

Sources of Law in Transition

Re-visiting General Principles of International Law

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Summary¹

General Principles of International Law have been a much contested source among International Law scholars. The ambiguity that surrounds their interpretation has resulted to a vivid dialogue around their legal nature, and their use in contemporary judicial practice of domestic and international tribunals. Globalization and the ever-increasing complexity of International Economics affected the position of General Principles within the international legal system, and resulted to their progressive consolidation in the area of International Economic Law. Further examination of issues arising vis-à-vis General Principles could prove to be useful in other areas of law, in the same manner they addressed legal issues in International Economic Law.

Introduction

General Principles of Law and their legal significance and application have been studied extensively into theory over the past century. The academic dialogue became vivid due to various reasons such as the ambiguity of the notion of General Principles or the incorporation of General Principles as such into article 38 of the International Court of Justice (hereinafter the ICJ) statute.

Article 38 paragraph 1(c) of the ICJ Statute lists „general principles of law recognized by civilized nations“ as one of the sources of applicable law in cases of disputes arising under International Law. This article is very often cited as an authoritative text that enumerates applicable law in the jurisprudence of various courts whenever a dispute arises among subjects of International Law. Thus, out of all articles of the Statute, this assumes a position of particular importance, since parties often expect it to be applied in cases before other tribunals in addition to the ICJ. Were the domain of its application simply the jurisprudence of the ICJ, or its predecessor, then the study of General Principles would have been simpler or at least more controllable for a

researcher. However, the possibility or the fact of invocation of the provision by other tribunals in addition to the ICJ, gives each source of the article a larger spectrum of applicability.

General Principles as a source of normativity appear to be vague and difficult to define and locate in contemporary practice. This could potentially lead to different attitudes towards them: it could be that they are seen as a blanket of safety, a final resort when nothing more concrete can be found to regulate a certain issue, or at the same time a reason for preoccupation, an open door through which unpredictable legislation might enter into legal relationships that did not foresee or expect such an outcome. The two different attitudes reflect at the same time an overall stance towards the contemporary role of the state. Those who see General Principles as a tool for innovative normative assessment of social phenomena are less attached to traditional notions of state sovereignty. On the other hand, those who remain suspicious towards General Principles are also reluctant to abandon the classical view that places the state in the central position of international law production.

This paper will try to address how General Principles of International Law have gained a crucial position in International Economic Law. It is divided into three parts.

The first part analyzes briefly the traditional view of General Principles of International Law and at the same time attempts to identify operative parts in theory that are still applicable today. It starts with a very short reference to their history before the incorporation in the ICJ Statute. Then it moves into looking at the text of article 38 par. 1 c. It also examines their legal nature and then we try to develop a comprehensive definition of General Principles of International Law by looking into theorists and the definitions they have given throughout the 20th century. Finally this chapter looks into traditional classifications of General Principles as well as a short reference to examples of their use in the ICJ jurisprudence.

The second part, after recognizing that there is generally a form of skepticism towards General Principles, moves into looking at what we identify as the two major reasons for this skepticism, namely the fear of judicial discretion and the disapproval of incorporating the words

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„civilized nations“ in the ICJ Statute. In the meanwhile, it looks at potential ways of dealing with this skepticism that put General Principles in a more obscure corner of International Law.

The final part examines how we actually witness a proliferation of General Principles of International Economic Law by overcoming these two grey areas. In particular, it looks at three areas where General Principles of International Economic Law have emerged. The areas briefly examined are International Trade Law (the example of WTO), International Investment Law (the example of Bilateral Investment Treaties) and Lex Mercatoria.

The argument this thesis aims at putting forward is that General Principles of International Law have a greater significance in the area of International Economic Law, and this fortifies their overall position as a source of International Law. This is due to their flexibility, which is more obvious in the area of jurisprudence. It is also due to the inclusion of the notion of civilization in their definition. Both factors have so far received negative criticism. This thesis suggests that these sources of skepticism should be revisited and assessed anew. Through that lens, General Principles of International Economic Law actually help consolidate both International Economic Law as well as General Principles of International Law as a source of law, as will be shown by the examples provided.

