project*, Investigation Report (n 116) para 312 (referring to the Aarhus Convention); *Pakistan: National Drainage Program Project*, Request for Inspection (n 131) para 40 (referring to the Ramsar Convention).

in project finance activities. As the Inspection Panel is a rule-based dispute settlement mechanism, in order to prompt the Panel actively to take account of MEA obligations when conducting investigations, it is of paramount importance to ensure that complainants advance their arguments according to pertinent Bank policies, which may well involve MEAs in an effective manner. The organisations' sharing of information and experience and assistance for local communities and NGOs, especially those in developing countries, can help to build and strengthen the capacity of civil society to make complaints.

As Ellen Hey has noted, although the Inspection Panel does not base its findings on international law in a strict sense, this does not prevent it from considering the project's compliance with treaty obligations pertinent to project finance activities.¹⁷⁸ The Panel's proactive attitude in tackling environmental issues in light of the borrowing government's MEA obligations promotes and contributes to the fulfilment of these treaty requirements by governments and the World Bank when designing, appraising and implementing project activities. Meanwhile, this also allows civil society to influence both the borrowers and the lending institution in implementing project finance activities through Bank policies, which, from a legal perspective, are soft-law instruments.

Finally, it is worth noting that the Inspection Panel adopted its pilot approach in 2014 in order to reach early solutions through dialogue without formal investigations.¹⁷⁹ This early problem-solving approach was launched for the first time in *Nigeria: Lagos Metropolitan Development and Governance Project*, which concerned the compensation issue arising from the demolition of hundreds of homes as part of a housing development project.¹⁸⁰ Future research should investigate if and how the pilot approach will be applied to environmental issues and the role of MEAs, which would otherwise be considered if private complaints are resolved through formal investigations, in the pilot approach.

Meanwhile, the World Bank is now reviewing and updating its current safeguard policies. The second draft of the Environmental and Social Framework

178 Ellen Hey, 'The World Bank Inspection Panel and the Development of International Law' in Nerina Boschiero, Tullio Scovazzi, Chiara Ragni and Cesare Pitea (eds), *International Courts and the Development of International Law: Essay in Honour of Tullio Treves* (Springer 2013) 731.

179 See text to n 27–46.

180 The Inspection Panel, *Nigeria: Lagos Metropolitan Development and Governance Project*, Notice of Non-Registration and Panel's Observations of the First Pilot to Support Early Solutions (16 July 2014) <[http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Notice of Non-Registration \(English\).pdf](http://ewebapps.worldbank.org/apps/ip/PanelCases/91-Notice%20of%20Non-Registration%20(English).pdf)> accessed 28 July 2016.

was issued on 1 July 2015. The proposed Framework comprises a Version for Sustainable Development, the World Bank Environmental and Social Policy for Investment Project Financing, and the Environmental and Social Standards (ESS).¹⁸¹ This Framework is meant to replace several current OPs and BPs, including OP/BP 4.01 on EIA, OP/BP 4.04 on Natural habitats and OP/BP 4.36 on Forests.¹⁸² The draft ESS has in many respects emphasised the importance of the borrower to fulfil its international environmental obligations.¹⁸³ However, the relevant rules do not further specify any particular MEAs that should be adhered to by the borrower. It remains to be seen whether specific MEAs will eventually be incorporated into the ESS and how these rules are applied and interpreted by the Inspection Panel following the adoption of the Environmental and Social Framework.

The establishment of the World Bank Inspection Panel is a constructive step in holding MDBs accountable for their activities. The operation of the Inspection Panel may not only provide redress for those affected by project finance decisions and operations, but also facilitate the implementation of social and environmental rules set out by the World Bank. Based on the above case analysis, this article concludes that the Inspection Panel has actively considered environmental issues in light of MEAs, along with other concerned operational policies and procedures of the World Bank. This was despite the fact that these Bank rules refer to MEAs only on a few occasions. The World Bank Inspection Panel represents an important

181 The World Bank, 'Environmental and Social Framework: Setting Environmental and Social Standards for Investment Project Financing, Second Draft for Consultation' (1 July 2015), para 2 <https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/clean_second_draft_es_framework_final_draft_for_consultation_july_1_2015.pdf> accessed 28 July 2016.

182 *ibid* para 12.

183 See, eg, The World Bank, 'Environmental and Social Standard 1. Assessment and Management of Environmental and Social Risks and Impacts', para 24 <https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/second_draft_proposed_environmental_and_social_standard_ss1.pdf> accessed 28 July 2016; The World Bank, 'Environmental and Social Standard 3. Resource Efficiency and Pollution Prevention and Management', paras 18, 19, 22 <https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/second_draft_proposed_environmental_and_social_standard_ss3.pdf> accessed 28 July 2016; The World Bank, 'Environmental and Social Standard 6. Biodiversity Conservation and Sustainable Management of Living Natural Resources', para 24 (b) <https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-bank-safeguard-policies/en/materials/second_draft_proposed_environmental_and_social_standard_ss6.pdf> accessed 28 July 2016.

example in modern international law in that, as an accountability mechanism, it has taken on a positive role of ensuring the projects' compliance with the environmental treaty obligations of the borrowing countries. Other similar mechanisms set up in regional MDBs¹⁸⁴ should learn from the experience of the Inspection Panel when exercising their investigatory mandates.

184 See, eg, the Independent Consultation and Investigation Mechanism in the Inter-American Development Bank, the Accountability Mechanism in the Asian Development Bank, the Project Complaint Mechanism in the European Bank for Reconstruction and Development, and the Independent Review Mechanism in the African Development Bank.

The Blind Justice Paradox: Judges with Visual Impairments and the Disability Metaphor

*Doron Dorfman**

Abstract

The metaphor connecting blindness and fair-impartial legal treatment has been embodied in the Western world for hundreds of years through the image of a blindfolded woman who represents justice. Nonetheless, not much has been written about the complexities and obstacles that stand in the way of placing actual blind judges on the bench. Nor has the 'Icon of Justice' been used to represent the social struggle for disability rights. This article is the first to turn a spotlight on the long history of blind people in England and the United States serving as members of the judiciary and to explore how this integration dovetails with the symbolic importance of blindness in the iconography of law. The article delves into the varied connotations of blindness throughout Western culture and legal history, specifically in its purported relationship to the objectivity of the judge. Finally, the article contrasts examples of the inclusion of blind people in Anglo-American legal systems with an Israeli case, revealing existing barriers that still prevent many blind people from entering the legal profession.

Keywords

Judges, Judicial Appointment, Disability, Disability Employment, Law and Humanities, Art and Law, Legal History, Comparative Law

1 Introduction

In late December 2014, Richard Bernstein made history as he was sworn in as the first blind person to serve on Michigan's highest court.¹ Bernstein's election

* Bradley Fellow at the Stanford Constitutional Law Center; Graduate Fellow at the McCoy Family Center for Ethics in Society at Stanford University; Perla and Samuel Rubinstein fellow at Alin Beit Noam Institute for Disability Studies; JSD Candidate at Stanford Law School. I would like to thank Susan Schweik, Justice Richard Bernstein, Leora Dahan-Katz, Noam Kuperstein, Asaf Kletter, Sophie Hagen, Emily Polk and the anonymous reviewer for their insightful comments and suggestions.

1 Jacob Gershman, 'Richard Bernstein Brings "Blind Justice" to Michigan's Highest Court' *The Wall Street Journal* (New York, 29 December 2014) <<http://on.wsj.com/1y1ARbg>> accessed 9 August 2016.

is emblematic of the integration of blind persons into symbolic judicial positions in Anglo-American legal systems. This article is the first to turn a spotlight on the long history of blind persons in England² and the United States (US) serving as members of the judiciary and to explore how this integration dovetails with the symbolic importance of blindness in the iconography of the legal system. The article delves into the varied connotations of blindness throughout Western culture and legal history, specifically in its purported relationship to the objectivity of the judge. Finally, the article contrasts examples of the inclusion of blind people in the Anglo-American legal systems with an Israeli legal case. A close examination of these case studies reveals the barriers that remain for individuals with visual impairments who want to enter the legal profession and the beliefs about disability that reinforce these obstacles.

The possibility of a blind individual serving in a judicial position in Israel first presented itself in 2005, when the case of *Amidar v Hai* came before the Tel Aviv District Court.³ An arbitrator in the case went blind while adjudicating it; she was then faced with a request, formally submitted to the court by one of the parties, to disqualify her based on the argument that her disability would prevent her from doing her job. Judge Rina Meshel of the Tel Aviv District Court dismissed the request, delivering an impassioned, advanced argument for the ability of a blind person to serve in a judicial position, specifically on the Israeli bench. However, Judge Meshel's argument was ignored once the case first reached the Israeli Supreme Court.⁴ Presented with the rare opportunity to change common perceptions of the ability of blind persons to hold key roles in Israeli society, the Court failed to rise to the occasion. Although the Court ultimately supported the right of the arbitrator to stay in her role, once the case reached it for the second time,⁵ the decision failed to address the complex processes of societal stigmatisation experienced by those

2 Most of the arguments I make in this article can be applied broadly to the British legal system as well, but since all the examples I use are from England and because the particularities of differences between the British and English systems do not matter to the project, I will refer only to the English system.

3 DC (TA) 23342/04 *Amidar—National Co for Immigrant Housing Ltd v Hai* 2002 (2) 664 (2005) (Isr) (*DC Amidar*).

4 CA 10487/07 *Amidar—National Co for Immigrant Housing Ltd v Hai* (5 May 2010), Nevo Legal Database (by subscription) (Isr) (*CA Amidar*).

5 CA 6931/11 *Amidar—National Co for Immigrant Housing Ltd v Hai* (10 November 2011), Nevo Legal Database (by subscription) (Isr) (*CA Amidar 2011*).

living with disabilities—processes acknowledged by numerous legal judgments and theoretical texts associated with the field of disability studies.

Disability studies is a relatively new field that is gaining momentum in academia and beyond.⁶ This field aims to study disability as a social, cultural, and political phenomenon across settings and disciplines.⁷ Disability studies is based on the premise that disability is socially constructed rather than purely a medical-pathological phenomenon that is intrinsic to the individual. This idea underlined the social model of disability that was developed in the early 1970s. This model elucidated the complex processes by which people with disabilities are stigmatised and consequently excluded and discriminated against by society. Further research and the theoretical development of the social model led to the understanding of disability as a complex and fluid phenomenon that ‘encompasses a wide range of bodily, cognitive and sensory differences and capacities’, yet ‘is produced as much by environmental and social factors as it is by bodily functions.’⁸

A disability rights critique of the law can be identified as early as the mid-1960s in the writings of Jacobus tenBroek, one of the founders of the US disability rights movement and the founder and president of the American National Federation of the Blind.⁹ Yet only in 2006 was a new field called disability legal studies, which infused the disability studies perspective into legal scholarship and practice, officially introduced by Israeli legal scholar Sagit Mor.¹⁰ This work contributes to the field of disability legal studies by investigating the role that courts, legal actors

- 6 Cecilia Capuzzi Simon, ‘Disability Studies: A New Normal’ *The New York Times* (New York, 1 November 2013) <http://www.nytimes.com/2013/11/03/education/edlife/disability-studies-a-new-normal.html?_r=0> accessed 9 August 2016; In August 2016, *The New York Times* initiated a series of stories on disability, written by disability studies scholars and people with disabilities. The first story by renowned disability studies scholar Rosemarie Garland-Thomson, touching on key concepts in the field such as disability, culture and identity, was published on 19 August 2016. See Rosemarie Garland-Thomson, ‘Becoming Disabled’ *The New York Times* (New York, 19 August 2016) <http://www.nytimes.com/2016/08/21/opinion/sunday/becoming-disabled.html?smid=fb-share&_r=0> accessed 22 August 2016.
- 7 Simi Linton, ‘What Is Disability Studies?’ (2005) 120 PMLA 518, 518; Sagit Mor, ‘Between Charity, Welfare, and Warfare: A Disability Legal Studies Analysis of Privilege and Neglect in Israeli Disability Policy’ (2006) 18 Yale J L & the Human 63, 64; Dan Goodley, *Disability Studies: An Interdisciplinary Introduction* (SAGE Publications 2010) xi.
- 8 Rachel Adams, Benjamin Reiss and David Serlin, ‘Disability’ in Rachel Adams, Benjamin Reiss and David Serlin (eds), *Keywords for Disability Studies* (New York UP 2015) 5–6.
- 9 Jacobus tenBroek, ‘The Right to Live in the World: The Disabled in the Law of Torts’ (1966) 54 California L Rev.
- 10 Mor (n 7) 67–68; Arlene S Kanter, ‘The Law: What’s Disability Studies Got to Do With It or an Introduction to Disability Legal Studies’ (2011) 42 Colum Hum Rts L Rev 403, 426–28.

and legal iconography play in the social construction of blindness inside and outside the courthouse.

This article also addresses the varied concepts and iconographies of 'blind justice' in Western societies and legal systems and draws connections between these metaphorical narratives and the appearance of literal, physical disability in the legal system. On the one hand, the image of a blindfolded woman holding a sword in one hand and scales in the other, to whom I refer as the 'Icon of Justice', represents the law's declared aspiration that judges achieve 'metaphoric blindness' with regard to those characteristics of the litigants that are irrelevant to the essence of the dispute or offence. On the other hand, Western society generally considers physical blindness to be a debilitating disability that prevents the blind person from performing a wide range of tasks and from serving, *de facto*, in a wide range of professional positions. I term this ambivalent attitude towards blindness in the legal sphere as the Blind Justice Paradox. Through an analysis of American, English, and Israeli case studies and examples, as well as the theoretical and representational basis on which their respective approaches to disability and blindness are founded, this article demonstrates the ways in which physical realities intrude upon the iconographical basis for societal imaginings of rationality and difference. Far from merely serving as a theoretical exercise, this article seeks not only to shed light on the contradictions in legal approaches to metaphoric and literal blindness, but also to advance the discourse regarding the rights of people with disabilities and to help alter stereotypes regarding their abilities and skills. By presenting facts from the actual historical records relating to representations of blindness in the legal systems of the West, this article forms part of a larger movement to promote the integration of blind persons into key roles in society.

The article is divided into three main sections: In the first section, I analyse the term 'blind justice' as it is presented through the symbol of the 'icon of Justice', including a discussion of the sociocultural associations with blindness throughout history as they appear in literature and folklore. This reveals the many, often contradictory approaches of the legal system toward blindness as imagery and as disability. In the second section, I present examples of the successful integration of blind judges into the English and American legal systems, and I trace its history back to the eighteenth century. I also discuss the social model of disability and, through it, the barriers that still exist in incorporating blind persons into the legal market and the judiciary. In the third section, I analyse the Tel Aviv District Court's judgment in the matter of *Amidar v Hai*: a brave approach that constitutes, in my opinion, a first step in paving the way for blind Israelis to fill judicial or quasi-judicial positions. I then present the Israeli Supreme Court's judgment in the

same matter, and demonstrate how it could have done better to promote a positive discourse surrounding the integration of blind persons into the Israeli legal system.

2 Socio-Cultural Aspects of 'Blind Justice'

2.1 The Ambiguity of the Icon of Justice

Throughout most of Western civilisation's history, 'justice' has been personified as a large woman, depicted in the nude or in a traditional Greek toga, bearing a series of symbolic objects. The most commonly recognised of these objects are the sword, the scales, and the blindfold, which in some depictions covers her eyes completely and in others has been pierced with holes that allow her to see through it.¹¹ The image of this intriguing woman—a religious, cultural and political icon—can be found in courts, town squares, law schools, and public buildings throughout Western Europe and the US, as well as in works of visual art, books, films, and other cultural products.¹²

Interestingly, this woman is one of many icons, mostly female, who symbolise abstract, philosophically important concepts. None of them, however, seem to have lingered in public consciousness more than the woman who represents justice.¹³ One possible explanation is that, over the course of history, Western sovereigns and governments have sought to associate themselves with the virtue of justice, taking pains to incorporate it visibly into their core societal institutions and maintain a connection with it in the public's awareness.¹⁴

11 Among the objects surrounding various images of the Icon of Justice are a bundle of wooden sticks and an axe (*fascēs*)—which historically symbolised the Roman Republic and the legal system—and a curved goat's horn overflowing with fruits and grains (*cornucopia*)—a symbol of wealth and food in ancient Greece and Rome. See Dennis E Curtis and Judith Resnik, 'Images of Justice' (1987) 96 Yale LJ 1727, 1741–43.

12 *ibid*; For recent examples of the use of the Icon of Justice in cultural products see Judith Resnik and Dennis Curtis, *Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms* (Yale UP 2011) 1–8.

13 The image of the Icon of Justice first appeared in the Middle Ages together with six other female icons representing basic virtues and qualities: intelligence, restraint, courage, faith, hope and generosity: Curtis and Resnik (n 11) 1729–31; Resnik and Curtis (n 12) 10.

14 It could be argued as well that the iconography of justice was used as visual justification for violence and strict measures on the part of sovereigns against their subjects. The other virtues, presented through other icons, were not as crucial for maintaining order and authority: Curtis and Resnik (n 11) 1734; Resnik and Curtis (n 12) 12.

The Icon of Justice image has gone through many transformations and has been linked to the religious iconography of various cultures (including Egyptian, Greek, and Roman mythology, as well as the New Testament); however, the objects surrounding the Icon are almost entirely consistent across manifestations.¹⁵ The aspect of the Icon of Justice that is often characterised as the ‘most mysterious and challenging’ is the woman’s blindfold, on which I choose to focus. This blindfold and the state of forced blindness that it imposes are, interestingly, absent from the Icon’s first incarnations. Thus, for example, coins in circulation during the reign of the Roman emperor Tiberius (who ruled from 14 to 37 CE) feature a woman holding a sword and scales with eyes uncovered. Similarly, artefacts from the Middle Ages depict the Icon with her eyes wide open. The blindfold began appearing on the Icon of Justice in the fifteenth century. This has encouraged many contemporary scholars to contemplate the nature of this forced blindness and its symbolism.¹⁶

In contemporary Western culture and art, blindness is treated ambivalently: on the one hand, it is perceived as a disability, as helplessness, or as punishment for sin and immorality¹⁷; on the other hand, it is considered to accompany the positive virtues of divine spirit, divine wisdom, clairvoyance, and fair and untainted judgment. This attitude of simultaneous awe and disgust, which I refer to as the Blind Justice Paradox, is also directed towards the blindness of the Icon of Justice.

The first known interpretation of the Icon’s blindness during the Middle Ages and the Renaissance was based on a European woodblock print from the year 1494 that appeared in Sebastian Brant’s book *Ship of Fools*.¹⁸ In the print, a fool is seen covering the eyes of the Icon of Justice, who is sitting in a chair, holding a sword and scales. Scholarly interpretations of this image have viewed the woman’s blindness as preventing her from properly using her sword or from seeing what is placed on the scales—that is, the blindness is a disability that prevents her from carrying out true justice. Blindness as a symbol of idiocy, incapacity, and disability

15 N S Gill, ‘Lady Justice, Justice Goddess Themis, Dike, Astraea, or Roman Goddess Justitia’ (*About.com*) <<http://ancienthistory.about.com/cs/grecomromanmyth1/a/justicegoddess.htm>> accessed 9 August 2016.

16 Martin Jay, ‘Must Justice Be Blind? The Challenge of Images to the Law’ in Costas Douzinas and Lynda Nead (eds), *Law and the Image: The Authority of Art and the Aesthetics of Law* (University of Chicago Press 1999) 19; David Howes and Constance Classen, *Ways of Sensing: Understanding the Senses in Society* (Routledge 2013) 95.

17 Georgina Kleege, *Sight Unseen* (Yale UP 1999) 14–15.

18 The Ship of Fools is an allegory first published in Basel, Switzerland. For additional information, see Duchan Caudill, ‘Ship of Fools’ (*About.com*) <<http://archive.fo/Z9j7B>> accessed 9 August 2016; Resnik and Curtis (n 12) 68.

also appears in iconography at the Strasbourg Cathedral in France. There, the icon of the blind woman as a symbol of the Jewish synagogue, which resists the enlightenment presented by the church and continues living in sin and ignorance, is set against the icon of the Christian church, a woman who is wide-eyed and open to redemption.¹⁹

The importance attributed in ancient history to the sense of sight is also demonstrated in the 'Eye of the Mind' metaphor, developed in Greek philosophy at the time of Plato to represent the wisdom, intellect, and perception of the world that separates man from animal. The metaphor claims that a person perceives and understands the world through his or her sense of sight, which is therefore superior among the five senses and essential in order to understand the world and grow.²⁰ This concept is also expressed in the Hebrew language, in which one word (PIKACH-פִּיקַח) is used to describe both a person who is sighted and one who is intelligent: describing someone who can 'see with his eyes' thus simultaneously evokes the sense of 'a person with great intellect, whole in his senses and mind'.²¹

2.2 Blindness in Folklore and Literature and the Medical-Individual Models of Disability

The negative cultural associations with blindness abound, and are not only transmitted through visual art.²² In folklore, blindness is often presented as punishment for inappropriate behaviour or moral misconduct connected to 'sexual offences'—self-gratification among men or promiscuous behaviour and infidelity

19 Jay (n 16) 21; Curtis and Resnik (n 11) 1756; Resnik and Curtis (n 12) 65; For an impression of the icon statues, see Mary Ann Sullivan, 'Ecclesia (Church) and Synagoga (Synagogue), Column Figures, South Transept Portal, Strasbourg Cathedral' <www.bluffton.edu/~sullivanm/strasbourg/strasbourg.html> accessed 9 August 2016.

20 Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton UP 1981) 38–39, 159; For a critique from the disability studies discipline of philosophical theories, which sanctify the sense of sight, see Anita Silvers, 'Formal Justice' in Anita Silvers, David T Wasserman, Marry B Mahowald and Lawrence C Becker (eds), *Disability, Difference, Discrimination: Perspectives on Justice in Bioethics and Public Policy* (Rowman & Littlefield Publishers 1999) 87–89; Georgina Kleege, 'Blindness and Visual Culture: An Eyewitness Account' in Lennard J Davis (ed), *The Disability Studies Reader* (4th edn, Routledge 2013) 447.

21 Entry: פִּיקַח (phonetic–Pike'ah) Eitan Avnion (ed), *Sapir Dictionary: Hebrew-Hebrew Dictionary Concentrated in the Present Method* (Prolog Publishing House Ltd 1997) 874.

22 I Bennett Capers, 'On Justitia, Race, Gender, and Blindness' (2006) 12 Michigan J Race & L 203, 210.

among women.²³ In certain cultures, blindness is considered a contagious disease, causing the banishment of blind people from society,²⁴ and in *Leviticus*, blindness is among the conditions that bar a person from entering the Holy Temple.²⁵

In folktales and Western literature from the eighteenth and nineteenth centuries, blind people are considered to be destructive and evil.²⁶ Literature of the twentieth century continues the trope, drawing on blindness to instil fear and horror in readers. Perhaps the most prominent example is José Saramago's novel *Blindness* from 1995,²⁷ which describes a city plagued by 'white blindness' in which those infected with loss of sight are institutionalised. Harsh scenes describe the terror of their condition: blind people, unable to find bathrooms, are forced to urinate in the hallways of the institution;²⁸ a blind man innocently and inadvertently comes too close to a fence and is shot by guards; horrific rapes occur within the blind community.²⁹ From these examples alone we can see how the novel uses blindness as an analogy for depravity and loss of humanity. The fact that the story's protagonist, the doctor's wife and the only one who does not lose her eyesight, is also the one to put a stop to the abuse and deliver justice by murdering the main rapist reinforces this conclusion.³⁰

Yaakov Steinberg's short story *The Blind Woman* from 1912³¹ tells the tale of Hannah, blind from birth and wed to a stranger, in an Eastern European Jewish community in the early twentieth century. Throughout the story, the reader must attempt to decipher Hannah's new and mysterious surroundings, her home, and her new husband's occupation. The husband, who wears heavy shoes, uses a large staff,

23 Annie Wagner-Lampl and George W Oliver, 'Folklore of Blindness' (1994) 88 *J Visual Impairment & Blindness* 267, 269; See also Jacobus tenBroek and Floyd W Matson, 'The Disabled and the Law of Welfare' (1966) 54 *California L Rev* 809, 813.

24 Wagner-Lampl and Oliver (n 23) 270.

25 *Leviticus* 21: 18.

26 Wagner-Lampl and Oliver (n 23) 271; For an overview of scholarship discussing the negative imagery of people with disabilities in literature, see David T Mitchell and Sharon L Snyder, *Narrative Prosthesis: Disability and the Dependence of Discourse* (University of Michigan Press 2001) 17–21.

27 José Saramago, *Blindness* (1st edn, Harvest Books 1999).

28 *ibid* 107–08.

29 *ibid* 142–43.

30 *ibid* 152–54; For additional critical reading of Saramago's novel, see Liat Ben-Moshe, 'Infusing Disability into the Curriculum: The Case of Saramago's *Blindness*' (2006) 26 *Disability Studies Q* <www.ds-q-sds.org/article/view/688/865> accessed 9 August 2016.

31 Yaakov Steinberg, *The Blind Woman, The Rabbi's Daughter, Daughter of Israel, Between the Silver Bricks* (Babel Publishing 2001) (Hebrew).

and utters few words throughout the narrative, gives the reader an impression of being nearly inhuman. In contrast to the characters of *Blindness*, the blind woman in this story represents humanity, while the sighted person, without disability, lacks it. Steinberg thus creates a protagonist with a physical impairment and focuses the story on her doomed attempt to cope with it, conveying a sense of human helplessness against 'a cruel fate' prescribed from childhood.

Blindness as reflected in folklore and literature is mirrored in the medical-individual models of disability that frame disability as misfortune and those with disabilities as 'less equal' and incompetent.³² The medical-individual models were developed during the nineteenth and early twentieth centuries, a time when the responsibility of Western governments to provide health services for their citizens had not yet been established. Therefore, it fell on physicians to treat and advise people with regard to health-related issues. This period of time also saw the rise of institutions in an attempt to control the non-working population, comprised mainly of people with disabilities.³³ Therefore, people with disabilities were excluded and segregated from society and its education system and labor market, in order to allow them to receive medical care. The exclusion of people with disabilities from society perpetuated complex processes of stigmatization and myth surrounding them and their capabilities.³⁴ Disability was seen as something that needed to be fixed so that the disabled could fit into society, regardless of their needs, wishes, or life experiences.³⁵ Historically in the US, disability served as an excuse for differential treatment and deprivation of rights not only with regard to disabled people, but also as a justification for the unequal treatment of the members of other groups, such as women and people of colour.³⁶ This structuring of pathology is now referred to as 'ableism': the process by which a person's overall abilities are considered to correspond directly to his or her sensory, physical, or mental abilities

32 Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* (Routledge 1997) 27.

33 Mike Oliver, 'Social Policy and Disability: Some Theoretical Issues' (1986) 1 *Disability, Handicap & Society* 5, 14.

34 Deborah A Stone, *The Disabled State* (Temple UP 1984) 107–17; Colin Barnes, 'A Brief History of Discrimination and Disabled People' in Davis (n 20) 20, 29.

35 Anthony F LoBianco and Kathy Sheppard-Jones, 'Perceptions of Disability as Related to Medical and Social Factors' (2007) 37 *J of Applied Social Psychology* 1, 1–2; Susan Wendell, 'Toward a Feminist Theory of Disability' in Davis (n 20) 336, 349.

36 See generally Douglas C Bayton, 'Disability and the Justification of Inequality in American History' in Paul K Longmore and Lauri Umansky (eds), *The New Disability History: American Perspective* (NY UP 2001) 33–57.

and measured against a level of productivity determined by non-disabled people.³⁷ According to this paradigm, only those with medical-rehabilitation training are qualified to 'repair' people with disabilities, while members of the community should not be involved in choosing how best to accommodate their own physical or mental needs.³⁸ Disability has thus been historically perceived as inherent to the person herself, hence the individual model of disability, which goes hand in hand with the medical model and views disability as a trait that an individual should try to overcome and undermines the role that myth and stigma play in the social construction of disability.³⁹

The literary works described above greatly emphasise the difference between a disabled and a non-disabled person, and use their characters' impairments as the main catalyst for plot developments.⁴⁰ Through the conscious or subconscious use of *synecdoche*, a literary-figurative device in which a whole is represented by its parts, the disability (blindness) essentially replaces the protagonist. Thus, Hannah from Steinberg's story is no longer a woman forced to marry a stranger and move her life to his home, but rather, a 'blind woman' whose disability forms the essence of her self.⁴¹ Disability studies scholar David Bolt describes a trend in twentieth century literature where many blind literary characters' names are displaced by

- 37 Simi Linton, *Claiming Disability: Knowledge and Identity* (NY UP 1998) 9; Gregor Wolbring, *The Politics of Ableism* (2008) 51 Development 252, 252–53.
- 38 Marta Russell, *Beyond Ramps: Disability at the End of the Social Contract: A Warning from an Uppity Crip* (Common Courage Press 1998) 15.
- 39 Michael Oliver, *The Politics of Disablement: A Sociological Approach* (Palgrave Macmillan 1990) 11; Rod Michalko, *The Difference that Disability Makes* (Temple UP 2002) 6–7 and 51; Lorella Terzi, 'The Social Model of Disability: A Philosophical Critique' (2004) 21 *J of Applied Philosophy* 141, 142–43.
- 40 Disability Studies scholars David Mitchell and Sharon Snyder argue that in many Western literary pieces, disability served as an 'opportunistic metaphorical device' they call 'narrative prosthesis': 'We therefore forward reading of disability as a narrative device upon which the literary writer of "open ended" narratives depends for his or her disruptive punch. Our phrase *narrative prosthesis* is meant to indicate that disability has been used throughout history as a crutch upon which literary narratives lean for their representational power, disruptive potentiality, and analytical insight (...) we want to demonstrate that the disabled body represents a potent symbolic site of literary investment'. Mitchell and Snyder (n 26) 49.
- 41 As articulated by Rosemarie Garland-Thomson: 'A disability functions only as visual difference that signals meaning. Consequently, literary texts necessarily make disabled characters into freaks, stripped of normalizing contexts and engulfed by a signal stigmatic trait'. Rosemarie Garland-Thomson, *Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature* (Columbia UP 1997) 11.

labels that refer to blindness, most obviously ‘the blind girl’ and ‘the blind man.’⁴² Bolt refers to this process as ‘nominal displacement,’⁴³ while demonstrating it in writings of such authors as Kenneth Jernigan,⁴⁴ Mary Norton,⁴⁵ and Stephen King,⁴⁶ all of whom have had female blind characters who were regarded as infantile, objectified, asexual, and weak,⁴⁷ similar to Steinberg’s Hannah. A notable character of a blind male judge in Thomas Wolfe’s 1940 novel *You Can’t Go Home Again*, Judge Rumford Bland, is described as causing fear and panic as a result of his presence alone and as having an ‘evil ghost-shadow of a smile’ and a ‘suggestion of a devilish humour’ when he speaks.⁴⁸

The perception of impairment as a barrier or tangible division between society and the disabled person links the cultural-literary perception of people with disabilities and the medical-individual models.⁴⁹ I argue that the connection between them is compelling because it helps to explain society’s discriminatory approach towards people with disabilities—blind people in this case—throughout history, within a legal framework and otherwise.

