

GENERAL PRINCIPLES OF LAW, INTERNATIONAL DUE PROCESS, AND THE MODERN ROLE OF PRIVATE INTERNATIONAL LAW

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Commentators have observed that the field of private international law is mired in the past. To update and adapt to an increasingly interconnected world, it should consider how other fields of international dispute resolution have changed to the evolving face of globalization in the past decade.

Private international law has been traditionally limited to developing rules to decide the proper forum and applicable law for transnational disputes, and to facilitate the recognition and enforcement of foreign judgments in municipal courts. The result is a field of mechanical rules that point parties to the right court and the proper law, with little regard to what that court does or what that law says. It has served the role of an international prothonotary – a mere guidepost for transnational actors seeking justice on the international plane.

This may have been sufficient in centuries past, where “international” discourse was largely limited to regional interactions among legal systems of similar traditions and competencies. But, in the last few decades, that

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discourse has become truly global. In U.S. federal courts, there were only 15 published opinions addressing proof of foreign law between 1966 and 1971, covering the laws of 12 different foreign countries. In the past five years, there have been more than 125 published decisions, covering the laws of approximately 50 foreign countries. The increased number of cases is mirrored by the increased range and complexity of the foreign laws at issue—from Afghanistan to Zimbabwe, Nicaragua and Iraq.

Of course, all of these foreign states unilaterally proclaim themselves to be *un Estado de derecho*, but these are often mere words. All too often, “[t]he more dictatorial the regime, the more surrealistically gorgeous” its laws.¹ The reality is that adherence to basic notions of justice is still a startling anomaly in today’s world.² With this in mind, the field of private international law must stop worrying about mechanical methods and grammatical texts, and begin operating in realistic *contexts*. Too often this discipline is over-concerned with the applicability of laws, but not the validity of laws; with proper methodology, but not judicious results. This article proposes that, in order to play a meaningful role in the resolution of modern transnational disputes, the field of private international law must play a meaningful role in explicating the *substance* of those municipal laws applied to the transnational scenario.

The means by which this explication may occur is nothing new within the field of international law *writ large*. For over a century international judges have observed that there are certain minimum, corrective principles inherent in every legal system. These “general principles of law recognized by civilized nations” derive from the consensus of municipal legal systems *in foro* domestic, and while they are grounded in the positive law of nation states, they rest alongside custom and treaties as a primary source of international law. They seek to define the fundamentals of substantive justice and procedural fairness, and have been applied by the International Court of Justice, international investment tribunals, and commercial arbitration panels time and again to reach judicious results when the applicable law otherwise would not. Taken together, these general principles form an emerging notion of international due process by which local legal processes are judged beyond their own sovereign borders. Just as they do on the international plane, these general principles can play a material role when a transnational case comes to a municipal court.

Applying these principles to inform the proper choice of law; to assist

1. Jan Paulsson, *Enclaves of Justice* 1, (University of Miami Law Legal Studies Research Paper No. 2010-29), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1707504.

2. See *id.* (referring to the “Fraudulent Consensus on the Rule of Law”).

in the interpretation and application of that law; or to assess the adequacy of a foreign judicial decision under a truly international standard; falls squarely within the bailiwick of private international law. Scholars, advocates, and judges operating in this field should take heed of these universal principles of law in cases that incorporate a foreign element; they should explicate them and apply them to achieve a result that is not only fair to the parties, but one that also advances minimum international standard of justice more generally. This trend may have already started, but it should be encouraged to continue, in order to move private international law alongside other disciplines of international dispute resolution.

I. THE RECURRING HYPOTHETICAL AND THE INFLUENCE OF PROFESSOR BIN CHENG

The annals of legal history are full of recurring tales. On the international plane, perhaps the most common is the nationalization decree used to expropriate foreign investment. We can crib the facts from any number of recent cases, or take them from the tomes of centuries past, but perhaps the best hypothetical was written by Jan Paulsson in a 2009 article.³ It goes something like this:

Rex has recently installed himself as the benevolent dictator of a resource-rich country. He took power from a government he accuses of having distributed national wealth in a grossly unfair manner, and he enjoys passionate popularity among the vast disadvantaged segments of the population. He accuses foreign business interests of having colluded with formerly powerful national elites. In pursuit of his policies, Rex decides to abrogate international treaties and rewrite national laws. With that, he also decides to nullify contracts made with foreign investors and expropriate foreign assets in the name of redistributive justice. His political majority will support him, as will the legislators and judges he has hand-picked for office. Rex insists that he respects the rule of law, but by “law” he means the rules he has put into place to further his policies.⁴ A legal action by an aggrieved foreign investor under that law may be futile.⁵ This is not only because Rex’s courts are often packed with his cronies, but also because *any* court that applies Rex’s laws as they are drafted and enacted will be obliged to reach the same conclusion. And the discipline of private

3. Jan Paulsson, *Unlawful Laws and the Authority of International Tribunals*, 23 ICSID Rev.—FOREIGN INVESTMENT L.J. 215, 221-22 (2008).

4. For a further discussion of “the law” as opposed to mere “laws,” see *infra* note 146.

5. See Paulsson, *supra* note 4, at 221-22.

international law, as it is traditionally conceived, reflexively points to Rex's laws as the rule of decision in transnational cases. Rex thus has free reign to abrogate his international contracts, even contracts to arbitrate,⁶ by the stroke of a pen.

International law has had to develop the mechanisms to deal with the "Rex's" of the world. For a time, these types of disputes were left to the discretion of negotiating sovereigns, who would espouse an investor's international claims against other states. Modern bilateral investment treaties (BITs) changed all that. Private companies no longer depend on the discretion of their home states in the context of diplomatic protection as to whether a claim should be raised against another state.⁷ They can bring an international claim against their host sovereign themselves.⁸ But, in some respects, all sovereigns are similar to Rex. They all find it intolerable, or at least inconvenient, that an external authority could be allowed to determine what is lawful or unlawful in their own territory.⁹ So, as a choice of law limitation, most BITs point to applying the respondent state's law when an investment tribunal is asked to adjudicate its breach of contract with a covered investor. The investor is thus protected against the

6. See, e.g., *Republic of Ecuador v. ChevronTexaco Corp.*, 499 F. Supp. 2d 452, 461, 463, 466 (S.D.N.Y. 2007) (holding that "extensive formalities" for state-contracting and an Ecuadorian Constitutional provision prohibiting state-owned entities from submitting to a "foreign jurisdiction" precluded any reasonable reliance on a contract—and its arbitration clause—that had been followed by the contracting parties for over two decades); cf. *Bitúmenes Orinoco S.A. v. New Brunswick Power Holding Corp.*, No. 05 Civ. 9485(LAP), 2007 WL 485617, at *18-19 (S.D.N.Y. Jan. 31, 2007) (refusing, for lack of proof, a state-owned entity's attempt to free itself from a contract to arbitrate by pointing to a Venezuelan law that stripped its board of directors from any authority to enter into the contract).

7. See Karl-Heinz Bockstiegel, *Arbitration of Foreign Investment Disputes – An Introduction*, in *NEW HORIZONS IN INTERNATIONAL COMMERCIAL ARBITRATION AND BEYOND* 125, 125-31 (Albert Jan van den Berg ed., 2005); JOHN COLLIER & VAUGHAN LOWE, *THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES* 1-15 (1999); M. SORNARAJAH, *THE SETTLEMENT OF FOREIGN INVESTMENT DISPUTES* 61-84 (2000).

8. There are presently over 2,000 bilateral and regional investment treaties that provide for the compulsory arbitration of investment disputes between investors and their host state. During the 1990s, roughly 1,500 BITs were concluded, and the inclusion of states' consents to investment arbitration became the norm. This wave of new treaties were not confined to the conventional relationship between capital-exporting and capital-importing states; developing states, too, began to sign investment treaties among themselves. United Nations Conference on Trade and Development, *Trends in International Investment Agreements: An Overview* 33-34, U.N. Doc. UNTAD/ITE/IIT/13 (1999). Cases and controversies soon followed; from 1995 to 2004, ICSID registered four times as many claims as in the previous 30 years, and the growth trend appears to be sustaining. This is only a snapshot of the explosion of investment arbitration because ICSID is only one forum for these disputes. Other forums, such as the ICC's International Court of Arbitration or ad hoc tribunals established under the UNCITRAL Rules, are also available for investor-state disputes, and these fora normally keep cases confidential unless both disputing parties agree otherwise.

9. See Paulsson, *supra* note 4, at 222.

inherent bias of Rex's legal process, but not from the bias of Rex's "laws" themselves.

So international law has taken the next logical step and developed a safety valve for dealing with Rex's "laws." An international tribunal's authority to determine and apply national law is plenary, so it is proper for it to refuse to apply "unlawful laws."¹⁰ The mechanism by which it does this varies, but one common approach is to apply "general principles of law recognized by civilized nations" as a corrective norm. There is a real convergence of certain long-standing and baseline principles of contract, procedure, causation, and liability in the municipal laws of the world, regardless of the one-off decrees that are passed for political expediency. The principles become "general" principles, and thus a primary source of international law, when they are deemed "universally recognized" by most civilized legal systems.¹¹ Once divined, these principles will "prevail over domestic rules that might be incompatible with them," such that "the law of the host state can be applied" where there is no conflict, but "[s]o too can [universal principles] be applied" to correct or supplant those national laws that are in disharmony with minimum international standards.¹² So where, for instance, an international investment tribunal accepts that Egyptian law is the proper law of the contract, it may likewise conclude that "Egyptian law must be construed so as to include such principles [and the] national laws of Egypt can be relied upon *only in as much as they do not contravene said principles*."¹³ The goal is to produce decisions that are grounded in positive law, but still detached from the constraints of domestic dogmatism

10. *Id.* at 224.

11. See BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 1* (Cambridge Univ. Press 2006) (1953); Vladimir-Djuro Degan, *General Principles of Law (A Source of General International Law)*, 3 FINNISH Y.B. INT'L L. 1, 46 (1992); Wolfgang Friedmann, *The Uses Of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279, 280-81 (1963); Michael D. Nolan and Frédéric G. Sourgens, *Issues of Proof of General Principles of Law in International Arbitration*, 3 WORLD ARB. & MEDIATION REV. 505, 505 (2009).