I. General Principles of International Law

A) History

One does not come across General Principles in international jurisprudence and literature as often as they come across treaties and custom. The limited use can be attributed to the tendency of traditional international law to mainly engage with the other two sources, as well as the skepticism towards a source that is not so clearly based on state consent, but looks rather as something introduced by judges in cases they cannot resort to anything more concrete. Thus it seems that states did not genuinely want to give the same significance to a source that would potentially lead into something they did not predict or consent to expressly.²

General Principles of law in the international domain were already recognized in the Hague Conferences of 1899 and 1907. Legal systems, already well developed and trying to coordinate with each other, needed a common denominator as a means of communication, since at that time phys-

ical distances were difficult to bridge.³ Later, they were incorporated as a source of law in the Permanent Court of International Justice (hereinafter PCIJ) Statute.

The travaux préparatoires of the PCIJ do not indicate that drafters were regarding the inclusion of General Principles as an act of innovation.⁴ They wanted to allow the Court to resort to as many legal orders as possible. At the same time they were concerned on the incompleteness of the other two sources. It is more likely that they wanted to avoid a state of *non liquet* but also not to allow judges to create their own law.⁵ What the drafters had in mind was the need for solid jurisprudence that leaves few questions to states as to what their obligations and rights are.⁶ At the same time, General Principles were considered to be law and the examples the drafters mentioned were all from domestic legal fora.⁷

In 1945, the ICJ was established together with the United Nations. The ICJ had some form of continuity with respect to the PCIJ. However it was not its legal successor.⁸ There are few differences between the two statutes and both of them enumerate sources of international law in their respective article 38. The sources enumerated are of identical wording. In paragraph 1 a phrase has been added to the ICJ Statute „...whose function is to decide in accordance with international law such disputes as are submitted to it...“ and also, as an issue of structure, article 38 of the ICJ has an additional paragraph, which in the PCIJ used to be part of number 4.⁹

A first approach to the interpretation of General Principles of International Law is to look at the wording of the text. As it is mentioned in article 31 of the Vienna Convention on the Law of Treaties „A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.“ The provision on General Principles of law has remained identical in both Courts' Statutes. From the wording, one can identify the four elements of this provision namely: a) „general“, b) principle,

2 Wolfgang Friedmann, *The Uses of „General Principles“ in the Development of International Law*, 57 A.J.I.L. 279, 280 (1963).

3 Hermann Mosler, *General Principles of Law*, 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 513, 516 (published under the auspices of the Max Planck Institute for Comparative Public Law and International Law dir. of Rudolf Bernhardt, Elsevier, Amsterdam and others, 1999).

4 *Id.*

5 Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, *Droit International Public*, at 312 (2^e ed. LGDJ 1980).

6 Mosler, *supra* note 3.

7 *Id.* at 516-517.

8 Peter Malanczuk, *Akerhurst's Modern Introduction to International Law*, at 281 (7th ed. Routledge, 1997).

which could or could not be different than a norm, but it is certainly not a conventionally established rule, nor a general practice accepted as law (these are characteristics of the other two sources) c) chronologically already recognized and not something in the making or to be made and d) recognized by „civilized nations“. When we talk about something being „general“ this could mean more than one things: it could mean something not regional, that is something general in a special way; it could mean something more abstract and incorporating more subparts, thus being more substantial; finally, it could be fitting in the distinction between general and special, it could be ‚not special‘. The notion of civilization and principal legal systems also appears one more time in the Statute of the International Court of Justice as it did in the Statute of the Permanent Court of International Justice, in their respective article 9.

The legal nature of General Principles has caused considerable discussion among scholars, but it has also been an issue of preoccupation for courts when applying General Principles. The drafters of the PCIJ were concerned about the incompleteness of the two other sources, treaties and customary international law.¹⁰ Ex post we validly make the claim that they were right, since a large body of customary international law was being created round and about the time of the drafting, it continued throughout the 20th century, and it only came to be recognized as such in the recent years.

9 The statute of the PCIJ in article 38 says:

The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
2. International custom, as evidence of a general practice accepted as law;
3. The general principles of law recognized by civilized nations;
4. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

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10 Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, *supra* note 5, at 312.