2.3 The Turning Point with Respect to Blindness in Culture and Law

In the mid-1500s, about a century after the creation of the woodblock print published in *Ship of Fools* and the connotations given therein to blindness, the trend reversed: positive interpretations of the Icon of Justice’s blindness became more prevalent. Asceticism, including an unwillingness to yield to ‘the lust of the eyes,’ was increasingly promoted by various religious factions. Blind persons were considered by these ascetics to possess the superior ability to avoid visual

42 David Bolt, *The Metanarratives of Blindness: A Re-reading of Twentieth-Century Anglophone Writing* (University of Michigan Press 2013) 36–37.

43 *ibid* 36.

44 *ibid* 37.

45 *ibid* 39.

46 *ibid* 41.

47 *ibid* 38–39.

48 *ibid* 44–45.

49 Garland-Thomson (n 41) 79; For a note discussing the low societal expectations of disabled people and the manifestation of the idea that ‘[d]isabled people are not just their obvious impairments’, see Tom Shakespeare, *Why Disabled Achievers Should Be Remembered* (BBC News Blogs, 9 January 2015) <<http://www.bbc.com/news/blogs-ouch-30700874>> accessed 9 August 2016.

temptations and thus, blind judges could potentially hear the parties' arguments in a neutral and objective manner.⁵⁰

Later, with the onset of the early modern period and the relinquishing of the feudal law of the Middle Ages, secular groups began attributing objectivity to blindness, using this metaphor to break from the constraints of religious rule and establish the independence of the judicial branch.⁵¹ It is no wonder that in Western Europe, the image of the Icon of Justice began appearing throughout the public sphere, adorning the fronts of the public buildings of the new civil government, now disconnected from the church. Legal scholars began to distance themselves from theories of natural, divine law and embrace the verbal drafting of codes and the development of a formative-factual standard of legal norms. Interestingly, during this time of the early modern period, other types of disabilities symbolised the desire to avoid unjust judgments. An example is a 1604 fresco from the Geneva City Hall, painted by Italian artist, Cesare Giglio, depicting judges who are handless and thus cannot receive bribes.⁵²

The Icon of Justice's blindness suited, therefore, the legal positivism movement of the period.⁵³ Current legal theory continues to mandate that judges keep a certain distance from the cases before them and exclude any personal views and ideologies from their judgments. Justice should be 'blind', ie, objective.⁵⁴ However, advocates of impartiality do admit to the difficulty of the task. The Icon of Justice's blindfold would, in reality, do little to enable impartial judging.

As part of his *Theory of Justice*, the philosopher John Rawls developed the 'veil of ignorance' doctrine. Rawls claimed that in order to create a fair and just process that does not lean in favour of a certain social group or conform to existing power dynamics, judges must detach themselves from their individual identities, as well as all character traits that might be relevant to the cases before them. Thus, obscuring herself behind the veil of ignorance, the decision-maker would seek to become an 'abstract human entity', able to judge equally and justly. The concept of the veil of ignorance is one of the most influential theoretical ideals of the legal system; its actual application, however, has proved to be complicated, just as the ideal of the

50 Jay (n 16) 24.

51 Curtis and Resnik (n 11) 1746.

52 *ibid* 1750; Sionaidh Douglas-Scott, *Law After Modernity (Legal Theory Today)* (Hart 2013) 216.

53 Jay (n 16) 24.

54 Thane Rosenbaum, *The Myth of Moral Justice: Why Our Legal System Fails to Do What's Right* (Harper Perennial 2005) 157; Scott (n 52) 217.

Icon of Justice occupies a position that is somewhat distant from reality.⁵⁵ Despite the difficulties of its implementation, however, the basic concept underlying Rawls' theory—'tactical ignorance', or 'tactical blindness'⁵⁶—can be found in existing practices. Thus, for example, in law schools around the world, exams and papers are submitted to professors anonymously to be rated objectively and 'blindly'.⁵⁷

Another scholarly camp rejects the ideal of complete objectivity out of hand, considering judgments based on one's personal perceptions as *faits accomplis*; they cannot be denied, and therefore the injustice should be accepted in certain cases.⁵⁸ Judge and scholar Learned Hand commented a number of times on the subject, arguing that, even if most judges will never admit it, many of their decisions are not objective; a judge cannot behave like a 'clean slate' and achieve total emotional disengagement.⁵⁹

A more moderate approach is offered by former Israeli Supreme Court Chief Justice and Yale Law School Professor Aharon Barak. In his book, *The Judge in a Democracy*, he claims that 'the judge must realize his role in a democracy impartially and objectively (...) Absence of bias is essential to the judicial process; hence the image of justice as blindfolded'.⁶⁰ According to Barak, the judge's objectivity is attainable, though it is not an easy task:

The objectivity required of a judge is difficult to attain. Even when we look at ourselves from the outside, we do so with our own eyes. Nonetheless, my judicial experience tells me that objectivity is possible. A judge does not operate in a vacuum. A judge is part of society, and society influences the judge. The judge is influenced by the intellectual movements and the legal thinking that prevail. A judge is always part of the people (...) He progresses with the history of the people. All of these elements contribute to the judge's objective perspective. Moreover, the judge acts within the limits of the court. He lives within a judicial tradition (...) The heavier the weight of the system, the greater the objectification of the judicial process.⁶¹

However, even Barak acknowledges that 'some subjectification of the process is inevitable (...) The personal aspect of a judge is always present, and his life

55 Christopher Tarver Robertson, 'Blind Expertise' (2010) 85 NYU Law Rev 174, 203; Howes and Classen (n 16) 98.

56 Robertson (n 55) 204–05.

57 *ibid* 205.

58 Rosenbaum (n 54) 157–78.

59 *ibid* 157–60.

60 Aharon Barak, *The Judge in a Democracy* (Princeton UP 2006) 101–02.

61 *ibid* 104–05.

experience neither disappears nor can disappear.’⁶² According to Barak, ‘it is enough for a judge to make an honest attempt to objectify his exercise of discretion, recognizing that it cannot be done in every circumstance.’⁶³

Apart from the idea of objective and just judicial decision-making, there are other virtues, such as extraordinary ‘compensatory powers’ or even a sixth sense, associated with blindness and blind people in Western literature.⁶⁴ In ancient Greece, mystical abilities of magical healing were attributed to the blind. For instance, the blind prophet Tiresias in Sophocles’s tragic play, *Oedipus the King*, possesses magical powers given to him by the gods as compensation for his blindness. Famous Greek poet Homer was also blind, and his poetry was considered to be ‘the kind which stems from divine inspiration.’⁶⁵

The progressively more positive depictions of the Icon of Justice’s blindness reflect an ideological trend in the Anglo-American legal system that has opened doors for blind persons to serve in influential positions. Nevertheless, structural-societal barriers to the full integration of blind persons in key positions in general, and in the legal profession in particular, still remain.

3 The History of Blind Judges in Anglo-American Law

In this section I present a number of examples of the successful integration of blind judges into the legal systems of the US and England. The integration of blind judges in the American and English systems has a 300-year history, and a number of blind judges have presided over the supreme courts in the US and England.

In the US there are currently two organisations for blind legal professionals devoted to making the profession accessible to people with visual impairments. The National Association of Blind Lawyers and the American Association of Visually Impaired Attorneys are very similar in nature and in their social goals.⁶⁶ Despite the efforts of these organisations to compile information about blind legal professionals, there is no official estimate regarding the number of blind judges presiding over courts in the US. This article is the first step in filling this gap in the literature.

62 *ibid* 105.

63 *ibid*.

64 Bolt (n 42) 69–76.

65 Wagner-Lampl and Oliver (n 23) 272–74.

66 Associated with the umbrella organisation, the American Council of the Blind (ACB).

Disability studies scholars called attention to the phenomenon of ‘false admiration’ of people with disabilities by non-disabled members of society and mainstream media.⁶⁷ The idea is that disabled individuals and professionals are being praised and put on a pedestal for routine tasks that they perform as part of their jobs, just because they live with disabilities.⁶⁸ The patronising message behind the phenomenon of ‘false admiration’ is that people with disabilities are less capable or should have things done for them, and therefore should be praised when they do it themselves.⁶⁹ In this section, I make an effort to avoid this patronising view and present the experiences and stories of blind judges that include hardships and failures alongside success and appreciation (as opposed to false admiration), as these are part of every professional career.

3.1 Stories from England

London of the mid-eighteenth century was a dangerous city. Between the years 1748 and 1754 the city experienced a wave of violence and crime that continued unabated despite the tough stance taken by the legal system and legislators against even petty crimes. In those years, Sir John Fielding served as a magistrate at the Westminster Court.⁷⁰ In 1754, Fielding, who had gone blind about a decade beforehand, took upon himself the implementation of a programme to eliminate crime in the city. The programme had been devised by his half-brother, renowned judge and author

67 Ben Whitburn, ‘Attending to the Potholes of Disability Scholarship’ in Tim Corcoran, Julie White and Ben Whitburn (eds), *Disability Studies: Educating for Inclusion* (Sense Publishers 2015) 215, 221; Katie Ellis and Gerard Goggin, *Disability and the Media* (Palgrave Macmillan 2015) 62–63; Emily Rapp Black, ‘My Paralympic Blues’ *The New York Times* (New York, 31 August 2016) <<http://www.nytimes.com/2016/08/31/opinion/my-paralympic-blues.html>> accessed September 19, 2016.

68 Late Australian comedian and advocate Stella Young used the term ‘inspiration porn’ to describe the objectification of disability, both in media and in everyday interactions. See Stella Young, *Inspiration Porn and the Objectification of Disability* (2014) <https://www.youtube.com/watch?v=SxrS7-I_sMQ> accessed 16 October 2016; Ellis and Gerard Goggin (n 67) 63.

69 Richard M Keller and Corinne E Galgay, ‘Microaggressive Experiences of People with Disabilities’ in Derald Wing Sue (ed), *Microaggressions and Marginality: Manifestation, Dynamics and Impact* (Wiley 2010) 241, 255–56.

70 J M Beattie, ‘Sir John Fielding and Public Justice: The Bow Street Magistrates’ Court 1754–1780’ (2007) 25 LHR 61, 61.

Henry Fielding, who had recently passed away.⁷¹ Fielding implemented the plan so successfully that within two years he was able to curb the criminal activity of the city's powerful gangs. His success earned him accolades as the 'most creative judge of the eighteenth century'. He was eventually knighted.⁷² As a tribute to his brother, Fielding turned the latter's house on Bow Street into the headquarters from which he headed his operations for twenty-six years, until his death in 1780.⁷³

One of Fielding's greatest successes was his establishment of an innovative bureaucratic mechanism for investigating crime, which was based on collecting information and cataloguing it in archives. Fielding even utilised the main promotional medium of those days—the daily press—to publish reports of crimes, descriptions of suspects and awards for those assisting the investigation.⁷⁴ Fielding created novel practices pertaining to the management of the criminal process, making it accessible to the public, and thus set into motion a mechanism later named 'public justice'.⁷⁵ The name reflected his commitment to serving the most marginalised members of English society. He also arranged workshops and classes at designated institutions for abandoned children and youth with a propensity towards crime. Fielding is quoted arguing that, although his blindness—which was caused by an accident—was perceived by everyone around him as a disaster, he himself did not see it that way at all.⁷⁶ Interestingly, however, Fielding did not provide any official support for people with visual impairments.

Despite his success story, about 200 years after Fielding's death, in 1946 an order was issued in England that prohibited blind judges from receiving the status of magistrate. The argument underlying the order was that the disability of these judges prevented them from forming a proper impression of the defendants appearing before them.⁷⁷ In 2001, the order was revoked by then British Minister

71 John Dashney, 'The Blind Beak of Bow Street' <<https://nfb.org/images/nfb/publications/books/kernel1/kern0808.htm>> accessed 9 August 2016.

72 Beattie (n 70) 63.

73 Dashney (n 71).

74 Beattie (n 70) 69.

75 *ibid* 70.

76 Dashney (n 71). This remark, as well as Fielding's success in creating a revolution in the execution of the criminal process, testifies to the deep roots of the social model of disability among disabled people, even before it was officially articulated in the 1970s, as will be discussed later in the article.

77 Tom Utley, 'Blindness a Virtue in Justice but Seldom on the Bench' *The Telegraph* (London, 27 June 2001) <<http://www.telegraph.co.uk/comment/4263377/Blindness-a-virtue-in-Justice-but-seldom-on-the-Bench.html>> accessed 9 August 2016.

of Justice Lord Derry Irvine, who appointed nine blind judges after having them serve for a trial period.⁷⁸

In 1990 the first blind judge, Sir John Wall, was appointed to England's High Court of Justice, the highest civil court in England.⁷⁹ Wall, who went blind when he was eight years old, is described as a man blessed with a phenomenal memory. He began his career as an attorney in the private sector, after studying throughout his life at both institutes for blind people and integrated institutes. Wall explained that finding employment after his graduation from Oxford had been a difficult task, and that he had therefore decided to focus his efforts on advocating for the employment of people with disabilities.⁸⁰ Unlike John Fielding, Wall worked extensively to promote the interests of people with disabilities, and he was even knighted in 2000 for his societal contributions and services.⁸¹ Wall retired from the English court in 2002 but continued his social activity from outside the court until he passed away in 2008.⁸²

In 1997, legal scholar Amir A. Majid was appointed as a part-time immigration judge.⁸³ Majid, who went blind later in life while a student at a university in Pakistan, where he was born, is a prominent scholar in international law and also works on disability-related issues.

Judge John Lafferty, who has been blind from birth, was appointed to be a judge in Snaresbrook Crown Court, England's largest court, in 2007 and currently serves on the bench.⁸⁴ Like Wall, Lafferty, who practised law as a solicitor for 20 years

78 Matt Born, 'Lord Chancellor Lifts Ban on Blind Magistrates' *The Telegraph* (London, 26 June 2001) <<http://www.telegraph.co.uk/news/uknews/1310223/Lord-Chancellor-lifts-ban-on-blind-magistrates.html>> accessed 9 August 2016; 'Bill Set to Become First Blind Magistrate' *The Bolton News* (Bolton, 13 July 2001) <http://www.theboltonnews.co.uk/news/6019826.Bill_set_to_become_first_blind_magistrate/> accessed 9 August 2016.

79 This is one house out of three constituting the Supreme Court in England.

80 John Wall, 'The Rights of Blind People' (2003) 16 *Community Eye Health J* <<http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1705870/>> accessed 9 August 2016.

81 'Birthday Honours List–United Kingdom' *The London Gazette* (Supplement No 1, London, 16 June 2000) <<https://www.thegazette.co.uk/London/issue/55879/supplement/1/data.pdf>> accessed 9 August 2016.

82 'Sir John Wall: First Blind High Court Judge of Modern Times' *The Times* (London, 11 December 2008) <<http://www.thetimes.co.uk/tto/opinion/obituaries/article2083884.ece>> accessed 29 August 2016.

83 'Blind Lecturer a Judge' *Times Higher Education* (London, 21 November 1997) <<https://www.timeshighereducation.com/news/blind-lecturer-a-judge/104451.article>> accessed 9 August 2016.

84 Jonathan Rayner, 'Interview: John Lafferty' *The Law Society Gazette* (28 September 2015) <<http://www.lawgazette.co.uk/people/interview-john-lafferty/5051158.fullarticle>> accessed 9 August 2016.

after graduating from the University of Leeds, admitted that finding employment after graduation had been a difficult task. In Lafferty's words:

Many prospective employers are unable to make the leap of imagination to see how a blind person can do a job that is regarded as difficult, such as practicing as a lawyer (...) If you can just have a dialogue with a prospective employer, your blindness (...) will be disregarded and their anxiety eased. That's what I hope my history will help achieve; telling employers that everything is possible. Hard work and determination will allow you to overcome all obstacles.⁸⁵

3.2 Stories from the United States

One of the earliest appointments in the US was in 1972, when a blind judge was chosen to sit on the Fourth Circuit in Duval County, Florida. Judge Louis Corbin was appointed to the court at the early age of 35, after eight years as an attorney in the private sector. Corbin, who had gone blind at the age of six as a result of an accident, spoke many times about the advantages of being a blind judge, able to avoid being distracted by appearances or attempts to influence and impress him.⁸⁶ Throughout the years in which he sat on the bench, Corbin refused to recuse himself from cases and transfer them to other judges due to his disability,⁸⁷ including cases that included evidence in the form of video footage; during these cases, Corbin would instruct the lawyers to describe the content of the footage to him in detail. In 1984, a torts case about a man killed in a work accident came before Corbin. The plaintiff—the wife of the deceased—requested that Corbin recuse himself, arguing that, as a blind judge, he could not form an impression from the photos of her late husband's injuries. Corbin refused, subsequently claiming that during his career he had successfully tried dozens of cases that included visual evidence.⁸⁸

85 *ibid.*

86 'Judge Blind, Not Justice' *Cape Girardeau Southeast Missourian* (1 September 1974).

87 *ibid.*

88 'Blind Judge Refuses to Disqualify Himself' *Ocala Star-Banner* (Jacksonville, 14 August 1984) <<http://news.google.com/newspapers?nid=1356&dat=19840814&id=1CEVAAAIBA J&sjid=bgYEA AAAI BAJ&pg=6899,7819745>> accessed 9 August 2016; In 1987, Corbin's career came to an abrupt end, after he resigned as part of his punishment for attempted sexual battery against a 17-year-old girl. See 'Blind Judge Reports to Prison' Associated Press (Jacksonville, 7 October 1987) <<http://www.apnewsarchive.com/1987/Blind-Judge-Reports-To-Prison/id-9892b5de46f8066e5d584b62b53a7b58>> accessed 15 December 2016.

Associate Circuit Judge Nicholas T. Pomero of Cook County in Illinois was appointed to the bench in 1976.⁸⁹ He served on the bench for thirty-four years 'earning a reputation for being an exceptionally fair, diligent, intelligent, and sensitive jurist'.⁹⁰ At one time, while adjudicating a murder trial, a lawyer challenged Pomero's ability to review a videotaped confession given to the police and asked Pomero to recuse himself 'because he would not be able to see the defendant's expression'. Pomero refused and was upheld by the state Supreme Court.⁹¹ Pomero said that, although he could not see the witness before him, he developed 'kind of a sixth sense' that allowed him to 'form these images in my brain, but those images are not perceived through sight, but through imagination, sounds, smell, feel and the other senses'.⁹²

Judge Tony Cothren, who gradually went blind as a child, was appointed to the Tenth Circuit in Jefferson County, Alabama, in 1996. He, like Pomero and Corbin, claims that his blindness does not interfere with his work as a judge. Cothren has stated that when he hears the voice of a man or a woman, he envisions in his mind an abstract shape of the person. He has also argued that he can envision his computer even though he cannot commit the vision to memory.⁹³ Cothren's career has been an eventful one. In 1998, he was suspended after being accused of inappropriate behaviour and failure to meet deadlines. Claims made against him argued that he tended to fall asleep on the bench. Cothren denied these allegations. The affair was of great interest to the blind community in the US, some of whom argued that these were false accusations arising from discriminatory attitudes toward Cothren as a person with a disability, and that Cothren had been suspended simply because he was the only blind judge in Alabama. Others, however, questioned the propriety of Cothren's claims that, as a disabled person, he was more dependent on his legal assistants, and that these assistants were responsible, through their own negligence,

89 Jim O'Donnel, 'Judge on His Own Merits' *Chicago Tribune* (Chicago, 8 September 1996) <http://articles.chicagotribune.com/1996-09-08/features/9609080091_1_senior-judges-criminal-felony-blind> accessed 9 August 2016.

90 Hal Dworkin, 'Testing for Total Inaccessibility in Examination Under the ADA: A Case Study of Logic Games' (2014) *U Ill L Rev* 1963, 1964–65.

91 'JudgewhoIsBlindRelieson "What'sInside" for Truth' *The New York Times* (New York, 24 June 1984) <<http://www.nytimes.com/1984/06/24/us/judge-who-is-blind-relying-on-what-s-inside-for-truth.html>> accessed 9 August 2016.

92 *ibid.*

93 Rick Bragg, 'A Sixth Sense and Sensibility' *The New York Times* (New York, 22 October 1996) <<http://www.nytimes.com/1996/10/22/us/a-sixth-sense-and-sensibility.html>> accessed 9 August 2016.

for the irregularities in his chamber.⁹⁴ Regardless of culpability, it is clear that Cothren faced increased public scrutiny for his disability in a time of crisis.

Judge Peter J. O'Donoghue, who gradually lost his eyesight beginning at the age of 12, was appointed to the Civil Court of the City of New York in 1996, and in 2002 was promoted to the New York State Supreme Court in Queens County. O'Donoghue is considered an excellent judge with careful attention to detail, a superb memory, and a strong code of professional ethics.⁹⁵

Judge Richard B. Teitelman was appointed to sit on the Supreme Court of Missouri from 2002 until 2016 (after serving as judge at a lower court since 1998).⁹⁶ Teitelman also went blind gradually as a child, an effect of which, he believes, is his extraordinary memory. He views his disability as an advantage, bringing a unique and interesting perspective to the judge's table. He is known as an advocate for disability rights, and has received a Lifetime Achievement Award for his work.⁹⁷

As of today, two blind judges have presided over the US Federal Courts. In 1994 Judge David Tatel was appointed to the US Court of Appeals for the District of Columbia Circuit. He still holds the position and is regarded as an excellent judge: 'because he can't see people, he sees through them. He picks up nuances that those of us who are sighted cannot'.⁹⁸ Judge Richard C. Casey was appointed to the Federal Court for the Southern District of New York in 1997.

Unlike other blind judges who went blind at a young age, both Tatel and Casey became blind later in life. Tatel went blind after law school and became a

94 Marc Maurer, 'The Search for Anonymity' An Address (9 July 1998) <<https://nfb.org/images/nfb/publications/convent/banque98.htm>> accessed 9 August 2016.

95 Charlie LeDuff, 'This Justice Is Blind, but He's a Great Listener' *The New York Times* (New York, 7 September 1997) <<http://www.nytimes.com/1997/09/07/nyregion/this-justice-is-blind-but-he-s-a-great-listener.html>> accessed 9 November 2016; See also the information page regarding Judge O'Donoghue at the Civil Court of the City of New York website: 'Hon Peter J O'Donoghue' (*NY States Unified Court System*) <https://iapps.courts.state.ny.us/judicialdirectory/Bio?JUDGE_ID=phuHnjfzplhkA0bEtoz0g%3D%3D> accessed 9 August 2016.

96 The information page regarding Judge Teitelman at the Missouri Supreme Court website: 'Judge Richard B Teitelman' (*Missouri Courts*) <www.courts.mo.gov/page.jsp?id=197> accessed 9 August 2016.

97 Jason Kander, *Official Manual State of Missouri 2013–2014* (Supreme Court of Missouri 2013) 234 <http://s1.sos.mo.gov/cmsimages/bluebook/2013–2014/5_Jud.pdf#judbranch> accessed 9 August 2016.

98 Barbara Slavin, 'A Judge of Character: Although He's Blind, David Tatel Skis, Runs and Climbs Mountains. By Summer's End, He May Be a Top Jurist Too' *Los Angeles Times* (Los Angeles, 28 July 1994) <http://articles.latimes.com/1994-07-28/news/ls-21024_1_david-tatel/2> accessed 9 August 2016.

senior partner at an influential Washington law firm.⁹⁹ Casey only became fully blind in his fifties, as a result of an illness that he contracted while working as an attorney for a private law firm in Manhattan.¹⁰⁰ At a lecture he gave in 1998 at a convention for the National Federation of the Blind, he introduced himself as a newcomer to the blind world and called for a change in societal attitudes toward blind people, as well as people with disabilities in general, and for their integration in all fields of life.¹⁰¹

At the time of Casey's appointment to the Federal Court, many raised concerns and doubts regarding his ability to function properly as a judge. In the end, these fears were proven to be unfounded and Casey presided for almost a decade, deliberating on matters of great interest to the American public, such as reproductive rights. Casey passed away in March 2007 at the age of 74.¹⁰²

3.3 Existing Barriers and the Social Model of Disability

The election of congenitally blind Richard Bernstein to the Michigan Supreme Court in December 2014 is significant since all of the American judges with visual impairments appointed prior to his election went blind at some point in their lives. Being born blind, however, figures centrally for Bernstein himself:

I genuinely believe as a blind person, I was created this way for a reason (...) It's not easy. It's incredibly challenging, incredibly difficult. But at the same time, it makes your life incredibly fulfilling. If I hadn't been born blind, I would not have lived my life with the same sense of mission and focus and purpose.¹⁰³

Currently there are still structural barriers that prevent congenitally blind people and those who went blind at an early age from entering the legal profession.

99 *ibid.*

100 Larry Neumeister, 'Blind Federal Judge an Inspiration' *Associated Press* (New York, 28 October 2001), <www.jwen.com/rp/articles/blindjudge.html> accessed 9 August 2016.

101 Richard C Casey, *A Jurist Who Happens to Be Blind in Federal Courts* <www.nfb.org/Images/nfb/Publications/bm/bm98/bm981202.htm> accessed 9 August 2016.

102 'Richard Conway Casey, 74, Blind Federal Judge, Dies' *The New York Times* (New York, 24 March 2007) <www.nytimes.com/2007/03/24/obituaries/24casey.html?_r=1> accessed 9 August 2016.

103 Louise Knott Ahern, 'Michigan's 1st Blind Justice Aims to Inspire' *Detroit Free Press* (Detroit, 11 January 2015) <<http://www.freep.com/story/news/local/michigan/2015/01/11/michigans-1st-blind-justice-richard-bernstein-aims-inspire-others/21611021/>> accessed 9 August 2016.

Recognition of these structural barriers is consistent with ideas that ground the social model of disability about societal disabling factors.

Since the mid-1970s, a new movement has challenged the medical and individualistic accounts of disability that were previously presented.¹⁰⁴ The underlying paradigm of the disability rights movement is the social model of disability. This model emerged in England in the early 1970s with the Union of Physically Impaired Against Segregation (UPIAS), a group comprised of physically disabled veterans who advocated for the deinstitutionalisation of people with disabilities, and who clearly articulated the idea that society plays a significant role in the disablement of people with disabilities.¹⁰⁵ This idea has since gained broader recognition.¹⁰⁶ The social model argues that people with disabilities are perceived as an inferior group due to the social construction of reality and environments, and thus challenges the medical-individual models, which imagine impairment as the sole reason for discrimination and differential treatment. The assumption underlying the social model is that disability is not an inherent phenomenon stemming from the individual, but rather, a phenomenon dependent on wider social contexts that stems from the ways in which environments and systems are constructed as well as the ways in which societal impressions regarding people with disabilities are constructed.¹⁰⁷ Over the years, the social model was criticized for not encompassing the full experience of disability, which often includes pain and hardship related to the body and impairments,¹⁰⁸ and for undermining the need for health care as well as the role of doctors, social workers and other professionals in the treatment of disability.¹⁰⁹ In response, over the years, the social model was further developed by scholars and policy makers and its ideas were implemented into law and public policy. A contemporary view of disability that stems from the original social model views it as complex and fluid, rather than a dichotomous process of presence or absence, which is multidimensional, dynamic, bio-psycho-

104 Joseph P Shapiro, *No Pity: People with Disabilities Forging a New Civil Rights Movement* (Broadway Books 1995) 49–58.

105 Tom Shakespeare, *Disability Rights and Wrongs: Revisited* (2nd edn, Routledge 2014) 12–17.

106 Katharina C Hayer, *Rights Enabled: The Disability Revolution, from the US, to Germany and Japan, to the United Nations* (University of Michigan Press 2015) 23.

107 Oliver (n 39) 11.

108 Tom Shakespeare and Nicholas Watson, 'The Social Model of Disability: An Outdated Ideology?' (2002) 9 *Research in Social Science and Disability* 2, 20.

109 Tom Shakespeare, 'Still a Health Issue' (2012) 5 *Disability & Health J* 129, 129–30.

social and interactive in nature,¹¹⁰ that is formulated through a complex interaction between the impairment and the social environment.¹¹¹ This view is also reflected in the United Nations' Convention on the Rights of Persons with Disabilities:

Recognizing that disability is an evolving concept and it results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.¹¹²

An alternative paradigm, the social model has served as the basis for domestic legislation around disability discrimination throughout the Western world. A well-known example of such legislation that exists in the US, England and Israel is the requirement that employers provide reasonable accommodations (or adjustments) for qualified employees or job applicants with disabilities, and adjust the work environment to meet their needs (rather than expecting the person to adapt to the work environment).¹¹³

For hundreds of years, across societies and cultures, people with disabilities were (and to some extent still are) considered 'unemployable'.¹¹⁴ In 1963 in England, for example, only about 6% of those registered as blind were employed, and about 63% of those who worked were engaged in sheltered or home employment.¹¹⁵ Almost 50 years later, in 2012, only 34% of the registered blind population in England were employed.¹¹⁶ In the US, according to data originating from the Bureau of Labor Statistics from March 2014, only 37.7% of the blind population are

110 Irving Kenneth Zola, 'Disability Statistics, What We Count and What It Tells Us—A Personal and Political Analysis' (1993) 4 J Disability Policy Studies 9, 18.

111 Saad Z Nagi, 'Disability Concepts Revisited: Implications for Prevention' in Andrew M Pope and Alvin R Tarlov (eds), *Disability in America: Toward a National Agenda for Prevention* (National Academies Press 1991) 309, 326; Carmelo Masala and Donatella Rita Petretto, 'From Disablement to Enablement: Conceptual Models of Disability in the 20th Century' (2008) 30 Disability & Rehabilitation 1233, 1234.

112 Convention on the Rights of Persons with Disabilities (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, preamble (section e).

113 In the US: Americans with Disabilities Act 1990, sections 12111–12112, 104 Stat 328 (ADA); in England: Equality Act 2010, sections 55(6), 60; in Israel, Equal Rights for Persons with Disabilities Law 1998, section 8 (Israeli Equal Rights Law).

114 tenBroek and Matson (n 23) 810; Stone (n 34) 55.

115 tenBroek and Matson (n 23) 810.

116 Fred Reid, 'Blind Rights Activist: "In the UK, 66% of visually impaired are unemployed"' (*EurActive.com*) 23 October 2012 <<http://www.euractiv.com/specialreport-eye-active-ageing/blind-rights-reporter-paints-var-interview-515575>> accessed 9 August 2016.

‘in the labor force’.¹¹⁷ In a conversation I had in August 2016 with Justice Bernstein, the most recently elected blind judge in the US, he attributed part of his success to his affluent background. Without the support of his family and their means, he believes that he would probably have been among the majority of blind Americans who are unemployed.