12. *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Application for Annulment, ¶¶ 40-44 (Feb. 5, 2002), 41 I.L.M. 933 (2002); *accord Amco v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Award, ¶ 40 (Nov. 20, 1984), 1 ICSID Rep. 413 (1993) ("applicable host-state laws . . . must be checked against international laws, which will prevail in case of conflict").

13. *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, ¶ 84 (May 20, 1992), 8 ICSID REV.-FOREIGN INVESTMENT L.J. 328, 352 (1993) ("When . . . international law is violated by the exclusive application of municipal law, the Tribunal is bound . . . to apply directly the relevant principles and rules of international law. . . . [S]uch a process 'will not involve the confirmation or denial of the validity of the host State's law, but may result in not applying it where that law, or action taken under that law, violates international law' (quoting A. Broches, *The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States*, 136 RECUEIL DES COURS 331, 342 (1972)).

and the idiosyncrasies of local law; for tribunals to display the same sort of “pragmatic functionality” that brings disputing parties to international arbitration in the first place.¹⁴

One good example is the case of *World Duty Free Company Ltd. v. The Republic of Kenya*.¹⁵ In 1989, a UK company had concluded an agreement with the government for the construction, maintenance, and operation of duty-free complexes at the Nairobi and Mombassa airports. Later, as alleged by Claimant, the government sought to cover-up a massive internal fraud by expropriating and liquidating Claimant’s local assets, including its rights under the 1989 Agreement. Claimant sought, *inter alia*, restitution for breach of the contract, which awkwardly referenced both Kenyan and English law as the governing law.

Kenya defended on the basis that the 1989 Agreement was “tainted with illegality” and thus unenforceable because it was procured upon the payment of a USD 2 million bribe from the Claimant to the former President of Kenya. Claimant did little to rebut the factual basis for that defense, but instead argued that “it was routine practice to make such donations in advance of doing business in Kenya” and that “said practice had cultural roots” in Kenya and was “regarded as a matter of protocol by the Kenyan people.”¹⁶ “[S]ufficient regard to the domestic public policy,” Claimant argued, required the Tribunal to uphold the contract notwithstanding the bribe.¹⁷

The Tribunal first divined, and then applied, “an international consensus as to universal standards and accepted norms of conduct that must be applied in all fora.”¹⁸ After surveying arbitral jurisprudence, a number of international conventions, decisions of domestic courts, and various domestic laws, the Tribunal concluded that “bribery or influence peddling . . . are sanctioned by criminal law in most, if not all, countries.”¹⁹ As a result, this consensus could be considered a general principle of English and Kenyan law, so “it is thus unnecessary for this Tribunal to consider the effect of a local custom which might render legal locally what

14. See Klaus Peter Berger, *General Principles of Law in International Commercial Arbitration: How to Find Them—How to Apply Them*, 5 *WORLD ARB. & MEDIATION REV.* 97, 105-06 (2011); see also Yves Derains, *The Application of Transnational Rules in ICC Arbitral Awards*, 5 *WORLD ARB. & MEDIATION REV.* 173, 193 (2011) (noting a “trend among international arbitrators which seeks to challenge the adequacy of applying national laws when resolving transnational disputes”).

15. ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).

16. *Id.* ¶¶ 110, 120, 134.

17. *Id.* ¶ 120.

18. *Id.* ¶ 139.

19. *Id.* ¶ 142.

would otherwise violate transnational public policy.”²⁰ Even “[i]f it had been necessary,” the Tribunal noted, it would have been “minded to decline . . . to recognise any local custom in Kenya purporting to validate bribery committed by the Claimant in violation of international public policy.”²¹ The Tribunal cited a similar approach taken by the UK House of Lords in *Kuwait v Iraqi Airways*, which is discussed below. Thus, “Claimant is not legally entitled to maintain any of its pleaded claims in these proceedings on the ground of *ex turpi causa non oritur action*,” the general principle of law that “[n]o court will lend its aid to a man who founds his cause of action upon an immoral or illegal act.”²²

Similar facts were presented in *Inceysa Vallisoletana v. El Salvador*, and the tribunal also decided the case in a similar fashion.²³ In *Inceysa*, a Spanish company signed a contract to provide industrial services to the Republic of El Salvador. It alleged before an ICSID Tribunal that the Republic breached that contract and expropriated its rights under it. For its part, El Salvador alleged that the Claimant only procured the contract through fraud, and therefore cannot claim any protections under the relevant BIT. But the Claimant had two separate decisions of the Supreme Court of El Salvador that sustained the legality of the bidding process for the contract; it alleged that those decisions were *res judicata* on the issue of Claimant’s alleged fraud.

The Tribunal agreed that the legality of the contract depended upon the “laws and governing legal principles in El Salvador.”²⁴ Primary among those laws was the relevant BIT, which was incorporated into domestic law by the Constitution, and provides for the application of “international law” to disputes regarding foreign investments.²⁵ Because “the general principles of law are an autonomous or direct source of international law,” the Tribunal held that they may be applied as “general rules on which there is international consensus” and “rules of law on which the legal systems of [all] States are based.”²⁶

While *res judicata* is one of those general principles, and decisions of the El Salvadorian Supreme Court should usually be binding when the applicable law is that of El Salvador, the Tribunal decided the issue of its

20. *Id.* ¶ 172.

21. *Id.*

22. *Id.* ¶¶ 179, 181.

23. *Inceysa Vallisoletana v. El Salvador*, ICSID Case No. ARB/03/26, Award (Aug. 2, 2006), available at http://www.italaw.com/sites/default/files/case-documents/ita0424_0.pdf.

24. *Id.* ¶ 218.

25. *Id.* ¶¶ 219-24.

26. *Id.* ¶ 227.

own competence without limitation from the national judgments. Reviewing the legality of the investment contract *de novo*, the Tribunal concluded that Claimant violated at least three general principles of law in its procurement. *First*, it violated the “supreme principle” of good faith, which, in the context of contractual relations, requires the “absence of deceit and artifice in the negotiation and execution of [legal] instruments.”²⁷ *Second*, it violated the principle of *nemo auditor propiam turpitudinem allegans*, which means that it cannot “seek to benefit from an investment effectuated by means of [an] illegal act.”²⁸ And *third*, “the acts committed by [claimant] during the bidding process [we]re in violation of the legal principle that prohibits unlawful enrichment.”²⁹ This principle, the Tribunal found, was codified in the “written legal systems of the nations governed by the Civil Law system,” and provides that “when the cause of the increase in the assets of a certain person is illegal, such enrichment must be sanctioned by preventing its consummation.”³⁰ Accordingly, “the *systematic* interpretation” of El Salvadorian law, underpinned by “the general principles of law,” must deny Claimant the right to access the jurisdiction of the Tribunal – irrespective of what the El Salvadorian Supreme Court may have already said on the matter.³¹

In 1953, Professor Bin Cheng wrote the seminal book on the type of “general principles” invoked in these investor-state arbitrations. Cheng set forth five general categories of substantive concepts that are commonly recognized by civilized nations. Basic notions like *pacta sunt servanda* and *res judicata* are among the most commonly recognized principles, expressed as Latin maxims to demonstrate their permanence and universality. Testifying to the importance of these principles of universal law, Professor Bin Cheng’s 60 year-old book remains one of the most cited treatises by international tribunals.

But is this a unique phenomenon of investment law? As a source of law listed in the ICJ Statute, is it limited to public international law? To be sure, lawyers not dedicated to non-state mechanisms like international arbitration tend to cling to what they know; they tend to fight with the national law with which they are familiar, and only begrudgingly accept foreign law as a rule of decision. In the U.S. at least, “the tendency of the federal courts is to duck and run when presented with issues of foreign

27. *Id.* ¶ 231.

28. *Id.* ¶ 242.

29. *Id.* ¶ 253.

30. *Id.* ¶ 254.

31. *Id.* ¶¶ 218, 263.

law,”³² and they may run faster when that foreign law is an amalgam of ancient principles divined from a comparative exercise. But the perception may not approximate historical reality: national courts may be looking – or perhaps should be looking – in the direction of these fundamental transnational rules.

The notion of “general principles” as a formal source of law before the International Court of Justice came about when European national courts were still reeling with post-WWII trauma. The Continental European tradition of mechanically applying written laws with extreme formalism was blamed for the grave injustices perpetuated by the courts of Nazi Germany and Vichy France.³³ When the war ended, the general principles – or *principes généraux* – obtained favor in France as a reaction against the Vichy period, in which French wartime courts blithely applied Vichy enactments, offering an alternative source to effectuate justice where the written law fails.³⁴

If the general principles obtained some acceptance in Europe – despite the generalized distaste in civil law for anything outside the Code – they obtained even greater acceptance in the common law systems.³⁵ In 1960, the Government of the Republic of Cuba established Banco Para el Comercio Exterior de Cuba (“Bancec”) to serve as an official autonomous credit institution for foreign trade. That same year, all of Citibank’s assets in Cuba were seized and nationalized by the Cuban Government. Separately, but soon thereafter, Bancec acquired a letter of credit issued by Citibank arising from a sugar transaction with a Canadian company. But when Bancec brought suit on the letter of credit in the United States, Citibank counter-claimed, asserting a right to set off the value of its seized Cuban assets. Citibank could only do so, though, if Bancec was deemed the alter ego of the Government of Cuba, and thus responsible for the expropriation. Cuban law was the natural choice of law, and Cuban law

32. Roger J. Miner, *The Reception of Foreign Law in the U.S. Federal Courts*, 432 AM. J. COMP. L. 581, 581 (1995).

33. Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology’s Impact on Substantive Law*, 35 CORNELL INT’L L. J. 101, 103, 142-48 (2001-2002) (citing, *inter alia*, JACQUES GHESTIN & GILLES GOUBEAUX, *TRAITE DE DROIT CIVIL: INTRODUCTION GENERALE* (1977)).

34. *Id.* at 142, 147.