Moreover, treaty law making processes were not as elaborate as they came to be later on. Thus, the drafters included General Principles in the statute as a reasonable method to avoid *non-liquet*. They obviously did not want to provide the judges with any general competence of filling lacunae through the notion of „justice“ or anything similar. The resort to as many legal orders as possible seemed to be a more legitimate and definitely a more democratic method of approaching the possibility of *non-liquet*.¹¹ The committee when including General Principles of Law in the statute was not under the feeling that they were doing something new or innovative. Perhaps the jurisprudence of the time favored the more frequent invocation of General Principles, and the examples that were put forward by the drafters had all been borrowed from domestic fora.¹²

Overall, the League of Nations as an international organization, despite the difficulties to function and the historical circumstances that led to its abolishment first, and then its replacement by the United Nations, was in paper a democratic organization. At the same time the veto power that all members could exercise made it dysfunctional in adopting a decision, and members could easily abuse veto powers. The inclusion of General Principles can be identified as one of the demonstrative facts of the democratic legitimacy attempted by the founders of the League of Nations. The same attempt to emphasize representation is seen in article 9 of the PCIJ. Unfortunately, Second World War and the failure of the organization did not allow this particular democratic model to survive.

General Principles though are not a dead letter today, even though evolution and proliferation of legislation in international law created a situation where most of the areas are covered by one or another legal norm or legal regime. The ICJ in the Aegean Sea Continental Shelf case (Greece v. Turkey) said that the judges are to interpret the rules of international law as they are in the present and not at the time of the drafting.¹³ Thus, the use and functionality of General Principles is not to be assessed based on the fact that the motive for their inclusion was the dislike for *non-liquet* which does not appear, *prima facie* at least, to be a problem in current jurisprudence. The proliferation of legislation has in most parts eliminated this problem. However, General Principles are not excluded from finding a new position in the international law today.

11 Mosler, *supra* note 3.

12 Id.

13 Paragraph 80 (at 34-35 of pdf). Available at http://www.icj-cij.org/icjwww/icas/igt/igt_ijudgment/igt_ijudgment_19781219.pdf

B) Definition

General Principles are considered to be law and not something else. This can be seen primarily in the drafters' intent since they perceived them as law. But more importantly, this is evident from the structure of article 38. All the three categories under a, b and c, are classified as „international law“. Also, General Principles, occupying a separate paragraph, are expressly distinct from custom.

Scholars have attempted various definitions of General Principles of International Law. In a sense of praetorian jurisprudence it seems that a court does not need to explain where it found the general principle, or how it established it exists. It can only invoke it, identify it as a general principle, that being enough to provide for legitimacy. Scholars on the other hand are trying to solve theoretical questions that might be of practical use.

Mosler sees General Principles as autonomous in International law. His explanation of autonomy however is linked to national legal orders. General principles are the product of general recognition in domestic legal fora. However, he says that they are not applied in international law with their „domestic“ capacity. General principles for him have two hats, the domestic and the international, and they change, depending on where they are used.¹⁴ They are also „an autonomous group of norms the contents of which are inspired by the *ius gentium*, the law applied by all peoples with a developed legal civilization.“ He also identifies a creative aspect to the role of a judge, who needs to shape the general principle in order to conclude to a judgment but at the same time he/she must not distance himself/herself from the core meaning and function of the general principle. As he puts it „the norm which he applies is a norm of international law, taken from principles observed in domestic legal orders and adapted by him to the particular needs of international relations.“¹⁵

In the field of international arbitration Hanessian sees General Principles as providing assistance in the implementation of national law, or as being applicable substantive law.¹⁶ In the latter case, the autonomy of General Principles is more visible. Pellet, Daillier and Dinh find there is no ambiguity with respect to the autonomy of General Principles of International Law and they basically see the foundation of that claim in article 38 that lays out the sources of International Law one after the other in a way that the one adds to the other, but also in a contrasting way.¹⁷ The

autonomy of General Principles as a source of International Law is perhaps their most crucial characteristic in our examination. Their autonomy practically means that interpretation of legal phenomena and solution of legal problems can be potentially based solely on a General Principle.