Stigma has been found to be a key barrier in gaining employment and social inclusion for blind people.¹¹⁸ Bernstein believes a committee would never have appointed him to the bench because of latent stigmas and disbelief in his abilities. He attributes his appointment to the fact that, in the US, state high court judges are elected by the public, and he believes that he had the opportunity to affect the voters and convince them of his abilities through the campaign he ran under the slogan ‘Blind Justice’. According to Bernstein, the people of Michigan wanted to elect a justice with whom they felt a connection, who can connect with their hardships and struggles and who cares about their issues. Although Michigan is known as a swing state, Bernstein became one of only two endorsed justices who was nominated by the Democratic Party, out of seven in the Michigan Supreme Court.

It is not only stigma, however, that gets in the way of blind people who aspire to go on the job market, particularly the legal market. Despite the fact that the Americans with Disabilities Act (ADA) (as well as other disability anti-discrimination laws around the world) prohibits discrimination in higher education and requires accommodations, including assistive technologies, to be applied to ensure accessibility,¹¹⁹ the main threshold to American law schools, the Law School Admission Test (LSAT), is completely inaccessible.¹²⁰ This is due to ‘logical games’ exercises that require the drawing of diagrams in order to solve them.¹²¹ Bernstein himself was admitted to Northwestern University Law School after convincing the school to accept him based on his academic record, extracurricular activities and

117 ‘Interpreting Bureau of Labor Statistics Employment Data’ (AFB American Foundation for the Blind, 2015) <<http://www.afb.org/section.aspx?SectionID=15&SubTopicID=177>> accessed 9 August 2016.

118 Bonnie O’Day, ‘Employment Barriers for People with Visual Impairments’ (1999) 93 *J of Visual Impairment and Blindness* 627, 630; Cecilia Benoit, Mikael Jansson, Martha Jansenberger and Rachel Phillips, ‘Disability Stigmatization as a Barrier to Employment Equity for Legally-Blind Canadians’ (2013) 28 *Disability & Society* 970, 976–81.

119 ADA (n 113) sections 12181(7)(J), 12189; Equality Act (n 113) part 2 chapter 6; Israeli Equal Rights Law (n 113) part 7 chapter 1.

120 See generally Dworkin (n 90).

121 *ibid* 1966–67, 1974–76.

letters of recommendation alone.¹²² Nevertheless, this can no longer be the case for other blind Americans who wish to go to law school, since prospective law students are now required by the Law Students Admission Council (LSAC) to take the test.¹²³ In June 2016, litigation brought against the American Bar Association, which only accredits US law schools that admit students according to the LSAT, was dismissed while the Sixth Circuit Court decided that the lawsuit should be filed against LSAC, the body that actually administers the exam.¹²⁴ Such a suit is likely to be filed soon by Angelo Binno, who was rejected from a few law schools due to his LSAT results and who started the legal battle against the LSAC in 2011.¹²⁵

As the stories presented here indicate, blind judges have been successfully incorporated into judicial systems, despite ambivalent attitudes towards and barriers against disability and blindness both societal and legal. As we shall see in the next section, the Israeli judicial system has also grappled with discomfort and bias when it comes to having blind persons serving in judicial roles.

4 Potential for Integrating Blind Judges into the Israeli Judiciary

The case of *Amidar v Hai* was argued in the Tel Aviv District Court in 2005 and concerned the request of Amidar, an Israeli state-owned housing company, to disqualify an arbitrator from her duties on account of her blindness. The case involved two parties that had signed an arbitration agreement, according to which attorney Heruta Harel would serve as arbitrator in any dispute between them. The dispute that emerged between the parties involved an agreement to convert an industrial building into a residence for new Eastern European immigrants. The plan to convert the building was not approved by the Local Planning and Zoning Committee, and Amidar cancelled the project. The arbitrator was finishing her review of the materials presented by the parties as well as of the various schemes related to the dispute when she lost her vision due to an illness. She therefore

122 Corey Wheeler, 'Farewell, Bernstein' *The South End* (Detroit, 7 December 2010) <http://www.thesouthend.wayne.edu/news/article_91e85791-165d-511b-9a68-5a015e04c8c8.html> accessed 9 August 2016.

123 Dworkin (n 90) 1966.

124 Melissa Daniels, '6th Circ. Tell Blind Man ABA Is Wrong Target for LSAT Suit' *Law360* (New York, 16 June 2016) <<http://www.law360.com/articles/807873/6th-circ-tells-blind-man-aba-is-wrong-target-for-lsat-suit>> accessed 9 August 2016.

125 *ibid*; Dworkin (n 90) 1965–66.

requested that the parties allow her to hire a paid assistant at their expense so that she could complete the work remaining and deliver a decision.¹²⁶ In light of these circumstances, Amidar petitioned the Tel Aviv District Court with a request to dismiss the arbitrator based on section 11(3) of the Arbitration Law allowing for the removal of an arbitrator in the event that she is unable to fulfil her duties.¹²⁷ According to Amidar, the arbitrator's blindness constituted a disability preventing her from fulfilling her duties for two reasons: first, the arbitrator would no longer be able to weigh evidence or review the schemes, plans, and other materials; and second, hiring a legal assistant would taint her opinion with an external perspective.¹²⁸ Despite legal aspirations of judges' 'metaphorical blindness', in this case the arbitrator's blindness was seen by Amidar as working against her, manifesting what I have here termed the Blind Justice Paradox: she had been struck by a disability that rendered her helpless. This case, therefore, demonstrates the paradoxical treatment of blindness in the legal realm: first as a physical attribute that implies incapability and second as a metaphor for just treatment under the law.

In her decision, Judge Rina Meshel determined that disqualifying an arbitrator from her duties was an extreme measure that would not only tarnish the arbitrator's reputation, but would also damage the quasi-judicial institution of arbitration. Therefore, only exceptional circumstances could justify such an action. Such exceptional circumstances could be, for example, a severely incapacitating disease that could cause 'real likelihood, under the circumstances, that the arbitrator will not produce a true and just arbitration award.'¹²⁹ The judge reviewed a number of Israeli evidentiary legal tests and determined that a blind judge could use them appropriately and just as well as any other judge.¹³⁰

126 *DC Amidar* (n 3) paras 1–4 (Meshel J).

127 *ibid* para 6. Similar clauses to this section in other countries are, for example, rule 18 to the Commercial American Arbitration Association Rules, which allows for the disqualification of an arbitrator due to 'inability or refusal to perform his or her duties with diligence and in good faith'; art 10.1 to the London Court of International Arbitration (LCIA) Rules which provides that '[i]f (...) any arbitrator dies, falls seriously ill, refuses, or becomes unable or unfit to act, either upon challenge by a party or at the request of the remaining arbitrators, the LCIA Court may revoke that arbitrator's appointment and appoint another arbitrator'; Section 5 of the Federal Arbitration Act 2001; For further comparative analysis, see Christopher Koch, 'Standards and Procedures for Disqualifying Arbitrators' (2003) 20 *J Int'l Arb* 325.

128 *DC Amidar* (n 3) para 6.

129 *ibid* paras 6–7.

130 *ibid* paras 8–10.

Judge Meshel further discussed the potential for blind or visually impaired jurists to serve as judges, although no blind judges have ever been appointed in Israel to date. She referred to sections 2–3 of the Israeli Equal Rights for Persons with Disabilities Law (Equal Rights Law), the Israeli counterpart to the ADA, which established the right of a disabled person to ‘equally participate in all areas of life (...) while fully maximizing his potential’. In addition, the judge gave an example from comparative law, referencing the case of the late US Federal Court judge Richard C. Casey.¹³¹ She concluded by determining that loss of eyesight could not justify relieving an arbitrator of her duties, and completely rejected Amidar’s arguments.

Consistent with alternative views on disability and the social model, Judge Meshel’s decision set a high bar, supporting a view of disability as constructed, for the most part, through complicated processes of stigmatisation by society at large.¹³² In contrast, the arguments of the plaintiff, Amidar, essentialised the difference presumably found in the arbitrator due to her disability. They even suggested that the arbitrator’s blindness impaired her cognitive ability and discretion, both by implying that it would diminish her analytical ability and thus prevent her from evaluating the importance of evidence, and by claiming that the arbitrator would be more easily influenced by the opinions of her legal assistant.

These claims mirror more common conflation by Israeli society (among others) of sensory with cognitive disabilities. According to this conflation, a person with a sensory or a physical disability is often perceived as also having a cognitive or mental impairment as well, and incapable of dealing with complicated tasks that require analytical resources. The judgment in *Amidar v Hai*, by contrast, emphasises blind individuals’ capabilities over their limitations, promoting the view that a blind person is able to fill positions other than those traditionally designated for this population. These traditional occupations include operating call centres and working in assembly lines in sheltered workshops;¹³³ they are often mundane, and do not require imagination or talent.¹³⁴ According to the judgment, a blind person is fully capable of filling an honourable judicial position of high social standing, requiring analytical and deductive skills, wisdom, and vast knowledge. I believe

131 *ibid* para 15.

132 *ibid*.

133 Shlomo Deshen, *Blind People: The Private and Public Life of Sightless Israelis* (State University of New York Press 1992) 63.

134 *ibid* 65; Dean W Tuttle and Naomi R Tuttle, *Self-Esteem and Adjusting With Blindness: The Process of Responding to Life’s Demands* (3rd edn, Charles C Thomas Publisher 2004) 32.

that this ruling is highly courageous; it is one of the first stepping-stones towards allowing people with disabilities to achieve legal recognition of their rights and equal integration into society.

Regardless of the importance and sophisticated nature of this decision, however, in paragraph 15 of the judgment we find an excerpt reflecting the views of the medical-individual models of disability:

And indeed, the legal sphere, and the judiciary in particular, should be at the forefront of the fight for the *rights of society's weakest links*.¹³⁵

This phrase encapsulates an attitude of charity and pity towards people with disabilities, and the perception of disability as a tragedy or divine punishment.¹³⁶ This mode of thinking stands in contrast to more progressive perceptions aligned with the social model which, as mentioned, views disability as a derivative of society's perception, and not a phenomenon immanent to the individual. Although there are those who claim that the 'mercy approach' produced advancement in legislation and recognition of the rights of people with disabilities, many activist groups have tried to detach themselves from this approach and from assumptions of 'inherent difference' and 'inferiority' connected to disability.¹³⁷

These contradictory approaches are exemplified in the ideological rivalry in the 1980s between two Israeli organisations for the blind. While the Centre for the Blind advocated for 'community rehabilitation' activities, the Association of Blind University Graduates (ABUG), a small circle of about one hundred blind members who wished to integrate into society as professionals, believed that blind people should only demand benefits materially relating to lack of vision, objecting to the view of blindness as a tragedy in order to promote the integration of blind people into larger society.¹³⁸ This debate was ignited in the wake of a religious institute having published a fundraising flyer in which its blind students were portrayed as its wards, and their condition as a 'cruel fate'. While the Centre for the Blind refused to publicly comment on the flyer, the members of ABUG harshly criticised it, as well as the Centre's behaviour.¹³⁹ Even today, in the post-disability rights legislation era, scholars argue that disability is still not widely perceived as a human rights

135 *DC Amidar* (n 3) para 15 (emphasis added).

136 Shapiro (n 104) 5.

137 *ibid* 23–24; One such group is UPIAS, which first articulated the social model in the 1970s: see Shakespeare (n 105) 12–17.

138 Deshen (n 133) 155–56.

139 *ibid* 162–63.

issue and that mercy and good will underlie the treatment of disability.¹⁴⁰ As I will point out below, this kind of a ‘mercy-based’ (as opposed to ‘rights-based’) approach, which found its way even into Judge Meshel’s advanced decision in the short excerpt above, would become central in a later decision on this case.

The Tel Aviv District Court was faced with the Amidar case a second time after the delivery of the arbitration award in the *Hai v Amidar* judgment.¹⁴¹ This time Judge Uri Goren considered Amidar’s application to dismiss the arbitration award. Among Amidar’s arguments, which included alleged procedural flaws and irregularities in the previous trial, Amidar also repeated its claims regarding the blind arbitrator’s inability to form an opinion from the witnesses and documents presented to her. This time, Amidar invoked the Hebrew Law, which, it argued, did not allow a blind judge to preside. Although primary sources of Hebrew Law such as the Mishnah and Shulḥan Aruch prohibit the appointment of a blind judge, even while admitting a judge who is blind in only one eye, a few later rabbis and Jewish scholars have ruled for allowing blind persons to serve in judicial roles.¹⁴² Judge Goren therefore denied Amidar’s application to dismiss the arbitration award and instructed it to be confirmed, while siding with the legal ruling of Judge Meshel.

This was not, however, the end of the story. Amidar filed for permission to appeal Judge Goren’s decision to the Supreme Court, and the case was brought before a panel of three justices.¹⁴³ In an exceptional move, the Supreme Court revoked the second part of the arbitration award, reasoning that it contradicted a former non-appealable court’s judgment and therefore defied *ordre public*. Indeed, upon accepting the judgments of Judge Goren and Judge Meshel, Justice Yoram Danziger dismissed Amidar’s claims regarding the arbitrator’s disability. However, he avoided making any fundamental statement regarding the ability of blind people to take part in the judiciary as Judge Meshel had done. In paragraph 20 of his judgment, Justice Danziger wrote:

140 Mary Johnson, *Make Them Go Away: Clint Eastwood, Christopher Reeve and the Case Against Disability Rights* (Advocado Press 2003) 57, 66; Michael Waterstone, ‘The Cost of Easy Victory’ (2016) 57 Wm & Mary L Rev 587, 614.

141 DC (TA) 191/06 *Hai v Amidar Co for Immigrant Housing Ltd* (31 October 2007) Nevo Legal Database (by subscription) (Isr).

142 Richard Gottheil and Judah David Eisenstein, ‘The Blind in Law and Literature’ in *Jewish Encyclopedia* (1906) <<http://www.jewishencyclopedia.com/articles/3374-blind-the-in-law-and-literature>> accessed 9 August 2016.

143 *CA Amidar* (n 4).

Despite the abovementioned, I wish to note that in the circumstances of the case before us, I found no merit in the Applicant's claims as if the arbitration award should have been revoked following the arbitrator's unfortunate illness, which caused her to go blind. As the appeal itself notes, the arbitrator's unfortunate illness and the blindness she contracted as a result thereof were discovered only during the second phase of the arbitration proceeding, after the first arbitration award was delivered. However, contrary to the Applicant's claims as if the arbitrator was required to review many documents and schemes in order to decide the second part of the arbitration proceeding, similarly to the District Court, I also hold that in light of the advanced stage of the arbitration proceeding when the arbitrator's disease was discovered, there was no reason for the arbitrator not to continue her work and conclude her decision in the matter of damages. The reviewing of these documents was done, most probably, already during the initial stage of the arbitration proceeding, for which there is no dispute regarding the arbitrator's ability to fulfil her duties.¹⁴⁴

As Justice Danziger states, the arbitrator was able to review the schemes and other evidence before she went blind, and therefore was fully capable of finishing the arbitration proceeding which she had begun; there was also no reason for the arbitrator not to use the help of the legal assistant, who simply read the documents to her.¹⁴⁵ Justice Danziger chose to decide only the matter at hand, and did not allow for interpretations about the ability of blind people to fill judicial or quasi-judicial roles. The opinion of Justice Ayala Procaccia on the same judgment did little to fill in this gap, as she did not refer to the question of the arbitrator's blindness at all.

In light of this judgment, it is hard not to feel a sense of missed opportunity. A case such as this one, with the potential to recognise the capabilities of people with disabilities to assume key roles in Israeli society, does not often reach the Supreme Court. The justices could have easily rested on Judge Meshel's decision, which expanded on the issue beyond the specifics of the case and opened up a broader discussion regarding the relationship between disability and society.

The Supreme Court justices' concrete unwillingness to make a fundamental and direct statement regarding people with disabilities and the Israeli Equal Rights Law is part of a wider trend of evading discussions of disability, overlooking its importance as a barrier that stands at the heart of many cases.¹⁴⁶ The path towards

144 *ibid* para 20 (Danziger J).

145 *ibid*.

146 Doron Dorfman, 'The Inaccessible Road to Motherhood—The Tragic Consequence of Not Having Reproductive Policies for Israelis with Disabilities' (2015) 30 *Colum J Gender & L* 49, 82.

achieving formal legal recognition of the rights of blind people and integrating them into the judicial sphere was blocked upon reaching the supreme legal authority in Israel.¹⁴⁷ There is a long way to go before the rights and skills of people with disabilities are fully recognised, despite the fact that the Israeli Equal Rights Law was enacted almost twenty years ago.

Nevertheless, one meaningful statement can be extracted from the Supreme Court's judgment in the matter of *Amidar v Hai*. Justice Eliezer Rivlin held a dissenting opinion, and stated in paragraph 15 of his judgment:

I agree with my colleague Justice Y. Danziger in the matter of the arbitrator's disease. I also believe that the stage in which the proceeding was at, *and in fact at any stage*, the arbitrator's disease had no influence on her ability to decide the arbitration. Neither of the Applicant's other claims constitute in my mind cause to intervene in the arbitration award.¹⁴⁸

Justice Rivlin opined that, even if the arbitrator had gone blind before reviewing the evidence, this would not have been enough of a reason to disqualify her—that a blind person could serve as an arbitrator throughout all phases of the proceedings, including the evidence-hearing phase, despite her inability to form an impression from the witnesses' appearances. Therefore, it is nevertheless possible to extract an attentive statement on the issue at hand.

One can wonder why the Supreme Court refrained from making a fundamental statement that could help to end or at least reduce and undermine the marginalisation of people with disabilities from the workforce and from key positions in Israeli society. Lack of awareness and recourse to the medical-individual models as well as mercy-based attitudes towards disability produce judicial rulings of this kind, and propagate injustice and discrimination against this group. Most likely, until a deeper perceptual change occurs among the entire population, and among judges in particular, we will be forced to read between the lines of judgments and hold on to small signs of progress.

About eighteen months after the Supreme Court's judgment, the case reached the courts for the fourth time. This time, *Amidar* petitioned the Tel Aviv District

147 Formal legal recognition is defined as a significant phase in making a right more accessible. It is the establishing moment in which a higher legal authority, such as the Supreme Court or the legislator, declares the existence of a right or the scope of the application of the equality principle. See Morton J Horwitz, 'Rights' (1988) 23 *Harvard Civil Rights and Civil Liberties L Rev* 393, 404.

148 *CA Amidar* (n 4) para 15 (Rivlin J) (emphasis added).

Court with the claim that the arbitrator should be relieved from her duties because, during the renewed hearings relating to the question of alleged damage caused to Amidar, she was being unfair and biased towards them.¹⁴⁹ Ironically, these claims go against the metaphor of blind justice as impartial and objective, raising once again the puzzle of the Blind Justice Paradox. Even in this request, Amidar repeated its claims regarding the arbitrator's inability to deliberate the case due to her blindness. Judge Yehuda Zaft refused to consider the question of ability once more since it had already been deliberated in previous judgments.¹⁵⁰ Amidar appealed the decision to the Supreme Court, before Justice Elyakim Rubinstein.¹⁵¹ In his 2011 decision, Justice Rubenstein referred to the question of the arbitrator's blindness in one paragraph at the end of his judgment:¹⁵²

With regard to the Applicant's claim which relies on the arbitrator's visual impairment, I do not believe that it is worth commenting on, and best if it were not made at all, both in light of their dismissal in previous non-appealable decisions, and due to the arbitrator's dignity, which we are all obligated to maintain and insist thereon. Let us imagine a situation in which, God forbid, one of us loses his eyesight, but not his mental capacity; would it be right to marginalise him, and push him aside? 'That which is hateful to you, do not do to your fellow' said Hillel the Elder (Babylonian Talmud, tractate Shabbat 31a). Our sages called a person who had lost his eyesight *Sagi Nahor*—great light—also in order to denote the virtues of a person who cannot see. Human history, from the Amora Rav Sheshet, to authors and creators of our time, is filled with examples of people with remarkable achievements despite their visual impairment. Thus, the great Egyptian author Taha Hussein, thus my former teacher at the Hebrew University, Prof. Haim Blanc, IDF disabled veteran from 1948 and a blind man, gifted linguist; and more recently the governor of the State of New York; also a judge at the US Court of Appeals for the Federal Circuit in Washington is a blind man.¹⁵³ I do not discount the technical difficulty of reviewing accounting documents etc. in the state of visual impairment, however it is Not in Heaven.¹⁵⁴

Justice Rubenstein's concrete referral to the question of the arbitrator's blindness should be commended, since beforehand, the Supreme Court completely ignored

149 DC (TA) 48355–06–11 *Amidar—National Co for Immigrant Housing Ltd v Hai* (7 September 2011), Nevo Legal Database (by subscription) (Isr).

150 *ibid* para 7 (Zaft J).

151 *CA Amidar 2011* (n 5).

152 *ibid* para 27.

153 Referring to Judge David Tatel.

154 *CA Amidar 2011* (n 5).

the issue. However, I believe that even this statement misses the great potential it could have had in describing the complexity of societal and legal attitudes towards blind persons and people with disabilities. In his judgment, Justice Rubenstein, like Judge Uri Goren, turns to the Hebrew Law as well as to his personal experiences and relationships in order to support his conclusion that ‘a person who has lost his eyesight should not be marginalised and pushed aside’. Surprisingly, Justice Rubenstein does not mention the Israeli Equal Rights Law at all, despite the fact that its underlying basic principle is recognition of ‘the value of each person created in the image [of God]’,¹⁵⁵ or the issue of the prohibition of employment discrimination.¹⁵⁶ The lack of legal framing shows, once again, how disability is often not thought of as a matter of rights, but rather as a general act of solidarity (at best) or an issue of mercy and kindness (at worst). Although Justice Rubenstein mentions the human dignity principle, he does not do so in order to invoke the prohibition on discrimination against a person for his difference, a principle he exemplifies through the rule: ‘[t]hat which is hateful to you, do not do to your fellow’. He reaches the desired and correct result in this case, but in a way that differs from the one proposed by this article. The problem with the approach taken by Justice Rubenstein is that it ignores the legal criteria and tools developed to improve the lives of people with disabilities and thus inherently limits the progress that can be made in this regard.

The relatively new field of disability legal studies, to which this article contributes, is intended to deal with issues of precisely this kind. Its goal is to expose judges, lawyers and jurists to an alternative and progressive approach towards disability to be used when they deal with the numerous issues pertaining to the relations between people with disabilities and the legal sphere. I believe that Justice Rubenstein’s welcomed judgment indicates the need for creating awareness of alternative models of disability in legislation, legal rulings and theories pertaining to society and the law’s approach towards people with disabilities.¹⁵⁷ I am hopeful that this article and those that follow will help to expand this awareness of the field among the courts, jurists, and the public. This way we will all benefit from a collection of precedents that apply the principles of the social model, which may significantly advance the rights of people with disabilities in many societies.

155 Section 1 (basic principle) to the Israeli Equal Rights Law (n 113).

156 *ibid* Section 8.

157 For a comprehensive and enthralling discussion regarding the importance of assimilating disability legal studies into the law faculties and the need to raise awareness of this field among jurists, see Kanter (n 10) 444–62.

5 Conclusion

The image of the blind Icon of Justice has been a fixture in the Western world for hundreds of years. Nonetheless, not much has been written about the complexities and obstacles that stand in the way of placing actual blind judges on the bench. Nor has the Icon been used to represent a social struggle regarding disability rights.

The unique case of *Amidar v Hai* represents a missed opportunity to challenge the traditional social construction concerning the abilities of blind persons, and people with disabilities in general, especially regarding their capability to assume key roles in society. The Israeli Supreme Court justices' way of dealing with the case before them, which avoided appealing to the Israeli Equal Rights Law and disability studies concepts, seems to be part of a wider trend I have addressed. The real-life examples of blind judges performing meticulous and complex judicial work stand as testimony to their abilities and the possibility of incorporating people with disabilities into judicial systems. I hope this article will serve as another brick in building the field of disability legal studies, and a reference for legal professionals encountering legal issues involving blindness and disability.

Federalism and Foreign Affairs in Canada and the European Union: The Search for Equal Autonomy

Thomas Verellen *

Abstract

This paper examines how two federal-type polities, Canada and the European Union, have addressed the tension between international law's fundamental value of State sovereignty and the constitutional value of federalism as it is professed in domestic settings. The paper argues that in both polities, federalism is still, to a large extent, put 'on hold' in the area of foreign affairs. Despite an increase in international activities by Canadian provinces since the 1960s, and despite the emergence of the European Union as a foreign policy actor of significance, in constitutional terms the authority to act internationally is still to a significant extent held or controlled by the order of government recognised as a sovereign State. In contrast to Canada, however, the dominance of the sovereign State in the area of EU foreign affairs is liable to spill over into the EU's domestic constitution. This observation calls for a recalibration of the federal balance in Europe's foreign affairs constitution. Such a recalibration, it is suggested, should start by critically reappraising the use of the technique of mixity.

Keywords

Comparative federalism, Foreign relations law, External action, European Union, Canada

1 Introduction

A tension exists between international law's fundamental value of State sovereignty and the value of federalism as it is professed in domestic settings.¹ Under domestic

* PhD Candidate at Institute for European Law, University of Leuven.
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1 On this topic, see also Ivan Bernier, *International Legal Aspects of Federalism* (Archon Books 1973) 1.

constitutional law, government power is considered to be divided between orders of government.² Under international law, by contrast, such divisions of power matter little. Thus, for example, in the context of international responsibility, the conduct of a State shall be considered an act of that State, 'whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State'.³ Similarly, the Vienna Convention on the Law of Treaties provides that, exceptions notwithstanding, 'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.⁴

Traditionally, this tension between a constitutional regime of divided power and an international legal order by and for unitary, sovereign States was resolved through the construction of a dualist 'wall' or 'veil' between the domestic and the international realms, whereby federalism was considered to stop at the water's edge. The United States is perhaps the best known example of this phenomenon, albeit not the only one.⁵ In that country, the federal Congress enjoys an implied power to implement treaties into domestic law, even if in a strictly domestic context the power to legislate on the subject of the treaty would come to the States.⁶ Similarly, the President and, to a lesser extent, Congress hold broad powers to conduct foreign affairs.⁷ The exercise of these powers can, under certain conditions, preempt the exercise of powers by the States.⁸ The justification for the existence of such

- 2 Kenneth Wheare, *Federal Government* (OUP 1964) 10; and more recently, Daniel Halberstam, 'Comparative Federalism and the Role of the Judiciary' in Gregory A Caldeira, Daniel Kelemen and Keith E Whittington (eds), *The Oxford Handbook of Law and Politics* (OUP 2008) 142, defining federalism as 'the coexistence within a compound polity of multiple levels of government each with constitutionally grounded claims to some degree of organizational autonomy and jurisdictional authority'.
- 3 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (12 December 2001) UN Doc A/RES/56/83, art 4(1).
- 4 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (Vienna Convention) art 27.
- 5 In the German context, see art 32(3) of the Basic Law, requiring prior federal consent to the conclusion of an international agreement.
- 6 See *Missouri v Holland*, 252 US 416 (1920); For a critique on the position of the Supreme Court in *Missouri*, see Justice Scalia's concurrent opinion in *Bond v United States*, 572 U.S. ____ (2014).
- 7 For the most sweeping expression of the exclusively federal character of the power over foreign affairs, see *United States v Curtiss-Wright Export Corp*, 299 US 304 (1936).
- 8 See, seminally, *Zschernig v Miller*, 389 US 429 (1968), in which the US Supreme Court invalidated a State statute for intruding in the federal realm of foreign affairs in which the President upheld an executive policy; For a recent example of the pre-emptive effect of the exercise of the President's foreign affairs powers on State law, see *American Insurance Association v Garamendi*, 539 US 396 (2003).

broad powers is often functional in nature: the specific context of foreign affairs requires the federal government to hold broader powers than it does in a strictly domestic context.⁹

As long as international law's purpose was to allow the different members of the international community each to pursue their own conception of the good life,¹⁰ the restriction of federalism to the domestic realm was not considered overly problematic. When the predominant purpose of international law changed, however, from that of pursuing the peaceful co-existence of distinct political communities to that of pursuing what were considered shared goals and values, such as the defence of human rights, or the integration of the global economy,¹¹ the exclusion of foreign affairs from the application of domestic constitutional principles, including the principle of federalism, was put into question. To name but one example of such critiques, in a 1991 book, American international lawyer Thomas Franck wondered: 'What is the point of a carefully calibrated system of divided and limited power if those who exercise authority can secure an automatic exemption from its strictures merely by playing the foreign-affairs trump?'¹²

This paper examines how two federal-type polities, Canada and the European Union, have taken up Thomas Franck's challenge as it pertains to the constitutional principle of federalism. How have Canadian and European constitutionalism responded to the tension between the domestic constitutional principle of federalism, on the one hand, and international law, on the other?

This paper argues that in both polities, the domestic constitutional value of federalism is still, to a large extent, put 'on hold' in the area of foreign affairs. That is, in constitutional terms, the authority to act internationally is still to a significant extent held or controlled by the order of government recognised by the international community as a sovereign State. This is in spite of an increase in international activities by Canadian provinces since the 1960s, and the emergence of the European Union as a foreign policy actor of significance—however slow

9 On this functional justification, see generally Peter Spiro, 'Foreign Relations Federalism' (1999) 70 U Colorado L Rev 1223, 1227–59; See also Ganesh Sitamaran and Ingrid Wuerth, 'The Normalization of Foreign Relations Law' (2015) 128 Harv L Rev 1897, 1906–18.

10 Sovereignty, in this sense, is based on an analogy with the individual in liberal thought. See, eg, Martti Koskeniemi, 'The Future of Statehood' (1991) 32 Harv Intern'l LJ 397, 404.

11 See Wolfgang Friedmann, *The Changing Structure of International Law* (Columbia UP 1964).

12 Thomas Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton UP 1992) 5; See also Spiro (n 9).

and hesitant this emergence may be.¹³ In contrast to Canada, however, where the dualist wall continues to stand strong, the dominance of the sovereign State in the area of EU foreign affairs is liable to spill over into the EU's domestic legal order. This observation calls for a recalibration of the federal balance in Europe's foreign affairs constitution. Such a recalibration, it is suggested, should start by critically reappraising the use of the technique of mixity.¹⁴

The paper is structured as follows. An introductory section shows that both Canada and the European Union are federal in nature. The second and third sections examine the structure of the foreign affairs constitution of both federal-type polities. In a fourth section, a brief comparison will be made between both polities. The paper ends with an assessment of both federal-type polities' foreign affairs constitution in light of the federalism principle.

