Katja Karjalainen
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International Actors and the Formation of Laws

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Foreword: The Finnish Branch of the International Law Association—Enhancing Awareness and Understanding of International Law

The Finnish Branch of the International Law Association (ILA) has been operating over 75 years to study, clarify and develop international law and to further the understanding and respect for it following the constitutional objective of its parent organisation.[1] The Finnish Branch was founded in Helsinki on 15 April 1946 shortly after the end of the Second World War. The aim in establishing such a branch in Finland was to promote the keeping abreast of the development of international law doctrine and practice abroad after the turmoil of the war. Additionally, it provided a means to ensure connections with academics and practitioners interested in international law from other countries. Indeed, the founding of the Finnish Branch became important for Finnish jurists in the post-war period. It opened up to them one way out of the isolated position Finland was suffering from after the war. Algot Bagge, a Swedish judge, deserves a special mention here since he patiently assisted in founding the Finnish Branch of the ILA and advocated for its approval by the ILA Executive Committee.

The eminent profiles of the founding members of the Finnish Branch illustrate the high importance accorded to and the eagerness to participate in international cooperation in the Finnish society even in a wider context than law. Among the founding members of the Branch were Cabinet Ministers, Chancellors of universities, and the Governor of the Bank of Finland, in addition to the high ranking jurist members such as the Presidents of the Supreme Court and the Supreme Administrative Court of Finland. Altogether, some thirty persons influential in Finnish society attended the founding meeting of the Branch.

Former Chair Justice Y. J. Hakulinen, President of the Helsinki Court of Appeal (period 1952–1974), deserves a special mention as an internationally distinguished and highly appreciated intellectual. Y. J. Hakulinen has been considered as one of

[1] The ILA was founded in Brussels in 1873. Its objectives, under its Constitution, are 'the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law'. See www.ila-hq.org (visited 17 May 2022).

the most productive and versatile law researchers in Finland who has additionally participated in legislative drafting procedures. Furthermore, former long-time Chair of the Branch Bengt Broms, Professor of Law (period 1980–2003), as a talented international law expert among others represented Finland in several meetings of the United Nations.

The Branch has currently about 60 members while its membership increased temporarily to over a hundred during the last decades of the twentieth century. Despite its comparably small size, the Finnish Branch has always played an important role in promoting the awareness and understanding of international law even beyond the borders of Finland. The Branch has participated actively in the work of ILA Committees, the organs of the ILA established to undertake research and then to report it in the realisation of the ILA's objectives. The Finnish Branch has hosted two ILA Conferences. The first one, the 52nd ILA Conference in Helsinki in 1966, led to the adoption of the Helsinki Rules on the Uses of Waters of International Rivers, which was the first general codification of the law of international rivers. The second one, the 67th ILA Conference in Helsinki in 1996, led to the adoption of the Principles on Provisional and Protective Measures in International Litigation (the so-called Helsinki Principles on Provisional and Protective Measures).

During the last decade, the Finnish Branch has met four to six times a year to discuss various international and private international law as well as international criminal law related topics. The meetings have touched upon various topics: among others, international judiciary, international law making, international labour law, concepts of private international law, space law, human rights, and international environment law.[2] The Finnish Branch has kept its meetings open to the public, which has resulted in new memberships. The Finnish Branch has also published eight books addressing international law, this book at hand again continuing the Branch's publishing tradition.

International Actors and the Formation of Laws illustrates the same eagerness and devotion to international law the Finnish Branch has showed during the over 75 years of its existence. It carries out the task of the Branch that is to collect expertise, share knowledge, enhance awareness and understanding of both public and private international law and international criminal law, to gather people together to discuss law, and to encourage even newcomers to join this discussion. Indeed, this task has its place even in the current fragmented and ever-changing global legal environment. Without breaking the almost 150 year-long tradition in developing international law and national laws, the Branch follows in the footsteps

[2] For instance, Professor Jan Klabbers, from the University of Helsinki, gave a presentation on 'The Ethics of Judging: Judge Röling in Tokyo', at the meeting of the Branch on 7 November 2018. At the Branch's 70th Anniversary Seminar in Helsinki on 24 November 2016, the speakers included Hans Danelius, Former Justice of the Supreme Court of Sweden, Veijo Heiskanen, Lawyer and Partner at LALIVE law firm, and Matti Pellonpää, Justice of the Supreme Administrative Court of Finland.

of its parent organisation. It provides additionally an easily approachable arena to meaningfully participate in discussion that ultimately affects the formation of laws.

Finnish Branch of the International Law Association (ILA), Helsinki, Finland

Gustaf Möller
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Abbreviations

AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
AML	Anti-Money Laundering
APG	Asia/Pacific Group on Money Laundering
BIPPA	Bilateral Investment Protection and Promotion Agreement
BIT	Bilateral Investment Treaty
CETA	Comprehensive Economic and Trade Agreement
CFATF	Caribbean Financial Action Task Force
CFR	Council of Foreign Relations
CMLR	Common Market Law Review
CoE	Council of Europe
COPUOS	United Nations Committee on the Peaceful Uses of Outer Space
CPA	Continuing Power of Attorney
CTC	Security Council Counter-Terrorism Committee
CTED	Counter-Terrorism Executive Directorate
CTF	Counter-Terrorism Financing
EAG	Eurasian Group
EAW	European Arrest Warrant
ECB	European Central Bank
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
ECJ (CJEU)	European Court of Justice (Court of Justice of the European Union)
EEC	European Economic Community
ELDO	European Launcher Development Organization
EPA	Enduring Power of Attorney
ESA	European Space Agency

ESA Convention	Convention on the Establishment of a European Space Agency
ESAAMLG	Eastern & Southern Africa Anti-Money Laundering Group
ESRO	European Space Research Organization
EU	European Union
EUMETSAT	European Organization for the Exploitation of Meteorological Satellites
Euratom	European Atomic Energy Community
EUTELSAT IGO	European Telecommunications Satellite Organization
FATF	Financial Action Task Force
FATF Recommendations	International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation
FCC	Federal Constitutional Court of Germany
FDI	Foreign Direct Investment
FRA	European Union Agency for Fundamental Rights
Freezing Act	Act on the Freezing of Funds with a view to Combatting Terrorism
FTA	Free Trade Agreement
GABAC	Central Africa Anti-Money Laundering Group
GAFILAT	Latin America Anti-Money Laundering Group
GATS	General Agreement in Trade on Services
GATT	General Agreement on Tariffs and Trade
GIABA	West Africa Money Laundering Group
HCCH	Hague Conference on Private International Law
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States
IGO	International Intergovernmental Organizations
IEEPA	International Economic Power Act
IEHC	High Court of Ireland
IIAs	International Investment Agreements
ILA	International Law Association
ILC	International Law Commission of the United Nations
ILO	International Labour Organization
ISDS	Investor-State Dispute Settlement
KKO	Korkein oikeus (Supreme Court of Finland)
Liability Convention	Convention on International Liability for Damage Caused by Space Objects

MENAFATF	Middle East and North Africa Financial Action Task Force
MER	Mutual Evaluation Report
MONEYVAL	Council of Europe Anti-Money Laundering Group
Moon Agreement	Agreement Governing the Activities of States on the Moon and Other Celestial Bodies
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
Nordic Arrest Warrant	Convention on Surrender on the Basis of Offense Between the Nordic States
NRA	National Regulatory Authorities
OJ	Official Journal of the European Union
Outer Space Treaty (OST)	Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies
Oviedo Convention	Convention on Human Rights and Biomedicine
RA	Representation Agreement
Registration Convention	Convention on Registration of Objects Launched into Outer Space
REPRO	Productive Recovery Program
Rescue and Return Agreement	Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space
SOU	Statens offentliga utredningar
Space Benefits Declaration	Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interests of all States, Taking into Particular Account the Needs of Developing Countries
STEP	Society of Trust and Estate Practitioners
Terrorism Financing Convention	International Convention for the Suppression of the Financing of Terrorism
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TIPs	Treaties with Investment Provisions
UN	United Nations
UN Space Treaties	OST, Rescue and Return Agreement, Liability Convention, Registration Convention and Moon Agreement
UNCITRAL	United Nations Commission on International Trade Law
UNCRPD	Convention on the Rights of Persons with Disabilities
UNCTAD	United Nations Conference on Trade and Development

UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNGA	General Assembly of the United Nations
UNSCR	United Nations Security Council Resolution

Introduction

Katja Karjalainen, Iina Tornberg, and Aleksi Pursiainen

1 Lawmaking and International Actors: Point of Departure

International Actors and the Formation of Laws observes the discourse that creates, modifies, and reshapes the law, as well as addresses actors that participates in that discourse. With the collective expertise and knowledge of the membership of the Finnish Branch of the International Law Association (ILA), the book examines the intersection between domestic, European, international, and even transnational legal regimes, where new law emerges as a product of this discourse. As the book focuses on the actors operating in legal regimes and their subtly, bluntly, or even outright aggressive impact on the formation of laws, it provides insights into the work and influence of discourse participants and novel perspectives on the interplay between them and the forming law. In accordance with the wide mandate of the ILA, the book collects contributions from authors experienced in judiciary, academia or as lawyers in public or/and private sectors, and thus by building on this versatile ground,

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overcome the barriers created by separate and even isolated perspectives on lawmaking. [1]

The book provides enlightening examples of diverse legal fields influenced by international, nondomestic actors. By exploring these actors, the book stresses their objectives and driving forces behind their efforts to influence law. Followingly, the book reveals an array of diverging methods used by international actors to influence law. Indeed, some of these actors strive for uniformity of norms within their legal fields, while others share a more limited ambition of establishing only minimum standards or just setting goals for future regulation, depending, among others, on their competence, the substantive fields they are operating on, and the practicalities they are facing. The forming law always bears the handprint of the actors participated in its formation.

The book contributes to the understanding of the mobility of law and contemporary law's interactive nature.[2] It demonstrates how the space for traditional domestic lawmaking shrinks and how the remaining bit becomes profoundly influenced by nondomestic factors. The book shows how the traditional idea of the nation-state model of law no longer coincides with the reality of lawmaking.[3] Lawmaking hierarchies that once constituted part of the development of the law of the nation-state nevertheless continue to operate but in a far limited manner.[4]

The book inevitably resonates with studies of global governance since it accepts the latter's impact on the formation of laws. However, the book does not merely address nonnational lawmaking. Similarly, it does not aim to develop theories of international lawmaking nor to provide explanations of the underlying global or transnational processes.[5] Instead, it illuminates the diffusion of legal ideas from the international arena to domestic legal systems—and vice versa—nevertheless, while being linked to studies on nonnational lawmaking.

As *International Actors and the Formation of Laws* well acknowledges, there are obvious benefits of working together internationally since many of the most pressing concerns of our time do not recognize national borders but must be addressed jointly.[6] However, as demonstrated by the Brexit or the development of rule of law in Poland,[7] many countries across the globe are opting for nationalist approaches

[1] E.g. Olmstead (1973). The ILA was founded in Brussels in 1873. The Association has via its national branches around 4400 members. The ILA objectives are pursued, among others, through the work of its International Committees, and the focal point of its activities is the series of Biennial Conferences. See, International Law Association. For the study, clarification, and development of International Law, https://www.ila-hq.org. Accessed 15 May March 2022.

[2] Also, Graziadei (2008), pp. 453–454.

[3] E.g. Patterson (2016), pp. 56–58.

[4] See, e.g. Sassen (2003), p. 6.

[5] See in this context e.g. Harman and Williams (2013), d'Aspremont (2016).

[6] This work can be done, among others, through governmental organizations or nongovernmental organizations (NGOs), as chapters of this book well illustrate. See also for example Charnovitz 1997.

[7] See further Rosas and Pellonpää in this book.

and viewing international cooperation with skepticism or even disdain, and needed mutual trust between States is decreasing. In addition, many actors that aim to tackle cross-border issues are set under pressure, their motivations being questioned, and their funding reduced.[8] This development is particularly problematic since nonnational actors continue to have an undeniable impact on global justice, among others, by giving a voice to vulnerable or disenfranchised groups.[9] Hence, discourse relating to fundamental and human rights in law emerges as an important nominator through the chapters of this book.[10]

Since international actors now play an undeniable role in the formation of laws, there is a pressing need to adopt an actor-based perspective. The book acknowledges that the way actors work is not uniform, their purposes and abilities being different. Through their work, they nevertheless keep adding new versatile layers to the existing regulatory environment. These include vertical top-down mechanisms for securing state compliance with international norms, horizontal market-led initiatives targeting firms as economic actors, or bottom-up grassroots incentives that rely on networking and mobilization to advance civil causes.[11] Followingly, each chapter of this book examines an actor at a time and captures its method of interaction with law.

Since the book has been prepared under the auspices of the Finnish Branch of the ILA, many of the authors have Finnish legal education. It exerts an unavoidable influence on their legal thinking despite their experience with and knowledge of international and European laws in more general. Therefore, the book unavoidably shares examples of a somewhat Finnish understanding of law heavily affected by international and European development and resonating with the understanding of law in other Nordic states. The "Nordic legal mind" can be illustrated by reference to "pragmatism, realism, absence of formality, an uncomplicated and understandable legal style, transparency, equality, and avoidance of extremes."[12] It is true that Nordic legal professionals often strive for pragmatic solutions and operate with general principles of law related to the legal field under scrutiny. Additionally, the book highlights Nordic commitment to rule of law and equality as it criticizes extremes that sometimes emerge in international fora.[13] Finally, this commitment to Nordic legal tradition also explains why authors in addition to Finnish examples use Nordic examples in many chapters of this book.

[8] Some international organizations adapt better to changes than others, for example, Debre and Dijkstra (2021).

[9] For example, Handmaker and Arts (2008), pp. 4–7. Also, further in this book Karjalainen and Koivurova as well as Lenzerini and Wiessner, E.

[10] In addition to remarks relating to EU accession to the European Convention on Human Rights, voluntary adult protection measures, counterterrorism measures, rights of indigenous peoples, and labor law are all subjects that are inseparable from international human rights development.

[11] Graziadei (2008), p. 456.

[12] Letto-Vanamo and Tamm (2019), p. 9.

[13] See further Pursiainen in this volume.

2 International Actors Addressed

Illustrating a wide range of objectives, motivations, and interests involved, the chapters of this book address a host of actors that operate in an international arena. Among these, the European Union (EU), the Council of Europe (CoE), the Financial Action Task Force (FATF), the European Space Agency (ESA), the International Centre for Settlement of Investment Disputes (ICSID), and the ILA itself are addressed. The chapters will shed light on their different purposes, mandates, compositions, working methods, and legal powers and, thus, provide a unique platform for discussion.

As Chapters "European Union Law and National Law: A Common Legal System?" and "Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe" of this book illustrate, the two lawmaking giants in Europe—the EU and the CoE—participate with other involved actors in an ongoing dialogue that creates, modifies, and reshapes the law.[14] The EU's decision-making powers and extensive competence, as well as its effective judicial enforcement, its direct effect, and the primacy of its legislation over national legal orders, make it a highly developed international organization or, as often characterized, a *sui generis* legal order.[15] In a similar vein, the CoE as a regional organization for the advancement of human rights serves also as a proper example of a nondomestic actor participating in the formation of laws. Its most important instrument, the European Convention on Human Rights (ECHR), exerts a significant influence on European legal systems, in particular through its enforcement mechanism. The European Court of Human Rights (ECtHR) exercises *de facto* judicial power. Its jurisprudence has not only sought to ensure the continuity and consistency of the application of the ECHR but also has adopted a dynamic and evolutive interpretation of the rights provided by the Convention, simultaneously widening the Convention's scope of protection.[16]

Additionally, two less renowned actors that lack explicit powers to impose binding norms but nevertheless wield a significant influence on their Member States and their domestic legislation are introduced by this book followingly. Chapter "The European Space Agency's Contribution to National Space Law" examines how the ESA, an intergovernmental organization that is simultaneously both a spacecraft developer and operator, contributes significantly to the development of domestic space laws and administrative practices within its Member States.[17] In addition, it describes vividly how the advice and assistance provided by the ESA to its Member States at the same time contribute to the role, rule and further development of international law. Chapter "The FATF and Evolution of Counterterrorism Asset Freeze Laws in the Nordic Countries: We Fought the Soft Law and the Soft Law Won" for its part illustrates how the FATF as an intergovernmental standard-setter is

[14] See further Pellonpää in this volume.

[15] See Rosas in this book. Also, Rosas and Lorna (2018).

[16] Also, Hernandéz (2016), p. 213.

[17] See further Tapio and Soucek in this volume.

able to impose its will on its Members through soft law instruments.[18] In this context, it lays bare the role that individual states may play in the formation of laws through international organizations. This applies especially to organizations that operate on topics related to the fundamental interests of states—such as internal and external security—where the interests of global superpowers may dominate the work of the organization and lead almost to forced implementation of some legal concepts seen as foreign by the adopting jurisdictions.[19]

In a similar vein, alternative dispute resolution mechanisms may exert a strong influence on law, as Chapter "Host States' Labour Regulation in the Aftermath of International Investment Disputes: Five Levels of Impact and Interaction" focusing on ICSID arbitration well exemplifies. Given the multiple reasons for claims under international investment agreements concluded to foster foreign investment, investor-state dispute settlement (ISDS) affects a broad spectrum of domestic law, such as labor law—the center of attention of this chapter. [20] Similarly, national court decisions may have an impact on ISDS, illustrating influence in both directions from international to domestic and the other way around.

Moreover, Chapters "Strengthening the Right to Personal Autonomy and Protection of Vulnerable Adults: from Human Rights to Domestic and European legislation on Voluntary Measures" and "The Role of the ILA in the Restatement and Evolution of International and National Law Relating to Indigenous Peoples" provide illuminating examples of how civil society actors motivated by their professional expertise or some personal causes can contribute to lawmaking on both national and international levels when the rights of persons in vulnerable situations are on the agenda.[21] Chapter "Strengthening the Right to Personal Autonomy and Protection of Vulnerable Adults: from Human Rights to Domestic and European legislation on Voluntary Measure" highlights intertwined work of different actors. It provides fascinating viewpoint on the interactions taking place simultaneously between actors operating on the international, regional, and domestic levels to improve the rights of vulnerable adults. Chapter "The Role of the ILA in the Restatement and Evolution of International and National Law Relating to Indigenous Peoples" examines how the ILA an international nongovernmental organization with a consultative status in number of United Nations specialized agencies affects the substance of law relating to Indigenous Peoples through its committee work. Insightfully, this chapter highlights how academics together as a professional expert group can strengthen the body of international law.

[18] See further Pursiainen in this volume.

[19] Ibid.

[20] See further Silvander in this volume. See more about the role of the state in investor-state arbitration Lalani and Polanco Lazo (2015).

[21] E.g. Tramontana (2012).

3 Substantive Scope of the Book

The relationship between EU law and national law is one of the most intriguing interactions between national and supranational legal systems. This theme is central to the contribution of a former judge of the European Court of Justice (CJEU), Allan Rosas, in Chapter "European Union Law and National Law: A Common Legal System?". While the fundamental impact of EU law on the domestic legal systems of the Union's Member States has been extensively researched, Rosas provides a fresh perspective by examining also the role that domestic laws play at the EU level and how it impacts EU law. The examination includes looking at the different functions that Member State national laws have in an EU law context by examining the relevance of national material, procedural, and institutional laws at the EU level. He argues that Member State national laws have directly impacted, and continue to impact, the substance of EU law, and the relationship between EU law and domestic law is fundamentally different from the traditional dichotomy between public international law and domestic law. In his opinion, the way in which EU law instrumentalizes domestic laws—in particular domestic institutional law—for its own purposes and harnesses national administrative bodies to the same end suggests that EU and national laws are best understood as forming a single complex system of multilevel governance. He argues that EU law and the national law of the EU Member States are so closely interwoven that they may be viewed today even as forming part of the same legal system.

In addition to the EU, the CoE and especially its ECHR with its unique enforcement mechanism, the ECtHR, have had a major impact on European legal systems. Interestingly, in Chapter "Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe", former judge of the ECtHR Matti Pellonpää combines these two actors and their roles in the development of human rights law in Europe. Pellonpää addresses the principle of mutual trust in EU law and judicial dialogue in Europe. He observes that the principle of mutual trust has played an important role in EU law, especially in the area of freedom, security, and justice. In its opinion on the potential accession of the EU to the ECHR, the CJEU held that the draft agreement was incompatible with EU law, especially since it did not sufficiently take into account the principle of mutual trust. As a reaction, Pellonpää argues that the case law of the two European courts, the ECtHR and the CJEU, does not confirm the existence of any inherent incompatibility but instead demonstrates a constructive judicial dialogue between the two. Pellonpää further observes the contributions that national courts, such as the German Federal Constitutional Court, have given to that dialogue. He notes that while the true nature of the principle of mutual trust in EU law remains subject to debate, close scrutiny reveals it as more a rebuttable presumption rather than a full-fledged legal principle. He concludes that, ultimately, the European and domestic courts involved are shown to have engaged in a constructive judicial dialogue, which has influenced the shaping of the principle of mutual trust in a manner that can be regarded as satisfactory from the point of view of both the ECHR and the EU. In his opinion, these keen observations deserve to be

taken into consideration in the continuing debate over the potential accession to the ECHR by the EU.

In Chapter "Strengthening the Right to Personal Autonomy and Protection of Vulnerable Adults: from Human Rights to Domestic and European legislation on Voluntary Measure", Senior researcher Katja Karjalainen on the basis of her previous research continues examining the role of the CoE, this time in the field of adult protection, while simultaneously expanding the review to other international actors that have made an impact on this field of law. Drafting and concluding the United Nations Conventions on the Rights of the Persons with Disabilities (UNCRPD) show the significance of civil society actors in the field of law. The focus of this chapter being on voluntary measures, Karjalainen investigates CoE recommendations 1999(4) and 2009(11), as well as Article 12 of the UNCRPD. She looks at selected domestic solutions and the way in which they reflect the goals and objectives set at the international level. The Finnish Law on Continuing Powers of Attorney (2007) and the British Columbian Representation Agreement Act (2000) serve as illustrative case examples in her contribution. Additionally, she notes that it is possible that the EU will start implementing measures also in the area of law that deals with the protection of vulnerable adults.

Human rights are also addressed in Chapter "The Role of the ILA in the Restatement and Evolution of International and National Law Relating to Indigenous Peoples", which deals with the rights of the Indigenous peoples and sheds light on the work of the ILA and its committees. Professors Timo Koivurova, Federico Lenzerini, and Siegfried Wiessner, the authors of this chapter have all participated in the ILA Committee work (2006-2012, 2014-2020) that dealt with the rights of indigenous peoples examine how the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was established and what its basic contents are. In this context, they explore the ILA's role in the restatement of the rights of Indigenous peoples and the ongoing evolution of these rights in both international and national laws. Insightfully, the authors emphasize importance of ILA Resolution No. 5/2012 in this process. However, they also shed light among others, on the rights in operation as well as good practices when they refer to the findings of the final report of the second ILA committee.

The book then turns its focus on the work of intergovernmental organizations. In Chapter "The European Space Agency's Contribution to National Space Law", Jenni Tapio, Chief Specialist at the Ministry of Economic Affairs and Employment of Finland specializing in space law, and Alexander Soucek, Head of the International Law Division at the ESA, discuss the interaction between this intergovernmental mechanism and a national administration. Capitalizing on the example of Finland and its novel domestic space law (2018), they show why and how international mechanisms can become facilitators of national lawmaking for the benefit of legislative and executive branches and nongovernmental norm addressees alike. In their contribution, Tapio and Soucek highlight the dual role of the ESA. It both represents a mechanism of international cooperation among its Member States and acts as a partner in international space cooperation on a global scale. From a functional perspective, the ESA is both a spacecraft developer and an operator

with an accumulated unrivaled technical expertise and an impact on the development of laws.

In a similarly unique and persuasive vein as the ESA, the FATF serves as a standard-setter for its Member States. In Chapter "The FATF and Evolution of Counterterrorism Asset Freeze Laws in the Nordic Countries: We Fought the Soft Law and the Soft Law Won", Aleksi Pursiainen, who has extensive work experience in the field of international sanctions and export control both from private and public sector, offers a critical assessment of the impact of the FATF on the development of counterterrorism asset freeze laws in Nordic countries. In his stimulating contribution, Pursiainen concentrates on one of the FATF's profoundly influential 40 Recommendations, which requires states to implement United Nations Security Council Resolution 1373(2001) and retraces its historical development through an analysis of FATF documentation. Combined with an analysis of the FATF's "mutual evaluations" in Nordic countries, this chapter reveals how the FATF adopted an expansive interpretation of UNSCR 1373(2001) and how it appears to ultimately succeed in enforcing compliance with the recommendation in the face of Nordic opposition despite the "soft law" nature of the FATF's Recommendations.

Finally, in Chapter "Host States' Labour Regulation in the Aftermath of International Investment Disputes: Five Levels of Impact and Interaction", Johanna Silvander with her profound work experience of both the International Labour Organization (ILO) and the United Nations Conference on Trade and Development (UNCTAD) addresses the question of how international law in the form of bilateral investment agreements (IIAs) affects and reforms domestic labor law in countries hosting foreign investment. The chapter builds on a qualitative study made on the database of the ICSID. It offers a unique insight into the impact that international arbitration awards can have on the domestic legal stage. Silvander's analysis indicates that while labor-related claims raised in arbitration were rarely successful, they very often had a discernible impact at the national level. These impacts range from direct changes in national legislation, induced by ISDS judgments, to a mirror effect where national court decisions came to impact ISDS outcomes.

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European Union Law and National Law: A Common Legal System?

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Abstract EU law and the national laws of the EU Member States are closely interwoven. From a historical point of view, they form two different legal orders, but they may today be viewed as forming part of the same legal system. The chapter explains the relationship between EU law and national law by looking first at the status of EU law in national law and then at the relevance of national law to EU law. The status and impact of EU law in domestic legal systems have already received a great deal of attention in the legal doctrine, and the chapter therefore particularly focuses on the second aspect, which has to date received far less attention. The role domestic laws play at the EU level is examined here by looking at the different functions that Member State national laws have in an EU law context by examining the relevance of national material (substantive) and procedural and institutional laws at the EU level. This chapter concludes that the relationship between EU law and domestic laws is fundamentally different from the traditional dichotomy between public international law and domestic law. Member State national laws have directly impacted, and continue to impact, the substance of EU law. Furthermore, the way in which EU law instrumentalises domestic laws—in particular domestic institutional law—for its own purposes and harnesses national administrative bodies to the same end suggests that EU law and national law are best understood as forming a single complex system of *multi-level governance*.

1 Introduction

The European Union (EU) is a *constitutional 'federative' order* rather than an intergovernmental organisation.[1] The objectives, tasks and competencies of the Union span over an ever-broadening field, albeit under the direction of the principle

[1] Rosas and Armati (2018) chs 1 and 2 in particular.

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of conferral.[2] Its constitutional order is endowed with an elaborate internal hierarchy of norms[3] as well as institutions empowered to adopt, in most cases by a majority voting, legislative and regulatory acts. At the same time, this constitutional order determines the status of Union norms in the national legal orders of its Member States.[4] The duty to ensure that the hierarchy of norms is respected, as well as the rules governing the relationship between Union law and national law, is entrusted above all to an independent judicial system, consisting of two Union courts[5] and the national courts of the Member States.[6]

These are the premises on which the present contribution is built. The following discussion will have a more limited focus, however. My aim is to consider the relationship between Union law and national law by looking first at the status of Union law in national law and then at the relevance of national law to Union law. The first aspect is a well-known characteristic of the EU legal system, and it has already received much attention in the legal doctrine. I will limit myself to a summary of the most salient features. The second aspect has received much less attention so far. It will be examined here by looking at the different functions that the national laws of the Member States may have in a Union law context by considering the relevance of national material (substantive) and procedural and institutional laws. The use, for Union law purposes, of national institutional law in particular, implying that national administrative and other bodies are to a greater or lesser degree instrumentalised with a view to carrying out the Union's tasks, supports the view that the EU is a complex system of *multi-level governance*.[7]

Public international law does not generally form part of national law unless such an effect is recognised in the national legal order. In other words, and as a general supposition,[8] public international law does not prohibit states from adopting a dualist approach to the question of the relationship between public international law and

[2] According to Article 4(1) of the Treaty on European Union (TEU), 'competences not conferred upon the Union in the Treaties remain with the Member States'.

[3] Rosas and Armati (2018) ch 5.

[4] Ibid ch 6.

[5] According to Article 19(1) TEU, the judicial institution, named the Court of Justice of the European Union, 'shall include the Court of Justice, the General Court and specialised courts'. Since the integration of the EU Civil Service Tribunal, established in 2008, into the General Court in 2016, there are no specialised courts.

[6] Rosas and Armati (2018) ch 16. In Opinion 1/09 (Draft agreement concerning a unified patent litigation system) EU:C:2011:123, para 69, the European Court of Justice (ECJ) observed that '[t]he national court, in collaboration with the Court of Justice, fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaties the law is observed'.

[7] Rosas and Armati (2018), pp. 48, 50–51,84–85, 96–107.

[8] It is readily acknowledged that the question of the relationship between public international law and domestic law is a complex one and that the general assertions in the main text do not give full credit to all the complexities involved.

domestic law.[9] EU law is a different animal since, as stated by the European Court of Justice (ECJ), the founding treaties of the Union, 'unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals'.[10] EU law is characterised by the fact that it 'stems from an independent source of law, the Treaties, by its primacy over the laws of the Member States ... and by the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves'...[11]

If one adds to these characterisations the various functions that national law may have in Union law (as will be elaborated upon below), it becomes obvious that there is such a close link between Union law and national law that the relationship between the two differs significantly from the traditional dichotomy between public international law and domestic law. The latter relationship seems more apt to describe the relationship between public international law and Union law (Union law then performing the role of domestic law). It is true that the ECJ has referred to the 'autonomy' enjoyed by Union law in relation not only to international law but also to the laws of the Member States.[12] The Court also has, on numerous occasions, referred to the 'procedural autonomy' of the Member States.[13] The question, then, arises whether the notion of autonomy should be maintained when analysing the relationship between Union law and national law or whether this relationship should be rather linked to the idea of EU law and national law forming a common legal system.[14] To the extent that they could be considered as forming a common legal system, the question also arises whether such a characterisation would fly in the face of the fact that the Union consists of 27 Member States, which can be said to have each their own national legal order, which may differ considerably from the other national orders. An effort to answer these questions will be made in the concluding section.

[9] With respect to United Nations law, the ECJ has stated that the resolutions of the UN Security Council 'are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations' and that the Charter 'leaves the Member States of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order', Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* EU:C:208:461, para 298.

[10] Opinion 1/09 (n 6), para 65.

[11] Opinion 2/13 (draft agreement on the accession of the EU to the European Convention on Human Rights) EU:C:2014:2454, para 166.

[12] Ibid, para 170.

[13] There is an extensive case law referring to this notion, Rosas and Armati (2018), p. 280.

[14] See also Rosas (2020), pp. 261–282.

2 Union Law as Part of National Law

The founding Community treaties, which established the European Coal and Steel Community (1951), the European Economic Community (EEC 1957) and the European Atomic Energy Community (Euratom 1957), while being based on the idea of supranationalism, were rather poor in explaining what status Community law was meant to have in the national legal orders of the six Member States. This task was left to the ECJ, which clarified the foundations of the Community legal order and its relationship with national law in the seminal judgments of *Van Gend & Loos* and *Costa v ENEL*.[15] It is interesting to note that in *Van Gend & Loos*, one of the arguments of Advocate General Roemer in rejecting the thesis of the direct effect of then Article 12 EEC was that *if* this provision was deemed to have a direct internal effect, 'breaches of Article 12 would render the national customs law ineffective and inapplicable in only a certain number of Member States'.[16] This was so because the Advocate General assumed that even if there was a direct effect, the national constitution (he mentioned Belgium, Italy and Germany) would seem to be based on the *lex posterior* rather than the *lex superior* principle when it came to the question of the relationship between international treaties and domestic law. He, in other words, considered that the EEC Treaty was to be seen as any international treaty and could not prevail over national law if the national rule in question was of a later date (lex posterior).

The answer of the ECJ was to make a clear distinction between international agreements in general and the EEC Treaty, the latter constituting 'a new legal order of international law', and to affirm, one year later in *Costa v ENEL*, that the law stemming from the Treaty was 'an independent source of law', which because of its 'special and original nature', could not be overridden by domestic legal provisions, 'however framed'. In contrast to 'ordinary international treaties', the EEC Treaty had created 'its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States'. As these clear and strong assertions of both direct effect and primacy created a problem with regard to ensuring respect for fundamental rights, these rights being recognised in national constitutions but not in Community law, the ECJ in *Stauder* held for the first time that fundamental rights formed part of the general principles of Community law.[17]

The emerging constitutional order thus implied that Community rules, which prevailed over national rules, became applicable also at the national level and could in many cases be directly invoked before national courts and authorities and that they consisted of not only written rules of primary (the basic Treaties with Protocols) and secondary (regulations, directives and decisions) law but also general principles of

[15] Case 26/62 *van Gend & Loos* EU:C:1963:1; Case 6/64 *Costa v ENEL* EU:C:1964:66.

[16] Case 26/62, Opinion of AG Karl Roemer of 12 December 1962, EU:C:1962:42, [1963] ECR, 23.

[17] Case 29/69 *Stauder* EU:C:1969:57. See also Rosas (2007), p. 33 at 36-40.

Community law, including fundamental rights.[18] There is no need here to recall the subsequently and extensively written primary and secondary laws, as well as the case law confirming and developing these features of the constitutional order. The direct applicability of Union law and the direct effect of many treaty provisions, regulations and, on certain conditions, directives and decisions have become a generally recognised attribute of the Union legal order.[19] Fundamental rights have been recognised, at a general level, in the basic Treaties and regulated in more detail in the EU Charter of Fundamental Rights.[20] The principle of the primacy of Union law over the laws of the Member States, and their constitutional law in particular, has been confirmed, over and over again, in ECJ case law,[21] including case law that leaves it to the ECJ to be the final arbiter of the validity of Union legal acts.[22] At the political level, a Declaration annexed to the Final Act of the Intergovernmental Conference, which adopted the Lisbon Treaty, contains an unconditional reaffirmation of the principle of primacy.[23]

That said, there is some national case law, especially of national constitutional courts, that seems to call into question, or at least assert some limits to, the principle of primacy.[24] This line of case law is usually based on the idea that by virtue of the principle of conferral and the national rules governing accession to the EU, the national courts may control whether certain actions by the Union, including the Union courts, go beyond what has been conferred (*ultra vires*).[25] Tensions and even conflicts between national and ECJ case law may arise in situations involving the principle of primacy, the direct effect of Union law and fundamental rights. An example is provided by the Danish Supreme Court's judgment in *Ajos*, holding that despite Article 6(1) and (3) of the Treaty on European Union (TEU), the provisions of the EU Charter of Fundamental Rights and the general principles mentioned in Article 6(3) have not been made directly applicable in Denmark.[26] This view appears to be based on the assumption that the question as to whether a direct effect exists

[18] To cite but three seminal judgments of the 1970s, see Case 11/70 *Internationale Handelsgesellschaft* EU:C:1970:114 (primacy and fundamental rights); Case 4/73 *Nold* EU:C:1975:114 (fundamental rights); Case 106/77 *Simmentahl* EU:C:1978:49 (direct effect and primacy).

[19] See, e.g., Rosas and Armati (2018), pp. 72–80. On the distinction between direct applicability and direct effect see ibid, 72.

[20] Ibid, ch 11, and Peers et al. (2014).

[21] Rosas and Armati (2018), pp. 62–68.

[22] Case 314/86 *Foto-Frost* EU:C:1988:471 and Rosas and Armati (2018), p. 67, 278, 283.

[23] Declaration No 17 concerning Primacy, [2008] OJ C115/344. The principle is also confirmed in the Preamble on the Agreement on a Unified Patent Court, concluded by 25 EU Member States in 2013, [2013] OJ C175/2.

[24] Rosas and Armati (2018), pp. 66–67.

[25] See, e.g., the judgment of the German Constitutional Court of 30 June 2010 on the constitutionality of the Lisbon Treaty, BVerfG, 2 BvE 2/08. For further examples see Rosas and Armati (2018), pp. 66–67.

[26] Case 15/2014 (First Chamber), judgment of 6 December 2016. See also Armati (2019).

should be judged on the basis of Danish law, a view that obviously cannot be reconciled with the ECJ case law since the judgments in *Van Gend & Loos* and *Costa v ENEL*. It is to be noted, however, that the *Ajos* case concerned not the principle of primacy in general but the alleged direct effect of fundamental rights (discrimination on the basis of age) in a horizontal situation, that is, litigation between private parties and, thus, a question that is still open to debate also at the Union level.[27]

Another example of a possible tension between national and ECJ case law is offered by the decision of the Italian Constitutional Court, in what has been referred to as the *Taricco* Saga,[28] to ask the ECJ to clarify the meaning of its *Taricco I* judgment (concerning national limitation rules in the context of criminal proceedings).[29] The Constitutional Court implied that a given interpretation of the consequences arising from the application of Article 325 of the Treaty on the Functioning of the European Union (TFEU) (combatting illegal activities affecting the financial interests of the Union) could lead the Constitutional Court to consider that the interpretation was incompatible with some overriding principles of the Italian constitutional order, in this case the principle of legality.[30] This request for a preliminary ruling led the ECJ to adjust its earlier judgment, stating that in the context as outlined by the Constitutional Court, there was not necessarily an obligation to disapply certain national provisions relating to limitation periods in the context of criminal proceedings.[31] There was no such obligation if the disapplication of the national provisions would entail a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed. By taking heed of the principle of legality as a fundamental right, guaranteed under both Union law and Italian constitutional law, the ECJ could avoid a clash between Union law primacy and the overriding principles of the Italian constitutional order.

A much more troubling national judgment is the more recent judgment of the German Federal Constitutional Court, following the ECJ judgment in *Weiss*, both judgments dealing with the legality of one of the programmes of the European Central Bank (ECB) for the purchase of government bonds on the secondary market.[32] The Constitutional Court declared the ECJ judgment, which upholds the

[27] With respect to the EU Charter, the ECJ has recognised the possibility of direct horizontal effect for Article 21 (prohibition of discrimination), see, e.g., Case C-414/16 *Egenberger* EU:C:2018:257, and 31(2) (paid annual leave), see, e.g., Joined Cases C-569/16 and C-570/16 *Bauer* EU:C:2018:871.

[28] See, e.g., Bonelli (2018), pp. 357–373.

[29] Case C-105/14 *Taricco and Others* ('Taricco I') EU:C:2015:656.

[30] Decision of 23 November 2016.

[31] Case C-42/17 *M.A.S. and M.B.* ('Taricco II') EU:C:2017:936.

[32] Case C-493/17 *Weiss and Others* EU:C:2018:1000; BVerfG (Second Chamber), 5 May 2020, 2 BvR 859/15.

legality of the programme, *ultra vires* and not binding on it as, in its view, there had not been a proper assessment of the proportionality of the implications of the ECB programme for economic policy (which is not within the ECB's core mandate, as compared to its monetary policy). In doing so, the German Court purported to impose a particular German approach to the principle of proportionality on the Union and the other 26 Member States.[33] The judgment thus goes far beyond a control of respect for the principle of conferral as a limit to the Union's competence and constitutes an open challenge to the jurisdiction of the ECJ as well as the independence and status of the ECB as a Union institution. While it is too early to assess all the implications of the judgment for the Union legal order, it should be noted that the ECB, while not considering itself bound by the German judgment, has cooperated with the German Central Bank (which is a member of the European System of Central Banks) with regard to the available information relevant for a proportionality assessment. In view of this information, the German Central Bank and the German Government have determined that the Bank may continue to participate in the bond purchasing programme.[34] If subsequently the German Constitutional Court were to prohibit the German Central Bank from participating in the programme and the latter complied, the ECB could, under Article 35(6) of the Statute of the European System of Central Banks and the ECB, bring an infringement action against the German Central Bank before the ECJ.

An even more serious challenge to the Union legal order is posed by a judgment of the Polish Constitutional Court of 7 October 2021.[35] The judgment seems to call into question the very foundations of Polish membership in the EU as not only the Polish Constitution is declared to be supreme in relation to Union law but also Articles 1 and 19 TEU are found to be in contravention of the Constitution. While it is far too early to predict the final outcome of this constitutional crisis and a kind of attempt at withdrawal from the EU legal order, it may be noted that the dispute was triggered by Polish legislative and other measures appearing to compromise the independence and impartiality of the national judiciary and the ensuing decisions of the ECJ finding violations of Article 19(1) second sentence (right to effective judicial protection) and of the European Court of Human Rights finding violations of Article 6 of the European Convention on Human Rights.[36]

[33] See, e.g., Pavlos Eleftheriadis, 'Germany's Failing Court', *Verfassungsblog on Matters Constitutional*, 18 May 2020, https://verfassungsblog.de/germanys-failing-court.

[34] See, e.g., Dolores Utrilla, 'Three Months after Weiss: Was Nun?' *EU Law Live*, 5 August 2020, eulawlive.com.

[35] Assessment of the Conformity to the Polish Constitution of Selected Provisions of the Treaty on European Union, judgment of the Constitutional Tribunal, 7 October 2021, https://trybunal.gov.pl/s/k-3-21)K 3/21 (s/k-3-21). See also Resolution No 04/2021, Committee of Legal Sciences of the Polish Academy of Science of October 12, 2021, in regard to the Ruling of the Constitutional Tribunal of October 7, 2021.

[36] See, e.g., Laurent Pech, 'Protecting Polish Judges from Political Control: A Brief Analysis of the ECJ's Infringement Ruling in Case C-792/19 (Disciplinary Regime for Judges) and Order in Case C-204/21 R (Muzzle Law)', Verfassungsblog 20 July 2021, https://verfassungsblog.de/protecting-polish-judges-from-political-control/; Marcin Szwed, 'Hundreds of Judges Appointed in Violation

These and other examples suggest that there is a grey area between national constitutional law and Union law, implying that, with regard to direct effect and/or fundamental rights in particular, national courts, notably constitutional courts, are not always ready to adhere to an unconditional principle of primacy. It should also be recalled that all Union legal acts, while they may be directly applicable, do not have a direct effect. Directives obtain this attribute only when the deadline for the transposition of the directive into national law has expired, and even then, the ECJ has, in principle, ruled out that directives may have a horizontal direct effect.[37] These caveats do not upend the fundamental conclusion to be drawn from the discussion so far: Union law is directly applicable at the national level and prevails, in principle, over national law, however framed. To what extent the caveats should be taken into account when making an overall assessment of the relationship between Union law and national law will be considered in the concluding section, after a discussion on the relevance of national law to Union law, to which I shall now turn.

3 The Relevance of National Law for Union Law

It is often assumed that the national legal order, while it may allow—or be compelled by the Union legal order to allow—the application of Union legal rules at the national level, does not form part of the Union legal order. Union institutions and bodies are supposed to interpret and apply Union law, while national law belongs to the realm of national authorities. This constellation is particularly conspicuous within the context of the preliminary ruling procedure, regulated in Article 267 TFEU, Article 23 of the Statute of the Court of Justice of the European Union[38] and Articles 93 to 118 of the Rules of Procedure of the Court of Justice.[39] The ECJ interprets Union law and the rules on the validity of Union secondary law, while the national court requesting a preliminary ruling interprets and applies national law.[40] This does not mean, however, that the state of national law would be irrelevant for the case pending before the ECJ. For the Union Court, it is necessary to understand the entire legal context of the case before the national court, and that is why Article 94 of the Rules of Procedure requires that the request for a preliminary ruling contain, inter alia, 'the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law', as well as a statement of the

of the ECHR: The ECtHR's Reczkowicz v Poland Ruling and Its Consequences', Verfassungsblog 29 July 2021, https://verfassungsblog.de/hundreds-of-judges-appointed-in-violation-of-the-echr/.

[37] See Rosas and Armati (2018), p. 73, 76–77 with references to case law.

[38] The Statute is contained in Protocol No 3 annexed to the TEU, the TFEU and the Treaty establishing the European Atomic Energy Community.

[39] [2012] OJ L265/1 with subsequent amendments.

[40] See, e.g., Broberg and Fenger (2014), pp. 137–139.

reasons that prompted the national court to make a reference concerning the interpretation or validity of certain provisions of Union law and 'the relationship between those provisions and the national legislation applicable to the main proceedings'.

The preliminary ruling context is far from the only situation where national law may become relevant for Union law purposes.[41] First of all, it should be recalled that Union law has in many ways been inspired by national law and that in such instances, national law, or rather common national legal traditions, may serve as a secondary means of interpretation for Union law purposes. The most clear-cut example is the fact that the common constitutional traditions of the Member States are relevant for determining the fundamental rights which constitute general principles of Union law. The ECJ case law to this effect, starting with *Internationale Handelsgesellschaft*,[42] is now codified in Article 6(3) TEU, which refers to the fundamental rights as general principles of Union law, not only as they are guaranteed by the European Convention on Human Rights (ECHR) but also 'as they result from the constitutional traditions common to the Member States'. As to the EU Charter of Fundamental Rights, not only does its Preamble mention the constitutional traditions of the Member States as sources of inspiration, but also its Article 52(4) provides that fundamental rights resulting from the constitutional traditions common to the Member States 'shall be interpreted in harmony with those traditions'.[43]

Another example of an explicit reference to national legal traditions is to be found in Article 340(2) TEU, which states that the non-contractual liability of the Union shall be determined 'in accordance with the general principles common to the laws of the Member States'. Article 340(3) refers in a similar way to the liability of the European Central Bank. As to contractual liability, Article 240(1) refers to the 'law applicable to the contract in question'. This may entail the outright application of national law, as will be demonstrated below.

If there are no Union law rules regulating a certain area, and especially if there is no Union competence in that area, the situation is perceived to fall under an exclusive national competence.[44] Such situations do not completely escape the reach of Union law, however, as there may be features of the national law in question that are found to contravene Union law rules. National law, even if it is based on an exclusive national competence, must always be in conformity with Union law. If the issue comes before the ECJ through a request for a preliminary ruling, the Court may find that Union law 'precludes' the national law of a given content.[45] In order to

[41] See, in particular, Prek and Lefèvre (2017), pp. 369–402.

[42] Case 11/70 (n 18).

[43] On Article 52(4), see Peers et al. (2014).

[44] See, e.g., Article 5(2) TEU, according to which competencies not conferred upon the Union remain with the Member States, and Article 2(2) TFEU, which provides that in areas of shared competence, the Member States shall exercise their competence to the extent that the Union has not exercised its competence.

[45] There is an abundance of case law using this formula, to cite but one recent example, see Case C-836/18 *Subdelegación del Gobierno en Ciudad Real* EU:C:2020:119, para 54.

arrive at this conclusion, the ECJ, while not being empowered to give an authoritative interpretation of national law, must necessarily have a certain understanding of the national rule at issue.[46]

This is even more so in the context of infringement procedures initiated by the Commission (Article 258 TFEU) or a Member State (Article 259 TFEU) against a Member State for alleged failure to fulfil a Union law obligation. Such failure may stem from not only the behaviour of national authorities but also the contents of rules of national law.[47] While the ECJ in such cases does not have the competence to annul a national rule found to contravene Union law, a judgment of non-fulfilment may entail an obligation for the Member State in question to repeal or amend the national rule (and a non-fulfilment of that obligation again may lead to financial sanctions in accordance with Article 260 TFEU[48]). In order to assess whether the national rule is in contravention of Union law, the ECJ must necessarily determine the meaning to be given to the national rule, also in situations when there is no or conflicting guidance provided by national case law. While such determination does not bind the national courts and the ECJ may be said to deal with national law as a question of fact rather than of law,[49] it remains the case that also national law is a normative rather than purely factual phenomenon. In any case, the distinction between questions of law and questions of fact is far from clear-cut.[50]

While national law, in accordance with what has been said above, must always be in conformity with Union law, the latter also relies on national law to achieve its own purposes. According to Article 291(1) TFEU, Member States 'shall adopt all measures of national law necessary to implement legally binding Union acts'. The main principle is thus that implementation takes place within the framework of the national legal order. Only where uniform conditions for implementation are needed that the Union legal act (normally a legislative act) shall, by virtue of Article 291(2), confer implementing powers on the Commission or, in some cases, the Council. The need to adopt national implementing acts is particularly obvious with respect to directives, but also regulations may be in need of national implementing measures.[51] The obligation of Member States to adopt measures necessary to implement legally binding Union acts is supplemented by the obligation, provided for in Article 19(1) second sub-paragraph, to 'provide remedies sufficient to ensure effective

[46] As noted above, at nn 38–39, Article 94 of the Rules of Procedure of the Court hence requires that the request for a ruling contain an explanation of the relevant national law.

[47] See, e.g., Prek and Lefèvre (2017), pp. 383–384.

[48] See, e.g., Materne (2012), pp. 348–405.

[49] Prek and Lefèvre (2017), pp. 383–384, 391–392.

[50] According to Article 256(1) TFEU and Article 58 of the Statute of the Court decisions of the General Court may be subject to a right of appeal to the ECJ 'on points of law only'. On the distinction between points of law and points of fact see Naomé (2018), pp. 83–109.

[51] See Article 289 TFEU and Rosas and Armati (2018), pp. 59–61.

legal protection in the fields covered by Union law'.[52] The basic Treaties, of course, contain numerous other obligations incumbent on the Member States, and some provisions refer to quite specific obligations to take measures, including measures to implement Union acts. To mention but one example, Article 325 TFEU refers to various obligations of the Member States and the Union to combat illegal activities affecting the financial interests of the Union, including, in Article 325(3), an obligation for the Member States to coordinate their actions and organise, together with the Commission, close and regular cooperation between the competent authorities.

Apart from such general references to the obligations of national authorities, Union law may contain more specific requirements with regard to the status and functioning of national bodies. An obvious and well-known example is the role of national courts as part of the EU legal system and the requirements stemming from Article 19(1) second sub-paragraph TEU referred to above, Article 47 of the EU Charter of Fundamental Rights (rights to an effective remedy and to a fair trial) as well as the above-mentioned Article 267 TFEU and the provisions of the Statute of the Court and its Rules of Procedure regulating the preliminary ruling procedure.[53] Sometimes Union law goes even further in instructing the Member States to designate certain national courts to perform specific Union tasks as required by Union law. An example is the requirement contained in Article 123 (1) of the Union Trade Mark Regulation,[54] entitled 'EU trade mark courts', which provides that the Member States 'shall designate in their territories as limited a number as possible of national courts and tribunals of first and second instance, which shall perform the functions assigned to them by this Regulation'. These functions include infringement actions and counterclaims for revocation or a declaration of invalidity of the EU trademark.[55]

There are also instances—in fact, an increasing number of instances—where national administrative bodies are harnessed for specific Union law purposes. Union law, in other words, requires the existence of certain national bodies, often referred to as 'national regulatory authorities' (NRAs), and contains some rules on their status and tasks. Examples are to be found in the areas of energy, telecom, airport slots for flights and data protection.[56] There is an abundance of ECJ case law, notably on the question of whether such NRAs are, under national law, sufficiently

[52] This requirement of effective legal protection has been held to include the requirement of independent and impartial judicial bodies; see notably Case C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117; Case C-619/18 *Commission v Poland* EU:C:2019:531.

[53] See also Rosas (2012), pp. 105–121; Rosas (2014), pp. 717–727.

[54] Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark [2017] OJ L154/1.

[55] See notably Article 124 of Regulation 2017/1001.

[56] Rosas (2013), pp. 283–295; Rosas and Armati (2018), p. 82, 106–107.

independent from other parts of the administration, as required by Union law.[57] Union law in such cases may be said to intervene in the national administrative apparatus and national administrative law of Member States, while at the same time national law and national administrative bodies become vehicles for the application and implementation of specific purposes of Union law. While it is still possible to maintain the idea that in such instances Union bodies, such as the Commission or the ECJ, do not directly apply national law (although they may assess whether national law is in conformity with Union law), the NRAs may be said to form part of an EU administrative system in the broad sense of the term, in a similar way as the national courts, in accordance with what has been said above, form part of an EU judicial system.

There are some—albeit rare—instances when a Union body may be deemed to apply national law as a question of law rather than of fact. One example is again offered by the Union trademark legislation. Article 8 of Regulation 2017/1001 lists a number of relative grounds for the refusal to register a trademark, in other words grounds that are only triggered upon opposition by the proprietor of an earlier trademark, including, as the case may be, a non-registered trademark or another sign used in the course of trade of more than mere local significance. The rights of proprietors of such non-registered trademarks or other signs are regulated in Article 8(4), which provides that the trademark applied for shall not be registered to the extent that, 'pursuant to Union legislation or the law of the Member State governing that sign', rights to the sign were acquired earlier and the sign confers on the proprietor the right to prohibit the use of a subsequent trademark. Article 60-(1) extends the relative grounds for refusal, including the ground mentioned in Article 8(4), to relative grounds for invalidity. A similar reference to not only Union legislation but also national law is to be found in Articles 8(6) and 60(1)(d) concerning certain designations of origin and geographical indications.

ECJ case law is based on the idea that in such situations, national law may become applicable, and hence its contents have to be determined.[58] The Court, in referring to the 'application of national law', has observed, inter alia, that lacunae in the documents submitted as evidence of the applicable national law cannot prejudice an effective judicial review and that, to that end, the Court 'must therefore be able to confirm, beyond the documents submitted, the content, the conditions of application and the scope of the rules of law relied upon by applicant for a declaration of invalidity'.[59] True, the Court has referred to the relevance of national case law and the literature and seems to consider that on questions of interpretation, national case

[57] For a list of cases, see Rosas and Armati (2018), p. 107, fn 104. For an example of a recent judgment, see Case C-578/18 *Energiavirasto* EU:C:2020:35, which concerns the Finnish electricity market and the status of the national energy agency as an NRA.

[58] Cases C-263/09 P *Edwin v OHIM* EU:C:2011:452; C-530/12 P *OHIM v National Lottery Commission* EU:C:2014:186; C-598/14 P *EUIPO v Szajner* EU:C:2017:265. See also Prek and Lefèvre (2017), p. 380, 393–394.

[59] Case C-530/12 P *OHIM v National Lottery Commission* (n 58), para 44; Case C-598/14 P *EUIPO v Szajner* (n 58), para 38.

law, if it is unambiguous, should be relied upon in particular. On the other hand, the Court has stated that it does *not* follow from an earlier judgment[60] that a relevant rule of national law, 'made applicable' by a reference in the Trade Mark Regulation, 'should be treated as a purely factual matter, the existence of which [the EU Intellectual Property Office] and the Court merely establish on the basis of the evidence before them'.[61] The content and scope of the relevant rule of national law must, if necessary, be determined ex officio and judicial review be conducted in accordance with the principle of effective judicial protection.