Of course, another issue is how relative is the autonomy of General Principles of International Economic Law that we will examine later within the context they arise. A principle autonomous within one legal regime might constitute internal law and not extend to other areas of International Economic Law. A good example of that would be the application of the Most-Favored-Nation clause in the World Trade Organization (hereinafter the WTO), which is recognized not only as a specific obligation but also as a general principle underlying the entire WTO-GATT system, but is not considered to be a codification or have any relevance to customary international law.¹⁸

Bassiouni, in a chapter of his article entitled „Scholarly definitions of General Principles“ he has a very good catalogue of almost all most important definitions by scholars of international law. He starts with a definition of Hersch Lauterpacht who says that General Principles „are not, as such principles of moral justice as distinguished from law; they are not rules of ‚equity‘ in the ethical sense; nor are they a speculative law conceived by way of deductive reasoning from legal and moral principles. They are, in the first instance, those principles of law, private and public, which contemplation of the legal experience of civilized nations leads one to regard as obvious maxims of jurisprudence of a general and fundamental character.“¹⁹

This definition does not give much guidance in terms of the legal nature of General Principles, since to Lauterpacht it seems to be an amalgam of equally vague and vast areas of law.²⁰ Lauterpacht says that for practical purposes the General Principles of article 38 are the General Principles of private law.²¹

Cheng says that General Principles are „cardinal principles of the legal system in the light of which international... law is to be interpreted and applied“. Again, this does not

14 Mosler, *supra* note 3, at 519.

15 *Id.* at 517.

16 Grant Hanessian, „General Principles of Law“ in the Iran-U.S. Claims Tribunal, 27 COLUM. J. TRANSNAT'L L. 309, 315 (1988-1989).

17 Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, *supra* note 5, at 315.

18 David Palmeter, Petros Mavroidis, *The WTO Legal System: Sources of Law*, 92 A.J.I.L., 398, 407 (1998).

19 International Law Being the Collected Papers of Hersch Lauterpacht, (E. Lauterpacht ed.) Volume I, The General Works, 68-86 (definition of General Principles on pg 69-70).

20 Cherif Bassiouni, *A Functional Approach to „General Principles“ of International Law* 11 MICH. J. INT'L L. 769, 770-771 (1989-1990).

21 International Law Being the Collected Papers of Hersch Lauterpacht, *supra* note 19, at 71.

help us in terms of it being an almost circular definition. It uses the notion of „principles“ and adds to it an evaluation of their importance, naming them „cardinal“. Therefore we can deduct one thing out of Cheng’s definition, General Principles are fundamental to a legal system.²²

Schlesinger defines General Principles as „a core of legal ideas which are common to all civilized systems“. This is more helpful, since it is not circular, but again, it enters the world of ideas. Perhaps it is a better approach to assign a philosophical element to General Principles, as legal ideas. This finds also a supporting element on the fact that it is customary international law that needs to be found in the practice of states in order to exist. Thus, General Principles can be only ideas, notions not escorted by any practical evidence. Again, the element of acceptance by civilized systems enters.²³

Verzijl says that they are „principles which are so fundamental to every well-ordered society that no reasonable form of co-existence is possible without their being generally recognized as valid.“²⁴ The first part of this definition resembles that of Cheng’s but then, the second part tries to describe their importance as something fundamentally important in societies’ co-existence. This brings to mind Rousseau’s social contract, a notion that moves between people and helps them tolerate and benefit from each other’s existence. Perhaps this definition overestimates the value of General Principles. It seems that article 38 of the ICJ Statute is well balanced. The coexistence of states in an international society under international law does not solely depend on General Principles but on all three sources, since they are all listed as „primary“ (in contrast with paragraph 4, the secondary sources).

This can be taken one step further and one can claim that the coexistence of people, groups and states is far more complex than the recognition of one single notion or just one set of principles (whether general or specific). Coexistence is a mixture of real and normative factors. We coexist because the earth is of finite dimensions and we inevitably find ourselves in a pragmatic proximity. It was impossible for most states to distance themselves from the world, because they inevitably had common borders with other states. This is the pragmatic aspect of coexistence, the fact that one finds oneself next to another. Then, there is a normative aspect to it, coming at a later time, since states developed an understanding of themselves and their neighbors

and thus they developed patterns of interaction that elevated into rules of how to interact with each other in order to make their inevitable proximity bearable for themselves. General principles are not the glue that holds us together as Verzijl might be suggesting.

Friedmann defines them as an embodiment of the „maximum measure of agreement on the principles relevant to the case at hand“. ²⁵ This, also circular, definition is more helpful than Cheng’s because it assigns General Principles an additional feature, that of agreement. Thus General Principles can be compared to self evident, or undisputable facts, an extreme skeptic might challenge them, but most agree to them. General principles have a factual nature or a fact-like function, they are taken as granted, or we all agree to them in advance in order to move on to discussing what we disagree on.