2 Federalism as equal autonomy in Canada and the European Union

Constitutionalism, both in Canada and the European Union, adheres to an understanding of federalism as equal autonomy. Kenneth Wheare defined federalism as the method of dividing government power so that the general and regional governments are each, within a sphere, co-ordinate and independent.¹⁵ Relying directly on Wheare, the Canadian Supreme Court stated in its 1998 *Quebec Secession* reference that:

In a federal system of government such as [Canada's], political power is shared by two orders of government: the federal government on the one hand, and the provinces on the other. Each is assigned respective spheres of jurisdiction by the Constitution Act, 1867.¹⁶

13 For a critical appraisal, see Karen E Smith, *European Union Foreign Policy in a Changing World* (3rd edn, Polity Press 2014) 208–10.

14 On the technique of concluding mixed agreements (ie, agreements to which both the EU and the Member States are parties), see Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart 2010).

15 Wheare (n 2) 10.

16 *Reference re Secession of Quebec* [1998] 2 SCR 217, (1998) 161 DLR (4th) 385 [56]; On the central role of the *Quebec Secession* reference in Canadian federalism, see Robert S Schertzer, 'Judging the Nation: The Supreme Court of Canada, Federalism and Managing Diversity' (PhD thesis, London School of Economics and Political Science 2012) ch 4 <<http://ethos.bl.uk/OrderDetails.do?uin=uk.bl.ethos.570991>> accessed 4 January 2016.

The Court continued: ‘The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction.’¹⁷ More recently, the Supreme Court of Canada made similar statements in its *Securities* reference, where it held that:

It is a fundamental principle of federalism that both federal and provincial powers must be respected, and one power may not be used in a manner that effectively eviscerates another. Rather, federalism demands that a balance be struck, a balance that allows both the federal Parliament and the provincial legislatures to act effectively in their respective spheres.¹⁸

These statements point to a conception of the constitutional structure of Canada as consisting of two orders of government that stand in a relation of equal autonomy. This conception has a long standing in Canada. In the 1892 *Maritime Bank* case, Lord Watson, speaking on behalf of the Judicial Committee of the Privy Council (the Privy Council) held:

The object of the [Constitution Act 1867] was neither to weld the provinces into one, nor to subordinate provincial governments to central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its own independence and autonomy.¹⁹

Differences of opinion persist with regards to the origins and nature of the constitutional ties that bind the federal and provincial governments in Canada.²⁰ Beyond contestation, however, is that any interpretation of Canada’s constitution

17 *Reference re Secession of Quebec* [1998] 2 SCR 217, (1998) 161 DLR (4th) 385 [58].

18 *Reference re Securities Act* [2011] 3 SCR 837, 339, (2011) DLR (4th) 577 [7].

19 *Liquidators of the Maritime Bank of Canada v The Receiver General of New Brunswick (Canada)* [1892] AC 437, 441; See also *Hodge v The Queen* [1883] 9 AC 117, in which the Privy Council confirmed the equal status of the provincial and federal legislatures.

20 Notable members of the Privy Council—in particular Lord Haldane—adhered to a compact theory of Canadian federalism. See John T Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto UP 2002) 161–62; The Supreme Court rejected this theory in *Re Resolution to amend the Constitution* [1981] 1 SCR 753, 803; (1981) 120 DLR (3d) 385, 435; See also Wade Wright, ‘Beyond Umpire and Arbitrator: Courts as Facilitators of Intergovernmental Dialogue in Division of Powers Cases in Canada’ (PhD thesis, Columbia University 2014) 328–29 <<http://academiccommons.columbia.edu/catalog/ac:173873>> accessed 31 August 2015, distinguishing between a provincial equality perspective, a pan-Canadian perspective, and a multinational perspective.

must take place within the confines of a normative theory in which provincial and federal governments stand in a relationship of equal autonomy.

Turning to Europe, in its seminal 1963 *Van Gend & Loos* judgment, the Court of Justice of the European Union (CJEU) held that:

The [Union] constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.²¹

In *Costa v Enel*, the Court dropped the reference to international law, referring to EU law instead as a ‘body of law’ and an ‘independent source of law’.²² In subsequent decades, the Court of Justice continued on the path of what many have described as one of a ‘constitutionalisation’ of the EU legal order and institutional structure, allowing the late Eric Stein to characterise early 1980s European Economic Community law as ‘a constitutional framework for a federal-type structure in Europe’.²³ At around the same time as the German Constitutional Court expressed its claim to ultimate authority in its 1992 Maastricht ruling,²⁴ academic commentators undertook efforts to pass ‘beyond the sovereign state’ and develop a constitutional theory for the European Union in which the Union and Member State legal orders were conceived of as co-equal in character.²⁵ Sir Neil MacCormick was arguably the first scholar of EU law to articulate this idea. In a 1993 article, he raised the following question:

Can we think of a world in which our normative existence and our practical life are anchored in, or related to, a variety of institutional systems, each of which has validity or operation in relation to some range of concerns, none of which is absolute over all the others, and all of which, for most purposes, can operate without serious mutual conflict in areas of overlap?²⁶

21 Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 1, para 12.

22 Case 6/64 *Costa v ENEL* [1964] ECR 585, 593–94.

23 Eric Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’ (1981) 75 AJIL 1, 1; The *Les Verts* judgment plays an important symbolic role in this narrative, as it contains the first reference to the EU Treaties as a ‘constitutional charter’. See Case 294/83 *Parti écologiste Les Verts v European Parliament* [1986] ECR 1339, para 23.

24 BVerfGE 89, 155 (12 October 1993) 2 BvR 2134/92, 2159/92, para 165.

25 Neil MacCormick, ‘Beyond the Sovereign State’ (1993) 56 MLR 1.

26 *ibid* 17.

Constitutional pluralism, as the theory became known, has become the dominant theory of European integration within EU legal circles, replacing the paradigm of classical constitutionalism described in the above.²⁷ EU constitutionalism gives expression to this theory of constitutional pluralism by combining the abovementioned claim to autonomy—the ‘new legal order’ claim—with a commitment towards protecting the national, including the constitutional, identity of the Member States.²⁸

It is suggested that, despite differences in the conceptual structure of both compound polities, what unites both Canada and the European Union is an adherence to a constitutional principle of federalism understood as the pursuit of equal autonomy between both orders of government that together constitute a compound polity.²⁹ In Canada, the federalism principle is expressed primarily at a hermeneutical level, ie, in the interpretation given to the division of legislative competences laid down in Canada’s written constitution. In the EU, by contrast, it is expressed at a systemic level, ie, in the process of mutual accommodation between the EU and Member State legal orders. Regardless of these differences, in both polities, the best possible interpretation of the constitutional structure is one in which a respect for the equal autonomy of both levels of government plays a prominent role. In the remainder of this paper, this understanding of federalism as equal autonomy will act, to paraphrase Canada’s Supreme Court, as the ‘lodestar’ by which the analysis of Canada and the EU’s foreign affairs constitution will be guided.³⁰

27 For a recent discussion of the different strands in constitutional pluralist thought, see Jan Komárek and Matej Avbelj (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012); Classical constitutionalism refers to what Mattias Kumm referred to as the ‘legalist monist’ conception of the structure of the EU polity. See Mattias Kumm, ‘Rethinking Constitutional Authority: On the Structure and Limits of Constitutional Pluralism’ in Matej Avbelj and Jan Komárek (eds), *Constitutional Pluralism in the European Union and Beyond* (Hart 2012) 39–66, 43–47.

28 Maastricht Treaty [1992] OJ C191/1 (TEU) art 4(2); On a role for this provision as a federalism safeguard in the EU, see François-Xavier Millet, ‘National Constitutional Identity as a Safeguard of Federalism in Europe’ (2012) EUI Working Paper 2012/06.

29 The similarities between the concept of federalism in the Anglo-American tradition and that of constitutional pluralism were noted in Robert Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (OUP 2009) 13–74.

30 *Reference re Secession of Quebec* [1998] 2 SCR 217, (1998) 161 DLR (4th) 385 [56]: ‘In interpreting our Constitution, the courts have always been concerned with the federalism principle, inherent in the structure of our constitutional arrangements, which has from the beginning been the lodestar by which the courts have been guided.’

3 Federalism and foreign affairs in Canada

How did Canadian constitutionalism address the challenge posed by the tension between the domestic principle of federalism and the international legal principle of sovereignty? As argued by a federal government lawyer:

The Constitution of Canada is a hybrid plant if ever there was one, deeply rooted in the soil of the British tradition of unwritten principles and conventions, but with most of its prominent offshoots—a written document, a federal provincial distribution of powers, an entrenched Charter, legal amending procedures, judicial review—grafted from the American genus and species.³¹

Absent any provisions on the subject of foreign affairs in Canada's written constitutional document—the Constitution Act 1867—it was the British constitutional tradition of unwritten principles and conventions that Canadian constitutionalism turned to in search of materials with which to craft a Canadian foreign affairs constitution.³²

Looming large in British constitutional thought on the subject of foreign affairs were two notions: that of dualism and that of the royal prerogative. At a basic level, dualism means that the international and domestic legal orders are considered conceptually distinct.³³ As a consequence of this separation, the validity of a domestic legal norm cannot be derived from an international legal norm. Validity within both legal orders must be derived from each legal order's rule of recognition. In practice, this means that for a treaty to have legal effect within domestic law, a form of normative action is required. In the United Kingdom, such action traditionally takes the form of a legislative act. Lord Atkin expressed this position well in the 1937 *Labour Conventions* case, where he held that 'within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of

31 Warren J Newman, 'Of Castles and Living Trees: The Metaphorical and Structural Constitution' (Conference on Emerging Issues in Canadian Public Law, Ottawa, May 2015) 20–21.

32 See, however, s 132 of the Constitution Act 1867, empowering the federal Parliament to implement Imperial treaty obligations affecting Canada; The extension of the scope of this provision to include Canadian treaty obligations was rejected in the *Labour Conventions* case; See *Attorney General of Canada v Attorney General of Ontario* [1937] AC 326 (*Labour Conventions*).

33 In contrast to monism, according to which domestic and international law form a single legal order. See Hans Kelsen, *Principles of International Law* (The Lawbook Exchange 2003) 403–04.

the existing domestic law, requires legislative action.’³⁴ The *Labour Conventions* case counts as a precedent both in the United Kingdom and in Canada. It confirmed the dualist orientation of Canada’s foreign affairs constitution. As in the United Kingdom, a treaty cannot, in and by itself, be binding within Canadian law.

Next to dualism, the royal prerogative is the other central concept of the United Kingdom’s foreign affairs constitution. In the United Kingdom, the concept operates as the constitutional foundation for the government’s authority over foreign affairs.³⁵ The concept has a long pedigree.³⁶ Albert Venn Dicey defined the prerogative as the ‘residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown.’³⁷ Public authority over foreign affairs was generally understood as being part of the royal prerogative.³⁸ The royal prerogative encompasses all actions traditionally understood as flowing from a polity’s status as a sovereign State. This includes the power to make treaties (*ius tractati*) and the power to send and receive ambassadors and consuls abroad (*ius legationis*).³⁹

The transplantation of concepts of British constitutionalism to Canadian soil raised questions regarding these concepts’ compatibility with Canada’s federal architecture. Two such questions are worth exploring: (i) Who was to be constitutionally empowered to exercise the foreign affairs prerogative: the federal Governor General (and thus in practice the federal government) and/or the

34 *Labour Conventions* [1937] AC 326, 347; For a more recent affirmation of this principle, see *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, (1999) 174 DLR (4th) 193 [69], where Justice L’Heureux-Dubé held that ‘[i]nternational treaties and conventions are not part of Canadian law unless they have been implemented by statute’.

35 See Ministry of Justice (UK), *The Governance of Britain* (Cm 7170, 2007) 16, describing the power to make treaties as a ‘prerogative executive power’.

36 For an overview of the notion’s historical origins and its historical role in the area of foreign affairs, see Campbell McLachlan, *Foreign Relations Law* (CUP 2014) 111–258.

37 AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan 1915) 424.

38 McLachlan (n 36) 117; For a confirmation of this position in the Canadian context, see *Canada (Prime Minister) v Khadr* [2010] 1 SCR 44 [35]: ‘The prerogative power over foreign affairs has not been displaced by s 10 of the Department of Foreign Affairs and International Trade Act (...) and continues to be exercised by the federal government. The Crown prerogative in foreign affairs includes the making of representations to a foreign government’.

39 Blackstone considered the following powers as falling within the scope of the foreign affairs prerogative: the power to appoint and to receive ambassadors, to make treaties with foreign states, to make war and peace, to exact reprisals for injury to his subjects by foreign states and to grant safe conduct for foreigners entering the nation. See McLachlan (n 36) 116, citing BL Comm.

provincial lieutenant governors (and thus in practice the provincial governments)?
 (ii) Which legislatures would be constitutionally empowered to implement treaties in Canadian law: the federal and/or the provincial legislatures?

3.1 The prerogative and Canada's federal architecture

As with other concepts and principles originally developed in a British context, questions were raised regarding the prerogative's relation to Canada's federal architecture. Canadian courts were presented with this challenge in the abovementioned *Labour Conventions* case. At issue was the constitutionality of federal legislation aimed at implementing a number of conventions adopted in the context of the International Labour Organization (ILO). The conventions addressed issues of labour law. As such, they touched on provincial legislative authority over property and civil rights in the province.⁴⁰

The Ontario government launched a constitutional challenge against the federal implementing legislation. Before the Supreme Court of Canada and ultimately the London-based Privy Council, the Ontario government argued that it, too, possessed the constitutional authority to adopt the involved ILO conventions.⁴¹ At the Supreme Court of Canada, Chief Justice Duff rejected Ontario's plea on behalf of a 3–2 majority. He responded by stating that:

As a result of the constitutional development of the last thirty years (and more particularly of the last twenty years) Canada has acquired the status of an international unit, that is to say, she has been recognized by His Majesty the King, by the other nations of the British Commonwealth of Nations, and by the nations

40 Constitution Act 1867 s 92(13). The federal government accepted before the Privy Council that in a strictly domestic context, the federal Parliament would not have had the legislative competence to adopt the contested statutes.

41 The Ontario Government argued that '[t]here are no grounds whatever for saying that the parties to advise His Majesty in matters relating to the jurisdiction of the Provinces have in some way come to the Dominion Ministers. The Province has the right to advise the Crown in matters where its legislative powers apply. Ontario has the right to enter into an agreement with another part of the British Empire or with a foreign State'. Bernier (n 1) 52, citing *Labour Conventions* [1937] AC 326.

of the world, as possessing a status enabling her to enter into, on her own behalf, international arrangements, and to incur obligations under such arrangements.⁴²

Regarding the nature of that competence, Duff CJ begged the question: ‘That this authority is exclusive would seem to follow inevitably from the circumstances that the Lieutenant-Governors of the provinces do not in any manner represent His Majesty in external affairs.’⁴³ The Privy Council did not consider it necessary to rule on the question of the impact of the federalism principle on the royal prerogative, although its ruling did appear to rely on the premise that only the federal government could exercise the royal prerogative to make treaties.⁴⁴

The issue of the locus and possible division of the power over foreign affairs has been, and continues to be, a thorny one in Canada. It became a focal point for supporters of Quebec autonomy during that province’s Quiet Revolution⁴⁵ and up until today some commentators defend the position that the foreign affairs prerogative can be exercised also by the provincial lieutenant governors (and thus by the provincial governments).⁴⁶ In addition, the government of Quebec itself continues to affirm, as former liberal premier Jean Charest held, that ‘[c]e qui est de compétence québécoise chez nous est de compétence québécoise partout!’—a proposition repeated by Quebec’s current international relations minister as recently as the spring of 2015.⁴⁷ Despite these claims, Canadian courts nonetheless

42 *Reference re legislative jurisdiction of Parliament of Canada to enact the Minimum Wages Act* [1936] SCR 461, 462; (1936) 3 DLR 673; note that the Privy Council’s *Labour Conventions* reference is the judgment in appeal against the Supreme Court of Canada’s reference mentioned here.

43 *ibid.*

44 In this sense, see Stéphane Beaulac, ‘The Myth of Jus Tractatus in La Belle Province: Quebec’s Gerin-Lajoie Statement’ (2012) 35 Dalhousie LJ 237, 250–52.

45 See, eg, the plea for a Quebec treaty-making power in JY Morin, ‘La personnalité internationale du Québec’ (1984) 1 *Revue Québécoise de Droit International* 163; See also the comparative analysis made nearly twenty years prior to this, before assuming a prominent role in the Quebec provincial government: JY Morin, ‘La conclusion d’accords internationaux par les provinces canadiennes à la lumière du droit comparé’ (1965) 3 *Can YIL* 127.

46 See generally Hugo Cyr, *Canadian Federalism and Treaty Powers: Organic Constitutionalism at Work* (Peter Lang 2009); Gibran van Ert, ‘The Legal Character of Provincial Agreements with Foreign Governments’ (2001) 42 *Les Cahiers de Droit* 1093.

47 Christian Dufour, ‘La doctrine Gérin-Lajoie pour toujours’ *Journal de Montreal* (Montreal, 29 March 2015) <<http://service.vigile.quebec/La-doctrine-Gerin-Lajoie-pour>> accessed 23 August 2015.

continue to consider the foreign affairs prerogative a prerogative of the federal government only.⁴⁸

3.2 Treaty implementation and Canada's federal architecture

Transplanting both dualism and the royal prerogative to Canadian soil raised yet another federalism question. Which Canadian legislature is constitutionally empowered to implement treaty obligations incurred by the federal government? In Australia, the Commonwealth Constitution explicitly allocates legislative competence over external affairs to the Commonwealth Parliament.⁴⁹ As mentioned, in the United States, the Supreme Court held in *Missouri v Holland* that Congressional power to implement treaties is a necessary and proper means of effectuating a treaty.⁵⁰ In Canada, by contrast, a similar general treaty-implementing power was rejected. In the same *Labour Conventions* case, Lord Atkin ruled that:

For the purposes of (...) the distribution of legislative powers between the Dominion and the Provinces, there is no such thing as treaty legislation as such. The distribution is based on classes of subjects: and as a treaty deals with a particular class of subjects so will the legislative power of performing it be ascertained.⁵¹

Put differently, the treaty origins of a statute do not affect the allocation of legislative competences in Canada; this allocation depends on substantive classes of subjects, not on the origins (domestic or international) or the type of instrument used.⁵² The

48 For a relatively recent confirmation of the position by the Quebec Court of Appeal, see *UL Canada Inc v Québec (A-G)* (2003) 234 DLR (4th) 398 [76] (Nuss JA): 'As a matter of International Law, a country is bound by a treaty from the moment it is ratified. In Canada, the Governor General has the Constitutional authority to ratify treaties'; Note that the Supreme Court of Canada itself has not revisited the issue since the remarks by Chief Justice Duff uttered in 1936. It did, however, on several occasions raise the possibility of overturning the *Labour Conventions* judgment. See, eg, *MacDonald v Vapor Canada Ltd* [1977] 2 SCR 134 [168ff] (Laskin CJ). Chief Justice Bora Laskin's opposition to *Labour Conventions* was well-known; See Bora Laskin, 'Some International Legal Aspects of Federalism: The Experience of Canada' in David Currie (ed), *Federalism and the New Nations of Africa* (Chicago UP 1964) 396.

49 *Australian Constitution* s 51 (xxix).

50 *Missouri v Holland* (n 6).

51 *Labour Conventions* [1937] AC 326, 351.

52 Note that the division of executive powers follows that of legislative powers in Canada. See *The Bonanza Creek Gold Mining Company Limited v The King* (1916) 1 AC 566, 579: 'The [Constitution Act 1867] has made a distribution between the Dominion and the provinces

refusal to make dependent the scope of the federal Parliament's legislative authority on the exercise of the federal government's treaty-making power sits well with the dualist philosophy underpinning Canada's foreign affairs constitution. The power to make international legal commitments remains separate from the power to change Canadian law. The dualist wall remains impermeable.

The refusal to extend the federal Parliament's legislative powers to keep pace with the federal government's extended executive powers in the area of foreign affairs is an important feature of Canada's foreign affairs constitution, setting Canada apart from federations such as Australia and the United States. This refusal has certain federalism repercussions. If it is beyond doubt that a federally concluded treaty will require provincial legislative implementation, then the federal government is well advised to ensure provincial 'buy in' at the level of the negotiation of that treaty. Such is the case, for instance, with the Canada-European Union trade agreement. Pressured in this direction by the European Union, Canadian provinces will implement the provisions of the treaty that touch on provincial heads of competence into domestic Canadian law. As a consequence, the federal government accepted a provincial role in the treaty negotiations.⁵³

However, the impact of the *Labour Conventions* principle on the overall federal balance in Canada should not be overstated. The principle does not constitutionally entrench a role for the provincial governments in the federal treaty-making process.⁵⁴ On many occasions, the federal Parliament will implement treaties, even if some provisions could be understood as touching on provincial

which extends not only to legislative but to executive authority (...) the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers'.

53 Provinces have been making active use of the political leverage that they have been offered. In early 2015, the province of Newfoundland and Labrador threatened not to implement the EU–Canada trade deal if it did not obtain federal funds in compensation for the potential job losses in the fisheries sector. See 'CETA Negotiations with Ottawa Suspended over Fisheries Fund, NL Says' *CBC News* (19 January 2015) <<http://www.cbc.ca/news/canada/newfoundland-labrador/ceta-negotiations-with-ottawa-suspended-over-fisheries-fund-n-l-says-1.2917699>> accessed 14 August 2015.

54 The provincial premiers have requested a formalisation of a provincial role in federal treaty negotiations. To our knowledge, the federal government has not responded to this request. See Government of New Brunswick, 'Premiers Strengthen Trade' *Communications New Brunswick* (10 August 2007) <<http://www.gnb.ca/cnb/news/iga/2007e1017ig.htm>> accessed 14 August 2015.

heads of competence.⁵⁵ This observation does not come as a surprise considering the structure of domestic federalism in Canada. The recognition of jurisdictional overlap is coupled with a tolerance of Canadian courts towards the operability of legislation—federal or provincial—that touches on heads of power allocated to the other level of government.⁵⁶ Such tolerance also exists in the context of foreign affairs, where one can expect federal implementing legislation in pith and substance in relation to a matter falling within a federal class of subjects to be considered *intra vires* the federal Parliament.

In summary, as holds true for Canada's domestic constitution, Canada's foreign affairs constitution can be understood as being 'similar in principle to that of the United Kingdom' albeit adapted to Canada's federal architecture. On the one hand, as in the United Kingdom, external sovereignty in Canada remains indivisible. Canada thus assimilates itself to the ideal-type of a unitary, sovereign State. On the other hand, the abovementioned dualist wall protects the legislative powers Canada's written constitution has allocated to the federal and provincial legislatures. This arrangement can be understood as a compromise between the need to ensure a smooth integration in the international legal order and the need to protect Canada's federal architecture.

55 It was uncertain, for instance, whether the federal Parliament had the constitutional authority to implement the entire North American Free Trade Agreement. Provincial governments had threatened to launch a constitutional challenge against the federal implementing legislation, but in the end refrained from doing so. On this subject, see H Scott Fairley, 'Foreign Affairs and the Canadian Constitution' (Biennial Conference of the International Law Association, Toronto, June 2006) <<http://www.ila2006.org/fairley.pdf>> accessed 5 January 2016.

56 On the 'flexible' nature of Canadian federalism, see *Ontario (A-G) v OPSEU* [1987] 2 SCR 2, 27; 41 DLR (4th) 1, 11 (Dickson CJ): 'The history of Canadian constitutional law has been to allow for a fair amount of interplay and indeed overlap between federal and provincial powers. It is true that doctrines like interjurisdictional and Crown immunity and concepts like "watertight compartments" qualify the extent of that interplay. But it must be recognized that these doctrines and concepts have not been the dominant tide of constitutional doctrines; rather they have been an undertow against the strong pull of pith and substance, the aspect doctrine and, in recent years, a very restrained approach to concurrency and paramountcy issues'; See also Bruce Ryder, 'The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and the First Nations' (1991) 36 McGill LJ 308, 324–26.

3.3 Principle and pragmatism in Canadian foreign affairs federalism

How to square, however, the picture of an impermeable dualist ‘wall’ between the internal and the external realms with the empirical observation that Canadian provinces do develop certain forms of international action—actions which include at least in one province the conclusion of agreements with third country governments that this province considers to be legally binding?⁵⁷

It is suggested that a strict reading of the scope of the foreign affairs prerogative precludes Canadian provinces from making agreements that can be considered treaties within the meaning of the Vienna Convention on the Law of Treaties—treaty-making, it was mentioned above, being a central component of the foreign affairs prerogative. However, Canadian constitutionalism has opted for a pragmatic reading of the scope of the foreign affairs power that accommodates, if only partially, provincial claims to hold an independent treaty-making power. This pragmatic interpretation of the prerogative was suggested by Edward McWhinney in a 1969 contribution. This was shortly after the showdown between the federal and Quebec governments over the conclusion of an agreement between France and Quebec of which both parties considered to constitute a treaty under international law. McWhinney pleaded for:

enlisting the virtues of constitutional self-restraint and moderation and of not escalating into a federal-provincial constitutional crisis over foreign affairs and the treaty power, before one is sure that, in substance, it really is ‘foreign affairs’ or even ‘treaties’ that are involved [*and not*] simply a normal question of provincial legislative competence involving, at the same time, some trans-national aspects.⁵⁸

57 The government of Quebec regularly concludes agreements with third countries on subjects covering the entire scope of its domestic competences. For an overview, see the database on the website of the Quebec International Relations ministry at <<http://www.mrif.gouv.qc.ca/en/Ententes-et-Engagements/Ententes-internationales>> accessed 29 August 2015; It should be noted that Quebec is not alone in undertaking international activities. For an early analysis, see Ronald G Atkey, ‘The Role of the Provinces in International Affairs’ (1970) 26 *Intern’l J* 249, 261; For a more recent contribution focussing on the area of international trade, see Christopher Kukucha, *The Provinces and Canadian Foreign Trade Policy* (UBC Press 2008).

58 Edward McWhinney, ‘Canadian Federalism, and the Foreign Affairs and Treaty Power: The Impact of Quebec’s “Quiet Revolution”’ [1969] *Can YB Int’l L* 3, 10.

It would appear that the federal government has taken up McWhinney's advice and embraced a pragmatic conception of the scope of the foreign affairs prerogative that leaves room for provincial international action without international legal consequences. While maintaining an uncompromising position at the level of principle,⁵⁹ the federal government, to our knowledge, has not undertaken any legal challenges against provincial practices of making agreements with third country governments.

This arrangement can perhaps best be understood as an example of a constitutional abeyance. A constitutional abeyance, Michael Foley explains, is 'a form of tacit and instinctive agreement to condone, and even cultivate, constitutional ambiguity as an acceptable strategy for resolving conflict.'⁶⁰ Constitutional abeyances are only effective, however, in so far as disagreements over substance remain within certain limits. If and when genuine disagreement arises, constitutional questions left unanswered will most likely re-emerge. This would appear to be the case in Canada as well.⁶¹ If a Canadian province would desire to make an agreement with a third country government that would run counter to federal law or policy, it is to be expected that the federal government of Canada will attempt to prevent that province from doing so. The constitutional argument that foreign affairs remain federal affairs could, in such a situation, be used as another means of exercising leverage.

In summary, it is suggested that Canadian constitutionalism couples principle with pragmatism. The federal government holds an exclusive power to bind Canada under international law. It applies this power pragmatically, which allows provincial governments to make certain agreements with third countries. In case of disagreement between the federal and provincial governments, however, the federal government will be able to revert back to a more principled position,

59 The position of the federal government in this debate has been articulated in Paul Martin, *Federalism and International Relations* (The Queen's Printer 1968) 15–16, arguing that the treaty-making power is part of the federal royal prerogative, and that the power to exercise the prerogative has never been delegated to the provincial lieutenant-governors. As confirmed to the author in an interview, this white paper remains government policy today.

60 Michael Foley, *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (Routledge 2011) xi.

61 See Can Erk and Alain-G Gagnon, 'Constitutional Ambiguity and Federal Trust: Codification of Federalism in Canada, Spain and Belgium' (2000) 10 *Regional & Federal Studies* 92, suggesting that ambiguity only works as a strategy of pacification if sufficient trust exists between orders of government.

precluding the provincial government from making the contested agreement. In the final analysis, therefore, it is argued that Canada's dualist wall stands strong. As far as the power to make commitments under international law is concerned, Canada presents itself to the outside world as a unitary, sovereign State. Constitutional restrictions on the exercise of the federal foreign affairs prerogative exist,⁶² but these do not include restrictions related to Canada's federal architecture.

4 Federalism and foreign affairs in the European Union

How did European constitutionalism address the challenge posed by the tension between the domestic principle of federalism and the international legal principle of sovereignty? As was the case with Canada's written constitution, the Treaty of Rome had little to say on the subject of foreign affairs. Only two treaty provisions empowered the then European Economic Communities to make treaties with third countries: the provision on the common commercial policy and that on the conclusion of association agreements.⁶³ In the absence of a more elaborate written constitutional framework, the EU's foreign affairs constitution was shrouded in mystery.⁶⁴ How, then, did European constitutionalism address the tension between the domestic constitutional value of federalism—as expressed in the EU's constitutional theory of constitutional pluralism—and international law's fundamental value of State sovereignty?

European constitutionalism addressed this challenge in two phases. In a first phase, the 'conceptual-federalist phase',⁶⁵ federalism conflicts were avoided

62 See *Khadr* [2010] 1 SCR 44 [36].

63 Treaty Establishing the European Economic Community [1957] Not published [the EEC Treaty or Treaty of Rome], respectively, arts 113, 131.

64 Different schools had different views on the nature of the EU foreign affairs constitution. For a comparison, see the report of the 1969 conference held at the University of Liège, where Pierre Pescatore and Rolando Quadri defended opposing theories on the international legal personality of the Union. See Michel Melchior (ed), *Les Relations Extérieures de La Communauté Européenne Unifiée. Actes Du Troisième Colloque Sur La Fusion Des Communautés Européennes Organisé à Liège Les 25, 26 et 27 Octobre 1967* (Institut d'études juridiques européennes de la Faculté de droit de l'Université de Liège 1969) 41–75 and 77–117.

65 Michel Waelbroeck introduced the distinction between competing conceptions of the EU's early foreign affairs constitution as a distinction between a 'conceptual-federalist' and a 'pragmatic' approach in M Waelbroeck, 'The Emergent Doctrine of Community Pre-Emption—

and a smooth integration in the international legal order was facilitated through a strategy of a progressive 'exclusivisation' of Union external competences. In this normative vision, external sovereignty over areas covered by the European integration process—in particular areas (to be) covered by the so-called 'common policies'—would gradually be 'transferred' to the Union level of government.⁶⁶ At least within those areas affected by the integration process, the Union institutions would be the holders of an external sovereignty not unlike that of the Union's treaty partners. Federalism was deemed protected sufficiently by the Member States' presence in the Council.