Another instance where national law has to be applied at the Union level is to be found in the Union legislation relating to the banking union. According to Article 4(3) of a Regulation concerning policies relating to the prudential supervision of credit institutions,[62] the European Central Bank (ECB) shall apply, apart from the relevant Union legislation, and where that legislation consists of directives, 'the national legislation transposing these Directives'. Where, again, the relevant Union law takes the form of regulations and where those regulations 'explicitly grant options for Member States, the ECB shall apply also the national legislation exercising those options'. Article 4(3) has been considered quite exceptional and also problematic.[63] The proposal of the Commission was based on the idea of using national authorities as intermediaries in the application of national law, coupled with the objective of a gradual harmonisation of national law with a view to enabling the ECB to apply a more comprehensive and precise Union legislation. Since especially the Member States that are not part of the euro area did not like the prospect of further harmonisation, the end result was to give to the ECB the task to also apply national law, even if divergent.[64]

Yet another context where national law may be directly applied by Union bodies is in the settling of disputes concerning contracts entered into by the Union. According to Article 272 TFEU, the Court of Justice of the European Union 'shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law'. And Article 340(1) TFEU provides that '[t]he contractual liability of the Union shall be governed by the law applicable to the contract in question'. The ECJ has observed that the latter provision 'refers, as regards the law applicable to the contract, to the Member States' own laws and not to the general principles common to the legal systems of the Member States'.[65] With respect to

[60] Case C-263/09 P *Edwin v OHIM* (n 58), paras 50–52.

[61] Case C-530/12 P *OHIM v National Lottery Commission* (n 58), para 37.

[62] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013 OJ L287/63.

[63] European Banking Union (2016) 109–110, 178–179, 182–183. See also Prek and Lefèvre (2017), pp. 380–381; Grundmann and Micklitz (2019), notably ch 1.

[64] European Banking Union (2016), pp. 178–179.

[65] Joined Cases C-80/00 to C-82/99 *Flemmer* EU:C:2001:52, para 54.

Article 272 TFEU, as the parties may have submitted their contractual relationship to a national law (which is often Belgian law), and if there is disagreement as to the terms of the contract or the applicable law, the Union courts (at first instance, the General Court, whose decisions may be appealed before the ECJ) may have to apply, and if need be interpret, the applicable national law.[66]

While national law may thus in different ways be of considerable relevance to Union law and may even in some instances be applied directly by Union bodies, it should hitherto be presumed that Union courts may not directly annul national legal acts. It is up to the national legislature and other authorities to draw the necessary conclusion as to whether a national act has been found to be in contravention of Union law. There is at least one exception to this rule, however. According to Article 14.2. of the Statute of the European System of Central Banks and of the ECB, the governor of a national central bank and the ECB may refer a national decision to relieve the governor from office to the ECJ. In a recent judgment concerning the decision to temporarily prohibit the Governor of the Latvian Central Bank from performing his duties, the ECJ held that such an action constitutes an action for annulment, comparable to actions under Article 263 TFEU.[67] According to the ECJ, the European System of Central Banks 'represents a novel legal construction in EU law which brings together national institutions, namely the national central banks, and [a Union] institutions, namely the ECB, and causes them to cooperate closely with each other, and within which a different structure and a less marked distinction between the EU legal order and national legal orders prevails'.[68]

4 A Common Legal System

As the original Community Treaties of the 1950s were not constructed and drafted as comprehensive constitutional instruments but rather formed a patchwork of some general principles of constitutional relevance and a host of fairly detailed provisions of a more technical nature, the task of making sense of it all, including clarifying the relationship between Community law and national law, fell upon the ECJ.[69] After *Van Gend & Loos* (1963) and *Costa v ENEL* (1964),[70] the idea has gained ground that Community law can be applied and invoked directly in the legal orders of the Member States and, when being so applied, enjoys primacy over 'purely' national rules. These principles are not dependent on national constitutional principles but

[66] Prek and Lefèvre (2017), pp. 374–378, with reference to relevant case law.

[67] Cases C-202/18 and C-238/18 *Rimšēvičs and European Central Bank v Latvia* EU:C:2019:139, paras 64–77.

[68] Ibid, para 69.

[69] On the early days of Community developments from a constitutional point of view, see Rosas and Armati (2018), pp. 9–12.

[70] Cases 26/62 and 6/64 (n 15).

follow directly from Union law, which is in this sense to be seen as forming part of national law. It is true that some constitutional or other national courts have formulated certain reserves in this respect, usually linked to the idea that there is an 'ultimate' national control mechanism that can verify whether the Union has acted within the confines of its competence, in accordance with the principle of conferral. These reserves are rarely brought to the fore, however, and do not upend the fact that under normal circumstances the direct applicability, direct effect and primacy of Union law are accepted also at the national level. It is too early to assess whether the recent judgments of the German Federal Constitutional Court in *Weiss* and by the Polish Constitutional Tribunal assessing the conformity of the TEU with the Polish Constitution will present a more serious challenge to the principle of primacy of Union law and to the Union legal order in general.[71]

Already for the above reasons, it is obvious that there is a close link between Union law and national law. This close link becomes even more obvious when the application of Union law at the national level is supplemented by shifting the focus to the relevance of national law in Union law contexts. As hopefully demonstrated by the discussion in Sect. 3 above, the Union legal order draws upon, harnesses, and instrumentalises and its institutions sometimes even apply national law, which is an indispensable component of the overall system. As the direct applicability of national law by Union institutions is still quite exceptional, it would go too far to equate the status of national law in the Union legal order with that of Union law in the national legal order. And if the notion of legal order is reserved for systems that are bestowed with such a norm hierarchy that norms of a lower hierarchical order may be invalidated because of incompatibility with norms of a higher order, then the Union and national legal systems may still be considered two distinct legal orders. As Union institutions are, as a general rule, empowered not to annul national legal acts but only to declare their incompatibility with Union rules, I prefer to speak of the primacy rather than supremacy of Union law over national law.[72]

That said, it is undeniable that there is a close interrelationship between Union law and national law. A well-known commentator has argued that they form a common legal space.[73] I would go somewhat further and say that one can speak of a *common legal system* made up of historically distinct legal orders.[74] A legal order is an order if the norms constitute a unity, have the same basis of validity, and are characterised by an internal norm hierarchy.[75] The notion of a legal system is here used as a somewhat broader doctrinal tool, referring to a more open system not

[71] See notes 32–34 above.

[72] Rosas and Armati (2018), pp. 64–65.

[73] Armin von Bogdandy, 'The Transformation of European Law: The Reformed Concept and its Quest for Comparison', *Max Planck Institute for Comparative Public Law & International Law Research Paper* No 2016-14.

[74] Rosas and Armati (2018), p. 15, 51, 63.

[75] Cf Kelsen (1982), pp. 64–84. This reference does not imply that the present author subscribes fully to Kelsen's thoughts, especially with respect to his discussion on the relationship between public international law and national law.

where the validity of a norm of one legal order necessarily depends on a norm of another order belonging to the same system but where the norms of both order are nevertheless closely interrelated.

As was noted in Sect. 1, the ECJ has referred to '[t]he autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law'.[76] While the notion of autonomy is entirely appropriate when it comes to the relationship between Union law and public international law,[77] it is much less obvious that it is the best way of characterising the relationship between Union law and national law. Nor is it, in my view, appropriate to speak of the 'procedural autonomy' of Member States as, in view of a well-established general principle of Union law, now codified in Article 19(1) second sub-paragraph TEU, there is an *obligation* of the Member States to provide remedies with a view to ensuring effective judicial protection rather than any autonomous right of the Member States to maintain their own procedural system regardless of the existence of applicable Union law provisions.[78]

Does the fact that there are at least 27 national legal orders in the EU upend the idea of a common legal system? I do not think so. Let us compare the situation with that of federal states. They consist of sub-federal states that all have their own constitutional system and may under federal constitutional law even enjoy a default competence (competence for all matters not reserved for the federal level). Yet federal and state laws are considered to be a part of a common legal system and, depending on how these concepts are understood, even a part of the same legal order. In the same way as with regard to the sub-federal units of a federal state, the national law of an EU Member State may differ from that of another Member State. These differences are on the other hand mitigated and circumscribed by EU law (through harmonisation and other measures). Moreover, even in situations where differences between two national legal orders persist, this does not prevent national law from being directly relevant for Union law purposes and sometimes even from being applied by Union bodies. Especially, the latter function may, of course, lead to different outcomes in different Member States. 'Unity in diversity' seems an appropriate slogan to describe this state of affairs as well.

[76] See, e.g., Opinion 2/13 (draft agreement concerning the accession of the EU to the European Convention on Human Rights) (n 11), para 170.

[77] See, e.g., Joined Cases C-402/05 and C-415/05 *Kadi and Al Barakaat Foundation v Council and Commission* EU:C:2008:461, paras 281 to 285. See also Rosas (2020), pp. 263–267.

[78] Rosas and Armati (2018), p. 280. This is not to say that the Member States may not maintain their own procedural law, especially if there are no relevant Union law rules. But this observation applies to material law as well. According to Article 2(2) TFEU, Member States may exercise a shared competence to the extent that the Union has not exercised its competence, and in situations of parallel and supplementary competencies, the competence of Member States to maintain their national law is even more obvious.

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Reflections on the Principle of Mutual Trust in EU Law and Judicial Dialogue in Europe

Matti Pellonpää

Abstract The principle of mutual trust plays an important role in EU law, especially in the area of freedom, security and justice. In its Opinion 2/13 on the planned EU accession to the European Convention on Human Rights (ECHR), the Court of Justice of the European Union (CJEU) considered the draft agreement to be incompatible with EU law, in particular because it did not sufficiently take into account the principle of mutual trust. This chapter examines whether the ECHR is, as suggested by Opinion 2/13, in fact incompatible with EU law and whether this creates an insurmountable obstacle to accession. The chapter argues that the case-law of the two European Courts, rather than confirming such inherent incompatibility, demonstrates a constructive judicial dialogue between them. This is a dialogue in which, in addition to the two supranational Courts, national courts, such as the German Federal Constitutional Court, have given their contribution. While the true nature of the principle of mutual trust in EU law remains subject to debate, close scrutiny reveals it as more of a rebuttable presumption than a full-fledged legal principle. Ultimately, the European and domestic courts involved are shown to have engaged in a useful judicial dialogue that has influenced the shaping of the principle of mutual trust in a manner that can be regarded as satisfactory from the point of view of both the ECHR and the EU.

1 Introduction

In a way, mutual trust is a prerequisite for all peaceful international legal relations. When two states conclude a treaty, the basic assumption is that the other party can be trusted, at least to a certain minimum extent. Mechanisms may be needed for the settlement of disputes concerning the interpretation and application of the treaty, but there is normally a mutual expectation, and a degree of belief, that the other party is willing to comply with its obligations in good faith.

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When one moves from general international law to the much more integrated system of the European Union, the role of mutual trust seems to be qualitatively different—or at least it is so as seen from the system's own perspective. Since the early 1960s, the European Court of Justice (ECJ) has characterized the EU[1] as "a new legal order" with its own "constitutional framework and founding principles."[2] In that legal order, the principle of mutual trust has been called a constitutional principle or, to quote Advocate General (AG) Bot in *Aranyosi and Căldăraru*, even a principle "among the fundamental principles of EU law, of comparable status to the principles of primacy and direct effect."[3]

The fundamental importance of this principle was emphasized by the ECJ in its Opinion 2/13 on the draft accession agreement of the EU to the European Convention on Human Rights (ECHR). The Opinion reflects the idea that the principle, premised on the shared values between the Member States,[4] far beyond merely justifying an expectation of compliance of EU law, creates especially in the field of freedom, security and justice an *obligation* to proceed, "save in exceptional circumstances", from the assumption of such compliance (para. 191).

In the opinion of the ECJ, the draft agreement was particularly problematic for the reason that it did not sufficiently take into account the principle of mutual trust between the EU Member States. Paragraph 194 of the Opinion reads as follows:

> In so far as the ECHR would, in requiring the EU and the Member States to be considered Contracting Parties not only in their relations with Contracting Parties which are not Member States of the EU but also in their relations with each other, including where such relations are governed by EU law, require a Member State to check that another Member State has

[1] The terms EU and EU law are in this article used also in contexts in which it would be more precise to speak about Community law or EC law, etc. ECJ refers to the Court of Justice of the European Union (CJEU), as it is called today, regardless of what the official name at a particular time was.

[2] E.g., ECJ Opinion 2/13 of 18 December 2014 on the accession of the EU to the European Convention on Human Rights, para. 158. As early as in ECJ Case 26/62, *van Gend & Loos*, judgment of 5 February 1963, the then Community was characterized by the ECJ as "a new legal order of international law for the benefit of which states have limited their sovereign rights. . .and the subjects of which comprise not only the Member States but also their nationals."

[3] Joined Cases C-404/15 and 609/15 PPU, *Pál and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, Opinion by Advocate General Bot delivered on 3 March 2016, para. 106. The ECJ judgment (ref. notes 41 and 49) in the case, rendered on 5 April 2016, is discussed below. It should be noted, however, that there is no unanimity about the precise status of the principle of mutual trust between the EU Member States. For Christiaan Timmermans, the duty of mutual recognition, which can be regarded as an important manifestation of mutual trust, is "more a rebuttable legal presumption than a full-fledged legal principle", Timmermans (2019), pp. 21 and 23. Also, the basis of the mutual trust in the EU constitutional system has been characterized differently. See Meyer (2019), pp. 163 and 177–179. According to Meyer (p. 179), there is much to say in favor of the argument that the basis of mutual trust is to be found in the principle of "loyalty", President Koen Lenaerts of the ECJ has stated that "the principle of equality of Member States before the Treaties is. . .the constitutional basis for the principle of mutual trust in the EU legal system", Lenaerts (2017), pp. 805 and 808. See also n 4 below.

[4] The ECJ underlined that the common values were both the "premiss" and "justification" for the existence of mutual trust (para. 168 of the ECJ's Opinion). See also Meyer (2019), p. 167.

> observed fundamental rights, even though EU law imposes an obligation of mutual trust between those Member States, accession is liable to upset the underlying balance of the EU and undermine autonomy of EU law.

This seems to suggest that there is an inevitable conflict between the two systems.[5] Indeed, the (alleged) lack of respect for the special role played by the principle of mutual trust in EU law has been regarded as one of the main reasons—if not the main reason—why the ECJ put, at least for some time to come, a stop to such an accession.[6]

The question of whether there is such a fundamental difference between the two systems as to render them incompatible with each other deserves further thought. The European Court of Human Rights (ECtHR) is, as was the former European Commission of Human Rights,[7] not infrequently confronted with complaints about alleged violations of especially Article 3 of the ECHR in connection with planned extradition, expulsion, or a similar removal measure to another state, i.e., something that under EU law may today belong to the area of freedom, security and justice, in which the principle of mutual trust plays a special role. It comes probably as no surprise that the ECtHR has not without reservation accepted that the mutual trust required by EU law should take precedence over a Member State's obligations under the ECHR. This has led to a dialogue—in the broad sense of the term—between the two courts, which, as will be seen, has shaped the contours of the principle of mutual trust.

Not only the two supranational European Courts but also national courts have participated in this dialogue/discussion. After all, it is the authorities and courts of EU Member States that are supposed to trust in their peers in other Member States, and their attitudes determine whether the trust proclaimed in solemn texts really exists. The Federal Constitutional Court of Germany (FCC) has over the years been a particularly influential player in the dialogue between the Luxembourg Court and the national level. Indeed, it has been said, with reference to the evolution of the ECJ's case-law on fundamental rights, that "it seems clear that the first judgments in this

[5] According to Meyer, the Opinion purports to create a contrast to the ECHR and demonstrate the mutual incompatibility of the two systems ("Das Gutachten konzentriert sich auf die Darlegung seiner Wirkung, um einen Kontrast zur EMRK zu schaffen und die Unverträglichbarkeit beider Systeme zu illustrieren."), Meyer (2019), p. 173.

[6] E.g., Classen (2016), pp. 667 and 672 ("Ce principe...a même été élément clé dans le refus de l'accord d'adhésion de l'Union européenne à la Convention européenne des droits de l'homme par la Cour de justice."). See also Timmermans (2019), p. 21 ("one of the main objections of the Court of Justice...against the draft agreement"). For Allan Rosas, the most important part of the negative opinion expressed in 2/13 was that the planned agreement did not prevent the risk of the principle of mutual trust being undermined through the accession, Rosas (2017), pp. 515 and 527–528.

[7] Until 1 November 1998, the supervision system of the ECHR was based on the existence of two part-time supervisory bodies, the European Commission and the European Court of Human Rights. Through Protocol No. 11 to the ECHR, restructuring the control machinery established thereby (ETS No. 155), they were merged into a single Court as from the date mentioned.

development both demonstrate and result from a dialogue with German case-law."[8] As will be seen, this dialogue has continued until these days. There has been a dialogue also between the FCC and the ECtHR, a dialogue that a former president of the ECtHR once eloquently compared with two "soloists in the Concerto for Two Violins in D minor of Johann Sebastian Bach."[9]

The purpose of the present article is to discuss whether there is such a fundamental difference as to make the EU accession impossible. At the same time, the discussion is intended to serve as an illustration of the importance of judicial dialogue in Europe. This discussion, it is believed, shows that instead of insurmountable antagonism, there are many similarities between the two supranational systems and that the interaction between them, supplemented also by contributions from national courts, has led to a useful judicial dialogue that has influenced the shaping of the principle of mutual trust in a manner that can be regarded as rather satisfactory from the point of view of the various stakeholders.

The following presentation is largely based on an analysis of some of the most important cases emanating from the courts involved and how the dialogue between them has shaped the principle of mutual trust. Reference was made to the ECJ's characterization of EU law as a "new legal order". As a background to the more detailed discussion of the case-law, it is worth making some remarks also concerning the ECtHR and how it understands its role and that of the ECHR.

2 The Principle of Mutual Trust in EU Law: Inherently Incompatible with the ECHR System?

While ECJ Opinion 2/13, cited in the beginning, appears to reflect a qualitative difference between EU law and the ECHR system, one may find examples of the ECtHR rather appearing to emphasize similarities between the two. Thus, in the case

[8] Rodrigues (2010), pp. 89 and 94. The German Constitutional Court's relevant practice is known as *solange* case-law. The Constitutional Court was originally reluctant to accept the primacy of EU law over the Fundamental rights guaranteed by the country's constitution as long as ("solange") the Community law did not sufficiently protect such rights ("Solange I"). After the protection of fundamental rights as general principles of Community law had been developed through the case-law of the ECJ as consequence of the dialogue referred to in the text, the Constitutional Court turned the principle around in the sense that as long as the fundamental rights protection under EU law stayed on the level now reached, the primary of EU law would be recognized even in Germany ("Solange II").

[9] This description concerned the "saga" of Princess Caroline (of Monaco), which in a way culminated in the Grand Chamber judgment of *von Hannover v. Germany (No. 2)* of 7 February 2012. In this case, the Court formulated certain important principles concerning the relationship between the right to privacy and the freedom of expression and the respective roles of the ECtHR and national courts in that respect. The citation is from President Dean Spielman's speech held at the opening of the judicial year of the Strasbourg Court in 2014. See Pellonpää (2016), pp. 353 and 359–360.

of *Ignaoua and Others v. the UK*, App no. 46706/08 (decision of 18 March 2014) involving the application of the European Arrest Warrant, which is to be discussed later, the ECtHR, on the one hand, acknowledged "that the mutual trust and confidence underpinning measures of police and judicial cooperation among EU [M]ember States must be accorded some weight" and, on the other, immediately added that this "reflects the Court's own general assumption that the Contracting States of the Council of Europe will respect their international law obligations" (para. 55).

While the ECtHR did not suggest that this assumption amounted to something comparable to the "constitutional principle" of mutual trust in EU law, it has long been the self-understanding of the ECtHR that the Convention system as well, while not "a new legal order", includes features that distinguish it from typical treaty-based regimes under international law. When rejecting as incompatible with the Convention the Declaration by which Turkey purported to limit its acceptance of the (then optional) right of individual petition to concern only the territory of Turkey as defined in the country's constitution (and thus to exclude Northern Cyprus), the Court stated that allowing such a qualification "would not only seriously weaken the role of the Commission and Court in the discharge of their functions but would also diminish the effectiveness of the Convention as a *constitutional instrument of European public order (ordre public)*."[10] On many occasions, the ECtHR has stated that the Convention "creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement'."[11] The self-understanding of the ECtHR as the guardian of a constitutional instrument of European public order makes it understandable for the Strasbourg Court to regard itself as an equal player with the ECJ and its reticence to accept that the principle of mutual trust could prevail over the protection of human rights.

One of the features justifying the characterization of the Convention as a "constitutional instrument of European public order", and at the same time the cornerstone of the "collective enforcement" doctrine, is the supervision system and the role played by the European Court of Human Rights, to which both High Contracting Parties and individuals can turn.[12] Especially the possibility for an individual filing of a complaint against a (contracting) state to the former European Commission of Human Rights, from where the case could on certain conditions proceed to the

[10] *Loizidou v. Turkey*, judgment (preliminary objections) of 23 March 1995, Series A no. 310, para. 75 (emphasis added). The same characterization is repeated, for example, in para. 156 of the *Bosphorus* judgment (n 17).

[11] See, among many other cases, *Mamatkulov and Askarov v. Turkey*, Grand Chamber judgment of 4 February 2005, ECHR 2005-I, para. 100.

[12] The basic rule concerning so-called inter-state complaints is Article 33. According to Article 34 (Individual applications), the ECtHR "may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereof."

European Court of Human Rights, was "revolutionary" at the time of the Convention's entry into force in 1953 and therefore required a specific acceptance. Today, the right to institute proceedings before the ECtHR follows directly from the ratification of the Convention. While not any more unique in the world, the right of individual complaint continues to be one of the salient features of the Convention regime.

It is interesting to note that in the earlier days, this particular feature was considered to justify a special trust, not entirely dissimilar from the mutual trust in EU law, in Member States that had accepted the individual right of petition. The former Commission proceeded from a sort of presumption that the removal of a person to a Council of Europe Member State that had ratified the Convention and accepted the right of individual petition would not violate Article 3 prohibiting inhuman treatment. In this way also the ECHR system was believed to have specific features that justified enhanced trust.[13] Thus, when the Commission for the first time declared admissible a complaint about an alleged violation of Article 3 in connection with the removal (extradition in that case) to another Council of Europe Member State, it attached "a certain importance" to the fact that the state in question, Turkey, had at that time not yet accepted the right of individual petition.[14] After Turkey had finally accepted that right, the Commission could declare inadmissible as manifestly ill-founded applications that, perhaps, would earlier have been regarded as admissible with reference to the impossibility for the applicant to make a complaint to the Commission.[15]

With hindsight, the Commission's trust in the force of its own proceedings reflects unrealistic optimism, and this position was abandoned as it became clear that such trust was not warranted. The Strasbourg case-law after 1990 shows that torture and inhuman treatment occur in several Council of Europe Member States and that the existence of the individual right of petition cannot justify too much trust

[13] See, e.g., *K. and F. v. the Netherlands*, App no. 12543/86, Decision of the Commission, 2 December 1986. See also Sudre (2013), p. 908. The situation here (trust on the part of the supervisory organs) is different from the EU system and the principle of mutual trust, which the *Member States* are expected to have in each other.

[14] *Cemal Kemal Altun v. Federal Republic of Germany*, App no. 10308/83, Decision of 3 May 1983 by the Commission on the admissibility of the application (THE LAW, para. 15, p. 234). The case ended tragically in that the Turkish applicant committed suicide while judicial proceedings concerning his application for asylum were pending before the Berlin Administrative Court. In March 1984, the Commission struck the application off its list (of cases). See *Cemal Kemal Altun v. Federal Republic of Germany*, Report of the Commission (adopted on 7 March 1984). The system of individual right of the petition was in those days (unlike today) still optional and required a special acceptance on the part of the state.

[15] See, e.g., *G. v. UK*, App no. 15608/89, Decision of the Commission, 7 December 1990, in which the Commission "attached importance to the fact that Turkey is a party to the European Convention on Human Rights and has accepted the right of individual petition under Article 25 of the Convention with the result that it is now open to the applicant to bring an application before the Commission in respect of any violation of one of the provisions of the Convention by the Turkish authorities."

that a person enjoys protection against ill-treatment if removed from one Council of Europe Member State to another.[16] At the same time, the number of those states that are Member States of both the Council of Europe and the EU has considerably increased, as has the scope of the EU's legal system, which now covers more and more human-right-sensitive areas, such as refugee law. This means that the possibilities of a situation in which a respondent state's obligations under both regimes are at stake with possible tension between them have increased. Indeed, the first judgment in which Article 3 of the ECHR was found by the ECtHR Grand Chamber to have been violated through removal of a person to another Council of Europe Member State involved EU law and two EU member countries. Before this judgment of 2011 rendered in *M.S.S. v. Belgium and Greece* is discussed, an earlier judgment in which the ECtHR had defined certain principles to be applied as regards the relationship between the Convention and EU law should be briefly recalled.

2.1 Bosphorus Hava Yolları Turízm ve Tícaret Anoním Šírketí v. Ireland *(ECtHR 2015) and the* "Bosphorus Doctrine"

The *Bosphorus* case[17] concerned the impounding, on the basis of UN sanctions implemented by an EC regulation, of an aircraft leased by a Turkish company from Yugoslav Airlines and alleged a violation of property rights in that connection. The ECtHR established what is known as the *Bosphorus* doctrine, according to which the ECtHR will, as a rule, not examine in detail measures for the enforcement of a State's obligations arising out of its membership in an international organization (in practice especially the EU) provided the organization is considered to afford fundamental rights protection "equivalent" to that provided by the Convention system. If this is the case, and if the Member State "does no more than implement legal obligations flowing from its membership in the organisation" (para. 156), the presumption is that it has complied with its Convention obligations. The presumption is, however, rebuttable, and if it turns out in a particular case that the protection of the Convention is "manifestly deficient," the considerations speaking in favor of judicial restraint on the part of the ECtHR "would be outweighed by the Convention's role as a 'constitutional instrument of European public order' in the field of human rights" (ibid). As in the instant case, there was no such deficiency, and as the "impugned measure constituted solely compliance by Ireland with its legal obligations flowing from membership of the European Community" (para. 158), the Court

[16] In its decision KKO 2019: 26 concerning extradition from Finland to Turkey the Finnish Supreme Court stated that the appropriateness of the treatment cannot be guaranteed by the fact that Turkey is a party to the ECHR and has in its extradition request assured that it would comply with the Convention.

[17] Judgment of the ECtHR (Grand Chamber) of 30 June 2005, ECHR 2005-IV.

concluded that the impoundment did not give rise to a violation of Article 1 of Protocol No. 1 to the Convention (protection of property).

The *Bosphorus* doctrine bears resemblance to the *solange* approach adopted long before by the German Federal Constitutional Court (*Bundesverfassungsgericht*) as regards the relationship between fundamental rights as guaranteed by the German Constitution and EU law.[18] Some of the limits of the doctrine came to be tested in the abovementioned *M.S.S.* case.

2.2 *ECtHR and the Dublin Regulation:* M.S.S. v. Belgium and Greece

The 2011 Grand Chamber judgment of the European Court of Human Rights in *M.S.S. v. Belgium and Greece*[19] concerned the transfer of an Afghan national, on the basis of the Dublin II Regulation, from Belgium to Greece, the EU country that the asylum seeker had first entered from outside the Union and that was primarily responsible for examining the application for asylum.[20] The so-called Dublin system is part of the area of freedom, security and justice, and it is the principle of mutual trust that is supposed to allow a smooth functioning of the system in that such a trust makes possible a more or less automatic surrender of the asylum seeker to the "correct" Member State. The applicant, however, alleged the violation of Article 3 of the ECHR by Belgium because it agreed to the surrender despite the fact that the asylum procedures in Greece were so deficient that he had little chance of having his application properly examined and despite the danger of being further removed to Afghanistan in breach of the principle of *non-refoulement* and Article 3. His complaint against Greece, also based on Article 3, concerned the detention conditions and other conditions to which he was subjected in that country.

As Belgium removed the applicant to Greece pursuant to the Dublin Regulation,[21] the question arose as regards the relevance of the *Bosphorus* doctrine. In *Bosphorus*, the ECtHR had committed itself to fargoing judicial restraint in evaluating acts of alleged violations by EU Member States when they were doing no more than comply with their obligations under EU law. The ECtHR took note of the "sovereignty clause" contained in Article 3 § 2 of the Dublin Regulation, according to which a Member State may, by derogation from the general rule of first country responsibility, "examine an application for asylum

[18] See n 8 and the text preceding it.

[19] Judgment of 20 January 2011, ECHR 2011-I.

[20] Reform of the EU asylum system is underway. In September 2020, the Commission presented a "new pact on migration and asylum" consisting of a number of proposals.

[21] Regulation (EU) 343/2013 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application in one of the Member States by a national of a third country ("Dublin II Regulation").

lodged with it by a third-country national, even if such an application is not its responsibility under the criteria laid down in the Regulation." From this, the Court concluded that in the circumstances of the case, the Belgian authorities could have refrained from transferring the applicant to Greece and that, therefore, "the impugned measure taken by the Belgian authorities did not strictly fall within Belgium's international legal obligations." (para. 340). Consequently, the presumption of equivalent protection did not apply. The ECtHR examined the complaint and found that Belgium had violated Article 3 and Article 13 (on effective remedies).[22] What was a discretionary power under the Regulation was transformed into an obligation of non-return under the Convention.

The judgment in *M.S.S. v. Belgium and Greece* became a landmark case, firstly in the sense that the Grand Chamber of the ECtHR for the first time found a violation of Article 3 of the Convention in connection with removal from a Council of Europe Member State (Belgium) to another (Greece), despite the existence of the possibility for the person to turn to the ECtHR from the latter State.[23] Secondly, the case was important also as a precedent concerning the application of the *Bosphorus* principle and the relationship between Convention obligations and the principle of mutual trust in EU law.

In *M.S.S.*, the ECtHR thus examined an EU Member State's compliance with the Convention in a situation in which the Member State, in light of Opinion 2/13 of the ECJ,[24] should proceed from the assumption that the receiving Member State complies with its obligations under EU law, including the obligation to respect fundamental rights. It was inevitable that the Luxembourg Court would sooner or later have to decide how to react to this apparent conflict.

3 The Role of Judicial Dialogue in the Development of Exceptions to the Principle of Mutual Trust in EU Law

An possibility for the ECJ to react arose soon after the *M.S.S.* judgment, as the ECJ had to give preliminary rulings requested by a British and an Irish court concerning a situation very similar to that concerning *M.S.S.* The judgment given in that case is discussed in this section, together with other case-law developments illustrating how the principle of mutual trust, as interpreted by the ECJ, has been influenced by that Court's interaction not only with the ECtHR but also with national courts, of which especially the German Federal Constitutional Court has played an important role.

[22] Also Greece was found to have violated Articles 3 and 13.

[23] Before the Court the Belgian Government explained that before returning the applicant to Greece it had also taken into account the possibility for the applicant, once in Greece, to make an application with the ECtHR and a request for interim measures. *M.S.S.* judgment, para. 329.

[24] Opinion 2/13 postdated the *M.S.S.* judgment, but in light of the Opinion, the principle of mutual trust existed already at the time of the judgment.

The other case-law developments referred to relate especially to the European Arrest Warrant (EAW), and, accordingly, the most important cases illustrating how the mutual-trust-related obligations have been shaped in that context are discussed separately after the Dublin Regulation cases. This section ends (in Sect. 3.4) with a discussion concerning the ECtHR Grand Chamber judgment in *Avotiņš v. Latvia* (2016), the first case in which the Strasbourg Court had an opportunity to take a stand on the continuing validity of the *Bosphorus* doctrine after Opinion 2/13 and other developments in the CJEU case-law that had taken place in the first half of the last decade. The last-mentioned developments started with the *N.S. and M.E.* judgment.

3.1 ECJ and the Dublin Regulation: *N.S.* and *M.E.* (2011) and C.K. (2017)

Still before the end of the year 2011, i.e., the year of the ECtHR's judgment in *M.S.S.*, the ECJ gave its judgment in *N.S. and M.E. and Others*[25] concerning the (planned) surrender of an Afghan asylum seeker from the UK to Greece (*N.S.)*, as well as the surrender of five persons from Ireland to Greece (*M.E. and Others*).

The ECJ proceeded from the principle of mutual trust, recalling that the Common European Asylum System was based on the assumption that the participating states observe fundamental rights, including, in addition to those guaranteed in the EU Charter on Fundamental Rights (CFS), rights based on the Refugee Convention of 1951 and on the ECHR, "and that Member States can have confidence in each other in that regard" (*N.S.*, para. 78). In view of this mutual trust, "it must be assumed that the treatment of asylum seekers in all Member States comply with the requirements of the Charter, the Geneva Convention and the ECHR" (para. 80).[26] The Court added, however, that it is "not inconceivable" (para. 81) that a state may face problems, making it difficult to treat asylum seekers in a manner compatible with their fundamental rights obligations, and that in case of systemic flaws resulting in inhuman or degrading treatment, the transfer of asylum seekers would violate Article 4 of the Charter (para. 86). Therefore, Article 4 of the Charter precludes the transfer of an asylum seeker by a Member State where its authorities "cannot be unaware that *systemic deficiencies* in the asylum procedure and in the reception conditions of asylum seekers" in the receiving Member State give rise to a real risk of inhuman or degrading treatment (para. 106, emphasis added).

[25] Joined Cases C-411/10 and C-493/10, *N.S. and M.E. and Others*, judgment (Grand Chamber) of 21 December 2011.

[26] *N.S.* was the ECJ's first judgment expressly referring to mutual trust in the area of freedom, security and justice. Ladenburger (2019), p. 163.

This judgment anticipated what was 3 years later stated in Opinion 2/13, namely that despite the principle of mutual trust and the presumption of compliance inherent in it, Member States may, "in exceptional cases" (para. 192 of Opinion 2/13), verify the observance of fundamental rights by the other Member State. Thus, in line with the ECtHR's stand in *M.S.S.*, the discretion allowed by the sovereignty clause "not to transfer" could in certain circumstances mean "an obligation" not to transfer. In *N.E. and M.E. and Others*, however, the threshold for such an exception appears to be set high insofar as a derogation from the obligation to surrender seems to presuppose the existence of *systemic deficiencies*, whereas under the ECHR, in principle, any single instance of removal of a person to a country where he or she runs a real risk of inhuman treatment violates Article 3 regardless of whether there are systemic deficiencies.[27]

Thus, at the first sight, it may seem that the ECJ has defined the scope of exceptions permitted to the obligation of transfer under the Dublin II Regulation to be narrower than that allowed by the ECtHR in the application of the ECHR, thus maintaining a "qualitative" difference between the EU system and that based on the ECHR. However, in light of later developments, this is not what seems to have been intended in the *N.S.* case. President Lenaerts of the ECJ has emphasized that the Court relied on the ruling of the ECtHR, a case involving the transfer of an asylum seeker to Greece, a country with such systemic deficiencies, and explained that in *N.S.*, the Luxembourg Court did not need to decide "whether Article 4 of the Charter may preclude the transfer of an asylum seeker in a situation that does not involve systemic deficiencies."[28]

When the ECJ did have to decide on this question, it took into account the ECtHR's case-law, stressing, to cite the case of *C.K.*,[29] that the Members States are, in their application of the Dublin III Regulation,[30] bound "by the case-law of the European Court of Human Rights and Article 4 of the Charter" (*C.K.*, para. 63), which corresponds to Article 3 of the ECHR (para. 67). The ECJ continued that it would be "manifestly incompatible with the absolute character" of the prohibition contained in Article 4 of the Charter if the prohibition could be disregarded "under the pretext that it does not result from a systemic flaw in the Member State

[27] The *N.S.* judgment with its reference to "systemic deficiencies" was codified in the Dublin III Regulation, which replaced the Dublin II Regulation. See n 30.

[28] Lenaerts (2017), p. 832.

[29] Case C-578/16 PPU, *C.K. and Others*, judgment of 16 February 2017.

[30] This Regulation (EU) 604/2013 replaced the Dublin II Regulation, and among other things "incorporated" the *N.S.* precedent insofar as instead the "sovereignty clause" contained in Dublin II Regulation there is now in Article 3(2) the following, so-called discretionary clause: "Where it is impossible to transfer an applicant to the Member State primarily designed as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible."

responsible" (para. 93). The ECJ referred especially to the ECtHR judgment in *Tarakhel v. Switzerland* (2014),[31] which had meanwhile put it beyond doubt that a Dublin transfer may violate Article 3 of the ECHR even in the absence of systemic deficiencies in the receiving state. The limitation of the exception to the existence of "systemic failures" had also been criticized—indeed rejected—by the UK Supreme Court in a judgment of 19 February 2014.[32] In *C.K.*, the ECJ modified its line accordingly.[33]

Thus, far from having been regarded as incompatible with (and as a hindrance to) the principle of mutual trust, the ECHR and the ECtHR case-law have been accepted as important sources of inspiration by the ECJ. First, the ECJ accepted that systemic deficiencies in the receiving states may bar surrender, and then in *C.K.*, the same Court took a further step to the effect that "even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of an asylum seeker within the framework of the Dublin III Regulation can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment within the meaning of that article" (para. 96; Article 4 of the Charter). President Lenaerts stated in his contribution already cited that "whilst the autonomy of the EU legal order requires that mutual trust should be afforded constitutional status, the contours of that principle are not carved in stone, but will make concrete shape by means of constructive dialogue between the ECJ, the ECtHR and national courts."[34]

As to national courts, the UK Supreme Court was mentioned above. The German Federal Constitutional Court has also played an important role, especially as regards developments in the field of European Arrest Warrant, another regime of the area of freedom, security and justice in which the principle of mutual trust plays a central role.

[31] Grand Chamber judgment of 4 November 2014, ECtHR 2014-VI, which concerned the sending of a family back to Italy (the country in the first place responsible under the Dublin Regulation, applicable in Switzerland by virtue of the association agreement between the country and the EU (para. 34) without individual guarantees from the Italian authorities that they would be taken charge of in a manner adapted to the age of the children and that the family would be kept together), would violate Article 3 of the ECHR. The ECtHR noted that while the general reception conditions in Italy were not ideal, they could "in no way be compared to the situation in Greece at the time of the *M.S.S.* judgment" (para. 114).

[32] *R (on the application of EM (Eritrea) (appellant) v. Secretary for Home Department (respondent)/2014/UKSC*; see Morgades-Gil (2015), pp. 433 and 445. The critical remarks by the UK Supreme Court were directed against the ECJ's judgment of 10 December 2013 in *Abdullahi*, C-394/12, in which the ECJ reiterated the "systemic failure" criterion enunciated in *N.S.*

[33] See also Wendel (2019), p. 111; who, at 124, states that in *C.K.*, the ECJ took distance from the criterion of systemic deficiencies, accepting implicitly the central argument of the ECtHR, according to which Article 4, because of its absolute character, excludes surrender also in case of threat of individual danger.

[34] Lenaerts (2017), p. 807.

3.2 *European Arrest Warrant: The Cases of Mr. R* (FCC 2015), *Aranyosi and Căldăraru* (ECJ 2016), and *Dorobantu* (ECJ 2019)

The European Arrest Warrant (EAW) was established through the Council Framework Decision of 13 June 2002[35] to replace traditional diplomatic extradition cooperation with direct cooperation between judicial authorities. In this context, the contours of the principle of mutual trust have been shaped by dialogue in which all the three main poles, the ECJ, the ECtHR, and national courts, especially the German Federal Constitutional Court, have participated.[36]

The first case to be discussed was actually given by the German Federal Constitutional Court (*Bundesverfassungsgericht*) on 15 December 2015.[37] It concerned the surrender proceedings based on an Italian EAW of Mr. R, a US citizen, to Italy, where he had been sentenced to a long prison sentence *in absentia*.[38] The German Federal Constitutional Court emphasized human dignity as part of German constitutional identity and held that the principle of guilt, *Schuldgrundsatz (nulla poene sine culpa)*, belongs to human dignity, which can be jeopardized if a criminal penalty is imposed without the facts having been properly examined.[39] As the judgment *in absentia* did not fulfill this criterion and as it was not clear whether a retrial in accordance with this principle was possible in Italy, the FCC sent the case back to the Higher Regional Court (*Oberlandesgericht* Düsseldorf) with the message that the latter should conduct

[35] Decision 2002/584/JHA on the European arrest warrant and the surrender procedure Frameworks between Member States (OJ 2002 LK 190, p. 1), as amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (OJ 2009 L 81, p. 24. Generally on the EAW, see Tolttila (2020).

[36] The EAW system raises also other questions than those relating to expected inhuman treatment in the receiving State, such as whether a prosecuting authority of the State issuing an EAW can be a "judicial authority" within the meaning of Article 6(1) of the Framework Decision. The ECJ has considered this possible, provided the authority is not "exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, such as Minister for Justice...". Joined cases C-50818 and C-82/19 PPU, *OG*, *PI*, judgment of 27 May 2019 (Grand Chamber), para. 90. On the case mentioned and other relevant case-law, see Böse (2020), pp. 1259–1282. In its (Grand Chamber) judgment of 24 November 2020 in Case C-510/19 (*AZ v. Openbaar Ministerie and YU and ZV*), the ECJ decided that the case-law concerning public prosecutors as the "issuing judicial authority" can be transposed to situations where a prosecutor acts as the "executing judicial authority." As the influence of the ECtHR case-law has been at the most marginal in this respect, the question relating to prosecuting authorities is not discussed in any detail.

[37] BvR 2735/14, also known as the case of Mr R.

[38] See Nowag (2016), p. 1441.

[39] Paras. 53–56 of the Decision. Human dignity (*Menschenwürde*) is guaranteed in Article 1(1) of the *Grundgesetz*.

further inquiries on the matter. It is noteworthy that the FCC did not seek a preliminary ruling from the ECJ.[40]

A preliminary ruling by a German court, on the other hand, was sought in what became the seminal case of *Aranyosi and Căldăraru*[41] concerning prison conditions in Hungary and Romania and the question of whether such conditions, including overcrowding, could necessitate an exception to the obligation, based on the principle of mutual trust, to execute an EAW.

The case-law of the ECtHR came to play a not insignificant role in that case decided by the ECJ in 2016. The Luxembourg Court no doubt was also aware of the 2015 decision of the German Federal Constitution Court (*Bundesverfassungsgericht*),[42] although it is not mentioned in the judgment of the ECJ, perhaps because the factual situation in *Aranyosi and Căldăraru* was different from that of the German identity control decision. While the latter decision concerned a situation not likely to arise in a great number of cases, in *Aranyosi and Căldăraru* the ECJ had to decide whether overcrowding and bad prison conditions, as they are known to exist in many European countries, constitute a bar to surrender.

Certain differences between the Advocate General and the Court in *Aranyosi and Căldăraru* illustrate the inherent tension between the requirement of mutual trust and that concerning the protection of human rights in a case of this kind.

Advocate General Bot, in his opinion of 3 March 2016, took up the question of whether the principles defined in *N.S. and Others* concerning the Common European Asylum System should be transposed to the mechanism of the EAW, as proposed by several intervening Member States (Opinion, para. 39). In other words, he asked whether a threat of inhuman treatment in the Member State to which the person is to be removed could constitute an impediment to the duty of surrender notwithstanding

[40] In the case C-399/11, *Melloni*, judgment of 28 February 2013, the ECJ rejected the approach of the Spanish Constitutional Court to rely on the national constitution, which gave further-going protection against surrender than EU law, to refuse extradition to Italy as doing so would have jeopardized the uniform interpretation of EU rules. In its 2015 decision, the German Federal Constitution Court neither asked for a preliminary ruling nor followed "the ruling of the CJEU in the *Melloni* case insofar as it derived respect for human dignity in extradition proceedings explicitly from the German Constitution rather than from the CFR" (Charter of Fundamental Rights); Röss (2019), pp. 25 and 32. The German Federal Constitutional Court concluded that a preliminary ruling according to Article 267 of the TFEU was not needed as there was no doubt that the EU law was not in conflict with the relevant provisions of the German Constitution; in other words, the matter presented an *acte clair*, para. 125 of the Decision. For criticism concerning the Constitutional Court's conclusion on *acte clair*, see Nowag (2016), p. 1451; Classen (2016), p. 675.

[41] Joined Cases C-404/15 and 609/15 PPU, *Pál Aranyosi and Robert Căldăraru v. Generalstaatsanwaltschaft Bremen*, judgment of the ECJ (Grand Chamber) of 5 April 2016.

[42] Indeed, it has been argued that the decision of the German Federal Constitutional Court was intended as a "warning" addressed to the ECJ. See Callewaert (2018), pp. 1685 and 1703. See also Bribosia and Weyembergh (2016), pp. 469 and 507 (". . .il n'est pas à exclure que la Cour de justice ait entendu 'l'avertissement' que lui avait adressé le *Bundesverfassungsgericht* dans sa décision récente du 15 décembre 2015").

the principle of mutual trust.[43] The AG replied to the question negatively by referring, among other things, to "a clear intention to distinguish the rules governing the European Arrest Warrant from those regulating the Common European Asylum System" (para. 91). He did take note of Article 1(3) of the Framework Decision, according to which the Decision "shall not have the effect of modifying the obligation to respect fundamental rights", but held that "introducing a systemic exception" to the general rule of extradition "would lead to the paralysis of the European arrest warrant mechanism" (para. 123). The AG proposed the application of the "principle of proportionality" (para. 135 et seq.): surrender for the purpose of execution of a sentence should "be considered proportionate where the conditions of execution do not lead to adverse consequences *out of all proportion* to those which would result from the sentence imposed if it were executed under normal circumstances" (para. 169, emphasis added). Thus, there should be a kind of "compromise" based on the weighing of the different interests involved—between the principle of mutual trust and the need to protect human rights.

The ECJ, however, did not entirely follow AG Bot. While the latter expressed concern that a broadly defined exception to the obligation to execute EAW's could undermine the core objectives of the area of freedom, security and justice based on mutual trusts, the Court rather emphasized that limitations on mutual trust[44] were possible, albeit only "in exceptional circumstances" (para. 82), and stressed the importance of Article 4 of the Charter, the absolute nature of which "is confirmed by Article 3 ECHR, to which Article 4...corresponds" (para. 86).

Instead of proceeding in a straightforward manner from the premiss of mutual trust, the ECJ set out a two-step analysis that the executing judicial authority has to follow when determining whether the execution of an EAW would, in the light of the conditions in the issuing Member State, amount to a breach of the prohibition set out in Article 4 of the Charter. As regards the first step, the authority must determine whether there are systemic or generalized deficiencies indicating that there is a real risk of inhuman or degrading treatment in the issuing state. Such information may be obtained, *inter alia*, from judgments of the ECtHR.

Such a general risk, however, cannot in itself lead to the refusal of the execution of an EAW. As a second step, the executing judicial authority must "make a further assessment, specific and precise, whether there are substantial grounds to believe that the individual concerned will be exposed to that risk because of the conditions for his detention envisaged in the issuing Member State" (para. 92). To that effect,

[43] Finland did not belong to the intervening Member States but it has included in its implementation legislation (Act 1286/2003 on Extradition between Finland and other EU Member States) a strictly formulated prohibition of extradition in case of danger of torture or other inhuman treatment. See Tolttila (2020), pp. 245 and 256.

[44] Even such limitations as are not explicitly mentioned in the Framework Decision, Article 3 of the Framework Decision enumerates certain grounds for "mandatory" non-execution of the EUW (e.g., when the offense in question is covered by amnesty in the executing State), whereas Article 4 deals with grounds for "optional" non-execution (e.g., where the person is being prosecuted for the same offense in the executing Member State).

the authority "must, pursuant to Article 15(2) of the Framework Decision, request the judicial authority of the issuing Member State that there be provided as a matter of urgency all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State."[45] This may lead to postponing the execution of an EAW and, finally, even to a refusal of such an execution.

The *Aranyosi and Căldăraru* judgment brings the ECJ case-law closer to that of the ECtHR but still does not give very precise indications as to what inhuman or degrading conditions within the meaning of Article 4 of the Charter and Article 3 of the Convention mean.[46] Such precision was given in *Dorobantu*, decided by the ECJ in 2019.[47] This judgment not only further aligned the case-law of the Union Court with that of the ECtHR insofar as concerns prison conditions in Romania but also constituted a further demonstration of the role of the German Federal Constitutional Court.

Mr. Dorobantu had been taken into custody in Germany on the basis of an EAW issued by a Romanian first instance court in connection with property-related offenses. The executing court in Germany was the Regional Court of Hamburg (*das Hanseatische Oberlandesgericht Hamburg*). By expressing concerns about the efficiency of European cooperation in the field of crime prevention in case of refusal of surrender on the ground of prison conditions, that court played a role somewhat similar to that played by AG Bot in *Aranyosi and Căldăraru.*

By no means was the Regional Court, though, ready to rely on "blind" trust. On the contrary, in accordance with the approach taken in *Aranyosi and Căldăraru*, the Regional Court sought further information from the Romanian authorities, among them an assurance that the complainant disposes at any time a minimum space of 3 m^2 in his cell, and examined the situation in the prisons of that country with considerable scrutiny.[48] It held that there were systemic deficiencies in the conditions in Romanian prisons but concluded, despite the fact that it did not get the assurance requested, that the person in question did not run the real risk of being subjected to inhuman or degrading treatment. The Regional Court expressed the fear of Germany becoming a safe haven for criminals. There was thus no hindrance standing in the way of the complainant's surrender to Romania after Mr. Dorobantu had served a prison sentence imposed on him for offenses committed in Germany.

The surrender could not, however, be carried out as the German Federal Constitutional Court admitted a constitutional complaint (*Verfassungsbeschwerde*) made to

[45] Para. 95 of the judgment. Thus, while AG Bot (Opinion, para. 183) held that "the executing judicial authority may legitimately ask" questions to the issuing judicial authority, according to the ECJ, in a similar situation, the authority "must" request supplementary information.

[46] Cf. Röss (2019), p. 39 ("The CJEU did not fully adopt the ECtHR's case-law either in its common decision of the cases *Aranyosi and Căldăraru* or in previous decisions").

[47] Case C-128/18, judgment (Grand Chamber) of 15 October 2019.

[48] The steps taken by the Regional Court are explained in the decision of 19 December 2017, to be discussed below, of the German Federal Constitutional Court, *Bundesverfassungsgericht*, 2 BvR 424/17. See paras. 8–25 of the decision. See also Röss (2019), pp. 27–28.

it and prohibited temporarily the extradition.[49] The formal reason for the Constitutional Court to quash the judgment of the Regional Court was that Mr. Dorobantu had been denied the right to a "lawful judge" (*gesetzlicher Richter*, Article 101 of the Constitution) on the ground that the Regional Court had failed to ask for a preliminary ruling. The case was remitted to the Regional Court.

In its reasoning, the Federal Constitution Court refers to the fact the ECJ's case-law regarding the minimum conditions to be derived from Article 4 of the Charter was incomplete (paras. 50–51) and directs the Regional Court to ask about the minimum standards under the ECHR and their relation to EU law, especially in light of *Mursić v. Croatia*,[50] decided by the ECtHR a few months after the *Aranyosi and Căldăraru* judgment. It appears from the *Mursić* judgment that the personal space per detainee below 3 m^2 creates a strong presumption of a violation of Article 3 (para. 54 of the Federal Constitutional Court's decision). The Constitutional Court also points out that the question of the role, if any, to be attributed to the dangers that the potential impunity may mean to the (European) crime prevention, needed elucidation (para. 58). In the same context, it emphasizes the absolute character of Article 4 of the Charter and Article 3 of the ECHR but, interestingly, does not require as a condition for surrender full compliance with the German standards, which are even stricter than those established by the ECtHR.[51] This seems to mean that, to some extent, the Constitutional Court shares the Regional Court's concern about the possibility of Germany becoming a safe haven for fugitive criminals. At the same time, this approach can be seen as a concession to the ECJ, which in the *Melloni* case had notably held that while the fundamental law standards of EU law must be respected in the application of the EAW, further-going domestic requirements should not be applied as this would jeopardize the uniform application of EU law.[52] The Constitutional Court could leave open this question as the Regional Court's decisions were in any case not compatible with the right to a lawful judge, and it was therefore not necessary at this stage to go into the question of whether also the human dignity provisions of the Federal Constitution (Article 1, para. 2, second sentence) would be violated (para. 59). Directing the Regional Court to request a preliminary ruling can be regarded as another sign of the Constitutional Court's commitment to a dialogue with the ECJ.

[49] In the judgment of the ECJ (paras. 29–35) a brief account of the Federal Constitutional Court proceedings is given. The references made to the decision of the Federal Constitutional Court in this article are references to that court's decision and its numbering of paragraphs.

[50] Judgment (Grand Chamber) of 20 October 2016.

[51] On the requirements imposed by German case-law in light of the constitutional protection of human dignity, see Röss (2019), pp. 36–38.

[52] Cf. n 40. In its decision of 15 December 2015, discussed above (in the text including and following n 36), "the Constitutional Court did not follow the ruling of the CJEU in the *Melloni* case insofar as it derived respect for human dignity in extradition proceedings explicitly from the German Constitution rather than from the CFR" (Charter of Fundamental Rights), Röss (2019), p. 32.

In accordance with the instructions it had received from the Constitutional Court, the *Regional Court* asked questions, going into details on the minimum standards under Article 4 of the Charter,[53] such as whether there is "under EU law, an 'absolute' limit for the size of custody cells." The Court also asked whether "factors such as the maintenance of mutual legal assistance between Member States, the functioning of European criminal justice system or the principles of mutual trust and recognition be taken into account" in that regard.

In its reply, the ECJ reiterated the principles concerning mutual trust and mutual recognition but added, recalling, i.a., its *Aranyosi and Căldăraru* judgment, that "the executing judicial authority has an obligation to bring the surrender procedure. . .to an end where the surrender may result in the requested person being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter" (para. 50). To establish whether this is the case, the authority has to carry out the two-stage inquiry outlined in *that judgment.* As regards the second stage concerning the question of whether the particular individual is threatened to be subjected to inhuman or degrading treatment because of systemic deficiencies (which were easily found to have been established in Romania), the ECJ referred to the criteria defined by the ECtHR, especially in the case *Muršić c. Croatia* (*Dorobantu*, para. 71), which not only sets a "strong presumption" of inhuman treatment if the personal space available to a detainee is "below 3 m^2 in multi-occupancy accommodation" but also contains other detailed requirements for acceptable prison conditions.[54] If there is a real risk of inhuman treatment because of the conditions of detention, those conditions "cannot be weighed, for the purposes of deciding on that surrender, against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition" (para. 84). Finally, the ECJ reiterates the principle expressed in *Melloni*, namely that the executing Member State may not make the surrender conditional upon the fulfillment of its national standards, which may be higher than those imposed by those resulting from Article 4 of the Charter and Article 3 of the ECHR.[55]

After *Aranyosi and Căldăraru* and *Dorobantu*, in similarity to the situation concerning the Dublin system, it could be regarded as fairly established that the principle of mutual trust would not prevail over human rights in the context of the

[53] The questions, partly cited below, can be found in para. 36 of the *Dorobantu* judgment of the ECJ.