35. This, of course, happens most often where the statute directs the court to “international law” as the rule of decision—as in the case of the Alien Tort Statute. *See, e.g.*, *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 54 (D.C. Cir. 2011) (Kavanaugh, dissenting) (arguing for the application of a “principle which is found to be generally accepted by civilized legal systems”); *see generally* David W. Rivkin, *A Survey of Transnational Legal Principles in U.S. Courts*, 5 WORLD ARB. & MEDIATION REV. 231, 234-37 (2011).

maintained strict separation between the company and the State, thus immunizing Bancec.

The case wound its way through the federal courts; the district court sided with Citibank on finding Bancec sufficiently aligned with the Government of Cuba, but the Second Circuit – applying Cuban law – reversed. The case ultimately came to be heard before the U.S. Supreme Court, which, in an opinion written by Justice Sandra Day O’Connor, disclaimed blind adherence to Cuban law, or even U.S. law, and instead applied “principles of equity common to international law and federal common law.”³⁶ These “controlling principles,” it said, were divined in large part by U.S. federal common law, supplemented by principles adopted by “governments throughout the world.” These principles formed the rule of decision on whether Bancec should be accorded separate legal status from the Government of Cuba.

Citing studies of English law,³⁷ Soviet law,³⁸ and comparative studies by both scholars and NGOs³⁹ — while discarding some principles applied by foreign courts as “not . . . universally acceptable,”⁴⁰ — the Court held that “[s]eparate legal personality” and “[l]imited liability is the rule, not the exception.”⁴¹ However, after referring to various authorities on European civil law⁴² and international decisions collecting “the wealth of practice already accumulated on the subject in municipal law[s]” around the world,⁴³ the Court held that Bancec’s independent corporate status could be disregarded in this instance, and that it could be held to answer in a U.S. court for Citibank’s expropriation in Cuba. Ultimately, this result was “the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law.”

II. GENERAL PRINCIPLES OF LAW IN THE REGULATION OF TRANSNATIONAL PRIVATE RELATIONSHIPS

What Justice O’Connor did in *Bancec* is not completely novel,

36. First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba (*Bancec*), 462 U.S. 611, 613 (1983).

37. *Id.* at 624 n.13; *see also id.* at 625 n.16, 626 n.18.

38. *Id.* at 624 n.13

39. *Id.*

40. *Id.* at 626 n.18.

41. *Id.* at 626.

42. *Id.* at 628 n.20.

43. *Id.*

whether in the United States or abroad. In that case, the foreign instrumentality's primary argument was that the law of the place of its incorporation – there, Cuba – should govern the substantive questions relating to its structure and internal affairs.⁴⁴ To be sure, “[a]s a general matter,” the incorporating state’s law typically governs to achieve “certainty and predictability” for “parties with interests in the corporation.”⁴⁵ But that rule is not absolute. According to the Court, “[t]o give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit th[at] state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts. We decline to permit such a result.” *Nemo iudex in causa sua*.⁴⁶ In the place of Cuban law, the Court applied “principles . . . common to both international law and federal common law,” as explicated by “governments throughout the world.”⁴⁷ In other words, the Court applied those aspects of U.S. common law consonant with “general principles recognized by civilized nations.”

That phrase was inserted into article 38 of the Statute of the International Court of Justice as one of the five sources of international law. It encompasses the positive, private laws of all national judicial systems, distilled to their base norms by a deductive and then comparative analysis.⁴⁸ Among the examples of the general principles cited in the *travaux préparatoires* of the ICJ Statute are *res judicata*, good faith, certain points of procedure (like burden of proof), proscription of abuse of rights, and *lex specialis generalibus derogat*.⁴⁹ These principles are, in a way, state practice *in foro domestic*, and states are bound to them in the same way they are bound to customary international law that stems from the concordance of their practice on the international plane.⁵⁰ As stated by one U.S. judge, “[p]rivate [domestic] law, being in general more developed

44. *Id.* at 621.

45. *Id.*

46. *See* Cheng, *supra* note 12, at 279 (“No one can be judge in his own cause.”).

47. *First Nat’l City Bank*, 462 U.S. at 623-24.

48. *See generally* Michael D. Nolan & Frederic G. Sourgens, *Issues of Proof of General Principles of Law*, 3 *WORLD ARB. & MEDIATION REV.* 505 (2009).

49. Cheng, *supra* note 12, at 25-26.

50. *See* Olufemi Elias & Chin Lin, *General Principles of Law, Soft Law and the Identification of International Law*, 28 *NETH. Y.B. INT’L L.* 3, 25-26 (1997). Indeed, the division between custom and general principles of law is often not very clear. In its broadest sense, customary international law may include all that is unwritten in international law, but in Article 38(a)(1), custom is strictly confined to what is a general practice among States and accepted by them as law. For the general principles, there is the element of recognition on the part of civilized peoples but the requirement of a general practice among States is absent. What is important for Article 38(a)(3) is general practices *within* States.

than international law, has always constituted a sort of reserve store of principles upon which the latter has been in the habit of drawing . . . for the good reason that a principle which is found to be generally accepted by civilized legal systems may fairly be assumed to be so reasonable as to be necessary to the maintenance of justice under any system.”⁵¹ So international tribunals, or national courts faced with a transnational case, have this reserve store of principles that form an international minimum standard of due process and fairness – based not on their own parochial views, but on the universal views of all legal systems.

There are also examples of this practice outside the United States. During the 1990 Iraqi invasion of Kuwait, ten commercial airplanes belonging to Kuwait Airlines were seized by Iraq. After the First Gulf War, Kuwait Airways subsequently brought an action in the UK against Iraq Airways for the aircrafts’ return. In transnational cases like this, English courts typically apply the “double actionability rule,” which requires that the act be tortious in England *and* civilly actionable in Iraq before an action will lie.⁵² But, under a special provision of Iraqi law, those seized aircraft were legally transferred to Iraqi Airways after the war. The Plaintiff conceded this legal point, but argued that the English Court should “altogether disregard” that Iraqi law.

The “normal position,” according to the court, was to follow its precedent on choice of law and apply “the laws of another country even though those laws are different from the law of the forum court.”⁵³ And, while the confiscatory Iraqi law was likely a violation of public international law, “breach of international law by a state is not, and should not be, a ground for refusing to recognise a foreign decree.”⁵⁴ While this latter principle “is not discretionary,”⁵⁵ the ultimate choice of law is, and “blind adherence to foreign law can never be required of an English court.” In exceptional cases, “a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of justice . . . [That is,] when it would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.”⁵⁶ In that situation, “the court will decline

51. Doe VIII v. Exxon Mobil Corp., 654 F.3d 11, 54 (D.C. Cir. 2011) (Kavanaugh, dissenting) (quoting J.L. BRIERLY, *THE LAW OF NATIONS* 62-63 (6th ed. 1963)).

52. Kuwait Airways Corp. v. Iraqi Airways Co., [2002] UKHL 19, ¶ 12, *available at* <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd020516/kuwait-1.htm>.

53. *Id.* ¶¶ 15-16.

54. *Id.* ¶ 24.

55. *Id.*

56. *Id.* ¶¶ 16-17.

to enforce or recognise *the foreign decree* to whatever extent is required in the circumstances⁵⁷ – even though it will continue to apply that foreign law *as a whole*.

That was the result in the case of *Kuwait Airways Corp. v. Iraqi Airways*. The Iraqi decree transferring legal title of foreign seized property no doubt violated international law: “Having forcibly invaded Kuwait, seized its assets, and taken KAC’s aircraft from Kuwait to its own territory, Iraq adopted this decree as part of its attempt to extinguish every vestige of Kuwait’s existence as a separate state.”⁵⁸ The decree was then plead by Iraqi Airways as an impediment to Plaintiff’s claim under the “double actionability rule.” But according to the English Court, “[an] expropriatory decree made in these circumstances and for this purpose is simply not acceptable today, . . . [and constitutes] a gross violation of established rules of international law of fundamental importance.”⁵⁹ Implicit in the decision is the principle of *nullus commodum capere de sua injuria propria* (no one can be allowed to take advantage of his own wrong). The foreign decree that would have otherwise governed the case was excised from Iraqi law and entirely ignored. Because the torts of conversion and usurpation were recognized in England and Iraq, respectively, and amply proven by Plaintiffs, under *both* English and Iraqi law the Plaintiff’s claim was sustained.⁶⁰

General principles of law often form an essential and functioning part of the civil law as well. To fill lacunae, many Civil Codes requires judges

57. *Id.* ¶ 17.

58. *Id.* ¶ 28.

59. *Id.* ¶ 29.

60. This is not to suggest that the general principles should abrogate the longstanding adherence to the “act of state” doctrine. In the United States, for instance, the act of state doctrine requires courts to presume valid acts of a foreign sovereign taken *within its territory*, and to refuse to adjudicate cases that require the court to assess their validity *within that territory*. See, e.g., *W.S. Kirkpatrick & Co. v. Evt’l Tectonics Corp.* 493 U.S. 400, 407 (1990) (“a seizure by a state cannot be complained of elsewhere in the sense of being sought to be declared ineffective elsewhere.”). The *Kuwait Airways* case, however, is different because the English court was not purporting to declare the seizure ineffective *inside* Iraq; it just refused to apply the expropriatory law as the rule of decision in its courts (that is, *outside* of Iraq). This is something that U.S. courts also can—and must—do. See, e.g., *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1025 (5th Cir. 1972) (“our courts will not give ‘extraterritorial effect’ to a confiscatory decree of a foreign state, even where directed against its own nationals.”). Whether the foreign law will be ignored in this instance is typically a function of *local* “public policy.” See *id.* at 78 (“We hold that it is our duty to assess, as a matter of federal law, the compatibility with the laws and policy of *this country* of depriving the original owners of [their] property without compensating them for it.” (emphasis added)). This article posits in § IV, *infra*, that perhaps the amalgam of fundamental legal principles adopted by civilized countries is a more just benchmark than the “unruly horse” of local public policy. *Richardson v. Mellish* (1824), 2 Bing 229, 252 (Burrough, J.) (“Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you”).

to reference “the general principles of universal law”,⁶¹ and many Codes of Civil Procedure instruct courts to decide legal issues “with clarity, based on the law and the merits of the process and, in the absence of law, [on] the principles of universal justice.”⁶² But while provisions like these are not exceptional in the civil law, their use is. With a tradition steeped in positivism and formalism, there is a concern that judges will employ general principles to impose their own unpredictable legal norms, rather than following the norms imposed by the legislature – what the French might condemn as a “*gouvernement de juges*.”⁶³ But some civil law scholars, heeding the lessons from the pre-WWII era, are beginning to eschew this cramped viewpoint of the civil law for something much more flexible.⁶⁴ Indeed, at least some national civil codes expressly direct judges to decide cases according to the spirit of their nation’s laws – a spirit conveyed by the entirety of the Code.⁶⁵

III. INTERNATIONAL DUE PROCESS AS A MINIMUM CORRECTIVE STANDARD

The “general principles of law” are not a tool of oppression; they are not just a way to correct idiosyncratic and exotic laws. Their procedural element, in fact, works just the opposite effect.