In a second phase, the 'pragmatic' phase, European constitutionalism abandoned this strategy of a progressive exclusivisation and instead pursued a strategy of a generalisation of shared competence in the foreign affairs area, coupled with a normative push towards joint action by the Union and the Member States. Member States and the Union institutions are invited to act collectively without the division of competences between both levels of government being clearly defined. In doing so, the Member States and the Union merge their external sovereignties so as to match the external sovereignty of their treaty partners. Unclear, however, is how the federalism principle is to fit into this arrangement. The Court of Justice appears willing to carve out a space in which federalism can be expressed at the level of the decision-making processes. As will be discussed, however, these efforts will remain unsatisfactory as long as it remains possible for Member States to become a party to an international agreement the EU could arguably conclude independently, thereby turning a proposed EU-only agreement into a mixed agreement.

Consent and Re-Delegation' in Terrance Sandalow and Eric Stein (eds), *Courts and Free Markets: Perspectives from the United States and Europe* (OUP 1982) 551–52. Waelbroeck was right in suggesting that both conceptions operated at the same time. It is suggested, however, that the history of the EU's foreign affairs constitution can be read as one of a gradual move from one conception to the other, whereby the 'pragmatic' conception gradually overtook the 'conceptual-federalist' reading as the dominant understanding of the structure of the EU's foreign affairs constitution.

- 66 It should be recalled from the outset that even in this ambitious understanding of the scope of the Union's external competences, it was not envisaged that the Union would replace the Member States entirely at the international level. As the Court of Justice already held in Case 26/62 *Van Gend en Loos* [1963] ECR 1, sovereignty was only transferred 'within limited fields'.

4.1 The conceptual-federalist phase: transferring external sovereignty to the Union

The Court of Justice first pronounced itself on the subject of foreign affairs in the 1971 *ERTA* judgment.⁶⁷ In what was incidentally the first inter-institutional dispute brought before the Court of Justice,⁶⁸ the Commission requested that the Court annul Council proceedings regarding the negotiation and conclusion by the Member States of an international agreement on road transport. In the Commission's view, if adopted, the international agreement would come into conflict with an existing Union regulation.⁶⁹ The Commission requested that the Court rule that 'where and to the extent to which the [Union] actually laid down such regulations, Member States lose their authority to legislate at the same level, and can only be called upon to take such measures as may be necessary to implement the [Union] provisions'.⁷⁰ The Council, followed by Advocate General Dutheillet de Lamothe, contested the Commission's argument. The Council argued instead that, absent an express attribution of powers to the Union, the Union did not hold any form of external competence, let alone an exclusive one. In its judgment of 31 March 1971, the Court followed the Commission as far as the question of principle was concerned. In particular, it ruled that:

Each time the [Union], with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right, acting individually or even collectively, to undertake obligations with third countries which affect those rules.⁷¹

The *ERTA* judgment pursued a double objective. On the one hand, from a foreign affairs perspective, the *ERTA* or 'pre-emption' doctrine can be understood as an

67 Case 22/70 *Commission v Council* [1971] ECR 263 (*ERTA*).

68 *ibid* para 284, Opinion of AG de Lamothe.

69 *ibid* para 270.

70 *ibid*.

71 *ERTA* [1971] ECR 263, 274, para 17. As far-reaching as the Court's argument appears to be, it did not benefit the Commission in that particular case. As the origins and a considerable amount of the work had been carried out before powers over transport had been transferred to the Union, the Court did allow the Member States to become Party to the road transport agreement, provided they acted throughout the treaty-making procedure in the interest of the Union: paras 84–90.

expression of a normative vision of a gradual eclipsing of the Member States from the international arena through the adoption of internal Union legislation.⁷² The Court perhaps, and the Commission quite certainly,⁷³ understood the establishment and gradual expansion of exclusive Union competence as the preferred constitutional answer to the challenge of ‘fitting’ into an international legal order made by and for sovereign States. By replacing the Member States at the international level in the areas concerned by the integration process, the Union would hold the attributes of external sovereignty. Federalism questions would not affect the Union’s ability to ‘speak with one voice’ internationally. The Union would be on an equal footing with its treaty partners.

On the other hand, from a domestic federalism perspective, the *ERTA* judgment aimed to ensure that the Member States would not be able to undo by external means that which they had agreed to internally. As the Court held:

These [external Union] powers exclude the possibility of concurrent powers on the part of Member States, since any steps taken outside the framework of the [Union] institutions would be incompatible with the unity of the Common Market and the uniform application of [Union] law.⁷⁴

In other words, by rendering exclusive external competence over areas within which domestic common rules had already been adopted, the Member States would not be in a position to affect, let alone undo, domestic EU norms by concluding international agreements with third countries.⁷⁵ In this sense, the Court of Justice aimed to tackle a problem that mirrors the one presented to the Privy Council in *Labour Conventions*: in both cases, one level of government aimed to encroach on the competences of the other level of government through the exercise of the

72 Pierre Pescatore, *Le droit de l'intégration: émergence d'un phénomène nouveau dans les relations internationales selon l'expérience des Communautés Européennes* (Bruylant 2005) 44, arguing that in *ERTA* the Court of Justice confirmed a necessary link between the internal process of unification and the right to represent the Community on the international stage.

73 On the role of the European Commission's legal service in the development of an autonomous legal order more generally, see generally Julie Bailleux, 'Michel Gaudet, a Law Entrepreneur: The Role of the Legal Service of the European Executives in the Invention of EC Law and the Birth of the Common Market Law Review' (2013) CML Rev 359.

74 *ERTA* [1971] ECR 263, para 32.

75 Note that in 1971 it was not at all clear whether the primacy principle could apply to international action undertaken by the Member States. See Marise Cremona, 'The Doctrine of Exclusivity and the Position of Mixed Agreements in the External Relations of the European Community' (1982) 2 OJLS 393, 397–98.

treaty-making power.⁷⁶ The fundamental difference between the two cases was that the federalism question in Canada arose at the level of the implementation of treaties, while in the EU it arose at the level of their conclusion.⁷⁷

Similar observations can be made in relation to those areas now considered as falling within the scope of the Union's so-called *a priori* exclusive competence.⁷⁸ In the Treaty of Rome, the nature of the common commercial policy—to take the best-known example of this type of competence—was left undefined.⁷⁹ The Court of Justice derived the exclusive character of the common commercial policy competence from what it considered its very nature or 'essence' as a policy that did not allow for concurrent Member State action. In Opinion 1/75, in particular, the Court of Justice held that the common commercial policy:

is conceived (...) in the context of the operation of the Common Market, for the defence of the common interests of the [Union], within which the particular interests of the Member States must endeavour to adapt to each other (...) Quite clearly, however, this conception is incompatible with the freedom to which the Member States could lay claim by invoking a concurrent power, so as to ensure that their own

76 For a similar observation in the EU-US context, see Eric Stein and Louis Henkin, 'Towards a European Polity? The European Foreign Affairs System from the Perspective of the United States Constitution' in M Cappelletti, M Seccombe and J Weiler (eds), *Integration Through Law. Book 3: Forces and Potential for a European Identity* (de Gruyter 1986) 43, pointing out that the ruling in *ERTA* could be seen as the 'exact reverse' of that in *Missouri v Holland*, 252 US 416 (1920).

77 In contrast to Canadian constitutionalism, which, as described, adheres to the philosophy of dualism, European constitutionalism from an early stage adhered to a philosophy of (qualified) monism. See already the judgment in Case 181/73 *Haegeman v Belgium* [1974] ECR 449, para 5: 'The provisions of the Agreement, from the coming into force thereof, form an integral part of [Union] law'; Monism is qualified in the European Union, however, since the Court of Justice acts as a 'gatekeeper' by subjecting the provisions of an international agreement to a direct effect test; For an example, see Case C-308/06 *Intertanko* [2008] ECR I-4057; On this subject, see Robert Schütze, *Foreign Affairs and the EU Constitution: Selected Essays* (CUP 2014) 50–54, comparing the direct effect test to the political question doctrine known in US constitutionalism.

78 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU) art 3(1).

79 This led to some speculation as to the precise nature of the competence. See Ulrich Everling, 'Legal Problems of the Common Commercial Policy in the European Economic Community' (1967) 4 CML Rev 141, 150.

interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the [Union].⁸⁰

Here as well, the Court of Justice might have had in mind a desire to prevent federalism conflicts from occurring as well as a normative vision of a gradual replacement of the Member States by the Union institutions within the areas affected by the integration process. Through exclusivity, a smooth integration in the international legal order would be ensured; at the same time, federalism conflicts could be prevented.

However, this vision was difficult to accept for many Member States. Already in the *ERTA* case itself, the tension between the Court's expansive understanding of the scope of the Union's external competences had come into conflict with a Member State's insistence to remain visible at the international level. Thus in *ERTA* itself, the Court introduced the *ERTA* doctrine at the level of constitutional principle, but at the same time sought ways to justify that the Member States, rather than the Union, were to conclude the treaty involved.⁸¹

More far-reaching still, in Opinion 1/78, the Court of Justice felt compelled to accept a Council submission that the allocation of competence is affected by the fact that Member States would, to a significant extent, finance the operations of a proposed treaty regime. After confirming its statement of principle in Opinion 1/75 regarding the nature of the common commercial policy—quoted in the above—the Court ruled that if:

the financing is to be by the Member States that will imply the participation of those States in the decision-making machinery or, at least, their agreement with regard to the arrangements for financing envisaged and consequently their participation in the agreement together with the Community. The exclusive competence of the Community could not be envisaged in such a case.⁸²

80 Opinion 1/75 (*Understanding on a Local Cost Standard*) [1975] ECR 1355, 1363–64; See also Case 41/76 *Suzanne Criel, née Donckerwolcke v Procureur de la République* [1976] ECR 1921, paras 24–26.

81 The *ERTA* case laid the foundation for what is known today as the trustee doctrine. On this doctrine, see generally Marise Cremona, 'Member States as Trustees of the Union Interest: Participating in International Agreements on Behalf of the European Union' in Anthony Arnall and others (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart 2011).

82 Opinion 1/78 (*International Agreement on Natural Rubber*) [1979] ECR 2871, para 60.

In other words, while maintaining its position of principle with regards to the nature of the common commercial policy, the Court from early on showed itself to be pragmatic in defining its scope.

4.2 The pragmatic phase: merging external sovereignties

In the early 1990s, it had become sufficiently clear that a gradual replacement of the Member States by the Union institutions would not occur in the near future. Member States were adamant to remain visible at the international stage. Presumably at least partially in response to this observation,⁸³ in a number of Opinions, the structure of foreign affairs federalism in the European Union went through a process of transformation. Prior to that period, EU external action was undertaken within a normative framework which aimed to progressively endow the European Union with the attributes of external sovereignty, and in which the federal relationship between the Union and the Member States would be hidden behind a dualist wall.⁸⁴ In the early 1990s, European constitutionalism moved to a normative framework in which the Union and the Member States would merge their external sovereignties to form what Robert Schütze has referred to as a ‘plenipotentiary’ whole.⁸⁵

This development had two aspects: first, it entailed a move away from a paradigm of exclusive external competences and an acceptance of the shared nature of both Union and Member State external competences; second, it implied an embrace of the technique of concluding mixed agreements.

83 Other factors being the experience of the genesis of the Maastricht Treaty, in which cracks in the permissive consensus around the European integration process were revealed, as well as the German Constitutional Court’s Maastricht ruling, in which similar concerns were given judicial expression.

84 See in that regard Ruling 1/78 (*IAEA Convention*) [1978] ECR 2871, in particular para 35, where the Court considered the federal relationship to be a strictly domestic question of no interest to the Union’s treaty partners.

85 Schütze (n 77) 202–03; Loïc Azoulay referred to this shift as one from a classical institutionalism, focussed on protecting the autonomy of the EU institutional framework towards a form of associative institutionalism; See Loïc Azoulay, ‘The Many Visions of Europe: Insights from the Reasoning of the European Court of Justice in External Relations Law’ in Marise Cremona and Anne Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart 2014) 176–80.

The generalisation of shared external competences was brought about primarily by means of a narrowing down of the *ERTA* doctrine.⁸⁶ In Opinion 2/91, the Court of Justice made a first step in this direction by recognising an *ERTA*-type exclusive Union competence only in relation to parts of a proposed international agreement.⁸⁷ Other parts would fall under shared Union-Member State competence. A similar conclusion was reached in Opinion 1/94, where the Court required an area to have been harmonised completely before an *ERTA*-type exclusive Union competence could be recognised.⁸⁸ In more recent case law, the Court took what Advocate General Bot referred to as a flexible approach.⁸⁹ The application of the *ERTA* principle now depends on a 'comprehensive and detailed' analysis of the relationship between a proposed international agreement and common EU rules, in order to assess whether the agreement 'may affect common rules,' as required by Article 3(2) TFEU.⁹⁰ Putting aside the intricacies of the *ERTA* doctrine as interpreted by the Court in recent case law, it is clear that the era of an expansive reading of the *ERTA* doctrine has passed.⁹¹

This narrowing of the *ERTA* doctrine coincided with an embrace of the technique of mixity. In Opinion 2/91, the Court held that in cases in which a treaty cannot be brought entirely within exclusive Union competence, 'negotiation and implementation of the agreement require joint action by the [Union] and the Member States.'⁹² In Opinion 1/94, the Court ambiguously concluded that the Member States and the Union were 'jointly' competent to conclude the General Agreement on Trade in Services and Agreement on Trade-Related Aspects of

86 In addition, it could be argued that the refusal to apply the so-called Opinion 1/76 or complementarity doctrine in any case after Opinion 1/76 also forms part of the Court's move towards the pragmatic paradigm; On the complementarity principle or doctrine, see Geert De Baere, *Constitutional Principles of EU External Relations* (OUP 2008) 52–58.

87 Opinion 2/91 (*ILO*) [1993] ECR I-1061.

88 Opinion 1/94 (*WTO*) [1994] ECR I-5267, para 96; On the implications of Opinion 1/94 on the structure of foreign affairs federalism in the EU, see generally N Emiliou, 'The Death of Exclusive Competence?' (1996) 21 *EL Rev* 294.

89 See Case C-66/13 *Green Network SpA v Autorità per l'energia elettrica e il gas* [2014] ECR I-3377, Opinion of AG Bot, paras 43–48, where he identified three phases in the Court's interpretation of the *ERTA* principle: an initial broad interpretation, a later stricter interpretation, and finally a more flexible interpretation.

90 See Opinion 1/13 (*Convention on the Civil Aspects of Child Abduction*) [2014] ECR I-2303, paras 70, 74.

91 For an analysis of the post-Lisbon *ERTA* case law, see Thomas Verellen, 'The *ERTA* Doctrine in the Post-Lisbon Era' (2015) 21 *CJEL* 383–410.

92 Opinion 2/91 [1993] ECR I-1061, para 12.

Intellectual Property Rights—a conclusion that perhaps revealed the degree to which ‘shared’ competence was conflated with the technique of concluding mixed agreements.⁹³ To our knowledge, in subsequent case law, in the area of foreign affairs, the choice for mixity has itself never been contested.

By embracing mixity, the Court of Justice accepted that the division of competences in the external context be left in abeyance. As was arguably the case with the scope of the foreign affairs prerogative in Canada, the practice of mixed agreements is another example of what Michael Foley referred to as ‘a constitutional abeyance’. As Geert De Baere argued:

Their lack of clarity as to the precise vertical division of competences makes mixed agreements suitable for enabling the Union to act internationally while keeping the competence situation sufficiently vague so as not to affect openly the Member States’ external competences.⁹⁴

As ‘mixity’ prevents the federal relationship in the EU from being settled at the level of the division of competences, federalism questions have started to appear at the level of the Union institutional structure itself. In particular, in three recent inter-institutional cases, the Court was asked to clarify the terms of the decision-making procedures on the basis of which EU external action is to be undertaken.⁹⁵ In the two cases in which the Grand Chamber of the Court has rendered judgment at the time of writing, as well as in Advocate General Sharpston’s Opinion in a third case, the autonomy of the Union’s legal and institutional order was given priority over that of the Member States. The full effectiveness of the text of the Treaties was given priority over arguments derived from the principle of sincere cooperation

93 Opinion 1/94 [1994] ECR I-5267, para 105.

94 Geert De Baere, ‘EU External Action’ in Catherine Barnard and Steve Peers (eds), *European Union Law* (OUP 2014) 738.

95 In Case C-28/12 *Commission v Council* [2015] ECLI:EU:C:2015:282 (*US Air Transport Agreement*), the Commission challenged the practice of hybrid Union-intergovernmental decisions used during the treaty-making process—a practice which, in the Commission’s view, undermined the autonomy of the Union institutional structure as it indirectly reintroduced decision-making by consensus and thus unanimity in the Council; In C-425/13 *Commission v Council* [2015] ECLI:EU:C:2015:483, the Commission took aim at what it considered an unconstitutional infringement by the Council of its prerogative to represent the Union externally; Conversely, in C-73/14 *Council v Commission* [2015] ECLI:EU:C:2015:663 (*ITLOS*), the Council launched a constitutional challenge against what it considered an overly expansive reading of the same Commission prerogative to represent the Union externally.

and the need to protect the ‘unified international representation of the Union and the Member States’.⁹⁶

This shift of emphasis away from the need to work closely to ensure the unified international representation of the Union and towards a greater emphasis on the ‘prerogatives’ of the different Union institutions could pave the way for a recalibration of the federal balance in the EU’s foreign affairs constitution. Rather than putting mixity itself into question, the Court appears to opt for an indirect strategy of strengthening the institutional position of the Union institutions *within* the mixed treaty-making procedure.

Yet, the recalibration put in motion in these cases has pitfalls, if only because it leaves untouched the conceptual structure within which the treaty-making process in all three cases takes place, ie that of a hybrid process characterised both by EU and international legal elements.⁹⁷ By prioritising the former over the latter, the autonomy of the latter is undermined. More precisely, as the Court of Justice pushes towards greater autonomy for the Union institutions within a mixed framework, the tension between EU law (protecting the autonomy of the Union) and international law (protecting the autonomy of the Member States) will increase. That is, ensuring the full effectiveness of EU law within a hybrid EU-international legal arrangement implies a violation of international law’s central value of State sovereignty. Arguably, this approach is reminiscent more of a classical *effet utile*-focussed conception of EU constitutionalism than it is of a conception of the structure of the European integration project as one in which two orders of government stand in a relationship of equal autonomy.

5 Comparing the European Union and Canada

What differences and similarities exist in the ways European and Canadian constitutionalism have addressed Thomas Franck’s challenge? How did European

96 In *US Air Transport Agreement* [2015] ECLI:EU:C:2015:282, para 55, the Court dispelled the Council’s argument that the use of hybrid decisions should be seen as an expression of the duty of sincere cooperation and thus of the requirement of a unified international representation of the Union and the Member States with a brief yet telling sloop that ‘[the principle of sincere cooperation] cannot justify the Council setting itself free from compliance with the procedural rules and voting arrangements laid down in Article 218 TFEU’.

97 For a further elaboration of this argument, see Thomas Verellen, ‘On Hybrid Decisions, Mixed Agreements and the Limits of the New Legal Order: *Commission v Council* (*‘US Air Transport Agreement’*)’ (2016) 53(3) CML Rev 741.

and Canadian constitutionalism address the tension between the domestic constitutional principle of federalism and international law's fundamental value of sovereignty? The comparison will take place in two steps. In a first step, the allocation of foreign affairs competences will be examined; in a second step, the exercise of these competences.

5.1 The allocation of competences

How have competences over foreign affairs been allocated in the European Union and Canada? At the level of competence allocation, in both federal-type polities, foreign affairs were initially considered federal affairs. In Canada, the power to bind oneself under international law was allocated exclusively to the federal government. In the European Union, the doctrines of pre-emption (*ERTA*) and *a priori* exclusivity were designed to put into motion a gradual transfer of external sovereignty over areas covered by the European integration process to the Union order of government. As European integration progressed, the European Union would gradually replace the Member States within the international arena.

However, in both polities, this initial understanding of the division of competences came into conflict with the international ambitions of the other level of government—the Canadian provinces and the European Member States. This conflict led to a softening of the terms of the allocation of foreign affairs powers to the federal order of government. In both polities, opportunities arose for the member units of the federation to also undertake international activities. In Canada, this softening occurred at the level of the enforcement of existing principles, whereby the federal government refrained from enforcing its reading of the constitutional settlement before the courts—a strategy that allows the provincial governments some leeway to make agreements with third countries. In the European Union, this softening occurred at the level of the articulation of the abovementioned doctrines. As the *ERTA* doctrine was narrowed, and as the expansion of the scope of *a priori* competences was put to a halt, European constitutionalism moved to a structure of shared competences. Under this arrangement, both the Union and the Member States in principle hold vast, albeit shared, treaty-making competences.

In short, in both federal-type polities, constitutionalism allows for both orders of government to undertake international activities. Only in the European Union, however, is this ability incorporated in the articulation of the division of competences.

5.2 Exercise of competences

Turning to the level of the exercise of competences, it is useful to make a distinction between direct and indirect restrictions on the exercise of foreign affairs competences. In Canada only indirect restrictions exist; in the EU, both direct and indirect restrictions exist.

Canada is typically considered a dualist federal system.⁹⁸ This means that, once it is established that a matter falls within the jurisdiction of one order of government, that government can exercise its competence over the matter involved freely. In Canada, this feature flows from the fusion of federalism and parliamentary supremacy: while in Canada, an encompassing supremacy as the one held by the UK Parliament is not conceivable, each legislature is nonetheless considered to reign supreme within the sphere allocated to it by Canada's written constitution.⁹⁹ However, the philosophy of dualism as expressed in the *Labour Conventions* case does potentially limit the federal government's freedom to exercise the federal foreign affairs prerogative. If it is established that a matter falls within a class of subjects allocated to the provincial legislatures, the federal government is well advised to ensure provincial 'buy in' at the level of the negotiation of treaties, for it will not be able to force the provincial legislatures to implement Canada's treaty obligations. Even though this indirect federalism safeguard lost some of its effectiveness in an era of flexible federalism in which competences *de facto* overlap significantly, it is suggested nonetheless that this feature of Canadian federalism does remain a factor to be taken into account by the federal government.¹⁰⁰

In the European Union, restrictions on the exercise of competence are both direct and indirect. They are direct, as the duty of sincere cooperation restricts the Member States in their ability to exercise shared foreign affairs competences

98 See, eg. Joanne Poirier, 'Taking Aim at Cooperative Federalism: The Long-Gun Registry Decision by the Supreme Court of Canada' *I-CONnect* (15 April 2015) <<http://www.iconnectblog.com/2015/04/taking-aim-at-cooperative-federalism-the-long-gun-registry-decision-by-the-supreme-court-of-canada/>> accessed 26 August 2015.

99 See, most recently, *Quebec (A-G) v Canada (A-G)* [2015] 1 SCR 693, 383 DLR (4th) 614 [20] (Cromwell and Karakatsanis JJ), holding that parliamentary sovereignty would be undermined if restrictions were put on the exercise of legislative competences in the name of a principle of 'cooperative federalism'.

100 In this sense, see, eg. Christopher J Kukucha, 'From Kyoto to the WTO: Evaluating the Constitutional Legitimacy of the Provinces in Canadian Foreign Trade and Environmental Policy' (2005) 38 *Canadian J Pol Sci* 129, 130–31, suggesting that enduring constitutional ambiguities creates motivation for federal-provincial cooperation.

independently from the other Member States and from the Union institutions.¹⁰¹ Member States must consult with the Union institutions before undertaking foreign affairs action once some form of concerted Union strategy exists. On some occasions—without it being clear when exactly¹⁰²—Member States are constitutionally required to refrain from acting all together. The result of the emergence of this duty of sincere cooperation, it is suggested, is that Member States are exposed to a significant normative pressure to act within a collective Union framework. To paraphrase Christopher Bickerton, to an important extent, European foreign affairs constitutionalism transformed Europe's *nation*-states into *Member States*.¹⁰³

Restrictions are also indirect. The widespread availability of mixity, in effect, leaves the division of competences in abeyance. Absent clarity on the division of competences, the Union order of government is put in a disadvantageous position vis-à-vis the Member States. For the Union, absent a clear mandate given to it by the Treaties, cannot act internationally; the Member States, by contrast, each hold an original, as opposed to a functional, form of international legal personality and can thus act without prior authorisation by the Treaties. Shared competences combined with unlimited mixity prevent the Union from acting autonomously at the international level. As the late Pescatore wrote in a 1999 contribution: 'Mixity combined with a presumption for the competence of Member States is (...) a way of whittling down systematically the personality and capacity of the [Union] as a representative of the collective interest'.¹⁰⁴

In summary, Canadian constitutionalism restricts the ability of the federal government as the sole holder of foreign affairs powers in an indirect manner. European constitutionalism restricts the ability of both the Member States and the Union order of government to act independently at the international level. More

101 In this sense, see Case C-246/07 *Commission v Sweden (PFOS)* [2010] ECR I-3317, paras 74–75.

102 A criticism expressed in Andres Delgado Casteleiro and Joris Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) 36 *EL Rev* 524, 538–39.

103 See generally, Christopher J Bickerton, *European Integration: From Nation-States to Member States* (OUP 2012), arguing that national authority in EU Member States is exercised primarily through external—in particular EU—rules and norms; For a further development of this strand of thought, as well as a critical assessment, see Christopher J Bickerton, Dermot Hodson and Uwe Puetter, *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (OUP 2015).

104 Pierre Pescatore, 'Opinion 1/94 on "Conclusion" of the WTO Agreement: Is There an Escape from a Programmed Disaster?' (1999) 36 *CML Rev* 387, 388.

precisely, in Canada, the federal government is the only order of government that can act internationally, but, in doing so, it must take into account provincial interests. In the European Union, all governments can act autonomously in theory, but in practice all governments must act collectively.

6 Conclusion: equal autonomy, also in foreign affairs?

In conclusion, it is argued that both in Canada and the European Union federalism is, to an important extent, put ‘on hold’ in the area of foreign affairs. The division of legislative competences does not affect the treaty-making power in Canada, making the federal government the only government actor empowered to make commitments under international law. In the European Union, the combination of loyalty with mixity moulds the Union and the Member State governments into a plenipotentiary whole—a strategy that might facilitate the integration of the Union into the international legal order, but only at the price of surrendering its ability to act independently from the Member States.

In the final analysis, however, European constitutionalism would appear to be less respectful of the federalism principle than is its Canadian counterpart. In Canada, the philosophy of dualism—the dualist ‘wall’ or ‘veil’—protects Canada’s domestic federal architecture. Despite its broad foreign affairs powers, the federal government cannot overturn the division of legislative powers laid down in Canada’s written constitution. The power to legislate remains divided, and the federal government cannot change Canadian domestic law through its use of the prerogative power.¹⁰⁵ In the European Union, by contrast, international agreements concluded by the EU are binding within the EU legal order, where they rank below primary law, but above secondary law.¹⁰⁶ If the conditions for direct effect are met, provisions of an international agreement have primacy over Member State law as well as over domestic Union legislation.¹⁰⁷

105 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817, 174 DLR (4th) 193 [67] (McLachlin J).

106 TFEU (n 78) art 216(2); *Intertanko* [2008] ECR I-4057, para 42; Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation* [2008] ECR I-6351, para 285.

107 On the conditions for provisions of international agreements to have direct effect in the EU legal order, see Case C-363/12 *Z v A Government Department* [2014] ECLI:EU:C:2014:159, para 85.

The EU's federal architecture, therefore, would appear to be less protected against the joint exercise of foreign affairs powers by the EU and the Member States than Canada's architecture is against the federal government's use of the foreign affairs prerogative. When participating in the negotiation and conclusion of mixed agreements, the Member States' role in the decision-making process is more pronounced than it is in a domestic EU context. This feature, coupled with the potential direct effect of the resulting treaty, undermines the institutional position of the supranational institutions, in particular the Commission and the Parliament.

This observation only further highlights the pernicious effects of mixity on the overall federal balance in the European Union. If one is committed to the notion of a European Union that is more than the sum of its parts, this paper suggests that the first place to look for remedies for this imbalance is at the elephant in the room that prevents federalism as equal autonomy from being expressed in the EU's foreign affairs constitution: the possibility for the Member States to turn EU agreements into mixed agreements, without this possibility being subject to meaningful federalism safeguards.

Unconstitutional Constitutional Amendments in European Union Law: Considering the Existence of Substantive Constraints on Treaty Revision

Reijer Passchier^{} and Maarten Stremmer^{**}*

Abstract

The issue of unconstitutional constitutional amendments is extremely topical in the field of national and comparative constitutional law. In a recent article (2013), Roznai signals that ‘the global trend is moving towards accepting the idea of limitations—explicit or implicit—on constitutional amendment power’. But what about the ‘supranational’ EU? Would there be room to argue that substantive limitations of amendability—explicit or implicit—also exist as regards the EU Treaties? Furthermore, if so, would the Court of Justice of the European Union (CJEU) have the competence to enforce such limits? These questions are the central focus of this article. We argue that accepting the idea of substantive requirements of Treaty revision may be one of the next important steps in the ongoing process of EU constitutionalisation. In the first part of the article, we explore what kind of arguments are being used to justify a doctrine of unconstitutional constitutional amendments in national systems. Next, we ascertain to what extent such arguments can be used to justify a doctrine of unconstitutional constitutional amendment in EU law. In conclusion, we argue that it is quite conceivable that certain EU Treaty amendments would indeed be deemed to be a violation of the Treaties. Moreover, we contend that it is not unimaginable that the CJEU will assume the power to substantively review amendments to the EU Treaties, in cases where the Member States would choose to put forth suspect revisions to these documents.

Keywords

Unconstitutional Constitutional Amendments, European Union, Treaty revision

* PhD Researcher and Junior Lecturer at the Department of Constitutional and Administrative Law, Leiden Law School (The Netherlands).

** PhD Researcher and Junior Lecturer at the Department of Public Law, Jurisprudence and Legal History, Tilburg Law School (The Netherlands).

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1 Introduction

The Treaty on European Union¹ (TEU) seems to provide that the Member States have the power to amend the European Union (EU) Treaties as they wish, provided that they follow the ‘ordinary revision procedure’ set out in Article 48. Does this mean that the Member States could legally introduce a principle of fascism into EU law? Would it be possible for the Member States to exclude, say, the Roma from the Charter of Fundamental Rights? Moreover, could the Member States legitimately use the Article 48 procedure to abolish the European Parliament? These are but a few awkward, yet not entirely unrealistic, possibilities.