[54] See paras. 70–79 of the *Dorobantu* judgment. As an illustration, one may refer to para. 73 of the judgment: "The strong presumption of a violation of Article 3 of the ECHR will normally be capable of being rebutted only if (i) the reductions in the required minimum personal space of 3 m2 are short, occasional and minor, (ii) such reductions are accompanied by sufficient freedom of movement outside the cell and adequate out-of-cell activities, and (iii) the general conditions of detention at the facility are appropriate and there are no other aggravating aspects of the conditions of the individual concerned's detention. . ."

[55] According to the ECJ, relying on such higher national standards would, "by casting doubt on the uniformity of the standard of protection of fundamental rights as defined by EU law, undermine the principles of mutual trust and recognition which Framework Decision 2002/584 is intended to uphold and would, therefore, compromise the efficacy of that framework decision" (para. 79).

EAW if unconditional reliance on such trust could lead to a violation of Article 4 of the Charter, interpreted in light of the corresponding provision of the ECHR, Article 3. Also, domestic courts, and not only the German Federal Constitutional Court, have contributed to this development by refusing surrender to an EU country with bad prison conditions, thus showing their lack of confidence in such a country notwithstanding the EU principle of mutual trust.[56] It is also recalled that in *Aranyosi and Căldăraru*, several intervening Governments held (AG Opinion, para. 39), unlike AG Bot, that the principle of non-refoulement established in the Dublin system should be transposed also into the sphere of the EAW. Thus, both the ECtHR and national actors clearly showed their reluctance to let the principle of mutual trust prevail over such fundamental, non-derogable core human rights as those guaranteed in Article 3 of the ECHR and the corresponding Article 4 of the Charter, and the ECJ modified its position accordingly.[57] The Finnish Supreme Court, in a decision rendered shortly after *Dorobantu*, largely relying both on *Dorobantu* and the ECtHR judgment in *Muršić*, refused surrender to Romania without entering into a discussion on whether mutual trust could prevail over the obligation to see to it that the core human rights guaranteed in Article 3 of the ECHR and Article 4 of the Charter are not violated in the application of the EAW.[58]

3.3 Right to a Fair Trial as an Obstacle to Extradition Under *the European Arrest Warrant: LM* (ECJ 2018)

It remained to be seen whether the principles thus developed in connection with non-derogable rights could be extended to rights of a less absolute nature, such as, and especially, the right to a fair trial guaranteed in Article 6 of the ECHR and Article 47 of the Charter.[59]

In light of the worrying rule of law developments in Poland, it came as no big surprise that the question arose in relation to that country. Three EAWs were issued

[56] See the UK cases *Hayli Abdi Babre* and *Rancadore* cited in Anagnostaras (2016), pp. 1675 and 1695.

[57] The ECJ stressed in *Aranyosi and Căldăraru* the absolute character of Article 4 of the Charter, confirmed by Article 3 of the ECHR. See paras. 85–86. See also *Dorobantu*, para. 82; *C.K.*, para. 59.

[58] The Supreme Court Decision (KKO 2020:25) was rendered on 17 March 2020.

[59] In *Al-Dulimi and Montana Management Inc. v. Switzerland*, judgment of 21 June 2016 (Grand Chamber), the ECtHR held that Article 6 of the ECHR did not belong to the corpus of *ius cogens* (unlike the prohibition of torture contained in Article 3). See paras. 135–136.

by Polish courts concerning Mr. Celmer,[60] who was accused in his home country of drug trafficking offenses and arrested in Ireland.

In *Celmer*, the Irish High Court asked whether it must make further assessment of the individual situation of the person detained in Ireland under an EAW issued against him in Poland if the conditions in that other country are incompatible with the right to a fair trial because its judicial system is no longer operating under the rule of law. The High Court also asked what guarantees of fair trial are at issue in such assessment in case there is a systematic breach of rule of law.

In *LM (Celmer)*, Advocate General Tanchev proposed, relying on the case-law of the ECtHR, that the execution of an EAW must be postponed if there is a real risk of a "flagrant denial of justice", meaning that the breach of the right to a fair trial that the person to be extradited risks is so serious that it destroys "the essence of the right".[61]

In its *LM* judgment, the ECJ did not disagree with AG Tanchev, although it did not employ the notion of "flagrant denial". The ECJ recalled the rule of law as the foundation of the European Union, emphasizing that "[t]he high level of trust between Member States on which the European arrest warrant mechanism is based" is founded on the premiss that the criminal courts of the other Member States. . .meet the requirements of effective judicial protection, which include, in particular, the independence and impartiality of those courts" (para. 58). From this, it follows that "the existence of a real risk that the person in respect of whom a European arrest warrant has been issued will, if surrendered to the issuing judicial authority, suffer a breach of his fundamental right to an independent tribunal and, therefore, of *the essence of his fundamental right to a fair trial*, a right as guaranteed by the second paragraph of Article 47 of the Charter, is capable of permitting the executing judicial authority to refrain, by way of exception, from giving effect to that

[60] Case C-216/18 PPU. In the Grand Chamber judgment of 25 July 2018 of the ECJ, the person in question is referred to as *LM*, whereas in the national Irish decisions, he (and the case accordingly) is called *Celmer.* In later judgments of the ECJ, also the name of the other party, Minister of Justice and Equality, is used as the name of the case. See Joined Cases C-354/20 PPU and C-412/20 PPU, *L. and P.*, Opinion of AG Sánchez-Bordona of 12 November 2020, where the *LM/Celmer* case is referred to as the judgment in *Minister of Justice and Equality.* This somewhat confusing practice is explained by the fact that as from 1 July 2018, the ECJ started a new practice of increasing data protection for natural persons in publications concerning preliminary ruling proceedings (ECJ Press Release 96/18m, 29 June 2018). For Case C-216/18 PPU, see, e.g., Constanidines (2019), p. 743; Wendel (2019), p. 111.

[61] Case of C-216/18 PPU, Opinion of AG Tanchev, 28 June 2018. AG Tanchev cited, *inter alia*, *Othman (Abu Qatada) v. United Kingdom*, ECtHR judgment of 17 January 2012, the first case in which the Strasbourg Court found a potential violation of Article 6 of the ECHR on the ground of a "real risk" of "a flagrant denial of justice" in the country to which the applicant would be removed. In that case, the question was of a risk of evidence obtained by torturing third persons being admitted in proceedings against the applicant in Jordan. As early as 1989, the ECtHR in *Soering v. United Kingdom*, judgment of 7 July 1989, Series A no. 161, had established that "an issue might exceptionally be raised under Article 6 by an expulsion or extradition decision in circumstances where the fugitive had suffered or risked suffering a flagrant denial of justice in the requesting country" (para. 113).

European arrest warrant, on the basis of Article 1(3) of Framework Decision 2002/584" (para. 59, emphasis added).

In *LM*, for the establishment of the existence of such a real risk, the ECJ adopted, *mutatis mutandis*, the kind of two-step approach applied in the *Aranyosi and Căldăraru* judgment. The information contained in the reasoned proposal of the Commission prepared in connection with the rule of law proceedings against Poland instituted in accordance with Article 7(1) of the Treaty on European Union (TEU)[62] is mentioned as "particularly relevant" for the purposes of the first-step assessment of "systemic or generalised deficiencies" (para. 61). If due to the existence of such deficiencies a real risk of violation of the fundamental right of a fair trial is established, the executing judicial authority must, as a second step, assess the particular circumstances of the case (para. 68). In carrying out its task, the executing judicial authority must, if need be, request from the issuing authority any supplementary information in accordance with Article 15(2) of the Framework Decision. If the real risk cannot be discounted, "the executing judicial authority must refrain from giving effect to the European arrest warrant" (para. 78).

Although structurally the *LM* judgment follows the example of *Aranyosi and Căldăraru*, there are important differences, which, however, do not mean a contradiction. First, the ECJ does not give very detailed guidance as to when the "essence" of a fair trial[63] would be violated, whereas in *Aranyosi and Căldăraru*, and especially in the later *Dorobantu* case, inhuman prison conditions are defined with precise instructions derived mainly from the case-law of the ECtHR concerning the application of Article 3 of the ECHR. In connection with the right to a fair trial, reliance on the Strasbourg case-law would not lead very far, the ECtHR having put the threshold for non-extradition or non-surrender very high ("flagrant" violation). Even if a less serious than "flagrant" violation (or violation of the "essence") were to suffice, the determination of the thresholds would be far less straightforward than in cases concerning prison conditions. When, in the latter situation, the prison system suffers from serious systemic deficiencies and it is known that the prison (or the possible prisons) in which the person to be surrendered would serve his or her sentence or otherwise be held detained is not free of those deficiencies, it is normally relatively easy to establish in light of the available information whether there is a real risk inhuman treatment. As to fairness of trial, it is in the practice of the ECtHR normally determined by taking into account the process as a whole. It is by no means excluded that even in a country with systemic problems of rule of law, a particular

[62] COM(2017)835 final, European Commission, Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland: proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law. On the Polish rule of law crisis, see von Bogdandy et al. (2018), p. 983.

[63] In her judgment in *Celmer (No. 5)*, Ms. Justice Donnelly of the High Court concluded that a violation of "the essence of the right and the flagrant denial of the rights are to be understood as one and the same." *The Minister of Justice and Equality v. Celmer (No. 5)*, 19 November 2018/2018/IEHC 639, para. 24. It is recalled that the referring court explicitly asked "what guarantees as to fair trial would be required" (ECJ judgment, para. 25).

trial court could guarantee a fair trial to a particular individual wanted for a particular crime. Even serious general problems as regards the rule of law do not as such justify the foregoing of the second step concerning a particular individual and that requested person's case, unless the European Council has decided on the basis of Article 7 (2) TEU that there is a serious and persistent violation of the principles set out in Article 2 TEU.[64]

As the ongoing rule of law proceedings had (and have) not led to such a finding based on Article 7(2) TEU, the High Court proceeded stepwise as instructed by the ECJ. Ms. Justice Donnelly of the High Court, who had sought the preliminary ruling, held in the judgment of 1 August 2018 that there indeed were systemic deficiencies such as to constitute "a real risk, connected with the lack of independence of the courts of Poland. . .of the fundamental right to a fair trial being breached."[65] After this finding, the High Court proceeded to the "second step" in order to make "a specific and precise determination as to whether having regard to the particular circumstances of the case there were substantial grounds for believing that the respondent will run real risk of his fundamental right to an independent tribunal, and therefore of the essence of his fundamental right to a fair trial." (*Celmer (No. 4)*, para. 26).

The High Court requested further information from the issuing judicial authorities in Poland. The most detailed response was given by the President of the Warsaw Regional Court, who stressed that Poland is a democratic state operating under rule of law. Also, another judge of the same Regional Court, who had been named in the arrest warrant emanating from that Court as the representative of the issuing judicial authority, gave a reply. This judge was much more critical as regards the general situation, holding that it was "not true that there are no risks for independence of judges and courts in Poland" (*Celmer (No. 5)*, para. 89). After setting out his general concerns, the judge, however, added that he and other judges adjudicating in the Warsaw Regional Court "try to perform our obligations to the best of our abilities and administer justice impartially and free from any pressures." (para. 103). It is perhaps somewhat paradoxical that the observations by the judge who appears to have been most critical of those giving comments as regards the development of the rule of law in Poland were "themselves an impressive exercise in judicial independence" (Supreme Court judgment of 2019, para. 87) and served as an important argument in favor of the conclusion that the arrest warrants could safely be executed notwithstanding the systemic deficiencies. High Court Justice Ms. Donnelly's conclusion was that "the real risk of a flagrant denial has not been established by this respondent. On that basis, the Court must order his surrender on each of

[64] According to recital 10 of Framework Decision 2000/584, the implementation of the European Arrest Warrant mechanism "may by suspended only in the event of a serious and persistent breach by one of the Member States of the principles set out in Article 2 TEU, determined by the European Council pursuant to Article 7(2) TEU, with consequences set out in Article 7(3) TEU."

[65] *The Minister of Justice and Equality and Artur Celmer (No. 4)*, High Court/2018/IEHC 4844, para. 25. In *Celmer (No. 5)* (see n 63), the High Court confirmed this finding; see paras. 92–94 and the paragraph below in the middle of the next page.

the European Arrest Warrants." (*Celmer (No. 5)*, para. 123). The Supreme Court dismissed Mr. Celmer's further appeal.

The right to a fair trial, protected in Article 6 of the ECHR and Article 47 of the Charter, tolerates more diversity between the various Member States than the absolute right guaranteed in Articles 3 and 4, respectively, and makes it easier for them to trust in each other. The bar for non-surrender is set high[66] because an executing judicial authority is, in such a situation, more likely to proceed from the main rule of mutual trust rather than to derogate from it, except where the systemic deficiencies amount more or less to a collapse of the rule of law in the issuing state.

In *L. and P.*,[67] AG Sánchez-Bordona, on the one hand, admitted that since the judgment given in *LM/Minister of Justice and Equality*, the general situation in Poland had worsened (paras. 57–58); on the other hand, he did not accept the proposition that this would justify an automatic suspension of the application of the Framework Decision in respect of any EAW issued by Polish courts (para. 60). The general situation would make it justifiable to forego the second step only after the European Council has determined under Article 7(2) TEU that the country is "in serious and persistent breach of the values of the rule of law referred to in Article 2 TEU" (para. 66).

The ECJ, in its judgment of 17 December 2020, followed the Opinion of AG Sánchez-Bordona. The Court answered to the questions referred to it and ruled that where the executing judicial authority has evidence of systemic or generalized deficiencies concerning the independence of the judiciary in the Member State existed at the time of issue of that warrant or that arose after that issue, it "cannot deny the status of 'issuing judicial authority'...and presume that there are substantial grounds for believing that that person will, if he or she is surrendered to that Member State, run a real risk of breach of his or her fundamental right to a fair trial, guaranteed by the second paragraph of Article 47 of the Charter, without carrying out a specific and precise verification which takes account of, inter alia, his or her personal situation, the nature of the offence in question and the factual context in which that warrant was issued, such as statements by public authorities which are liable to interfere with how an individual case is handled." (para. 69 and final ruling).

These recent developments suggest that further worsening of the general rule of law situation in Poland does not (easily) justify the foregoing of the second step, although it may increase the possibility that a particular court in a particular situation is not regarded as capable of guaranteeing fair trial to the person wanted. Whether or not the fact that, as compared to the *Aranyosi and Căldăraru* situation, much is left

[66] See Constantinides (2019), n 60, 751 ("the ECJ made the standard for not granting an extradition request very high indeed.").

[67] Joined Cases C-354/20 PPU and C-412/20 PPU, *L. and P.;* Opinion of AG Sánchez-Bordona, 12 November 2020 (see also n 60); and the ECJ judgment (Grand Chamber; urgent preliminary ruling procedure), 17 December 2020.

to the national courts to decide is something to be regretted, is a question that can be left open here.[68] However it may be, *LM/Celmer* and the subsequent *L. and P.* cases have shown that the right to a fair trial as guaranteed in Article 6 of the ECHR, with its very high "flagrant denial" standard as a factor preventing extradition, does not stand in the way of the functioning of the EAW regime and thus, in this respect, does not run into conflict with the EU principle of mutual trust.[69]

3.4 Recognition and Enforcement of Civil Judgments: Avotiņš v. Latvia (ECtHR 2016)

Right to a fair trial was at issue also in the last case to be discussed before some conclusions are drawn, but the context was different from that of *LM/Celmer* in *Avotiņš v. Latvia* (App no. 17502/07), decided by the Grand Chamber of the ECtHR on 23 May 2016, which provided the Strasbourg Court the first opportunity to pronounce itself on the continuing validity of the *Bosphorus* doctrine after the

[68] Cf. Wendel (2019), pp. 112 and 126–127. The ECJ's reticence to take itself responsibility may (at least partly) be explained by its concern to maintain "institutional balance", as it is the Council which alone is competent to decide of serious breach by a Member State of the principles set out in Article 2 of the TEU and in accordance with what was said earlier (in Sect. 3.3), a real risk of a "flagrant violation" or violation of "the essence" of right to a fair trial presupposes such serious systemic deficiencies in the upholding/maintenance of rule law as to amount to a situation envisaged in that Article. Cf. also the judgment of the ECtHR in the case of *Romeo Castaño v. Belgium* (App no. 8351/17) of 9 July 2019, marked by AG Sánchez-Bordona in his Opinion (n 67), para. 51, fn 22. The ECtHR noted that "[t]he reason which prompted the Court to find a violation of Article 2 is the lack of sufficient basis for the refusal to surrender her" ("N.J.E., the person suspected of involvement in the death of the applicants' father") (para. 3). In the concurring opinion by Judge Spano joined by Judge Pavli it is concluded that "'the challenge of symmetry' between the Convention law and European law is an ongoing enterprise..."

[69] It remains to be seen if the ECtHR's Grand Chamber judgment rendered on 1 December 2020 (i.e., only 16 days before the judgment by the ECJ in *L. and P.*; see above the text in-between the note numbers 67–69.) in *Guðmundur Andri Ástráðsson v. Iceland*, App. no. 26374/18, influences the ECJ's case-law. The Strasbourg Court held that right to a "tribunal established by law is a stand-alone right under Article 6 § 1…" (para. 231) and that the newly established Icelandic Court of Appeal (*Landsrettúr*) did not meet the criteria of such a tribunal because of serious irregularities in the appointment of its first members, including especially one judge who participated in the case concerning the applicant. One could raise the question of whether extradition in circumstances in which there is a real risk that the person's case is handled by a court not meeting the criteria of a "tribunal establish by law" (and this may arguably concern certain Polish courts) can ever be justified, but the answer to the question is not straightforward. The judgment against Iceland contains an overview of the case-law of the EU courts (paras. 131–139). The relationship of the Grand Chamber judgment to ECJ case law is discussed in a separate Opinion of judges O'Leary, Ravarani, Kucsko-Stadlmayer and Ilievski (paras. 37–41), who to some extent disagree with the majority as regards the conclusions to be drawn from the cases decided by the EU courts. On the relationship between the EU and ECtHR case-law (including the Chamber judgment of 12 March 2019 in *Guðmundur Andri Ástráðsson v. Iceland*, App no. 6374/18), see also Leloup (2020), pp. 1139–1162.

ECJ's Opinion 2/13 of December 2014. The case concerned the execution in Latvia, on the basis of EU Regulation No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, or Brussels I Regulation, of a civil judgment by which the applicant had been ordered in Cyprus to pay US$100,000 to a Cypriot company from which he had borrowed that amount. The Brussels regime belongs to the area of freedom, security and justice, in which the principle of mutual trust plays an important role.

The creditor's request for the recognition and enforcement of the judgment was granted by the Latvian Supreme Court. In his application before the ECtHR, the applicant complained that his right to a fair hearing had been violated on the ground that the Senate of the Latvian Supreme Court had allowed the enforcement of a Cypriot judgment, which had allegedly been rendered in violation of his defence rights (para. 69). The applicant submitted that "in declaring the Cypriot judgment enforceable and refusing to examine his argument that he had not been duly notified of the examination of the case by the Cypriot court, the Latvian courts had failed to observe the guarantees of a fair hearing, in breach of Article 6 § 1 of the Convention." (para. 78). That Article 6 had been violated because of the failure to comply with Article 34(2) of the Brussels I Regulation.[70]

A central issue for the ECtHR to determine was the role of the *Bosphorus* doctrine. The Court recalled the two conditions for the application of the presumption based on the doctrine, namely "the absence of margin of manoeuvre on the part of the domestic authorities and the deployment of the full potential of the supervisory mechanism provided by European Union law" (para. 105). Both conditions were regarded as met. First, Article 34(2) of the Dublin I Regulation[71] did not confer any discretion on the Latvian court from which the declaration of enforceability was sought, and thus the *Bosphorus* presumption in principle applied.[72] As to the second

[70] According to Article 34(2), the recognition of a judgment could be refused "(w)here it was given in default of appearance, if the defendant was not served with the documents which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defense, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so."

[71] In its third-party submissions, the AIRE Centre argued that the Supreme Court "could and should" have applied Article 34(1), which required the refusal of recognition for public policy grounds and thus allowed a degree of discretion (para. 108). The ECtHR replied that the applicant's arguments before the Supreme Court had been limited to those raised under Article 34(2) and that therefore it is not the ECtHR's "task to determine whether another provision of the Brussels I Regulation should have been applied." (id.).

[72] See paras. 106–107. This conclusion was not necessarily self-evident. See Kohler (2017), pp. 333 and 335, footnote 22: "Ob dies (i.e., the lack of discretion) bei Art. 34 Nr 2...tatsächlich der Fall ist, kann bezweifelt werden." The author refers to the dissenting opinion of the presiding judge, who voted in favor of a violation, as well as to the concurring opinion of two judges who belonged to the majority but did not agree with the reasoning concerning the applicability of the *Bosphorus* doctrine, basing their finding of non-violation of Article 6 on the fact that in their view, there was no such shortcoming in the Latvian proceedings as to constitute a breach of Article 6.

condition, the ECtHR distinguished this case from the *Michaud* case,[73] emphasizing that in that case, the applicant's request that the domestic court seek a preliminary ruling was rejected, whereas in *Avotiņš*, no such request was made by the applicant, who, moreover, had not advanced any argument that would have necessitated the seeking of a preliminary ruling (para. 111). The ECtHR stressed that the *Bosphorus* requirement of exhaustion of the full potential of the EU law supervision mechanism should not be applied without excessive formalism and that a request for a preliminary ruling is not required in all cases without exception (para. 109). Thus, the *Bosphorus* principle applied, and all that remained was to examine whether there had been such a "manifest deficiency" as to rebut the presumption (para. 112).

In *Avotiņš*, the ECtHR Grand Chamber recalled that the recognition and enforcement of such a judgment in a Convention state require "some measure of review of that judgment in the light of the guarantees of a fair hearing", the intensity of the review depending on the nature of the case (para. 98). In this case, the intensity of review under that law was limited by the principle of mutual trust, in addition to which the *Bosphorus* principle applied to the review of the situation under the Convention.[74] The possible deficiency turned on the question of whether in using the mechanism provided by Article 34(2) of the Brussels I Regulation the applicant could have commenced proceedings in Cyprus to challenge the judgment. According to the ECtHR, the issue of the burden of proof with regard to the existence and availability of a remedy in the State of origin, a question not governed by EU law, was a crucial one and should have been examined in adversarial proceedings in Latvia. That this did not happen was "regrettable" (para. 121) but not sufficient to find manifest deficiency as the Court accepted, in light of the information provided by the Cypriot Government at the Grand Chamber's request, that the applicant had had a "realistic opportunity" (para. 122) of appealing in Cyprus. The Court concluded that there was no such manifest deficiency in the protection of fundamental rights "that the presumption of equivalent protection is rebutted" (para. 125) and, hence no violation of Article 6 of the ECHR.

In its *Avotiņš* judgment, the ECtHR assumed a conciliatory tone toward EU law without, however, giving up its own control. As to the conciliatory aspect, the ECtHR not only recognized the importance of mutual trust in EU law but also considered the creation of the area of freedom, security and justice "to be wholly legitimate from the standpoint of the Convention" (para. 113).

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[73] In *Michaud v. France*, *App no. 12323/11*, judgment of 6 December 2012, ECHR 2012-VI, the ECtHR had held that by not making a preliminary ruling reference to the ECJ the French *Conseil d'Etat* had ruled without exhausting the full potential of the EU supervisory machinery. Para. 115.

[74] See *Avotiņš*, para. 115. In similarity to the EAW meaning simplification as compared to traditional extradition proceedings, the Brussels I Regulation (as part of the creation of the area of freedom, security and justice) aimed at simplifying enforcement of foreign judgments even further as compared to the former Brussels Convention of 1968 by reducing the requirement of *executor* to more or less a formality. Further simplification took place in 2015 when Regulation (EU) No 1215/2012, or the Brussels I Regulation (recast), entered into force. See Ait-Ouyahia (2016), pp. 957, 959, 964–965.

Moreover, although *Avotiņš* could have provided the ECtHR opportunities to "retaliate" Opinion 2/13,[75] which must have been a disappointment for the Strasbourg Court, the judgment does not reveal any sign of vindictiveness. Instead, the last-mentioned Court recalled its commitment to "international and European co-operation" (para. 113) and confirmed the continuing validity of the *Bosphorus* doctrine, an important expression of that commitment.

However, the *Bosphorus* doctrine and its presumption notwithstanding, domestic courts cannot refrain from examining a "serious and substantiate complaint of manifest deficiency...on the sole ground that they are applying EU law" (*Avotiņš*, para. 116). Moreover, in limiting the review of ECHR's compatibility to "exceptional circumstances" in accordance with Opinion 2/13 (para. 191), "the principle of mutual trust could, in practice, run counter to the requirement imposed by the Convention according to which the court in the State addressed must at least be empowered to conduct a review commensurate with the gravity of any serious allegation of a violation of fundamental rights in the State of origin, in order to ensure that the protection of those rights is not manifestly deficient" (para. 114). Thus, the ECtHR retained its power of supervision of the Convention obligations but exercised this power in such a manner as to minimize its interference in the EU context, choosing to regard an established procedural shortcoming as "regrettable" but not as a "manifest deficiency".

4 Concluding Remarks

In this final section, some concluding remarks are made on the basis of the case-law reviewed, first, on the question of whether it was really necessary or well-founded to regard the reasons derived from the principle of mutual trust as an impediment to the planned EU accession to the ECHR. After that, some thoughts are devoted to the question concerning the nature of the principle: is it really one of "the fundamental principles of EU law, of comparable status to the principles of primacy and direct effect"[76] or rather a "fiction"[77] or something between the two?

[75] Thus, in *Avotiņš*, the ECtHR could have stated, in similarity to the *Michaud* case, that by not seeking a preliminary ruling of the ECJ, the Latvian Supreme Court "ruled without full potential of the relevant international machinery for supervising fundamental rights" (*Michaud* judgment, para. 115) and that therefore the *Bosphorus* presumption did not apply. The lack of any discretion on the part of the Latvian Supreme Court could also have been questioned with reference to Article 34(2) of the Regulation, as was done by the dissenting judges in the Chamber which had decided the *Avotiņš* case on 25 February 2014 a 4-3 vote in favor of non-violation; joint dissenting opinion by judges Ziemele, Bianku and De Gaetano. These judges stressed that Article 34(2) provides for exceptions to the automatic execution of judgments, which means that there was no such strict obligation under EU law, compliance with which rendered the *Bosphorus* presumption applicable. See also n 73.

[76] As characterized by Advocate General Bot, see the text preceding n 3.

[77] As also has been suggested, see Timmermans (2019), p. 28.

When adopting Opinion 2/13 on the compatibility of the planned EU accession to the ECHR, the ECJ, strictly speaking, analyzed the situation as being *after* the accession, i.e., after the Convention having become formally a part of EU law. All the case-law examples given above naturally predate the accession, which to date has not taken place. This does not, however, mean that the developments described would be without relevance when the situation after the accession, if any, is assessed. Clearly, the point of departure of the ECJ is that the principle of mutual trust, whatever its precise status, is an important principle of EU law, and to the extent that some features of the ECHR system are compatible or incompatible with it, the situation is not likely to be fundamentally different in all respects after the accession, although the accession would bring with it certain nuances, which is to be discussed later.

The first conclusion to be drawn from the cases discussed is that they do not support the impression that the reading of Opinion 2/13 may convey, namely that there is a kind of inherent incompatibility between the obligations that an EU Member State may have under Union law, on the one hand, and under the ECHR, on the other. The ECtHR, while acknowledging the importance of mutual trust in the EU area of freedom, security and justice, has not renounced its control, especially not in those cases concerning the Dublin Regulation on asylum seekers and the European Arrest Warrant where procedures concerning these regimes threaten to lead to a treatment prohibited by the ECHR articles guaranteeing unconditional rights. The ECJ, in turn, far from insisting on the principle of mutual trust in such cases, has adjusted its own line so as to take into account of the ECtHR's case-law despite voices showing readiness to accept a certain level of risk of violations of even some of the most fundamental human rights for the sake of mutual trust and the smooth functioning of the systems based on it.[78]

As the things stand now, the conflict point between the two systems has not led to any real collision between them or decisively hampered cooperation in the aforementioned area of freedom, security and justice. That cooperation as regards especially the EAW has perhaps not proceeded with such fluidity[79] as originally planned is probably not something that the ECJ now regrets. In the context of the Dublin system and the EAW, it seems that the ECtHR has played the role of a useful reminder in situations in which reliance on mutual trust has threatened to lead to situations incompatible with one of the core fundamental rights, namely the prohibition of torture and inhuman treatment. It may be that the developments in question not only have benefited the particular individuals concerned but may also have contributed to the general improvement of prison conditions, which despite numerous judgments of the ECtHR leave in many countries much to desire.

[78] Cf. the Opinion AG Bot in *Aranyosi and Căldăraru*, as discussed above, see the text preceding and following n 43. See also the Hamburg Court of Appeal (*Hanseatisches Oberlandesgericht*) in *Dorobantu*, the text preceding n 49.

[79] All in all, however, the EAW system seems to be working rather well. Thus in 2015 more than 16,000 arrest warrants were issued and more than 5300 executed by the Member States. Tolttila (2020), p. 265.

Not only is this a consequence of a dialogue between the ECJ and the ECtHR, but also national courts have given their contribution to the discussion in the spirit of European "constitutional pluralism".

As to other, less absolute rights, the cases reviewed do not either indicate that the ECHR as interpreted by the ECtHR would run into an inevitable conflict with the EU law principle of mutual trust. As regards the right to a fair trial as an impediment to surrendering under the EAW, the threshold ("flagrant denial") for a duty to deny extradition or similar surrender imposed by Article 6 of the ECHR is high, as shown by the *LM/Celmer* and *L. and P.* cases. The *Avotiņš* case concerning the mutual recognition and enforcement of civil judgments on the basis of the Brussels I Regulation, in turn, did not show any particular eagerness on the part of the ECtHR to use to a maximum extent its possibility to interfere with the functioning of the EU system, although the Court clearly did not renounce its possibility of interfering in cases of "manifest deficiency".

All in all, as the things stand, there seems to be a peaceful coexistence characterized by mutual complementarity between the EU regimes based on the principle of mutual trust and the principles of the ECHR. That raises, first, the question of whether accession is still needed and, second, what would change if it (accession) did happen? The first question of a "policy nature" is mainly left aside here; it suffices to say that there are obvious arguments favoring the accession.[80]

Opinion 2/13 was, as mentioned, adopted having in mind a future situation in which the EU would be a party to the ECHR through accession. What would be different in case accession became a reality?

As regards absolute core rights, such as Articles 2 and 3 of the ECHR, not much, if anything, would probably change. Serious risk of torture or inhuman treatment would continue to constitute an obstacle to a removal to a country where such treatment exists, and this regardless of whether the risk arises in an individual situation or follows from a "systemic deficiency". While the ECtHR would continue to ensure the respect for those rights, any conflict between it and the ECJ would be unlikely as the ECJ presumably would continue interpreting corresponding Charter rights in the same spirit as it did in *Dorobantu* (n 47), where it stated that "(a)s regards, in particular, the personal space available to each detainee, the executing judicial authority must, in the absence, currently, of minimum standards in that respect under EU law, take account of the minimum requirements under Article 3 of the ECHR, as interpreted by the European Court of Human Rights" (para. 85).

As to other than absolute rights, especially the *Avotiņš* case concerning the right to a fair trial shows that the ECtHR has not renounced its control here either, but the *Bosphorus* doctrine, with its presumption of compatibility, means that without the EU accession, the control is, in the field of applicability of the doctrine, in principle,

[80] See Callewaert (2018), p. 1697, who among other arguments states that if the continuation of the *status quo* "is accepted as a valid alternative to EU membership, in the Convention system any contracting state could legitimately suggest withdrawal from that system on the ground that its Supreme Court will autonomously ensure compliance with the Convention without review by the ECtHR."

not as intensive as it would be without the doctrine. One could imagine, for example, that the shortcoming in *Avotiņš*, characterized from the point of view of Article 6 of the ECHR by the ECtHR as only "regrettable" but not as a "manifest deficiency", could, without the effect of the *Bosphorus* doctrine, be regarded as a breach of Article 6.

Therefore, an important question is whether the *Bosphorus* doctrine could survive the accession, if any. This appears to be more than doubtful since after the accession, the EU would, in principle, be a contracting party among others without any special privilege which the presumption brought about by the doctrine brings with it, as compared to other parties. Thus, the *Bosphorus* doctrine as such would likely disappear.

However, the abolition of the *Bosphorus* doctrine would not necessarily mean the total abolition of the kind of judicial restraint the ECtHR has applied on the basis of the doctrine. As a contracting party to the ECHR, the EU hardly could be given a special privilege of deference from which other parties, say Turkey or the United Kingdom, do not profit, but it would not be treated worse than the others either. Thus, one would expect that the principle of subsidiarity would be applied to the EU in principle in the same way as it would be applicable to others. The growing importance of this principle of subsidiarity has been one of the salient features of case-law development in this century,[81] so much so that more and more references are made to an "age of subsidiarity". To quote the current president of the ECtHR,

> the Strasbourg system's substantive embedding phase, during which the Court independently attempted to embed the Convention into national legal systems, has shifted in recent years towards an 'age of subsidiarity' which is focused on the procedural embedding of Convention law.[82]

Procedural embedding in this sense, if I understand it correctly, does not refer to procedural law in a narrow sense and as distinct from substantive law, but rather it pertains to the trend discernible in the case-law, which aims at enhancing domestic legal structures and procedures (in the direction of the rule of law) and thereby strengthen their ability to deal with various substantive law problems in the spirit of the principle of subsidiarity. Quite obviously, the age of subsidiarity, and the privilege of deference on the part of the ECtHR brought by it, is for many contracting parties not an existing state of affairs but rather a goal the attainment of which presupposes a certain level of guarantee of rule of law: "States that do not respect the rule of law cannot expect to be afforded deference under process-based review in the age of subsidiarity."[83] Thus, the privilege of deference must be "earned", which means that the ECtHR can show more restraint vis-à-vis one contracting party than

[81] The emphasis on subsidiarity is not limited to case-law. Protocol No. 15 (CETS No. 213) amending the ECHR entered into force on 1 August 2021, and thereby a reference to the principle of subsidiarity is also reflected in the preambular provision of the Convention.

[82] Spano (2018), pp. 1 and 13.

[83] A citation from the abstract of the article referred to in the previous note.

another depending on whether the state's ability to act in accordance with the rule of law can be trusted or not.

The principles just outlined would apply also to the EU, if it is ever to become a party to the ECHR. The question then would arise as to whether the EU legal system belongs to those that deserve the deference (or more deference than most). There are strong reasons to argue that the same reasons which have led the ECtHR to adopt the *Bosphorus* doctrine, namely that the EU legal system provides human rights protection "equivalent" to that of the ECHR, would justify the conclusion that the EU would belong to the contracting parties which are ripe for the "age of subsidiarity", justifying deference similar to that from which the EU legal system has profited so far on the basis of the *Bosphorus* doctrine. Thus, the EU could be in a position different from that of a state which does not respect the rule of law and therefore does not deserve the privilege of deference, but this difference would be based on an objective criterion rather than mean a double standard.

Of course, there may be obstacles other than those arising from the principle of mutual trust applied in the field of freedom, security and justice.[84] Thus, in Opinion 2/13, the ECJ held reasons related to Article 344 of the TFEU, "according to which Member States undertake not to submit a dispute concerning the interpretation and application of the Treaties to any method of settlement other than those provided therein" (para. 201), as one of the main obstacles to accession. This was so because the draft Accession Agreement did not contain sufficient guarantees against the possibility of an EU Member State to introduce an inter-state complaint to the ECtHR in accordance with Article 33 of the ECHR in a case involving (also) a violation of EU law. According to the ECJ, this problem could only be healed by "the express exclusion of the ECtHR's jurisdiction under Article 33" over such disputes (para. 213). Such an unconditional ruling not only makes the accession very difficult, but it can also be taken to show a rather low level of trust in the EU Member States on the part of the ECJ. Advocate General Kokott, in her Opinion, showed a more "accession friendly" attitude by holding that in this respect, the possibility of conducting infringement proceedings against Member States citing a violation of Article 344 is sufficient to safeguard the practical effectiveness of Article 344.[85]

The concept of mutual trust thus has many dimensions.[86] Going back to the duty of such trust *between EU Member States*, as expressed in Opinion 2/13, and to its

[84] For an analysis of all the objections made in the Opinion, see Polakiewiecz (2016), p. 10.

[85] Opinion, procedure 2/13, View of AG Kokott delivered on 13 June 2014, para. 118.

[86] One may also approach the relationship between the ECJ and the ECtHR as involving mutual trust. The *Bosphorus* doctrine can be seen as an expression by the ECtHR of considerable trust in the EU legal system as developed by the ECJ. While Opinion 2/13 can hardly be regarded as reciprocating this trust, such trust in the ECtHR is discernible, for example, in the ECJ's holding in *Dorobantu* that in the absence of EU minimum standards concerning prison conditions, the minimum requirement imposed by the ECHR, "as interpreted by the European Court of Human Rights" (including presumably future interpretations), must be taken into account in the context of the EAW. See *Dorobantu*, para. 85. Trust in the ECHR regime can be seen also in the ECJ's *RO* judgment cited at the end of this chapter. See n 68 and the text preceding it.

nature, it is recalled that AG Bot characterized, in *Aranyosi and Căldăraru*, mutual trust as one "among the fundamental principles of EU law, of comparable status to the principles of primacy and direct effect."[87] In light of the relevant practice, the characterization of the principle of mutual trust as similar to those of primacy and direct effect does not seem to be the best one, at least if the principle is suggested to produce straightforward obligations comparable to the other principles mentioned. The following characterization by Timmermans seems to correspond better to the realities: "Thus, far from imposing an unconditional obligation, the principle of mutual recognition is characterized by its flexible nature. It is in my view more a rebuttable legal presumption than a full-fledged *legal* principle."[88]

Inherent in the nature of this presumption is that it is expected to become stronger and stronger in order to finally become a "full-fledged legal principle". In other words, mutual trust appears, to some extent, to be the goal. While there are cases which seem to proceed from the assumption that mutual trust exists as a fact,[89] in especially newer cases, mutual trust is frequently referred to as an *objective* or as something that *should* exist rather than as something that exists.[90] For the attainment of the goal, trust must be earned[91] in the same way as, in the ECHR system, the privilege of deference under process-based review in the "age of subsidiarity" must be earned,[92] and trust may also be lost.[93]

Referring to the fact that trust is a state of mind of uncertain duration and may be lost, Timmermans adds that trust is "to some extent a fiction".[94] Trust is also fiction in the sense that, in many instances, it simply does not exist where it ideally should. According to Opinion 2/13, the fundamental premiss and justification of mutual trust is "that each Member State shares with all the other Member States, and recognises

[87] Opinion of AG Bot, para. 169.

[88] Timmermans (2019), p. 23. What the author says about mutual recognition clearly seems to apply to "mutual trust", the latter being, for him, "the foundation for mutual recognition", Timmermans (2019), p. 25.

[89] See Opinion 2/13, para. 191, quoted above in the text phrase after n 4), as well as the joined cases C-187/01 and C-385/01, *Gözütok and Brügge*, judgment of 11 February 2003, cited by Timmermans (2019), p. 25.

[90] *Aranyosi and Căldăraru* (n 41), para. 76: "The Framework Decision thus seeks. . .to facilitate and accelerate judicial cooperation with a view to contributing to *the objective set for the European Union* to become an area of freedom, security and justice, founded on the high level of confidence which should exists between the Member States. . ." (emphasis added). Reference can also be made to the newer case of C-717/18, *X*, ECJ (Grand Chamber) judgment of 3 March 2020, concerning EAW and double criminality, para. 35: ". . .that framework decision seeks. . .to facilitate and accelerate judicial cooperation with a view to contributing to the objective set for the European Union of becoming an area of freedom, security and justice, on the basis of the high level of confidence which *should exist* between the Member States..." (emphasis added).

[91] President Lenaerts stated that mutual trust "must be 'earned' by the Member States of origin as through effective compliance with EU fundamental rights standards.", Lenaerts (2017), p. 840.

[92] See n 80 and the text preceding it.

[93] Timmermans (2019), p. 28.

[94] Ibid.

that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU" (para. 168). However, clearly, such a recognition, which in some cases does not amount to much more than lip-service, has not been sufficient to create genuine trust. Thus, the Finnish Supreme Court in the case mentioned earlier (n 58) would hardly have trusted in the Romanian prison system merely on the ground that both countries, as EU Member States, share the same values, even if it had not been exempted from the necessity of pondering whether there was sufficient trust, as the non-extradition could be directly based on the cases of *Mursić* (ECtHR) and *Dorobantu* (ECJ).

Thus, more than solemn declarations are needed to create genuine trust.[95] As an example, one may refer to the Nordic Order between five states, of which two (Iceland and Norway) are not Members of the EU but largely share common legal traditions, not only with each other but also with the EU Members of the group. These countries can also be said to genuinely share the same basic values, and it is no surprise that they were ready to agree on the Nordic Arrest Warrant, which simplifies even further the procedure as compared to the EAW, for example, by totally abolishing the requirement of double criminality. Indeed, for the Nordic EU Member States, the replacement of the traditional Nordic extradition arrangements dating back to the 1950s by the EAW would have meant a drawback, which in part explains the conclusion of the 2005 Convention on surrender on the basis of offense between the Nordic states (The Nordic Arrest Warrant).[96] One is also allowed to assume that many courts in EU Member States would be ready to have more trust, say, in Canadian courts than in their fellow courts in certain other EU Member States, although the EU principle of mutual trust is not applicable in a relationship between, for example, German and Canadian authorities.[97] Nor does Brexit mean that British courts would lose the trust they enjoy, although they no longer are able to request for a preliminary ruling from the ECJ.[98]

Although mutual trust is to some extent a fiction, it is nevertheless a useful fiction as it justifies, explains, and facilitates mutual recognition, which after all, for the

[95] Cf. Meyer (2019), pp. 166–167 ("Abstraktes Vertrauen auf Metaebene hilft nicht über konkrete operative Mängel hinweg, die in den nationalen Rechtsordnungen noch gar nicht verarbeitet oder erkannt sind").

[96] See Suominen (2014), p. 41. Article 31(2) of the EAW contains an explicit provision on the allowability of such further simplification. The Nordic Arrest Warrant is also dealt with in Tolttila (2020), pp. 36–47.

[97] "However, that principle of mutual trust...is not applicable in relations between the Union and a non-Member State." Opinion 1/17 of the Court (Full Court) on certain aspects of the Comprehensive Economic Agreement between Canada, on one part, and the European Union and its Member States, on the other part (CETA), 30 April 2019, para. 129. What is said about the European Union clearly applies also to its Member States.

[98] Case C-327/18 PPU, *RO*, judgment of 19 September 2018, para. 52. The case concerned execution by an Irish court of EAWs issued by UK courts after the UK Government had made their notification of withdrawal in accordance with Article 50 of the EU Treaty. See also Ladenburger (2019), pp. 174–175.

most part, functions well in the EU.[99] By its flexibility, the principle is conducive to a "functional" approach, whereby a smaller amount of trust may suffice in one context while not in another.[100] Growing trust in various contexts can lead to spillover effects, creating conditions for genuine trust in other areas. Gradual development of case-law, based on the ECJ's dialogue with the ECtHR and national courts, is likely to be conducive to improvements, not only paving the way for genuine trust, as envisaged in Opinion 2/13, but also contributing to the creation of conditions for a genuine "age of subsidiarity" in the ECHR regime. One day, hopefully, the development reaches a point where, on the one hand, it may not matter so much whether the EU adheres to the ECHR, and, on the other, the obstacles standing in the way of such accession disappear, making it possible for the EU to comply with Article 6(2) of the TEU, according to which the Union "shall accede" to the European Convention on Human Rights.

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[99] Timmermans (2019), p. 25, refers to case-law and states "that the principle of mutual recognition is rooted in the principle of mutual trust" and that "the latter is the foundation for the first." He continues (at 29) that as a principle, "mutual trust has special dimension which a mere legal presumption would not have." Although the principle has "the nature of a rebuttable legal presumption", it has "a certain emotional connotation, which fits well in a constitutional language attempting to qualify the implications of the interrelationships between the Member States in the EU legal order." Ibid.

[100] Even within the same regime such as the EAW, less trust may be needed for the verification, for example, of whether the issuing state complies with the requirement of double criminality than as regards the assessment of whether the prison conditions to which the surrendered person may be subjected are compatible with human dignity. Double criminality was at issue in Case C-717/18, *X*, the ECJ (Grand Chamber) judgment of 3 March 2020, n 90.

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Strengthening the Right to Personal Autonomy and Protection of Vulnerable Adults: from Human Rights to Domestic and European legislation on Voluntary Measures

Katja Karjalainen

Abstract This chapter analyzes the formation of domestic law and European law from the perspective of voluntary measures and the representation of persons whose personal faculties are impaired or insufficient. It assesses the instruments of the Council of Europe (CoE), especially Recommendation No (1999)4 and Recommendation No (2009)11, and Article 12 of the Convention on the Rights of Persons with Disabilities (UNCRPD). It also looks at domestic solutions and the way in which they reflect goals and objectives set at the international level. The Finnish Act on Continuing Powers of Attorney (2007) and the British Columbian Representation Agreement Act (2000) are used as illustrative case studies on how endorsing human rights can take different forms. The comparative notions employed in this chapter concern the question of who is able to carry out a voluntary measure and, thus, of how jurisdictions address impairment in existing decision-making capacity, which is one of the most intriguing questions relating to voluntary measures following the conclusion of the UNCRPD. Furthermore, the chapter notes the possibility of the European Union (EU) implementing measures in the area of law dealing with the

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protection of vulnerable adults and, in particular, in relation to voluntary measures. In this context, the chapter highlights the intertwined work of different international actors in the formation of laws.

1 Introduction

One of the most important, and the most difficult, of the issues involved in adult protection matters is how to strike a balance between the right to personal autonomy, self-determination and protection. Domestic guardianship regimes based on Roman law have traditionally emphasized protection, especially the protection of family property.[1] Safeguarding the interest or the right to personal autonomy of the vulnerable adult himself or herself had been for many years a secondary goal. Adult protection was based on involuntary measures put in place by either a court or an authority.[2] Even today, legal systems take very different approaches from each other to promoting the personal autonomy and self-determination of adults who do not have full decision-making capacity—which is to say that as a result of an impairment or insufficiency in their personal faculties, they can no longer fully protect their interests. Nonetheless, we can observe a major paradigm shift—a changing mentality towards perceiving persons with impairments in decision-making capacity as actors and recognized members of society instead of as objects of protection. Many jurisdictions have renewed guardianship regimes with the aim of respecting as far as possible vulnerable individuals' own personal autonomy and interests as far as possible, taking into account their individual circumstances.[3]

Domestic lawmakers have started to promote voluntary measures as a primary means of protecting vulnerable adults. They refer to measures put in place by individuals themselves with the purpose of ensuring the exercise of their own legal capacity, notwithstanding existing or future impairments of their own capacities.[4] Voluntary measures offer an essential means of supporting capacity in the area of law concerning the protection of adults whose decision-making capacity has diminished as they contribute to protecting individuals' personal autonomy and right to

[1] See, e.g., Rheinstein and Stoljar (1973).

[2] Explanatory memorandum of Recommendation (99)4 of the Committee of Ministers to member states on principles concerning the legal protection of incapable adults, adopted 23 February 1999, para. 40.

[3] See, e.g., Majstorovic (2011), p. 172. Ageing societies also seek to promote the use of advance planning tools as emphasizing the agency of the vulnerable person and reserving a role for that person and his or her next of kin is cheaper than using traditional guardianship models. See, e.g., Explanatory memorandum of Recommendation CM/Rec(2009)11 of the Committee of Ministers to member states on principles concerning continuing powers of attorney and advance directives for incapacity, adopted 9 December 2009, para. 11. See also government proposal HE 52/2006 p. 9.

[4] See Explanatory memorandum of Recommendation Rec(99)4 of the Committee of Ministers to member states on principles concerning the legal protection of incapable adults, adopted 23 February 1999, para. 33.

self-determination: in other words, a person's ability to govern his or her life choices. Depending on the jurisdiction involved, these voluntary measures are referred to as, inter alia, private mandates, continuing powers of attorney (in Finnish *edunvalvontavaltuutus*, and in Swedish *framtidsfulmakt)*, springing powers of attorney and advance directives.[5]

This chapter deals with domestic and European laws in relation to voluntary measures. It provides viewpoint on the interactions taking place simultaneously between actors operation on the international, regional, and domestic levels to improve rights of vulnerable adults. Involuntary measures as well as advance directives covering health care wishes or representation in health care matters are excluded from the scope of the chapter, along with various other issues.[6] The chapter starts with an analysis of Recommendation No (1999)4 on principles concerning the legal protection of incapable adults, of Recommendation CM/Rec(2009)11 on principles concerning continuing powers of attorney and advance directives for incapacity and of Article 12 of the UN Convention on the Rights of Persons with Disabilities (UNCRPD). The chapter references domestic solutions and how they reflect goals and objectives being established at the international level. The Finnish Act on Continuing Powers of Attorney[7] and the British Columbian Representation Agreement Act[8] are used as illustrative examples on how endorsing human rights can take different forms. Comparative notions relating to these two legal systems focus on the question of how jurisdictions address an existing impairment of an adult's decision-making capacity. The final part of the chapter offers *de lege ferenda* analysis concerning the role of the EU. In principle, the EU is bound by similar fundamental and human rights obligations as domestic legal systems that require supportive autonomy-orientated decision-making mechanisms. The EU has acceded to the UNCRPD,[9] and the Charter of Fundamental Rights reflects the rights laid down in the European Convention on Human Rights (ECHR).[10] However, the EU

[5] Voluntary measures are determined as follows in the review of CM/Rec(2009)11: powers of attorney, advance directives, representation agreements, supported decision-making arrangements, co-decision-making arrangements, advocacy arrangements where the advocate is chosen by the person represented and all other measures established by people to be supported by such measures themselves, as contrasted with involuntary measures imposed by a court, tribunal, authority or other mechanisms, including by operation of law, rather than by the people subject to such measures themselves. See Ward (2017), p. 12.

[6] In some jurisdictions health care representation and wishes are included in the CPAs. However, they are also often dealt with under different instruments as is the case in principle in Finland.

[7] *Laki edunvalvontavaltuutuksesta* 648/2017.

[8] Representation Agreement Act, RSBC 1996, c 405.

[9] Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2009] OJ L23/35.

[10] Article 7 (Respect for private and family life). It is also worth noting that in accordance with the Charter the EU recognizes and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life (Article 25). The EU recognizes and respects the right of persons with disabilities to benefit from measures designed to ensure their

can only act to the extent that its competence allows it to do so, meaning that in principle EU actions in this area are limited to the cross-border protection of adults.

2 Vulnerable Adults as Fully Recognized Members of Society

Human rights have had an impact on, among other things, what can and cannot be accepted in the field of family law. Article 8 of the ECHR, which deals with the protection of family and private life, has had an important impact in this regard.[11] The development of domestic guardianship regimes and voluntary measures is also connected to the judgments handed down by the European Court of Human Rights (ECtHR) concerning Article 8 of the Convention.[12] However, they have, more importantly, been influenced by other actions taken by the CoE to harmonize family law and promote the human rights of vulnerable adults.[13] CoE Recommendation No (1999)4 and CM/Rec(2009)11 have had a key impact in this regard.[14] For instance, in the Nordic states, Recommendation No (1999)4 provided an impetus for acts on continuing powers of attorney.[15] Recommendation CM/Rec (2009)11 was drafted to give member states guidance on legal reform, allowing provisions to be made for future incapacity.[16] It has also contributed to creating

independence, social and occupational integration and participation in the life of the community (Article 26).

[11] For example, in relation to the status/situation of children born out of wedlock, unmarried fathers and same-sex couples. See European Court of Human Rights (ECtHR), *Johnson and others v. Ireland*, 18 December 1986, no. 9697/82; *Keegan v. Ireland*, 26 May 1994, no. 16969/90; *Oliari and others. v. Italy,* 21 July 2010, nos. 18766/11 and 36030/11.

[12] In respect of the ECtHR's case law, see, e.g., *Shtukaturov v Russia*, 27 March 2008, no. 44009/05; *Berková v Slovakia*, 24 March 2009, no. 67149/01; *Sýkora v Czech Republic*, 22 November 2012, no. 23419/07; *Ivinovic v Croatia*, 18 September 2014, no. 13006/13.

[13] In addition to the ECHR in this context the 1997 Convention on Human Rights and Biomedicine (Oviedo Convention) and its additional protocols should also be noted. Its various provisions are relevant in this context, but particular attention should be paid to Article 9 of the Oviedo Convention, which stipulates that 'the previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention, in a state to express his or her wishes shall be taken into account'.

[14] See also Committee of Ministers of the Council of Europe, Recommendation Rec(2006)5 on the Council of Europe Action Plan to promote the rights and full participation of people with disabilities in society: improving the quality of life of people with disabilities in Europe 2006–2015, 5 April 2006; Recommendation CM/Rec(2014)2 on the promotion of human rights of older persons, 19 February 2014.

[15] See, e.g., government proposal HE 52/2006 pp. 5–7; Välimäki (2013), p. 227.

[16] Explanatory memorandum of Recommendation CM/Rec(2009)11 of the Committee of Ministers of the Council of Europe to member states on principles concerning continuing powers of attorney and advance directives for incapacity, 9 December 2009, paras. 13, 44.

interest in the development of voluntary measures and stimulating consideration of related issues.[17]

The development that has taken place in relation to adult protection matters has been increasingly linked to the UNCRPD as a result of long-term grassroots activities on the part of disability organizations. This provides a good example of how civil society activism offers a means for placing individual rights on the agenda of justice and contributing to content and understanding these rights.[18] In the context of the UNCRPD, the International Disability Caucus has ensured a move away from a medical and/or charitable concept of disability towards a rights-based framework marked by principles of equality and non-discrimination.[19] This group's contribution to the drafting process in respect of the UNCRPD was important from the perspective of shifting away from involuntary measures towards voluntary measures.

2.1 Recommendations (1999)4 and (2009)11 of the Council of Europe

The protection of vulnerable adults as a legal field was underdeveloped in a number of member states of the CoE still in the late twentieth century.[20] The CoE first addressed the issue of adult protection in discussions at the Third European Conference on Family Law held in Cadiz, Spain, in 1995. The conference requested the CoE to invite a group of specialists to examine the desirability of drafting a European legal instrument dealing with the matter in order to guarantee the integrity and rights of vulnerable adults. The group's work resulted in Recommendation No (1999)4, and it also considered it necessary to draft an additional instrument in order to provide guidance for member states on law reform and to lay down provisions on

[17] Ward (2017), p. 14.

[18] See, about process leading to the UNCRPD, Quinn (2009), p. 92. On the participation of disability groups, see, e.g., Bell (2017); Sieh and McGregor (2017), pp. 48–49.

[19] See European Union Agency for Fundamental Rights (FRA) (2013), p. 8.