Arriving at one definition of substantive justice in a transnational case is a difficult thing. Every state has vastly different procedures to determine what is “justice,” and those procedures produce vastly different final judgments. But when recognition of those judgments is sought abroad, the enforcement state must ascertain whether they meet minimum standards of justice before giving them its *imprimatur*. Like the discretionary application of foreign law, “[n]ations are not inexorably bound to enforce judgments obtained in each other’s courts.” In the United States, as in many national courts, “[i]t has long been the law . . . that a foreign judgment cannot be enforced if it was obtained in a manner that did not accord with the *basics* of due process.”⁶⁶ Similarly, if an individual

61. Civil Code, art. 18 (Ecuador); *see also* Code of Civil Procedure, art. 8 (Venez.); Code of Criminal Procedure, art. 134 (Arg.); Code of Civil Procedure, art. 274 (Ecuador); Constitución Política de la República de Chile [C.P.], art. 54; Constitution, arts. 3, 9, 11 (Arm.); Constitution, art. 24 (Bulg.); Code of Civil Procedure, art. 145 (Bol.); Code of Civil Procedure, art. 2 (Kaz.).

62. Code of Civil Procedure, art. 278 (Ecuador).

63. *See* Curran, *supra* note 34, at 148.

64. *See id.* at 144 (citing, *inter alia*, Jean Boulanger, *Principes généraux du droit et droit positif*, in 1 LE DROIT FRANCAIS AU MILEAU DU XXE SIÈCLE: ÉTUDES OFFERTES À GEORGES RIPERT 68 (1951)).

65. *See* Civil Code, art. 1 (Switz.); Civil Code, art. 12 (It.). This sort of judicial methodology has a long history in Germany, too. *See* Curran, *supra* note 34, at 151-66.

66. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1410, 1412 (9th Cir. 1995) (emphasis added). By

aggrieved by a foreign judgment or government decision wants redress for his gripe on the international level, he can bring an arbitral claim against the offending state under a relevant BIT (if one indeed exists). That state will be liable for a denial of justice if the decision was tainted by a “flagrant abuse of judicial procedure”⁶⁷ or “fundamental breaches of due process.”⁶⁸ In both scenarios, while “[a]n alien usually must take [a foreign] legal system as he finds it, with all its deficiencies and imperfections,”⁶⁹ “[t]he sovereign right of a state to do justice cannot be perverted into a weapon for circumventing its obligations toward aliens who must seek the aid of its courts.”⁷⁰ In both scenarios, there is an international minimum standard of justice that must be done. And, as we will see below, the national and international inquiries largely overlap. This is because, for nearly as long as individuals were engaging each other across national borders, there has existed a rudimentary code of “international due process” consisting of “certain minimum standards in the administration of justice of such elementary fairness and general application in the legal systems of the world that they have become

design and necessity, the “basics” are not parochial; the standard is not “intended to bar the enforcement of all judgments of any foreign legal system that does not conform its procedural doctrines to the latest twist and turn of our courts.” *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000). Indeed, the statute requires only that the foreign procedure be “compatible with the requirements of due process of law,” not ‘equivalent’ to the requirements of American due process, and “[i]t is a fair guess that no foreign nation has decided to incorporate [U.S. notions of] due process doctrines into its own procedural law.” *Id.* So, while a foreign legal system need not share every jot and tittle of U.S. jurisprudence, it “must abide by fundamental standards of procedural fairness,” *Cunard Steamship Co. v. Salen Reefer Servs. AB*, 773 F.2d 452, 457 (2d Cir. 1985), and “afford the defendant the basic tenets of due process,” *Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997)—that is, “a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations, our peers”—if it wants its judgments enforced here, *Ashenden*, 233 F.3d at 477. According to Judge Posner of the United States Court of Appeals of the Seventh Circuit, “[w]e’ll call this the ‘international concept of due process’ to distinguish it from the complex concept that has emerged from [domestic] case law.” *Id.*

67. *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 155-56 (Feb. 5) (Tanaka, J., concurring).

68. JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 205 (2005).

69. *Salem (U.S.) v. Egypt*, 2 R.I.A.A. 1161, 1202 (1932). For instance, in *The Affaire du Capitaine Thomas Melville White*, the British Government complained to an arbitral tribunal that the arrest of one of its citizens in Peru was illegal. The tribunal, however, had “little doubt” that “the rules of procedure to be observed by the courts in [Peru] are to be judged solely and alone according to the legislation in force there.” See *Décision de la commission, chargée, par le Sénat de la Ville libre hanséatique de Hambourg, de prononcer dans la cause du capitaine Thomas Melville White, datée de Hambourg du 13 avril 1864*, in Henri La Fontaine, *PASICRISIE INTERNATIONALE, 1794-1900: HISTOIRE DOCUMENTAIRE DES ARBITRAGES INTERNATIONAUX*, 48 (Kluwer 1997) (1902).

70. J. Irizarry y Puente, *The Concept of Denial of Justice in Latin America*, 43 MICH. L. REV. 383 (1944).

international legal standards.”⁷¹

One might think that the mutual interests of international commerce and the rule of law would espouse an incredibly high standard of “due process” in both scenarios. It doesn’t. The cross-border movement of legal rights and judgments depends largely upon a “spirit of co-operation” among states, which in the end is guided by “many values” beyond substantive justice, “among them predictability, . . . ease of commercial interactions, and stability through satisfaction of mutual expectations.”⁷² To satisfy these needs, international challenges to judgments and judicial recognition of the same do not turn on American, common law, or even Western notions of “due process.” Rather, as we will see below, they turn on “a concept of fair procedure simple and basic enough to describe the judicial processes of civilized nations.”⁷³ Stated otherwise, in both the national and international scenario, the applicable standard of due process requires only “justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world.”⁷⁴

This notion of international due process is drawn from the general principles of law. But rather than supplanting and correcting-*upward* a deficient foreign law before it is applied in a local court, international due process corrects-*downward* the parochial notions of local due process to grant greater leeway to foreign judgments. Drawing on our prior discussion of “Rex,” this deferential standard aims to *help* his minimally-adequate decisions and judgments gain international approval (provided, of course, that they are minimally adequate); not supplant them with a different set of processes, priorities and rules. In this way, the general principles coalesce around this one minimum standard of treatment to which all states can, and must, strive to attain.

For well over a century, U.S. jurisprudence has itself compiled a laundry list of elements that undergird the ‘international concept of due process.’ There must be, for instance, an “opportunity for [a] full and fair trial abroad before a court of competent jurisdiction”; “regular proceedings” and not *ad hoc* procedures; “due [notice] or voluntary

71. Friedmann, *supra* note 12, at 290.

72. *Societe Nationale Industrielle Aerospatiale v. United States Dist.*, 482 U.S. 522, 543 n.27 (1987).

73. *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000).

74. Elihu Root, President, Am. Soc’y of Int’l Law, *The Basis of Protection to Citizens Residing Abroad*, Address Before the American Society of International Law Annual Meeting (Apr. 28-30, 1910), in 4 PROC. AM. SOC. INT’L L. 16, 21 (1910), *quoted in* Edwin Borchard, *The “Minimum Standard” of the Treatment of Aliens*, 38 MICH. L. REV. 445, 458 (1940).

appearance of the defendant”; “a system of . . . impartial administration of justice between the citizens of its own country and those of other countries”; and assurances against “fraud in procuring the judgment.”⁷⁵ Other elements include the assurance that “the judiciary was [not] dominated by the political branches of government or by an opposing litigant”; that the defendant was able to “obtain counsel, to secure documents or attendance of witnesses”; and that the parties “have access to appeal or review.”⁷⁶ These “are not mere niceties of American jurisprudence” but are instead “the ingredients of ‘civilized jurisprudence’” and “basic due process.”⁷⁷

These core concepts of international due process can be directly traced to the general principles of law. As a theoretical matter, both are based in the positive laws that apply in domestic legal systems. Just as national principles become general principles when they are universally accepted by the majority of civilized legal systems, rules of process form the baseline notion of international due process when they are “simple and basic enough to describe the judicial processes of civilized nations, our peers.”⁷⁸

We see this common thread between principles and process as a matter of practice, too. The U.S. Supreme Court has long held that judgments rendered without service of process or notice are contrary to “immutable principle[s] of natural justice,”⁷⁹ “*coram non judge*,”⁸⁰ and void.⁸¹ This is not only a general principle of American law, but is also a “fundamental condition[]” that is “universally prescribed in all systems of law established by civilized countries.”⁸² Accordingly, this basic principle forms a core component of both American due process and international due process,⁸³ such that judicial judgments, if they were rendered in their

75. *Hilton v. Guyot*, 159 U.S. 113, 202 (1895).

76. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 482 cmt. b (1987).

77. *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1413 (9th Cir. 1995) (quoting *Hilton*, 159 U.S. at 205); see also *British Midland Airways Ltd. v. Int’l Travel, Inc.*, 497 F.2d 869, 871 (9th Cir. 1974) (“It has long been the law that unless a foreign country’s judgments are the result of outrageous departures from our own notions of ‘civilized jurisprudence,’ comity should not be refused” (quoting *Hilton*, 159 U.S. at 205)).

78. *Ashenden*, 233 F.3d at 477.

79. *Hollingsworth v. Barbour*, 29 U.S. 466, 475 (1830).