In many national constitutional systems, such illiberal amendments would presumably be considered unconstitutional. Written constitutions often include, besides procedural requirements, substantive requirements of amendability that forbid certain kinds of changes.² States that do not have explicit constraints on formal constitutional change may have some kind of implicit doctrine that deems certain constitutional norms and values untouchable. It is, furthermore, conceivable that constitutional changes that are legally permissible are nevertheless considered substantially illegitimate for the reason that it is impossible as a political matter to fulfil the qualified requirements to pass a formal amendment—a phenomenon that Albert has labelled ‘constructive unamendability’.³

The idea of an ‘unconstitutional constitutional amendment’ may seem paradoxical.⁴ Yet, according to Roznai, ‘the global trend is moving towards accepting

- 1 Consolidated Version of the Treaty on European Union [2008] OJ C115/13 (TEU).
- 2 According to the Constitute database, 78 of the national constitutions in the world include unamendable provisions. See The Comparative Constitutions Project, ‘Constitute’ <<https://www.constituteproject.org/search?lang=en&key=unamend>> accessed 24 August 2015; For a discussion and categorisation of the many forms of formal unamendability in constitutional states, see Richard Albert, ‘Constitutional Handcuffs’ (2010) 42 Arizona St LJ 663, 678ff.
- 3 Richard Albert, ‘Constructive Unamendability in Canada and the United States’ (2014) 67 SCLR 181, 182.
- 4 Jacobsohn calls it a ‘conundrum’. He argues that asking whether a constitution—or a constitutional amendment, for that matter—can be unconstitutional is sort of like asking whether ‘the Bible can be unbiblical’. See Gary Jeffrey Jacobsohn, *Constitutional Identity* (HUP 2010) 34; Harris notes that ‘[a]t first blush, the question of whether an amendment to the Constitution could be unconstitutional seems to be either a riddle, a paradox, or an incoherency’. See William F Harris, *The Interpretable Constitution* (John Hopkins UP 1993) 169; The possibility of an unconstitutional constitutional amendment strikes Preuss as ‘inconceivable within the logic of a legal hierarchy’. See Ulrich K Preuss, ‘The Implications

the idea of limitations—explicit or implicit—on constitutional amendment power.⁵ Significant numbers of contemporary states, moreover, have implemented the practice of judicial review of constitutional amendments.⁶ However, what about the ‘supranational’ EU? Would there be room to argue that substantive limitations of amendability—explicit or implicit—also exist as regards the European Treaties? Furthermore, if so, would the CJEU have the competence to enforce such limits? These questions are the central focus of this article.

The search for substantive constraints on the Member States’ EU Treaty revision power is not self-evident. On the face of it, the EU formally does not have a constitution, but is governed by a set of Treaties—the TEU, the Treaty on the Functioning of the European Union⁷ (TFEU) and the Charter of Fundamental Rights of the European Union⁸ (Charter)—and under international law, treaties may be amended by agreement between the parties.⁹ This would mean that the Member States are not bound by any other procedural or substantive requirements of treaty amendability.¹⁰ In other words, the revision procedure set forth in Article 48 would be optional. The Member States would ultimately remain ‘masters of the treaties.’¹¹

of ‘Eternity Clauses’: The German Experience’ (2011) 44 Israel LR 429, 431. The mystery disappears if one realises that there is a difference in legal status between a constitution and a constitutional amendment (in the context of unconstitutional constitutional amendments): the constitution is in force, whereas a constitutional amendment is not; as a proposed change to the constitution, it is not yet part of the constitution. Clearly, a proposed change can contradict one or more parts (or even the identity or spirit) of the existing constitution.

- 5 Yaniv Roznai, ‘Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea’ (2013) 61 AJCL 657, 660.
- 6 See Kemal Gözler, *Judicial Review of Constitutional Amendments: A Comparative Study* (Ekin Press 2008) 52 ff.
- 7 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).
- 8 Charter of Fundamental Rights of the European Union [2010] OJ C83/02 (Charter).
- 9 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 39 (VCLT).
- 10 Koen Lenaerts and Piet Van Nuffel, *European Union Law* (3rd edn, Sweet and Maxwell 2011) 82–83.
- 11 *The Maastricht Case* (1993) 89 BVerfGE 155, para 111; *The Lisbon Case* (2009) 123 BVerfGE 267, para 231.

It is often considered, however, that EU primary law—the Treaties and general principles of EU law—has been undergoing ‘constitutionalisation’.¹² This phenomenon is described by Möllers as:

the unorganised intensification of a legal regime, whose increasing quantity of norms finally enables the emergence of normative structures—of legal principles—that can be generalised and that are also, at least factually, difficult to amend due to their generality. In this way, a spontaneous internal hierarchy of norms arises that increases and accelerates through the multiplication of adjudicative authorities.¹³

Indeed, since the 1960s, EU primary law has in fact enjoyed legal supremacy above all other kinds of Union law, and, at least as a matter of doctrine, it has also taken precedence over the laws of the Member States.¹⁴ Like national constitutional law, EU primary law attributes power to public authorities, regulates relationships between public authorities, and regulates relationships between public authorities and individuals. The contemporary Treaties provide for fundamental rights and key values of modern constitutionalism, such as democracy and the rule of law.¹⁵ The CJEU, moreover, has increasingly employed what von Bogdandy has termed ‘constitutional semantics’.¹⁶ As early as 1986, it referred to the Treaties as the ‘constitutional charter’ of the EU,¹⁷ and more recently, it introduced the terms

12 Since 2009, the TEU gives expression to the fact that the constitutionalisation of the EU is not per definition a progressive development (notwithstanding art 1 TEU, which speaks of ‘an ever closer union’). Art 48 TEU, which provides the ordinary Treaty revision procedure, states that proposals for amending the Treaties may serve not only to increase, but also to *reduce* the competences conferred on the Union. Art 50 TEU, moreover, provides that any Member State may decide to withdraw from the Union.

13 Cristoph Möllers, ‘Pouvoir Constituant—Constitution—Constitutionalisation’, in A von Bogdandy and J Bast (eds), *Principles of European Constitutional Law* (2nd edn, Hart and CH Beck 2010) 169, 195.

14 Lenaerts and Van Nuffel (n 10) 81.

15 See, in particular, TEU (n 1) art 2; Since 2000, the EU has had in place the Charter, which became legally binding in 2009; However, since 1970, the CJEU has declared that it would protect human rights as an integral part of EU law. See *Case 11/70 Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1126 (Internationale Handelsgesellschaft).

16 Armin von Bogdandy, ‘Founding Principles of EU Law: A Theoretical and Doctrinal Sketch’ (2010) 16 ELJ 95–96.

17 *Case 294/83 Les Verts v European Parliament* [1986] ECR 1339, para 23.

‘constitutional principle’ and ‘constitutional guarantee’.¹⁸ In EU legal scholarship, it is now almost conventional to regard EU primary law as constitutional law.¹⁹ Accepting the idea of substantive requirements of Treaty revision may be one of the next important steps in the ongoing process of EU constitutionalisation.

We are fully aware of the fact that we are not the first to consider the existence of substantive constraints on EU Treaty amendability.²⁰ It should be noted that the CJEU never declared a Treaty amendment in violation of the Treaties. However, when in the early 1990s, the CJEU opined that it has the task to safeguard respect for ‘the autonomy of the Community [now EU] legal order’;²¹ commentators suggested that fundamental EU tenets, such as respect for human rights, democracy, and the rule of law, may be untouchable.²² The discussion, however, fell silent. In the past two decades, the idea of substantive requirements for EU Treaty revision has hardly been considered.²³

Meanwhile, the process of constitutionalisation has continued rapidly. Therefore, it is now time to rethink this topic. All the more reason to do so is the fact that the issue of unconstitutional constitutional amendments is extremely topical in the field of national constitutional law.²⁴ It is true that comparing national

18 Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] ECR I-06351 (*Kadi I*), paras 5 and 285.

19 See, eg, Möllers (n 13); Lenaerts and Van Nuffel (n 10); Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (2nd edn, Hart 2012) 1 ff; A journal called ‘European Constitutional Law Review’ has been in publication since 2005.

20 See, eg, Bruno de Witte, ‘Rules of Change in International Law: How Special is the European Community?’ (1994) 25 NYIL 299.

21 Opinion 1/91, *European Free Trade Association* [1991] ECR I-6079, para 35.

22 cf José Luis da Cruz Vilaça and Nuno Piçarra, ‘Y a-t-il des limites matérielles à la révision des traités instituant les Communautés Européennes?’ (1993) 29 Cahiers de Droit Européen 37; Roland Bieber, ‘Les limites matérielles et formelles à la révision des traités établissant la Communauté Européenne’ (1993) 367 Revue du Marché Commun et de l’Union Européenne 343; Deirdre Curtin, ‘The Constitutional Structure of the Union: A Europe of Bits and Pieces’ (1993) 30 CMLR 17; Joseph H H Weiler and Ulrich Haltern, ‘The Autonomy of the Community Legal Order: Through the Looking Glass’ (1996) 37 Harv Intl LJ 411.

23 For an exception, see Markus Sichert, *Grenzen der Revision des Primärrechts in der Europäischen Union* (Duncker und Humblot 2005); See also, Wim J M Voermans, ‘Constitutional Reserves and Covert Constitutions’ (2009) 3 Indian J Const L 84, 99. Voermans focusses on the principle of conferral and calls it the ‘meta-constitutional reserve’ of the European constitutional order.

24 cf Gary Jeffrey Jacobsohn, ‘An Unconstitutional Constitution? A Comparative Perspective’ (2006) 4 ICON 460; Preuss (n 4); Rosalind Dixon, ‘Transnational Constitutionalism and Unconstitutional Constitutional Amendments’ (2011) Chicago Public Law and Legal Theory

law with EU law poses methodological challenges; as Dehousse has cautioned, the EU operates at a different level.²⁵ Still, we believe that a cross-level comparative analysis can make an important contribution to the current understanding of the EU legal order.²⁶

Below, we will first explore the kinds of arguments that are being used to justify a doctrine of unconstitutional constitutional amendments in national systems. We will show that substantive amendment limitations may be based upon the constitutional text or upon an implicit understanding of which norms or values may not be touched. Secondly, we will ascertain the extent to which such arguments can be used to justify a doctrine of unconstitutional constitutional amendment in EU law. In conclusion, we will argue that it is quite conceivable that certain EU Treaty amendments would indeed be deemed to be a violation of the Treaties.

Searching for substantive requirements of amendability may reveal deeper constitutional structures that underlie the text of the EU Treaties. It may furthermore reveal whether and how constitutional aspirations expressed by the TEU preamble, among other sources, have been translated into enforceable provisions. Considering the idea of substantive constraints on the Member States' power of Treaty revision may be especially important, moreover, at a time when constitutional democratic norms and values are under considerable pressure in certain European countries.²⁷

Working Paper 349 <<http://www.law.uchicago.edu/files/file/349-rd-transnational.pdf>> accessed 1 February 2015; Gábor Halmai, 'Unconstitutional Constitutional Amendments: Constitutional Courts as Guardians of the Constitution?' (2012) 19 Const 182; Roznai (n 5); Carlos Bernal, 'Unconstitutional Constitutional Amendments in the Case Study of Colombia: An Analysis of the Justification and Meaning of the Constitutional Replacement Doctrine' (2013) 11 ICON 339; Po Jen Yap, 'The Conundrum of Unconstitutional Constitutional Amendments' (2015) 4 GlobCon 114; Richard Albert, 'The Theory and Practice of Unconstitutional Constitutional Amendment in Canada' (2016) Queen's LJ (forthcoming).

25 Renaud Dehousse, 'Comparing National and EC Law: The Problem of the Level of Analysis' (1994) 42 AJCL 761, 769.

26 *ibid* 781.

27 cf Gábor Halmai, 'An Illiberal Constitutional System in the Middle of Europe' (2014) European YB HR 497, 497ff; Armin von Bogdandy and Pal Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart 2015); Tomasz Konieczny, 'Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense' (*Blog of the International Journal of Constitutional Law*, 6 December 2015) <<http://www.icconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense/>> accessed 30 January 2016.

2 Substantive requirements of amendability in national constitutional systems

In this section, we will examine doctrines of unconstitutional constitutional amendments in leading national constitutional jurisdictions. We will argue that substantive requirements of amendability may be justified with direct reference to specific constitutional provisions in the constitutional text itself—explicit limitations—and with reference to the constitutional context—implicit limitations. We will also consider the possibility of judicial enforcement of these limitations.

2.1 Explicit limits: arguments based on the constitutional text

78 constitutions in the world provide what the Germans call ‘eternity clauses’ (*Ewigkeitsklauseln*): explicit substantive prohibitions that preclude certain amendments by making them illegal.²⁸ Eternity clauses may prohibit the textual alteration of certain constitutional provisions, but they may also designate certain ‘core’ norms and values as untouchable. Article 79(3) of the German constitution, the Basic Law for the Federal Republic of Germany (German Basic Law), provides an example of both:

Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 [human dignity] and 20 [basic institutional principles] shall be inadmissible.

According to German legal doctrine, constitutional amendments that would appear to contravene Article 79(3) could be tested, and in cases where an amendment is seen to violate the eternity clause, they could be ruled impermissible.²⁹

Other examples of explicit substantive limits of amendability may be found in the US, France and Italy. Article V of the United States Constitution 1787 provides that a qualified majority of Congress and the states may amend the document provided that ‘no State, without its Consent, shall be deprived of its equal Suffrage

28 The definition is derived from Jacobsohn (n 4) 35.

29 See Hartmut Maurer, *Staatsrecht I: Grundlagen, Verfassungsorgane, Staatsfunktionen* (5th edn, CH Beck 2007) 745.

in the Senate'. Both the French and Italian constitutions provide that the republican form of government shall not be a matter for constitutional amendment.³⁰

Some constitutions, moreover, also designate what kinds of textual changes may not be brought about by way of formal constitutional amendment. Article 112(1) of the Constitution of the Kingdom of Norway 1814 (Norwegian Constitution), for instance, provides that formal amendments may never 'contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution'.³¹ To be meaningful, of course, this provision needs some articulated doctrine that indicates what amounts to altering the 'spirit' of the Norwegian Constitution.

2.2 Implicit limits: arguments based on the constitutional context

Under constitutional texts that do not contain an eternity clause, arguments for the recognition of substantive requirements of amendability may yet be available. Substantive constraints on constitutional revision may also be justified on the basis of a doctrine or concept of amendment opposing changes that are so fundamental that they would amount to a complete replacement of the constitution. An alternative justification may be provided by a doctrine of 'supra-constitutional' norms that occupy such high moral ground that they can never be revised.

As regards substantive limits that are derived from the concept of amendment itself, India is a case in point. Indian constitutional amendment theory starts from the premise that any part of the constitution may be amended by following the procedure laid down in Article 368.³² However, in the famous 1971 *Keshavananda*³³ case, the Supreme Court has held that the Constitution of India provides certain 'basic features' that cannot be altered by way of formal amendment.³⁴ The Court asserts the right to annul any amendment that seeks to alter the basic structure or the basic framework of the Constitution on the ground of 'ultra vires'. In other words, it has held that the word 'amend' in Article 368 encompasses only the possibility of

30 Art 89(5) of the Constitution of the Fifth Republic 1958 (Constitution of France); Art 139 of the Constitution of the Italian Republic 1947.

31 See also Eivind Smith, 'Old and Protected? On the "Supra-Constitutional" Clause in the Constitution of Norway' (2011) 44 *Israel LR* 369.

32 See Durga Das Basu, *Introduction to the Constitution of India* (20th edn, Lexis Nexis 2012) 167.

33 *Kesavananda v State of Kerala* [1973] AIR 1461 (SC).

34 *ibid* para 787.

bringing about changes that fit into the existing structure of the Constitution. The amendment procedure prohibits changes that would be tantamount to drafting a new constitution. Since the Indian Supreme Court first introduced this so-called 'basic structure doctrine', the judiciary has recognised at least 25 basic features.³⁵

Also in other jurisdictions, it is considered that a constitutional amendment procedure may not be used fundamentally to alter the existing constitutional framework. In *Raven v Deukmejian* (1990),³⁶ the California Supreme Court invalidated a constitutional amendment because 'it substantially alters the preexisting constitutional scheme or framework heretofore extensively and repeatedly used by courts in interpreting and enforcing state constitutional protections'.³⁷ In other words, the court held that the scope of changes that can be brought about by way of formal amendment is limited. While the US Supreme Court has never really scrutinised the constitutionality of a constitutional amendment, some American constitutionalists have argued that the procedure laid down in Article V is designed as a means to 'respond to imperfection', not as a means to bring about fundamental change.³⁸

Murphy asserts that similar arguments could be used in any system that considers itself a constitutional democracy.³⁹ Indeed, the verb 'to amend' stems from the Latin word *emendare*, which means 'to correct' or 'to modify'. Any amendment that would *de facto* abolish the existing constitutional order or fundamentally change its nature would, therefore, not be an amendment at all, but a replacement—and that is, by definition, not the power an amendment procedure grants, or so Murphy's argument goes.

In the same vein, Roznai argues that a fundamental distinction between, what he calls, a people's 'primary constituent power'—the constitution-making power—and a people's 'secondary constituent power'—the constitution-amending power—

35 Basic features include the 'essence' of fundamental rights, the principle of separation of powers, federalism, the powers of the Supreme Court, and social justice. For a detailed list, see Basu (n 32) 168.

36 *Raven v Deukmejian* (1990) 52 Cal 3d 336 [276 Cal Rptr 326, 801 P 2d 1077].

37 *ibid* 354.

38 Sanford Levinson, *Framed: America's 51 Constitutions and the Crisis of Governance* (OUP 2012) 331.

39 Walter F Murphy, *Constitutional Democracy: Creating and Maintaining a Just Political Order* (John Hopkins UP 2007) 506.

can be made in every country whose people live under a written constitution.⁴⁰ According to Roznai's theory of 'foundational structuralism', the primary constituent power cannot be bound by prior constitutional rules; it is unlimited by nature. However, the instituted secondary constituent power is, instead, a delegated power 'acting as a trustee of the primary constituent power'.⁴¹ The secondary constituent power, Roznai argues, can therefore not destroy or replace the constitution that the primary constituted power has created; it must build upon the foundational principles that grant the constitution its identity.⁴²

Arguments for substantive requirements of constitutional amendability may also be based upon some kind of understanding of supra-constitutional norms or natural law-like norms that supposedly limit the constitutional legislator. As Murphy puts it:

Citizens' rights and dignity are not fundamental merely because the basic charter and the larger constitutional order recognize them as such; rather, the basic charter and the constitutional order protect those values because they are fundamental.⁴³

Here, the idea is that certain norms and values are of such a fundamental nature that they constitute morally compelling demands. For that reason, the constitutional legislator cannot deviate from them.

The idea of supra-constitutionality has been embodied paradigmatically in the German constitutional order. Respect for human dignity and human rights constitutes the core of the German Basic Law. Since the early days of its existence, the German Federal Constitutional Court has reinforced this view. In its famous 1951 *Southwest* case,⁴⁴ for example, it held that:

(...) a constitutional provision itself may be null and void is not conceptually impossible (...) There are constitutional principles that are so fundamental (...) that they also bind the framer of the constitution, and other constitutional provisions that do not rank so high may be null and void because they contravene these principles.⁴⁵

40 Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers* (PhD thesis, London School of Economics and Political Science 2014), 81–170 (Ch. 4–6).

41 *ibid* 237.

42 *ibid*.

43 Murphy (n 39) 508.

44 *The Southwest Case* (1951) 1 BVerfGE 14.

45 Translated and reprinted in part in Walter F. Murphy and Joseph Tanenhaus (eds), *Comparative Constitutional Law* (St Martin's Press 1977) 208.

2.3 Judicial review of constitutional amendments

The recognition of substantive requirements of amendability in a particular constitutional order does not necessarily imply that this order also subjects constitutional amendments to substantive judicial review.⁴⁶ ‘Understanding that constitutional change may produce an unconstitutional result does not in itself prescribe a particular remedy’, as Jacobsohn explains.⁴⁷ Indeed, only a very small number of constitutional documents in the world expressly grant the judiciary the power to review constitutional amendments substantively.⁴⁸ Far more commonly, is a doctrine or actual practice according to which the judiciary has the right to declare a constitutional amendment ‘unconstitutional’ on substantive grounds.⁴⁹ The two most prominent examples of the latter judicial power are found in Germany and India.

The German Basic Law does not grant the Constitutional Court an express right to review the constitutionality of constitutional amendments. However, according to German constitutional doctrine, the Constitutional Court has the right to declare a constitutional amendment unconstitutional and null and void when that amendment would not meet the substantive requirements set out in Article 79(3) of the German Basic Law.⁵⁰ In several judgments, the German Federal Constitutional Court has actually reviewed the constitutionality of constitutional amendments.⁵¹

The Indian case is fascinating, and it arguably indicates that anything is possible in constitutional law. After the Indian Supreme Court introduced the practice of judicial review of constitutional amendments and the basic structure

46 Although Roznai believes that, ultimately, the two ideas are inseparable. See Roznai (n 5) 661.

47 Jacobsohn (n 4) 82.

48 Art 93(3) of the Constitution of Chile (1980) provides that it is one of the powers of the Constitutional Court to resolve ‘the questions concerning constitutionality which arise during the processing of the Bills of law or of constitutional reform and of the treaties submitted to the approval of the Congress’; Art 146(a) of the Constitution of Romania provides that the Constitutional Court has inter alia the power to review initiatives to revise the constitution. That is to say, it has a precautionary power to review constitutional amendments; See The Comparative Constitutions Project, ‘Constitute’ <https://www.constituteproject.org/constitution/Chile_2014?lang=en> and <https://www.constituteproject.org/constitution/Romania_2003?lang=en> accessed 14 June 2016.

49 cf Gözler (n 6); Halmai (n 27).

50 See Maurer (n 29) 745.

51 See *The Article 117 Case* (1953) 3 BVerfGE 225; See also *The Eavesdropping Case* (1970) 30 BVerfGE 1.

doctrine in the 1971 *Keshavananda* case,⁵² the government sought to reverse the ramifications of this sweeping ruling.⁵³ In 1976, therefore, the Indian Parliament added two clauses to the constitutional amendment procedure (set out by Article 368) that purported to prohibit the judiciary from reviewing the constitutionality of formal constitutional amendments.⁵⁴ The first clause added (now paragraph 4 of Article 368) provides, '[n]o amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article (...) shall be called in question in any court on any ground'.⁵⁵ The second clause added (now paragraph 5 of Article 368) provides, '[f]or the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article'.⁵⁶ Four years later, the Supreme Court would nullify this attempt to preclude the judicial review of constitutional amendments. In the case *Minerva Mills Ltd v Union of India*,⁵⁷ it ruled that the new paragraphs 4 and 5 of Article 368 were unlawful. The Court upheld its *Keshavananda* judgment, stating that judicial review is a basic feature of the Indian Constitution and cannot be abolished by way of constitutional amendment. To this day, the Court has continued to assert its right to review the constitutionality of constitutional amendments.⁵⁸

3 Substantive constraints on EU Treaty revision

The brief review above has shown that the idea of substantive constraints on the power to amend a national constitution can be justified with reference to explicit limitations within the constitutional text itself—commonly in the form of an eternity clause—or with reference to implicit limitations. Implicit limitations may be based upon a normative understanding of what amounts to 'amendment' as opposed to 'fundamental change', or upon a belief in natural law-like or 'supra-constitutional' norms. In some countries, the constitutionality of constitutional

52 See above (n 33).

53 Basu (n 32) 167.

54 The [Indian] Constitution (Forty-second Amendment) Act 1976, art 55.

55 *ibid.*

56 *ibid.*

57 *Minerva Mills Ltd v Union of India* [1980] AIR 1789 (SC).

58 Basu (n 32) 45.

amendments can be—and in fact is—reviewed by the judiciary. The power of a court to review constitutional amendments is usually not expressly provided by the constitutional text, but justified by an implicit doctrine. The case of India shows that a court can even assert the power to review the validity of constitutional amendments in defiance of an explicit constitutional prohibition against doing so.

We are now ready to explore whether any of these ideas make sense with regard to the legal system of the EU. Below, we will explore whether, and to what extent, EU law may be open to the idea of unconstitutional constitutional amendments. We will first try to establish whether the Treaty revision procedure is optional or mandatory, as the existence of a mandatory procedure is a prerequisite for accepting substantive limitations. Next, we will investigate possible limits to Treaty amendments—explicit or implicit—and the mandate of the CJEU to review Treaty amendments. Our conclusion will be that it is quite conceivable that, in the near future, substantive revision limitations will be also accepted in EU law.

3.1 Prerequisite: the mandatory status of the revision procedure

As we noted at the outset of this article, the search for substantive limits to EU Treaty amendment is not self-evident. The EU is established by means of international treaties between the Member States. According to Article 39 of the Vienna Convention on the Law of Treaties, a treaty may be amended by ‘agreement’ between the parties; furthermore, such an agreement can take many different forms. The agreement to amend a treaty does not have to constitute a treaty itself. For example, oral agreements are also perfectly possible.⁵⁹ A subsequent practice in the application of a treaty can also have the effect of modifying it, if all parties implicitly consent to it.⁶⁰ This procedural freedom is coupled with substantive freedom. In principle, there are no substantive limits to international treaty amendments. The only thing that is needed is agreement between the parties.⁶¹

Under international law, the parties to a treaty can provide for an amendment procedure. This, of course, confers a considerable benefit—that an orderly means by

59 The legal force of such an agreement is preserved by art 3 of the Vienna Convention on the Law of Treaties.

60 *ibid* art 31(3)(a).

61 It is true that international law recognises peremptory norms (*ius cogens*), but there is no agreement regarding precisely which norms are peremptory and how they reach that status. The Vienna Convention on the Law of Treaties, which declares any treaty that conflicts with a

which amendments can be brought about is agreed upon from the start. However, there may also be reasons not to include an amendment clause in a treaty. For example, such a clause might be politically undesirable in a treaty that establishes a border. Perhaps counterintuitively, if the parties decide to include an amendment clause, under international law, this clause is not binding on the parties. As Aust explains, 'should the means not be suitable, the parties can simply ignore it and amend the treaty in any way they can agree on'.⁶²

Article 48 TEU provides for a revision procedure of the EU Treaties.⁶³ Clearly, the significance of this article depends on whether the procedure it sets out is exclusive or not. In the latter case, the Member States could easily evade any possible substantive constraints on Treaty amendment by relying on their general (and substantively unlimited) international treaty-making power to amend the Treaties. Arguments to the effect that the Member States can amend the Treaties on the basis of general consent outside the revision procedure of Article 48 TEU have stressed, in one way or another, the Member States' sovereignty; in other words, their status as subjects of international law. The Member States are the 'Masters of the Treaties', as the German Federal Constitutional Court calls it.⁶⁴ In terms of constitutional theory, this means that the Member States possess constituent power with regard to the EU, and create the Union's primary law. The EU institutions, representing constituted power, are based on, and limited by, primary law. Crucially, the Member States themselves remain outside constituted power. This implies that the Member States can freely choose whether or not to use the procedure in Article 48 TEU if they want to change the Treaties.

This line of reasoning, however, ignores the possibility of self-bindingness. The purpose of Article 48 TEU is precisely to exclude the possibility of informal Treaty changes by agreement among the Member States. If one were to accept amendments outside the formal procedure, this would upset the institutional balance between the EU institutions. That is, it would imply that the European Council could transform itself into a diplomatic conference—and on the basis of general consent, without being subject to any formal requirements, could simply

peremptory norm to be void, does not specify any peremptory norms, nor are they specified by any authoritative body. For a discussion, see Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2008).

62 Anthony Aust, *Modern Treaty Law and Practice* (3rd edn, CUP 2013) 233.

63 Outside the scope of this article is a discussion of the 'passerelle clause' and the amendment procedure for changing the status of the special territories of the Member States.

64 See above (n 11).

modify all primary law.⁶⁵ Indeed, in *Defrenne*,⁶⁶ the CJEU ruled this option out: ‘In fact, apart from any specific provisions, the Treaty can only be modified by means of the amendment procedure carried out in accordance with Article 236 [now Article 48 of the TEU].’⁶⁷ This ruling implies that, within the EU legal order, with regard to the form of amendment, the Member States are no longer the masters of the Treaties. They are bound by the revision procedure of Article 48 TEU.⁶⁸

The question, then, is whether the Article 48 procedures allow for every possible change, or whether they forbid certain kinds of revisions.

3.2 Explicit limits: arguments based on the text of the Treaties

The revision procedure in Article 48 TEU, in fact, lays down two procedures: an ‘ordinary revision procedure’ and a ‘simplified revision procedure.’⁶⁹ Both procedures differ not only in formal requirements, but also with regard to what can be changed and how it can be changed. The simplified procedure can be used to amend all or parts of the provisions of Part Three of the TFEU, which relates to Union policies and internal actions. This comprises, *inter alia*, the internal market and the four freedoms, the area of freedom, security and justice, economic and monetary policy, and social policy. Negatively formulated, it excludes the general principles of the EU, non-discrimination and citizenship, external action, and institutional and financial issues. The simplified revisions procedure, moreover, may not be used to increase the competences of the Union. By contrast, the ordinary revision procedure may

65 cf De Witte (n 20) 314–15.

66 Case 43–75 *Gabriella Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 456.

67 *ibid* para 58.

68 The Member States have signed a number of treaties closely related to EU law outside of the EU legal framework. Such treaties could, in principle, affect EU primary law. See the discussion of the *European Free Trade Association* case and the *European and Community Patents Court* case below. A recent example is the Treaty Establishing the European Stability Mechanism (ESM). A separate treaty, amending art 136 TFEU, gave the ESM a legal basis in EU law. It was argued that the ESM was incompatible with the ‘no bailout’ clause of Art 125(1) TFEU, but the CJEU was not convinced. See the discussion of the *Pringle* case below.

69 Some national constitutions include more than one amendment procedure. Sometimes, the amendment procedures can only be used to amend specified provisions of the constitution. Albert describes this feature as ‘restricted single track’. See Richard Albert, ‘The Structure of Constitutional Amendment Rules’ (2014) 49 *Wake Forest LR* 913, 942–43.

be used to amend all primary law, and it may also be used to increase (or to reduce) the competences of the Union.

Therefore, Article 48 TEU clearly sets out formal requirements for any Treaty revision. However, does it also put forward substantive limits of Treaty amendability? At first glance, this is not the case: Article 48 seems to provide procedural constraints only. However, the questions as to whether a particular amendment can or cannot be brought about by using the simplified revision procedure may, as a practical matter, turn out to be a substantive one. The recent *Pringle* case illustrates this point.

In *Pringle*,⁷⁰ the CJEU was asked to assess the validity of a Treaty revision engineered using the simplified revision procedure. The amendment inserted a provision for a stability mechanism into Article 136 TFEU. Ten intervening states, in addition to the European Council and the Commission, argued that the CJEU 'has no power under Article 267 TFEU to assess the validity of provisions of the Treaties'. One reason they cited was that 'the consequence of reviewing the substantive compatibility of an agreed Treaty amendment with existing Treaty provisions would (...) be to preclude amendments to the Treaties'.⁷¹

The Court, however, was of a different opinion. First, it made the observation that the amendment was 'an act of the institutions' under Article 267 TFEU, as it concerned a decision of the European Council. This means, the Court held, that the CJEU has jurisdiction. The Court then went on to verify whether the procedural rules of the simplified procedure were followed, and determined that this also encompasses an assessment that the amendment does not increase the competences of the Union and concerns only Part Three of the TFEU. The latter determination contains the finding that the amendment 'does not entail any amendment of provisions of another part of the Treaties on which the European Union is founded'.⁷²

According to Advocate General Kokott, such an assessment amounts to a substantive review of the amendment.⁷³ The content of the amendment cannot be assessed by reference to the provisions of Part Three, precisely because the amendment aims to change parts of Part Three. Amendments under the simplified

70 Case C-370/12 *Thomas Pringle v Government of Ireland* [2012] ECLI:EU:C:2012:756, para 30.

71 *ibid* Opinion of AG Kokott, para 19.