[20] See Explanatory memorandum of Recommendation CM/Rec(2009)11 of the Committee of Ministers of the Council of Europe to member states on principles concerning continuing powers of attorney and advance directives for incapacity, 9 December 2009, para. 10. To illustrate the matter, for example, in Finland, the old guardianship law was in force until 1999. In principle, it was based on the ward's incompetency. However, important amendments were made in 1983. The declaration of incompetency had to be based on the interest of the ward. Furthermore, the declaration of incompetency was no longer based on diagnostic listing (*numerus clausus*), and it was made possible to terminate the declaration of incompetency/guardianship. See government proposal HE 146/1998 vp., pp. 18, 35–36, *Oikeusministeriön lainvalmisteluosaston julkaisu* 9/1982, pp. 7–9, 28, and Tornberg (2012), pp. 166–173.

voluntary measures.[21] Hence, the work also eventually led to the adoption of Recommendation CM/Rec (2009)11.

Recommendation (1999)4 applies to 'adults who, by reason of an impairment or insufficiency of their personal faculties, are incapable of making, in an autonomous way, decisions concerning any or all of their personal or economic affairs, or understanding, expressing or acting upon such decisions, and who consequently cannot protect their interests'. The Recommendation's core aim is to ensure that involuntary measures to protect a vulnerable adult must always take second place. They can only be used if the adult cannot be supported in any other way, i.e. by means of voluntary measures or informal measures (support provided by next of kin). The Recommendation encourages member states to consider the need to provide for, and regulate, legal arrangements that a person can take to provide for any subsequent incapacity (principle 2(7)). The explanatory memorandum of the Recommendation makes a reference, in this context, to legislation on continuing powers of attorney and advance directives.[22]

It is important to note that the Recommendation puts the principles of subsidiarity, necessity and proportionality at the heart of every adult protection matter. It recommends that decisions made in adult protection matters should be proportionate and necessary. In deciding whether a legal measure is necessary, any less formal arrangements that might be employed and any assistance that might be provided by family members, by public authorities or by other means must be noted (principle of subsidiarity). No measure of protection should be established unless it is necessary, taking into account the circumstances of any case (principle of necessity). The principle of proportionality requires that where a measure of protection is necessary, it should be proportional to the degree of the capacity of the person concerned and tailored to the individual circumstances of the case. The measure should restrict rights and freedoms of the person concerned by the minimum that is consistent with achieving the purpose of the intervention.[23]

The Recommendation CM/Rec(2009)11 builds upon the principles contained in Recommendation No (1999)4. However, it adopts a more straightforward attitude in promoting personal autonomy as it explicitly lays down the principle of self-determination and recommends that governments of member states promote self-determination for capable adults by introducing legislation on continuing powers of attorney and advance directives. The promotion of self-determination under the Recommendation means that states should (1) promote self-determination for capable adults in the event of their future incapacity, by means of continuing powers of attorney and advance directives, and (2) consider giving those methods priority over

[21] Explanatory memorandum of Recommendation CM/Rec(2009)11 of the Committee of Ministers of the Council of Europe to member states on principles concerning continuing powers of attorney and advance directives for incapacity, 9 December 2009, paras. 1, 13.

[22] Explanatory memorandum of Recommendation Rec(99)4 of the Committee of Ministers of the Council of Europe to member states on principles concerning the legal protection of incapable adults, adopted 23 February 1999, paras 33, 38–40.

[23] ibid.

other measures of protection in accordance with the principles of self-determination and subsidiarity.[24] The Recommendation contains guidance for states concerning matters such as the content of voluntary measures—in the form of continuing powers of attorney (CPAs) and advance directives—and the appointment of attorneys, the form of such documents, and their revocation, entry into force, certification, registration and notification, and supervision.[25]

The European Committee on Legal Co-operation working under the CoE decided in 2014 to review the implementation of Recommendation CM/Rec (2009)11. The review, published in 2017, notes that CPAs in respect of both economic and financial matters as well as health, welfare and other personal matters are available in 16 member states of the CoE. Domestic solutions vary, meaning that, for example, the material scopes of measures vary significantly between different jurisdictions. In some member states, CPAs can only cover financial matters, and in others, all or some personal matters can also be covered by voluntary measures. By way of illustration, Austria and the Netherlands, for example, reported no exclusions from the material scope of voluntary measures.[26] In Finland, consent to marriage or adoption, acknowledgement of paternity, making and revocation of a will, and representing the grantor in other matters of a comparably personal and individual nature are excluded from the scope of voluntary measures (section 2 of the Act on Continuing Powers of Attorney).

The two Recommendations do not directly address the issue of who is capable of giving voluntary measures—that is, what kind of decision-making capacity the grantor must have when appointing a representative and specifying requirements or providing guidance as to matters to be handled by him or her. Most importantly, the Recommendations do not directly address the question on whether a person has this right despite an existing impairment or insufficiency of his or her decision-making capacity. This is one of the core questions when contemplating how and to what extent voluntary measures promote personal autonomy and the right to self-determination—and can contribute to recognizing vulnerable adults as full members of society. The lack of reference to this matter may be due to the fact that, often and traditionally, voluntary measures are considered to be instruments used in old age, and ageing people have at least theoretically had the chance to make advance preparation for potential future challenges concerning their decision-making capacity.[27] One may also argue that the guiding principles of the Recommendations implicitly include the idea of a wide and flexible personal scope of voluntary

[24] Principle 1 appendix to recommendation CM/Rec(2009)11 of the Committee of Ministers of the Council of Europe to member states on principles concerning continuing powers of attorney and advance directives for incapacity, 9 December 2009.

[25] ibid, Principles parts II and III.

[26] Ward (2017), pp. 20–21, 31–32.

[27] See, e.g., Pritchard-Jones (2019); Public Health Agency of Canada, A Dementia Strategy for Canada, June 2019, p. 36.

measures.[28] The question of personal scope later came to the fore, however, particularly in the context of the UNCRPD due to its inherently wide personal scope.

2.2 *UN Convention on the Rights of the Persons with Disabilities*

The UNCPRD seeks to facilitate the equal enjoyment of human rights—equality of opportunities—by removing hindrances and obstacles to participation (Article 3). The Convention is a significant move away from a formal model of equality towards a substantive model and seeks to support the agency of individuals with disabilities in all areas of life.[29] The Convention enshrines the concept that the core element of disability lies in the dynamics between impairment and the environment—impairment or insufficiency constitutes a hindrance that affects interaction and impedes participation in society.[30] As specified in Article 1(2), the Convention applies to 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.[31]

The replacement of intrusive involuntary guardianship measures with less drastic measures is an important element in the removal of barriers and the recognition of vulnerable adults as full members of society.[32] Article 12(2) of the UNCRPD requires states parties to recognize that people with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. Article 12(3) covers the right to autonomy and self-determination in decision-making by reference to supported decision-making, meaning that a person with disabilities is to decide for himself or

[28] See European Union Agency for Fundamental Rights (FRA) (2013), p. 19.

[29] See, e.g., Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018) on equality and non-discrimination (CRPD/C/GC/6), adopted on 9 March 2018, paras. 10–11. See also Seoane (2011), p. 23.

[30] See, e.g., Karjalainen and Ylhäinen (2021), pp. 9–10.

[31] The definition therefore covers a wide range of insufficiencies and impairments of personal capacity notwithstanding the fact that they are caused by old age or are congenital, for example. However, as noted in the legal literature, the definition is not as exhaustive as it ought to be. Ward refers to 'discrimination within anti-discrimination' as 'people with short-term mental and intellectual impairments may well need the protections of the Convention. Also marginalised are people whose cognitive impairments are disabling even when all barriers are removed'. Ward (2020), p. 15.

[32] The Committee on the Rights of the Persons with Disabilities states that Articles 5 and 12 are fundamentally connected because equality before the law must include the enjoyment of legal capacity by all persons with disabilities on an equal basis with others (Article 3). Discrimination through denial of legal capacity may be present in different ways, including status-based, functional, and outcome-based systems. Denial of decision-making on the basis of disability through any of these systems is discriminatory. See Committee on the Rights of Persons with Disabilities General Comment No. 6 (2018) on equality and non-discrimination, CRPD/C/GC/6, adopted on 9 March 2018, para. 47.

herself and is entitled to receive sufficient support when making those decisions. An adult has the right to be supported and protected flexibly, depending on what his or her own will and preferences are or may be assumed to be (Article 12(4)). Hence, the legal system must provide an appropriate assessment limited to what types of support a vulnerable adult needs in order to be able to exercise his or her legal capacity—to govern his or her affairs and life choices.[33] On the one hand, this requires to step-by-step approach to protection. The level of protection must be determined on the basis of individual needs of a vulnerable adult.[34] On the other hand, the emphasis is intended to be on the best interpretation of the will and preferences of the vulnerable adult.[35] This refers to the vulnerable adult's protection and representation based on their independent wishes or on what is believed to be their own wishes. It differs from the more traditional 'best interests' concept, in which such interests reflect what others (the representatives of the adult in question) consider to be in their best interest.[36]

Different opinions exist among legal and disability experts as to how far-reaching the requirement to replace intrusive measures with less drastic measures is. This is illustrated by the discussion on the content of Article 12(3) among stakeholders and public authorities. Advocates of the rights of persons with disabilities argue strongly that Article 12 should be read as to wholly prevent traditional guardianship regimes and especially measures leading to any kind of deprivation of legal capacity.[37] Legal experts and state actors take a different standpoint, noting that it would be practically impossible for all those who fall within the scope of the Convention to benefit from a system in which only supported decision-making is possible as they perhaps do not have sufficient decision-making capacity nor have ever had any decision-making capacity.[38]

[33] See, e.g., Arstein-Kerlake (2017), pp. 77–78.

[34] E.g. the recently adopted Austrian legislation illustrates the approach. See Federal Ministry of Constitutional Affairs Austria, pp. 6–9.

[35] Committee on the Rights of Persons with Disabilities General Comment No. 6 (2018) on equality and non-discrimination CRPD/C/GC/6, adopted on 9 March 2018, para. 49.

[36] Arstein-Kerlake (2017), pp. 73–74. However, there is an inherent difficulty built inside the 'will and preferences of an adult' as the following example illustrates. In situations in which a person has dementia, their will and preferences may diverge completely from their will and preferences from the time before they had dementia. Which should be followed in that situation? See Pritchard-Jones (2019), p. 4.

[37] Committee of the Rights of the Persons with Disabilities, General Comment no. 1, 19 May 2014, paras 17, 26. In its concluding observations on states parties' initial reports, in relation to Article 12, the Committee on the Rights of Persons with Disabilities has repeatedly stated that states parties must 'review the laws allowing for guardianship and trusteeship, and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will and preferences'. See also Arstein-Kerlake (2017), pp. 70–71.

[38] Illustratively, Canada reserved the right to continue the use of substitute decision-making arrangements in appropriate circumstances and subject to their existing regulations and safeguards. See, e.g., James and Watts (2014), p. 13. However, in the context of Article 12, one must note that the term legal capacity is interpreted differently in different jurisdictions. In Nordic states, a person

In relation to the question of who may be a grantor of powers granted in the context of voluntary measures, a similar challenge arises as between personal autonomy and protection. How can people who were born with intellectual disabilities and never had full decision-making capacity benefit from measures that require at least some capacity to decide for oneself and understand the significance of those decisions? Are they automatically excluded from the personal scope of the voluntary measures? In view of the aims of the UNCRPD, this should not be the case. Voluntary measures must be available to an extent even if a person's decision-making capacity is only partial. The Committee on the Rights of the Persons with Disabilities states that all persons with disabilities have the right to engage in advance planning and should be given the opportunity to do so on an equal basis with others.[39] Domestic jurisdictions take their own approaches to the matter, as discussed in the following section.

3 Voluntary Measures in Domestic Legislation

Legal systems address the question of how to strike a balance between the right to personal autonomy and self-determination and the protection of vulnerable adults differently. This issue relates to all aspects of adult protection and voluntary measures, including the material scope of measures and the content of powers granted. It concerns the kinds of formal requirements private mandates have to fulfil, how and when they enter into force and how the use of powers is monitored and supervised.[40] As explained above, the analysis of domestic adult protection in this contribution deals in particular with the question of who has sufficient decision-making capacity to grant powers of representation by way of a voluntary measure. What decision-making capacity requirements does the grantor need to fulfil? Is full decision-making capacity required, or does something less suffice? These questions are addressed below by reference to the Finnish and the British Columbian approaches. The Finnish Act on Continuing Powers of Attorney is an obvious choice for an author in possession of Finnish legal education, but the British Columbian Representation Agreement Act is a less obvious one. However, it is a justified choice because it represents a unique bottom-up legislative approach to domestic adult protection as it has been strongly influenced by local disability activism. It is also internationally regarded as a model example of good policy on supported decision-making and

cannot lose his or her legal personality, that is, his or her capacity to have rights and obligations as a natural person. This is not the case in some other jurisdictions, which influences the way in which legal capacity is interpreted and understood under Article 12.

[39] Convention on the Rights of Person with Disabilities, General Comment No. 1 (2014), para 17.

[40] See, e.g., Ward (2017), pp. 35–43.

promoted by the UNCRPD—despite the fact that it was drafted prior to the advent of the UNCRPD.[41]

3.1 The Finnish Approach

The Act on Continuing Powers of Attorney entered into force in Finland in 2007 and is intended both to promote the individual's will and autonomy and to reduce the burden on the general guardianship system in an ageing society.[42] It aims to allow a person to organize his or her matters in advance in case he or she later becomes incapable to handle them due to illness, mental disability or other similar cause.[43]

Under the Act, a CPA is a private-law mandate in terms of its basic infrastructure, but its purpose and legal effects are essentially the same as those granted under the Guardianship Services Act.[44] The granted powers may relate to the representation of the grantor in relation to financial or personal matters or both. A CPA may provide for the day-to-day management of monetary affairs, the sale of a property under certain conditions or the provision of a medical authorization (section 2). In principle, the granted powers cannot extend beyond the powers of a guardian under the Guardianship Services Act.[45] This means, inter alia, that in relation to personal matters, representation is governed by the same principles as under the Guardianship Services Act (section 29(2)). The decision is made by the grantor if he or she is capable of understanding the content of the decision at the moment the decision is made even if the mandate covers representation in relation to personal matters.[46]

The Act on Continuing Powers of Attorney does not specify in detail the competencies a grantor can give to a representative. They may vary depending on the grantor's will, need and decision-making capacity. The capacity to grant a CPA is directly connected to the content of the particular instrument in question. Under section 5 of the Act, a person of at least 18 years of age can give a CPA if he or she is capable of understanding its meaning. Thus, the grantor must be able to understand its significance at the moment the powers are granted (i.e., when he or she signs the document). This requirement is to be interpreted in accordance with the general rule set out in the Contracts Act.[47] Hence, an adult only needs to understand those matters that are covered under the intended CPA. He or she does not need full decision-making capacity. For instance, an adult may be able to stipulate that a representative can handle his or her daily financial matters, but he or she cannot give power to sell a

[41] See, e.g., United Nations (2007), pp. 89–90, and Kerzner (2017), p. 111.

[42] See government proposal HE 52/2006, pp. 8–9,14–15.

[43] Government proposal HE 52/2006, pp. 11–12.

[44] *Laki holhoustoimesta* 1.4.1999/442.

[45] ibid, pp. 11, 19–20.

[46] See, e.g., Antila (2007), pp. 17–18.

[47] See section 31 of the Act. *Laki varallisuusoikeudellisista oikeustoimista* (228/1929).

property. In a similar vein a guardianship decision covering only financial matters does not impede an adult of granting powers under a CPA in relation to personal matters if the adult at the moment of granting powers understands the significance of the powers he or she is about to grant. Furthermore, an adult may still be capable of granting powers under a CPA even if his or her existing capacity is such that it fulfils the conditions for the authorization of a power of attorney laid down in the Act (section 24(1)(3). Such authorization can be sought from the Digital and Population Services Agency immediately after the CPA has been signed by the grantor.[48]

The approach adopted under the Finnish Act is flexible and in principle human-rights friendly as it is based on the grantor's de facto decision-making capacity to understand the exact meaning of the powers he or she is granting. It protects the right to personal autonomy and self-determination of those whose existing decision-making capacity is only partial and seems to be in line with the requirements set in the UNCRPD and implicitly in the CoE's Recommendations. However, the approach represented by the Act is not based directly on the idea of favoring capacity and step-by-step approach to protection. This becomes clear when one compares the Finnish model with the British Columbian Representation Agreement.

3.2 The British Columbian Approach

In the 1990s, a new wave of legislation began to emerge in Canada in response to concerns expressed by families and carers of people with intellectual and developmental disabilities and by health and social care professionals working with those people.[49] In British Columbia, the need for new legislation stemmed from the fact that the Power of Attorney Act did not provide sufficient safeguards in relation to the impairment of decision-making capacity. Furthermore, the traditional committeeship (guardianship) model was not considered to strike a sufficient balance 'between the individual's rights to autonomy and self-determination against the state's duty to protect its citizens'.[50] Consequently, the Power of Attorney Act[51] was amended to include rules on enduring powers of attorney (EPAs). This was, however, regarded as insufficient from the perspective of persons with an existing impairment of decision-making capacity as the Act sets relatively high requirements with regard to an individual's capacity.[52] The problem was addressed by means of special

[48] See, e.g., Mäki-Petäjä-Leinonen (2013), pp. 174–175.

[49] See, e.g., Donnelly (2019), p. 4.

[50] See A Comparative Analysis of Adult Guardianship Laws in BC, New Zealand and Ontario CCELS Report No. 4 BCLI Report No. 46 October 2006 p. 12. See also James and Watts (2014), p. 17.

[51] Power of Attorney Act, RSBC 1996, c 370.

[52] BCLI Report No. 46 October 2006 pp. 7–8.

legislation, in the form of the Representation Agreement Act,[53] which entered into force in 2000. The Act was a result of the work of local disability activists. The intention was to avoid guardianship through the use of personal planning tools and to seek an empowering, normalizing tool that would enable adults with challenges to make their own decisions to the greatest extent possible.[54]

Acquiring a full understanding of the meaning of a representation agreement (RA) calls for brief remarks on EPAs. Division 2 of the Power of Attorney Act[55] contains provisions on making an EPA (section 12). It is important to note that the provisions on EPAs are based on the presumption of capacity. This means that an adult (an individual 19 years or older) is presumed to be making decisions about his or her financial affairs and to understand the nature and consequences of making, changing or revoking an EPA. An adult may make an EPA unless incapable of understanding its nature and consequences. Section 12 lays down a test of incapability and contains, inter alia, examples of the bases on which an adult's capacity should be evaluated.[56] It states that an adult is incapable of understanding the nature and consequences of the proposed EPA if the adult cannot understand all of the following: (a) the property the adult has and its approximate value; (b) the obligations the adult owes to his or her dependants; (c) the powers given in the EPA;[57] (d) that unless the attorney manages the adult's business and property prudently, their value may decline; (e) that the attorney might misuse the attorney's authority; (f) that the adult may, if capable, revoke the enduring power of attorney; and (g) any other prescribed matter.

Unlike an EPA, an RA is based on the presumption of capability. Until the contrary is demonstrated, every adult is presumed to be capable of (a) making, changing or revoking an RA and (b) making decisions about personal care, health care and legal matters and about the routine management of his or her financial affairs. An individual adult's way of communicating with others does not offer grounds for deciding that he or she is incapable of understanding (section 3). The incapability test contained in the RA is twofold. The requirements set in relation to an adult's decision-making capacity depend on whether the RA only covers the standard provisions set out in its section 7 or whether it also contains the non-standard provisions set out in section 9. In accordance with section 8, an adult may make an RA on the basis of section 7 even if he or she is incapable of concluding a contract; managing his or her health care, personal care and legal matters; or dealing with the routine management of his or her financial affairs. In deciding whether an adult is incapable of making an RA consisting of one or more of

[53] See https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96405_01.

[54] ibid.

[55] See https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/96370_01.

[56] On the common law test of incapability, see, e.g., Kerzner (2017), pp. 112–113.

[57] See section 12(2)(c): 'the adult's attorney will be able to do on the adult's behalf anything in respect of the adult's financial affairs that the adult could do if capable, except make a will, subject to the conditions and restrictions set out in the enduring power of attorney'.

the standard provisions, or of changing or revoking any of those provisions, all relevant factors must be considered.[58] Section 10 sets out a test of incapability for non-standard representation agreements. An adult may authorize a representative to do any or all of the things referred to in section 9 unless he or she is incapable of understanding the nature and consequences of the proposed agreement.[59]

It is noteworthy that Article 8 of the Representation Agreement Act turns the idea of capacity upside down. The British Columbian standard RA is in principle based on a similar premise as the Finnish CPA, which relates to an adult's understanding of the specific requirements and powers imposed and conferred on the grantee. However, an RA favours capacity and gives it high importance. Its specific provisions are expressly designed to support capacity. Thus, the way in which capacity is understood and supported in an RA does not fully reflect the approach taken in Finnish CPAs. To conclude, one can argue in principle that the approach taken in British Columbian RAs reflects the requirements laid down in the UNCRPD better than the Finnish approach. However, whether this holds true in practice is another matter. As demonstrated above it seems that also the Finnish Act on Continuing Powers of Attorney can be interpreted in accordance with the requirements set out in the UNCRPD.

4 Protection of Vulnerable Adults in the European Union

The EU does not have the competence to regulate substantive elements of family law. For two overlapping reasons, there is, however, some space for adult protection within the EU legal system. On the one hand, the cross-border implications of the voluntary measures fall under Article 81 of the TFEU, which gives the EU the competence to develop juridical co-operation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of

[58] Section 8(2) provides a non-exhaustive list of the relevant factors: (a) whether the adult communicates a desire to have a representative make, help make, or stop making decisions; (b) whether the adult demonstrates choices and preferences and can express feelings of approval or disapproval of others; (c) whether the adult is aware that making the representation agreement or changing or revoking any of the provisions means that the representative may make, or stop making, decisions or choices that affect the adult; (d) whether the adult has a relationship with the representative that is characterized by trust.

[59] Disability advocates were in favour of an extremely low threshold of capacity necessary to make representation agreements. However, the legal and health care communities were reluctant to accept such a low, undefined and vague capacity threshold. This critique lessened following the conclusion of the UNCRPD, as it can be seen to mainstream supported decision-making in a new way and also as a result of a wider acceptance of the principles set out in Article 12 of the Convention. BCLI Report No. 46 October 2006, pp. 7, 15–17, James and Watts (2014), pp. 15–17.

decisions in extrajudicial cases.[60] On the other hand, the EU ought to guarantee equality of opportunities to all its citizens. Discrimination on the basis, inter alia, of disability is prohibited under EU law.[61] As EU citizens, vulnerable adults should be able to fully exercise their right of free movement.[62]

The EU's Disability Strategy 2021-2030 illustrates its commitment to endorsing the goals of the UNCRPD. The Strategy recognizes that legal barriers exist in particular for persons with intellectual disabilities, psychosocial disabilities or mental health problems whose legal capacity is often restricted or removed. The Strategy offers people with disabilities the right, inter alia, to protection from any form of discrimination, to equal opportunities and to access to justice. In order to improve people with disabilities' access to justice and legal protection, the European Commission aims to develop measures to encourage the EU member states to collect good practices on supported decision-making.[63] The Commission also intends to pave the way for the ratification of the 2000 Hague Convention on the International Protection of Adults[64] by all the member states and assist its member states to implement the Convention in line with the requirements set in the UNCRPD.[65]

In addition to the connections with the UNCPRD, EU actions in the field of adult protection are also substantively intertwined with the CoE's actions, despite the fact that as the CoE has focused on soft law, the harmonization of substantive law and potential EU actions in this field would concern private international law. As Adrian Ward states: '[t]he organisations should work hand in hand to achieve the best possible protection for all those involved'.[66] This is self-evident as private international law solutions in relation to adult protection must follow the same principles and approaches set up in the human rights framework, as any form of substantive law must do. This is not only important from the perspective of providing rights-friendly protection for vulnerable adults themselves but also essential for the whole field of

[60] Despite the fact that adult protection can be classified to belong to the scope of adult protection in many domestic legislations whether or not it family law in the meaning of Article 81(3) of the TFEU is another matter.

[61] Charter of Fundamental Rights of the European Union, Article 21(1). All EU member states are party to the UNCRPD and it is also the first human rights convention to which the EU itself has become a party.

[62] See, e.g., Karjalainen (2016), pp. 285–300.

[63] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Union of Equality: Strategy for the Rights of Persons with Disabilities 2021–2030 COM/2021/101 final, pp. 13–14.

[64] Convention of 13 January 2000 on the International Protection of Adults. The Convention entered into force on 1 January 2009.

[65] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Union of Equality: Strategy for the Rights of Persons with Disabilities 2021–2030 COM/2021/101 final, p. 14.

[66] See Adrian Ward in Vulnerable Adults in Europe. European added value of an EU legal instrument on the protection of vulnerable adults in European Parliamentary Research Service (2016), pp. 73–73.

private international law, which ought to aim to achieve justifiable and acceptable solutions.[67]

4.1 Cross-Border Adult Protection and the 2000 Hague Convention

The issue of EU adult protection measures came to the fore in 2009 when the European Parliament issued a session document with recommendations on the cross-border implications of the legal protection of adults, which notes, inter alia, that the legal protection of vulnerable adults must be a pillar of the right of free movement of persons. The provisions of the Hague 2000 Convention can help achieve the goal of establishing an area of justice, freedom and security, and in order to ensure the effectiveness of incapacity mandates in all the member states, a single form could be created at the Union level.[68] In a similar vein, a few years later, the European added value assessment concluded that uncertainty regarding adult protection should urgently be tackled at the EU level: 'Filling the legal gap would be enable affected adults to benefit from the EU's principle of free movement and residence instead of facing potential difficulties in protecting their interests abroad.'[69]

Despite the need to solve cross-border challenges related to the protection of vulnerable adults, the fact that the cross-border implications of adult protection are already regulated under the 2000 Hague Convention makes the question of whether and to what extent the EU should exercise its competence in that area a difficult one to answer. In the EU-related documents, the Convention is the primary way to protect vulnerable adults, but the EU has not excluded the possibility of laying down its own additional adult protection measures.[70] As noted above, the EU encourages its member states to ratify the Convention. It cannot accede to the Convention itself as it has acceded to the UNCRPD because the 2000 Hague Convention lacks a regional economic integration organization (REIO) clause that would allow an REIO to become a party to the Convention.[71]

[67] Karjalainen (2019), pp. 460–464.

[68] Session document with recommendations to the Commission on cross-border implications of the legal protection of adults (2008/2123(INI)), paras I, L and O.

[69] Vulnerable Adults in Europe. European added value of an EU legal instrument on the protection of vulnerable adults in European Parliamentary Research Service (2016), pp. 4, 16.

[70] Franzina and Long (2016).

[71] See Chapter VII of the Convention. Another interesting question is whether the EU should use its external competence and oblige member states to ratify or accede to the Convention.

The 2000 Hague Convention applies to the protection in international situations of adults who, by reason of an impairment or insufficiency of their personal faculties, are not in a position to protect their interests (Article 1(1)). The purpose of the Convention is to determine the state whose authorities have jurisdiction to take measures directed to the protection of the person or property of the adult, to determine which law is to be applied by such authorities in exercising their jurisdiction, to determine the law applicable to the representation of the adult, to provide for the recognition and enforcement of such measures of protection in all contracting states and to establish necessary co-operation between the authorities of the contracting states (Article 1(2)).

The Convention also addresses many of the thorniest cross-border problems relating to voluntary measures.[72] Article 15 covers the choice of applicable law that determines 'the existence, extent, modification and extinction of powers of representation granted by an adult, either under an agreement or by a unilateral act, to be exercised when such adult is not in a position to protect his or her interests'.[73] The article recognizes an adult's right to have his or her own previously expressed wishes respected in cross-border situations as it gives CPAs a cross-border effect by facilitating their circulation.[74] Hence, in principle, a CPA granted in one contracting state is similarly valid in another contracting state. However, practical problems arise as the Convention has not yet been ratified by a sufficient number of EU member states.[75] Furthermore, experience has highlighted difficulties in the cross-border use of CPAs.[76] It may be that a contracting party distrusts the validity of powers granted abroad.[77] Furthermore, it may be that not that many legal practitioners or grantors of powers consider choice of law clauses to be an essential part of voluntary measures.[78]

[72] CM/Rec (1999)4 contributed to the fact that the Hague Convention on International Protection of Adults includes choice-of-law clauses covering voluntary measures. Clive (2003), para. 2.

[73] Article 15 provides that the applicable law is that of the adult's habitual residence at the time of the agreement or act, unless the applicable law has been designated expressly in writing. The states whose laws may be designated are (a) a state of which the adult is a national; (b) the state of a former habitual residence of the adult; (c) a state in which property of the adult is located, with respect to that property.

[74] However, there are certain problems related to the choice of law rules of the Hague Convention. Karjalainen (2018/2019), pp. 449–451.

[75] To date it has been ratified by 13 states (including Finland), all of which are European states. See the status table of the Convention available at www.hcch.net (accessed 14 March 2022).

[76] Proposals submitted in relation to the evaluation of CM/Rec(2009)11 considered useful discussion with the Permanent Bureau of the Hague Conference on Private International Law about the possibility of a parallel review of the 2000 Hague Convention. Ward (2017), p. 15.

[77] Ruck Keene (2015), p. 162.

[78] Karjalainen (2016), p. 263. Similarly, for instance, in pre-nuptial agreements, the choice-of-law aspect is very seldom taken into consideration. Jäntera-Järeborg (1989), pp. 198–199.

4.2 The Role of Expert Organizations in Relation to EU Actions

In the light of the scope of this book, it is interesting to note that in recent years, expert organizations have actively provided information and ideas relating to the cross-border protection of vulnerable adults in the area of EU. Some of these ideas deal specifically with actions related to voluntary measures.[79]

In 2019, the European Law Institute (ELI) published a report on cross-border adult protection, which suggested that the EU consider funding projects entailing the creation of national registers of private mandates and ensuring the interconnection of these national registers. The report noted that registering private mandates in electronic registries would assist third parties—including financial, insurance and medical institutions—in verifying the authenticity of those mandates, as well as, in some cases, whether they had come into effect.[80] In 2012, the Society of Trust and Estate Practitioners (STEP) proposed an instrument called a European Power of Representation. STEP's view was that the creation of a form that could be easily understood and recognized throughout the EU would reduce many existing practical problems.[81] STEP noted that problems related to existing impairments in decision-making capacity that may impact the capacity to grant powers could be avoided by means of a regulation on a general power of attorney, which could be used both before and after a person—as a result of the impairment or insufficiency of his or her personal faculties—becomes unable to protect his or her interests.[82]

Both these suggestions have obvious practical benefits. ELI's suggestion that member states should be encouraged to create interconnected national registries is also in line and could be connected with the EU's recent digitalization endeavours in the area of justice.[83] STEP's idea concerning the European Power of Representation

[79] In addition to what is explained below the interest of expert organisations to contribute to the matter of adult protection in the area of EU is well illustrated by their active response to Call for an evidence for impact assessment "Civil judicial cooperation – EU-wide protection for vulnerable adults". By way of illustration, working groups of the European Law Institute and the European Association of Private International Law are drafted position papers for the call. I participated to the drafting of the latter. See, Civil judicial cooperation—EU-wide protection for vulnerable adults Call for evidence for an impact assessment—Ares(2021)7915787. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12965-Civil-judicial-cooperation-EU-wide-protection-forvulnerable-adults_en (accessed 14 March 2022).

[80] Report of the European Law Institute. The Protection of Adults in International Situation, 2020, p. 48.

[81] STEP is a global professional body comprising lawyers, accountants, trustees and other practitioners that help families plan for their futures. See www.step.org (accessed 14 March 2022).

[82] European Parliament: Directorate-General for Internal Policies, Policy Department C, Citizens' rights and constitutional affairs, 2012, p. 22.

[83] See Digitalization of Justice. https://ec.europa.eu/info/policies/justice-and-fundamental-rights/digitalisation-justice_en (accessed 14 March 2022), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the

would make it possible to further emphasize an adult's right to personal autonomy as a starting point for protection under private international law as it would show that within the EU, protection is primarily based on the authorization of self-stipulated granted powers rather than on official or judicial decisions. It would also make it possible to tackle the legal certainty and predictability challenges created by the differences between various national laws as the proposed instrument would facilitate the automatic circulation of evidence of the granted powers.[84] However, both these ideas face significant challenges. Creating functional registries even at the national level alone has proven problematic. The differences between the member states' substantive domestic laws also have an impact, given that different approaches may be taken towards such questions as when granted powers should be registered (if at all) and at what point in time they are to be regarded as having been granted and authorized.[85] When it comes to the proposed European Power of Representation, it is not entirely clear whether the EU has the competence to regulate the matter. Roughly speaking, it seems that the EU would have competence only if the regulation dealing with the matter amounted to a substantively empty instrument of private international law and the EU's rules were confined to formal requirements in relation to the instrument, whose content would be based on national law. For example, the decision-making capacity to grant powers and the extent of the representative's powers would be determined by member state laws.

It would be justifiable for a voluntary measure granted in one member state to be easily used in another. This primarily concerns functional choice of law rules. With regard to more material solutions—i.e. a European standard form for a power of representation or the creation of national registries—one must note that, despite the fact that such developments would certainly be beneficial, in addition to possible competence issues, it may be questioned whether the level of mutual trust required between the member states could be brought into existence to a sufficient extent to make such an instrument viable. On the one hand, there are major differences between the member states concerning registration and drafting policies and requirements relating to voluntary measures and family-law related documents in general that would certainly make it more difficult to find a common ground for a standard form or registration that would inevitably

Committee of the Regions. Digitalisation of justice in the European Union A toolbox of opportunities COM/2020/710 final.

[84] Furthermore, in a similar fashion to the Succession Regulation, a European instrument could also produce standardized forms for European citizens to use to draft private mandates. The Curry-Sumner report attached to the European Added Value Assessment contemplates that the Succession Regulation could serve as inspiration for any future European instrument in relation to vulnerable adults, because the problems encountered, for instance with respect to the circulation of documents, are similar in both fields. This would reduce legal costs and provide more efficiency in cross-border situations. See Curry-Sumner (2016), pp. 95–96; and Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107.

[85] See, e.g., Ward (2017), pp. 33–35.

require faith in the practices and policies of other member states. On the other hand, despite international instruments aimed at harmonizing minimum standards of adult protection, significant differences remain between the substantive laws of the various member states in respect of adult protection, personal autonomy and the self-determination of vulnerable adults.[86] These differences relate, inter alia, to the key issue touched upon in this contribution: what kind of decision-making capacity an adult must have in order to be able to grant powers by way of a voluntary measure?

5 Concluding Remarks

The analysis of the human rights framework and comparative notions on domestic legislation illustrate that voluntary measures find their way onto the legal agenda in a variety of ways. As elaborated in the chapter, in Europe, they have been endorsed especially through academic and legal expert collaboration. In Finland, for instance, the motivation behind the Act on Continuing Powers of Attorney was European ideas and development in the form of CoE Recommendation (1999)4, which for its part was born out of European expert collaboration. When it comes to possible future measures of the European union in protecting vulnerable adults it also seems that expert organizations have a keen interest in contributing to the matter. Internationally, on the other hand, disability organizations strongly influenced the conclusion of the UNCRPD. In a similar vein, the British Columbian Representation Agreement Act resulted from local disability activism.

Article 12 of the UNCRPD and the guiding principles of the two CoE Recommendations discussed above—subsidiarity, necessity and proportionality—are intertwined. The European standards are to be interpreted in the light of the UNCRPD and vice versa. This is illustrated by one of the most important questions to be tackled by domestic legislation in the near future and on which the UNCRPD, in particular, sheds light. Namely, voluntary measures ought also to be available to those whose existing decision-making capacity is impaired. However, this inclusive and flexible approach towards the personal scope of voluntary measures is also implicitly supported by the guiding principles laid down in the CoE Recommendations. Hence, in future, a flexible approach towards the protection of vulnerable adults ought to gain ground in the context of legislative reforms. This refers to step-by-step approach to protection explicitly illustrated by the British Columbian system. Furthermore, a flexible approach towards the capacity to grant continuing powers of attorney, as adopted in the Finnish Act on Continuing Powers of Attorney, implicitly promotes the same approach. The Finnish example, in fact, shows that flexible interpretation and a human-rights-friendly approach can contribute to broadening the personal scope of voluntary measures.

[86] Cf., e.g., Karjalainen (2016), p. 286; Kiss (2021).

In relation to the EU, questions related to voluntary measures are linked not only to personal autonomy, self-determination, non-discrimination and equality of opportunities—rights provided in the human rights instruments—but also to EU citizens' right of free movement. When it comes to voluntary measures, legal problems related to them may prevent the free movement of vulnerable adults. These challenges have been acknowledged at the EU level, as the body of reports and statements highlight. Due to limitations on the EU's competencies, the key issue concerns in principle the cross-border (private international law) aspects of voluntary measures. Studies produced by expert organizations have argued that better circulation of voluntary measures in Europe and the possibility of a European power of representation would support both equality of opportunities and the free movement of EU citizens.

In summary, one might think that ethically delicate questions related to family law and, in particular to adult protection, are intrinsically domestic in nature. This is not true as this chapter demonstrates. The development of voluntary measures is an example of the intertwined work of different international actors. Importantly, a vast array of different actors with different working methods have contributed and continue to contribute to the development of laws on international, European and domestic level when it comes to voluntary measures and supporting equality of opportunities and the right to personal autonomy of vulnerable adults.

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The Role of the ILA in the Restatement and Evolution of International and National Law Relating to Indigenous Peoples

Timo Koivurova, Federico Lenzerini, and Siegfried Wiessner

Abstract The main goal of this chapter is to explore the International Law Association's (ILA's) role in the restatement and ongoing evolution of Indigenous rights in international and national law. It first examines the way in which the main instrument for Indigenous peoples from a global viewpoint came into being and what its basic content amounts to. The chapter then assesses the role played by the ILA during the period of the first ILA Committee's (Committee on the Rights of Indigenous Peoples) mandate in restating and influencing the evolution of international law as it relates to Indigenous peoples. It also examines the contribution made by the second ILA Committee (Committee on the Implementation of the Rights of Indigenous Peoples of the International Law Association) in ascertaining a possible implementation gap between international standards in respect of Indigenous peoples and the reality of certain cases on the ground, as well as the development of best practices to overcome it. Thereafter, this chapter draws conclusions on the ILA's role in the evolutionary process of the law relating to Indigenous peoples.

Section 1 has been written by Timo Koivurova; Section 2 has been written by Federico Lenzerini; Sections 3 and 4 have been written by Siegfried Wiessner; Section 5 has been written by Timo Koivurova.

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1 Introduction

It has been argued many times that international law develops in a rather glacial manner, given that it emerges out of the legally relevant conduct of some 200 states, with widely varying views on international policy. Against this background, it seems quite astonishing that the rights of Indigenous peoples have evolved so rapidly in view of how slowly public international law normally develops. It was only from the beginning of the 1980s that Indigenous rights became an issue of concern to the United Nations in a more comprehensive manner, even if there had been prior work on the topic by the International Labour Organization (ILO).[1] This intense normative and institutional development within the UN culminated with the establishment in 2000 of the UN Permanent Forum on Indigenous Issues and the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007.[2]

The Declaration has already had an impact on many domestic legal systems. Most provisions of the UNDRIP aim to influence how states conduct themselves internally towards Indigenous peoples living in their traditional territories. Indigenous international law is hence inherently at the interface of international and national law, as most rules grant rights to Indigenous peoples vis-à-vis states that currently happen to have sovereignty over areas that are also the ancestral lands and waters of Indigenous peoples.

There have been many agents of change, effectuating the rise of Indigenous rights in international law. The work of international organizations representing Indigenous peoples, such as the Inuit Circumpolar Council, worldwide has been the single biggest driver for this change. These organizations individually, but, more importantly, working collectively, have been able to push for changes in the attitudes of states. A good example is the negotiation process for the Declaration, which, with the innovative arrangements within the UN, was able to accommodate direct negotiations between the representatives of states and Indigenous peoples.

Yet there have been many other drivers of change, with varying roles in the process. In this chapter, we will explore the contributions of the International Law Association (ILA) that we consider as one of the most important international non-governmental organizations. Through its Committee on the Rights of Indigenous Peoples, composed of 30 experts from around the world, the ILA undertook a six-year study of pertinent state practice and *opinio juris*, as well as relevant treaties and the UN Declaration on the Rights of Indigenous Peoples (2006–2012). The

[1] There have been two conventions on Indigenous rights adopted within ILO, albeit with different policy bases: Indigenous and Tribal Populations Convention, 1957 (No. 107), at <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107> accessed 11 March 2022 and Indigenous and Tribal Peoples Convention, 1989 (No. 169), at <www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169> accessed 11 March 2022.

[2] The declaration and related materials can be downloaded at <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> accessed 11 March 2022.

Committee arrived at an interim and a final report and Resolution No. 5/2012, which found collective rights of Indigenous peoples to their traditional lands and resources, their cultural heritage and wide-ranging autonomy. The further realization of these rights has been surveyed, particularly in case studies on land rights, by the successor ILA Committee on the Implementation of the Rights of Indigenous Peoples, with the adoption of the Final Report at the virtual biennial ILA conference, originally scheduled for Kyoto, on 13 December 2020.[3]

The main goal of this chapter is to explore what has been the role of ILA in the restatement and ongoing evolution of Indigenous rights in international and national law. We will first examine how the main instrument for Indigenous peoples from a global viewpoint came to be and what its basic content is. Then we will study and assess what role the ILA played during the first Committee in influencing the evolution of Indigenous international law. Important is also to examine what has been the contribution of the second Committee in ascertaining a possible implementation gap between international standards of Indigenous peoples and the reality of certain cases on the ground, as well as the development of best practices to overcome it. Thereafter, we will draw conclusions on the role of ILA in the evolutionary process of the law relating to Indigenous peoples, emphasizing the distinctive role of the resolutions of this organization in providing evidence for the existence of rules of international law under Article 38(1)(d) of the Statute of the International Court of Justice (ICJ).

2 The UNDRIP: Genesis, Contents and Significance

Twenty-two years is a period of time unusually long for negotiations finalized to the adoption of a declaration of principles by the UN General Assembly. While declarations of principles relate to "matters of major and lasting importance where maximum compliance [by UN member states] is expected",[4] and in some cases already reflect or become *fons et origo* of customary international law, their rules are actually of a non-binding character. One would therefore expect that negotiations would not take too long. However, as far as the UNDRIP is concerned, from the drafting of the first set of (seven) principles prepared by the UN Working Group on Indigenous Populations in 1985[5] to the adoption of the Declaration by the General

[3] ILA, Kyoto Conference (2020), Implementation of the Rights of Indigenous Peoples, Final Report, and ILA Resolution No. 3/2020, Committee on the Implementation of the Rights of Indigenous Peoples, both available at (or "downloadable from") <https://www.ila-hq.org/index.php/committees> accessed 11 March 2022 (scroll down to "Index of Current Committees" and follow "Implementation of the Rights of Indigenous Peoples (2006-2012)", then select "Documents").

[4] UN Economic and Social Council, 'Report of the Commission on Human Rights' 18th Session (19 March–14 April 1962) E/3616/Rev. l para 105.

[5] UN Doc E/CN.4/Sub.2/1985/22 (27 August 1985), Annex II.

Assembly on 13 September 2007,[6] exactly 22 years of intense and, for most of its provisions, controversial negotiations proved to be necessary. This was mainly due to the active involvement in the negotiations of representatives of Indigenous peoples, side-by-side with (and sometimes confronting) state representatives.

Indigenous negotiators never gave up with regard to the parts of the future declaration that they considered decisive for ensuring the appropriate protection of Indigenous peoples' rights. Notably significant, they never surrendered in conducting the so-called *battle of the "s"*, which "constituted a central site of discursive contest between state and Indigenous representatives".[7] Throughout the whole duration of the negotiations – from the draft adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1994[8] to the text approved by the Human Rights Council on 29 June 2006[9] to the adoption of the Declaration by the General Assembly—Indigenous peoples have always been referred to as people*s*, with the final "s", and, as such, are holders of the right to self-determination, expressed by Article 3 of the final text of the UNDRIP as the right by virtue of which Indigenous communities "freely determine their political status and freely pursue their economic, social and cultural development".

This provision is substantively counterbalanced by Article 46, para. 1, stating that "[n]othing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States". It was actually the inclusion of this particular paragraph that unlocked the impasse that had precluded the Declaration from being adopted for a number of years. However, the presence of this provision does not really prejudice the substance of the right of Indigenous peoples to self-determination, at least according to the way it is conceived by Indigenous peoples themselves. In fact, most Indigenous communities aspire to exercise it according to its "internal" dimension, i.e. within the state where they live, without claiming any right to political secession from the latter. The right to self-determination is intertwined with the right to autonomy, expressed by Article 4 as "autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions".

Another significant aspect addressed by the UNDRIP, which for reasons that are self-evident proved to be particularly controversial during the negotiations, is the one relating to land rights. In this respect, Article 25 of the approved text establishes that "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold

[6] A/RES/61/295.

[7] See Morgan (2016).

[8] Res 1994/45 of 26 August 1994.

[9] Res No. 1/2 of 29 June 2006.

their responsibilities to future generations in this regard". According to Article 26(1), they even have the "right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired".

However, even more than with respect to this provision, a particularly fervent debate went through virtually the entirety of the negotiations about the provision of the Declaration recognizing the right of Indigenous peoples to seek redress for their traditional lands taken or occupied by others against their will. Indigenous representatives have never accepted a solution different from the one establishing that the primary form of redress for this violation of their land rights had to be the restitution of the lands concerned and that alternative forms of reparation could only be considered when restitution would be objectively impossible. This led several state delegations to express their deep concern, especially in light of "the possible retroactive application of compensation".[10]

In any event, despite the many attempts reiterated by state representatives to weaken the content and scope of the provision in point, Indigenous representatives were able to bring it, substantially unmodified, to the finish line. Consistently, Article 28, para. 1, UNDRIP, reads as follows: "Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent."

It is especially notable that this rule, according to its definitive text, in consideration of the way its text is formulated, has remained of retrospective applicability, covering in principle also the instances of deprivation of Indigenous peoples' ancestral lands occurring in the past. It was especially due to this provision (and, exactly, its applicability *ex tunc*) that, for instance, the government of New Zealand decided to vote against the adoption of the Declaration, as its articles on redress and compensation, particularly Article 28, were considered "unworkable in New Zealand despite the unparalleled and extensive processes that exist under New Zealand law in this regard [...] the entire country would appear to fall within the scope of the article [...] It is impossible for the State in New Zealand to uphold a right to redress and provide compensation for value for the entire country."[11] In reality, a situation like the one envisaged by the delegate of New Zealand is very unlikely to happen in practice in the real world; in fact, in order for Article 28 UNDRIP to be enforceable, it is necessary that an Indigenous community continues to retain—today—the cultural connection with the land of which it was deprived in the past. Furthermore, while the first option contemplated by the provision in point is restitution, in many cases the practical feasibility of the latter may be hindered by the fact that, for different reasons, it has become materially

[10] See the position of the delegate of Sweden, available in UN Doc. E/CN.4/1997/102 (10 December 1996) para 273.

[11] See UNGA General Assembly official records, 61st session: 107th plenary meeting (13 September 2007) A/61/PV.107.

impossible or may conflict with the essential interests of the national community as a whole, also protected by international law. This is exactly the reason why Article 28 accepts that, depending on the specific circumstances of each situation, restitution may not be possible, and, when this happens, it may be replaced by "just, fair and equitable compensation". That said, as a matter of law, the retroactive applicability of Article 28 UNDRIP is beyond doubtful, as confirmed by the fact that, as noted below in this section, New Zealand and other states that had originally voted against the adoption of the UNDRIP decided, within a very short span of time, to reverse their position and endorse the Declaration.

The aspect of reparations, restitution and redress for the wrongs suffered by Indigenous peoples is a central one in the context of the UNDRIP, as demonstrated by the many relevant provisions included in its text, establishing a right to redress for, *inter alia*, actions perpetrated with the aim or having the effect of depriving the communities concerned of their integrity as distinct peoples, or of their cultural values or ethnic identities, for instances of forced assimilation or integration of such communities within the dominant society (Article 8, para. 2), "with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs" (Article 11, para. 2) or for the deprivation of their means of subsistence (Article 20, para. 2).[12]

As a whole, the UNDRIP defines and protects the rights of Indigenous peoples in a quite comprehensive and evolutionary manner. In addition to the provisions referred to in the previous lines, other articles attaining special significance and, therefore, worth mentioning are, among others, the following:

- Article 5 (according to which "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State")
- Article 8 (concerning the right of Indigenous peoples and individuals "not to be subjected to forced assimilation or destruction of their culture")
- Article 10 (right not to be forcibly removed from their lands or territories)
- Article 11 (right to practise and revitalize their cultural traditions and customs)
- Article 12 (right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; right to maintain, protect, and have access in privacy to their religious and cultural sites; right to the use and control of their ceremonial objects; right to the repatriation of their human remains)
- Article 13 (right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures)

[12] On this issue, see Lenzerini (2018), pp. 573–598.

- Article 14 (right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning)
- Article 16 (right to establish their own media in their own languages and to have access to all forms of non-Indigenous media without discrimination)
- Article 19 (right to be consulted by states, which should cooperate in good faith with them in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them)
- Article 24 (right to their traditional medicines and to maintain their health practices)
- Article 31 (right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions)
- Article 34 (right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and juridical systems or customs); and
- Article 40 ("right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights")

In terms of legal significance, the UNDRIP has gone much beyond an "ordinary" declaration of principles. As co-author of this contribution, Professor Siegfried Wiessner has commented that, with the UNDRIP, Indigenous peoples "have re-emerged empowered, with a strong voice looking forward to self-actualization as a group, steeped in their culture, but open to self-determined change, on their lands with which they share a strong, often spiritual bond. The success has not been on a straight upward trajectory; there have been ups and downs along the journey. That is why UNDRIP has been a milestone of re-empowerment."[13]

When the Declaration was adopted by the General Assembly in 2007, it received an affirmative vote from 143 states, a negative vote from only four countries—the United States, Canada, Australia and New Zealand—and 11 abstentions. Between 2009 and 2010, the four countries originally voting against, in addition to Colombia and Samoa (which in 2007 were among the abstaining states), officially endorsed the Declaration, affording it virtually universal support. Moreover, one of the very few states with significant populations of Indigenous peoples in their territories that so far have never expressed official support for the UNDRIP—Russia (which in 2007 was among the abstaining countries)—has argued that it already complies with the

[13] Siegfried Wiessner, 'Introduction, Methodology of Work, Background and Legal Status of UNDRIP', in ILA, The Hague Conference (2010), Rights of Indigenous Peoples, Interim Report, available at <http://www.ila-hq.org/index.php/committees> accessed 11 March 2022 (scroll down to "Index of Former Committees" and follow "Rights of Indigenous Peoples (2006-2012)", then select "Documents") 2. See also S. James Anaya and Siegfried Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment' *Jurist* (3 October 2007) <www.jurist.org/commentary/2007/10/un-declaration-on-rights-of-indigenous-2/> accessed 11 March 2022.

principles enshrined by the Declaration and that, therefore, there is no need to formally endorse it.[14]

Furthermore, the authoritative character of the UNDRIP has been affirmed by both domestic courts and international human rights bodies and other tribunals (including the Inter-American Court of Human Rights, the African Commission and Court on Human and Peoples' Rights, and the Caribbean Court of Justice),[15] producing a generally accepted *opinio juris*, which has brought its main principles to actually develop into rules of customary international law. These rules are, in particular, those establishing the right of Indigenous peoples to self-determination; their right to autonomy or self-government; their right to cultural identity and cultural heritage; their right to their traditional lands, territories and resources; as well as their right to reparation and redress for the wrongs they have suffered.[16]

3 The ILA Committee on the Rights of Indigenous Peoples (2006–2012)[17]

The International Law Association, at its 2006 Biennial Meeting in Toronto, established a Committee on the Rights of Indigenous Peoples. It was given the task of writing an authoritative commentary on Indigenous peoples' rights, including, as added later, the meaning of the 2007 UN Declaration. In its final composition, it featured no less than 30 expert members from all inhabited continents.[18] Its original chair was Professor S. James Anaya. In 2008, Professor Anaya was appointed UN Special Rapporteur on the Rights of Indigenous Peoples. He thus could no longer chair the Committee, and he asked Professor Siegfried Wiessner, with the agreement of the Committee members, to lead it.[19] At the 73rd ILA Biennial

[14] See Federica Prina and Alexandra Tomaselli, Case Study on 'Land and fishing rights of indigenous peoples in Russia. Main Findings', 2020, prepared for the ILA Committee on the Implementation of the Rights of Indigenous Peoples, available at <http://www.ila-hq.org/index.php/committees> accessed 11 March 2022 (scroll down to "Index of Current Committees" and follow "Implementation of the Rights of Indigenous Peoples (2006-2012)," then select "Documents") 2.

[15] See the discussion and references in Lenzerini (2019), pp. 51, 56–57 (notes 22–32).

[16] See International Law Association, Resolution No. 5/2012, 'Rights of Indigenous Peoples', see Appendix, *infra*.

[17] The following remarks on the work of the ILA Committee on the Rights of Indigenous Peoples draw heavily on the article by Wiessner (2013), pp. 1357–1368.

[18] For a list of all members, see <http://www.ila-hq.org/index.php/committees> accessed 11 March 2022 (scroll down to "Index of Former Committees" and follow "Rights of Indigenous Peoples (2006-2012)", then select "Members").

[19] ILA, Rio de Janeiro Conference (2008), Rights of Indigenous Peoples, First Report, available at <http://www.ila-hq.org/index.php/committees> accessed 11 March 2022 (scroll down to "Index of Former Committees" and follow "Rights of Indigenous Peoples (2006-2012)", then select "Documents") 3.

Meeting in Rio de Janeiro, Professor Wiessner was formally appointed chair, and the Committee established ten subcommittees dealing with distinct themes, such as the legal nature of the Declaration and its rights; the definition *vel non* of Indigenous peoples; the right to self-determination and autonomy; the rights to cultural identity, education and the media; the rights to traditional lands, including free, prior and informed consent; treaty rights; the right to development, to name a few.

The new Rapporteur of the Committee, co-author of this contribution, Professor Federico Lenzerini from the University of Siena, coordinated the process, integrating work done at an intersessional workshop at the European University Institute in Florence, Italy, and combined subcommittee reports in a 52-page interim report for the ILA's 74th Biennial Meeting in The Hague. After another intersessional meeting conducted at the University of Anchorage in Alaska in August 2011, at the invitation of Inuit Committee member Dalee Sambo Dorough, the final report of the Committee and a resolution for the ILA's 75th Biennial Meeting in Sofia was prepared. The final report supplemented the interim report of 2010. The package of both the interim and the final report, plus the resolution, were presented for discussion and adoption at the Open Session of the Committee on 28 August 2012. This session was open to all members of the ILA.