Gutteridge says that General Principles originally derive from private law, are recognized in substance by all major systems of law and should not violate fundamental concepts of those systems in their application.²⁶ This creates two different categories in domestic legal systems, that of General Principles and that of fundamental concepts, without explaining why and where the two are different.

The definition provided by Jalet is interesting. According to her, General Principles are „principles that constitute that unformulated reservoir of basic legal concepts universal in application, which exist independently of institutions of any particular country and form the irreducible essence of all legal systems“. ²⁷ The idea of General Principles as a „reservoir“ is close to what the drafters were thinking and at the same time it is close to a contemporary interpretation of the provision that the court would want. The drafters worked towards the abolition of *non liquet*. They wanted for a reservoir of norms that made sure lacunae would not prevent cases from being decided.

Combining all the elements found in various definitions we can see the following as features of General Principles:

- a) They are part of International Law
- b) They are (more or less) autonomous
- c) They promote creativity by judges
- d) They are fundamental to a legal system

22 Bassiouni, *supra* note 20, at 770.

23 Schlesinger Rudolf B., *Research on the General Principles of Law Recognized by Civilized Nations* 51 AM. J. INT’L L. 734, 739 (1957).

24 Bassiouni, *supra* note 20, at 771.

25 Friedmann, *supra* note 2, at 284.

26 Bassiouni, *supra* note 20, at 771.

27 Freeman Frances T. Jalet, *The Quest for the General Principles of Law Recognized by Civilized Nations- A Study* 10 UCLA L. REV. 1041, 1044 (1962-1963).

e) They might be „ideas“, therefore have a philosophic aspect, but a better term would be „normative notions“, because it shows that General Principles are law

f) They are only one of the three sources and one of the elements that keep the international law system together

g) They are a reservoir

Using the aforementioned elements, we can form a definition of General Principles of International Law:

General Principles are an autonomous, created by general consensus, systemically fundamental part of International Law, that consists of different normative notions, in which judges refer to, through a creative process, in order to promote the consistency of International Law.

C) *Hierarchy*

One important issue that surfaces vis-à-vis General Principles, and especially in light of article 38, is how they rank among the other sources of international law. As mentioned already, General Principles are only one of the many fundamental elements that constitute International Law, and definitely among the three most important, enumerated in article 38. Therefore General Principles are placed above other forms of International Law elements (rules of lower quality²⁸), not mentioned in Article 38, and also they are placed above the judicial decisions and the teachings of publicists mentioned in paragraph 1 (d) of the International Court of Justice Statute. The remaining question is what is the place of General Principles among international conventions and international custom, how do primary sources rank among each other (it would be oversimplified to rank them in the order they are mentioned). The Statute does not help in this respect since it gives no guidance as to which source is ranked higher than the others.²⁹ However, the existence of *jus cogens* indicates there is a hierarchy among International Law rules.

The question set in theory is whether the three sources more or less equal, which means that a judge can base decision on one of all, all three, or a combination that he/she shall choose. What we need to ask is whether a decision could be solely based on customary international law, or treaty law solely, or General Principles of international law. According to the definition put forward previously, General Principles are autonomous. But their autonomy needs to be further explained.

28 Mosler, *supra* note 3, at 517.

29 Although Mosler claims that the charter „indicates the order the international judge has to follow when deciding a dispute according to international law“. This cannot be inferred by the mere fact of the order of sources. *Id.* at 518.

Mosler suggests³⁰ that General Principles could be used in both the application of treaty and custom. That does not render them auxiliary tools, though. He also says that they are examined after treaty and custom but their „legal quality“³¹ is the same as the other two³² and that, like the other two sources, General Principles too have an obligatory character.³³

A useful guide in order to further explore this question is §102 number 4 of the 3rd Restatement.³⁴ It states that „General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law“. According to comment 1,³⁵ General Principles can be an independent source of law only if customary and law and international agreements have not regulated at all, or have left lacunae in a certain matter. In the reporter's notes they are mentioned as „independent, though secondary source“. ³⁶

This question becomes more concrete in the case of conflict between either customary international law and General Principles or treaty law and General Principles. The outcome of such a conflict will determine which ranks higher. But before posing such a question, one has to see whether there is a possible outcome of it, that is, if it is a reasonable question to pose. We have to reflect on the possibility of custom and General Principles leading to opposite results, which seems rather difficult to occur, if not impossible. If General Principles are the product of a general agreement, and customary international law appears in cases where state practice is escorted by *opinio juris*, then it is rather difficult for states to create customary international law which opposes the General Principles they accept, or to develop principles that lead to results different than their established practice. Also, it seems equally difficult – again, if not impossible – for a state to enter into an international agreement that has consequences that are opposite to the General Principles underlying and solidifying its legal order. One does not refute their own principles.