72 *ibid* para 32.

73 *ibid* para 23.

procedure, therefore, have to be examined in the light of the provisions of primary law established elsewhere. 'A formal amendment of Part Three of the TFEU must not have as a consequence a substantive amendment of primary law which may not be amended by means of the simplified revision procedure.'⁷⁴ This would imply that the European Council is barred from amending the text of Part Three of the TFEU in a way that is incompatible with provisions of primary law outside Part Three. Otherwise, the European Council could amend all provisions of the Treaties by using the simplified procedure.

The Court eschews the distinction between formal and substantive review, stating that it simply examines the validity of the amendment in light of the conditions laid down in Article 48(6) TEU. It holds that the amendment does not overextend Part Three and does not create any new competences for the EU. Therefore, in *Pringle* the CJEU made it clear that there are substantive limits to amendments under the simplified revision procedure: they may not entail changes of primary law outside Part Three of the TFEU.

However, what about the more interesting and fundamental question: do substantive constraints exist with regard to the ordinary revision procedure? Article 48 TEU remains textually silent on the issue. It does not provide a kind of eternity clause, as for instance the German, the American, and the French constitutional documents do.⁷⁵ It also does not explicitly provide that 'the spirit' of the Treaties may not be revised, as, for example, the Norwegian Constitution does.⁷⁶ Therefore, it seems, at least from a strictly formal (or legalistic) point of view, that the procedure may be used to amend all primary law as well as to increase or to reduce the competences of the Union. If there are any substantive constraints on Treaty amendability, they do not follow immediately from the text of the Treaties.⁷⁷ We should therefore consider the possibility of implicit limits.

74 *ibid* para 28.

75 See the discussion of explicit limits in national constitutions above.

76 *ibid*.

77 Still, the word 'revision' employed by art 48 TEU could be interpreted to imply that the ordinary revision procedure of art 48 may only be used to bring about corrections, improvements, or updates, not fundamental change. See the definition in OED, 'Revision' (*Oxford English Dictionary*) <<http://www.oed.com/view/Entry/164894?rskey=wq1paf&result=1#eid>> accessed 24 August 2015; See also the discussion of implicit limits in national constitutions above.

3.3 Implicit limits: arguments based on the context of the Treaties

3.3.1 Hints in the case law of the CJEU

The CJEU, in a number of opinions, has clearly hinted at the existence of substantive limits under the ordinary revision procedure. In 1991, the Court had to give its opinion on the validity of a treaty establishing a European Economic Area.⁷⁸ The treaty provided an alternative judicial system. The Court held: ‘However, Article 238 of the EEC Treaty does not provide any basis for setting up a system of courts which conflicts with Article 164 EEC Treaty and, more generally, with the very foundations of the Community’.⁷⁹ The Commission had suggested that in case of a conflict, the EEC Treaty could be amended. In the Court’s view this would not solve the problem: ‘For the same reasons, an amendment of Article 238 in the way indicated by the Commission could not cure the incompatibility with Community law of the system of courts to be set up by the agreement’.⁸⁰ The Court here distinguishes between ‘ordinary’ EU primary law and ‘the very foundations of the Community’, by which it includes the judicial system. These very foundations possess a higher rank than other primary law. The court at least suggests that they constitute an absolute substantive limit on Treaty revision, meaning that they could never be amended.

The CJEU employed a similar line of reasoning in its opinion on the compatibility with EU law of a draft agreement that aims to set up a European patent court.⁸¹ That court would be outside the institutional and judicial framework of the EU, and would have exclusive jurisdiction to hear actions brought by individuals in the field of patent law and to interpret and apply EU law in that field. This, the CJEU concluded, ‘would deprive courts of Member States of their powers in relation to the interpretation and application of European Union law and the Court of its powers to reply, by preliminary ruling, to questions referred by those courts’.⁸² Consequently, the contemplated system ‘would alter the essential character of the powers which the Treaties confer on the institutions of the European Union and

78 See above (n 21) para 35.

79 *ibid* para 71.

80 *ibid* para 72.

81 Opinion 1/09 *European and Community Patents Court* [2011] ECR I-1137.

82 *ibid* para 89.

on the Member States and which are indispensable to the preservation of the very nature of European Union law.’⁸³

In its opinion on the draft agreement concerning the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the CJEU once again stressed its exclusive jurisdiction in the field of EU law.⁸⁴ The Court found that, although the TEU provides for the accession of the EU to the ECHR,⁸⁵ the agreement that is supposed to facilitate this accession is not compatible with the TEU because it disrupts EU competences and the monopoly of the CJEU in the interpretation of EU law.⁸⁶

The three aforementioned opinions of the Court concern mainly institutional features of the Union, in particular the Union’s judicial system. This system is part of the essence of the EU, the Court stated, and hence it cannot be altered—probably not even with an explicit Treaty amendment. However, in the case law of the Court, there is also the hint at a substantive Treaty amendment limit that is not so much institutional in nature, but rather concerns the moral-political identity of the Union. In the *Kadi I* judgment, the Court draws a distinction between two kinds of limitations on the operation of the common market. On the one hand, there are limitations placed on the common market in exceptional circumstances, which are permitted under Articles 297 and 307 TFEU in order to carry out international obligations for the purpose of maintaining global peace and security. On the other hand, there are limitations that would imply a ‘derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms enshrined in Article 6(1) TEU [now Article 2 of the TEU] as the foundation of the Union.’⁸⁷ Limitations of the latter kind, the Court suggested, are prohibited.⁸⁸ Therefore, the Court has ruled that there is a normative hierarchy between the foundation of the Union and the other principles and rules of primary law, including the four freedoms. Whereas the latter can be subjected to limitations, the former cannot. Translated to the amendment procedure, this would impose

83 *ibid.*

84 Opinion 2/13 *Accession to the ECHR* [2014] ECLI:EU:C:2014:2454.

85 TEU (n 1) art 6(2); See also Protocol 8 to the Treaties, art 1 of which stipulates that the agreement relating to the accession ‘shall make provision for preserving the specific characteristics of the Union and Union law’.

86 Opinion 2/13 (n 84).

87 *Kadi I* (n 18) para 303.

88 *ibid* para 304.

a categorical prohibition: the foundations of the Union can never be amended, at least not in a limiting sense; they can only be corrected and perfected.

Hence, the CJEU seems to deem the EU judicial system and the foundational values of the EU so fundamental that they can never be abolished. The considerations of the Court, meanwhile, remain very concise. Moreover, the very limited number of cases available for analysis cannot provide a definitive answer. For this reason, it is appropriate to undertake a more daring exploration of possible substantive limits to Treaty revision. To this end, we must explore the deeper structure that arguably underlies the text of the Treaties.

3.3.2 The deeper structure of EU law

In its *Kadi I* judgment, the CJEU suggested that Article 2 TEU provides an unchangeable core of EU law. The first sentence of Article 2 states: ‘The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.’ These values are also mentioned in the Preamble to the TEU, and in the Preamble to the Charter.⁸⁹ The fact that these values are placed at the beginning of the TEU indicates that they are of the utmost importance to the EU. If there are any substantive limitations to Treaty amendability, Article 2 TEU seems to point at the most obvious ones (besides the Union’s judicial system). The question, then, is whether Treaty amendments must be tested against Article 2, or—delving even closer to the heart of the matter—whether it is possible directly to amend the values of this article by removing one of the values (such as democracy) or by inverting one of them (such as by turning equality into inequality).

Contrasted against Article 2 TEU as the unchangeable core of EU law, European integration, it could be argued, is an open-ended process. Article 1 TEU describes this process as a process of ‘creating an ever closer union’, but it does not oblige the Member States to develop the Union in a specific direction. Furthermore,

89 According to the second sentence of TEU (n 1) art 2: ‘These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’. The ‘values’ mentioned in this sentence are characteristics of European society (or the societies of the Member States); they are not EU values. An important argument for this interpretation is that the values of freedom and human rights require a distinction between state and society. In light of these values, the state—or, in this case, the EU—may not impose its values on society.

the ordinary Treaty revision procedure explicitly allows for a reduction of competences on the side of the EU.⁹⁰ The lack of political consensus about the founding values of the Union—for example, concerning the value of solidarity—provides another argument for the claim that Article 2 TEU can never be the final definition of the core of the Union.⁹¹

There are, however, also strong arguments in favour of taking the values of Article 2 TEU as the ultimate criteria of legality for any Treaty amendment. These values constitute the ‘foundation’ of the Union, so changing them would impact the whole edifice of EU law. Importantly, the founding values are positioned before the objectives of the Union, which are listed in Article 3 TEU. This indicates that these values are not instrumental; instead, they constrain the Union’s objectives, and all EU action should comply with them. Further testament to this is the fact that political parties in the European Parliament are obliged to respect the Union’s founding values. Only political parties that ‘observe’ the values of Article 2 TEU are entitled to register at the European Parliament and receive funding.⁹² Clearly, the rationale of this is to bar and eliminate any political forces that would attempt to undermine these values.

We can take Article 2 TEU as the normative core of EU law, against which all Treaty revisions must be tested—the status of the values of Article 2 TEU is another question altogether. While EU law does not define the concept of values, von Bogdandy has defined values as ‘normative convictions of a highly abstract order that are part of the social identity of the individual.’⁹³ Callies, following Di Fabio, defined values as ‘basic attitudes of society or individuals characterized by a particular strength and conviction of truth.’⁹⁴ In both definitions, values are understood as subjective preferences of individuals. This would imply that the EU is founded on the ethical convictions of the majority of its citizens.

90 In contrast, the fifth indent of art B of the Maastricht Treaty determined: ‘The Union shall set itself the following objectives: – to maintain in full the “acquis communautaire”’.

91 CONV 574/1/03 REV1, Reactions to draft arts 1 to 16 of the Constitutional Treaty—Analysis, Brussels, 26 February 2003.

92 See Regulation (EC) 2004/2003 of the European Parliament and of the Council of 4 November 2003 on the regulations governing political parties at the European level and the rules regarding their funding [2003] OJ L 297/1, arts 2 and 3.

93 Armin von Bogdandy, ‘The European Constitution and European Identity: Text and Subtext of the Treaty Establishing a Constitution for Europe’ (2005) 3 ICON 295, 308.

94 Christian H Callies, ‘Europe as Transnational Law: The Transnationalization of Values by European Law’ (2009) 10 German LJ 1367, 1367.

This subjective interpretation of values relativises the validity of the foundational values. In principle, they may be immutable, but if the citizens of the EU come to hold different moral and political convictions, the values of Article 2 TEU have to change as well. They constitute a substantive limit to Treaty revisions, but they can be revised. If society changes, the values of the EU will change as well.

One of the problems with this interpretation is that the values of the EU lose their corrective function. According to the doctrine of constitutional democracy, human dignity and equality are not merely preferences: they are considered the ultimate norms of law. Legislatures and constitution drafters do not create them, but are morally obligated to recognise them legally. A positivistic interpretation that makes the validity of human rights dependent upon day-to-day societal attitudes misses the very point of human rights.

This consequence can be avoided by interpreting the values of Article 2 TEU, not as subjective preferences, but as objective ‘supra-constitutional’ moral-political truths. Human dignity and human rights do not originate in a contingent choice. The Member States have not created or invented them. As treaty-making parties, they have merely fulfilled their moral obligation to recognise these values legally. The foundational values of the EU define the bedrock of the European project; amending them in a detrimental way would amount to betraying everything for which the EU stands.

This objective interpretation, which is indebted to a form of moral realism, is problematic in itself. Law and societal reality may not correspond completely. Indeed, law lives through a certain degree of discrepancy with societal reality (otherwise, law would be redundant). However, this discrepancy can only be relative; if it is too wide, law loses its actual validity, and becomes meaningless. Here we encounter a kind of European Böckenförde dilemma: the free, secularised EU lives by values that it cannot guarantee itself.⁹⁵ If the Member States really do want

95 The full formulation in the original German: „Der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann. Das ist das große Wagnis, das er, um der Freiheit willen, eingegangen ist. Als freiheitlicher Staat kann er einerseits nur bestehen, wenn sich die Freiheit, die er seinen Bürgern gewährt, von innen her, aus der moralischen Substanz des einzelnen und der Homogenität der Gesellschaft, reguliert. Andererseits kann er diese inneren Regulierungskräfte nicht von sich aus, das heißt mit den Mitteln des Rechtszwanges und autoritativen Gebots zu garantieren suchen, ohne seine Freiheitlichkeit aufzugeben und—auf säkularisierter Ebene—in jenen Totalitätsanspruch zurückzufallen, aus dem er in den konfessionellen Bürgerkriegen herausgeführt hat“. Ernst-Wolfgang Böckenförde, *Staat, Gesellschaft, Freiheit: Studien zur Staatstheorie und zum Verfassungsrecht* (Suhrkamp 1976) 60.

to chart a different moral-political course, the values of Article 2 TEU will degrade into a reality on paper. The EU, as a legal construct, simply misses the capacity to enforce its values (leaving aside the preliminary question whether enforcing them is a justified responsibility of the EU at all). Of course, this is not likely to happen in the near future, but neither can the possibility be excluded.

A third option would be to combine both interpretations: on the one hand, the values of Article 2 TEU constitute an unchangeable core of EU law; on the other hand, because of their very abstract nature, they allow for changing interpretations. The foundation of the EU would become a ‘living foundation’.⁹⁶ This option may seem attractive, but in fact it would mean that the foundational values would lose much of their bite. At the very least, they would lose their capacity effectively to guide the development of the EU legal order. The foundational values would then no longer be able to prevent radical changes. Furthermore, this option would grant the CJEU considerable leeway to interpret them in a very indefinite way.

The objective interpretation of the EU’s founding values—according to which human dignity and human rights are moral-political truths—seems to be the most consistent with the self-understanding of the EU. The Treaties, including the Charter, are infused with the idea that the Union stands for values that can never be abandoned. Taking this idea seriously, we suggest, would require accepting the founding values of the Union as substantive limits to Treaty revision.

3.4 Review by the CJEU

An affirmative answer to the question whether there are substantive limits to Treaty amendments does not imply, strictly speaking, that the CJEU has the responsibility (and should have the competence) to review amendments in this respect. On the one hand, it can be pointed out that the CJEU, under Article 48 TEU, does not even have a role in the consultation process (as do the European Parliament and the European Commission). On the other hand, it can be pointed out that the CJEU, on the basis of Article 19(1) TEU, has a very broad charter—namely ‘to ensure that in the interpretation and application of the Treaties the law is observed’. The

96 Comparable to the idea that the ECHR is a ‘living instrument’ that ‘must be interpreted in the light of present-day conditions’, an idea that was acknowledged by the European Court of Human Rights (ECtHR) for the first time in 1978. See *Tyrer v United Kingdom* (1978) ECHR Series A no 26, para 31.

Treaties do not contain any restrictions on the jurisdiction of the CJEU concerning the review of Treaty amendments. This finding is particularly significant given the fact that Article 269 TFEU explicitly lays down such a restriction in other circumstances.⁹⁷ It can be argued, *a contrario*, that the Court has the competence to review both the formal and substantive aspects of Treaty amendments.⁹⁸ This argument is reinforced by the fact that the CJEU has always been a very active court.

This does not alter the reality that the number of institutions that can meaningfully initiate a legal procedure against an amendment would be very limited. As all the Member States will have agreed to the amendment under this scenario, only the European Commission would be in a position to start an infringement procedure (against all of the Member States). Another option would be national courts that refer to the Court for a preliminary ruling about the validity of the Treaty amendment.⁹⁹

On first examination, two issues may seem to make it unlikely that the CJEU would substantially review Treaty amendments. First of all, it can be sceptically asked where the Court might derive its legitimacy to do so. As the CJEU is not a democratically legitimised institution, why should it have the power to invalidate amendments that are unanimously accepted by the Member States? One answer might be due to the fact that the revision procedures are not democratic either. In practice, the procedures to amend the Treaties lack transparency. Furthermore, it could be argued that the CJEU has its own, non-democratic legitimacy. The CJEU, after all, may serve as the guardian of human dignity and human rights against popular democracy and the delusions of the day. Defending the core of European values, the Court could even enhance its legitimacy vis-à-vis national courts.

Secondly, one could point to the very abstract nature of the Union's founding values. How could the Court possibly use them to invalidate amendments? Clearly,

97 According to art 269 TFEU, the Court can review acts adopted pursuant to art 7 TEU (the political sanctioning mechanism for the case of the existence of a serious and persistent breach by a Member State of EU values) solely at the request of the Member State concerned and solely in respect of procedural stipulations. This limitation of the jurisdiction of the Court was motivated by the extreme political sensitivity of such acts.

98 *Pringle* (n 70) Opinion of AG Kokott.

99 A third option would be that a national (constitutional) court declares an EU Treaty amendment incompatible with its national constitution. This scenario—first envisaged in the first *Solange* judgment of the German Federal Constitutional Court (*Solange I* (1974) 37 BVerfGE 271)—will not be explored here, as this article focuses on substantive limits to EU Treaty amendments ensuing from EU law, not from national (constitutional) law.

the values need specification in order to make a difference. Giving this power to the CJEU, it must be acknowledged, would give the Court enormous leeway. The only constraint on the judges is the moral expectation that they will administer justice in the spirit of European values. However, at the same time, it must be pointed out that the Court has already shown itself to be very well-suited for this job. For one value, respect for human rights, it was the Court (not the Member States or other EU institutions) that has fleshed out its concrete meaning in an impressive collection of case law.

4 Conclusion

We started our article by asking a couple of provocative questions. Could the Member States use the Article 48 revision procedure of the TEU to introduce a principle of fascism in European law? Could they use the same procedure to exclude certain minorities from the Charter of Fundamental Rights? Could the Member States legitimately use the Article 48 procedure to abolish the European Parliament? Our exploration suggests a tentative no.

Although the EU Treaties do not contain explicit substantive limits of Treaty amendability—and the CJEU has never expressly ruled to this effect—there is, nevertheless, room to argue that the idea of a doctrine of unconstitutional constitutional amendments is indeed relevant with regard to the legal system of the EU. In its case law, the CJEU has repeatedly emphasised that the judicial system of the Union is part of the Union's essence. Changes to the Treaties that would impair this essence seem to be unacceptable to the Court, indicating that there is a substantive constraint to Treaty amendability concerning the institutional features of the Union. More saliently, we have also encountered possible constraints that relate to the moral-political identity of the Union. As we have argued, there are good reasons to assume that the founding values of the Union, as enshrined in Article 2 TEU, constitute substantive limits of EU Treaty amendability. We have also argued that it is not unimaginable that the CJEU will assume the power to substantively review amendments to the EU Treaties, in cases where the Member States would choose to put forth suspect revisions to these documents.

Would this conclusion make any practical difference in cases where the Member States leverage Article 48 fundamentally to change the constitutional democratic identity of the EU? In other words, could a doctrine of unconstitutional constitutional amendments—including a judicial power substantively to review Treaty revisions—save a Europe in which the 'spirit of moderation,' to use the

famous words of Hand, is gone?¹⁰⁰ As Jacobsohn suggests, '[e]ndowing courts with a judicial review responsibility over constitutional amendments might, when prudently considered, be thought of in relation to the relative ease or difficulty of altering the document'.¹⁰¹ In India, for example, where the larger part of the constitutional document can be amended by just a simple majority in Parliament, the judiciary may adopt a relatively strong stance when faced with illiberal opposition. Amending the EU Treaties, by contrast, is extremely challenging, as it requires unanimous support of the Member States. It would be a formidable undertaking for the CJEU to go against that potent tide. Indeed, ultimately, the people of Europe therefore presumably comprise the body that should be counted on to prevent illiberal amendments from ever being adopted.¹⁰² For, in the end, law itself cannot prevent a revolution.

100 Learned Hand, *The Spirit of Liberty* (Alfred A Knopf 1953) 164 quoted in Jacobsohn (n 4) 82.

101 Jacobsohn (n 4) 82.

102 cf German Basic Law art 20(4): 'All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available'.

What a Tangled Web We Weave: Conflicts in Rating Agency Liability

*Nicholas Hoggard**

Abstract

Regulation (EU) 462/2013 imposes civil liability upon credit rating agencies for causing loss to investors by virtue of intentional or grossly negligent infringement of certain regulatory requirements. This article argues that this regulation does nothing more than replicate the UK's existing law on deceit, albeit that it is (inexplicably) more restrictive for claimants. Further, it considers the potential harm to taxonomy and—by extension—to the rule of law caused by such legal duplication when resorting to very specific harmonisation measures.

Keywords

Credit Rating, Deceit, Fraud, Tort, Regulation, Taxonomy, Misstatement

Of the many causes attributed to the credit crisis, few have received more attention than the role of credit rating agencies (CRAs). A small number of large CRAs dominate an industry whose judgement on the credit-worthiness of debt obligations informed the investment decisions of banks and investors the world over. In this paper, I consider the latest in a line of EU Regulations dealing with CRAs. These regulations include Regulation (EU) 462/2013 of 21 May 2013 amending Regulation (EC) 1060/2009 on credit rating agencies [2013] OJ L146/1 (the Regulation). The Regulation imposes civil liability upon CRAs for causing loss to an investor by committing any of a significant number of infringements.¹

In Part 1 of the paper, I submit that, while this civil liability replicates the existing UK law of deceit almost exactly, it is more restrictive than the law of deceit, in that it requires the defendant's reliance to be reasonable. In Part 2, I consider that this divergence from the law of deceit is more than a mere triviality—it has both

* Teaching Fellow, Durham Law School (UK); Barrister of Lincoln's Inn.

1 The Regulation, by art 8d, inserts art 35a into Regulation (EC) 1060/2009 of 16 September 2009 on credit rating agencies [2009] OJ L302/1, affording investors or issuers a civil claim for damages against CRAs, subject to certain provisions (discussed below).

practical and legal implications. The practical implications arise from the global reach of English law in the debt markets. For example, English law governs more sovereign bonds than the law of any other country, and the majority of those bonds are listed outside of London and denominated in currencies other than sterling. The legal implications are two-fold.² Firstly, it must be considered what role is left for domestic law in the context of rating agency liability. Secondly, there is a broader theoretical point to be made in terms of the potential harm to taxonomy and, ultimately, to the rule of law that could be brought about by continued resort to specific, directly effective civil liabilities without careful consideration of the domestic context over which they impose themselves.

It is worth considering, briefly, the background against which this debate is set. CRAs are, at best, perceived as having underestimated the risk inherent in much of the world's debt and, at worst, are alleged to have deliberately changed rating models to increase the apparent credit worthiness of the booming subprime collateralised debt market. That is not, of course, to suggest that such action was fraudulent (despite the fact that, in January 2015, Standard & Poors (S&P) settled charges of fraudulent misconduct brought by the US Securities and Exchange Commission), though it was perhaps in response to market pressures.³ As issuers began to structure products with significant concentrations in one market (such as in subprime residential mortgages), there was considerable pressure on the CRAs to adjust their models to produce greater tranches of AAA-rated debt⁴ within investment vehicles.⁵ For example, in 2004, Moody's, the second largest CRA,⁶ stopped using the *binomial expansion* ratings model, which favoured diversity in a portfolio, but then did not commit 'nearly enough resources to get the ratings

2 Issam Hallak, 'Governing Law of Sovereign Bonds and Legal Enforcement' in Robert W Kolb (ed), *Sovereign Debt: From Safety to Default* (Wiley 2011) 208.

3 US Securities and Exchange Commission, 'SEC Announces Charges Against Standard & Poor's for Fraudulent Ratings Misconduct' (*US Securities and Exchange Commission*, 21 January 2015) <www.sec.gov/news/pressrelease/2015-10.html> accessed 6 January 2016.

4 AAA-rated debt are gold-standard, highest quality debt. They are the least likely to default of any tranches of debt.

5 See generally John M Griffin and Dragon Y Tang, 'Did Credit Rating Agencies Make Unbiased Assumptions on CDOs?' (2011) 101(3) AER 125.

6 In the first half of 2007, Moody's rated 91.2 per cent of the US asset and mortgage-backed securitisation market, second only to S&P. See Asset-Backed Alert 'Rating-Agency Shares of US ABS and MBS in the First Half' (30 June 2007) <<https://www.abalert.com/rankings.pl?Q=102>> accessed 10 May 2016.

right' to reflect changing correlative risk.⁷ S&P, similarly, were alleged not to have allocated resources to improving the analytics because 'improving the model would not add to S&P's revenues'.⁸ The progression to more issuer-friendly ratings was clearly not uncontroversial. Nevertheless, it did not facilitate claims against CRAs in the UK. This is because the lack of proximity between CRAs and investors renders a claim in negligent misstatement difficult to establish. This difficulty is aggravated in a claim of fraud (or deceit) because such claims require proof of an intention to deceive.⁹

The influence of firms such as Moody's, S&P, and Fitch was so significant that, in effect, they operated as gatekeepers to the debt market.¹⁰ By issuing a poor rating, they could effectively price smaller issuers out of the market. Even government-backed liquidity schemes, such as the Bank of England's 2008 Special Liquidity Scheme, required eligible debt to be rated AAA or equivalent by at least two of S&P, Moody's, and Fitch.¹¹ It was for similar reasons that there were only a few rating agencies. Due to the pressure on issuers to compete, there was little incentive to have their products rated by relatively small or unknown CRAs, whose ratings carried less gravitas than those of larger firms. In sum, the CRAs commanded considerable influence over a global market (involving private and state actors), which was not always exerted with the care or accuracy that circumstances demanded.¹² The EU's—and the United States'—decision to regulate the CRA market more keenly is thus unsurprising.

7 US Senate, Permanent Subcommittee on Investigations, *Wall Street and the Financial Crisis: Anatomy of a Financial Collapse* (112 S Hrg 675) 293.

8 *ibid* 292.

9 *Derry v Peek* (1889) 14 AC 337 (HL) 374.

10 Matthias Lehmann, 'Civil Liability of Rating Agencies: An Insipid Sprout from Brussels' (2014) LSE Law, Society and Economy Working Papers 15/2014, 3 <http://www.lse.ac.uk/collections/law/wps/WPS2014-15_Lehmann.pdf> accessed 12 January 2015; See also, Franz P Hops, 'Problems and Reforms in Mortgage-Backed Securities: Handicapping the Credit Rating Agencies' (2009–2010) 79 *Miss LJ* 531, 535.

11 Bank of England 'Special Liquidity Scheme: Market Notice' (21 April 2008) <<http://www.bankofengland.co.uk/markets/Documents/money/marketnotice080421.pdf>> accessed 14 February 2015.

12 See, eg, *Bathurst Regional Council v Local Government Financial Services Pty Ltd (No 5)* [2012] FCA 1200, in which S&P was found to have breached a duty of care to investors by awarding a AAA rating to a highly volatile instrument (it lost c.90 per cent of its value in fewer than 24 months).

1 Duplication of laws

1.1 Article 35a liability

The background set out above does not elucidate why the regulation of CRAs necessitated the inclusion of a directly effective civil law action against CRAs. This latest Regulation (the Regulation)¹³—the third of its kind since 2009—affords investors a private cause of action¹⁴ against a CRA if loss is suffered as a result of an agency committing, intentionally or with gross negligence, any one of over 80 regulatory infringements, where that infringement has an impact on a credit rating. These infringements, listed in Annex III of the 2009 Regulation¹⁵ include, for example, a CRA's failure to assess 'whether there are grounds for re-rating or withdrawing an existing credit rating';¹⁶ a CRA's failure to ensure that 'the provision of an ancillary service does not present a conflict of interest with its credit rating activity';¹⁷ a CRA's introduction of 'compensation or performance evaluation contingent on the amount of revenue that the credit rating agency derives from the rated entities';¹⁸ and a CRA's failure to use 'rating methodologies that are rigorous, systematic, continuous and subject to validation based on historical experience, including back-testing'.¹⁹ Put simply, these regulatory requirements aim to ensure the accuracy and fairness of credit rating.

It is not within the remit of this paper to analyse the regulatory requirements. The focus, rather, is on the imposition of additional civil liability under Article 35a of the Regulation. It is possible to contend both that the Annex III requirements are sound and that the liability contingent on infringement is not. The civil liability is clearly dependent on some sort of factor capable of breach as provided in Annex III. However, those Annex III requirements do not depend on EU statutory liability for their relevance. For example, one could imagine the Annex III requirements

13 See above (n 1).

14 Art 35a was into Regulation (EC) 1060/2009.

15 Annex III was inserted into the 2009 Regulation by Regulation (EU) 513/2011 of 11 May 2011 amending Regulation (EC) 1060/2009 on credit rating agencies [2011] OJ L145/51, art 1 para 27.

16 Regulation (EC) 1060/2009 (n 1) Annex III, I No 21.

17 *ibid* I No 23.

18 *ibid* I No 41.

19 *ibid* I No 43.

forming a guideline for assessing, say, a breach of a standard of care in an action for negligent misstatement in the UK. There is also something to be said for harmonising credit rating practice across member states. So, to reiterate, Annex III is arguably of merit, and one need not disagree with that proposition in order to consider that Article 35a was unnecessary or undesirable, or both.

There are certain features of this liability that warrant consideration. Firstly, it is not the accuracy of the statement that triggers liability, but rather the intentional or grossly negligent commitment of an infringement (albeit that such an infringement must have ‘an impact on the credit rating’). Such an observation may appear unremarkable, though it will be worth bearing in mind for what follows.

Furthermore, the infringement must, of course, require intention or gross negligence—mere negligence will not suffice.²⁰ The Regulation leaves it to the individual member States to define the terms ‘intention’ and ‘gross negligence’. In the UK, gross negligence is generally understood to mean no more than negligence ‘with the addition of a vituperative epithet’.²¹ However, for the purposes of CRA liability, ‘gross negligence’ has been understood to mean recklessness.²² Recklessness relates not to breach of a standard (as is the case of negligence), but to intention. Specifically, that the defendant acts recklessly with respect to:

- (i) a circumstance, when he is aware that a risk exists or will exist; or
- (ii) a result, when he is aware of a risk that it will occur,

and it is, in the circumstances known to him, unreasonable to take the risk.²³

Thus, the focus of the cause of action in recklessness is different from that of negligent misstatement (which is concerned with the failure to meet a reasonable standard of care). The cause of action against a CRA will require the claimant to prove, at a minimum, that the CRA was *careless as to the risk of infringement*, not that they happened not to meet an objective standard of care.

20 Regulation (EC) 1060/2009 (n 1) art 35a, para 1.

21 *Wilson v Brett* [1843] 11 M&W 113, 115 (Baron Rolfe).