The session was chaired by Ralph Wilde (University College London) and was well attended. Upon the presentation of the report and resolution by the Chair and Rapporteur, interventions from the floor from among the Committee members present—Dalee Sambo Dorough, Mahulena Hofmann, Willem van Genugten, Rainer Hofmann, Ana Vrdolyak, Christina Binder and Katja Goecke—and comments and questions from non-Committee members of the ILA, all supportive and informative, the Chairman of the Session put the Committee's proposal to a vote. All ILA members voting in that room raised their hands emphatically in favour—save one formal abstention by a late arrival to the meeting, who did not feel knowledgeable enough about the subject to cast a substantive vote.

After this decision, the ILA Steering Committee put its finishing touches on the resolution, without changing the substance of the Committee's proposal. A question was asked as to why the resolution did not include a definition of the term "Indigenous peoples". The Committee Chair responded that the Committee as a whole, in particular its Indigenous members, was unwilling to present a formal definition as this was seen, inter alia, as another attempt at colonization. Still, in the final report, a section had been included to clarify the understanding of the term. Two essential elements of that multi-factorial description of Indigenous peoples were self-identification as such and Indigenous peoples' special, often spiritual relationship with their ancestral lands.[20] The Steering Committee was satisfied with this response.

[20] ILA, Sofia Conference (2012), Rights of Indigenous Peoples, Final Report, available at <www.ila-hq.org/index.php/committees> accessed 11 March 2022 (scroll down to "Index of Former Committees" and follow "Rights of Indigenous Peoples (2006-2012)," then select "Documents"), 2–3.

At the closing plenary session of 30 August 2012 in the Aula of the University of Sofia, the Chairman of the ILA Executive Council, The Rt Hon the Lord Mance, Justice of the United Kingdom Supreme Court, and Open Session Chairman Wilde introduced Resolution No. 5/2012. Dr. Wilde stated:

> This resolution represents the culmination of six years of very hard work on this important and cutting-edge topic. Its conclusions and recommendations are based on a wide-ranging and rigorous study of state practice in this area, as reflected in the Committee's two lengthy reports. The resolution and those reports are clearly destined to play a major role in influencing the understanding and development of international law in this field.

And then he commended the adoption of the Resolution—to the rousing applause of the audience. As with the prior resolutions, Lord Mance, after waiting for objections, which did not come, declared the resolution properly offered, seconded and passed.

This resolution of the ILA is historic. Not only does it recognize collective human rights;[21] it also specifies a number of rights that have become part and parcel of customary international law. These include the following:

(A) The right to *self-determination* to the extent it is recognized under international law.[22] Using the template of the distinction between external and internal self-determination,[23] the interim report, as integrated into the final report and resolution, made clear that Indigenous peoples would have a right to secede only if such a right, under any condition, were to be recognized by the international community with respect to any other people as well.[24] Indigenous peoples would have the same rights as other peoples in this respect, no less.[25]

(B) More content filled is the right to *autonomy*, the right to internal and local self-government, as laid down in Article 4 of the Declaration.[26] It includes, inter alia, the right of an Indigenous people to continue its structures of leadership and

[21] ILA Resolution No. 5/2012, Appendix, Conclusion No. 1.

[22] *Id*., Conclusion No. 4.

[23] Drawing on the Canadian Supreme Court's conceptualization in its advisory opinion on the status of Québec, "external" self-determination has been defined as the "right of peoples to freely determine their international status, including the option of political independence", while "internal" self-determination denotes the "right to determine freely their form of government and their individual participation in the processes of power" within a particular nation-state. Wiessner (1999), p. 57, 116. The ILA Committee on the Implementation of the Rights of Indigenous Peoples also refers to the "internal dimension" of the right to self-determination in its Final Report, 2020, *n* 5, 4.

[24] In the extra-colonial context, legal affirmations of such a right have been few and far between. The Canadian Supreme Court in its advisory opinion on the status of Québec referred to a potential right of all peoples to "external self-determination [. . .] where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development". *Re: Secession of Quebec,* [1998] 2 S.C.R. 217, Supreme Court of Canada, 37 *ILM* 1340, 1373, para. 138.

[25] Jon Van Dyke, 'Self-Determination', in ILA, The Hague Conference (2010), Rights of Indigenous Peoples, Interim Report, *n* 16.

[26] ILA Resolution No. 5/2012, Conclusion No. 5.

traditions, commonly designated as their customary law.[27] In its generality and global reach, this specific right of Indigenous peoples under international law is unprecedented.[28] This autonomy can take many forms; as every provision in the Declaration and the general law of Indigenous peoples, it has to be interpreted from its *telos*, i.e. the safeguarding and flourishing of Indigenous peoples' cultures and traditions.[29] As against the rights of individual members, limits to this self-rule of the group are the customary international law of individual human rights as well as rights under treaties that the state, on whose territory the Indigenous peoples reside, has accepted.[30]

(C) Indigenous peoples' rights to their *cultural identity* have to be recognized, respected, protected and fulfilled by the state.[31] The customary international law obligation here does not translate into a general positive right.[32] Rather, it is to be seen as a right not to be denied the right to speak and teach their own language, the evermore threatened anchor of their culture.[33] They also have the right to establish schools and media of their own.[34]

(D) The key right of Indigenous peoples under customary international law translates into a state obligation to "recognize, respect, safeguard, promote and fulfil the rights of Indigenous peoples to their *traditional lands, territories and resources*",[35] which includes, in the first place, the demarcation, titling and equivalent forms of legal recognition of these resources. This right recognizes the conceptually indispensable link of the peoples to the areas with which they

[27] It helps here to understand the law, in line with policy-oriented jurisprudence, as a process of authoritative and controlling decisions within any community, be it territorial or personal. Michael Reisman et al. (2007), p. 575, 587–588, 591–592; Wiessner (2010), p. 45, 47–49.

[28] There have been a number of minority rights arrangements under specific treaty regimes, especially after World War I, but no such general legal right of a group under international law has been recognized before. Domestic law, on the other hand, knows of many such arrangements, which created, inter alia, the basis for the customary international law conclusion. For details, see Eckart Klein, *Minderheitenschutz im Völkerrecht*, Schriftenreihe Kirche und Gesellschaft Nr. 123 (1994); id., 'Minderheiten', 'Minderheitenrechte', 'Minderheitenschutz', in *Evangelisches Soziallexikon* (2001) Sp. 1083–1088.

[29] Wiessner (2011), p. 121, 129.

[30] ILA, Sofia Conference (2012), Rights of Indigenous Peoples, Final Report, *n* 23, at 3.

[31] ILA Resolution No. 5/2012, Conclusion No. 6.

[32] ILA, Sofia Conference (2012), Rights of Indigenous Peoples, Final Report, *n* 23, at 15: "At the moment, ... the legal evolution occurred in this respect has probably not yet reached the point of leading to the existence of a rule of customary international law dictating a *positive* State obligation to take all possible measures in order to allow indigenous peoples to preserve their languages and transmit them to future generation. At the same time, it is reasonably indubitable that such an obligation actually exists in *negative* terms, in the sense that States are bound not to create any obstacles to the efforts and activities carried out by indigenous peoples in order to preserve their own languages as an element of their cultural identity."

[33] Dussias (2008), p. 5; as to the importance of language, see Klein (1998), p. 59.

[34] ILA Resolution No. 5/2012, Conclusion No. 8.

[35] ILA Resolution No. 5/2012, Conclusion No. 7.

have a special, often spiritual connection. It also recognizes the special role Indigenous peoples have played in the preservation of these lands, making them their trusted guardians. Their use typically was oriented not at the exploitation of the resource to the point of exhaustion but at the preservation of those lands for future generations, making them a model for modern environmental law's quest for sustainability. Maybe this right is the most consequential one as it may collide with the interests of other actors in the use of these very lands, sometimes with the national interest.[36] The Indigenous peoples' right to their traditional lands and resources, inter alia, with respect to Mayan lands, has been recognized by Belize's Supreme Court as part of "general international law"[37] and, as to a Sami community's exclusive right to confer the rights to reindeer herding, small game hunting and fishing they hold in their lands, by the Supreme Court of Sweden in the *Girjas Sameby* case,[38] as part of their rights under customary international law to use their traditional lands and resources, referencing, inter alia, Article 26 UNDRIP.[39]

(E) The right to *free, prior and informed consent* to governmental measures affecting Indigenous peoples leads usually only to the right of the affected communities to be consulted. This consultation, however, must include the active participation of Indigenous peoples in the planning of such projects. If a project significantly endangers the very essence of an Indigenous people's culture, then consent is required under customary international law.[40] It, however, ought not to be arbitrarily denied.

(F) *Reparations and redress* for wrongs are also addressed, with due regard for their proper format, adequacy and effectiveness.[41] This redress must be established in conjunction with the peoples concerned, "available and accessible in favour of Indigenous peoples", and, "according to the perspective of the Indigenous

[36] For a good analysis, see Vadi (2011), p. 797.

[37] See Federico Lenzerini and Siegfried Wiessner, Case Study on 'The Maya Communities in Belize', in ILA, Johannesburg Conference (2016), Implementation of the Rights of Indigenous Peoples, Interim Report, available at <http://www.ila-hq.org/index.php/committees> accessed 11 March 2022 (scroll down to "Index of Current Committees" and follow "Implementation of the Rights of Indigenous Peoples (2006-2012)", then select "Documents") 12–14.

[38] See Rainer Hofmann, Case Study on 'Swedish Supreme Court (Högsta Domstolen), Girjas Sameby, Case No T 853-18 (23 January 2020). Recognition of Sami Indigenous People's Exclusive Right to Confer Hunting and Fishing Rights in Girjas Sameby Area', in ILA, Kyoto Conference (2020), Implementation of the Rights of Indigenous Peoples, Final Report, *n* 5, 9.

[39] See ILA, Kyoto Conference (2020), Implementation of the Rights of Indigenous Peoples, Final Report, *n* 5 12–13.

[40] "When the essence of their cultural integrity is at significant risk, obtaining the free, prior and informed consent of the indigenous peoples concerned becomes mandatory." ILA, Sofia Conference (2012), Rights of Indigenous Peoples, Final Report, *n* 23 10.

[41] ILA Resolution No. 5/2012, Conclusion No. 10. For different ways to effectuate reparations, see Lenzerini (2009).

communities concerned, actually capable of repairing the wrongs they have suffered".[42]

4 The Legal Effect of ILA Resolution No. 5/2012

UN Special Rapporteur James Anaya, in his enthusiastic endorsement of the report and resolution, wrote that the resolution is "highly authoritative" and may, as intended, assist him and other decision-makers in their work of interpreting, applying and implementing Indigenous peoples' rights.[43] Earlier, in 2011, the International Centre for Settlement of Investment Disputes (ICSID) Arbitral Tribunal in the *Grand River Case* had referred to the work of the Committee and its interim report in finding that there "may well be [...] a principle of customary international law requiring governmental authorities to consult Indigenous peoples on governmental policies or actions significantly affecting them".[44]

Generally, the resolutions of the International Law Association, just as those of the International Law Commission, have been recognized as evidence of international law. The *Third Restatement of Foreign Relations Law of the United States* affirms this characterization,[45] as does the leading textbook of international law in Germany. As Graf Vitzthum stated there, the global resolutions of a body as qualified and diverse as the International Law Association are stating a rare consensus among, at times, radically different cultures and value traditions and thus should be especially appreciated and valued.[46] This is particularly true when, as in this case, they pass not only uncontested, but with emphatic support.

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[42] *Id.*

[43] S. James Anaya, 'Statement of Endorsement of Committee Final Report and Resolution', in ILA, Sofia Conference (2012), Rights of Indigenous Peoples, Final Report, *n* 23, 31, 32:

The committee's work before you reflects the highest standards of our profession. ... Given the thorough research undertaken by the committee, the conclusions as formulated in its final report and resolution are highly authoritative. I am confident that, as intended, this expert commentary will reduce confusion and contention over the content and normative status of the provisions of the UN Declaration and of indigenous peoples' rights in general. It will help me in my work as Special Rapporteur as I endeavor to guide states toward ever close compliance with the new regime of indigenous peoples' human rights.

The commentary will be available to practitioners and advocates, governments, courts and tribunals, academics and indigenous organizations, to draw on and refer to in dealing with the important issues that concern indigenous peoples. Accordingly, it will be a hallmark of the work of the International Law Association in the new environment of the values-based international law of the 21st century.

[44] *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, 12 January 2011, <https://2009-2017.state.gov/s/l/c11935.htm> accessed 11 March 2022, para 210.

[45] American Law Institute, *Third Restatement of the Foreign Relations Law of the United States,* § 103 Reporters' Notes *n* 1 (1987).

[46] Graf Vitzthum (2004), p. 72, para 147.

The arguably most authoritative source on the content of international law, the International Law Commission (ILC) of the United Nations,[47] has accorded such evidentiary status to its own proceedings and those of the ILA in the context of the identification of the rules of customary international law. For the determination of the "teachings of the most highly qualified publicists of the various nations" under Article 38(1)(d) of the ICJ Statute, the ILC refers not only to individual scholars but also to the collective authority of a diverse and highly qualified community of scholars in the *Institut de Droit International* and the International Law Association.[48]

On such firm ground, ILA Resolution No. 5/2012 transcends the writings of individual scholars, no matter how well researched and persuasive their work is. It has come about to help complete the circle of protection for the most vulnerable and precious peoples on the face of the Earth.

5 The Committee on the Implementation of the Rights of Indigenous Peoples (2014–2020)

Resolution No. 5/2012 finalized the mandate of the first ILA Committee on the Rights of Indigenous Peoples. In the following months, the idea of continuing its work was advanced, and at the end of 2013, the new Committee was finally established, deciding that it should focus in general on how Indigenous rights are realized in practice. Ultimately, it was decided that the focus should be on the actual implementation of the rights to lands, territories and resources, given the centrality of the profound relationship that Indigenous peoples have with their environment and their reliance upon the same for the diverse economic, social, cultural and spiritual elements of their distinct identity.

The Committee on the Implementation of the Rights of Indigenous Peoples was formally established by the Executive Council of the ILA in November 2013 and had its first meetings in April 2014, in the context of the Biennial ILA Conference in Washington, DC, and on 20–21 February 2015 in The Hague. Both of these meetings were used to sharpen the focus of the mandate, to invite and select additional members and to divide work. The chairs of this Committee were Professor Willem M. Genugten and the chair of the Inuit Circumpolar Council, Dalee Sambo

[47] The International Law Commission was established by the General Assembly, in 1947, to undertake the mandate of the Assembly, under article 13 (1) (a) of the Charter of the United Nations to "initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification".

[48] International Law Commission, *Identification of customary international law: Ways and means for making the evidence of customary international law more readily available*, Memorandum by the Secretariat, 12 January 2018, U.N. Doc. A/CN.4/710, para72 and 73. *See also* Paragraph (5) of the commentary to draft conclusion 14, Official Records of the General Assembly, Seventy-first Session, Supplement No. 10 (A/71/10), para 63.

Dorough, together with rapporteurs Professor Federico Lenzerini and Professor Timo Koivurova.

The second Committee chose to approach the topic by selecting key cases in the domain of the rights to lands and to the natural resources located therein, from different regions of the world. The Committee decided to apply an interdisciplinary analysis of such cases, taking full account of all relevant factors but mainly focusing on legal issues and approaches, ranging from Indigenous customs, practices, land tenure systems and law as well as national, regional and international law. The goal was to identify an effective resolution of the potentially competing rights and interests concerning the lands, territories and resources of the Indigenous peoples concerned: (1) paying particular attention to the cultural elements as well as to the cultural implications arising from violations of the land rights of Indigenous peoples, culture being the cornerstone of the very identity and existence of those peoples, and (2) paying attention to economic factors and actors, with a focus on state and third parties, including multinational companies.

Hence, the idea was to analyze cases not purely from a legal perspective but from what is often referred to as "law in (its societal) context". It was also decided that special focus would be devoted to the identification and selection of "best practices", or rather "good practices", of countries that have or are attempting to implement the UNDRIP standards and to the evaluation of how such practices could be applied to other areas, taking note of existing cultural and social differences, as well as regional differences.

The plan was to focus on a number of "leading questions" while leaving the authors of respective case studies the space to handle the analysis their own way, as long as they were addressing the following core questions: *does "the law of Indigenous peoples" (customary, national and/or international) play a role in analyzing and solving the conflict at hand? If so, are there any interactions or direct linkages between these three layers? If Indigenous peoples law plays a role, what judicial and/or non-judicial procedures have been used? To what extent are the relevant Indigenous peoples given the space to act autonomously and/or to participate directly in decision-making by national governments? Is the right to self-determination fully recognized and respected? Is the right of Indigenous peoples to free, prior and informed consent operationalized in the context of resolving contentious issues and/or affirming their rights to lands, territories, and resources? Did the outcome, if any, do justice to the victims? If yes, in what way (reparation, compensation, etc.)? From the perspective of the Indigenous peoples concerned, was the outcome fair and equitable? Was it arrived at in a fashion consistent with the norms established by the UNDRIP? What form did the agreement or outcome take, e.g., land rights affirmed in law, policy or legislation, was it demarcated, did full implementation of all rights and interests result, etc.? If full implementation was not realized, what were the barriers or road blocks? What best practices or lessons have been learnt? What could be learned for the future?*

The Committee presented an interim report at the Biennial ILA Conference in Johannesburg (2016)[49] and used the Sydney Biennial Conference (2018)[50] to discuss a number of remaining substantive issues, followed by an interim Committee meeting in Geneva, in July 2019. While the Committee worked at some moment with a list of some 50 cases, it must be observed, however, that at the end, only 36 case studies have been finalized, varying from real case studies, including responses to the questions central to the mandate, to short case notes, supplemented with some, partly case-oriented, articles. At the Geneva meeting, it was therefore decided to limit "the empirical ambitions" the Committee had in mind. At the same meeting, the Committee members were also invited to send in general reflections on the implementation of the rights of Indigenous peoples. The final report was submitted to and approved at the virtual Kyoto Biennial Conference on 13 December 2020.

5.1 The Final Report

The final report of the second Committee consists of the following elements.[51] In the introduction, the mandate and methodology of the Committee's work are outlined. Section 2 takes up the many themes, approaches, general reflections and outcomes the Committee members have advanced via their case studies. The focus of Sect. 2 is on the recognition of the overarching right to self-determination in its "internal dimension", which remains not fully realized in many countries. Indeed, the case studies show a series of problems as regards the right in point, as some cases basically show that it is totally denied, while in other cases self-determination is recognized in principle, but no real follow-up measures are taken. It is evident that the right to self-determination is underlying the exercise of all other interrelated rights and, as such, is linked to concepts such as "autonomous decision-making", "self-government" and "free prior and informed consent" (FPIC). They are the core elements of the law of Indigenous peoples, and it will come as no surprise that the concepts arose in nearly each and every case. In many cases, it was observed that free, prior and informed consent—one of the key practical translations of the right to self-determination—is regularly lacking when it comes to policymaking on development projects with economic dimensions. In addition, in many of these cases, Indigenous rights standards are not known or misinterpreted by state organs and the corporate actors, which is extremely unfortunate, given the huge adverse impact

[49] See ILA, Johannesburg Conference (2016), Implementation of the Rights of Indigenous Peoples, Interim Report.

[50] See Implementation of the Rights of Indigenous Peoples, Working Session, Tuesday, 21 August 2018, 3.30 pm, available at <https://www.ila-hq.org/index.php/committees> accessed 11 March 2022.

[51] See *n* 5.

their activities have on Indigenous communities. But there are also good signs emerging from the case studies. In some cases, state organs are clearly aware of the need to take steps and are involved in processes of recognizing the need to pay specific attention to the rights of Indigenous peoples, including the decision-making rights, in accordance with Article 38 UNDRIP.

The use of legal instruments in solving conflicts is also addressed in Sect. 2. A first and relatively negative observation would be that Indigenous peoples face many difficulties in bringing their cases to courts, which means that many violations of their rights go unreported. This reluctance might, as the cases demonstrate, relate to the complexity of judicial procedures, the lack of trust in possible outcomes, the lack of financial means and possible retaliation but also to the availability of out-of-court means to solve problems, for instance mediation, round tables and truth and reconciliation commissions. Yet it is also important to note that many cases show that courts have applied UNDRIP, ILO Convention 169 and other Indigenous rights' standards to solve problems tabled before them. And many case studies show that the judiciary can indeed be an important mechanism in the process of interpreting and defending Indigenous rights.

Section 3 is devoted to good practices, aspects of which stem from the case studies. Many cases indeed demonstrate good or best practices, even if the case presenters note that context specificity and side elements make the outcome not "a best practice in full". The transferability between different contexts is an issue. Nations and Indigenous peoples do have specific histories linked to, often at least partly, different problems and varying legal as well as quasi-legal systems. In the report, some key aspects are drawn from a selected number of case studies. These can be seen as good practices, especially from the perspective of Indigenous peoples and their supporters.

One important aspect of good practices is that some cases have been solved through a resort to the customary law and practices of Indigenous communities. Of much importance is also re-interpreting national customary law consistent with the international standards for Indigenous peoples' rights, such as those contained in the UNDRIP, ILO Convention 169, the American Declaration on the Rights of Indigenous Peoples as well as several UN and regional human rights treaties. Another important aspect is that bringing cases to supreme courts, constitutional courts, regional courts and commissions can well advance the situation of Indigenous peoples since judgments by the highest legal authorities have trickled down to lower courts and policy instances. It comes out also from a couple of cases that, even if the UNDRIP is not per se legally binding as a whole, it should be fully respected as a general international guideline for Indigenous policies domestically and in litigation. Similarly, in some cases, it has been declared that specific norms contained in the Declaration, conceived as a "living instrument", are to be seen as customary international law.

Section 4 concentrates on reflections and the way forward. Through relying, again, on the outcomes arising from case studies, it is noted that they show a reality not dissimilar from what usually happens with human rights generally speaking. Such outcomes range from those "totally positive" to those "totally negative", while

the majority of them are "partially positive". While, generally speaking, the level of implementation of the rights of Indigenous peoples resulting from the case studies is quite heterogeneous, the global reality that they disclose is that the existence of the relevant legal standards, including under customary international law, is never seriously disputed by states and that it is generally recognized by the international community as a whole. At the same time, many violations take place—as happens with respect to human rights and legal norms generally speaking—but in most cases, they are actually treated as violations, confirming, again, the actual existence of the relevant standards. The way forward should therefore mainly consist in the reinforcement of such standards and the improvement of their level of implementation in the various regions of the world.

Finally, in Sect. 5, recommendations are provided, which involve states, international organs and institutions, Indigenous peoples themselves, non-governmental organizations (NGOs), investors, scholars and the civil society, whose efforts should all converge towards the actual further realization of Indigenous peoples' rights.

6 Conclusions

Overall, the activity of the two ILA Committees dedicated to Indigenous peoples has lasted for 14 years, from 2006 to 2020. The two Committees may be considered complementary and successive to each other, in terms of the mission accomplished and, especially, of the continuity of the work carried out. While the main role of the Committee on the Rights of Indigenous Peoples was to delineate the international legal standards in force in the field after the adoption of the UNDRIP, as well as to clarify their content and scope—at a time when such an issue was still quite controversial among scholars—the Committee on the Implementation of the Rights of Indigenous Peoples pursued the goal of ascertaining the extent to which the above legal standards find their actual realization in various contexts at the domestic level. Of course, in terms of influence in the development of international law on Indigenous peoples, the most significant outcome arising from the work of the two Committees is represented by Resolution No. 5/2012, which, as emphasized in Sect. 4 above, is to be considered as an expression of the "teachings of the most highly qualified publicists of the various nations", pursuant to Article 38(1)(d) of the ICJ Statute. Indeed, the highly authoritative significance of the Resolution is beyond any doubt, and it may be reasonably inferred that it has already played a significant role in the process leading to the concrete affirmation of the rules of customary international law in the field of Indigenous peoples' rights. Overall, the Committee on the Rights of Indigenous Peoples has carried out a thorough work of research and evaluation, which has already had a significant impact on the subsequent developments of international law on Indigenous peoples. One example of this impact is the influence of the research developed within the Committee on the determination of an

important ICSID arbitration case, as described above at the beginning of Sect. 4.[52] More generally, the main merit of the Committee on the Rights of Indigenous Peoples has been to provide an authoritative and detailed explanation of the meaning of UNDRIP and of the specific implications arising from it, leading, in the light of thoroughly researched state practice and *opinio juris*, to the finding of some of its main principles as existing rules of customary international law. This work has been positively received and reaffirmed by many scholars, who, in their turn, may well influence the future developments of international (and domestic) law in the field of Indigenous peoples' rights.

As far as the work of the Committee on the Implementation of the Rights of Indigenous Peoples is concerned, at the time of this writing, it is probably still too early to evaluate the influence that it may be playing in the development of the said international standards in terms of domestic implementation. At least, however, this Committee has shed light on both the good practices and the main shortcomings characterizing the current state of implementation of Indigenous peoples' rights by governments, and the fact of making them more internationally visible is likely to contribute to the improved and more effective realization of such rights throughout the world.

In the last two decades, an increasing number of scholars, practitioners and activists have dedicated their time and efforts to the advancement of Indigenous peoples' rights, with each of them providing important contributions to the building of the edifice of such rights in the framework of the international legal order. In particular, the experts gathered by the ILA to serve on the two pertinent Committees have played a significant role in clarifying and advancing the rights of Indigenous peoples. They were sowing seeds that have already started to produce fruits towards building an inclusive public order respecting their individual and collective dignity, with the prospect of many more to come.

Appendix

RESOLUTION No. 5/2012

RIGHTS OF INDIGENOUS PEOPLES

The 75th Conference of the International Law Association held in Sofia, Bulgaria, 26 to 30 August 2012:

HAVING CONSIDERED The Hague Conference Report and the Sofia Conference Report of the Committee on the Rights of Indigenous Peoples;

RECOGNISING the need for guidance for States, competent international bodies, civil society and indigenous peoples to ascertain the contents of international

[52] See text corresponding to *n* 47.

law applicable to indigenous peoples as well as further to enhance the safeguarding of indigenous peoples' human rights;

THANKS the Chair, the Rapporteur and the members of the Committee on the Rights of Indigenous Peoples for their work;

ADOPTS the Conclusions and Recommendations annexed to this Resolution;

REQUESTS the Secretary-General of the International Law Association to forward a copy of the Hague Conference Report and the Sofia Conference Report of the Committee on the Rights of Indigenous Peoples, as well as a copy of the present Resolution, to the Secretary-General of the United Nations, appropriate international and regional organizations, the United Nations Human Rights Council, the United Nations Permanent Forum on Indigenous Issues, the United Nations Expert Mechanism on the Rights of Indigenous Peoples, the United Nations Special Rapporteur on the Rights of Indigenous Peoples and the President of the International Court of Justice;

RECOMMENDS to the Executive Council that the Committee on the Rights of Indigenous Peoples, having accomplished its mandate, be dissolved.

CONCLUSIONS AND RECOMMENDATIONS OF THE COMMITTEE ON THE RIGHTS OF INDIGENOUS PEOPLES

I. Conclusions

1. Indigenous peoples are holders of collective human rights aimed at ensuring the preservation and transmission to future generations of their cultural identity and distinctiveness. Members of indigenous peoples are entitled to the enjoyment of all internationally recognised human rights—including those specific to their indigenous identity—in a condition of full equality with all other human beings.
2. The 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a whole cannot yet be considered as a statement of existing customary international law. However it includes several key provisions which correspond to existing State obligations under customary international law.
3. The provisions included in UNDRIP which do not yet correspond to customary international law nevertheless express the aspirations of the world's indigenous peoples, as well as of States, in their move to improve existing standards for the safeguarding of indigenous peoples' human rights. States recognised them in a "declaration" subsumed "within the framework of the obligations established by the Charter of the United Nations to promote and protect human rights on a non-discriminatory basis" and passed with overwhelming support by the United Nations General Assembly. This genesis leads to an expectation of maximum compliance by States and the other relevant actors. The provisions included in UNDRIP represent the parameters of reference for States to define the scope and content of their existing obligations—pursuant to customary and conventional international law—towards indigenous peoples.

4. States must comply with the obligation—consistently with customary and applicable conventional international law—to recognise, respect, protect, fulfil and promote the right of indigenous peoples to self-determination, conceived as the right to decide their political status and to determine what their future will be, in compliance with relevant rules of international law and the principles of equality and non-discrimination.
5. States must also comply—according to customary and applicable conventional international law—with the obligation to recognise and promote the right of indigenous peoples to autonomy or self-government, which translates into a number of prerogatives necessary in order to secure the preservation and transmission to future generations of their cultural identity and distinctiveness. These prerogatives include, inter alia, the right to participate in national decision-making with respect to decisions that may affect them, the right to be consulted with respect to any project that may affect them and the related right that projects significantly impacting their rights and ways of life are not carried out without their prior, free and informed consent, as well as the right to regulate autonomously their internal affairs according to their own customary laws and to establish, maintain and develop their own legal and political institutions.
6. States are bound to recognise, respect, protect and fulfil indigenous peoples' cultural identity (in all its elements, including cultural heritage) and to cooperate with them in good faith—through all possible means—in order to ensure its preservation and transmission to future generations. Cultural rights are the core of indigenous cosmology, ways of life and identity, and must therefore be safeguarded in a way that is consistent with the perspectives, needs and expectations of the specific indigenous peoples.
7. States must comply—pursuant to customary and applicable conventional international law—with the obligation to recognise, respect, safeguard, promote and fulfil the rights of indigenous peoples to their traditional lands, territories and resources, which include the right to restitution of the ancestral lands, territories and resources of which they have been deprived in the past. Indigenous peoples' land rights must be secured in order to preserve the spiritual relationship of the community concerned with its ancestral lands, which is an essential prerequisite to allow such a community to retain its cultural identity, practices, customs and institutions.
8. States must recognise the right of indigenous peoples to establish their own educational institutions and media, as well as to provide education to indigenous children in their traditional languages and according to their own traditions. States have the obligation not to interfere with the exercise of these rights.
9. States must cooperate in good faith with indigenous peoples in order to give full recognition and execution to treaties and agreements concluded with indigenous peoples in a manner respecting the spirit and intent of the understanding of the indigenous negotiators as well as the living nature of the solemn undertakings made by all parties.
10. States must comply with their obligations—under customary and applicable conventional international law—to recognise and fulfil the rights of indigenous

peoples to reparation and redress for wrongs they have suffered, including rights relating to lands taken or damaged without their free, prior and informed consent. Effective mechanisms for redress – established in conjunction with the peoples concerned—must be available and accessible in favour of indigenous peoples. Reparation must be adequate and effective, and, according to the perspective of the indigenous communities concerned, actually capable of repairing the wrongs they have suffered.

II. Recommendations

11. States ought to restructure their domestic law with a view to adopting all necessary measures—including constitutional amendments, institutional and legislative reforms, judicial action, administrative rules, special policies, reparations procedures and awareness-raising activities—in order to make the full realization of indigenous peoples' human rights possible within their territories, consistently with the rules and standards established by UNDRIP.
12. Indigenous peoples are encouraged to cooperate actively and in good faith with States, to facilitate the implementation of States' international obligations related to indigenous peoples' rights, consistently with the rules and standards established by UNDRIP. Indigenous peoples are obligated to respect the fundamental human rights of others and the individual rights of their members, consistently with internationally recognised human rights standards.
13. Civil society, in all its components, ought to promote a favourable environment for the affirmation of indigenous peoples' rights, especially by nurturing a positive understanding within society as a whole of the value of indigenous cultures as well as of the positive role which may be played by indigenous peoples to further sustainable life in the world.
14. The competent bodies, specialized agencies and mechanisms of the United Nations system—including the Human Rights Council, the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples and the Special Rapporteur on the Rights of Indigenous Peoples—are encouraged to continue and strengthen their activity, in cooperation with States and indigenous peoples, in order to ensure further protection, promotion and improvement of indigenous peoples' rights throughout the world, consistently with the rules and minimum standards of human rights established by the UNDRIP.

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The European Space Agency's Contribution to National Space Law

Jenni Tapio and Alexander Soucek

Abstract The European Space Agency (ESA) represents a mechanism of international cooperation among its Member States and acts as a partner in international space cooperation on a global scale. Carrying out space programmes and operating satellites in outer space, the ESA is a rare example of an intergovernmental organisation that is, from a functional perspective, both a spacecraft developer and an operator, having accumulated unrivalled technical expertise over four decades and having fostered competitiveness through investment in the space industry across its Member States. This chapter explains the way in which the ESA and its Member States interface, *de iure* and *de facto*, in law making. Capitalising on the example of Finland and its novel domestic space law (2018), the chapter highlights and explains the process of interaction between an intergovernmental mechanism and a national administration, showing why and how international mechanisms can become facilitators of national law making for the benefit of legislative and executive branches and non-governmental norm-addressees alike.

1 Introduction

This chapter examines the ways and limits of cooperation[1] between an international intergovernmental organization ('IGO')—the European Space Agency ('ESA')—and its Member States for the purposes of establishing and implementing national

The views expressed are made exclusively in personal capacity.

[1] Recognising that the notion of cooperation has multiple meanings. For this chapter it means, in a generic way, 'a situation where parties agree to work together to produce new gains for each of the

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space law. It also discusses whether such interaction could be labelled a *sui generis* 'consultancy service'. Two predominant ways, or mechanisms, of cooperation are identified in this respect:

(i) ESA providing an *intergovernmental mechanism* for its Member States, enabling the latter to cooperate and exchange information on international and national space law;[2]
(ii) ESA acting as a *service provider* delivering 'general counselling services' to all Member States and specific 'consultancy services'[3] upon a Member State's individual request.[4]

The discussion develops along four steps: First, the international legal framework relating to space activities is summarised, as a backdrop for the following analysis. Second, the intergovernmental mechanism of ESA is explained and contextualised. Third, the procedure of legal and technical advice towards ESA Member States, its legal basis and its limit are explored. Fourth, the resulting legal effects are sketched out and conclusions are drawn.

2 Space Law As a Branch of International Law

2.1 The Foundation of International Space Law

The human quest to explore the unknown has sparked the fascination of many for centuries. The first space missions launched end of the 1950s drove the need for legal principles governing the activities of states in outer space.[5] These principles were first drafted in the form of United Nations ('UN') General Assembly Resolutions,[6]

participants unavailable to them by unilateral action, at some cost. Its constituent elements are working together, agreement to do so (not just coincidence), cost, and new gains for all parties'. Zartman and Touval (2010), p. 1.

[2] ESA's offer further explained in Sects. 3 and 4.

[3] The terms 'general counselling services' and 'consultancy services' are introduced and used here as mere *illustrations*; they are no legal terms defined in any treaty law or secondary law analysed in the context of this chapter.

[4] Such consultancy service can be generally characterised as follows: a service provider has resources on offer and the customer is willing to pay remuneration for getting that resource. The specific details on the scope of the service and the terms of service may be stipulated in an agreement between the parties. However, as will be shown in this chapter, while private law/contractual law categories can help to understand the content of such a relation, it will remain a public relation between an IGO and its Member State.

[5] The legal issues relating to outer space had attained the attention of scholars before the launch of the first space activities, for a summary *see* Kopal (2011), pp. 221–225.

[6] UN General Assembly Resolution no. 1721 (XVI) 20 December 1961; UN General Assembly Resolution A/RES/18/1962 (13 December 1963) ('Legal Principles Declaration').

before being codified in the Outer Space Treaty ('OST'), which entered into force in October 1967 and sets out rights and obligations of states relating to the exploration and use of outer space.[7] In the following years, four consecutive treaties complemented and further developed the OST. They establish more specific rights and obligations in relation to the rescue of astronauts and return of space objects;[8] the liability for damages caused by space objects;[9] the registration of space objects;[10] and the activities of states on the Moon and other celestial bodies[11] (collectively referred to as 'the UN space treaties'). While the extent of their acceptance varies,[12] the UN space treaties nonetheless form the 'cornerstones' of international space law, laying down the foundational principles for the governance and regulation of space activities.

Recognising that the peaceful exploration and use of outer space requires continuous intergovernmental dialogue, the UN space treaties call for international

[7] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and other Celestial Bodies, entered into force 10 October 1967: 610 UNTS 205 ('OST'). The most fundamental substantive principles are found in Articles I-XII of the OST. Article I of the OST *inter alia* establishes that freedom of exploration and use of outer space, including the Moon and other celestial bodies, and that exploration and use shall be carried out for the benefit and in the interest of all countries. Article II of the OST establishes that outer space is not subject of national appropriation 'by claim of sovereignty, by means of use or occupation, or by any other means'. The OST furthermore forbids the placement of weapons of mass destruction in outer space (Article IV para.1 of the OST) and establishes international responsibility of States for all national space activities, whether carried out by governmental or non-governmental actors (Article VI of the OST), as well as the principle of liability for damage caused by space objects to another State Party (Article VII of the OST). To ensure that outer space remains free for exploration and use, and that all actors uphold fundamental principles of law, space activities 'shall be carried on in accordance with international law, including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation and understanding' (Article III of the OST).

[8] Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space, entered into force 3 Dec. 1968: 672 UNTS 119 ('Rescue and Return Agreement').

[9] Convention on International Liability for Damage Caused by Space Objects, entered into force 1 Sept. 1972: 961 UNTS 187 ('Liability Convention').

[10] Convention on Registration of Objects Launched into Outer Space, entered into force 15 Sept. 1976: 1023 UNTS 15 ('Registration Convention').

[11] Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, entered into force 11 July 1984: 1363 UNTS 3 ('Moon Agreement'); The Moon Agreement has not been widely ratified, and consequently its effects may be considered less significant.

[12] The OST, the Rescue and Return Agreement, the Liability Convention, the Registration Convention and the Moon Agreement. For the status of State ratifications of the five UN space treaties, *see* UN office for Outer Space Affairs, Status of International Agreements relating to Activities in Outer Space https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/status/index.html.

cooperation.[13] Accordingly, states have established mechanisms to provide for coordination and exchange, including the further development of space law itself. The primary forum to deliberate on matters relating to the peaceful exploration and use of outer space is the UN Committee on the Peaceful Uses of Outer Space ('COPUOS').[14] COPUOS is the only UN committee entirely dedicated to matters relating to outer space. Beyond COPUOS, other institutions facilitate coordination and cooperation in relation to space activities, among those various IGOs[15] including ESA. In the space law sphere, IGOs can not only declare acceptance of the rights and obligations provided for in the UN space treaties[16] but may take on a role in the development and application of space law itself. This latter possibility is central to ESA's contribution to national space law.

2.2 *National Space Law*

The legal principles provided for in the UN space treaties are implemented and further developed through national law.[17] While the OST does not oblige states to enact national space law,[18] many states have opted for the creation of national space law as the most effective way of implementing such principles.[19] Adherence to international law requires 'concrete measures'[20] to understand and, where necessary, influence the carrying out of space activities. Consequently, states have an interest, if

[13] *See* especially Articles III, IX and X of the Outer Space Treaty, and in relation to Article I see also the Space Benefits Declaration.

[14] *See* COPUOS Doc. A/AC.105/1113, para. 250; COPUOS with its two standing sub-committees: The Scientific and Technical Subcommittee and the Legal Subcommittee, the latter directed 'to study the nature of legal problems which may arise from the exploration of outer space'. UN General Assembly Resolution 1472 (XIV) of 1959, section A, para 1(b).

[15] Other IGOs in the space field include, e.g. the International Telecommunications Union ('ITU'), the European Union ('EU'), the European Organization for the Exploitation of Meteorological Satellites ('EUMETSAT'), the Intersputnik International Organization of Space Communications, and the European Telecommunications Satellite Organization ('EUTELSAT IGO').

[16] *See* Sect. 3.4; with the notable exception of the OST itself.

[17] The interpretation, application and enforcement of international legal principles at domestic level can be considered both state practice and *opinio iuris*: 'Although national space legislation cannot have a direct influence on international law, it might be regarded as an expression of *opinio juris'*. Hobe (2009), p. 31.

[18] *See* e.g. Marboe (2015), p. 497; Brisibe (2015), pp. 556–557.

[19] In the European context, among the first national space laws were Norway's Act on launching objects from Norwegian territory into outer space, No. 38, 13 June 1969, Sweden's Act on Space Activities 1982: 963, 18 November 1982.

[20] Schmidt-Tedd (2011), p. 310.

not a constitutional necessity, to set up a domestic regulatory framework that governs space activities of their nationals.[21]

A central element of national space law is the authorisation and supervision of non-governmental space activities. The duty of states to authorise and supervise is inherently linked to their international responsibility and liability for such activities, and a corollary to the freedom of exploration and use of outer space. States parties must ensure that national space activities, including those by non-governmental actors, are carried out in compliance with international law.[22]

In addition to their bridging role between the international and domestic spheres, national space laws can also 'incorporate' norms of non-legally binding character to become binding for the norm-addressees. Thus, they also take on a bridging role between law and 'soft law'.

The importance of national space law in the overall governance of space activities is growing commensurate to the increasing commercialisation of space activities and the diversification of space actors. States have an interest to ensure that non-governmental space actors are organised in a responsible manner and that adequate technical and financial safeguards are put in place to ensure that sufficient resources exist throughout a space activity's lifecycle. This requires them to make informed decisions. In addition, individual state behaviour cannot be isolated from the international context. If each state were to consider exclusively own interests and not the impacts of its legal and policy actions on others, the global governance of space activities would run the risk of becoming increasingly fragmented.[23] The domestic regulation of space activities is therefore not only a consequence of a state's obligations and interests, but it can provide fresh impetus to promote cooperation, norm coherence and the rule of law.[24]

[21] E.g. under the Finnish Constitution (Suomen perustuslaki 731/1999), any restrictions imposed to businesses must be regulated at the level of law (*see* e.g. Articles 2.3§, 80§).

[22] Article VI of the OST. Under Article VI, the acts and omissions of non-governmental entities, not confirming to international law, are attributed to the State in addition to those acts and omissions by the governmental agencies, in case they qualify as 'national activities in outer space'. The duty to authorise and supervise is an independent legal duty of a State. this legal relation has been described as 'private activity but public responsibility' Von Der Dunk (2011), p. 5; it should be noted that also compliance, e.g. the requirements concerning registration of space objects set out in Article VIII OST and the Registration Convention necessitate some form of regulatory activity at national level.

[23] Similarly to what has been submitted in connection to 'international regulatory network' studies, *see* e.g. Slaughter and Zaring (2006), pp. 211–229.

[24] Recognising that participation in such cooperation remains voluntary (beyond that what the States have committed in binding international agreements), *see* e.g. Article 2 of the UN General Assembly Resolution 'Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interests of all States, taking into Particular Account the Needs of Developing Countries' UNGA(A/51/20) 1996 ('Space Benefits Declaration').

2.3 A Paradigm-Change in Space Law-Making

While the UN space treaties remained, for decades, the predominant source of space law, two more recent—and interconnected—developments are diversifying the picture of space governance in the twenty-first century:

1. First, the increase in space actors and activities, notably of non-governmental ('private') nature,[25] is leading to more States adopting national space laws.[26] States, vested with sovereign power to regulate the conduct of natural and legal persons within their jurisdictions, have the obligation—and interest—to exercise an appropriate level of control over non-governmental space activities.[27]
2. Second, space law is increasingly complemented by non-legally binding instruments, including, *inter alia*, UN resolutions, guidelines, codes of conduct, industry best practices and technical standards.[28] The character of such 'soft law' instruments is heterogeneous and their recognition and implementation to guide the behaviour of modern-day space actors remains voluntary.[29] National space laws are an avenue to transform non-legally binding instruments into legal obligations at national level.[30]

As other fields of law, space law continues to develop and transform along with the activities it regulates, and the competence to control, or to 'regulate', entails the competency *to be able* to control. Hence, states must possess 'appropriate means' to efficiently—and suitably—manage the behaviour of non-governmental actors within their jurisdiction. This opens an avenue for IGOs such as ESA to support the process of establishing and implementing national space law. IGOs provide a forum for the coordination of national approaches, thus supporting that space activities are regulated with a certain degree of unity and coherence. Their assistance can be an important factor in establishing and implementing national space law, owed to the

[25] These developments are often characterised by the term 'NewSpace'.

[26] Currently 12 of 22 ESA Member States have national space laws (Norway, Sweden, Finland, Denmark, the Netherlands, Belgium, Luxembourg, France, Austria, the United Kingdom, Portugal, and Greece). Many of these have been promulgated or subject to update in the recent years; *see* e.g. Finland's Act on Space activities (63/2018).

[27] The very purpose of Article VI is 'to ensure that any outer space activity, no matter conducted by whom, shall be carried on in accordance with relevant rules of international law and to bring the consequences of such activity within its ambit', Lachs (1972), p. 122; 'The result is that non-governmental national space activities are assimilated to governmental space activities'. Cheng (1998), p. 14.

[28] For detailed discussion of soft law in the context of space activities, *see* for example various authors in Marboe (2012).

[29] *See* Tapio and Soucek (2019), pp. 565–582; especially in the context of space debris mitigation, Soucek and Tapio (2019), pp. 553–580.

[30] This further underlines the importance of national space laws as elements of *corpus iuris spatialis*.

fact that the authorisation and supervision of national space activities are not only a *legal* undertaking but require detailed *technical* and *practical* knowledge.[31]

3 The European Space Agency

3.1 Object and Purpose[32]

ESA is an IGO established by the Convention on the Establishment of a European Space Agency ('ESA Convention'). Signed in May 1975, the ESA Convention did not enter into force until 30 October 1980.[33] ESA features the characteristics commonly accepted as constituent elements of international organisations:[34] It is founded by an international treaty, governed by international law and possesses its own international legal personality; the latter expressly established in the ESA Convention.[35] As of 2021, it has 22 Member States.[36] Its institutional structure, with a Director General as the executive organ and a Council as the plenary organ, underlines this focus. The institutional set-up, however, must not belie the Agency's regional and global significance in the space domain. With an annual budget of approximately 6 billion Euro in 2020,[37] major regional and international cooperation partners, renowned technical competence and a long history of scientific achievements, ESA is a key player in spaceflight.

[31] Schmidt-Tedd (2011), p. 310.

[32] For a summary overview of ESA's mandate, functioning and practice, *see* ESA, *The European Space Agency as a mechanism and an actor of international cooperation*, Conference Room Paper, United Nations Committee on the Peaceful Uses of Outer Space, Legal Subcommittee 2018, A/AC/105.C/C.2/2018/CRP.20.

[33] During this five-year 'interregnum', the Agency operated on the constitutional grounds of its predecessor organisation, European Space Research Organization ('ESRO'). ESA in fact had two predecessor organisations: Besides ESRO, it was the European Launcher Development Organization ('ELDO') that was later joined, together with ESRO, to become ESA.

[34] *See* International Law Commission ('ILC'), Draft articles on the responsibility of international organisations, Art. 2 (a): '"international organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities'.

[35] ESA Convention, Art. XV.1 and Annex I, Art. I sentence 1: 'The Agency shall have legal personality'.

[36] States which either signed and ratified the ESA Convention as part of the group of original founding members, or which acceded after the Convention's entry into force on the grounds of a unanimous decision of all Member States expressed through the ESA Council, s*ee* ESA Convention, Art. XXII.

[37] ESA, *ESA budget 2020*, https://www.esa.int/ESA_Multimedia/Images/2020/01/ESA_budget_2020, 30 April 2020.

ESA's *raison d'être* is contoured in one sentence: 'The purpose of the Agency shall be to provide for and to promote, for exclusively peaceful purposes, cooperation among European States in space research and technology and their space applications (...)'.[38] A particular feature is ESA's role as a 'space agency' for those of its members states which do not have their own national space agency. Alongside, ESA was from the outset perceived necessary to bundle individual states' resources to realise common inter-State goals, considering that 'the magnitude of the human, technical and financial resources required for activities in the space field is such that these resources lie beyond the means of any single European country'.[39]

The ESA Convention grants the Agency international legal personality, which empowers it, *inter alia*, to enter into agreements with other subjects of international law, both states[40] and other IGOs.[41] ESA also possesses contracting capacity, which enables it to enter into private legal relationships, predominately with the space industry of its Member States, to carry out its mission and 'improve the worldwide competitiveness of European industry'.[42] ESA can furthermore acquire property and be a party to legal proceedings, within the limits of its immunities.[43] Finally, ESA's legal personality enabled it to declare acceptance of some of the UN space treaties and thus carry rights and obligations provided for in the latter. This interplay between treaty law and institutional law has not only led to the creation of specific ESA secondary law[44] but is also important for ESA's role in advising its Member States.

3.2 Competences

The question of an IGO's legal personality is to be distinguished from its competences, i.e. powers.[45] An IGO's powers are not 'any uniform set of activities' but instead 'an individual set of powers (...) rarely carved in stone but (...) open to different constructions'.[46] Still, there is a good deal of 'carving' to be found in ESA's

[38] ESA Convention, Art. II first sentence.

[39] ESA Convention, Preamble, para.1.

[40] Over the years, ESA has concluded many international agreements with Governments of non-Member States.

[41] For example, the EU, the EUMETSAT or the UN.

[42] ESA Convention, Article VII para. 1 lit. b.

[43] ESA Convention, Article 1 of Annex I: 'The Agency shall have legal personality. It shall in particular have the capacity to contract, to acquire and dispose of movable and immovable property, and to be party to legal proceedings'.

[44] *See* e.g. Resolution of the Council of the European Space Agency on the Agency's Legal Liability (1977) ESA/C/XXII/Res.3, The ESA Director General's administrative instruction 'ESA Space Object Registration Policy' in force since March 2014.

[45] Gazzini (2011), p. 43.

[46] Engström (2011), p. 56.

'foundation stone', the ESA Convention. It starts with a detailed account of the Agency's purpose, which *inter alia* includes: the elaboration and implementation of a long-term European space policy; the recommendation of space objectives to Member States; the concerting of policies of Member States; the elaboration and implementation of activities and programmes in the space field; the coordination of the European space programme and national space programmes; and finally the elaboration and implementation of an appropriate and coherent industrial policy.[47]

A strong relation with the European space industry is at the heart of ESAs existence, regulated by a toolset of industrial policy rules and regulations and implemented through procurement contracts. Through this system, ESA supports and develops the worldwide competitiveness of European space industry. The straightforward distribution of ESA's competences among its organs, and the clear mechanisms[48] for its daily operations, make it unnecessary in practice to resort to theories of implied powers or other means of interpretation.

3.3 Leeway and Limit of ESA's Competences

ESA carries out its mandate through the constant creation of norms of heterogeneous character. Some of those are legal norms; others have political or administrative character. In a simplified approach, three categories of legal instruments can be distinguished along the sphere within which they usually take and develop effect: (i) *internal* legal acts; (ii) legal acts with effect towards *Member States*; (iii) legal acts with effect towards *third parties*. A different angle can be taken based on the legal foundation of the instrument, i.e. whether it is explicitly foreseen in ESA's primary law or introduced by secondary or tertiary legal layers. However, those are merely attempts of characterisation and categorisation, to describe what is immanent to any IGO: legal norm-making as an epiphenomenon of an organisation's existence and operation.

The nature of legal norms created *in* and *through* an IGO's system depends on the latter's founding treaty. More specifically, it follows from (i) the purpose and objective of the organisation; (ii) the type and extent of transferred competences; (iii) the system-inherent institutional processes; and (iv) the legal relation between the organisation and its Member States. What do these forms of institutional norm-making mean for the IGO's relationship with its Member States? Can ESA take decisions to bind its Member States, and if so, how far can those decisions reach into the respective domestic legal order of a Member State? *Wouters* and *De Man* argue that it is 'undisputed that international organizations can take decisions that are binding upon their member states and that they can even exercise sovereign

[47] For all these competences, see ESA Convention, Art. II.

[48] E.g. for the setting up and execution of programmes the calculation of financial geographical return.

powers',[49] yet they equally diagnose that the ideal of an organisation 'creating law through predictable mechanisms in a way consistent with the goals of the member states (. . .) no longer hold[s] true'.[50] In this regard, it is important to distinguish law making *with* Member States (i.e. with the participation of Member States through the institutional mechanism) from law making *for* Member States. Many of ESA's legal instruments require decisions of the Council as the organisation's plenary organ; this can be considered law making *with* Member States' participation, and such participation is necessary although Member States are neither addressed or bound by the resulting instrument, nor a party to it.

The situation is inversed when it comes to ESA Programme Declarations which are international agreements[51] between certain or all ESA Member States and with legally binding effect upon them, whereas ESA is no party to them.

Both types, however, derive from the same primary legal source, the ESA Convention, and they are generated through the same legal system. The conditions and effects of norm-making within an organisation's institutional system are thus, evidently, of great variety. Their range is characterised by the extent to which an organisation is both a coordination medium for its members or a legal entity distinct from its members. An example of the latter will be discussed in the following section.

3.4 ESA As an Actor in Space Governance

While IGOs cannot be parties to the UN space treaties in absence of a specific provision allowing them to do so, they may—provided the fulfilment of certain conditions[52]—unilaterally declare their acceptance of the rights and obligations

[49] Wouters and De Man (2011), p. 192.

[50] Ibid.

[51] Vienna Convention on the Law of Treaties Art. 1: For the purposes of the present Convention: (a) '"treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation', entered into force on 27 January 1980. United Nations, Treaty Series, vol. 1155.

[52] For the conditions, *see* e.g. Liability Convention , Art. XXII para.1: 'In this Convention, with the exception of Articles XXIV to XXVII, references to States shall be deemed to apply to any international intergovernmental organization which conducts space activities if the organization declares its acceptance of the rights and obligations provided for in this Convention and if a majority of the States members of the organization are States Parties to this Convention and to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies'.

provided for therein, except for the OST.[53] ESA, through decisions of its Council,[54] has declared acceptance of the Rescue and Return Agreement; the Liability Convention and the Registration Convention. The conditions for declaring acceptance of the Moon Agreement were, and still are, not fulfilled[55] for ESA.

ESA also holds a permanent observer status in COPUOS. Owed to the gradual standstill of global treaty-making in the space domain after the 1980s, alternative forms of normative development play a particularly important role in space law altogether, alongside the national regulation of space activities. The relative influence of ESA in those processes—including cooperation, coordination and information sharing—is based on two factors: first, its technical competence and experience as a space actor; second, its 'cooperative DNA', i.e. the inherent capacity to coordinate, or offer platforms to coordinate, the positions of multiple States.

In this respect, ESA acts as an 'intergovernmental mechanism' for its Member States, allowing them to cooperate and exchange information on international and national space law.[56] The possibility for ESA Member States to discuss, inform, coordinate and exchange views promotes the development of space law and elevates coherence at international level. Additionally, ESA supports its Member States to coordinate positions and prepare sessions of COPUOS. Together with the more specific 'consultancy' role of ESA discussed here, this type of multilateral coordination can help to prevent fragmentation in space law and facilitate finding convergence in its implementation.

It is common that IGOs provide general assistance to their Member States, even if that assistance may touch upon the latter's internal regulatory sphere. Such assistance is usually not tailored for the purposes of one specific Member State but provided at a more general level to *all* Member States. In space law, this is evidently the case with the UN. Through a series of well-developed tools of cooperation,[57] the UN aids governments for their drafting of national space law. Other institutions such as the International Law Association ('ILA') complement these efforts, offering their own instruments and analyses.[58]

[53] An exception is the unilateral declaration of acceptance of the OST by INTERSPUTNIK in 2018.