30 *Id.* at 518.

31 Emphasis added.

32 Mosler *supra* note 3, at 518 where he says „[General Principles] are not however subsidiary in the sense that their legal quality is different from that of treaties and customary rules. They may even be stronger than the two preceding groups if a peremptory norm belonging to the general principles group supersedes contractual provisions or customary rules.“

33 *Id.* at 514.

34 Restatement (Third) of Foreign Relations Law § 102 (1987).

35 Restatement (Third) of Foreign Relations Law § 102 cmt 1 (1987).

36 *Id.*

The nature of General Principles is to appear in jurisprudence when the two other sources are either insufficient (the case of lacunae) or have reached such a level of complexity and number of rules that some form of coordination is needed for the judge to determine which rule to use first and what validity he/she should give to each one. In both cases, their role in a decision is as essential as the role of custom and treaty is.

Without the judge cannot reach a complete and viable decision. So when they are needed, they rank equally as the other two, and when the judge does not need to resort in them, it seems irrelevant to question their hypothetical ranking. Therefore the three sources of International Law of Article 38 are equal and can be used independently from each other. Moreover General Principles of International Law can be considered to be a primary source, depending on what position they are given.³⁷ If both General Principles and one of the other two sources combined provide the answer to an issue, then mentioning both, regardless of order, will only add legitimacy to the judgment. Thus, the General Principles are a) equal to both custom and treaty law, b) autonomous, because each expresses different legal norms, of a different nature and c) independent, since for all three there is the possibility that they alone provide the solution to a legal question.

D) Categories of General Principles

The Aristotelian tradition in science has led theorists into classifying and separating different notions. This was inevitably applied to General Principles, since the enumeration of categories of principles renders them more specific and closer to legal reality. Mosler distinguishes three categories of General Principles, namely „principles taken from generally recognized national law“, „general principles originating in international relations“ and „general principles applicable to all kinds of legal relations“. Within each category he sees various examples which create subcategories. He tries to create an almost exhaustive list of General Principles.³⁸ The first two categories, given the examples he provides, are more or less clear. It is interesting to look into his examination of the third category, namely „general principles applicable to all kinds of legal relations and in any form of legal system“. Here, as systems he mentions municipal, international (states), international institutions (the law of organizations) or other, autonomous systems. Thus, any principle can derive from an established legal regime or the activity of other actors, more or less autono-

mous. General Principles can assist other actors in particular to become more functional and enable it to be distinguished from other spheres of activity. This inclusion by Mosler is quite worthy of note in its concept.

Friedmann also tries to identify the categories of General Principles of international law. Like Mosler, Friedman also sees three categories of General Principles, namely „principles of approach and interpretation to legal relationships of all kinds“, „minimum standards of procedural fairness“ and „substantive principles of law sufficiently, widely and firmly recognized in the leading systems of the world to be regarded as international legal principles“³⁹. But Friedmann’s classifications seem rather more clear-cut or consistent with the functionality of General Principles: they have an interpretive, a procedural and a substantive aspect. This also adds to their autonomy as a source of law.

E) Jurisprudence

The practical use of General Principles of international law has been limited because traditional international law was not oriented toward an extensive study of General Principles. Mosler presents a very good evaluation of the International Court of Justice jurisprudence with respect to General Principles.⁴⁰ The Court has invoked General Principles in a number of cases. In the *South-West Africa* case (1950) McNair saw the inclusion of General Principles of domestic law in international law as a process through which „international law borrows from this source [...] not by means of importing private law institutions, lock, stock and barrel’ ready-made and fully equipped with a set of