80. *Coram non judge* means “[o]utside the presence of a judge” or “[b]efore a judge or court that is not the proper one or that cannot take legal cognizance of the matter.” BLACK’S LAW DICTIONARY 338 (7th ed. 1999).

81. See, e.g., *Boswell’s Lessee v. Otis*, 50 U.S. 336, 350-51 (1850).

82. *Twining v. New Jersey*, 21 U.S. 78, 111 (1908).

83. See *Hilton*, 159 U.S. at 166 (“Every foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings, and due notice.”); *Int’l Transactions, Ltd. v. Embotelladora Agral Regiomontana*,

state of origin without proper notice, will almost universally be denied recognition and enforcement in another state and may even constitute an international delict if property is seized in the rendering state as a result.⁸⁴

Similarly, Professor Bin Cheng devoted a chapter of his book on the General Principles to the notion of *audiatur et altera pars*, which translates in practice to the “fundamental requirement of equality between the parties in judicial proceedings” and their equal right to be heard.⁸⁵ Elsewhere, he discussed the maxim *nemo debet esse iudex in propria sua causa*, or the “universally accepted doctrine that no one can be judge in his own cause,”⁸⁶ and the principle that requires tribunals to exercise only that jurisdiction authorized by law (*extra compromisum arbiter nihil facere potest*). All three of these general principles have found their way into the core notions of international due process. Nearly contemporaneously with Bin Cheng’s book, the Council of Europe drafted the European Convention on Human Rights, which provided an early attempt to codify an intra-European baseline of due process, and included within it the guarantee that “everyone is entitled to [(1)] a fair and public hearing within a reasonable time [(2)] by an independent and impartial tribunal [(3)] established by law.”⁸⁷ Violation of this article can impugn a foreign judgment in both domestic⁸⁸ and international⁸⁹ courts. The parallels between Bin Cheng’s general principles of law and the ECHR’s baseline notion of due process are hard to ignore.

Modern soft law codifications, like the ALI/UNIDROIT Principles of Transnational Civil Procedure, provide an even clearer example of many of the principles underlying international due process.⁹⁰ For instance, the

SA de CV, 347 F.3d 589, 594 (5th Cir. 2003) (“Notice is an element of our notion of due process and the United States will not enforce a judgment obtained without the bare minimum requirements of notice.”).

84. See, e.g., *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, ¶¶ 146-51 (Apr. 12, 2002), 18 ICSID Rev.—FOREIGN INVESTMENT L.J. 602 (2003).

85. CHENG, *supra* note 12, at 291-98.

86. *Id.* at 279.

87. Convention for the Protection of Human Rights and Fundamental Freedoms, art. VI, para. 1, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) (emphasis added).

88. See, e.g., *Yukos Capital S.A.R.L. v. OAO Rosneft*, Amsterdam Court of Appeal, Case No. 200.005.269/01, Decision, ¶ 3.10 (Apr. 28, 2009), available at <http://www.iiiglobal.org/component/jdownloads/finish/170/4135.html> (unofficial translation).

89. See, e.g., *Oao Neftyanaya Kompaniya Yukos v. Russia*, ¶ 551 (Sept. 20, 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-106308>.

90. Instruments like these are, almost by definition, an attempt to deduce general principles from a comparative exercise. They are, according to one scholar, “normative instrument[s] that attempt[] to construct a single unified body of . . . rules from a number of legal systems.” Peter L. Fitzgerald, *The*

three general principles that underlie the notion of a fair hearing by a competent court are listed in the first three articles of that instrument, which address the “independence [and] impartiality” of judges, their “jurisdiction over parties,” and the “procedural equality of the parties.”⁹¹ The general principle that judgments cannot be rendered without due notice follows soon thereafter, at article 5.⁹² That article also catalogues a number of general principles that have been applied as such by national and international courts, including the requirement of “effective . . . notice” at the outset of proceedings, and the “right to submit relevant contentions of fact and law and to offer supporting evidence” in support of a defense or a claim.⁹³

Other general principles appear throughout the ALI/UNIDROIT Principles, too. A claimant bears the burden of proof, and a defendant must prove all the material facts that are the basis of his defense.⁹⁴ These are universal principles that have long been applied as such by domestic and international courts and tribunals.⁹⁵ There also is “little, if indeed any question as to *res judicata* being a general principle of law” common to all civilized countries.⁹⁶ That a second suit is barred by a former adjudication involving the same subject matter and legal bases is “a principle inherent in all judicial systems.”⁹⁷ The Principles, too, are designed to “avoid repetitive litigation” with detailed rules on claim and issue preclusion.⁹⁸

International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the United Nations Convention on the International Sale of Goods (CISG) and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States, 27 J.L. & COMM. 1, 33 (2008); see also Berger, *supra* note 15, at 109-13.

91. ALI/UNIDROIT Principles of Transnational Civil Procedure, 2004 UNIFORM L. REV. 758, 760-66.

92. *Id.* at 768.

93. ALI/UNIDROIT Principles, *supra* note 92, art. 5.4; CHENG, *supra* note 12, at 293; see, e.g., *Hilton v. Guyot*, 159 U.S. 113, 159 (1895) (To be recognized, a foreign judgment must be the product of “due allegations and proofs, and opportunity to defend against them.”); *Iran Aircraft Indus. v. Avco Corp.*, 980 F.2d 141, 146 (2d Cir. 1992) (refusing recognition of arbitral award under the due process defense of the New York Convention, where judge had previously told the claimant that invoices may be submitted in summary form to prove their claims, only to switch course at the hearing on the merits and deny the claims for failure to submit the original invoices; “by so misleading [claimant], however unwittingly, the Tribunal denied [claimant] the opportunity to present its claim in a meaningful manner.”); *Generica Ltd. v. Pharm. Basics*, 125 F.3d 1123, 1130 (7th Cir. 1997) (“When the exclusion of relevant evidence actually deprived a party of a fair hearing, therefore, it is appropriate to vacate an arbitral award.”).

94. ALI/UNIDROIT Principles, *supra* note 92, art. 21.

95. See, e.g., CHENG, *supra* note 12, at 326-335.

96. *Id.* at 336.

97. PETER R. BARNETT, *RES JUDICATA, ESTOPPEL AND FOREIGN JUDGMENTS: THE PRECLUSIVE EFFECTS OF FOREIGN JUDGMENTS IN PRIVATE INTERNATIONAL LAW* ¶ 1.12 (2001).

98. ALI/UNIDROIT Principles, *supra* note 92, art. 28, cmt. P-28A.

And, it has been universally acknowledged that a default judgment cannot lie until the court has satisfied itself of its jurisdiction and that the claim is well-founded in fact and law.⁹⁹ The Principles, too, incorporate this rule.¹⁰⁰

When pulled together into a “Transnational [Code of] Civil Procedure,” as ALI and UNIDROIT have done, these individual principles form a set of minimum “standards for adjudication of transnational commercial disputes.”¹⁰¹ In other words, they constitute an attempted codification of “international due process.”

The application of the international concept of due process is becoming more common in domestic courts, and we can point to some high-profile examples. Several years ago, thousands of Nicaraguan citizens sued Dole Food Company and The Dow Chemical Company in Nicaraguan courts, alleging that they were exposed to chemicals causing them to be infertile while working on the defendants’ banana plantations. Nicaraguan courts applied Special Law 364, which was enacted in Nicaragua specifically to handle these claims.¹⁰² This law assumed the plaintiffs were indigent and covered their costs, imposed minimum damage amounts, irrefutable presumptions of causation, summary proceedings, abolition of the statute of limitations, and strict curtailment of appellate review.¹⁰³ In the end, Nicaraguan courts entered over \$2 billion in judgments for the plaintiffs.

When Plaintiffs sought to enforce one of these judgments in Florida, the defendants objected on numerous grounds, including the lack of due process that the defendants received in Nicaragua. The court, citing *Ashenden*, evaluated the Special Law 364 to determine whether it was “fundamentally fair.”¹⁰⁴ Because it “targets a handful of United States companies for burdensome and unfair treatment to which domestic Nicaraguan defendants are never subjected,” the court held that the foreign judgment should not be recognized or enforced. Specifically:

[T]he legal regime set up by Special Law 364 and applied in this case does not comport with the “basic fairness” that the “international concept of due process” requires. It does not even come close. “*Civilized nations*” do not typically require defendants to pay out millions of dollars without proof that they are responsible for the alleged injuries.

99. See, e.g., CHENG, *supra* note 12, at 297.

100. ALI/UNIDROIT Principles, *supra* note 92, art. 15.3.

101. *Id.* at 758.

102. *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307, 1316-18 (S.D. Fla. 2009).

103. *Id.* [BB 4.1][subs ok, as noted above, changed pincite][EK]

104. *Id.* at 1327 (citing *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000)).

*Basic fairness requires proof of a connection between a plaintiff's injury and a defendant's conduct (i.e., causation) before awarding millions of dollars in damages. Civilized nations do not target and discriminate against a handful of foreign companies and subject them to minimum damages so dramatically out of proportion with damage awards against resident defendants. In summary, civilized nations simply do not subject foreign defendants to the type of discriminatory laws and procedures mandated by Special Law 364, and the Court cannot enforce the judgment because it was rendered under a legal system that did not provide "procedures compatible with the requirements of due process of law."*¹⁰⁵

This admonishment from the court in *Osorio* didn't flow from the Fourteenth Amendment of the U.S. Constitution, whose "due process" clause encompasses not only "idiosyncratic jurisprudence"¹⁰⁶ on principles of procedural fairness, but also substantive matters like personal privacy¹⁰⁷ and applicable law.¹⁰⁸ "It is a fair guess that no foreign nation has decided to incorporate our due process doctrines into its own procedural law,"¹⁰⁹ so insisting on all of the rigors of our system would undoubtedly stunt the movement of judgments abroad. The deficient process followed in Nicaragua violated something far less stringent and more fundamental – that is, the basic rules of procedural fairness followed by all "[c]ivilized nations."¹¹⁰

International norms developed through "discursive synthesis" like this – that is, the interaction of many different legal traditions and principles – are always "more likely to be implemented [in national legal systems] and less likely to be disobeyed [on the international level]."¹¹¹ In some ways, this is Harold Koh's "Transnational Legal Process" on full display – principles are divined from the interaction of legal systems, those principles are internalized into a country's normative system, and a new baseline legal rule is created which will guide transnational interactions between parties in the future.¹¹² The result, we can hope, is a compliance pull to the rule of law, and the optimistic establishment of "enclaves of justice." In Mexico,

105. *Id.* at 1345. (citation omitted) (emphasis added).