[54] ESA Declaration of Acceptance of the Astronauts Agreement, the Liability Convention and the Registration Convention (adopted by the ESA Council on 12 December 1978, deposited on 2 January 1979).

[55] Only three of ESA's Member States are State Parties to the Moon Agreement.

[56] ESA's offer further explained in Sect. 4.

[57] This includes, e.g. questionnaires, technical presentations, materials, compendia, and even a General Assembly Resolution on national space legislation.

[58] Sofia Guidelines for a Model Law on National Space Legislation of the ILA, adopted by the 75th ILA Conference on 30 Aug. 2012 as resolution 6/2012 ('Sofia Model Law').

4 The Availability of ESA's Assistance to Its Member States

With 50 years of being at the forefront of spaceflight, ESA pools a vast amount of theoretical knowledge and practical experience. Both can be of interest for its Member States even outside the Agency's own activities and programmes, triggering the question whether any of the Member States could individually profit from capabilities resulting from, and residing within, ESA's intergovernmental mechanism. It is not only a question of ownership of, and rights in, assets of the Agency;[59] it is in the same way a question of mandate.

4.1 The General Availability of ESA's Resources to Its Member States

The ESA Convention refers to the possibility for Member States to benefit from ESA's experience and knowledge several times, most prominently in Article IX ('Use of facilities, assistance to Member States and supply of products'). Accordingly, ESA 'shall make its facilities available, at the cost of the State concerned, to any Member State that asks to use them for its own programmes' provided however 'that their use for its own activities and programmes is not thereby prejudiced'.[60] Furthermore, '[i]f, outside the activities and programmes (. . .) but within the purpose of the Agency, one or more Member States wish to engage in a project, the Council may decide by a two-thirds majority of all Member States to make available the assistance of the Agency. The resulting cost to the Agency shall be met by the Member State or States concerned'.[61]

These provisions refer, primarily, to the carrying-out of (national) space projects or programmes, for example a satellite mission. The term 'facilities', in this context, would for example refer to the Agency's test centres, complex technical facilities which most states do not possess or could otherwise get hold of. However, more than deciphering the practical meaning in each case, it is important to determine the underlying rationale anchored in the ESA Convention. A teleological interpretation of Article IX allows for the conclusion that the Agency is mandated to support an individual Member State for the purpose of assisting in national (space) activities, under some general conditions:

[59] The ownership of assets of ESA is regulated in ESA Convention Art. IV of Annex III: 'The Agency, acting on behalf of the participating States, shall be the owner of the satellites, space systems and other items produced under the programme as well as of the facilities and equipment acquired for its execution. Any transfer of ownership shall be decided on by the Council'.

[60] ESA Convention, Art. IX.1, first sentence.

[61] ESA Convention, Art. IX.2.

(i) the assistance must be carried out in accordance with the purpose of the Agency as defined in Article II of the ESA Convention;
(ii) the assistance must not prejudice the Agency's own activities and programmes (for example by unduly consuming or deviating workforce);
(iii) the Member State concerned must cover the associated cost (which come on top of, and must be distinguished from, the state's contributions to ESA's programmes and activities); and
(iv) the Council determines the associated practical arrangements.

The permissibility of assistance, and its limits, correspond to the wider frame of intergovernmental cooperation set up by the ESA Convention. For several of its Member States, ESA is more than 'just' an intergovernmental mechanism collaterally supplementing national space capabilities. It is rather conceived as a central element therein, or even a substitute for a national space agency. At the same time, resource efficiency is a *topos* found across the ESA Convention, from the preamble ('desiring ... to increase the efficiency of the total of European space efforts by making better use of the resources at present devoted to space'[62]) to the operative part ('... the Member States and the Agency shall endeavour to make the best use of their existing facilities and available services as a first priority, and to rationalise them'.)[63] However, all these differ from the case examined here: ESA's direct contribution to a domestic regulatory process.[64]

4.2 *Advice and Assistance Upon Request: When ESA Becomes a 'Consultant' for National Law-Making and Implementation*

ESA's contribution to national space law making and implementation can be structured along its nature, form, mandate and legal relationship.

1. **The nature of the interaction between ESA and a Member State.** In ESA's practice, the terms *'advice'* and *'assistance'*[65]—although not defined in the Agency's legal framework—describe two levels of 'relationship intensity': whereas 'advice' is predominantly used to refer to the sharing, in a generic way, of information, knowledge and experience, 'assistance' refers to the more

[62] ESA Convention, 4th preambular paragraph (excerpt).

[63] ESA Convention, Art. VI.2 first (excerpt).

[64] For a general overview of ESA's role in the context of national space law, see: The European Space Agency and the promotion of national space legislation, COPUOS Legal Subcommittee 2016, Conference Room Paper, UN document A/AC.105/C.2/2016/CRP.23.

[65] ESA Council Resolution, 'Towards Space 4.0 for a United Space in Europe', 2016 and ESA Council Resolution on Space: The five dimensions of Space 4.0 (adopted on 28 November 2019) ESA/C-M/CCLXXXVI/Res.1 (Final).

concrete taking-over and carrying-out of a task, or assignment. Moreover, the terms 'legal' and 'technical' specify the *content* of the relation. Both the distinction between 'advice' and 'assistance' and between 'legal' and 'technical'—being typically combined in the forms of 'legal advice' and 'technical assistance'—justify the observation that the support by ESA to national law making and implementation can be considered a *sui generis* activity; that observation is sustained, as will be discussed in the following, by its peculiar legal implications.

2. **The form of the interaction**. Any relation of a certain complexity, even if between an IGO and one of its Member States, is habitually regulated by means of an agreement. Whereas mere legal advice, for example in the form a bilateral meeting or an organised workshop, will hardly necessitate the conclusion of an agreement, certainly not in written form, the provision of expertise to review the technical specifications of a satellite calls for an agreed definition of that relationship and its consequences.[66] When it comes to helping a Member State, on the latter's request, to scrutinise a space mission to be licensed, this not only requires resources, but usually also the exchange of information of sensitive nature. In such cases, technical assistance agreements between ESA and the requesting Member State are the instrument of choice. The conclusion of such agreements usually lies within the competence of the Director General.[67] However, the legal relation between ESA and the government of one of its Member States will always be one of a *public* nature, not private or contractual. Even if covered by a technical assistance agreement and based on (full) cost reimbursement, this relation cannot be assessed on the grounds of a merely contractual relation between a service provider and a client.

   But where is the line to be drawn between benefiting, *en passant*, from the expertise of the Executive, and having to reimburse an agreed service provided by the latter? There is no simplistic legal answer. A certain minimum of 'implied services' will always be part of the 'package deal' between an organisation and its members; in other terms: membership in an IGO entails profiting from that very mechanism. The ESA Convention indirectly confirms this when it calls on both Member States and the Executive to 'facilitate the exchange of scientific and technical information'.[68] However, what lies typically outside of that nucleus will have to be compensated so as to not introduce an unbalanced advantage for one Member State to the detriment of the others. Again, the ESA Convention helps in defining these boundaries. Its articles on 'facilities and services' (Article VI) and 'Use of facilities, assistance to Member States and supply of products' (Article IX) allow identifying as of when the relationship intensity level requires the

[66] This duality can be observed in practice. Legal and technical information, discussion and networking usually form part of the 'daily business' of ESA's interaction with its Member States. The provision of (technical) services, however, and even more so the management of a national space project, require a more elaborate legal foundation.

[67] ESA Convention, Article XII.

[68] ESA Convention, Article III para.1 sentence 1.

fulfilment of two conditions: an agreement from the collective (i.e. a Council decision) and the monetary compensation of an individual advantage drawn from the mechanism financed by the collective (i.e. cost reimbursement).

3. **The mandate.** ESA's advice and assistance for national space law making started with the gradual rise of space law making in Europe. With this trend unfolding during the last decade (2010–2020), most of ESA's activities in this respect date to this period. In two subsequent Council meetings held at ministerial level in 2016 and 2019, the ministers of Member States responsible for space matters collectively acknowledged the Agency's activities in this respect by appreciating 'the continued role of ESA in supporting Member States, at their request, in the establishment and implementation of national space legislation through technical and legal advice'.[69] This is not to be construed as granting an enlarged competence, but rather as the (political) acknowledgement of the Agency's role in applying the ESA Convention.
4. **The legal relationship.** When it comes to ESA advising a national legislator for establishing or applying domestic law, and even more so if such relation is formalised by means of an agreement, to what extent can one speak of a 'Member State relation' still? Is it not rather a relationship between a government and an external expert, or consultant, who is tasked—and *paid*—for carrying out a specific assignment, under specific conditions? In that case, the external expert would merely 'happen to be' an IGO, and the relation would not differ from the private contractual relation with any other 'expert' hired for delivering a work or service, be it a natural or legal person.

   This comparison is based on a simplification. The IGO-Member State relation cannot be ignored; it will still produce some effect, not least because it provides for the very basis of the 'contractual' relation entered into through a technical assistance agreement. Without the mandate established in the founding treaty, and the Member State quality defined through the status of State Party to that treaty, the relationship of assistance in the described form could not happen.[70] Further to that, the assisting party—ESA—remains in any case an IGO, with all consequences, in particular with the privileges and immunities it enjoys in the relation to its Member States.[71] Precisely this relation is taken up by Article 40.3 of the Agency's Financial Regulations which clarifies, for making available the Agency's expertise, facilities, services or products, the following: 'These activities shall be considered official activities of the Agency in the sense of Article VII.2 of Annex I to the Convention. They shall be covered by the privileges and immunities applicable to official activities of the Agency (. . .)'.

[69] ESA Council Resolution, The five dimensions of Space 4.0, adopted on 28 November 2019, ESA/C-M/CCLXXXVI/Res.1 (Final).

[70] ESA can provide various forms of assistance to non-Member States or international intergovernmental organisations. In those cases, however, the legal basis is a different one, mostly ESA Convention, Article XIV.1 ('Cooperation'), which requires a unanimous decision of all Member States.

[71] ESA Convention, Article XV and Annex I.

5 Relationship, Scope and Limit of International 'Consultancy' for National Space Law

With regard to its role as a *service provider,* ESA's engagement to assist Member States in the development and application of national space law may take on two degrees of *relationship intensity*:

(a) ESA is providing general counselling services to its Member States in relation to legal, technical or practical questions on space activities. This generic advice is part of the 'membership package', i.e. it comes as an epiphenomenon the very relation between the IGO and its Member States, and the latter are not obliged to reimburse related cost;[72] and
(b) ESA is providing specific 'consultancy services' upon request by one of its Member States, during either (a) the *drafting phase*, i.e. making of the national space law, or (b) the *implementation phase*, i.e. making of administrative decisions in application of the law. For this specific advice, ESA and the requesting—and at the same time recipient—Member States usually agree on separate terms and conditions, especially regarding financial and managerial aspects of the service to be delivered, in line with ESA's legal framework.

The latter case (b) is arguably a rather unique arrangement in which ESA offers its own competencies, as a de facto 'consultant', for the benefit of a requesting Member State. Such a service may be requested, and provided, *before* the national space law is in place, of *after* its enactment; in the latter case, the assistance will not be asked by the legislator but by the executive organ, who needs to apply the law to a specific case. The point in time of the service delivery has implications on the factual circumstances of the case underlining the special nature of the service.

5.1 Setting Up a National Space Law Framework: The Drafting Phase

In the *drafting phase*, in addition to safeguarding legislative techniques, a legislator must ensure that it has a sufficiently good level of knowledge and information relating to the subject matter of the legislation. For this purpose, it may seek external expert opinion to the extent prescribed and limited by constitutional and administrative legal requirements. The regulation of spaceflight is no commonplace subject matter, especially not for those states which have not been exposed to this field before. The national legislator will therefore have to study and understand the nature and character of space activities before attempting to define the regulatory

[72] This type of service is discussed in Sect. 4 above. It is to be noted that 'related cost' would also be difficult to assess and single out, as generic advice is usually difficult to specify in terms of individual effort.

conditions; to the extent, this process needs external expertise—and it often *will* do so—, such expertise will have to be acquired from appropriate, trustful sources.

Those states which look back on a significant spaceflight history, and which possess both a national (space) infrastructure and an established (space) community, are usually able to identify and access such sources 'in-house', that is: at their own domestic level.[73] Others, in the absence of national sources, may turn to the next-closest reliable source; at this stage, an intergovernmental mechanism such as ESA may be the source of choice, especially because the Member State can profit from the 'package deal' in satisfying its needs.[74] Moreover, a public intergovernmental entity will typically bring the additional benefit of relative impartiality, opposite to industry which, despite being a central player to also listen to carefully, will have to defend its specific *private interests*.[75]

5.2 Application of the National Framework to Concrete Cases: The Implementation Phase

In the *implementation phase*, the motivation for seeking assistance is still the same: profiting from external expertise. However, the context and the circumstances in which the assistance is requested is an entirely different one: the application of the existing law, and, more specifically, the authority's decision-making process. The assistance could in this phase include more detailed assessment on the characteristics and circumstances of the specific mission, both from legal and technical perspectives.

Opposite to the legislative process of law making, the process of executive decision making directly affects the individual rights and interests of citizens. Considering that the OST obliges States Parties to authorise 'the activities of non-governmental entities in outer space', this authorisation process is a core element of any national space law. It serves the purpose to ensure that the pre-requisites set by the national space law are in place; only upon official validation may a license for carrying out a space activity be granted. The license decision directly affects the rights of an individual license applicant, who may be granted the authorisation to undertake a space activity, or not. Either way—'go' or 'no-go'—the decision will produce consequences at multiple levels; for the licensee, the taxpayer or third parties which may be affected by the activity going forward or being

[73] In the European context, the example of France can be mentioned here, it being one of the first States to enact national space legislation and one with a rich spaceflight heritage.

[74] *See* Sect. 4.2 above.

[75] Those interests may differ from those of the public authorities, the national taxpayers or the international community—all of them may be equally legitimate, but the legislator will have to combine them into one piece of legislation.

stopped. If an IGO's expertise is to play a role in this process, the limits and effects of providing such expertise will have to be made clear.

5.3 *Consequences of the 'Relationship Intensity': Internal Constitutional Boundaries and the 'Terms of Service'*

There is a limit to be drawn by defining exactly how far expert advice can reach into a national regulatory process. ESA's competences and its relationship with Member States, both established by the ESA Convention, do not foresee the Agency to exercise any sort of *decision authority* in that regard.[76] The obligation to authorise and supervise national space activities set out in Article VI of the OST is the legal duty of states. Subject to their national legal frameworks, states exercise a 'freedom of authorisation' by having the right to refuse to grant a license or stipulating conditions to it (an authorisation is not a *fait accompli)*. The expert opinion by ESA will always be of neutral, technical nature and cannot constitute a recommendation, a certification or any other expression of judgmental character. The same must be confirmed from the state's perspective: Through voluntary cooperation and informal exchange, states remain in control of *drafting* and *implementation* and responsible for the product: a national regulatory framework and the authorisation decisions made in its application.[77]

But what about the 'terms of service' governing the relationship between ESA and the Member State when ESA acts as a 'consultant'? That relationship is one between a national authority and a party that happens to be a subject of public international law. In parallel, the membership relationship between the state and the IGO continues to exist, while a separate written agreement relating specifically to the assistance provided may be concluded, especially in cases when the specific

[76] 'ESA cannot take on any legal competence, authority or responsibility with regard to the authorisation, certification or supervision of space activities under a national legal framework, nor act beyond the boundaries set by its own legal framework. This framework, however, leaves ample room for sharing knowledge, expertise and experience for the benefit and in the interest of States and their appropriate regulation of space activities'. (The European Space Agency and the promotion of national space legislation, A/AC.105/C.2/2016/CRP.23).

[77] The following example shall illustrate this limit in practice: Within the specific relationship of advice and assistance, a Member State may request technical expertise from ESA for processing a licensing application; the question to be examined as part of the governmental authorisation process is to what extend the applicant's proposed satellite system respects international standards for the mitigation of space debris; the national licensing authority does not have the necessary technical expertise to answer this question and, for that reason, submits the relevant documentation to ESA for examination; in its provision of assistance, ESA will limit itself to the technical assessment of how far the proposal responds to the standardised requirements and to what extend this is documented; this result will be provided to the national licensing authority; how the national licensing authority uses this result, and what role it plays in the further authorisation process, lies entirely within the sovereign remit of the Member State.

circumstances require more complex, more detailed and longer service provision. Despite its content being *de facto* that of 'consultancy service provision', this instrument will ultimately be characterised as an international agreement between ESA and, usually, the ministry responsible for space affairs on the Member State's side, possibly triggering questions on its specific legal nature within the state's constitutional and administrative hierarchy, and its interpretation.

6 Concluding Remarks: The Effects of ESA's Advice and Assistance to Member States

This contribution presented and discussed two ways of cooperation between ESA and its Member States relating to national space law: ESA as an '*intergovernmental mechanism*' and ESA as a '*service provider*'; that distinction is a structural aid and a practical finding, likewise. The remarkable, often subtle diversity in the relationship between an IGO and its Member States—as exemplified here in the case of legal and technical assistance for law making and decision-making—is based on different legal pretexts and produces different legal consequences.

As shown, the regulation of space activities is an unusual field that requires specific technical expertise. Therefore, national regulators may require external help. With reliable expertise being scarce, a state seeking for help to regulate space activities must mitigate risks by choosing reliable partners and entering into solid contractual relationships. ESA, an intergovernmental mechanism 'solidified' over decades through the successful management of space programmes for its Member States, can offer both legal and technical assistance in a rather unique way. However, in doing so, ESA must respect the limits of its own legal framework provided for by the ESA Convention. It cannot act in the same way as a consultancy company contracted under private law. Neither can it take on tasks that would not be covered by its mandate nor can it accept contractual terms that would shift typical 'consultancy risks' from the client, the Member State, to the organisation.

An important foundation for the interaction between ESA and its Member States in the context of national space law is that the regulation of national space activities lies exclusively within State competence. Whatever level that interaction takes, even at its most intense level, it does not shift that competence, and duty, from the state to ESA. ESA's role as a 'consultant' can support the process of national law making, or even the formulation of an individual governmental license decision, but it remains an *input*, an element of advice. Augmenting regulative 'competency' through external expertise does not mean that the corollary of the regulator's competence, i.e. its responsibility, would be outsourced.

Organising external expertise to help domestic regulation is part of a cross-disciplinary exercise. Compliance with international space law obligations requires technical competencies, which might be more efficiently drawn through forms of consultancy, especially if the state is merely enabling private actors to carry out

space activities. Arguably, it may therefore be more resource efficient to receive the required knowledge from external sources, provided, of course, that the knowledge comes from a *trusted* source: after all, it forms the basis of authorities' actions. In the case of ESA, the membership relation will guarantee a certain minimum level of trust and reliance. ESA can convey to its Member States not only its technical expertise gained during the years of developing and operating spacecraft, but also its expert opinion on the regulation of space activities itself, including facilitating networking among various regulators.[78]

What may look, at the end, as a straightforward exercise of knowledge transfer and advise-giving, will produce practical and legal consequences that may go far beyond that bilateral relationship. The assistance provided by ESA not only directly helps Member States to make and implement national space law, but it ultimately sustains the very role and purpose of public international law by inducing something that can be labelled a *consistency effect*. The more Member States cooperate through and with the ESA mechanism, the more likely will it be that international legal principles are implemented nationally in a similar manner. This entails that the central international obligations are understood and complied with based on the same understanding; that details of domestic regulation are discussed in a regular exchange; and that lessons learned by states, individually and collectively, are fed back to promote global space governance. ESA's assistance to its Member States in making and implementing national space law is therefore, ultimately, a contribution to the role, rule and further development of international law.

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The FATF and Evolution of Counterterrorism Asset Freeze Laws in the Nordic Countries: We Fought the Soft Law and the Soft Law Won

Aleksi Pursiainen

Abstract The Financial Action Task Force (FATF) is an inter-govermental body devoted to developing international standards for combatting money laundering as well as terrorist and proliferation financing. It is particularly known for its profoundly influential "40 Recommendations" and the grueling mutual evaluations to which member governments periodically subject each other. Despite the non-binding "soft law" nature of its Recommendations, the FATF has had an immense impact on the development of domestic laws in jurisdictions around the world. Some have sought to explain the FATF's powers through its ability to penalize non-compliant jurisdictions through a "blacklisting" mechanism, while others have emphasized the softer, persuasive powers a co-operative expert organization can have on its members. This chapter explores the historical development of a particularly contentious FATF Recommendation on counterterrorism asset freezes and its implementation in the Nordic countries to provide a detailed example of how the FATF influences individual states—and how individual states, in turn, may influence the FATF.

1 Introduction

This chapter revisits an ongoing discussion on the nature and causes of the global influence of the Financial Action Task Force (FATF), an inter-governmental standard-setter in the fields of anti-money laundering (AML) and counterterrorism

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financing (CTF). Specifically, the chapter will recap the two main competing strands of approaches seeking to explain the mechanisms through which this influence is exerted and then assess their ability to explain the history of the implementation of a particular FATF standard—concerning counterterrorism asset freezing mechanisms—in the Nordic countries.

The chapter is divided into five sections. Section 2 introduces the FATF as an organization. It will then briefly summarize the competing "coercive" and "voluntarist" attempts to explain why the FATF, despite the "soft law" nature of its standards, is able to induce compliance in jurisdictions across the world.[1] The first set of explanations argue that the FATF is essentially a tool harnessed by a few powerful states to promote their self-interests and, more importantly for this chapter, that the primary motivation behind compliance with FATF standards is the fear of being blacklisted by it. The second set of explanations argues that the FATF is, quite the contrary, an intricate network of states and other international actors engaged in expert-driven development of mutually agreed standards, with the primary motivation behind compliance being a shared perception of the legitimacy of the resulting norms.

Section 3 begins with an outline of United Nations Security Council Resolution 1373 (2001) ("UNSCR 1373 (2001)"), a binding UN Security Council Resolution, which established an obligation on states to freeze assets to counter international terrorism in the wake of the September 11 attacks on the United States. The section then describes the development of FATF's standards related to such asset freezes and explains how these two instruments conspired to create an international norm requiring states to establish an *administrative procedure for the freezing of terrorists' assets* exhibiting particular mandatory characteristics. Building on this description of the relevant legal standards, Sect. 4 then retraces the evolution of efforts to implement UNSCR 1373 (2001) and the related FATF standards in the Nordic countries. The section shows how these countries held out for more than a decade without implementing key requirements under the newly established norm and how their resistance now seems to have been finally exhausted. Finally, Sect. 5 offers an explanation as to the causes for this prolonged resistance in the Nordic countries, despite their usual acquiescence to international law and multilateral institutions, and the reasons that ultimately broke down that resistance. The chapter concludes with some reflections on the relative merits of the coercive and voluntarist explanations of the FATF's influence.

[1] For explanations making what can be described as "coercive" arguments on the FATF's influence *see,* e.g., Simmons (2001), pp. 589–620; Jojarth (2009), Chapter 5; Goldbarhst (2020), esp. 174–182; Beekarry (2011) esp. 179–188. For contributions emphasizing "voluntarist" views, *see*, e.g., Heng and McDonagh (2008), pp. 553–573, Kerwer and Hülsse (2011), pp. 50–67, Nance (2018a), pp. 131–152, and FATF, *see* e.g. Pavlidis (2021), esp. 767.

2 The Financial Action Task Force

2.1 The FATF as an Organization

The Financial Action Task Force (FATF) was launched in 1989 by the G7 Summit held in Paris.[2] It was originally established as a temporary task force consisting of 11 individual members to focus on money laundering related to international trade in narcotics and, in particular, on determining the aggregate value of related flows of funds.[3] Today, it is an organization with 39 members (37 Member States, plus the European Commission and the Gulf Co-operation Council)[4] and is widely recognized as the most important international standard-setter in anti-money laundering (AML) and counterterrorist financing (CTF).[5] In addition to its members, it has nine "Associate Members", each essentially a regional organization styled after the FATF itself. These regional organizations are partly responsible for ensuring the global reach of the standards set by the FATF—by far the majority of countries of the world are members of one of these organizations.[6] Finally, the FATF is joined by numerous "Observer Organizations", such as the European Central Bank, the International Monetary Fund (IMF), the Organisation for Economic Co-operation and Development (OECD) and the World Bank. As a bureaucracy, however, the FATF is staggeringly small in comparison to its global influence: the FATF budget for 2018 was just over six million euros.[7]

The constitutive document of the FATF is the "Mandate of the Financial Action Task Force", a declaration that is being (re-)issued by the ministers of its members periodically since 1989, with the latest mandate having been approved "open-endedly" in 2019.[8] The Mandate assigns ten different tasks and functions to the FATF, of which three are of particular importance:

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[2] Financial Actions Task Force, *History of the FATF*, https://www.fatf-gafi.org/about/historyofthefatf/.

[3] Nance (2018b), pp. 109–129.

[4] Financial Action Task Force, *Members and Observers, https://www.fatf-gafi.org/about/membersandobservers/* (accessed on July 15th, 2020).

[5] Since 2012, the FATF's mandate has explicitly included also counter-proliferation.

[6] The Associate Members are the Asia/Pacific Group on Money Laundering (APG) based in Sydney, Australia; the Caribbean Financial Action Task Force (CFATF) based in Port of Spain, Trinidad and Tobago; the Eurasian Group (EAG) based in Moscow, Russia; the Eastern & Southern Africa Anti-Money Laundering Group (ESAAMLG) based in Dar es Salaam, Tanzania; the Central Africa Anti-Money Laundering Group (GABAC) based in Libreville, Gabon; the Latin America Anti-Money Laundering Group (GAFILAT) based in Buenos Aires, Argentina; the West Africa Money Laundering Group (GIABA) based in Dakar, Senegal; the Middle East and North Africa Financial Action Task Force (MENAFATF) based in Manama, Bahrain; and the Council of Europe Anti-Money Laundering Group (MONEYVAL) based in Strasbourg, France (Council of Europe).

[7] Financial Action Task Force, *Annual Report 2017–2018*, 66.

[8] Financial Action Task Force, *Mandate*¸ Approved by the Ministers and Representatives of the Financial Action Task Force (2019).

(i) Developing and refining international standards for combating money laundering and the financing of terrorism and its proliferation
(ii) Assessing and monitoring its members, through "peer reviews" ("mutual evaluations") and follow-up processes, to determine the degree of technical compliance, implementation and effectiveness of systems to combat money laundering and the financing of terrorism and its proliferation; and
(iii) Identifying and engaging with high-risk or non-co-operative jurisdictions and those with strategic deficiencies in their national regimes as well as co-ordinating actions to protect the integrity of the financial system against threats posed by them.[9]

The ultimate decision-maker in the FATF is its Plenary, which approves, *inter alia*, FATF's standards on AML and CTF, the results of the peer reviews of its members and decisions on identifying high-risk or non-co-operative jurisdictions. Plenary decisions are made by consensus.[10] In practice, all this means that (1) the members, associate members and observer organizations in the FATF develop and constantly refine a document called *FATF Recommendations*,[11] which describes FATF's understanding of how its members should go about countering threats falling within the ambit of the organization, and also numerous associated documents guiding their implementation and interpretation, feeding into their further development. (2) Each member is subjected to a periodic *Mutual Evaluation* process, where other members review its efforts to comply with the Recommendations and, in particular, highlight any shortcomings in its laws, the capabilities of its competent authorities and its resource allocation. The Plenary approves a Mutual Evaluation Report, which grades the member's compliance with each of the Recommendations. If the results are not satisfactory, the country will be expected to improve and be placed in a "follow-up process", where it must report back to the FATF on the progress it has made until it can demonstrate adequate improvement. The regional FATF-style organizations undertake similar reviews regionally among their own Member States. (3) The Plenary can, in the most severe cases of non-compliance with FATF standards, decide to identify a (member or non-member) jurisdiction as "high-risk", a designation other members (and states globally) are expected to take as a warning sign and as a call to take measures to protect themselves from threats to the integrity of the international financial system caused by that jurisdiction. A slightly less dire warning is a public announcement that a jurisdiction is under

[9] *Ibid.,* 4–5.

[10] *Ibid.,* 7–8. In the experience of the author, as a matter of procedural custom, a single dissenting vote is not considered enough to prevent a "consensus" from forming in the Plenary or its subsidiary working groups; therefore, an individual member cannot not block a decision that negatively affects it without support from at least one additional member.

[11] Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation* (Updated June 2019), http://www.fatf-gafi.org/recommendations.html, hereinafter *FATF Recommendations* or *FATF Recommendations (2019)*.

"Increased Monitoring", with the implied threat of further action unless a significant improvement is made.[12]

The FATF Mandate not only lays down the substantive scope of the organization's work, its working methods and the structure of its bureaucracy, but it also specifically provides for its own legal effect: "Legal Effect of the Mandate: . . . *This Mandate is not intended to create any legal rights or obligations*."[13] The constituent document of the organization is, in other words, unambiguous: the FATF is not intended to wield any legally binding powers towards its Member States. Its mandate is to develop standards to fight financial crime and to support the Member States that choose to seek to meet those standards voluntarily rather than out of a sense of legal obligation. The FATF Recommendations, in other words, are a prime example of what is commonly known as *soft law*.[14]

2.2 Competing Explanations of the Influence of the FATF

Competing explanations on the FATF's influence can be divided into two rough categories: firstly, approaches that emphasize the FATF's blacklisting capabilities as the key to coercing compliance and, secondly, approaches that underline its nature as an intricate network where influence is born in largely voluntary processes of mutual co-operation and benchmarking, leading ultimately to the creation of norms that countries voluntarily comply with due to their perceived legitimacy.

The first set of explanations, which I shall call "coercive" approaches, emphasize the ability of dominant FATF Member States to pressure others into action and, even more importantly, the power of the FATF to order countermeasures on jurisdictions that consistently fail to co-operate with it or that are unable or unwilling to bring their domestic AML/CTF frameworks up to the standards held by the FATF. The toughest of these measures are reserved for "high-risk" jurisdictions, in relation to which the FATF publishes a "call of action", recommending that states undertake various protections and restrictions in their undertakings with the financial sectors of these jurisdictions. The other is the Grey List, which does not specifically mandate any action but indicates the judgement by the FATF that the country has strategic deficiencies and thereby may be a cause of AML/CFT risk to those that co-operate with it without taking extra precautions.

[12] In July 2020, two countries were considered "High-risk" (Democratic People's Republic of Korea and Iran) and 18 were subject to increased monitoring (Albania, the Bahamas, Barbados, Botswana, Cambodia, Ghana, Iceland, Jamaica, Mauritius, Mongolia, Myanmar, Nicaragua, Pakistan, Panama, Syria, Uganda, Yemen and Zimbabwe), two of which had been determined to have made adequate progress, warranting an on-site visit, a hurdle that needs to be cleared before being removed from the Increased Monitoring List (sometimes known as the FATF Grey List).

[13] *Ibid.,* 10 (emphasis added).

[14] *See generally* Turner (2014–2015), 547.

Ultimately, the cost of FATF countermeasures could therefore include restrictions to access to global financial markets, decreased credit ratings, increased costs of borrowing and other concrete and quantifiable negative effects on the non-compliant. Therefore, the coercive explanation goes, violations of the "soft law" instruments issued by the FATF are ultimately sanctioned with penalties that are as "hard" as any within the sphere of international law.[15] The economic impact of these measures would be politically so costly that national Parliaments do not have the courage to go against the FATF and instead choose to legislate as "recommended" in the national Mutual Evaluation Reports.[16] In a recent refreshing econometric analysis of compliance with FATF norms, Mekpor, Aboagye and Welbeck conclude that, in fact, "[i]t seems as though countries are doing just enough to avoid being blacklisted by FATF giving the reputational repercussions of blacklisting", suggesting that the coercive analysis sufficiently explains the FATF's influence.[17]

Doron Goldbarhst has provided an elegant elaboration of this approach.[18] In addition to the direct threat of blacklisting, *Goldbarhst* argues that the power of FATF's standards is further explained by the organization's strategy of framing many of its key recommendations as essentially restatements of pre-existing "hard law" norms with obvious authority, such as, in the CTF context, the Terrorist Financing Convention or binding UN Security Council Resolutions. As *Goldbarhst* puts it, the FATF then "leverages these binding norms to support the implementation of all recommendations made by it, in manner that is indifferent to the normative source of the recommendation".[19] In other words, the FATF eagerly portrays its recommendations as reflective of a legal obligation, even in cases where they lack any clear foundation on authoritative instruments of international law, thereby inducing acquiescence. Coercive explanations often acknowledge also the role of powerful individual states, in particular the United States, as both the authors and the guarantors of the norms issued by the FATF, in particular in the CTF realm. *Goldbarhst* explains that the influence of individual powerful FATF members is multiplied due to the organization's "multi-layered" structure, whereby the FATF standards are developed in a relatively select group of 39 members in the "first layer", i.e. the FATF itself, but where compliance is required by a much broader range of jurisdictions that belong to the "second layer" (i.e. the regional bodies), which have limited say in developing the standards. This enables much more

[15] *Saby Ghoshray* refers to FATF standards as "hardened soft law", *see* Ghoshray (2014), 521–546, while Beekarry describes them as "the hardest type of soft norms", *see* Beekarry (2011), 158.

[16] For contributions emphasizing "coercive" arguments on the FATF's influence, see footnote 2 above.

[17] Mekpor et al. (2018), 442–459.

[18] Goldbarhst (2020), esp. 174–182.

[19] *Ibid.*, 177.

ambitious regulating than a setting where consent would be required by each participating jurisdiction individually.

If accurate, the coercive explanation of the FATF leaves it vulnerable to criticism. Critics could suggest that the organization's rule-making process lacks democratic legitimacy, that it serves to further amplify the influence of already powerful economies and that it threatens to punish those with insufficient resources to meet the standards set by their wealthier peers.

On the other hand, some contributors see value in a system capable of forming robust global rules in the absence of a requirement of consent from each individual state. Among such commentators is *Andrew Guzman*, who argues that such structures may be necessary for forming effective responses to urgent and critical global issues, where treaty-based (i.e. consent-driven) lawmaking is too slow and too unambitious.[20] *Goldbarhst* has noted this argument as well: "Prior to the establishment of the FATF, the need for consent was a major challenge for CTF (and AML) efforts ... The FATF overcame the need for consent by producing soft-law recommendations in a hard-law environment. ..."[21]

However, a competing set of explanations seek to challenge the coercive approach position, rejecting both the decisive role of a few powerful actors in the FATF and the centrality of the threat of formal punishment in explaining its influence instead of looking for answers in the working methods of the FATF and, more broadly, its collectivist nature. For lack of a better term, I shall call these "voluntarist" explanations in distinction to the coercive explanations described above.

Among the most important early contributions to this line of reasoning was made by Heng and McDonagh, who in 2008 formulated what they referred to as the "governmentality" approach to the FATF.[22] Among their arguments was the importance of "benchmarking": they argued that the driving force behind compliance with FATF standards was not the fear of formal sanctions but rather the perception of states (both members and non-members) of those standards as the "right way" to do things, conferring "moral legitimacy" on the rules pronounced by the FATF. In other words, Heng and McDonagh argue that countries seek to comply with the standards, not because of legal obligation or fear of being sanctioned but because they perceive the standards as reflective of the values of a community of which they wish to be accepted members.[23]

Kerwer and Hüssle subscribe to the perceived legitimacy of FATF standards as key drivers behind compliance.[24] They believe that this legitimacy rests primarily on the FATF's nature as an inclusive *expert* organization rather than a political body.

[20] Guzman (2012), 747.

[21] Goldbarhst (2020), 174. Goldbarhst is also very aware of the drawbacks of such a system and suggests a range of reforms to address them; *see* Goldbarhst (2020), pp. 178–182.

[22] Heng and McDonagh (2008), 553–573.

[23] *Ibid.,* esp. 566–567.

[24] Kerwer and Hülsse (2011), 50–67.

Compliance results from this legitimacy rather than fear of punishment; they argue—how else could one explain high levels of compliance among *non-member* states, which are not exposed to most of FATF's "formal" punishment methods? To be fair, *Kewer and Hüssle* do also recognize that coercion plays a "narrow role" in explaining FATF's influence: the FATF blacklist aims to secure a basic level of acceptance by states of FATF standards, they say, but those that have accepted this basic level are left to operate in a voluntary setting.

A more recent elaboration of the voluntarist explanation is the "experimentalist" approach, most visibly promoted in the FATF context by *Mark Nance*.[25] The fundamental source of the experimentalist criticism towards claims made by coercive arguments is that there is little actual evidence that blacklisting in fact has significant quantifiable adverse effects and that attempts to identify such effects have consistently failed.[26] If there is no true cost associated with being blacklisted, then why would states (or, more precisely, their legislatures or individual politicians) go to such lengths to avoid it?

Nance offers an alternative explanation, describing the FATF as exercising "experimentalist governance".[27] There are five elements that are crucial to this model of explanation of an organization:

(A) The role of penalties (i.e. threat of being placed on a list) is understood differently: they seek not to enforce "narrow" compliance (i.e. devout adherence to a norm as is) but rather to force *engagement* in the rule-making process itself, to help define more palatable versions of the norm.
(B) It involves a rule-making and peer review mechanism that is intentionally *reflective*, in that lessons learned in the implementation of a standard will feed to the further development of that standard in a continuous cycle, where the norm is developed by the entire network of participants rather than dictated by its most powerful members.
(C) The members of an experimentalist network are engaged not only in "shallow" persuasion of others (i.e. seeking to convince them to comply, for reward or penalty, despite their opposition to the norm) but also in *"deep" persuasion*, i.e. seeking to persuade them that the norm is, in fact, more worthy than its alternatives and the right thing to do.
(D) Experimentalist organizations are inclusive in that they offer a wider range of entities the opportunity to participate, thereby inducing *democratic destabilization*, where the sheer broadness of opinion, information and argumentation shakes preconceptions and promotes the development of improved standards.

[25] Nance (2018a), 131–152.

[26] *Ibid.,* 134.

[27] On experimentalist governance in general, *see e.g.* Dorf and Sabel (1998), pp. 267–473; Sabel and Zeitlin (2008), pp. 271–327; de Búrca et al. (2014), pp. 477–486. On commentaries favourable to an experimentalist explanation of the FATF, *see* e.g. Pavlidis (2021), pp. 765–773, esp. 767 (although Pavlidis does acknowledge also the role of coercion).

(E) The experimentalist explanation rejects the distinction between "hard" and "soft" law as unhelpful, instead preferring to focus on "the social construction of obligation", i.e. seeking to understand norms as they actually operate in their *social context* rather than through dogmatic legal analysis.[28]

For the proponents of this approach, the FATF is a textbook example of experimentalist governance. *Nance* recounts the board participation of different actors in FATF's work ("large and small states; powerful and weak states; post-industrial and developing economies; umbrella organizations and more specific organizations"), the iterative development of FATF standards, the iterative Mutual Evaluation Rounds and their feedback on the standards themselves, the often broad and open-ended content of particular recommendations and FATF's preferred method of making decisions through negotiated consensus rather than a majority vote. *Nance* concludes that understanding the FATF is meaningfully possible only through the experimentalist lens. The coercive explanation is simply not up to the task.

Specifically, voluntarist explanations, such as the experimentalist approach, offer a different view as to why the FATF wields the influence it does. As *Nance* observes in concluding his experimentalist thesis of the FATF:

> For scholars of FATF, an experimentalist understanding means taking more seriously the internal operations and process of FATF. This is difficult, as it requires careful process tracing to identify. To do otherwise, however, is to risk imputing causation to what in fact is correlation. Many observers argue that FATF is driven by the US and EU because their interests align. This overlooks substantial disagreements among the US and the many diverse members of the EU. It also ignores the possibility that the causal arrows, in some cases, point in the opposite direction. If this experimentalist interpretation is correct, it means that FATF, the network, plays a much larger role in shaping actor preferences than has previously been acknowledged.[29]

The following section intends to take *Nance* up on his call to engage in "careful process tracing" of a particular norm developed in the FATF. Hopefully, we can thereafter in the conclusion of this chapter plausibly reflect on the relative merits of these two competing yet plausible strands of explanations that were once described by *Kewer and Hüssle* as "irritatingly" contradictory.[30]

3 The Evolution of the Concept of Administrative Asset Freezes

3.1 Adoption of UNSCR 1373 (2001)

At the turn of the millennium, the most substantial international legal instrument of a general application on countering the financing of terrorism was the International

[28] Nance (2018a), 135–136.

[29] Nance (2018a), 148.

[30] Kerwer and Hülsse (2011), 64.

Convention for the Suppression of the Financing of Terrorism ("Terrorism Financing Convention").[31] It had been adopted by the UN General Assembly in December 1999 and would enter into force in April 2002 after its 22nd ratification.[32] While the thrust of the Convention was to require the criminalization of the act of financing terrorism,[33] its Article 8 also contained a provision on freezing assets intended to the be used for the commission of acts of terrorism:

1. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the **identification, detection and freezing or seizure of any funds used or allocated for the purpose of committing [terrorist crimes]** as well as the proceeds derived from such offences**, for purposes of possible forfeiture.**
2. Each State Party shall take appropriate measures, in accordance with its domestic legal principles, for the forfeiture of funds used or allocated for the purpose of committing the offences set forth in article 2 and the proceeds derived from such offences.[34]

The scope of assets to be frozen under the Convention was thereby limited to such assets that could be specifically identified as having been intended for terrorist purposes, and their freezing was envisaged to generally lead to the confiscation of those assets.

As such, the measures required by the Convention closely resembled measures already used and familiar in most jurisdictions, including in the Nordic countries, with respect to other types of crimes and assets associated with their commission. The main relevance of the provision was, rather than to create a new type of coercive measure or investigative tool, to ensure that while states went about criminalizing terrorism financing, they would also ensure that these types of freezing and seizing tools were extended to that (new) type of crime as well. In this chapter, such measures will be referred to as the *freezing of assets as part of a criminal proceeding*.

In a rapid and robust response to the terrorist attacks against the United States on 11 September 2001, the United Nations Security Council adopted Resolution 1373 (2001), invoking its powers under Chapter VII of the UN Charter to impose binding norms of international law.[35] The Resolution contained a broad range of counterterrorism measures, including the mandatory criminalization of the "provision and collection" of funds for the purposes of terrorism financing, echoing what was contemplated in the Terrorism Financing Convention.

Most importantly for the present chapter, UNSCR 1373 (2001) also introduced an asset freezing requirement, which differed from the "traditional" model endorsed by the Convention. Paragraph 1(c) of the Resolution requires all states to

[31] *International Convention for the Suppression of the Financing of Terrorism,* New York, 9 December 1999, United Nations Treaty Series vol. 2178, 197.

[32] United Nations Treaty Collection, Status of Treaties, https://treaties.un.org/.

[33] *Ibid.*, Article 2.

[34] *Ibid.*, Article 8.

[35] Charter of the United Nations, Chapter VII.

> . . .[f]reeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.[36]

In other words, while the Convention required the freezing of *specific* assets used in the commission of terrorism, UNSCR 1373 (2001) turned this around by targeting the persons committing the acts and requiring the freezing of *all* their assets, regardless of whether those assets were tied to any particular act of terrorism.[37]

UNSCR 1373 (2001) also differed significantly from earlier UN sanctions resolutions that had imposed targeted asset freezes. For instance, Resolution 1267 (1999), which laid the foundation for a system of targeted sanctions against the Taliban and al-Qaida, specifically empowered a committee operating under the Security Council to identify by name those persons and entities whose assets must be frozen. In a stark difference, UNSCR 1373 (2001) requires states themselves to identify which persons to target.

While it was clear that paragraph 1(c) of UNSCR 1373 (2001) strived for something different than Article 8 of the Terrorism Financing Convention, the details of how to implement the Resolution were left to the Member States. The Resolution takes no position on, for instance, whether the freezing should be executed as part of a *criminal* or an *administrative* proceeding, nor does it provide for any threshold for the level of certainty of guilt that should trigger these measures. The requirement was, simply, to establish a mechanism capable of identifying persons satisfying the defined criteria as laid down by law and then freezing their assets "without delay".

A guidance document issued by the Counter-Terrorism Committee Executive Directorate (CTED), a body assigned to support the Security Council Counter-Terrorism Committee (CTC), later suggested (and continues to suggest to this day) that the choice of framework was up to the individual Member State:

> States should have in place a legal provision that provides for the freezing of terrorist funds and assets pursuant to resolution 1373 (2001) and establish a designating mechanism with adequate due process consideration, as well as a dedicated mechanism to address foreign asset-freezing requests . . . *Asset-freezing mechanisms may be of an administrative or criminal nature*, provided that the State can freeze without delay and on an *ex parte* basis.[38]

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[36] UNSCR 1373 (2001), paragraph 1(c). Paragraph 1(d) provides for a complementary obligation to prevent any funds or assets from being made available for the benefit of such persons.

[37] There were other expansions as well, including broadening the scope also to entities "owned or controlled" or those "acting on behalf of" terrorists, as well as "funds derived or generated" from the relevant assets.

[38] The quotation is from the most recent guidance document, Counter-Terrorism Committee Executive Directorate (CTED), *Technical Guide to the Implementation of Security Council Resolution 1373* (2019), paragraphs 51 and 55 (emphasis added).

3.2 Evolution of the FATF Standard on UNSCR 1373 (2001)

The FATF also reacted almost instantly to the 9/11 attacks. Until then, its mandate had exclusively covered money laundering, but within weeks of the attacks, it was extended to cover also countering the financing of terrorism. Already in October 2001, the existing *FATF 40 Recommendations* were supplemented by the so-called *IX Special Recommendations*.[39] Each of the new Special Recommendations dealt with a specific aspect of countering the financing of international terrorism, including also the implementation of UNSCR 1373 (2001) and other counterterrorism sanctions resolutions adopted by the Security Council.

Among the newly created Special Recommendations, the first paragraph of *Special Recommendation III* dealt with counterterrorism asset freezes pursuant to UNSCR Resolutions, providing as follows:

> Each country should implement measures to **freeze without delay funds or other assets of terrorists, those who finance terrorism and terrorist organisations in accordance with the United Nations resolutions** relating to the prevention and suppression of the financing of terrorist acts.[40]

A set of Interpretative Notes accompanying the *IX Special Recommendations* described the nature of the measures envisaged under Special Recommendation III thusly:

> It should be stressed that none of the obligations in Special Recommendation III is intended to replace other measures or obligations that may already be in place for dealing with funds or other assets in the context of a criminal, civil or administrative investigation or proceeding. The focus of Special Recommendation III instead is on the **preventative measures that are necessary and unique** in the context of stopping the flow or use of funds or other assets to terrorist groups.[41]

As for identifying and designating those whose assets are to be frozen, the Interpretative Note further provided that

> [j]urisdictions should develop and implement procedures to freeze the funds or other assets . . . without delay and without giving prior notice to the persons or entities concerned . . . **Consequently**, these procedures must ensure (i) the **prompt determination whether reasonable grounds or a reasonable basis exists** to initiate an action under a freezing mechanism **and** (ii) the subsequent **freezing** of funds or other assets **without delay upon determination that such grounds or basis for freezing exist**.[42]

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[39] Financial Action Task Force, *IX Special Recommendations* (2001).

[40] Financial Action Task Force, *IX Special Recommendations* (Update of 2008) 2 (emphasis added). https://www.fatf-gafi.org/publications/fatfrecommendations/documents/ixspecialrecommendations.html.

[41] Financial Action Task Force, *IX Special Recommendations* (Update of 2008), 7.

[42] *Ibid.*, 11. The Interpretative Note to Special Recommendation III contained also a number of other specific pieces of guidance as to how it should be implemented, including on appointing competent authorities to make freezing decisions, maintaining sanctions on those failing to comply with the freeze, etc., which are not present in UNSCR 1373 (2001); these are not, however, essential for the present chapter.

Special Recommendation III itself is hollow in terms of substance, in that it only recommends countries that implement UNSCR Resolutions, including UNSCR 1373 (2001), which they were bound by international law to do anyway. However, the Interpretive Note adds something that was not present in paragraph 1(c) of UNSCR 1373 (2001): that the trigger for the freezing action should be the determination by the state in question that *reasonable grounds or basis* exists for believing the person has committed or attempted to commit a terrorist crime (or that any of the other paragraph 1(c) criteria, such as "being owned or controlled by", were satisfied). UNSCR 1373 (2001) itself made no mention of such a threshold, yet the Interpretive Note confidently pronounces that *as a consequence* of the Resolution, the threshold should be reasonable grounds. However, there does not appear to be any objective reason why this specific threshold arises from the binding UNSCR 1373 (2001).

Finally, with respect to international co-operation, the Interpretative Note explained:

> Additionally, to ensure that effective co-operation is developed among jurisdictions, **jurisdictions should examine and give effect to, if appropriate, the actions initiated under the freezing mechanisms of other jurisdictions. When** (i) a specific notification or communication is sent and (ii) **the jurisdiction receiving the request is satisfied, according to applicable legal principles, that a requested designation is supported by reasonable grounds,** or a reasonable basis**,** to suspect or believe that the proposed designee is a terrorist, one who finances terrorism or a terrorist organisation**, the jurisdiction receiving the request must ensure that the funds or other assets of the designated person are frozen without delay**.[43]

Again, this was something of which UNSCR 1373 (2001) made no mention: the existence of a requirement to treat foreign requests for asset freezes with essentially the same threshold as that of domestically initiated freezes.

In 2012, the FATF merged it with the 40 AML Recommendations and the additional special CTF Recommendations, creating the set of standards in force today (there are now 40 recommendations in total). In the new framework, Recommendation 6 on *Targeted financial sanctions related to terrorism and terrorism financing* reads as follows:

> Countries should **implement targeted financial sanctions regimes to comply with United Nations Security Council resolutions** relating to the prevention and suppression of terrorism and terrorist financing. **The resolutions require countries to freeze without delay** the funds or other assets of, and to ensure that no funds or other assets are made available, directly or indirectly, to or for the benefit of, any person or entity either (i) designated by, or under the authority of, the United Nations Security Council under Chapter VII of the Charter of the United Nations, including in accordance with resolution 1267 (1999) and its successor resolutions; or (ii) designated by that country pursuant to resolution 1373 (2001).[44]

The text of the Recommendation made by the FATF is unambiguous: "countries should implement targeted financial sanctions regimes *to comply with United Nations Security Council resolutions*". In other words, insofar as it concerns

[43] *Ibid.*, 8.

[44] *FATF Recommendations (2012),* 11.

UNSCR 1373 (2001), the action recommended by the FATF was to establish a domestic asset freeze mechanism that satisfies the requirements laid down by the Security Council.

On this specific issue, then, like its predecessor, the new Recommendation appears to not add anything substantive on top of the requirement on the Member States to implement UNSCR 1373 (2001), already a binding obligation under international law. For instance, like Special Recommendation III, Recommendation 6 appears to be entirely neutral on the procedural design of the mechanism, including on whether states ought to pursue domestic asset freezes as part of their criminal or administrative procedural legal frameworks.

However, the new Recommendations were also accompanied by a set of Interpretative Notes.[45] For Recommendation 6, parts of the guidance remained unchanged (such as the point on "reasonable grounds"[46] and the requirement to treat foreign requests similarly as domestically initiated processes[47]), but a lot more substance was added.[48] For the purposes of this chapter, two additions were made that are particularly important.

Firstly, an addition was made to the description of the nature of the asset freezing measures:

> It should be stressed that none of the obligations in Recommendation 6 is intended to replace other measures or obligations that may already be in place for dealing with funds or other assets in the context of a criminal, civil or administrative investigation or proceeding … **Measures under Recommendation 6 may complement criminal proceedings against a designated person or entity, and be adopted by a competent authority or a court, but are not conditional upon the existence of such proceedings.** Instead, the focus of Recommendation 6 is on the preventive measures that are necessary and unique in the context of stopping the flow of funds or other assets to terrorist groups; and the use of funds or other assets by terrorist groups.[49]

Secondly, as for identifying and designating those whose assets are to be frozen, the amended Interpretative Note now provides in a similar fashion that

> **[w]hen deciding whether or not to make a … designation, countries should apply an evidentiary standard of proof of "reasonable grounds" or "reasonable basis**". For designations under resolutions 1373 (2001), the competent authority of each country will apply the legal standard of its own legal system regarding the kind and quantum of evidence for the determination that "reasonable grounds" or "reasonable basis" exist for a decision to designate a person or entity, and thus initiate an action under a freezing mechanism … **Such … designations should not be conditional upon the existence of a criminal proceeding.**[50]

[45] *Ibid.,* 29–112.

[46] *Ibid.,* 41.

[47] *Ibid.,* 39.

[48] For the full Interpretative Note on Recommendation 6, *see FATF Recommendations,* 37–44.

[49] *FATF Recommendations*, 37 (emphasis added).

[50] *FATF Recommendations*, 39 (emphasis added).

Since these were thusly accepted by the organization as the appropriate interpretation, it was no longer a major leap to adopt them in the *FATF Methodology*, a guidance document on conducting Mutual Evaluations, as one of the specific criteria against which compliance with Recommendation 6 should be assessed.[51]

In other words, since 2012, the FATF has explicitly maintained the position that in implementing UNSCR 1373 (2001), it is incumbent upon a state to ensure that (i) it can designate persons as terrorists and freeze their assets *in an administrative proceeding* and, moreover, *even in the absence of any criminal proceeding relevant to that designation* and that (ii) such designations are made on basis of an evidentiary standard of *reasonable grounds* and that (iii) foreign requests are treated equally with domestically initiated processes.[52] As described above, nothing in the text of UNSCR 1373 (2001) suggested that either of these would be required by the Security Council.

However, simultaneously with the development of the new FATF requirements, the Security Council itself decided to lend its weight behind the organization. Already in 2005, it had endorsed, in broad terms, the work of the FATF by "strongly urging" UN Members States "to implement the comprehensive, international standards embodied in the Financial Action Task Force's (FATF) Forty Recommendations on Money Laundering and the FATF Nine Special Recommendations on Terrorist Financing",[53] repeating this message of general endorsement in 2011.[54]

After the adoption of the new *FATF Recommendations*, the Security Council went further, stating in 2014 as follows:

> [The Security Council] *strongly urges* Member States to **apply the elements in FATF's Interpretive Note to Recommendation 6**, and to take note of, inter alia, related best practices for effective implementation of targeted financial sanctions related to terrorism and terrorist financing, and ***takes note*** **of the need to** have appropriate legal authorities and procedures **to apply and enforce targeted financial sanctions that are not conditional upon the existence of criminal proceedings, and to apply an evidentiary standard of proof of "reasonable grounds" or "reasonable basis"**....[55]

In other words, while falling short of actually issuing a legally binding order on the Member States to follow the letter the new Interpretative Note to Recommendation 6, the Security Council did specifically make known its approval of it and (again

[51] Financial Action Task Force, *Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems* (2013) ("FATF 2013 Methodology"), 32–33: "6.2. In relation to designations pursuant to UNSCR 1373, countries should: ... (d) apply an evidentiary standard of proof of 'reasonable grounds' or 'reasonable basis' when deciding whether or not to make a designation. Such (proposals for) designations should not be conditional upon the existence of a criminal proceeding...."