22 HM Treasury, *Explanatory Memorandum to the Credit Rating Agencies (Civil Liability) Regulations 2013* (Cmd 1637, 2013) 7.5.

23 *R v G* [2003] UKHL 50, [41] (Lord Bingham), affirming the earlier case of *R v Cunningham* [1957] 2 QB 396.

1.2 English tort of deceit

English private lawyers will recognise that this formulation resembles the English tort of deceit. Deceit consists in the making of a false statement, knowing it to be false, or ‘recklessly, careless whether it be true or false’,²⁴ and the claimant then acts to his or her detriment in reliance on it.

Professor Möllers and Ms Niedorf, discussing the new Regulation, contend, however, that this is not deceit because deceit requires misrepresentation of fact, *rather* than of opinion.²⁵ Furthermore, they contend that, in any event, the claimant will have to show that the defendant lacked reasonable belief in the truth of the statement, thus rendering any claim in the tort of deceit very unlikely.²⁶ To this, a third possible objection could be added, ie deceit requires an intention that the claimant relies on the statement. In the context of ratings requested by the issuer, and made publicly available, such a class would either be restrictively narrow (ie, those whom the CRA specifically knew would act in reliance on their statement) or fancifully wide (ie, those who would rely on the statement, if they were to act).

However, it is respectfully submitted that such a conclusion rests on too simplistic a view of English tort law. For the sake of clarity, let us reiterate the alleged obstacles to deceit: (i) a statement of opinion cannot constitute deceit; (ii) even if the CRA was reckless as to a specific infringement, that is not proof that they lacked a reasonable belief in the statement itself; and (iii) it is not at all clear, given the context in which CRAs operate, that reasonable bounds can be placed on the intention element.

As to the first, it is submitted that a statement of opinion can, under certain circumstances, be regarded as a statement of fact for the purposes of tortious deceit. As to the second, the problem with the objection, if it relates to the law as it is (ie, post-Annex III requirements), is that it presupposes that *recklessness as to the ultimate truth of the statement* and *recklessness with regard to a necessary precursor to the statement* are somehow discrete. As to the third, intention in English law has long included oblique intention, where the outcome is a virtual certainty, even if

24 *Derry v Peek* (1889) 14 AC 337 (HL), 374.

25 Thomas M J Möllers and Charis Niedorf, ‘Regulation and Liability of Credit Rating Agencies—A More Efficient European Law?’ (2014) 11(3) ECFR 333, 355.

26 *ibid* 356.

not directly intended,²⁷ and thus concerns relating to the size of the potential class of claimants are misplaced. Let us consider each in turn.

1.2.1 Opinion can constitute fact

Whilst it is true that statements of opinion do not normally constitute a statement of fact, numerous cases have held that a statement of opinion can—especially when it comes from a professional or competent party—contain within it an implicit representation of fact, that fact being that there are reasonable grounds for holding the opinion. For example, Lord Evershed MR in *Brown v Raphael*²⁸ held that:

The representation was not merely confined to the fact that the vendor entertained the belief but also, inescapably, there goes with it the further representation that he, being competently advised, had reasonable grounds for supporting that belief.²⁹

Similarly, Romer LJ, in his judgment in the same case, opined:

I should have thought that it was fairly obvious that the statement purporting to come, as it did come, from the vendor's solicitors, and expressing a belief vital in relation to this legal transaction, inevitably would suggest to the purchaser that the opinion was being expressed upon reasonable grounds; for it was a matter which everybody concerned, and especially a solicitor, must know would vitally affect the value of the reversion which the purchaser was proposing to buy (...).³⁰

Brown LJ in *Economides v Commercial Assurance Co plc*³¹ reiterated his statement from *Brown*, albeit to distinguish it, saying that the representation 'would inevitably carry with it the implication that there were reasonable grounds to support the belief'.³² On the basis of these authorities, amongst others,³³ one may at least conclude that opinions in professional contexts—especially where those opinions are vital to the transaction—carry with them an implied representation

27 *R v Woollin* [1999] 1 AC 82 (HL).

28 *Brown v Raphael* [1958] Ch 636 (CA).

29 *ibid* 644.

30 *ibid* 649.

31 *Economides v Commercial Assurance Co plc* [1997] 1 QB 587 (CA).

32 *ibid* 599a.

33 See, eg, *Credit Lyonnais Bank Nederland v Export Credit Guarantee Department* [1996] 1 Lloyd's Rep 200, 216 (Longmore J).

that there are reasonable grounds for the belief. It may, perhaps, be going too far to suggest that *all* opinions carry with them such representations, though one can comfortably assert that opinions from CRAs—being both professional and vital—carry with them such implied representations of fact.

1.2.2 Annex III infringement renders opinions unreasonable

In the absence of Annex III (or any specific requirements) it would be difficult to establish the grounds for asserting that a CRA lacked a reasonable belief in the truth of its statement. While not impossible, any inquiry must first establish what constitutes ‘reasonable grounds’, even before matters of proof are considered. The main benefit of the specified infringements listed in Annex III is that they can provide clear guidelines for determining when a rating will be reasonable (the conceit being that an infringement renders the rating unsound—otherwise what point is the requirement?). There is a sound logic in this position, as is clear when one considers the alternative: can the law, on the one hand, hold that a rating can be sound only if the agency undertaking the rating has avoided all specified infringements, while, on the other, stipulate that the agency can have reasonable grounds for believing its statement *regardless* of whether it avoided the infringements? Clearly not: such an assertion would be hopelessly inconsistent.

1.2.3 Intention

It is fairly settled law that, in order to succeed in a claim for deceit, the claimant needs to show that the defendant intended that the claimant would act on the representation and not, for example, that the statement was made to the claimant in particular, or that he would suffer harm as a result.³⁴ This is important. For example, there can be no doubt that May LJ, in his judgment in *Abu Dhabi Investment Co v H Clarkson & Co*,³⁵ was incorrect in asserting that deceit required ‘an actual intention to deceive the claimant’.³⁶ Firstly, a reasonable reading of the authority

34 See, eg, Michael Jones, Anthony M Dugdale and Mark Simpson (eds), *Clerk & Lindsell on Torts* (19th edn, Sweet & Maxwell 2005) paras 18–29–18–31; William V H Rogers (ed), *Winfield and Jolowicz on Tort* (18th edn, Sweet & Maxwell 2010) para 11–11.

35 *Abu Dhabi Investment Co v H Clarkson & Co* [2008] EWCA Civ 699.

36 *ibid* [33].

cited by his Lordship does not support such a conclusion. The authorities are not considered in any detail in the judgment, but, inasmuch as they deal with the specific issue of intention at all, they confirm the aforementioned position—that the defendant must intend the claimant act on the statement.³⁷ Secondly, and far more fundamentally, were this the case, then the tort of deceit would undermine itself, at least in instances where the defendant was reckless as to the truth of the statement. That is, how can one at once intend that the claimant actually be deceived while simultaneously not caring about the truth of the statement?³⁸ While you may not honestly believe what you are saying, that does not mean you honestly believe you are lying. There is a subtle but important difference between intending that someone act on a statement you neither know nor care is true, and intending for someone to believe an untruth. May LJ appears, perhaps, to have conflated the concepts.

With that in mind, it is worth noting two important caveats. Firstly, the claimant need not be specifically identifiable with regard to intention; it is sufficient that the claimant belongs to a class of persons.³⁹ Secondly, the defendant need not have primarily or explicitly intended that the claimant would act on the statement; it is sufficient that such was a virtual certainty (as noted in *Woollin* above).

How, then, should the intention requirement be interpreted with respect to CRAs? Put at its most restrictive, one could argue that the defendant ought to be virtually certain that everyone within a class of persons *would* act on the basis of the statement. This argument has the merit of being a largely literal interpretation of the law. Thus, the CRA would have to know that: (a) a pool of people would act on the basis of their statement—not *might*, would; and (b) this pool of people will not necessarily include just those who have already chosen to invest in the relevant security but will also include people with whom the CRA has no legal relationship, ie, people who are still deciding whether to invest. However, by expanding the class to include those who may invest (and, by extension, who may not invest, and those

37 Eg, in *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 (HL), 211—a case and page specifically cited by May LJ—it was clearly stated that the false statement ‘must be made with the intention that it should be acted upon by the plaintiff’ (Viscount Maugham); See also, Jones, Dugdale and Simpson (n 27) para 18–01—also cited by May LJ—in which it is clearly stated that intention in deceit means that the defendant ‘intends that the claimant should act in reliance on [the false representation]’.

38 L C H Hoyano, ‘Lies, Recklessness and Deception: Disentangling Dishonesty in Civil Fraud’ (1996) 75 Can Bar Rev 474, 487.

39 *Abu Dhabi Investment Co* (n 35).

who could not care less either way), it becomes impossible to assert that the CRA could be virtually certain that they would act on the basis of the statement. The literal interpretation, then, becomes self-defeating.

A second interpretation fits more comfortably with common sense and avoids the logical conflict. It should be sufficient that, in making a statement, CRAs can be virtually certain that *some* people within the class will act. The sense in this proposition becomes apparent if we remove ourselves from the amorphous realm of speech. Consider this: I own a car and, in a moment of questionable judgement, decide to loosen significantly all of the wheel-nuts before driving down the motorway. That one or more of my wheels will come off is a virtual certainty; I intend or am at least reckless as to this outcome. That other drivers will be affected by the resulting disaster is also a virtual certainty, as I obliquely intend that members within a class (motorway users) will be affected by my action. But can I say with any certainty that *you*—as another driver and thus member of that class of motorway drivers—will be affected by it? Of course not. Yet were I to crash into you—and ignoring other relevant laws for the sake of the hypothesis—one would never wish to deny your claim for damages simply because I had not intended that you would be affected. Indeed, it would have been wholly unrealistic for me to suppose that all members of the class would be affected; the fact that it is only *one* member of that class who was affected should not diminish my liability to that member. And so it is with deceit.

Thus, a CRA can be held to have intended that a claimant would act on the rating, on the proviso that the claimant belongs to that class of persons who are virtually certain to act on the basis of a rating. It is, for example, difficult to see why professional investors ought not to be regarded as such a class. To those more used to the realm of negligence, this net seems to be cast very wide; absent the limiting factor of proximity, we seem left with something more closely resembling reasonable foreseeability. Though, of course, this is not negligence. There would seem very little reason for limiting liability in fraud to similar extents.

What has been established, then, is that the current English tort of deceit, fortified by Annex III, achieves at least as much as the Article 35a civil law action. CRAs are professional, often privy to information inaccessible to others, and thus their opinions carry with them an implied representation that there are reasonable grounds for holding those opinions, and this places it squarely within the purview of the law on deceit. Such an observation may appear trifling—on its own, it probably would be—but it is demonstrative of a quick-fix approach to law that is troubling, as shall be demonstrated in the following sections.

2 Taxonomic objections

2.1 Specific conflicts in CRA liability

One of the fundamental problems with duplication of laws actually arises from inexact duplication. This is the problem here. Article 35a(1) states that:

An investor may claim damages under this Article where it establishes that it has reasonably relied (...) on a credit rating for a decision to invest into, hold onto or divest from a financial instrument covered by that credit rating.

Taken on its own terms, the requirement is not without possible justification: one suspects that the requirement of reasonable reliance is partly to ensure that investors are not at liberty to make risky investments effectively underwritten by the CRAs. That being said, the requirement of reasonable reliance does seem out of place in an article concerned with *intentional or grossly negligent* infringement.⁴⁰ However, there exists no such requirement in tortious deceit. All that is required in this respect is that the claimant relied on the statement, not that the reliance was in any way reasonable. The claimant's own lack of care may be a defence to a claim in negligence, but it does not apply to deceit.⁴¹

This leaves the current law in something of a quandary: if Article 35a is to sit alongside domestic law, then whatever justification the reasonableness requirement may have, it is undone by basic civil fraud. This may not be true in all member states, of course; however, if that is the case, then there are obvious implications for harmonisation. This would not be a problem if the sole objective of Article 35a were to impose a minimum standard of protection, a proposition that is admittedly not without some precedent. Arden LJ, in respect of conflicts between the UK's Equal Pay Act 1970 and Article 141 of the European Union Treaty in *Wilson v Health and Safety Executive*,⁴² noted that Community law does not prevent member states from conferring greater rights to equal pay.⁴³ Therefore, so long as domestic

40 There is a general requirement in private law that the parties be viewed as equal—see, eg, Ernest J Weinrib, *Corrective Justice* (OUP 2012)—which is respected by recognising the contributory negligence of the claimant; to ignore one party's negligence in favour of the other's is clearly unjust. It is not clear that the scales are so equally weighted where one party commits a wrong tantamount to fraud and the other party only commits negligence.

41 *Central Ry of Venezuela v Kisch* (1867) LR 2 HL 99.

42 [2009] EWCA Civ 1074 (CA).

43 *ibid* [67].

law affords protection that is at least equivalent to that offered under Community law, it will be compatible with Community law. The analogous reasoning works inasmuch as both the Treaty and Article 35a liability afford protection by the grant of rights, ie the English law on deceit can be compatible with the Regulation if it affords greater protection to investors than the Regulation.

However, the equal pay protection afforded under the Treaty is based on—and a logical corollary of—a core, foundational principle of the Community that prevents comparable situations being treated differently without justification.⁴⁴ The Regulation is more removed from this tight logical relationship, and is less obviously based on a single principle against which we can judge the compatibility of national law. For example, domestic law could be judged to promote equal pay more effectively than specific Community laws, and thus still be compatible with Article 141. In this context, one cannot make a relevant argument that domestic law promotes investor protection more effectively than the Regulation, because the Regulation's explicit objective is regulation of CRAs, and not investor protection—even if the latter is the overriding rationale. If harmonisation is a principle on which the Regulation is based, then such will be of little comfort to those seeking to promote better protection through domestic law.

In the alternative, then, we must consider that the Regulation supersedes domestic laws of deceit, at least in respect of CRAs, on the basis that tortious deceit conflicts with one of the substantive provisions of the Regulation (and who is to say that Article 35a(1) concerning reasonable reliance is any less substantive than the rest of Article 35a?). Such would, of course, be the traditional interpretation of Regulations.⁴⁵ It seems particularly odd for the rules on fraud to be altered in a contingent manner, and yet more odd for CRAs to receive greater protection from claims arising from their own fraudulent acts than is afforded to those whose fraud may cause less systemic harm, viz. every other legal person under that governing law. The Council probably did not consider that this liability amounted to fraud in the first place, but such an observation does not change the fact that it does so in England and Wales, nor does it help solve the conundrum. Such conflicts are bound to occur again in other guises, so long as quick-fix solutions are found in

44 Case 43/75 *Defrenne v Sabena* [1976] ICR 547, [12].

45 Case 39/72 *Commission of the European Communities v Italian Republic* [1973] ECR 101, [4]: 'It cannot be accepted that a Member State should apply in an incomplete or selective manner provisions of a Community Regulation (...)'.

directly effective specific civil actions, imposed upon otherwise long and carefully considered law. This is not wanton criticism; it is a fact.

2.2 General theoretical considerations

Bizarre though this situation may be, there is a sense in which we are where we are, for now at least. In the final Part of this paper, it is apt briefly to consider some of the more theoretical aspects of this problem, if only as a guide for future decision-making.

Of the many possible defining characteristics of the rule of law, few can be so certain as the requirement that the law must be accessible and intelligible to those who would fall within its purview. Accessibility would require that the law does not regulate the same wrong—the term ‘wrong’ is used in the sense of a legal category, rather than merely meaning the same ‘act’—under different regulatory regimes. We accept, of course, that certain actions may violate a number of different principles: a breach of contract may violate contractual and tortious principles, just as a criminal act may generate both criminal and civil liability. But one may rightly question a law that regulates varyingly an act violating just one legal principle. Similarly, for the law to be intelligible, it must, *inter alia*, be possessed of internal consistency, of a unity of meaning; if the law is to be a creature of reason, then internal contradictions are certainly a sign of misunderstanding or poor reasoning, and thus to be avoided. For example, it is a troubling oddity of the English (and not just English) common law that fraud ‘vitiates all transactions known to the law’⁴⁶—except, of course, where that fraud relates to inducement to engage in sexual activity, where, save in certain exceptional circumstances, consent to sex will not be vitiated by fraud.⁴⁷ This is not to argue that the law is to become slave to language, but evidently there is not a clear understanding of some element of—in this example—either fraud, or consent, or rape law. Fundamentally, the law, if

46 *Lazarus Estates Ltd v Beasley* [1956] 1 QB 702 (CA) 722 (Parker LJ).

47 See, eg, *R v Flattery* (1877) 2 QBD 410; *R v Clarence* (1888) 2 QBD 23, 43: ‘the proposition that fraud vitiates consent in criminal matters is not true’ (Stephen J). It is not suggested that such should necessarily be the case in rape law, but rather that such a contradiction may denote a more fundamental conceptual problem; For a thorough exposition of the subject, see especially Jed Rubenfeld, ‘The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy’ (2013) 122 Yale LJ 1372.

it is to be fair, must be consistent; if it is to be consistent, it must eschew flawed taxonomy and internal contradiction.

The aforementioned golden thread is important for understanding any system of law. Just as we may ask what makes dogs and wolves different enough to be of different subspecies, but similar enough to be of the same species, we may ask what marks the essential difference between negligence occasioning physical harm and negligence occasioning economic loss; or—conversely—what, despite evident differences, unifies them when compared with, say, contract law. The example is not wanton. Tort law in England has developed in a piecemeal fashion, and, despite notable attempts to find irreducible core elements, remains largely diffuse.⁴⁸ There is something to be said for pragmatism over formalism, of course, but there will come a point at which pragmatism must yield to the requirement that like cases be treated alike. It is clearly not enough simply to assert that ‘tort is the realm of legal wrongs,’ and thereafter list the many and various wrongs that constitute tort. One needs to ask what is meant by wrong that makes tortious wrongs different from, say, criminal wrongs or—more pertinently for private law—from the ‘wrong’ of breach of contract. It is also worth asking what it is that entitles torts to belong to the same taxonomic group beyond merely asserting that they do not belong in a different taxonomic group (what, for example, unites defamation and negligent misstatement?). This is not to say that there are not some answers to these questions—and certainly this paper is not the forum to consider them all—but it is important that we ask the questions; without clear taxonomic understanding, we cannot hope to decide like cases alike.

Perhaps these considerations speak for themselves, but it should be abundantly clear that a growing archipelago of small islands of liability from the EU—albeit that EU law is in a different but overlapping legal taxonomy—can only serve to obfuscate and to sever nascent golden threads. They render illusory any coherence in our law, which ‘is liable to be affected whether the basic approach of some area of law is changed or whether some ill-fitting and largely unnecessary principles are superimposed on to it.’⁴⁹ It would be one thing if those islands of liability were addressing gaps in the national law—and no doubt some do and will—though, as has been shown herein, this is not always the case.

48 The most notable of which—at least for its prominence—is that of Lord Atkin in *Donoghue v Stevenson* [1932] AC 562 (HL) 580.

49 Lady Justice Arden, ‘Peaceful or Problematic? The Relationship Between National Supreme Courts and Supranational Courts in Europe’ (2010) 29(1) YEL 3, 5.

3 Concluding remarks

Though much of the CRA regulatory regime that now exists in the EU is to be commended, as it provides guidelines vital to ensuring long-term confidence (if not stability) in the potent debt markets, the creation of directly effective liability remains both a mystery and a problem. Why the same could not have been achieved through a Directive is confounding. The end result is a near duplication of tortious deceit in England and Wales—fraud, by any other name—except it did not even manage exact duplication (in the matter of reasonable reliance). Accordingly, where there would have been mere confusion, there is now genuine conflict, a conflict that seems to resolve itself by affording CRAs greater protection against liability for fraud than is afforded to any other actor. Whilst the final subsection in this paper may have seemed somewhat removed from the rest of the discussion, given that Article 35a is already with us, it is in many respects the most important. For as long as we classify our private law by causative events—like unjust enrichment, or breach of contract, or deceit—we must never allow ourselves to fail to understand that causative event, lest we lose sight of what makes those whom we make liable actually liable. The quick-fix civil liability in the Regulation takes us one further step into the morass of ill-defined and inconsistent private liabilities.

Strategically Created Treaty Conflicts and the Politics of International Law

By Surabhi Ranganathan.

Cambridge, Cambridge University Press, 2014.

448pp, £75 (hardcover).

Valentin Jeutner^{*}

In October 2015, one week before Pakistan's Prime Minister, Nawaz Sharif, visited the United States, it emerged that the United States may be exploring the possibility of reaching a nuclear deal with Pakistan. While it is too early to speculate on the exact character and content of such an agreement, it has been reported that the United States is seeking guarantees from Pakistan to restrict its nuclear programme in a manner that is proportionate to the defence needs of the country.¹ In exchange, the United States might attempt to convince the Nuclear Suppliers Group² (NSG) to exempt Pakistan from the NSG's rules enabling nuclear trade with Pakistan, which would otherwise be prohibited because of Pakistan's continued opposition to the Nuclear Non-Proliferation Treaty (NPT).³ The tension between such an agreement and the United States' existing obligations under international law, for example,

* Junior Research Fellow in Law, Pembroke College, University of Oxford.

1 David Ignatius, 'The U.S. Cannot Afford to Forget Afghanistan and Pakistan' *The Washington Post* (Washington DC, 6 October 2015) <https://www.washingtonpost.com/opinions/the-dangers-that-still-lurk-in-south-asia/2015/10/06/e3adf016-6c73-11e5-b31c-d80d62b53e28_story.html> accessed 6 November 2015; David E Sanger, 'U.S. Exploring Deal to Limit Pakistan's Nuclear Arsenal' *The New York Times* (New York, 15 October 2015) <<http://www.nytimes.com/2015/10/16/world/asia/us-exploring-deal-to-limit-pakistans-nuclear-arsenal.html>> accessed 6 November 2015.

2 'Nuclear Suppliers Group—Home' <<http://www.nuclearsuppliersgroup.org/en/>> accessed 6 November 2015.

3 Treaty on the Non-Proliferation of Nuclear Weapons (adopted 1 July 1968, entered into force 5 March 1970) 729 UNTS 161.

under the NPT, could be analysed in terms of a conflict of norms,⁴ conflict of laws,⁵ or conflict of regimes.⁶ In her new book, *Strategically Created Treaty Conflicts and the Politics of International Law*, Surabhi Ranganathan presents a novel approach that suggests that the conclusion of a US–Pakistan nuclear deal might represent a strategic treaty conflict, although the deal itself is not considered.

According to Ranganathan, a strategic treaty conflict exists when States conclude agreements specifically in order to ‘displace, compete with, carve exceptions from, or alter, the regime established’ by an existing treaty or treaty regime.⁷ Ranganathan identifies two core features of strategic treaty conflicts. First, strategic treaty conflicts often exist between multilateral and bilateral or small-group treaties. Second, strategic treaty conflicts often concern treaties with non-identical parties. Ranganathan’s thesis is that treaty conflicts of this kind are much more than a mere deontological incompatibility of legal norms that could be resolved by means of traditional norm conflict resolution devices, as contained, for example, in the Vienna Convention on the Law of Treaties (VCLT).⁸ Instead, she argues that strategic treaty conflicts are a reflection of the complex relationship and inter-dependency of law and politics in the international affairs of states.

In her book, Ranganathan introduces and develops this argument in two parts and seven chapters including a short conclusion. The first part (Chapters I–III) considers numerous conceptual and historical issues. The second part (Chapters IV–VI) consists of three case studies analysing strategic treaty conflicts in practice. In the first chapter, Ranganathan introduces the idea and the problem of strategic treaty conflicts. She observes that treaty conflicts occur frequently and perceptively acknowledges the various challenges that intentional departures from established legal norms pose to the integrity of international law and its relationship with politics and international relations.⁹ Subsequently, Ranganathan situates strategic treaty conflicts in the maelstrom between two critical narratives. The first such

4 See, eg, Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (CUP 2003).

5 See, eg, Ralf Michaels and Joost Pauwelyn, ‘Conflict of Norms or Conflict of Laws?: Different Techniques in the Fragmentation of Public International Law’ (2012) 22 *Duke J Comp & Int’l L* 349.

6 See, eg, Dirk Pulkowski, *The Law and Politics of International Regime Conflict* (OUP 2014).

7 Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (CUP 2014) 7.

8 Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

9 Ranganathan (n 7) 17.

narrative is epiphenomenality—which holds that treaty conflicts merely express underlying State interests—as advanced *inter alia* by Goldsmith and Posner.¹⁰ The second narrative is lawfare—namely, that treaty conflicts reflect the instrumental use of law by States—as developed in the writings of David Kennedy.¹¹ Without committing fully to either one of the two narratives, Ranganathan sets out to assess the strength of both accounts with respect to legal doctrine and the practice of international law.

Chapter II focuses on the genesis of international treaty law's 'political decision principle' as reflected in the VCLT's Article 30(4)(b). The political decision principle stipulates that States owing conflicting international obligations to different treaty parties pursuant to different treaties are entitled to elect to which of the two conflicting norms they wish to comply, subject to compensating any detrimentally affected treaty party.¹² In the context of treaty conflicts, the VCLT's Article 30(4)(b) is highly relevant because it is only due to the article's insistence on the continued legal validity of conflicting treaty obligations owed to non-identical parties that strategic treaty conflicts can arise. In contrast to attempts to construe Article 30(4)(b) as a concession to sovereign power, Ranganathan argues that the choice of the principle was informed both by the liberal (in the sense that Article 30 would encourage recourse to international law) and constructivist (in the sense that recourse to international law would strengthen respect for international law) motives of the VCLT's authors.¹³

In Chapter III Ranganathan considers three managerial understandings of, and approaches to, treaty conflicts that all envision institutional modifications of conflicting treaties. First, Ranganathan considers Lauterpacht's¹⁴ doctrine of the approximate application of treaties by courts.¹⁵ Second, she evaluates approaches relying on compliance management by treaty bodies¹⁶ favoured *inter alia* by Chayes and Chayes.¹⁷ Finally, Ranganathan evaluates accommodation attempts by

10 See, eg, Jack L Goldsmith and Eric A Posner, *The Limits of International Law* (OUP 2006).

11 See, eg, David Kennedy, *Of War and Law* (Princeton UP 2006).

12 See Manfred Zuleeg, 'Vertragskonkurrenz Im Völkerrecht. Teil I: Verträge Zwischen Souveränen Staaten' (1977) 20 German YB Int'l L 246.

13 Ranganathan (n 7) 94.

14 *Admissibility of Hearings of Petitioners by the Committee on South West Africa* (Advisory Opinion) [1956] ICJ Rep 35 (Separate Opinion of Sir Hersch Lauterpacht).

15 Ranganathan (n 7) 99.

16 *ibid* 113.

17 Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (rev edn, HUP 1998).

means of treaty coordination or regime interaction¹⁸ as advanced by Young,¹⁹ and Wolfrum and Matz.²⁰ Although Ranganathan acknowledges that each of the three approaches is informed by distinct objectives, she shows that they share an interest in facilitating discourses framed in terms of international law—again, in pursuit of a constructivist and liberal understanding of international law.

Chapters IV, V and VI then respectively consider strategic treaty conflicts concerning the deep seabed mining regime of the United Nations Convention on the Law of the Sea,²¹ the tensions surrounding the establishment of the International Criminal Court and the subsequent conclusion of numerous Bilateral Immunity Agreements by the United States, and concerning the agreement of the India-US Civil Nuclear Deal. Each of the case studies offers an extremely rich account of both the legal and political genealogy of the respective conflicts. While the level of detail in the case studies might not always be easy to digest for those who are not experts in the law of the sea, international criminal law or the international nuclear regime, Ranganathan generally takes great care to relate the case studies back to the conceptual observations introduced in the earlier chapters.

At times, however, the sheer density of presented facts and ideas makes it difficult to keep track of the book's central thesis. For example, towards the end of Chapter I the reader is introduced to the works and thoughts of numerous authors, namely Higgins, McDougal and Lasswell, Kratochwil, Koskenniemi, Thompson, Onuf, Brunnée Toope and Fuller within the short space of ten pages. Similarly, the presentation of the three strands of managerial thought in Chapter III might have deserved at least as much space as some of the subsequent case studies. As a result, Ranganathan's otherwise very clearly presented arguments are at risk of getting lost in the thicket of authors, cases and ideas. Yet, given the remarkable interdisciplinary ambitions of the book, the corresponding necessity to discuss and introduce a large variety of materials, and considering that the book already reaches the 500 page mark, a certain level of compactness is excusable.

Another criticism relates to Ranganathan's perhaps too quick dismissal of attempts to distinguish between true and false conflicts.²² There is no doubt that

18 Ranganathan (n 7) 125.

19 Margaret A Young, *Trading Fish, Saving Fish: The Interaction between Regimes in International Law* (CUP 2011).

20 Rüdiger Wolfrum and Nele Matz, *Conflicts in International Environmental Law* (Springer 2003).

21 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November, 1994) 1833 UNTS 3.

22 Ranganathan (n 7) 10.

such attempts may often be no more than ‘red herrings’.²³ However, unless the notion of treaty conflict is to lose all meaning, it is in principle still very important to distinguish between actual and merely apparent conflicts. Ranganathan rightly observes that international law’s traditional refusal to accept that contradictory relationships between permissive and prescriptive norms can give rise to true norm conflicts is unhelpful.²⁴ Distinctions on this basis often fail adequately to capture the challenge that particular conflicts pose to specific treaties and they unduly subordinate entitlements to obligations.²⁵ But this does not mean that the distinction between true and false conflicts is flawed in and of itself. Otherwise it might become difficult to draw a line between a State’s outright contestation of an established treaty and an actual (legal) strategic treaty conflict. Thus it might be more constructive to criticise on what basis true and false conflicts are distinguished from each other, rather than calling into question the distinction itself.²⁶

However, these observations should not in any way distract readers from the fact that Ranganathan’s thoughtful book immensely enriches the existing literature on both treaty and norm conflicts. Her unique interdisciplinary approach not only problematises treaty conflicts, but also, and importantly, considers their wider implications for the role of international law in the international affairs of states. Going forward, Ranganathan’s concept of a strategic treaty conflict will be of great help to those analysing the political and legal implications of past and present, actual or potential strategic treaty conflicts, such as the proposed US–Pakistan Nuclear deal. Even beyond the treaty context, the strategic-conflict-concept may shed considerable light on other established norm-challenging phenomena, such as persistent objectors in customary international law or the practice of the (strategic) non-recognition of states.

23 *ibid* 225.

24 *ibid* 11.

25 *ibid* 303.

26 Note also that international law scholars increasingly recognise the possibility of true contradictory norm conflicts: See, eg, Christopher J Borgen, ‘Treaty Conflicts and Normative Fragmentation’ in Duncan Hollis (ed), *The Oxford Guide to Treaties* (OUP 2012) 455–56; Erich Vranes, ‘The Definition of “Norm Conflict” in International Law and Legal Theory’ (2006) 17 EJIL 395, 415; Pauwelyn (n 4) 176, 199.