106. *Ashenden*, 233 F.3d at 477.

107. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (noting the private nature of the petitioners' conduct).

108. *See, e.g.*, *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

109. *Ashenden*, 233 F.3d at 476.

110. *Id.* at 477.

111. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 481 (1995).

112. Harold Koh, *The Transnational Legal Process*, 75 *NEB. L. REV.* 181, 204-05 (1996); Harold Koh, *Why Do Nations Obey International Law?*, 106 *YALE L. J.* 2599, 2646 (1997).

for instance, it is reported that NAFTA has encouraged government officials and courts to avoid conduct that might fall below the international minimum standard, and thereby be impugned in an international forum.¹¹³ A foreign court applying a baseline notion of international due process to Mexican laws and decisions might exert a similar compliance pull – to the benefit of foreigners and citizens alike.

Of course, commentators may levy the same criticisms against this process that have been made since the inception of “general principles” as a primary source of international law nearly a century ago. Some may bemoan that “unelected” judges may be given free rein to divine principles made by “the world community at the expense of state prerogatives,” where “the interests of the [home] state[] are neither formally nor effectively represented in th[at] lawmaking process.”¹¹⁴ But, in a transnational case, there is nothing new about judges applying law that was made elsewhere; it happens all the time whenever the courts’ own choice-of-law principles so direct. Nor is there anything undemocratic about judges applying principles that were crystallized outside its territorial jurisdiction (at least in non-Constitutional matters).¹¹⁵ This is something that American judges have done since the beginning of the Republic, whenever they declared rules of customary international law to be part of “general common law.”¹¹⁶ The process of “finding”¹¹⁷ general principles – that is, identifying the underlying legal rationale behind a particular rule and surveying its general acceptance across legal systems – is certainly no more (and probably less) discretionary than divining a customary international law.¹¹⁸ And if predictable outcomes is the main concern, and

113. See Paulsson, *supra* note 2.

114. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 868 (1997).

115. I am not suggesting that these general principles can or should be applied to help discern a constitutional question. See generally Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL’Y 653 (2009). That lively debate of beyond the scope of this article. I will only note that it is a far lesser intrusion—and far less controversial—to apply these principles to a transnational *civil* case, where the parties have litigated their claims overseas or are actually arguing for the applicability of foreign law.

116. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.20 (2d Cir. 1980); see also *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938) (U.S. courts variably “apply Federal law, state law, and international law, as the exigencies of the particular case may demand.”); *The Nereide*, 13 U.S. 388, 423 (1815) (stating that “the Court is bound by the law of nations which is a part of the law of the land”).

117. See Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1561-62 (1984) (“In a real sense federal courts find international law rather than make it, . . . as is clearly not the case when federal judges make federal common law pursuant to constitutional or legislative delegation.”).

118. Harold Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1853 (1998).

judges cannot be trusted to ensure that predictability, is not a methodology designed to apply well-accepted and ancient principles better than that hazards of an uncertain choice of law determination, followed by blind adherence to idiosyncratic rules?¹¹⁹

IV. THE RELEVANCE OF GENERAL PRINCIPLES TO THE MODERN ROLE OF PRIVATE INTERNATIONAL LAW

The discipline of private international law, defined in its simplest terms, is the body of authority that regulates private relationships across national borders, and resolves questions that result from the presence of foreign elements in legal relationships.¹²⁰ This doesn't tell us much, so we need to dig a bit deeper.

Contrary to what the label suggests, it is also important to acknowledge that private international law is really not “international law” at all, in that it does not constitute a set of rights and obligations between states. Rather, it is *municipal* law that is applied because of the presence of a foreign element. By ASIL's definition it “has a dualistic character, balancing international consensus with domestic recognition and implementation, as well as balancing sovereign actions with those of the private sector.”¹²¹

Traditionally, “private international law” does its part to resolve transnational disputes by pointing parties to the proper forum and the proper law, without purporting to resolve the substance of a juridical question. Its rules rarely provide the ultimate solution to a dispute, and it has been said that this discipline of law “resembles the inquiry office at a railway station where a passenger may learn the platform at which his train

119. See Emmanuel Galliard, *General Principles of Law in International Commercial Arbitration—Challenging the Myths*, 5 *WORLD ARB. & MEDIATION REV.* 161, 169 (2011).

120. See, e.g., P.M. North & J.J. Fawcett, *CHESHIRE & NORTH'S PRIVATE INTERNATIONAL LAW* 3, 7 (13th ed. 1999); *Private International Law*, DEPARTMENT OF INTERNATIONAL LAW, http://www.oas.org/dil/private_international_law.htm (last visited Apr. 1, 2013) (“Private International Law is the legal framework composed of conventions, protocols, model laws, legal guides, uniform documents, case law, practice and custom, as well as other documents and instruments, which regulate relationships between individuals in an international context.”); *Private International Law*, AUSTRALIAN GOVERNMENT, <http://www.ag.gov.au/Internationalrelations/PrivateInternationalLaw/Pages/default.aspx> (last visited Apr. 1, 2013) (“Private international law is an area of law that deals with civil transactions and disputes that contain international elements. Also known as ‘conflicts of laws’, the subject is primarily concerned with developing principles and rules to resolve the following three stages of a legal conflict: Jurisdiction, Choice of law, Recognition and enforcement of judgments.”).

121. Louise Tsang, *Private International Law*, AMERICAN SOCIETY OF INTERNATIONAL LAW (June 21, 2011), <http://www.asil.org/erg/?page=pil>.

starts”—it points parties to the right court and the right law, “[b]ut it says no more.”¹²² If this sounds like a simple process, leading to clean and predictable results, it isn’t. One negative consequence of the inherently municipal nature of private international law is uncertainty: with little harmonization of these various rules among states, there is no guarantee that the same dispute involving a foreign element will be decided in the same manner from one jurisdiction to another. And even once a choice of forum and law is made, the chosen law doesn’t always dictate a simple, judicious, and expected result. The chosen local law applied to the transnational case can lead to absurd results, and foreign law applied in local courts can often be even worse.

As the discussion above demonstrates, in order to play a meaningful role in aiding the resolution of modern transnational disputes, the authorities that encompass the rules of private international law must play a role in determining the *substance* of those municipal laws applied to the transnational scenario. Like investment tribunals in the past decade-and-a-half, courts seised with transnational matters and asked to apply foreign law should develop corrective mechanisms grounded in positive law that ensure substantive justice from a universal perspective. If we continue to hew to a mechanical application of the chosen municipal law, and excuse it with “meretricious concessions to cultural relativism,” we may find ourselves “complicit with dictators, fanatics and thugs” who have perpetrated the “fraudulent consensus on the rule of law” worldwide.¹²³ By the same token, if we continue to rely on the “unruly horse” of local public policy, or insist on parochial norms to stunt the movement of foreign judgments around the world, we threaten the very foundation of international law—that “systemic value of reciprocal tolerance and goodwill” which furthers the “mutual interests of all nations in a smoothly functioning international legal regime.”¹²⁴

To some extent, private international law organizations have already heeded this call. The Hague Conference on Private International Law, for one, has recently acknowledged the “need, in practice, to facilitate access to foreign law” as an “essential component to . . . the rule of law and . . . the proper administration of justice.”¹²⁵ Efforts like this will make it easier

122. See North & Fawcett, *supra* note 121, at 8-9.

123. See Paulsson, *supra* note 2, at 9.

124. *Societe Nationale Industrielle Aerospatiale v. United States for the S. Dist. of Iowa*, 482 U.S. 522, 555 (1987) (Blackmun, J., concurring in part and dissenting in part).

125. See generally Hague Conference on Private International Law, Feb. 15-17, 2012, *Conclusions and Recommendations on Access to Foreign Law in Civil and Commercial Matters*, available at http://www.oas.org/dil/private_international_law.htm.

for the national judge to apply the *whole law* to a particular case – the underlying universal principles as well as its normative code.¹²⁶ Moving one step further, for almost a century the International Institute for the Unification of Private Law (UNIDROIT) has been modernizing, harmonizing, and coordinating the rules of private commercial law to formulate uniform law instruments, and numerous treaties have been concluded between states that effectively do the same.¹²⁷ And for centuries before that, *lex mercatoria* has provided rules of international trade that have long been used to “clarify, to fill gaps, and to reduce the impact of peculiarities of individual country’s laws.”¹²⁸ But insofar as they are derived from scholarly consensus (in the case of uniform law instruments), and mercantile usage (in the case of *lex mercatoria*), these non-state laws have their obvious drawbacks.¹²⁹ Municipal courts may not recognize the choice of non-state codifications to a particular dispute before it. In Europe, this traces back to Article 1(1) of the Rome Convention, which stipulates that the Convention governs the “choice between the laws of different countries.”¹³⁰ Other provisions, too, especially those dealing with contracts – such as Articles 3 (3) and 7 (1) – refer to the applicable law as “the law of a country.” This is true in the United States too. Section 187 of the Second Restatement of Conflicts, and Sections 1-105 and 1-301 of the UCC, designate the law to which reference is made as the “law of a state.” And because “state” is defined in that Restatement as a “territorial unit with a distinct body of law,” this wording suggests that only the application – and the choice – of state law is contemplated.¹³¹ There is a need, then, for

126. See *infra* note 146.

127. See, e.g., Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11; Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929, *opened for signature* Sept. 28, 1955, 478 U.N.T.S. 371; Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, Sept. 18, 1961, 500 U.N.T.S. 31.

128. Andreas F. Lowenfeld, *Lex Mercatoria: An Arbitrator’s View*, in *LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW* 71 (Thomas E. Carbonneau ed., 1998).

129. See Galliard, *supra* note 120, at 161-62 (noting that “it would be misleading . . . to equate general principles with *lex mercatoria*” because only the former is “rooted in national legal systems” and identified through a comparative law analysis).

130. Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on June 19, 1980.

131. Case law is generally in accord. In *Trans Meridian Trading Inc. v. Empresa Nacional de Comercializacion de Insumos*, 829 F.2d 949, 953-54 (9th Cir. 1987), for example, the Court of Appeals for the Ninth Circuit refused to enjoin payment on an international letter of credit despite the fact that the contract had been expressly made subject to the “Uniform Customs and Practices for Documentary Credit (UCP)” published by the International Chamber of Commerce, which allowed issuance of an

an established source of *positive* law to do what the *lex mercatoria* does – to “clarify, to fill gaps, and to reduce the impact of peculiarities of individual country’s laws.”¹³²

This is precisely where the “general principles of law recognized by civilized nations” can, and should, enter the field of private international law. These principles are, by definition, borne from *municipal* law – or in the least the distillation of underlying legal principles that give shape to those positive laws. Again, by definition, they stem from “*international consensus*” – before being characterized as general, the judge must deem them accepted by the majority of legal systems in the world. And they must also possess some modicum of “*domestic recognition*” to be accepted by the forum that seeks to apply them. In the transnational case, involving litigants from varying legal traditions, a solution premised on international rather than municipal principles is always the preferred solution; a solution based on one of the three primary “sources of international law” codified by the Statute of the International Court of Justice may be the best solution of all. One could even argue that this source of international law is the one that is best designed for private international law cases; it is, after all, the *only* source that derives from the world’s many *municipal* codes, which in and of themselves are designed to apply to the conduct of *private relationships*.

To be clear, though, this suggestion is not intended to formulate a new approach to the choice of law, even though on its face it may look like the “better law” approach championed by Professor Lefflar a half-century ago,¹³³ or the “principles of preference” introduced by Professor Cavers decades before that.¹³⁴ Both sought to announce criteria of rule-selection; a “choice between laws;”¹³⁵ a unified theory by which judges could choose the competing municipal law that would best effect “relevant multistate policies”¹³⁶ or some subjective notion of justice.¹³⁷ What I am suggesting

injunction under the given circumstances. The court held that the UCP was not the law “of a foreign jurisdiction, but rather . . . a compendium of commercial practices published by the International Chamber of Commerce.” Therefore, “a provision in a letter of credit that the UCP governs the transaction” did not “prevent application of California’s Commercial Code.”

132. Lowenfeld, *supra* note 129, at 149.

133. R. LEFLAR, *AMERICAN CONFLICTS LAW* 258 (1968).

134. D. CAVERS, *THE CHOICE-OF-LAW PROCESS* 64 (1965).

135. LEFLAR, *supra* note 134, at 258.

136. CAVERS, *supra* note 135, at 64.

137. I would note, however, that there is no reason why the general principles of law could not play an important role in the search for the appropriate choice of law. For example, in *Eli Lilly do Brasil, Ltda v. Fed. Express Co.*, 502 F.3d 78, 81-82 (2d Cir. 2007), Eli Lilly had contracted with FedEx to ship pharmaceuticals, which were stolen while being transported by truck in Brazil. Eli Lilly elected to sue in the Southern District of New York instead of Brazil, requiring the court to determine

comes *after* a choice of law is made. From there the court ascertains that law – and, if necessary, invokes certain “general principles of law recognized by civilized nations” to correct any unjust outcomes perpetuated by that law. From there that law is applied in this corrected form, hopefully resulting in “justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world.”¹³⁸ At the very least, it results in a chosen law that eschews parochial outcomes for a transnational dispute. That is the law that sets sail beyond a state’s borders.

Nor is this an effort to craft a comparative code of conduct applicable to transnational relationships everywhere. It is much more modest than that. These *principles* are distinguishable from *rules*. “A rule . . . is essentially practical and, moreover, binding.”¹³⁹ The Eighth Commandment, ‘Thou Shalt Not Steal,’ is a fundamental rule, adopted by every civilized legal system, but its widespread acceptance does not make it a “general principle of law recognized by civilized nations.”¹⁴⁰ Principles simply “express[] a general truth, which guides our action,” and the action of legislatures, and “serves as a theoretical basis” for binding rules of practical application.¹⁴¹ By way of illustration, while theft may be strictly prohibited as a firm *rule*, the *principle* that laws have only prospective effect¹⁴² (for instance) is far less obligatory.

So when a municipal court is given the authority to apply a certain law

whether the federal common law or Brazilian law applied. In conducting its choice of law analysis, the court recognized that Brazil’s interest under § 188 of the Restatement (Second) of Conflict of Laws was greater than the United States’ interest; however, the court noted that this was not the “end of [the] inquiry or determinative of its conclusion.” The court found that the expectation of enforceability of contracts should be afforded greater weight than Brazilian law. In reaching this conclusion, the court applied the following two general principles of law: (1) “the well-settled ‘presumption in favor of applying that law tending toward the validation of the alleged contract’” and (2) “the general rule of contract that ‘presumes the legality and enforceability of contracts’”—*pacta sunt servanda*. *Id.* at 82; see also CHENG, *supra* note 12, at 142. Since these general principles favored enforcing the contract, they were weighed against Brazil’s interest in having its own law applied. The principle of *locus regit actum*—and the greater interest in applying the law of another interested sovereign—was displaced by the general principle of law that the contract may rather have effect than be nullified. *Ut res magis valeat quam pereat*.

138. Root, *supra* note 75, at 21.

139. CHENG, *supra* note 12, at 376.

140. See *Filartiga v. Pena-Irala*, 630 F.2d 876, 888 (2d Cir. 1980) (“[T]he mere fact that every nation’s municipal law may prohibit theft does not incorporate the Eighth Commandment, ‘Thou shalt not steal’ [into] the law of nations.”); see also *Flores v. S. Peru Copper Corp.*, 414 F.3d 233, 249 (2d Cir. 2003) (“Even if certain conduct is universally proscribed by States in their domestic law, that fact is not necessarily significant or relevant for purposes of customary international law.”).

141. CHENG, *supra* note 12, at 376.

142. CHENG, *supra* note 12, at 141.

to a transnational case – be it foreign or domestic – its authority is plenary, and it has the authority to *determine* foreign law before it applies it. This is vital, and it means that the *whole law*, including the superior norms and foundational principles to the black-letter rules, may be applied.¹⁴³ A foreign criminal law that purports to have retroactive effect may be rejected by the municipal court seized to apply it, for instance, on the grounds that such laws violate the “general principles of law recognized by civilized nations” (including, very likely, the nation whose legislature purported to ignore it). By the same token, a domestic law which requires witnesses to stand on their head as they testify should not foreclose the enforcement of a foreign judgment where the trial witnesses stand on their feet; the international standard of due process demands no more.¹⁴⁴ Whatever the fate of those “unprincipled” rules in the territories of the states that enacted them, they remain there. The application of the general principles keep *the law*¹⁴⁵ in good health, even though imperfect “laws” may be passed from time to time.

143. See, e.g., Paulsson, *supra* note 2, at 12-13 (describing the multiple levels of rules that apply to sports). Federal Rule of Civil Procedure 44.1 is broad enough to encompass a deep study of systemic norms when asked to discern and apply a foreign law. Fed. R. Civ. P. 44.1 (“In determining foreign law, the court may consider *any* relevant material or source” (emphasis added)). Indeed, as Judge Posner has recently noted, judges are “experts on law,” and thus may resort to the “abundance of published materials, in the form of treatises, law review articles, statutes, and cases, . . . to provide neutral illumination of issues of foreign law.” See *Bodum, USA, Inc. v. La Cafeiterra, Inc.*, 621 F.3d 624, 633 (7th Cir. 2010) (Posner, J., concurring). While interested foreign sovereigns often come into U.S. court, as *amicus* or otherwise, to espouse a particular interpretation, U.S. courts typically do not give these proffered interpretations determinative weight without due consideration and assessment of their correctness within the broader regime of the particular foreign law. See, e.g., *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 714 (5th Cir. 1999) (“we do not feel compelled to credit the [foreign agency’s] determinations without analysis”); *McNab v. United States*, 331 F.3d 1228, 1241-45 (11th Cir. 2003) (refusing to defer to the Honduran government’s interpretation of its own law because that interpretation conflicted with the text of three other Honduran statutes). This is the correct approach, especially when the proffering sovereign has a financial stake in the outcome of the case. *But see Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70, 92 (2002) (A foreign sovereign’s views regarding its own laws merit—although they do not command—“some degree of deference.”); *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1312 (7th Cir. 1992) (the court owes “substantial deference to the construction a foreign sovereign places upon its domestic law, because [it has] long recognized the demands of comity in suits involving foreign states, either as parties, or as sovereigns with a coordinate interest in the litigation”).

144. See, e.g., PAULSSON, *supra* note 69, at 205.

145. I use the italicized word “*the law*” in this sense to mean the national law *in its totality*. “Laws,” on the other hand, are singular edicts, decrees, and the like. Paulsson, *supra* note 4, at 215. It is a flaw of the English language that there are not two words to make the distinction. In French, for instance, when the legislature passes “*le lois*,” it never dispenses with “*le droit*.” Replacing the latter would take a revolution. We are thus speaking here of the equivalent of France’s “*le droit*”—the system of legal norms that are the object and instrument of legal order in a society, and which create, modify, apply and impose respect for that order. *Id.* at 217 (citing S. ROMANO, L’ORDINAMENTO GUIRIDICO 10 (1918)).

Owing to their “inchoate” nature and corrective role, such principles actually do better resting *alongside* the black letter rules of municipal law, guiding the application of municipal law rather than forming a freestanding rule of decision themselves. For international law *writ large*, this is common territory. In many contexts, only once challenges are raised to the legitimacy or propriety of municipal law is the “[a]ttention . . . immediately switched to international law, to see whether it may have a corrective effect, by operation of such things as international minimum standards or international public policy.”¹⁴⁶ This is the norm before investment tribunals, where the “general principles of law” are very often applied in a corrective role. This apparent modesty, however, should not be overstated. As we have seen above, general principles of law can correct a rule of law in an outcome determinative way, even in municipal courts. When an otherwise applicable foreign law would shield a state-owned corporation from liability, and allow it to benefit from its own state’s international delicts, “general principles” step in to disregard the corporation’s separate legal status.¹⁴⁷ “[L]imited liability is [still] the rule,” but “controlling principles” imply an exception.¹⁴⁸ Similarly, even when parochial notions of due process might render a foreign judgment unenforceable, a “less demanding standard” of “international due process” – derived from certain principles and processes accepted by civilized nations – may be applied to recognize the judgment.¹⁴⁹ The acknowledgment and application of general principles derived from the positive laws of the forum and other legal traditions can be the difference between applying *a* rule of law, and applying *the* rule of law. While the former can waver with the shifting sands of political expediency (often to the detriment of the foreign litigant), the latter remains stubbornly constant.