[52] Again, there are also a number of other specific requirements that have been developed by the FATF in relation to asset freezes; *see in detail FATF 2013 Methodology,* 32–35; these are not, however, essentially for the present chapter and not as fundamental as the three listed here.

[53] UN Security Council Resolution 1617 (2005).

[54] UN Security Council Resolution 1989 (2011), paragraph 11.

[55] UN Security Council Resolution 2161 (2014).

without issuing a binding norm) "took note" that freezing mechanisms "needed" to be independent of criminal proceedings and based on the "reasonable basis" standard, as suggested by the FATF.

Consequently, while nominally (and uncontroversially) only recommending since 2001 that states implement a binding UN Security Council Resolution on asset freezes, the FATF had in fact decided by 2012 that it expected states to do so in a particular manner perceived by the FATF as the only appropriate approach: by establishing an *administrative procedure for freezing terrorists' assets based on the evidentiary standard of reasonable grounds where foreign requests are treated equally with domestically initiated processes*. This interpretation was then echoed with approval by the Security Council a few years later, in 2014, although in terms that fell short of issuing a binding norm of international law that would have required compliance.

4 Evolution of Domestic Asset Freezing Laws in Nordic Countries

4.1 Introduction: FATF Third and Fourth Round of Mutual Evaluations

The following account on the development of domestic laws draws significantly (though not exclusively) on the Mutual Evaluation Reports and the various follow-up reports of the Nordic countries in the third and fourth round evaluations in the FATF. These rounds were chosen because the third was the first one where Special Recommendation III was in force and the fourth round is the most recent one, still ongoing at the time of the writing of this chapter.

In the third round, countries would be placed in a so-called "regular follow-up process" following their initial Mutual Evaluation Report if their system showed significant deficiencies (as most jurisdictions did).[56] Countries in regular follow-up were required to report back in two years with progress made on those Recommendations that had not received a "Largely Compliant" (LC) or "Compliant" (C) grade. A country could then be removed from the regular follow-up when it had shown sufficient action and, in particular, when all of the six "Core Recommendations" and ten "Key Recommendations" had reached a level of either LC or C.[57] Special Recommendation III was considered a Key Recommendation.

[56] Specifically, the criteria for being placed in regular follow-up were: "a) Where any of Recommendations 1, 5, 10, 13 or Special Recommendations II or IV are rated either PC or NC; or b) Where the Plenary so decides." *See* Financial Action Task Force, *Third Round of AML/CFT Mutual Evaluations, Process and Procedures* (2009).

[57] *Ibid.,* 12–14. Core Recommendations were Recommendations 1, 5, 10, and 13 as well as Special Recommendations II and IV.

The Plenary, when assessing whether to release a country from follow-up, was however granted some discretion related to this rule: it would "retain some limited flexibility" for Key (but not Core) Recommendations "if substantial progress has also been made on the overall set of Recommendations that have been rated [Partially Compliant (PC)] or [Non-Compliant (NC)]".[58]

Additionally, countries would be directed into "enhanced follow-up" if they did not show adequate progress in the regular follow-up. The enhanced follow-up would consist of more frequent reporting to the FATF and the following additional gradual steps:

a) Sending a letter from the FATF president to the relevant minister(s) in the member jurisdiction, drawing attention to the non-compliance with the FATF Recommendations.
b) Arranging a high-level mission in the member jurisdiction to reinforce this message, where a meeting will be held with ministers and senior officials.
c) In the context of the application of Recommendation 21 by its members, issuing a formal FATF statement to the effect that the member jurisdiction is insufficiently in compliance with the FATF Recommendations, and recommending appropriate action, and considering whether additional countermeasures are required.
d) Suspending the jurisdiction's membership of the FATF until the Recommendations have been implemented.
e) Terminating the membership of the jurisdiction.[59]

In the Fourth Evaluation Round, the major change was to introduce a framework to measure not only the technical compliance of the country with the Recommendations but also the practical effectiveness of the system. For this chapter, which focuses on the interplay between the FATF and domestic laws, however, technical compliance remains the key issue also when looking at the fourth round evaluations.

Here, a similar division into "regular" and "enhanced" follow-up remained, with the same threats levied against those in the enhanced version. However, instead of the focus on getting a passing grade on "Core and Key" Recommendations to be removed from follow-up, the fourth round procedures take a different stance:

> The general expectation is for countries to have addressed most if not all of the technical compliance deficiencies by the end of the 3rd year, and the effectiveness shortcomings by the time of the follow-up assessment.[60]

In a footnote, the process document further explains:

[58] *Ibid.*, 13.

[59] *Ibid.,* 14.

[60] Financial Action Task Force, *Consolidated Process and Procedures for Mutual Evaluations and Follow-Up, "Universal Procedures"* (2019), 14.

> It is up to the Plenary to determine the extent to which its members are subject to this general expectation, depending on the member's context.[61]

In other words, the special attention given to Key Recommendations, such as the one on asset freezes, on which this chapter focuses, was no longer present (although, in a sense, a more limited set of "Core Recommendations" remain[62]).

In the following subsections, the chapter examines how each of the Nordic countries was assessed, specifically with regard to Special Recommendation III and, subsequently, Recommendation 6, in the third and fourth round evaluations.

4.2 Norway

Norway implemented UNSCR 1373 (2001) initially by a provisional decree in the immediate aftermath of the 9/11 attacks, in October 2001, followed by implementation through the Criminal Procedure Act (Lov om rettergangsmåten i straffesaker, LOV-1981-05-22-25) in 2002.[63] The amendments made to the Criminal Procedure Act empowered a prosecutor to take a decision (without needing a court order) to freeze "with just cause" the funds of a person suspected of committing or attempting to commit a terrorist act or the offence of terrorist financing.[64] From the preparatory works of the amendment, it is clear that a criminal procedural framework was deliberately chosen over an administrative one, after broad consultations.[65]

This was the state of affairs when Norway, a member of the FATF since 1991, underwent its third round of mutual evaluation in 2005. In 2005, the FATF standards consisted of the 40 FATF Recommendation and the IX Special Recommendations—with Special Recommendation III governing compliance with UNSCR 1373 (2001).

The FATF accepted the Norwegians' contention that it had made efforts to comply with Special Recommendation III but found many weaknesses in the system it had established. In issuing a "Partially Compliant"[66] rating on Norway for Special

[61] *Ibid.,* note 18.

[62] Ibid., 13–14, where the procedures mandate that the "country would be placed into enhanced follow up if it has 8 or more NC/PC ratings for technical compliance, or is rated NC/PC on any one or more of R.3, 5, 10, 11 and 20", placing particular importance therefore on these five Recommendations (which do not include Recommendation 6).

[63] *Prop. 100 L (2018 – 2019), Proposisjon til Stortinget (forslag til lovvedtak), Endringer i straffeloven mv. (terrorrelaterte folkerettslige forpliktelser m.m.),* 42.

[64] Financial Action Task Force, *Third Mutual Evaluation/Detailed Assessment Report, Anti-Money Laundering and Combating the Financing of Terrorism, Norway* (2005).

[65] *Ot.prp. nr. 61 (2001-2002), Om lov om endringer i straffeloven og straffeprosessloven mv. (lovtiltak mot terrorisme – gjennomføring av FN-konvensjonen 9. desember 1999 om bekjempelse av finansiering av terrorisme og FNs sikkerhetsråds resolusjon 1373 28. September 2001)*, 55–56.

[66] The scale used by the FATF is "Non-Compliant", "Partially Compliant", "Largely Compliant" and "Compliant".

Recommendation III, the FATF summarized the main shortcomings with regard to UNSCR 1373 (2001) as relating to the lack of measures to monitor compliance, lack of a clear basis for humanitarian exemption under the asset freeze law, limitation on the scope of the measures due to the narrow definition of the concept of "terrorism financing" in Norwegian law, lack of communication within the government and lack of guidance towards economic operators.[67]

In the paragraphs leading to the summary, the Report also expresses some dissatisfaction on the overall nature of the freezing mechanism: "The underlying rationale for [UNSCR 1373 (2001) and [Special Recommendation III] is to implement measures that are both of a preventive and deterrent nature; however, this approach is lacking in the Norwegian system."[68] Objections presumably raised by Norwegians on the potential human rights implications of ordering asset freezes unconnected to criminal proceedings were not accepted:

> Freezing orders in the context of terrorist financing may raise sensitive issues, particularly concerning human rights. However, proper implementation of both [UNSCR 1373 (2001)] and Special Recommendation III can be achieved (and has been achieved by countries with legal systems similar to Norway's) while still meeting international obligations concerning the respect for human rights and the fight against terrorism.[69]

However, the fact that the asset freezes occurred as part of Norway's criminal procedural framework was not rejected as such, and since no mention of the procedural choice is made in the "Summary of factors" underlying the Partially Compliant rating, Norway would have been well in its rights to believe that the mechanism it had in place was in principle capable of satisfying Special Recommendation III once the gaps relating to compliance monitoring, humanitarian exemptions, the definition of terrorism financing and information sharing were addressed. In 2009, the FATF assessed the progress Norway had made in a "Follow-Up Report" on the Mutual Evaluation,[70] which finally concluded (grudgingly[71])

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[67] Financial Action Task Force, *Third Mutual Evaluation/Detailed Assessment Report, Anti-Money Laundering and Combating the Financing of Terrorism, Norway* (2005), Compliance with Special Recommendation III, Summary of factors underlying rating, 47.

[68] *Ibid.,* 47.

[69] *Ibid.* These

[70] Financial Action Task Force, *Mutual Evaluation Fourth Follow-Up Report, Anti-Money-laundering and Combating the Financing of Terrorism, Norway* (2009), 15–17, where these correspond with the "deficiencies" Norway had been expected to address.

[71] *Ibid.*, 4–5: "Overall, Norway has reached a satisfactory level of compliance with all core Recommendations and eight of the key Recommendations, but has not reached a satisfactory level of compliance with two of the key Recommendations – SR III and SR I ... The mutual evaluation follow-up procedures indicate that, for a country to have taken sufficient action to be considered for removal from the process, it must have an effective AML/CFT system in force, under which it has implemented all core and key Recommendations at a level essentially equivalent to C or LC, taking into account that there would be no re-rating. The Plenary does, however, retain some limited flexibility with regard to the key Recommendations if substantial progress has also been made on the overall set of Recommendations that have been rated PC or NC ... Consequently, it is

that Norway had made sufficient progress overall to be released from the follow-up procedure, although deficiencies on Special Recommendation III remained.

The first phase of the next evaluation round of Norway culminated when a new Mutual Evaluation Report was approved by the FATF Plenary in October 2014.[72] This time, the standards against which they were measured were the new 2012 *FATF Recommendations*, where the recommendation to comply with UNSCR 1373 (2001) was contained in Recommendation 6. The underlying laws in Norway were largely unchanged, although additional guidance had been issued towards financial institutions.[73]

In line with the new interpretations adapted and the new *FATF Methodology*, the Norway 2014 MER no longer beats around the bush:

> Norway has sought to implement targeted financial sanctions pursuant to UNSCR 1373 through a mechanism to freeze terrorist assets in the [Criminal Procedure Act] . . . Norway does have a mechanism which allows authorities to freeze without delay any assets of a natural or legal person suspected of terrorism offences, or an enterprise directly or indirectly owned or controlled by a suspected person . . . **However, under this mechanism, a freezing order can only able be made as part of an ongoing criminal investigation** . . . Therefore, while this mechanism provides for additional terrorist asset freezing, it does not implement all aspects of the targeted financial sanctions pursuant to UNSCR 1373 as required by Recommendation 6. **Norway cannot consider requests for designation by foreign countries,** although the asset freezing mechanism may be used when acting upon a rogatory letter from another country if Norwegian authorities open an investigation.[74]

In other words, whereas the connection of asset freezes to ongoing criminal proceedings was mentioned merely as a mellow *obiter dictum* criticism in 2005, by 2014, it was among the main reasons that Norway is seen to not comply adequately with Recommendation 6—despite the admission that the country was able to freeze "without delay" funds of those suspected of terrorism, as required by UNSCR 1373 (2001).[75]

All available evidence suggests that the Norwegians have never shared the FATF's position that the effective implementation of UNSCR 1373 (2001) is only achievable through an administrative freezing mechanism. Norway made a conscious decision to adopt a different approach in 2002, defended this aspect of their mechanism successfully in the 2005 Mutual Evaluation and entered the 2014 Evaluation with no indication that its position had changed. They were never

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recommended that **this would be an appropriate circumstance for the Plenary to exercise its flexibility and remove Norway from the regular follow up process**. . ." (emphasis added).

[72] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures, Norway, Mutual Evaluation Report* (2014), http://www.fatf-gafi.org/publications/mutualevaluations.

[73] *Ibid.*, 150.

[74] *Ibid.*, 150–151 (emphasis added).

[75] Due to this and many other perceived shortcomings, Norway is ultimately placed in an "enhanced follow-up process", requiring it to report back frequently on the progress it has made.

going to prevail, however, against the explicit criterion adopted in evaluation *Methodology*, stating that there was no acceptable alternative.

Ultimately, the Norwegian Government appears to have succumbed. In 2019, it presented a bill to Parliament for the modification of several terrorism-related laws, including the provisions governing domestic asset freezes pursuant to UNSCR 1373 (2001).[76] It proposes moving the mechanism from the scope of the Criminal Procedure Act to a section of the Police Act that authorizes certain types of preventative measures in the absence of (typically, prior to) any formal criminal proceeding.

The proposal steadfastly maintains that there is no binding legal obligation on Norway to change its ways. It also continues to hold the view that information gathering and assessment required to identify persons to target is precisely the kind of work that is most effectively and expertly conducted in the framework of criminal investigations or proceedings. Moreover, the government contends that the execution of asset freezes through these tested and capable institutions and processes would best serve to ensure that the rights of the persons targeted are appropriately respected and that there is proper public accountability for the actions taken. The need to look for alternative solutions, the government pointedly states, is born only out of the criticism levied against Norway by the FATF in the 2014 MER.[77]

4.3 Finland

Finland, also a member of the FATF since 1991, was assessed in the third round of FATF Mutual Evaluation in 2007, two years after Norway. Targeted sanctions, including those pursuant to UNSCR 1373 (2001), were implemented in Finland primarily through EU-level regulations. The EU maintained a joint list of persons involved in terrorism, as required by UNSCR 1373 (2001), and their funds were frozen through a directly applicable EU regulation. Decisions on who to target were ultimately made by the EU Council.[78]

However, the EU-level mechanism had, from the perspective of the Mutual Evaluation of Finland, one crucial flaw: it did not apply to persons within the Union. The EU was perceived to lack jurisdiction to impose binding asset freezing obligations within the Union as its powers related to targeted sanctions derived from its foreign and security policy competence. Due to this reason (and the consequent inability of Finland to consider de-listing requests or freezing requests from third countries, the scope of the criminalization of "terrorism financing", the scope of the definition of "funds" in the EU regulations and a lack of guidance to economic

[76] *Prop. 100 L (2018 – 2019), supra* note 61, esp. pp. 44–45.

[77] *Ibid.,* Sections 5.3.4. and 5.11.3.

[78] Financial Action Task Force, *Third Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism, Finland* (2007), 52.

operators), Finland, like Norway, was assigned a "Partially Compliant" grade in its 2009 Mutual Evaluation Report.[79]

For Finland, this marked the beginning of a lengthy process. It initially held out from even attempting to domestically address this deficiency because, as part of the Lisbon Treaty, which entered into force in 2009, the EU was granted competence to impose "internal" asset freezes. However, for reasons beyond this chapter, the EU has been to this day unable to agree on the specifics of the mechanism. The Member States that wish to freeze the assets of persons within their borders must therefore rely on their domestic laws.

The FATF was therefore unsatisfied. The deficiencies in its AML/CTF system identified in the 2009 MER were deemed serious enough for Finland to be placed in a lengthy follow-up process, which ultimately involved as many as *nine* follow-up reports to the FATF.[80] In 2012, the Finnish Government determined it was no longer feasible for it to wait for an EU-level solution. A bill was submitted to Parliament to enact an *Act on the Freezing of Funds with a view to Combatting Terrorism* (laki varojen jäädyttämisestä terrorismin torjumiseksi (325/2013), "Freezing Act"), which was approved, after some debate, in May 2013.[81]

The Act empowered the Finnish National Bureau of Investigation (NBI), a national-level police agency, to order the freezing of funds of anyone who, "with reasonable cause", was suspected of involvement in a terrorist crime or was charged or convicted of such an offence, as well as certain associated persons and entities. Police authorities and prosecutors in Finland were required to notify the NBI whenever they deemed there to be a reasonable cause to suspect someone. The threshold of "reasonable cause" was intended to be the same as in criminal procedural law: police authorities are required by law to initiate a criminal investigation on any person suspected, with reasonable cause, of an offence.[82]

The Act also enabled the NBI to order a freeze on the basis of a foreign request; here, however, the threshold was set differently: the requesting state had to show that there was an "ongoing investigation on the basis of credible evidence" of an act that would be classified as a terrorist offence under the Finnish Criminal Code (rikoslaki (39/1889)).[83]

Finland returned to the FATF in 2013, reporting on the entry into force of the Freezing Act and its subsequent capability to domestically designate terrorists as required under UNSCR 1373 (2001) and recommended by *Special Recommendation III*. Reception at the FATF, however, was less than enthusiastic. In its overall conclusion, the FATF states: "While Finland recently introduced the Act on the

[79] *Ibid.,* 53–54 and 57.

[80] https://www.fatf-gafi.org/countries/#Finland.

[81] Government Proposal HE 61/2012 vp. The author of this chapter was a legal officer in the Finnish Foreign Ministry at this time, and secretary to the inter-department working group charged with reviewing the issue and ultimately drafting the proposal to Parliament on required laws.

[82] *Ibid.,* p. 20.

[83] *Act on the Freezing of Assets with a view to Combating Terrorism (325/2013),* Section 3.

Freezing of Funds with a view to Combating Terrorism, 2013, several of its provisions do not comply with the FATF requirements. As a result, Finland's level of compliance with [Special Recommendation III] is still at [Partially Compliant]."[84] This included the higher threshold for foreign requests.[85] Nevertheless, as it had with Norway, the Plenary decided grudgingly to release Finland from the follow-up process despite deficiencies, including Special Recommendation III.[86]

Finland's next evaluation, this time under the new *FATF Recommendations* and the 2013 *Methodology*, was conducted in 2019. For reasons that are not clear from the official documentation, though perhaps should be credited to more persuasive argumentation by the Finnish delegation,[87] the FATF had grown much happier with the Finnish system by the time the new Mutual Evaluation Report was approved: Finland's rating with the new Recommendation 6 was deemed to be "Largely Compliant" with only "minor shortcomings", despite no apparent changes in the mechanism since 2013, when it was still deemed to be riddled with deficiencies.[88] Among these remaining shortcomings, preventing Finland from scoring the fully "Compliant" grade was the threshold for foreign requests.

4.4 Sweden

Sweden was evaluated by the FATF in 2006. In terms of UNSCR 1373, paragraph 1 (c), Sweden's system suffered from identical flaws as Finland's: there was no legal basis to freeze the assets of "domestic" terrorists.[89] There had been a proposal in 2002 to establish a domestic mechanism, but the proposal was rejected—possibly due to the introduction of the EU-wide measures referred to above.

In its defence in the 2006 FATF discussion, Sweden referred to the prospect of amendments to the EU Treaties that would establish competence for the EU to freeze funds within the Union and its own active support for such amendments.[90] It also pointed out that it had launched domestically an official commission tasked with proposing a complete overhaul of its domestic sanctions legislation; the report was still being prepared when the 2008 Mutual Evaluation Report was approved.[91] Not

[84] Financial Action Task Force, *9th Follow-up Report, Mutual Evaluation of Finland* (2013), 29.
[85] *Ibid.,* 25.
[86] *Ibid.*, 7.
[87] Coincidentally, unlike in 2013, the author of this chapter was no longer in charge of making those arguments to the FATF in 2019.
[88] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures, Finland, Mutual Evaluation Report* (2019), 167.
[89] Financial Action Task Force, *Third Mutual Evaluation/Detailed Assessment Report, Anti-Money Laundering and Combating the Financing of Terrorism, Sweden* (2006), 42–47.
[90] *Ibid.*, 42–43.
[91] *Ibid.* 43.

surprisingly, the FATF issued a grade of only "Partially Compliant" for Special Recommendation III,[92] and overall, Sweden was placed in the "follow-up process" requiring it to update the FATF on its progress.

When Sweden's fourth follow-up report to the 2006 MER was debated in the FATF in 2010, nothing much of relevance had changed for Special Recommendation III. Sweden reported that any domestic processes to address the gaps had been put on hold since the Treaty of Lisbon, which had entered into force in December 2009, had established EU-level competence to freeze the assets of "internal" terrorists. However, the EU had failed to exercise this competence, and therefore Sweden was still unable to point to either a domestic or EU-level mechanism that would have addressed the gap. The FATF reprimanded Sweden:

> Sweden has chosen to only rely on common EU action to adopt restrictive measures, including the freezing of funds of terrorism suspects, although it has explored possibilities to take national measures . . . The new EU treaty framework provides a hitherto not existing legal ground to adopt legislation at the EU level which would create the possibility to adopt freezing measures also against EU internals. According to the new treaty, the initiative to adopt such legislation belongs to the EU Commission, and Sweden trusts that it will be adopted in due course . . . Nevertheless, **under the old or new Treaty framework, as other EU member states have done, Sweden should and could have taken domestic measures to implement requirements not covered on the EU level. This shortcoming remains.**

However, as Sweden had made significant progress on most other areas of concern, the Plenary decided to release Sweden from the follow-up process in 2010 using its "flexibility", despite the continuing deficiencies with regard to Special Recommendation III.[93]

The next full round of evaluation of Sweden, this time under the new *FATF Recommendation* and the associated *Methodology*, was conducted in 2017. The 2017 MER notes that Sweden had not adopted any new legislation to address the gaps and was again afforded a "Partially Compliant" rating for Recommendation 6.[94] Sweden was placed in what is known as "enhanced follow-up process", described by the organization itself as a process that "based on the FATF's traditional policy that deals with members with significant deficiencies (for technical compliance or effectiveness) in their AML/CFT systems, and involves a more intensive process of follow-up" than the standard "follow-up process".[95] In 2018, after their first follow-up report, they were partially absolved and moved to the regular follow-up.

There no was concrete progress on Recommendation 6 to report. However, the tone of Sweden's engagement in it had changed. Whereas on earlier occasions it had mostly sought reliance on prospective changes in EU-level regulations, there was now an admission that national measures would be needed. Sweden had developed

[92] *Ibid.*, 47.

[93] *Ibid.*, 5.

[94] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures, Sweden, Mutual Evaluation Report* (2017), 150–154.

[95] *Ibid*, note 1.

yet another draft legislative proposal, which had been submitted first to the Minister for Foreign Affairs and thereafter sent out for public consultation.[96]

The current proposal[97] recommends that public prosecutors be granted the power to order an asset freeze on the basis of reasonable grounds to suspect someone of having committed, or attempted to commit, a terrorist offence, as defined in Swedish law, and to give effect to foreign requests. The memorandum, while clearly based on extensive research and proposing a sophisticated asset freezing regime, is not always able to hide its lack of enthusiasm on what it has been tasked to do—for instance when, in assessing the overall impact of the proposed legislation, it notes:

> The proposed law on the freezing of assets is intended to ensure that Sweden fulfils its obligations under Resolution 1373 (2001) in full. Resolution 1373 (2001) in turn aims to prevent terrorism and terrorist financing. Whether freezing measures really prevent terrorism and terrorist attacks is not entirely easy to judge. However, the international community has considered that such measures, in combination with many others, are necessary in the fight against terrorism.[98]

4.5 Denmark

Denmark's third round of Mutual Evaluation Report was approved by the FATF in 2006.[99] For Special Recommendation III, Denmark relied on the same EU level as the other Nordic EU members, which enabled freezing the assets of terrorists outside the Union. For those falling within the scope of the EU measures, including terrorists within the EU, Denmark informed the FATF that it had in place another measure.

Its Criminal Code (Straffeloven), and criminal procedure provided for the "preventive confiscation of any assets, including funds and objects, which may be applied to commit crimes" and the freezing of assets "on the basis that there are reasonable grounds to suspect an individual committed an offence and seizure is necessary to secure evidence or the claim for confiscation (including preventive confiscation)".[100] This appeared to satisfy the "reasonable grounds" threshold requirement.[101]

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[96] *Ibid.*, 9.

[97] (SOU 2018:27), *Ekonomiska sanktioner mot terrorism,* Betänkande av 2015 års sanktionslagsutredning (2018).

[98] *Ibid.*, 157 (translation by the author of this chapter). The original text in Swedish reads: "Den föreslagna lagen om frysning av tillgångar syftar till att Sverige ska uppfylla sina förpliktelser enligt resolution 1373 (2001) fullt ut. Resolution 1373 (2001) syftar i sin tur till att förhindra terrorism och finansiering av terrorism. Huruvida frysningsåtgärder verkligen förhindrar terrorism och terroristattentat är inte helt lätt att bedöma. Det internationella samfundet har emellertid ansett att sådana åtgärder, i kombination med många andra, är nödvändiga I kampen mot terrorism."

[99] Financial Action Task Force, *Third Mutual Evaluation Report in Anti-Money Laundering And Combating the Financing of Terrorism, Kingdom of Denmark* (2006).

[100] *Ibid.*, 65.

[101] *Ibid.,* 65–66.

However, the Report noted that in Denmark, "there is not a basis for (nor policy in favour of) seizing funds collected/received, etc. to support terrorists or terrorist organizations for non-terrorism related activities". Under the domestic measures, therefore, "Denmark may thus not freeze all funds and assets of persons who commit or attempt to commit or participate in or facilitate the commission of terrorist acts, but only those funds that will be used for terrorism purposes". The Report summarizes the Danish defence for this as follows:

> Danish authorities explained that they view the freezing requirements of [UNSCR 1373 (2001)] as covering only assets that will be used in one way or another for terrorism purposes, and would not act to freeze assets for other purposes outside of the obligations with respect to persons who have been listed for whom the wider obligation is applied. They believe that Article 1(c) of [UNSCR 1373 (2001) must be read in the context of Article 8 of the Terrorist Financing Convention which requires measures to identify, detect, freeze or seize "any funds used or allocated for the purpose of committing [a terrorist act]". The Danish view is that the condition of a connection to a terrorist act must be taken into account in interpreting Article 1(c) of UNSCR 1373 (2001). **They state that outside situations where there is a direct legal basis in a UN Resolution or EU regulation, freezing assets that are beyond those that might in one way or another be used for terrorism purposes might conflict with the Danish Constitution or the European Convention for the Protection of Human Rights and Fundamental Freedoms**. **They believe their interpretation is consistent with the principles on the law of property set forth in Section 73 of the Danish Constitution and the first Additional Protocol to the European Convention for the Protection of Human Rights.**[102]

The FATF was sceptical:

> Although Danish authorities have a different view, [UNSCR 1373 (2001)] appears to go further than the Terrorist Financing Convention with a requirement that all resources of those who participate in or facilitate the commission of a terrorist act (including by collecting or providing funds), not merely funds that are intended for use in the commission of the crime be frozen.[103]

Otherwise, they saw no issue with the domestic mechanism that Denmark had established: "These mechanisms, with [this] one exception, appear to meet the requirements of obligations imposed by S/RES/1373."[104] Denmark was rated "Partially Compliant" for Special Recommendation III.[105] There were other Key Recommendations and three Core Recommendations that were also below bar (all rated PC),[106] sending Denmark into regular follow-up.

In 2010, Denmark applied to be removed from the follow-up procedure.[107] For Special Recommendation III, the follow-up report hesitates due to a change in the scope of the criminalization of the offence of financing terrorism in Danish law:

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[102] *Ibid.*, 66.

[103] *Ibid*.

[104] *Ibid.*

[105] *Ibid*, 64–71.

[106] *Ibid.,* 188–199.

[107] Financial Action Task Force, *Mutual Evaluation, Third Follow-up Report, Anti-Money Laundering And Combating the Financing of Terrorism, Kingdom of Denmark* (2010).

> [Denmark] stated [in 2006] that, outside situations where there is a direct legal basis in a UN resolution or EU regulation, freezing assets that are beyond those intended for use for terrorist purposes might conflict with the Danish Constitution or the European Convention for the Protection of Human Rights and Fundamental Freedoms. The deficiency relates to this limitation in how Denmark's alternative freezing mechanism may be applied...
>
> Denmark's MER considered [the] alternative asset freezing mechanism broadly adequate to meet Denmark's SRIII obligations in the circumstances where the EU Regulation is inapplicable. However, the MER highlighted as a deficiency that there is not a basis for seizing funds not intended to support terrorist acts by terrorists or terrorist organisations ... The changes to the scope of the offence corresponding to terrorist financing appear sufficient to address the technical deficiency noted in the MER, although its practical application has yet to be fully tested as a standalone asset freezing mechanism. However, the **FATF's understanding and application of SRIII has developed since 2006, and it is not clear that the preventive confiscation mechanism should be considered an adequate substitute** for asset freezing powers in those cases to which the EU regulation does not apply.[108]

The Report concluded that because of this (and some uncertainty as to the EU-level mechanism), Denmark could not be given a better grade than "Partially Compliant".[109] On all other Core and Key Recommendations, Denmark was given a passing grade. Again, the Plenary decided to exercise its discretion and relieve Denmark from follow-up, given that Special Recommendation III was the only key deficiency and the gap was largely due to the "development in the FATF's understanding" of its own Recommendation.[110]

By the fourth round evaluation of Denmark, in 2017, the tone has changed:

> The Danish authorities have advised that they would rely on court-based powers under the criminal justice framework ... However, this is untested so it is unclear whether the various statutory criteria to which they are subject would be treated as met by the courts by the fact of listing alone, or whether evidence of a link to actual or expected criminality would be required. Even if these powers are applicable in this context, the use of them would be dependent on first receiving intelligence ... in order to identify the relevant assets.
>
> ...the absence of any specific measures to freeze the assets of listed EU internals constitute [s a] significant deficienc[y] in meeting [criteria laid down in the *2013 Methodology]* which are fundamental components of [Recommendation 6] There are also significant deficiencies in the absence of formal mechanisms to designate or seek designation of individuals not listed by the UN....[111]

There is no more hesitance as to whether the confiscation procedures within the criminal law framework might be satisfactory. There are also no longer references to any Danish qualms over the compatibility of comprehensive administrative asset freezes and fundamental rights—whether because the Danes no longer saw this as a problem or, perhaps more likely, because the authors of the Report no longer

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[108] *Ibid.*, 19–20.

[109] *Ibid.*, 21.

[110] *Ibid.* 4–5.

[111] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures, Denmark, Mutual Evaluation Report* (2017), 151–157.

considered them noteworthy, given yet further developments in the FATF's "understanding" of Recommendation 6.

Denmark received a resounding "Partially Compliant" rating on Recommendation 6 as well as 18 other Recommendations and was ushered into enhanced follow-up. At the time of writing, they had produced two "enhanced follow-up reports", in 2018[112] and 2019,[113] the first of which improved grades on nine of the problem recommendations and the second on three, leaving six to be addressed and Denmark still in enhanced follow-up.

For Recommendations 6, the first follow-up report remained silent on any movement on a domestic asset freezing mechanism. The second report hinted at what is to come: "On [Recommendation 6], initial steps have been taken to establish a national procedure to implement [UNSCR 1373 (2001)]."[114]

4.6 Iceland

Iceland's third evaluation round report was approved in the FATF Plenary in 2006.[115] Of all the Nordic countries, it was the only one graded entirely "Non-compliant" for Special Recommendation III. The Report was deeply critical:

> Iceland does not have effective laws and procedures to give effect to freezing designations in the context of [UNSCR 1373 (2001)]. While [a Government "Announcement"] creates a basic legal framework give effect to [UNSCR 1373 (2001)], [it] does not fully cover all persons who commit or attempt to commit terrorist acts . . . As a practical matter . . . the only lists that can be enforced are those [issued by UN Security Council under resolution 1267 (1999)].
>
> . . .[A] domestic mechanism to enact [UNSCR 1373 (2001) should be implemented to be able to designate terrorists at a national level as well as to give effect to designations and requests for freezing assets from other countries.[116]

As Iceland would have been preparing to report back to the FATF on a follow-up to the Mutual Evaluation, a devasting financial crisis took hold of the country as all three of its major private banks went into default and derailed the country, putting it in severe economic depression and political unrest. Consequently, the next time

[112] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures, Denmark, 1st Enhanced Follow-up Report & Technical Compliance Re-Rating* (2018).

[113] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures, Denmark, 2nd Enhanced Follow-up Report & Technical Compliance Re-Rating* (2019).

[114] *Ibid.*, 4.

[115] Financial Action Task Force, *Third Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism, Iceland* (2006).

[116] *Ibid.*, 36–39.

Iceland took centre stage, the FATF was in the fourth evaluation round, and Iceland's report was approved in the Plenary in 2018.[117]

Some improvement had been made since 2006 on what was now Recommendation 6, but largely not as it related to UNSCR 1373 (2001). Here, Iceland's system still left much to be desired:

> Iceland has no mechanism in place to identify targets for domestic designations ... Iceland considers adoption of EU designations, but there is no explicit timeframe for consideration or requirement to act promptly ... Regulation on Actions Against Terrorism ... requires the Minister for Foreign Affairs to consult with the DPO as to whether there is a reasonable basis to give effect to a designation request from another country.[118]

Overall, the fourth round evaluation results for Iceland were nearly catastrophic. Out of the ten "effectiveness" measures, which range from Low to Substantial, it received six "Lows" and only one "Substantial".[119] A staggering 22 of the 40 Recommendations were rated below a passing grade. Iceland's follow-up report in June 2019 was an improvement, but 12 below grade recommendations remained.[120] Recommendation 6, too, remained at "Partially Compliant"; however, Iceland, too, was able to report that it had, finally, put forward a legislative proposal to establish a domestic asset freeze mechanism.[121]

Things were not looking up to Iceland overall, however. In October, the FATF announced that Iceland had "strategic AML/CFT deficiencies" in its system and would be placed on the list of "Monitored Jurisdictions".[122] Iceland is in the process of executing an "Action Plan", devised jointly with the FATF, to address the most significant of these deficiencies. The content of the Action Plan is not public.

5 Conclusions

5.1 Some General Observations

At long last, it is time to return to the questions that were raised in the introduction to this chapter. Firstly, why did the Nordic countries, famous for their respect for international law and support of multilateral institutions, resist the full implementation of paragraph 1(c) of UNCSR 1373 (2001), and the FATF interpretation of it, for

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[117] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures, Iceland, Mutual Evaluation Report,* (2018).

[118] *Ibid.,* 128.

[119] *Ibid.,* 11.

[120] Financial Action Task Force, *Anti-Money Laundering and Counter-Terrorist Financing Measures, Iceland, Follow-up Report & Technical Compliance Re-Rating* (2019), 12.

[121] *Ibid.*

[122] *Outcomes of FATF Plenary, 16–18 October 2019,* http://www.fatf-gafi.org/publications/fatfgeneral/documents/outcomes-plenary-october-2019.html.

so long? Secondly, what can we say of the reasons that seem to have led each of them, to varying degrees, to move closer to full implementation in the past few years? And, finally, how do the answers to these two questions reflect on the competing "coercive" and "voluntarist" explanations of FATF's global influence on the development of domestic laws in jurisdictions around the world?

The intention of the previous section was to follow the advice of *Nance*, who suggested that in order to meaningfully comment on the FATF's influence, one should engage in "careful process tracing" of the standard(s) being examined.[123] This is not always easy to do since much of the deliberations and debates underlying the FATF's work, in terms of both developing its standards and the Mutual Evaluations, is not public. FATF public documents do not usually reveal who proposed what, who opposed it on what grounds, whether one side won outright or if a compromise was struck. The FATF, with its consensus-based decision-making, appears mostly to speak with one voice in public. However, there are some sources available that do provide fruitful insights. Firstly, in some cases, paragraphs in publicly available documentation, in particular in Mutual Evaluation and Follow-up Reports, while written in a matter-of-factly tone, betray an underlying disagreement among participants to the Evaluation. Secondly, domestic sources of the Member States sometimes offer a glimpse of critical national views on the FATF doctrine. Finally, other sources and developments external to the FATF occasionally offer clues as to the originator or proponent of a particular FATF standard or interpretation.

5.2 *Reasons for Nordic Resistance*

The opposition of the Nordic countries to the FATF asset freezing standard was relentless for more than a decade. Even after being battered, to varying extents, in the initial mutual evaluation reports in the third round, four of the five countries made no concrete steps to comply during the entire lengthy follow-up process. The only exception was Finland, which enacted the *Freezing Act*, but only in 2013, after having spent six years in the punishing follow-up process, submitting no less than nine follow-up reports along the way. All four of the Nordic countries that eventually exited the follow-up did so with Special Recommendation III as essentially the only Core or Key Recommendation not satisfactorily implemented,[124] in each case requiring the Plenary to exercise its "flexibility" towards FATF requirements to

[123] *Supra*, note 29.

[124] In Norway's case, it was determined that also Special Recommendation I still had deficiencies, but the Report noted "that the main concerns relating to SR I are with regard to the insufficient implementation of SR III, and so the underlying issues are the same", and in Denmark's case, Recommendation 35 had problems, but the Report noted that "Plenary may nevertheless decide that on a risk-sensitive basis R. 35 should be considered equivalent to LC"; *see* Financial Action Task Force, *Mutual Evaluation Fourth Follow-Up Report, Anti-Money-laundering and Combating the Financing of Terrorism, Norway* (2009), 4, and Financial Action Task Force, *Mutual Evaluation,*

see the countries released. This prolonged resistance to one specific standard is striking, given the importance these countries typically place on adherence to international norms and to co-operation within international organizations, even when this entails compromise.

The explanation of why the Nordics were so reluctant to implement the administrative asset freeze standard begins with its origins. As noted, the United Nations Security Council adopted UNSCR 1373 (2001) almost instantaneously after the September 11 attacks. The United States drafted the resolution, and reportedly, almost no modifications were made to this US draft by other Security Council members.[125] Such unanimity is rare, but in this case understandable, given the international sympathy towards the United States and the equally broad revulsion over the cruelty of attacks it had suffered.

For the United States, a system of asset freezing outside the criminal procedural framework was nothing new. Under the *International Economic Power Act (IEEPA)*, the President was authorized to impose unilateral targeted sanctions, typically asset freezes, in situations where the President determined key US security interests to be in jeopardy.[126] While the source of the underlying threat had to be external, the competencies granted under the *IEEPA* extended to certain domestic persons connected to that threat, for instance those acting on behalf of a foreign terrorist organization.

In fact, President Bush had invoked the IEEPA in response to the September 11 attacks just a few days before the adoption of UNSCR 1373 (2001) with *Executive Order 13224.*[127] The Executive Order authorized, among other things, the freezing of assets of persons the Treasury and State Departments determined to have committed, or pose a significant risk of committing, acts of terrorism, as well as persons associated with them.

In the third round of mutual evaluations of the FATF, in 2006, the United States' compliance with UNSCR 1373 (2001) was praised extensively:

> **Overall, the U.S. has built a solid, well-structured system aimed at effectively implementing the UN sanctions under [UNSCR 1373 (2001)].** The statistics on the frozen terrorist related assets speak for themselves. Indeed, the measures in place correspond to most recommendations set out in the FATF Best Practices Paper for SR III. Combating terrorism in all its facets and targeting particularly the financial aspects obviously being a prime concern in U.S. policy, it has engaged substantive resources to cut off the financial basis from terrorist entities and activities. The [Office of Foreign Assets Control (OFAC)]

Third Follow-up Report, Anti-Money Laundering And Combating the Financing of Terrorism, Kingdom of Denmark (2010), 5, respectively.

[125] Stiles and Thayne (2006), p. 158.

[126] *International Emergency Economic Powers Act,* United States Public Law 95–223 (28.12.1977).

[127] *Executive Order 13224 of September 25, 2001, Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism.*

> plays a central role in this process. This authority has powerful means, both legal and structural, at its disposal to fulfil its mission and it uses them quite adequately, as the figures show.[128]

Compare the apparent ease with which the US complied with the Special Recommendation with, for instance, the summary by MONEYVAL, the European "regional FATF-style body", of the third round of evaluation among its 28 Member States:

> **Countries performed poorly in respect of [Special Recommendation III], with 24 countries (82.7 %) receiving ratings in the lower range and none were rated as "compliant". More than a quarter of MONEYVAL countries were found to be "non-compliant".** This is problematic in terms of the general readiness of jurisdictions to freeze terrorist assets.[129]

Moreover, no other permanent member of the Security Council had appropriate measures in place for the domestic implementation of paragraph 1(c) of UNSCR 1373 (2001) in the third round of evaluations—except for the United Kingdom, which had adopted appropriate domestic legislation that entered into force just as its mutual evaluation process was starting in late 2006.[130]

In light of the above, it is no stretch to say that paragraph 1(c) of UNSCR 1373 (2001), drafted by the United States, reflected the content and concepts of US domestic law, which were, broadly speaking, unfamiliar in other jurisdictions across the world. The unfamiliarity of the concept of domestic administrative asset freezes was surely one of the primary reasons the Nordic countries so resisted it.[131] Adopting the new standard would have required a significant overhaul of the way these countries had traditionally approached counterterrorism financing, and

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[128] Financial Action Task Force, *Third Mutual Evaluation Report on Anti-Money Laundering and Combating the Financing of Terrorism, United States of America* (2006) 58–59.

[129] MONEYVAL, *3rd Round of Mutual Evaluation Reports, Horizontal Review,* (2010). The 28 Members assessed were Albania, Andorra, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Georgia, Hungary, Latvia, Liechtenstein, Lithuania, Malta, Moldova, Montenegro, Monaco, Poland, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, "the former Yugoslav Republic of Macedonia", and Ukraine, and in addition Israel.

[130] For the UK, see Financial Action Task Force, *Third Mutual Evaluation Report, Anti-money Laundering and Combating the Financing of Terrorism, the United Kingdom of Great Britain and Northern Ireland* (2007), 64–77, and for the other Permanent Members of the Security Council, see Financial Action Task Force, *Third Mutual Evaluation Report, Anti-money Laundering and Combating the Financing of Terrorism, People's Republic of China* (2007), 41–45; Groupe d'Action Financier, *Rapport d'Évaluation Mutuelle, Lutte Contre le Blanchiment de Capitaux et le Financement du Terrorism, France* (2011), 147–172; and Financial Action Task Force, *Second Mutual Evaluation Report, Anti-money Laundering and Combating the Financing of Terrorism, Russian Federation* (2008), 46–53.

[131] The first Finnish domestic memorandum contemplating the establishment of an administrative asset freezing system says so explicitly, noting that "[t] he working group is of the opinion that a preventative administrative asset freezing mechanism is *prima facie* an element foreign to the Finnish legal system" (translation by the author of this chapter), *see* Ulkoasiainministeriö, *Terroristivarojen jäädyttämistä koskeva hallinnollinen järjestelmä,* työryhmämietintö (2009), 10.

understandably they were reluctant to accept that they needed to do so. More specifically, they framed their resistance in both constitutional and practical terms.

The constitutional opposition arose from concerns over the compatibility of the standard with fundamental rights. The Danish evaluation process provides the clearest written example of this argument: as we saw above, they fought admirably to convince the FATF that a more traditional asset freezing mechanism, such as the one envisaged by the Terrorist Financing Convention, was to be preferred and that the alternative administrative mechanism advocated by the FATF did not appear to be consistent with the Danish Constitution, the European Convention for Human Rights and its first Additional Protocol.[132]

It seems safe to assume that the Norwegians, as well, explicitly raised human rights concerns during their evaluation since their third round report had to explicitly reject those concerns, noting, with a hint of arrogance, that the "proper implementation of both [UNSCR 1373 (2001)] and Special Recommendation III can be achieved (and has been achieved by countries with legal systems similar to Norway's) while still meeting international obligations concerning the respect for human rights and the fight against terrorism".[133]

As for the practical reasons for opposing the standard, the Nordics appeared to be authentically unconvinced that the mechanism would add much in terms of the effectiveness of their counterterrorism activities and therefore found it redundant, given that there are other, more "traditional" measures already in place.

There is ample evidence of this scepticism. In 2009, when Finland was contemplating establishing an administrative freezing mechanism for the first time, triggered by the FATF evaluation, the preparatory working group stated in no uncertain terms:

> The Working Group is of the opinion that an administrative freezing mechanism would not significantly improve the ability of domestic law enforcement to prevent terrorism financing. We believe that existing powers and processes under anti-money laundering laws are adequate for these purposes ... The Working Group further considers that an administrative asset freezing mechanism would also not be needed for the purposes of giving effect to requests from third countries ... In light of the above, the Working Group is of the opinion that a need to establish an administrative asset freezing mechanism stems primarily from Finland's international obligations.[134]

As we mentioned in Sect. 4, both Norway[135] and Sweden,[136] too, remained vocally unconvinced of the necessity of administrative asset freezing measures, even as they were preparing to enact laws to establish them.

Despite the concerns related to fundamental rights and "the doubts over the usefulness of the administrative asset freezing mechanism today, in 2020, Finland

[132] *Supra*, 21.

[133] *Supra,* 14–15.

[134] *Supra* note 127, 9–10.

[135] *Supra*, 16.

[136] *Supra*, 20.

has adopted an administrative asset freezing system, Norway, Sweden, and Iceland each has developed a legislative proposal to establish one, and even Denmark has taken its "initial steps" to do the same. What, then, has changed?

What the chapter has hopefully succeeded to establish is that when the Nordics were evaluated in 2006–2007, there was still a struggle ongoing in the FATF over the "correct" understanding of the asset freezing requirement but that sometime during the decade to follow, the Nordics and any like-minded states had lost that struggle. Specifically, it was shown in Sect. 3 that there was still hesitance within the FATF under the old *Special Recommendations* as to the appropriate interpretation and application of the asset freezing recommendation. This was also visible in Sect. 4, where particularly for Norway and Denmark, the evaluation reports appeared to still maintain the possibility that another type of system might yet satisfy *Special Recommendation III.*[137]

By the time the fourth evaluation round started, however, the issue was settled, as we saw in Sect. 3. The Interpretative Note and, in particular, the assessment Methodology expressly stated that the only thing that would do was an *administrative procedure for freezing terrorists' assets based on the evidentiary standard of reasonable grounds where foreign requests are treated equally with domestically initiated processes*. There was no room left to suggest otherwise, and no verbal acrobatics could confuse evaluators from seeing a deficiency where any of these elements was not present. The Nordics had lost the argument, pure and simple.

So *what had changed* was that the content of the FATF standard and all the associated documentation had crystallized into this singular understanding that no longer left room for a dissenting opinion. Just as importantly, *nothing el*se *had*. The Nordic comments recounted above, even the most recent ones, all maintain the same tone of disapproval, or at least of scepticism, towards the whole exercise, as they have exhibited from the start. The evaluation procedures described above in Sect. 4.1 do not seem to impose an increased threat of being placed into an "enhanced follow-up", or not being released from the regular kind, for not adequately complying with Recommendation 6. If anything, the current procedures appear to be *more relaxed* when it comes to Recommendation 6 since it is no longer considered a "Key Recommendation" that ought to carry particular weight in these considerations.

Therefore, the most convincing conclusion in light of the evidence at hand is simply that as long as the obligation under the *FATF Recommendations* was unclear, the Nordic countries allowed other considerations to weigh in their calculations and ultimately held those considerations as more important than the FATF standard; however, as soon as the scope of the FATF standard was settled, they felt compelled to comply with it.

[137] *Supra*, 15 and 21, respectively.

5.3 *Reflections on Coercion and Voluntarism*

The above conclusion does not explain *why* they were so compelled. This final section will reflect on the extent to which the "coercive" and "voluntarist" explanations on the FATF may be able to shed light on this remaining question.

At first sight, the Nordic history with Recommendation 6 does not appear to be constituent with the voluntarist interpretation of the FATF, as summarized in Sect. 2.2.

In the voluntarist model, an organization does not seek to enforce "narrow" compliance with a rule at the threat of penalty but rather seeks to force engagement by members to the rule-making process itself in order to develop a better and more broadly acceptable version of the norm. For the asset freezing standard, the opposite appears to have taken place. Faced with a norm the Nordic countries fundamentally objected to, they no doubt engaged in their mutual evaluations and other FATF debates in attempts to convince members of the organization otherwise, to accept that different means could achieve the same goal and that flexibility was therefore justified. Nevertheless, over time, the relevant standard drifted farther away not only from their position but also from any position that would have challenged the original "correct" interpretation.

Neither was the development of the standard *reflective*, as it ought to have been for the voluntarist explanation, in the sense that the content of the standard would have been developed by a collective network of equal partners rather than dictated by the most powerful members. If anything, it appears that the standard was moulded by the United States at the international level to reflect the content of US domestic laws, disregarding the fact that other jurisdictions were unfamiliar with it, and then forced upon opposing FATF members rigidly as it was understood by the US.

Moreover, the Nordic experience does not seem to reflect the kind of *deep persuasion* that the voluntarist explanations would suggest take place in the FATF, in other words that those opposing would choose to comply because they were persuaded that they had been wrong in their initial opposition, rather than being forced to accept a norm of which they disapproved, or that they had finally seen the norm as morally legitimate or otherwise more worthy than its alternatives. As shown above, the Nordic countries appear to still regard administrative asset freezes as unnecessary, at best. Similarly, there appears to have been little *democratic destabilization* on the original asset freezing requirement since its inception. As noted, if anything, it appears to have developed to rigidly require the type of mechanisms the United States preferred already in 2001, and no amount of competing ideas, opinions or information appeared to have changed that.

To give due respect to voluntarist arguments, it should be noted that the focus of this chapter has been very narrowly on one FATF standard, which has a very particular history and role anchored in tragic terrorist attacks in the United States. It is entirely possible that for other FATF standards with other kinds of histories, the voluntarist explanation offers valuable insights, perhaps more so than other existing approaches. In fact, it might even be that one of the reasons why countries such as the

Nordics have been so reluctant and slow to implement this particular standard is that, in this particular instance, the FATF failed to exercise a voluntarist governance approach: in the absence of broad participation and the ability to feed into the development of the norm, members rejected it, whereas many other standards have not faced a similar opposition due to a more collectivist drafting history. More research would be needed to assess this.

Turning now to coercive approaches, it appears that they also fall short of providing a complete explanation of the Nordic history with the asset freezing standard. Most importantly, it is difficult to reconcile the significant change in the attitude of the Nordic countries towards the standard from mid-2000s to late 2010s with the idea that the fundamental force driving compliance with FATF standards would be the fear of formal penalties for non-compliance. As described above, if anything, the risk of penalties for non-compliance with the asset freezing requirement has been *reduced* in that time, and certainly nothing suggests that it would have increased. Yet all five countries appear more inclined to comply today than they were 15 years ago.

However, for this particular standard, at least, the coercive explanations appear to be correct in their suggestion that individual powerful states may be tempted to utilize an organization such as the FATF to dictate norms for the rest of the world. The history of Special Recommendation III and Recommendation 6 is, in light of the evidence we have, quite clearly an attempt by the United States to impose a particular model—their own—upon the world.

Even a more insightful contribution from the coercive camp is that of *Goldbarhst*, when he calls out the FATF on broadly invoking binding norms of international law in support of its own standards, regardless of whether those norms in fact support the specific content of the standard.[138] The relationship between UNSCR 1373 (2001) and Recommendation 6, as elaborated above, surely vindicates this *Goldbarhst* proposition, at least in this limited context.

Ultimately, then, the change of heart in the Nordics did not come about through any inclusive mechanism whereby they would have seen the error of their ways or managed to refine the standard to something more in line with their preferences. It also does not appear to have been motivated, at least primarily, by fear of formal penalty. Neither the coercive approaches nor the voluntarists are able to exhaustively explain the Nordic history with the asset freezing standard.

Unfortunately, the evidence at hand does not offer a firm basis on which to formulate a conclusive alternative explanation. Neither FATF documents nor the national documentation developed in relation to the Nordics' compliance with Special Recommendation III or Recommendation 6 directly addresses the issue of why their governments appear to have shifted their position over time. However, the explanation is likely to stem at least partially from a Nordic policy preference that goes beyond the FATF: namely multilateralism.

[138] *Supra*, note 18.

While the Nordics operate in different foreign and security policy contexts compared to each other, some being members of North Atlantic Treaty Organization (NATO) and others not, some belonging to the European Union while others have opted out, they all profess a deeply rooted commitment to, and aspiration to promote, compliance with international law and respect of multilateral institutions.[139] As small nations, their security interests are better served and their voices heard louder in a rule-based multilateral world rather the one dominated by raw power politics.

In this light, the issue to explain is not why the Nordics are now accepting to implement the FATF standard but rather why they continued to oppose it for so long. I argue that the primary answer lies in the development of the standard itself. As long as there was room to argue within the FATF that there were several equally valid ways of implementing the standard, the Nordics could maintain both a policy of strict adherence to international standards, in general, and opposition to a specific, disputed interpretation of one standard, in particular. However, once it was settled within the FATF beyond dispute that there was only one appropriate method of implementation, it was no longer possible to maintain both positions. The opposition to the particular FATF standard, being the less fundamental of the competing policy goals, had to give in.

These insights are, of course, limited to the particular experience of these select countries in relation to this specific standard. They certainly do not validate either of the competing approaches over the other. Further research on other FATF standards and their detailed histories would therefore help understand their relative merits and whether either of them ultimately offers a sufficient explanation of FATF's global influence.

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Host States' Labour Regulation in the Aftermath of International Investment Disputes: Five Levels of Impact and Interaction

Johanna Silvander

Abstract International law in the form of international investment agreements (IIAs) and investor-state dispute settlement (ISDS) judgements provide impetus to changes in domestic labour and labour market related social regulation and policies in countries hosting foreign investment. The International Centre for the Settlement of Investment Disputes (ICSID) has a leading role in defining the contents of international law in what comes to IIAs as it has administered the majority of known international investment cases and many IIAs include provisions directing investment disputes to be arbitrated through ICSID's ad hoc tribunals. This chapter pinpoints a non-negligeable incidence of ISDS cases including labour-related claims and defenses. Irrespective of the labour related claims' success in arbitration, the analysis finds five different levels of these cases' impacts on domestic regulation in host states.

1 Introduction

1.1 Setting the Scene

There is a broad recognition that foreign direct investment (FDI) is a vital component of sustainable development.[1] To foster the potential benefits, states have concluded

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[1] Addis Ababa Action Agenda of the Third International Conference on Financing for Development [2015]; UN General Assembly Resolution 70/1, Transforming our world: the 2030 Agenda for Sustainable Development [25 September 2015].

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thousands of international investment agreements (IIAs)[2] to encourage FDI flows.[3] Yet the perceived threat created by international trade and investment agreements to national sovereignty on key social protections is one of the most significant causes behind recent setbacks in negotiating agreements such as the Transatlantic Trade and Investment Partnership.[4]

This chapter contributes to research on the topic by examining how the interpretation and application of IIAs in investor-state dispute settlement (ISDS) may affect labour and labour-market related social regulation and policies in host states.[5] While it is true that states adopting regulation with general welfare aims in good faith and in a non-discriminatory manner can do so without a duty to compensate the harmed foreign investor,[6] the cases may impact host state legislation through different means. Indeed, irrespective of this and the direct success rate of claims, different levels of ISDS cases' impact on national regulation can be found. This chapter identifies and presents in dedicated sections below five main levels of such impacts which can be placed on a continuous line where both ends represent an opposite extreme. At one end, direct and immediate changes to domestic regulation can be found, while a reinforcement of the status of national labour and social regulation, and situations where the outcomes of domestic legal procedures impact ISDS outcomes, can be observed at the other end. Several cases analysed reveal issues to be addressed that link with the overall criticism directed at international investment law and ISDS.[7]

The research focuses on cases arbitrated under the International Centre for the Settlement of Investment Disputes (ICSID) that has administered the majority of international investment cases. Arbitration is provided by *ad hoc* tribunals established in line with the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention), which has a broad global membership.[8] Many IIAs provide for dispute settlement directly at the international level through ICSID, and typically there is no requirement to exhaust domestic remedies before investors can resort to international arbitration.[9] ICSID arbitration therefore plays a leading role in defining the

[2] The term covers bilateral investment treaties and trade and economic partnership agreements with investment provisions.

[3] There are a total of 3263 concluded IIAs of which 2614 are in force (UNCTAD investment policy hub <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 15 May 2022).

[4] <https://ec.europa.eu/trade/policy/in-focus/ttip/> accessed 4 September 2021.

[5] Host state is the state that receives an international investment, while home state corresponds to the foreign investor's nationality. Dolzer and Schreuer (2012), p. 44. The status of a host state relies on the definition of an investment in the applicable IIA (see further in Sect. 3.2).

[6] Saluka Investments B.V. v. The Czech Republic, UNCITRAL (2006), para. 255.

[7] Harten (2007); Subedi (2008), p. 176; Hirsh (2009), pp. 97–114; Saulino and Kallmer (2015).

[8] ICSID Convention has 156 contracting and 8 signatory states <https://icsid.worldbank.org/en/> accessed 15 May 2022.

[9] See on exceptions to this main rule in Dolzer and Schreuer (2012), p. 264.

contents of international law with regard to IIAs. While ICSID tribunals are not obliged to follow prior jurisprudence, they have *de facto* aspired to treat similar cases similarly to form a coherent area of law.[10] A degree of pursuit towards coherence in case law is thus expected, which helps to draw some more general conclusions based on the individual cases discussed. This justifies studying ICSID arbitration awards in this chapter to find out how international investment law impacts regulation and policies in host states that typically appear as defendants in investment arbitration.

1.2 Overview of Research Material

This chapter was developed based on a systematic review of case law to comprehensively identify cases relevant for labour and labour-market related social policy topics in the ICSID case database.[11] This process was undertaken to address one of the most prominent issues in ISDS related discussions, namely uncertainty arising from a lack of information.[12] The chosen method helped to conclude that labour and labour-market related social policy issues—in the realm of the chosen key words—were invoked in a substantive manner in 6% of total ICSID cases with publicly available material, thus representing a non-negligible share of cases. The systematic review includes all cases registered with ICSID between 1972 and 2015, thus covering a broad spectrum of developments in international investment law that

[10] Reinisch (2006), p. 167. See also, for instance, *Transportes Cercanias*, Decision on Jurisdiction, under 167.

[11] A comprehensive key word search method producing quantitative data was chosen as the basis for systematically identifying cases with the most potential to include actual labour and related social policy claims and arguments. All publicly available awards and decisions on jurisdiction of cases registered under ICSID between 1972–31.12.2015 were scanned using eight key words: labour, employment, wage, recruitment, hiring, dismissal, bargaining and human rights, extracted from previous background research by the International Labour Organization (ILO). A systematic word frequency analysis was used to examine patterns relating to working conditions. Only words related directly to labour issues were counted. Both American and British spellings were looked up, and texts in other languages were filtered for appropriate synonyms. The systematic key word search method made it possible to narrow down the preliminary legal analysis while combing the case law with a fine-tooth comb so as not to exclude any potential matches. Materials were searched on all publicly available websites, incl. principally ICSID website <https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx> and UNCTAD Investment Policy Hub <https://investmentpolicy.unctad.org/>. The list of cases available on the ICSID website showed 558 registered cases until 31.12.2015, however, only 304 of those had publicly available decisions at the cut-off-date. The key word search revealed that labour and social policy arguments have played a role in ISDS. Out of the 304 cases with publicly available material, 43% had at least one keyword, and out of these 40% showed two or more separate keywords. The highest incidence was found on the words labour, human rights and employment. In one case, UNCITRAL rules were applied, but the case was administrated under ICSID (UPS). The legal analysis included two labour-related cases from outside of the ICSID framework for reasons of principle level importance.

[12] See, for instance, Harten (2007), p. 49; Theodorakis (2015).

considering the generally lengthy ISDS processes continue to remain topical and valid.

In the majority of the identified cases, labour-related arguments were included in the investor's claim, but they were also referred to in state defence and independently by the tribunals. Many of the standard IIA provisions have provided the basis for such arguments, including the fair and equitable treatment (FET) standard and other standards of treatment, expropriation and actions tantamount to expropriation, umbrella clauses and so-called stabilisation clauses in investor-state agreements—chiefly relied upon by investors—as well as treaty preamble clauses, general exceptions, and definition of protected investment—often invoked by states. Thematically, the identified cases cover minimum wage increases and wage increments, the question of contribution to the host state's development, labour market policies, fundamental human and labour rights, union activities, dismissal regimes, employment creation requirements, enterprise ownership and management quotas and affirmative action policies, as well as penalties for using foreign labour.

The success rate of the investor claims was moderate yet noteworthy.[13] Claims of an investor directly challenging labour regulation or state action were either unsuccessful (8), settled (2); or mixed / partly successful (1).[14] In one case, the investor claim was successful based partially on a human rights claim (Bernhard von Pezold).[15] In the two settled cases, Foresti and Centerra Gold, however, the investors succeeded to change host state regulation through negotiations.

Three cases concerned the applicability of bilateral investment treaty (BIT) exceptions clauses. Here the investment tribunals had to decide on whether the host state had contributed to its own economic crisis through its labour and other policies with a view to granting or refusing applicability of the exceptions clause. In two out of three cases, investors successfully argued for the inapplicability of the exceptions clause (El Paso Energy[16] and Impregilo[17]) while state defence was mostly successful in one case (Continental Casualty Company[18]).

[13] When analysing success, only the labour-related claims are considered, not the final outcome of a particular case.

[14] Astaldi S.p.A. v. Republic of Honduras, ICSID Case No. ARB/07/32; Sempra Energy International v. The Argentine Republic, ICSID Case No. ARB/02/16; United Parcel Service of America Inc. v. Government of Canada; Elsamex, S.A. v. Republic of Honduras (ICSID, ARB/09/4); Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia; Noble Ventures, Inc. v. Romania (ICSID, ARB/01/11); Veolia Propreté v. Arab Republic of Egypt (ICSID, ARB/12/15); Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic (ICSID, ARB/09/1) (IC on the labour-related claim unsuccessful); Centerra Gold Inc. v. The Kyrgyz Republic (Permanent Court of Justice); Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID, ARB(AF)/07/01 (settled); Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/16 (mixed).

[15] Bernhard von Pezold and others v. Zimbabwe, ICSID Case No. ARB/10/15 (Award 2015).

[16] El Paso Energy v. Argentina, ICSID Case No. ARB/03/15 (Award 2011).

[17] Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17 (Award 2011).

[18] Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9 (Award 2008).

. In four cases, job creation, quality of jobs and skills upgrading were brought up to justify the existence or non-existence of an investment. In three cases, jurisdiction was established to the benefit of the investor (Quiborax;[19] OI European Group BV;[20] and Pezold); while in one case the tribunal concluded that there had been no investment in the meaning of the ICSID Convention (Malaysian Historical Salvors[21]). However, the latter award was later annulled.[22] Further, due to lack of evidence, state defence was unsuccessful in one case directly invoking a BIT preamble clause on the protection of workers' rights (Hassan Awdi[23]). One case containing a statement of principle about labour and human rights remains outside of this classification (Phoenix[24]).

Subsequent to the case analysis, the defendant host states' labour and foreign investment legislation and policies leading to and after the ISDS cases were reviewed to identify any changes that could be linked to the ISDS cases. The findings of the analysis, together with the outcomes of the ISDS cases themselves, are discussed in the subsequent sections.

2 ISDS As a Trigger to Changes in Domestic Regulation and Policies

2.1 Direct Changes to Host State Regulation in Follow-Up to ISDS Cases

Two of the identified ICSID cases appear to have led to direct changes in domestic regulation and policies as a result of the ISDS proceedings.[25] In one of them, a labour

[19] Quiborax v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2 (Decision on jurisdiction 2012).

[20] OI European Group BV v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/25 (Award 2015).

[21] Malaysian Historical Salvors v. Malaysia, ICSID Case No. ARB/05/10 (Award on Jurisdiction 2007).

[22] Decision on the application for annulment, 16 April 2009.

[23] Hassan Awdi v. Romania, ICSID Case No. ARB/10/13 (Award 2015).

[24] Phoenix v. Czech Republic, ICSID Case No. ARB/06/5 (Award 2009).

[25] The case materials reviewed also included an additional case identified outside of the ICSID framework which provides an interesting reference point and demonstrates the occurrence of labour-related cases with impacts on national policies and legislation also beyond ICSID. In Centerra Gold Inc. and Kumtor Gold Company v. The Kyrgyz Republic (Permanent Court of Justice, The Hague), the investor challenged a government amendment to existing regulation which led to a high increase in the company's labour costs. While official documents apart from a Procedural Order (No. 1 dated 7 July 2008) and Termination Order (dated 29 June 2009) are not available on the dispute, the company itself announced on its website that the dispute concerned a government amendment to existing regulation, introducing a high-altitude premium that increased salaries for national employees. The investor considered this to have breached the stabilisation

market focused part of a well-known affirmative action policy in South Africa, the Black Economic Empowerment Policy, was challenged before an ICSID tribunal in the context of the mining sector. In Foresti et al. v. South Africa, ICSID Case No. ARB(AF)/07/01 (Award 2010), an unlawful expropriation claim targeted legislation-based requirements to transfer a certain percentage of mining company ownership to historically disadvantaged South Africans (HDSA) together with employment equity measures. The investor argued that unlawful expropriation had been imposed, as the required transfer allegedly could not be done at a fair market value. The investor therefore requested the ISDS tribunal to confirm a breach of the Belgium – Luxembourg – South Africa BIT (1998)[26] as well as the Italy – South Africa BIT (1997)[27].

The legislation targeted by the claim involved the Mineral and Petroleum Resources Development Act and the Mining Charter adopted in 2002. These instruments set both HDSA ownership and employment equity requirements, notably to achieve 26% HDSA ownership of mining assets by 2014 as well as 40% HDSA participation in management functions by 2009.[28] As such, the affirmative action instruments directly targeted the labour market, aiming to improve diversity in the mining sector's management positions as well as in its ownership structure. While the requirement of employment equity plans increasing HDSA share in management was mentioned, the claimants did not invoke this as a direct ground for expropriation. However, employment equity requirements were negotiated as a part of the later settlement package.

An Offset Agreement was reached between the Department of Mineral Resources and the claimant in December 2008, providing that instead of selling 26% of shares to HDSAs, the investor had to provide a 21% beneficiation offset[29] and offer a 5% employee ownership program for employees in the operating companies. As a result, the claimant later sought discontinuance of proceedings as well as an award on the allocation of costs. The tribunal ordered the claimants to pay €400,000 to the respondent in fees and costs, and dismissed the claims with prejudice. In setting

provision of the investor-state agreement, and challenged the regulation change on that basis. The case was first handled by the Permanent Court of Arbitration, but was later settled between the parties (Termination Order dated 29 June 2009).

[26] Agreement between the Republic of South Africa and the Belgo-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments, signed in Pretoria on 14 August 1998.

[27] Agreement between the Government of the Republic of South Africa and the Government of the Italian Republic for the Promotion and Protection of Investments, signed in Rome on 9 June 1997.

[28] Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry, published in Annexure A to Notice 1639 of 2004, Government Gazette No. 26661, 13 August 2004. Notice 1639 published a Scorecard for the Broad based Socio-Economic Empowerment Charter for the South African Mining Industry.

[29] Beneficiate = process and add value to the quarried stone. In an article appeared in 2002, the South African Minister of Mines explained that 'minerals beneficiation – adding value to South Africa's traditional resource exports – offered special benefits in skills transfer and employment that made it possible to offset progress in manufacturing against a lack of progress in ownership'.

this amount relatively low, the tribunal considered the paradox that the companies in question employed significant numbers of HDSAs in the beneficiation process.[30]

Interestingly, the Foresti dispute appears to have contributed to a change in national legislation in South Africa. In 2010, an amendment of the Mining Charter was approved, where offsetting of the 26% ownership requirement was allowed against a certain value of beneficiation.[31] The settlement outcome achieved by a foreign investor was thus extended to the whole sector through a change in the general legal framework. The ISDS case might not have been the only contributing factor to the change in legislation, as policy proposals in that direction had already been made in 2002,[32] and the mining sector legislation had also been challenged by other investors through domestic courts at the time.[33] The claimants, however, argued that their mere registering of the ISDS claim had caused the respondent to enter into an agreement with them and to grant them the requested rights.[34] Indeed, the claimants considered that had they opted for domestic proceedings,[35] they could not have obtained as favourable conditions as through initiating arbitration.[36]

In this case, the protection of private property and the policy objective of enhancing the socio-economic status of HDSAs presented two opposing goals in the local context, both linking to international human rights law. Being faced with ISDS claims, the South African Government decided to steer its affirmative action policy from principally promoting HDSA ownership and their increased representation in management positions in natural resources sectors towards enriching the manufacturing process and enhancing workers' skills. The affirmative action policy had been defended by the respondent in the Foresti case with the necessity to—among others—'ameliorate the disenfranchisement of HDSAs and other negative social effects caused by apartheid in general and the 1991 Mineral Rights Act in particular'[37] In the same lines, *Amici curiae*[38] accepted to participate in the proceedings in Foresti put forward human rights argumentation in support of affirmative

[30] Concurring Statement of Arbitrator Matthews, 03/08/2010, Foresti.

[31] Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry published in Government Notice no. 838 in Government Gazette 33573 of 20 September 2010 (Mining Charter II).

[32] Text to n 29.

[33] Petition for limited participation as non-disputing parties in terms of articles 41(3), 27, 39, and 35 of the Additional Facility rules, International Centre for Settlement of Investment Disputes, Case number: ARB(AF)/07/01 between Piero Foresti, Laura de Carli & Others and The Republic of South Africa, para. 4.16.

[34] Foresti, para. 89.

[35] One of the applicable BITs included a 'fork-in-the-road' clause making it mandatory for the investor to choose whether to pursue the case at the domestic or international level, this choice being definitive.

[36] Foresti, para. 94.

[37] Foresti, para. 69.

[38] 'Friend of the Court', a non-disputing party that has an interest in the case and can provide information.

action policies, invoking, among others, the South African Constitution and several international human rights conventions and comments by their supervisory committees.[39] The non-disputing parties argued, among other things, that the challenged regulation had aimed to 'proactively redress the apartheid history of exploitative labour practices, and discriminatory ownership policies',[40] demonstrating the continued disadvantaged situation of black South Africans in the country. They raised the conflict between different areas of international law and the South African Constitution in terms of human rights promoting measures and called for 'an interconnected approach' to international law.[41] As such, while the ISDS tribunal did not judge on merits at the end, the case's impact on domestic legislation appears undeniable. It also changed the direction of the affirmative action policy strongly defended by the respondent and the non-disputing parties.

Labour-market related affirmative action policies and racial discrimination were also discussed in another context in Bernhard von Pezold and others v. Zimbabwe, ICSID Case No. ARB/10/15 (Award 2015), the second identified case that appears to have led to direct changes in domestic regulation as a result of ISDS proceedings. The case is interesting from the point of view of the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) which contains provisions on indigenous peoples' land-related rights, particularly as these relate to the labour market as a key factor of production. Furthermore, the case is unique in condemning racial discrimination, and in confirming the legitimacy of affirmative action policies in general before ISDS. The case concerned the land reforms carried out in Zimbabwe in the context of rising demands from the population, unrest and occupation of farmland by settlers in the early 2000s. The investors in the case, white farmers of foreign nationality, challenged the alleged expropriation of their farms by the state without compensation based on the Switzerland-Zimbabwe BIT (1996)[42] and Germany-Zimbabwe BIT (1995)[43]. The tribunal found that unlawful expropriation existed merely because the properties were acquired without compensation. Further, it found that sufficient evidence existed on the discriminatory basis of the expropriations, as they were based on the farmers' skin colour. The tribunal also concluded that no legitimate purpose could be established, as the land did not seem to be further distributed to historically disadvantaged or landless population.[44] Breaches of FET and other standards of treatment were equally found.

[39] The African Charter on Human and Peoples' Rights (1981), the International Covenant on Civil and Political Rights, 1966 (including comments by the supervisory Human Rights Committee), the Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

[40] Petition (n 24), para. 4.1.

[41] Petition, para. 4.14.

[42] Agreement between the Swiss Confederation and the Republic of Zimbabwe on the Promotion and Reciprocal Protection of Investments, signed in Harare on 15 August 1996.

[43] Agreement between The Republic of Zimbabwe and The Federal Republic of Germany concerning The Encouragement and Reciprocal Protection of Investments, signed in Harare on 29 September 1995.

[44] Bernhard von Pezold, paras 501 and 502.

Interestingly, in relation to the state of necessity plea of Zimbabwe, the Pezold tribunal went on to discuss the *erga omnes*[45] obligation not to engage in racially discriminatory acts as well as its relationship with affirmative action policies. The tribunal acknowledged the legitimacy of affirmative action, observing that 'it is accepted by the international community that situations will arise where racial discrimination is justified and will remain so for as long as is necessary. Policies that discriminate in favour of the aboriginal inhabitants of a particular State (affirmative action) may, generally speaking, fall within this category as justifiable'.[46] In this case, however, the tribunal found that the respondent's position had been too extreme: the programme implemented from 2000 onwards had been racially motivated. As such, the breach of an *erga omnes* obligation precluded the defence of necessity by Zimbabwe. Exceptionally, the Tribunal ordered not only compensation but also restitution of farmland to the claimants or, alternatively, higher amounts of compensation if restitution would not be effected. Zimbabwe sought to annul the decision, but the application of annulment was dismissed (Decision on Annulment, 21 Nov. 2018).

Once again, the ISDS case had direct impacts on national legislation. Diplomatic pressure was also comprehensively exercised against Zimbabwe's expropriation practices at the time, and it will certainly have affected the Government's policies in later years.[47] However, the specific role of ISDS can be directly distinguished from both the 2013 Constitution and national legislation enacted in 2020,[48] few years after the Pezold award and the decision on annulment to the favour of the investor. Zimbabwe's Constitution of 2013 had already foreseen compensation for expropriations in the context of the land reform, and international processes[49] appear to have contributed to the inclusion of persons whose rights were guaranteed by international agreements as beneficiaries to be compensated both for land and improvements.[50]

[45] Erga omnes obligations are "obligations in whose fulfilment all states have a legal interest because their subject matter is of importance to the international community as a whole", Oxford Reference library.

[46] Bernhard von Pezold, para. 652.

[47] See, for instance, Reuters report on compensations to white farmers (other than those protected by a BIT): <https://www.reuters.com/article/us-zimbabwe-farmers/zimbabwe-to-start-paying-white-farmers-compensation-after-april-idUSKCN1RK0UU> accessed 17 May 2022; <https://www.dw.com/en/zimbabwe-compensates-white-farmers-with-billions/a-54395238> accessed 17 May 2022.

[48] Statutory Instrument 62 of 2020, CAP. 20:29, Land Commission (Gazetted Land) (Disposal in Lieu of Compensation) Regulations (2020) Zimbabwe.

[49] The Request for Arbitration by von Pezold claimants was registered in June 2010 by the ICSID Secretariat. See also ICSID Case No. ARB/10/25, Border Timbers Limited, Timber Products International (Private) Limited, and Hangani Development Co. (Private) Limited v. Republic of Zimbabwe, registered for arbitration Dec. 2010, award July 2015; ICSID Case No. ARB/05/6, Bernardus Henricus Funnekotter and others v. Republic of Zimbabwe, registered for arbitration April 2005, award April 2009.

[50] Constitution of Zimbabwe Amendment Act, 2013 (Act 20 of 2013), Section 295 (2).

The possibility to apply for the disposal of land was enacted through the *Disposal in Lieu of Compensation Regulations* (*Regulations*) in March 2020. In the same sense as the ISDS tribunal's reasoning, the *Regulations*' objective was to 'provide for the disposal of land to persons [. . .] who are, in terms of section 295 of the Constitution, entitled to compensation for acquisition of previously compulsorily acquired agricultural land' (Art. 3). The Regulations are applicable to 'indigenous' Zimbabweans and citizens of a Bilateral Investment Protection and Promotion Agreement (BIPPA) or a BIT country (Art. 4.1(a-b)). In line with the Regulations, the individuals concerned may apply to obtain title to an agricultural land that previously belonged to them, and their applications will be reviewed by a committee set up for the purpose (Art. 5.1-2). The state still maintains the possibility to pay compensation 'on its own discretion' if it 'prefers' (Art. 7.2 (d)). The disposal of land as a result of the process is stipulated as the 'final settlement of any claims that the applicant may have from the State in respect of compensation' (Art. 9.1).

As such, the ISDS awards have been enforced and further expanded to all concerned individuals through national legislation, starting from the Constitution. It is noteworthy that the Constitution provides a particularly advantageous treatment to 'indigenous' Zimbabweans and to BIPPA and BIT country citizens, namely compensation for agricultural land and for improvements, while white Zimbabwean farmers only receive compensation for improvements. The *Regulations* implement the constitutional provision in the case of the two former categories. The compensation deal targeted at white Zimbabwean farmers was separately struck in August 2020 and they were, in line with the Constitution, only compensated for improvements.[51] The relatively stronger protection provided to citizens of BIT partners—together with 'indigenous' Zimbabweans—gives indications of the comparatively strong impact of ISDS on domestic legislation and policies.

2.2 ISDS As a Contributor to a Broader Policy Shift

Similarly to the cases discussed in the previous section, three others seem to have influenced domestic regulation and policies. However, in these cases the role of ISDS seems to be that of one contributing variable among various factors, leading to changes within a broader policy shift.

These interesting developments can be traced based on the three ISDS cases that discussed the possibility to exclude from treaty protection investments allegedly not contributing to the host state economic development because of either insufficient job creation (Malaysian Historical Salvors v. Malaysia, ICSID Case No. ARB/05/10 (Award on Jurisdiction 2007; and Decision on the application for annulment, 2009))

[51] Communiqué on the agreement between the Government of Zimbabwe and former farm owners as detailed in the global compensation deed for improvements on farms compulsorily acquired for resettlement during the land reform programme, 4 Aug. 2020.

or inappropriate working conditions maintained by the enterprise (Quiborax v. Plurinational State of Bolivia, ICSID Case No. ARB/06/2 (Decision on jurisdiction 2012) and OI European Group B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/25 (Award 2015)). In these cases, the state defenses arguing for inadmissibility to arbitration based on lack of contribution to the host state's development were largely unsuccessful. The resulting impacts at the national level—mostly as a response to ISDS as a whole—have taken two directions: on the one hand distancing the country from the case outcome and the ISDS in its entirety, and on the other hand converging with the judgement.

In these three cases, the success of the state defenses was partially dependent on the choice of interpretation line by the ISDS tribunal. A part of the tribunals based their analysis of the definition of an investment on the applicable BIT only, arguing that the ICSID Convention, in line with its *travaux préparatoires*,[52] does not include a definition of an investment. BIT definitions of an investment are typically broad and do not often include references to expected development effects. Other tribunals considered both the ICSID Convention—Art. 25 (1) and the preamble alluding to the investments' expected economic development impacts—and the applicable BIT (so called 'double-barrel test').[53] The latter approach has enabled tribunals to take into account development impacts as an element of a protected investment, yet with varying results.

In OI European Group B.V., the dispute arose out of the expropriation of two glass container production plants based on various grounds, including alleged 'contraventions of environmental law and workers' rights', 'violations of free competition',[54] 'food security', 'endogenous development' and 'protection of fundamental constitutional principles'.[55] The Dutch claimant contended various breaches of the Netherlands–Venezuela BIT (1991)[56].

. The employment-related discussion in the case concerned again the assessment of admissibility to arbitration. The respondent argued for the use of a 'double keyhole' (double-barrel) test, in this contemplating that no necessary contribution to the host state's development had been made. The tribunal considered it appropriate to apply the double-barrel test and analysed admissibility under both the BIT and the ICSID Convention.[57] Applying a teleological interpretation focusing on the treaties' objectives to promote economic development and generation of wealth in the host state, the tribunal concluded that the requirement of contribution to the host state's development had been fulfilled.[58] It found that when an investment manifests

[52] International Bank for Reconstruction and Development (IBRD) (1965).

[53] See, for instance, IISD (2011); Burger (2013).

[54] OI European Group B.V., para. 281.

[55] *Ibid*., para. 299.

[56] Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Republic of Venezuela, signed in Caracas on 22 October 1991.

[57] OI European Group B.V., paras 220–247.

[58] *Ibid.,* para 247.

itself in business assets in the receiving country, particularly where the investor exercises the management of the enterprise, there cannot be any doubt about the existence of an investment. It considered two types of inputs, contribution in money (aporte en dinero) and contribution in industry (aporte en industria), stating that these provided the types of results that were expected when FDI was promoted.[59] The company had—through its investment—realised a contribution to the industry by improving the management of Venezuelan enterprises. The results had been successful: the companies had broadened their activity and created more jobs. On these grounds, the existence of an investment was confirmed and admission to arbitration granted.

Interesting developments in Venezuela's FDI regulation can be observed after and leading to the award cited—all in response to a range of concerns over ISDS. A Decree[60] passed in 2014 linked productive investment to national development (Art. 1) and removed the possibility of submitting FDI disputes to international arbitration, applicable to any IIAs negotiated after the publication of the Decree (Art. 5). The only possible exception left to the rule of national jurisdiction on international investment disputes were dispute settlement mechanisms developed in the framework of the Latin American and Caribbean integration. The definition of an investment (Art. 6) provided different developmental characteristics related to employment policy, including contribution to employment creation and promotion of small and medium enterprises (SMEs).

More followed after the OI European Group B.V. award through the adoption of a Constitutional law on productive foreign investment (*Ley Constitucional de Inversión Extranjera Productiva*)[61] in 2017, introducing further requirements of sustainable development impact, including explicitly with regard to decent working conditions. Among the objectives of the law figure the promotion of productive foreign investment to foster a comprehensive development of the nation, supreme happiness of the people and strengthening of a productive and diversified economy; and generating decent, fair and productive work (Art. 2 (i) and (iv)).[62] In the definition of an investment, reference is no longer made to contributions through 'employment creation' but to 'creation of decent work' (Art. 7.1). Generating decent, fair and stable work is also included as one of the objectives to be considered in national FDI incentive programs (Art. 22 (under 10)). The jurisdiction over international investment disputes was scoped further, maintaining domestic courts as the main arena for such disputes. However, the door to 'other integration schemes'

[59] *Ibid.* para 235.

[60] Decreto No 1.438 con rango, valor y fuerza de ley de inversions extranjeras de 17 de noviembre de 2014, Gaceta Oficial de la República Bolivariana de Venezuela No 6.152 Extraordinario, 18 de noviembre de 2014.

[61] Gaceta Oficial N° 41.310: Ley Constitucional de Inversión Extranjera Productiva 29 de diciembre de 2017.

[62] Translations from Spanish by the author.

beyond the regional ones was re-opened, in both cases after having exhausted national remedies and with an existing prior agreement (Art. 6).

Similar changes at the national level were recorded in Bolivia after the Quiborax case, arbitrated under the Bolivia – Chile BIT (1994))[63]. In its pleadings, the host state argued against the admissibility of the case to arbitration, claiming that the investor's job creation did not contribute to its economic development. The host state contended that the foreign company's workers were allegedly working without contracts, on a temporary basis, receiving irregular salary payments and using their own tools. In essence, the host state's argumentation indicates a desire to a certain level of job quality provided by investments that it considers meriting protection.

Differing from the line of interpretation adopted in the OI European Group B.V., the tribunal in Quiborax concluded from the start that the definition of an investment did not comprehend a requirement on a contribution to the host state's economic development. It came to this conclusion by considering previous case law as well as by viewing even a failed investment still an investment.[64] Therefore, an assessment of whether there had been a development contribution was not necessary in the tribunal's view. Nevertheless, and while not relevant to gain jurisdiction, the tribunal still considered that a contribution to the state's economic development had been made, as the mining concessions had generated a growing level of economic activity.[65] The quality of employment offered was not discussed.

Bolivia responded at the national level, although not only based on the above case but a range of ISDS claims that the country had faced. A new investment law (*Ley de Promoción de Inversiones*)[66] was adopted in 2014, and a new arbitration law in 2015 (*Ley de Conciliación y Arbitraje*),[67] stressing the need for investments to contribute to the state's economic and social development and legislating on arbitration of investment disputes exclusively at the national level. The specific conditions laid down for investments require, among other things, technology transfer in the form of providing training to Bolivian personnel as well as technology itself, and respect for general labour law (Art. 11, Investment Law). So-called 'preferred investments' need to generate decent work and technology transfer (Art. 22, Investment Law). The Arbitration Law, Chapter on investment disputes with the state, provides that investment disputes will be submitted to the 'jurisdiction, laws and authority' of Bolivia (Art. 127, Arbitration Law) and that conciliation and arbitration are carried out at the national level (Art. 129). The arbitral tribunal must apply the Bolivian Constitution, laws, and norms to decide on the fundaments of the dispute (Art. 133.3).

[63] Acuerdo entre la República de Bolivia y la República de Chile para la Promoción y Protección Recíproca de Inversiones, signed in La Paz 22 Sept. 1994.

[64] Quiborax, para. 220.

[65] Quiborax, para. 235.

[66] Ley de Promoción de Inversiones N° 516, 04.04.2014, Estado Plurinacional de Bolivia.

[67] Ley de Conciliación y Arbitraje N° 708, 25.06.2015, Estado Plurinacional de Bolivia.

Nevertheless, while the legislation adopted in 2014–2015 put an emphasis on the investment's contribution to development, brought investment arbitration as a whole to the national sphere, and included explicit wording on labour law and the objective of generating decent work, the changes were not brusque in the national context. In fact, it is possible to observe a continuum in the policy direction of gradual disengagement from ISDS since several years, in response to a range of ISDS claims.[68] In 2007, Bolivia withdrew from ICSID, being the first country in the world to do so. In 2009, a significant Constitutional reform was carried out. This reform introduced, inter alia, provisions specific to investments and dispute settlement in the oil and gas industry, stipulating that '[n]o foreign jurisdiction or international arbitration will be accepted in any case [. . .]' (Art. 366 Constitution).[69] As such, ISDS cases as a whole, but also other policy drivers seem to have contributed to the changes promoting national approaches in FDI management.

The policy choices in Malaysia, on the other hand, took quite the opposite turn after the annulment decision in Malaysian Historical Salvors. In the main proceedings of the case, the tribunal applied the 'double-barrel test' in assessing its jurisdiction to arbitrate on the case concerning a marine salvage operation that led to a dispute on payments to the investor. It analysed the definition of an investment in the ICSID Convention (Art. 25 (1)), and on that basis considered a contribution to the host state's economic development a necessary element of an investment, which needed to be particularly strong to compensate for other 'typical characteristics' of an investment that were missing in the marine salvage operation. The tribunal acknowledged that the jobs created by the project had, to some extent, contributed to the host state's development.[70] However, the public benefit of the marine salvage contract was not considered 'of the same quality or quantity envisaged in previous ICSID jurisprudence': the operation was not comparable for instance to large infrastructure development.[71] The case was dismissed as the investment was not found to fit the definition of an investment in the ICSID Convention; no assessment in light of the BIT provisions was carried out.

Nevertheless, the 2007 award was later annulled, as the annulment committee found that the tribunal had manifestly exceeded its powers by not having considered the Malaysia – UK BIT (1981)[72], which provided a broad definition of an investment, as well as the *travaux préparatoires* of the ICSID Convention indicating that the negotiating parties had explicitly decided not to include a definition of an

[68] The UNCTAD Investment Policy Hub reports 17 cases raised against Bolivia to-date (three decided against the state, four pending, ten settled), with a significant majority of them initiated prior to 2015.

[69] See further in <https://isds.bilaterals.org/?bolivia-s-step-back-in-state> accessed 17 May 2022.

[70] The operation had 'employed over 40 people in Malaysia, as well as a village of local residents', Malaysian Historical Salvors, para. 133.

[71] *Ibid*., para. 132.

[72] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Malaysia for the Promotion and Protection of Investments, London, 21 May 1981 (Treaty Series No. 16 (1989)).

investment in it. The tribunal was found to have erroneously elevated the elements of an investment under the ICSID Convention into 'jurisdictional conditions'[73] and interpreted these in a way to exclude small contributions of a cultural and historical nature.

There were significant changes in Malaysia's FDI policies at the juncture of the Malaysian Historical Salvors annulment decision of 2009. The World Bank reports on a 'wave of liberalization' that took place between 2009 and 2012, where certain previously applied limitations to foreign participation and equity requirements of 30% participation of indigenous Malaysians (*bumiputera*) were removed from 44 services sub-sectors.[74] Among the sectors liberalised in the first phase of the process in 2009 were vessel salvage services.[75] Further, an objective of clearly scoping out developmental tests from BITs can be seen in the sole BIT concluded by the country after 2009, as reported through online repositories.[76] This BIT was signed with San Marino in 2012,[77] and it includes a broad definition of an investment accompanied with a reference to the characteristics of investment only requiring: 'commitment of capital, the expectation of gain or profit, or the assumption of risk' (Art. 2.1 (a)). This clearly writes off the requirement of a contribution to the host state's development that was part of the so called Salini criteria,[78] and was initially promoted by Malaysia in the main proceedings of Malaysian Historical Salvors.

2.3 *Towards Development-Oriented Provisions in IIAs*

Some of the identified cases touching on labour law and policies seem not to have resulted in immediate changes in labour law at the national level, but could have been a trigger in changing countries' positions in IIA negotiations. IIAs adopted by Argentina after the cases raised against the country as a result of emergency legislation enacted during the economic and social crisis of early 2000s provide indications of a movement towards development-oriented provisions in investment

[73] *Ibid*., para. 80 (b).

[74] The World Bank (2020), p. 7.

[75] The World Trade Organization (2018), p. 128.

[76] <https://investmentpolicy.unctad.org/international-investment-agreements/countries/127/malaysia> accessed 17 May 2022.

[77] Agreement between the Government of Malaysia and the Government of the Republic of San Marino on the Promotion and Protection of Investments, signed in Kuala Lumpur 27 Sept. 2012.

[78] ICSID Case No. ARB/00/4, Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco introduced the Salini criteria: duration, regularity of profit and return, assumption of risk, substantial commitment, and a contribution to the host state's economic development. While these criteria were followed by a part of ICSID tribunals, a move away from the Salini test can be observed in case law. This has been largely due to the difficulty of determining the details of a test on such a contribution as well as the preparatory materials to the ICSID Convention indicating the deliberate choice to leave out the definition of an investment. See Burger (2013).

agreements. Beyond ISDS cases themselves, also the work of many international organisations and NGOs could have influenced such a movement.[79]

Labour regulation came into play in the above-mentioned cases in two different ways: labour law was directly challenged in one case (Sempra Energy International v. Argentine, ICSID Case No. ARB/02/16 (Award 2007)) and in the three others Argentina's labour and economic policies in general were assessed to find out whether the country could resort to an exceptions clause or state-of-necessity plea so as not to be tried before the ICSID tribunal (El Paso Energy v. Argentina, ICSID Case No. ARB/03/15 (Award 2011); Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17 (Award 2011) and Continental Casualty Company v. Argentine Republic, ICSID Case No. ARB/03/9 (Award 2008)).

The outcomes of these cases varied due to the differing interpretation of the applicability of the exceptions clause—or state-of-necessity plea—in arbitration. In Sempra Energy International, the investor challenged the Emergency Law that restricted the lay-off of workers and increased the company's costs, claiming a breach of the Argentina – USA BIT (1991)[80]. The tribunal did not find merit in investigating this peripheral claim on its own but viewed the regulation's impacts as a part of the overall impact of the crisis on the business. This was based on three principal grounds: (i) the labour regulation did not impede lay-offs (but only increased the compensation to be paid); (ii) it was applied to the whole economy, not only to the claimant; and (iii) obligations were eased as employment conditions improved.[81] While the tribunal found a breach of FET on other aspects of the claim, the decision was later annulled on grounds of manifest excess of powers based on the non-application of the BIT's exceptions clause.[82]

On the other hand, labour policies entered the equation indirectly in the three other Argentina cases. Crisis-time emergency measures were challenged in Continental Casualty Company, El Paso Energy, and Impregilo. In the two former cases, Argentina evoked the Argentina-US BIT's (1991) exceptions clause and in the latter case made a state-of-necessity plea under customary international law,[83] in the absence of an exception clause in the applicable Argentina – Italy BIT (1990)[84], so as not to be tried for the challenged crisis measures.

[79] See, for instance, UNCTAD, *Investment Policy Framework for Sustainable Development* (Geneva 2015); *UNCTAD's Reform Package for the International Investment Regime* (2018 edn., Geneva 2018); *International Investment Agreements Reform Accelerator* (Geneva 2020).

[80] Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment, signed in Washington Nov. 14, 1991.

[81] Sempra Energy International, para. 194.

[82] A notice of resubmission proceedings was submitted. The proceedings were discontinued for unknown reasons <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/88/sempra-v-argentina> accessed 17 May 2022.

[83] The standard has been codified in Article 25 of the ILC Articles.

[84] Acuerdo entre la República Argentina y la República Italiana sobre Promoción y Protección de las Inversiones, signed in Buenos Aires, 22 May 1990.

In the 2008 award on Continental Casualty Company, the tribunal accepted Argentina's plea under the applicable exceptions clause in the Argentina-US BIT[85] regarding most of the emergency measures that were challenged by the claimant. It concluded, as the El Paso Energy and Impregilo tribunals three years later, that the exceptions clause (or state-of-necessity plea) was applicable on economic crises except where the state had substantially contributed to create its own crisis. The tribunal found that Argentina had taken the challenged measures due to necessity and with no other reasonable options available at that time.[86] Analysing the hypothesis that Argentina's labour and economic policies could have substantially contributed to the crisis, it concluded, among other things, that Argentina had followed policies recommended by relevant international organisations—or left some unimplemented with their blessing—in the years leading up to the crisis. The tribunal made a clear point about not judging on any policies adopted by Argentina, but simply assessing whether the measures taken were well-founded.[87] With the exceptions clause applicable to most measures challenged, Argentina was ordered to compensate the claimant on one measure only, where the plea was not accepted.[88]

However, the conclusion was the opposite when the same policies were assessed by the El Paso Energy and Impregilo tribunals three years later. In El Paso Energy, the tribunal, relying on two expert reports by the claimant's and the respondent's economists, found that Argentina had contributed to the emergence of the crisis situation in a substantial manner. Both sides' experts concurred on a finding that the 'absence of fiscal discipline' and 'failure to liberalise labour markets and trade policies played a significant role in bringing about the crisis'.[89] The tribunal came to the conclusion that 'Argentina's failure to control several internal factors, in particular the fiscal deficit debt accumulation and labour market rigidity, substantially contributed to the crisis'.[90] Consequently, Argentina could be held accountable for its crisis-time measures and was found to be in breach of the FET standard.[91] Similarly, in Impregilo, the tribunal concluded that Argentina had significantly contributed to the state of necessity with its policies, including

[85] Exceptions clause (Art. XI), Argentina-US BIT: 'This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests'.

[86] See Continental Casualty Company, para. 174 and El Paso Energy, para. 612.

[87] The subsequent request for partial annulment of the tribunal decision by the investor was not successful on this same point (applicability of Art. XI and state of necessity).

[88] Continental Casualty Company, paras 220–222.

[89] El Paso Energy, paras 652–653.

[90] *Ibid.*, para. 656.

[91] Notwithstanding, one of the arbitrators disagreed with the majority decision, expressing the opinion that '[i]t should not lightly be assumed that a State is responsible for an economic collapse in a liberal market economy', referring to the Continental Casualty Company (El Paso Energy, para. 667).

inappropriate labour and trade policies, which is why the state of necessity plea was not accepted. In both cases Argentina filed an application for annulment, but these were dismissed.[92]

At the national level, no immediate changes were directly observable in labour regulation after the Argentina awards. Indeed, the crisis-time labour regulation was extended until 2007, with a gradual relaxation of the measures. Further, a payroll subsidy was introduced to cushion the impacts of the crisis (Productive Recovery Program, REPRO)—a tool that continued to be used in the following—global—financial crisis of 2008–2009.[93]

Intuitively, some changes could be expected at the level of new IIAs, considering the vulnerable situation where the unclarity on the interpretation of exceptions clauses had led the country in the ISDS cases. Testing this hypothesis against actual concluded IIAs, some changes towards 'new generation IIAs'[94] can indeed be observed after the Argentina awards. First, a gap in concluding new BITs can be observed between 2001 and 2016, while prior to 2001 there were BITs concluded every year or even several per year. Only three BITs were signed by Argentina after the Argentina awards. A similar break can be observed in concluding other Treaties with Investment Provisions (TIPs) between 2005 and 2016, with only three TIPs signed after the awards cited.[95]

Second, a tendency to incorporate more elaborate safeguard or development-oriented clauses in IIAs can be observed. While the exceptions clause added in the BIT concluded with Qatar in 2016[96] was rather restrictive, focusing principally on security interests in the military sense, much more comprehensive exceptions were included in the Argentina – United Arab Emirates BIT (2018)[97], extending to measures in view of protecting human, animal and plant life or health, the environment and national treasures or monuments, among other matters. The Argentina – Japan BIT (2018)[98] ended up incorporating Article XX of the General Agreement on Tariffs and Trade (GATT) 1994[99] and Article XIV of the General Agreement on

[92] Both decisions of the Ad Hoc Committee on the Application for Annulment came out in 2014.

[93] Bertranou et al. (2014), p. 10.

[94] UNCTAD discusses different types of IIAs by classifying them in 'generations' [old-generation treaties (concluded before 2010) and new-generation treaties]. See <https://investmentpolicy.unctad.org/> accessed 17 May 2021.

[95] <https://investmentpolicy.unctad.org/international-investment-agreements/countries/8/argentina> 17 May 2021.

[96] The Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar, signed in Doha 6 Nov. 2016.

[97] Agreement for the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the United Arab Emirates, signed in Abu Dhabi 16 April 2018.

[98] Agreement between the Argentine Republic and Japan for the Promotion and Protection of Investment, signed in Buenos Aires 01 Dec. 2018.

[99] Marrakesh Agreement Establishing the World Trade Organization, adopted in Marrakesh on 15 April 1994, Annex 1A: Multilateral Agreements on Trade in Goods, General Agreement on Tariffs and Trade (GATT) 1994.

Trade in Services (GATS)[100] as exceptions clauses. Furthermore, a range of different 'new generation' provisions were included in these BITs, such as right to regulate; compliance with the laws of the host state and corporate social responsibility (Qatar), right to regulate; investment and environmental, health and other regulatory objectives; compliance with the host country's laws; corporate social responsibility (United Arab Emirates), and preamble provisions with objectives on the non-relaxation of health, safety and environmental measures and cooperation between labour and management in promoting investment; measures against corruption; corporate social responsibility; and health, safety and environmental measures and labour standards (Japan). Similar 'new generation' clauses can be found in the TIPs concluded after the awards, including the Argentina – Chile FTA (2017)[101], Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017)[102] and Argentina – US Trade and Investment Framework Agreement (2016)[103].

3 Mirror Effect: Consideration of Domestic Law Before ISDS

3.1 ISDS Boosting the Status of Domestic Law

When ISDS tribunals reach judgements that include statements explicitly reaffirming the status of national legislation from the perspective of international investment law, could these be considered as boosting the status of host state legislation? It is important once again to underline the sovereign right of states to legislate regardless of IIA provisions—however, with the risk of becoming liable to compensate an investor if found to be in breach of any. Therefore, it is interesting to reflect on whether such 'confirmations of legality' can have impacts of their own.

Two such examples of ISDS judgements can be presented from the identified cases. In Elsamex v. Republic of Honduras, ICSID Case No. ARB/09/4 (Award 2012), a peripheral claim raised based on a public works contract concerned a retroactive raise in minimum wages. In the year in question, Honduras had promulgated the yearly update of minimum wages in March instead of the start of the year, with a retroactive effect since January. The investor argued that introducing the update later than usual and applying the new rates retroactively amounted to an unjustified and unpredictable change of contract terms. The tribunal, however, found

[100] *Ibid.* Annex 1B General Agreement on Trade in Services (GATS).

[101] Acuerdo Comercial entre la República Argentina y la República de Chile, signed in Buenos Aires 02 Nov. 2017.

[102] Protocolo de Cooperación y Facilitación de Inversiones Intra-MERCOSUR, signed in Buenos Aires, 07 April 2017.

[103] Trade and Investment Framework Agreement between the Government of the United States of America and the Government of the Argentine Republic, signed in Buenos Aires 23 March 2016.

the state action legitimate. The yearly minimum wage update process was foreseen in the Minimum Wage Law[104]: an administrative process established in law or other regulation, due to its public character, should be known to any investor. Considering the 'protective character' of labour law ('la esencia proteccionista del derecho laboral'), updating of minimum wages was predictable and retroactive application possible. In addition, the tribunal underlined the fact that the Honduran Constitution[105] gave labour law the status of public order and made specific reference to the minimum wage setting process. This was found to seal the conclusion that the tribunal had reached on the question.[106] Similarly, in Astaldi S.p.A. v. Republic of Honduras, ICSID Case No. ARB/07/32 (Award 2010), the tribunal concluded that enterprises participating in public procurement bids had the obligation to know the constitutionally guaranteed, predictable minimum wage revision system in Honduras and calculate their offers on that basis.[107]

No changes were observed in the Honduran legal framework after the two awards: the constitutional provision relating to minimum wage (Art. 128.5) and the minimum wage setting process (Labour Code N° 189/1959)[108] remained the same. The ISDS judgement certainly did not give reason to change the regulation. Nonetheless, since year 2012, no updates to minimum wages have been gazetted any later than in January of the year in question, and updates for years 2012–2013[109] and 2014–2016[110] were concluded at once. Such a tendency to increasingly ensure timely publication and predictability of minimum wages, agreed in a tripartite setting, could be a result of efforts to avoid further challenges on the matter.

It is plausible to assume a certain deterring or preventative effect of this type of awards on investors' willingness to bring claims concerning increases in minimum wages more generally. Observing this empirically, however, does not fully confirm the assumption. In Veolia Propreté v. Egypt, ICSID Case No. ARB/12/15, an alleged refusal by the host government to modify contract terms in response to an increase in minimum wages was challenged based on a stabilisation contract. Stabilisation contracts can be far-reaching in terms of requirements for a status quo of the legislative environment surrounding the investment in the host state and can make states liable to compensate investors on a stricter basis than BITs. For instance, in a

[104] Ley del Salario Mínimo, Decreto 103, 20 de enero de 1971.

[105] Constitución Política de la República de Honduras 1982, Asamblea Nacional Constituyente, DECRETO Nº 131 Publicada en la Gaceta No. 23,612 del 20 de enero 1982.

[106] Elsamex, paras 585–620.

[107] Astaldi S.p.A., para 72.

[108] Decreto N° 189/1959, Código del Trabajo y sus Reformas, Título IV Jornadas, descansos y salarios, Capítulo V.

[109] <http://www.poderjudicial.gob.hn/CEDIJ/Documents/ACUERDO-TRIPARTITO-SOBRE-LA-REVISION-SALARIO-MINIMO.pdf> accessed 5 May 2021.

[110] <https://www.ccichonduras.org/website/Descargas/LEYES/LEYES_LABORALES/SALARIOS_MINIMOS/SALARIO%20MINIMO_2014-2015-2016_ACUERDO_STSS_599_2013.PDF> but see <https://www.tsc.gob.hn/web/leyes/Salario_minimo_2016.pdf> accessed 5 May 2021.

labour-related case arbitrated outside ICSID, the ISDS tribunal considered that had there been a stabilisation agreement with specific provisions on the disputed matter (new legislation restricting the use of foreign workers), the outcome of arbitration would likely have been negative for the state.[111] Combined with umbrella clauses in BITs, as in the Veolia case, stabilisation agreements may enable investors to access ISDS. However, the Veolia case was decided in favour of the state in 2018, i.e. no IIA breach was found.[112]

3.2 National Court Decisions Impacting ISDS Outcomes

In two of the identified cases, national court decisions concerning the investor came to influence later ISDS judgements. This demonstrates that the impact of ISDS is not merely unidirectional, but also court sentences in host states can provide decisive evidence at the international level.

First, in Hassan Awdi v. Romania, ICSID Case No. ARB/10/13 (Award 2015), the respondent Romania invoked a preamble clause[113] in the US-Romania BIT (1992)[114] to seek inadmissibility based on an alleged breach of the Fundamental Principles and Rights at Work by the investor.[115] Romania claimed that the investor's breach of the applicable investment contract's social obligations with a view to maintaining a certain number of employees and specific employment conditions had compelled contract termination. According to the respondent, the claimant had organised a scheme to replace the existing employees with labour brought from

[111] See *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. the Government of Mongolia* (UNCITRAL). While not arbitrated under ICSID, the case is a powerful demonstration of the impact of stabilisation agreements also in the context of labour regulation. In the case, the investor claimed a breach of FET (legitimate expectations), NT and MFN standards of the Mongolia – Russia BIT (1995) due to a new law introducing additional penalties for the employment of foreigners in the mining industry. The mere restriction of the use of foreign workers was found not to amount to a breach of the BIT per se, considering that the measures taken by Mongolia were not 'arbitrary, unreasonable, discriminatory, unpredictable or contrary to Claimants' legitimate expectations' (Paushok, para. 373). It is noteworthy, however, that the presence of a stabilisation agreement with provisions concerning the regulation of the use of foreign workers would most likely have led to a different kind of conclusion, as explicitly stated by the tribunal in the case.

[112] UNCTAD Investment Policy Hub <http://investmentpolicyhub.unctad.org/ISDS/Details/458> accessed 5 May 2021. Full material is not available, but the case is included here due to its importance as a case fully built on a labour-related argument.

[113] The invoked BIT preamble clause states: 'Recognizing that the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognized worker rights'.

[114] Treaty between the Government of the United States of America and the Government of Romania concerning the Reciprocal Encouragement and Protection of Investment, signed in Bucharest 28 May 1992.

[115] Hassan Awdi, para. 145.

Honduras, subjected to forced labour and paid less than the promised wages. The defendant claimed bad faith and actions against internationally recognised workers' rights and the well-being of employees on the part of the claimant—actions that should deprive the investor from treaty rights based on the BIT state parties' intention to protect workers' rights.[116]

The tribunal, however, concluded that there was not enough evidence to draw conclusions on wrong doings that could amount to inadmissibility based on the good faith principle or misrepresentation. The fact that a national criminal court had released the investor of charges against human trafficking and lowered sentences for economic crimes played a key role in this determination.[117] While noting that the threshold for inadmissibility is high, it can be drawn from the tribunal's reasoning that with sufficient evidence on the lack of good faith, inadmissibility would be considered. The judgement in Phoenix v. Czech Republic, ICSID Case No. ARB/06/5 (Award 2009) provides support to this conclusion, as there the tribunal—as a matter of principle—explicitly excluded investments entailing gross human rights violations from the scope of BIT protection.[118] As in Hassan Awdi, any future tribunals may take into account evidence from cases decided at the national level, be it to award protection or deny it at the international level.

Second, in Swisslion DOO Skopje v. The Former Yugoslav Republic of Macedonia, ICSID Case No. ARB/09/16, the investor claimed a breach of the FET principle and expropriation in the implementation of an acquisition contract. The contract included a commitment to increase employment in the acquired company, but due to a national minority shareholder's actions, this was not possible. The investor had decided to create employment in subsidiaries instead. The latter had been considered a contract breach by a domestic court. Analysing the national court decision and administrative practice, as well as the investor's actions, the ISDS tribunal considered that both sides were correct in their interpretations of the job creation commitment. The tribunal thus found no expropriation. Instead, it concluded a breach of FET, as the investor had not been advised in the problematic situation and the state had interfered in its activities.[119]

[116] Hassan Awdi, paras 77–87; 143, 145–146.

[117] Hassan Awdi, para 212.

[118] Taking an extreme example, the tribunal stated: '[. . .] nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs'. Phoenix, para. 78.

[119] Swisslion, para 276.

4 Conclusions: Impacts Beyond the Immediately Perceivable

The analysis presented in the preceding sections leads to the conclusion that impacts of ISDS decisions on national labour and labour market related social regulation and policies extend beyond the immediately discernible. In quantitative terms, 6% of total ICSID cases with publicly available material were found to be directly relevant. Among the analysed cases, the success of labour related claims was moderate. However, the analysis of the cases' impacts on host state regulation tells a different story: almost all of the analysed cases had some impact at the national level, organised at five different levels in this analysis. These impacts range from direct changes in national legislation, induced by ISDS judgements, to a mirror-effect where national court decisions have come to impact ISDS outcomes. In addition, reference cases from outside the ICSID framework also indicate potential impacts, requiring only minor differences in the legal facts—such as existence of a stabilisation agreement in Paushok[120]—to cause a different ISDS outcome and possibly corresponding impacts on host state legislation.

Linking to sociology of law, it is interesting to observe such impacts in light of the world polity theory.[121] The theory builds on the conception that the legal systems of the world evolve towards the same direction with the help of international governmental and non-governmental organisations that through their work spread 'conceptions of sovereignty and universalistic principles' into national legal systems around the world.[122] ICSID, as an organ established under the World Bank, can in a conceptual sense be assimilated to such international organisations. As seen in this chapter, ISDS tribunals established under ICSID have produced judgements and facilitated settlement outcomes that have contributed to changes in national legislation.

This leads to a question on whether there is scope to speak about a 'global convergence' of legal systems based on the material discussed in this chapter. Intriguingly, the immediate response could indicate the opposite: while some legal systems have indeed followed certain ISDS outcomes, others have gone to the opposite direction, taking distance from the ISDS as a whole. Nevertheless, it is plausible to discern a tendency, albeit partial, towards development-oriented provisions in national regulation and newly concluded IIAs, as well as increased efforts towards transparency and predictability in national legislation, in follow-up to ISDS challenges. While not the focus of this chapter, such theoretical considerations could be further developed in subsequent research on the topic.

[120] Paushok, paras 370 and 373.

[121] See more in Deflem (2008), pp. 254–257.

[122] *Ibid*. p. 254.

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