This combination of features is precisely what makes the “general principles of law” so special, and so relevant, to modern transnational disputes. A court charged with applying a specific national law has both the duty and the authority to apply it as a whole. This not only includes its black letter rules, but also the underlying principles that provide intent and direction to those rules. These principles, then, reaffirm the correct result as a matter of *that* law, with no need to determine whether “better” national rules or the norms of international law should take precedence.¹⁵⁰ The

146. *Id.* at .

147. *First Nat’l City Bank v. Banco Para el Comercio Exterior de Cuba (Bancec)*, 462 U.S. 611, 613 (1983)

148. *Id.*

149. *Society of Lloyd’s v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000).

150. *See Jan Paulsson, Unlawful Laws and the Authority of International Tribunals*, 23 ICSID

outcome “is shown not to be an international imposition on [the applicable] national law,” but a “vibrant affirmation” of the very foundational core of that law, backed by the imprimatur of all “civilized nations, our peers.” So while there is some overlap with traditional doctrines dealing with the exclusion of foreign law – like public policy – the application of general principles to guide the outcome of a transnational case is far less intrusive (and perhaps, when defined correctly, far less arbitrary¹⁵¹). The otherwise applicable foreign law is not displaced and discarded as contrary to some *parochial* sense of “good morals [or] some deep-rooted tradition of the common weal” of the forum.¹⁵² Rather, it is applied in its fullest and fairest sense, checked by the *international* minimum standard. This is also what differentiates general principles from applying uniform law instruments and *lex mercatoria*, which are non-state sources with little, if any, positive law footing. But still, the benefit of these non-state sources of law is realized. “General principles” allow judges to “play their proper role in ensuring that law does not present itself as a blank sheet of paper upon which any dictator or dominant group can write laws illegitimate within the legal order, and thereby debase law itself” – and the transnational commercial interests that depend upon it. The legal “conscience,” therefore, remains constant.

And that “conscience,” itself, is self-correcting. Even absent the doctrines of *stare decisis* or binding precedent, it is “pointless to resist the observation” that judicial decisions help “generate norms of international law.”¹⁵³ But if one municipal court or international tribunal characterizes a principle as one of general and universal applicability, the fallout from that observation should not be exaggerated. It will not instantly bind other parties and states in their international affairs and disputes, or trigger an immediate wave of jurisprudential change as a new, formal rule of international law. That decision will simply enter the fray of all international judicial decisions, where some shine as “bright[] beacons”

Rev.—FOREIGN INVESTMENT L.J. 215, 221-22 (2008).

151. See, e.g., *Davies v. Davies* (1887), L. R. 36 C. D. 364 (Kekewich, J.,) (“Public policy does not admit of definition and is not easily explained. It is a variable quantity; it must vary and does vary with the habits, capacities, and opportunities of the public.”); *Besant v. Wood* (1879), L. R. 12 C. D. 620 (Jessel, M.R.) (“It is impossible to say what the opinion of a man or a Judge might be as to what public policy is.”)

152. *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 111 (1918). See also *World Duty Free Company Ltd. v. The Republic of Kenya*, ICSID Case No. ARB/00/7, ¶¶ 140, 147 (“Domestic courts generally refer to their own international public policy,” even though “some judgments” do refer to a “universal conception of public policy”).

153. Jan Paulsson, *International Arbitration and the Generation of Legal Norms*, in TREATY ARBITRATION AND INTERNATIONAL LAW 879 (2006)

and become norm-setting examples, while others “flicker and die near instant deaths.”¹⁵⁴ This is a function of the “Darwinian” and non-hierarchical system that permits those decisions that are unfit to be cast aside. “Good [decisions] will chase the bad, and set standards which will contribute to a higher level of consistent quality.”¹⁵⁵ Only if the decision is a good one, the characterization a defensible one, and the principle is indeed a universal one, will a new rule emerge.

This is where judges and scholars come in. In the realm of public international law, where the general principles were originally meant to apply, their development has long been stunted by the truncated reasoning of the international judge. When the ICJ ‘finds’ and applies a general principle of law, it typically does so without any formal reference or label.¹⁵⁶ And when it does name the source, it never publicizes its comparative process in divining the principle applied, but rather *ipse dixit* simply states that the principle is “admitted in all systems of law,”¹⁵⁷ or that it is “widely accepted as having been assimilated into the catalogue of general principles of law.”¹⁵⁸ To be sure, and as Justice Ginsburg noted in *Intel*, the “comparison of legal systems is slippery business, and infinitely easier to state than to apply.”¹⁵⁹ But difficulty cannot be allowed to excuse the entire exercise.¹⁶⁰ Commentators have noted that “[i]t would be

154. *Id.*

155. *Id.*

156. See Jenks, *Prospects of International Adjudication*, pp. 268-305; Lauterpacht, *Development*, pp. 158-72.

157. *Corfu Channel Case (PCIJ)*

158. *Sea-Land Servs. (PCIJ)*

159. *Intel v. Advanced Micro Systems*, 542 U.S. at 252.

160. Indeed, at least one arbitration case was annulled for that very reason. the proper explication of the relevant principle as one that is indeed grounded in the positive law of all municipal systems is essential. The case of *Klückner v. Cameroon* perhaps the best cautionary tale against the ipse dixit typically employed by the ICJ. Award, 21 October 1983, 2 ICSID Reports 59-61; Decision on Annulment, 16 May 1986, 1 ICSID Reports 515. In *Klückner*, the applicable law was Cameroonian law, which in turn is based on French law. Rather than discerning the content of the former, the Tribunal instead exclusively based its decision on the “basic principle” of “frankness and loyalty” that can be divined from “French civil law” (while noting without citation that this is also a “universal requirement” that inheres in all “other national codes which we know of” and both “English law and international law”). On an application for annulment, the ad hoc Committee found that this truncated reasoning amounted to a failure to apply the proper law: “Does the ‘basic principle’ referred to by the Award . . . as one of ‘French civil law’ come from positive law, i.e., from the law’s body of rules? It is impossible to answer this question by reading the Award, which contains no reference whatsoever to legislative texts, to judgments, or to scholarly opinions. . . . [The Tribunal’s] reasoning [is] limited to postulating and not demonstrating the existence of a principle or exploring the rules by which it can only take concrete form.” Accordingly, the Award was annulled because the Tribunal did not apply “the law of the Contracting State,” but instead based its decision “more on a sort of general equity than on positive law . . . or precise contractual provisions.” In other words, the Tribunal’s error was not in

welcomed not only by the parties but also by the international legal world” if the reasoning of the Court’s judgments were to explain *how* it had examined, by comparative methods, “the assertion that a general principle of law, having a specified meaning and significance, forms part of binding general international law.”¹⁶¹

Perhaps the private international law world can do better. In helping to determine the substance of municipal laws applied to the transnational scenario, private international law scholars and judges might be better suited, and better situated, to explicate this source of law beyond its current state of arcane lore. Public international law scholars understandably spend their time hovering above the world’s municipal legal systems, descending to earth when they must but otherwise keeping a firm distance from the nuance of substantive and procedural rules, let alone the principles that underlie those rules. Private international law scholars, on the other hand, draw from diverse pools of municipal law specialists, who spend their days toiling in the quagmire of transnational procedures, in the comparative search for common substantive rules. And, after all, their reasoned work is another venerable source of international law – subsidiary, though complementary, to the general principles.¹⁶²

In much the same way, municipal courts are the most common forum for private international law matters and the primary source of decisions that hone future precedent in the field. They may also be the most suitable courts to find and apply general principles of law. International judicial bodies like the ICJ depend upon the consent of states for their jurisdiction and their legitimacy. Its judges are understandably reluctant to find and expressly apply “new” substantive laws – especially those without a formal basis in state consent – lest they be accused of the unauthorized legislation of international law. For investment tribunals, too, who are subject to review and annulment, this is a real worry.¹⁶³ “The suspicion which states, especially those on the losing side, may entertain of indirect expansion of the scope of international law by a tribunal . . . no doubt largely accounts for the failure of the [international courts] . . . to make any significant use of this potentially very fertile source of development in international law.”¹⁶⁴ Municipal courts, however, have far fewer worries. With few

resorting to the corrective and supplementary role of international law and general principles of law, but in not demonstrating the existence of concrete rules under that law as properly applied.

161. Hermann Mosler, *supra* at 180.

162. ICJ Statute, Art. 38(e)

163. *See supra* n. 154.

164. Wolfgang Friedmann, *The Uses Of “General Principles” In The Development Of International Law*, 57 AM. J. INT’L L. 279, 280-81

exceptions around the world, their jurisdiction and legitimacy is relatively stable. In the common law tradition, their discretion to resort to general principles to decide a transnational case before it is relatively unfettered. In the civil law tradition, that discretion is commonly enshrined in a Code. So, somewhat ironically, the “courts of civilized nations” may be the best forum for the “general principles of law recognized by civilized nations” to take hold.

* * *

There is no sacred principle that pervades all decisions, and neither justice nor convenience is promoted by rigid adherence to any one principle as a means to effect justice between litigating parties. And to be sure, the application of general principles is not a panacea for the promise of universal justice. Judges are unlikely to exercise their authority to apply these principles very often. Still, it is important for private international law as a discipline to see to it that judges know such authority exists; that they know the application of foreign (or forum) law includes the application of its foundational norms; and that they know where other courts have trodden before in doing the same. The intent of this article is to open our mind’s door to a possible new frontier of private international law, and to be more than the “railway station” for transnational disputes.