37 Nguyen Quoc Dinh, Patrick Daillier, Alain Pellet, *supra* note 5, at 313.

38 Mosler, *supra* note 3, at 518-525: 1. Principles taken from Generally Recognized National Law: a) Liability, responsibility, reparation b) Unjust enrichment c) Property, expropriation, indemnity d) Denial of justice e) Right of passage f) Prescription g) Error h) Implied agreement i) Preclusion by conduct j) Principles of presumption in certain circumstances k) General principles of administrative law l) Procedural principles i) Drawing conclusions from one’s own precedent ii) *Res judicata* iii) *Res judicata* affecting distribution of powers in other UN bodies iv) Requirements of judicial process (equality of the parties) v) Admission of indirect evidence. 2. General Principles Originating in International Relations: a) Principles resulting from specific features of the international legal community i) Protection of diplomats and consuls ii) Sovereign immunity iii) Primacy of international law, limits between domestic and national jurisdiction iv) Territorial jurisdiction b) Generally accepted principles i) Freedom of the high seas ii) Diplomatic protection, exhaustion of local remedies iii) Laws of war iv) Delimitation of boundaries on the sea, equidistant lines c) Principles connected with treaties d) Elementary considerations of humanity. 3. General Principles Applicable to all Kinds of Legal Relations: a) Good faith, *pacta sunt servanda*, unilateral declarations b) Equity c) Estoppel d) Principles of judicial procedure e) Respect of basic human rights.

39 Friedmann, *supra* note 2, at 287.

40 Mosler, *supra* note 3, at 519-525.

rules". In the *Chorzów* case the ICJ accepted the principle of reparation as a general principle. It also examined the expansion of the principle in internal administrative law of the United Nations in the advisory opinion *on the application for review of judgment No.158 of the United Nations Administrative Tribunal*. In the *Barcelona Traction* case the Court examined principles regarding property, expropriation and indemnification and issues of denial of justice. A rather more substantive principle, the right of passage under international law, was examined in the *Right of Passage over Indian Territory* case, and the plea of error in the *Temple of Preah Vihear* case. In the *North Sea Continental Shelf* case one of the issues were the principles regarding contentious proceedings and so was the case of *Interpretation of the Agreement of the 25th of March 1951 between the WHO and Egypt*. It adjudicated on General Principles relevant to international relations in the case of *United States Diplomatic and Consular Staff in Tehran*, and the freedom of maritime communication in the *Corfu Channel* case.

An interesting question is whether today, as fifty years ago, courts perceive themselves conditioned upon the consent of states. Many international tribunals have taken a different course today, like the WTO panels whose reports are binding if they are approved by the Dispute Settlement Body or the special tribunals created by the UN. Their purpose is not to please states, they are either in support of the trade system as such and the coordination and implementation of WTO rules or to deliver justice in the cases of jus cogens violations.

II. Factors generating suspicion towards General Principles of International Law

A) General Principles as a window for judicial discretion

Many scholars⁴¹ see General Principles as a *carte blanche* to the judges to introduce legislation or rules that the states did not intend to establish, (or at least they recognize that criticism as possible). What is interesting to see is Ford's reference to Justice Aharon Barak of the Israeli Supreme Court.⁴² He tries to address legitimacy questions that arise in cases of judicial discretion. Ford incorporates this rationale in his analysis of General Principles of International Law, showing that this is a field where judicial discretion is sometimes not just a possibility but an inevitable situation. Justice Barak advises jurists to step outside themselves when exercising judicial discretion. He sees this pro-

cess as an attempt to incorporate society's values into legal reasoning, and since every person, judges too, has their own sets of values, it is inevitable when asked to make a value-based assessment, to use their values as a guideline. Justice Barak says this should not happen. The judge should proceed to examine the social reality around him/her instead of imposing his/her own values to people. Then Ford moves into examining whether General Principles are an invitation to judges to move into an extensive comparative law analysis.⁴³ This moves towards evaluating the universality of a proposition, whether it actually receives the support by representative legal systems or not.⁴⁴

This „system-representative“ approach through a comparative analysis is rather state centered. One could call it old-fashioned since it is based on what today one can see as an arbitral geographic classification. An example of how sovereignty is nowadays stepping aside is seen as an increasing amount of issues is being regulated by international organizations. These gain territory into domestic legislation through many emerging rules (i.e. the IMF imposes standards of legislative conduct through conditionality, the WTO panels and Appellate body issue reports that are binding if they are adopted by the Dispute Settlement Body as already mentioned briefly above).

A contemporary judge, when he/she decides on a certain issue concerning inter-border activities, should instead of looking into which geographical legal system it falls under, actually determine what area of activity it belongs to. If for example one has to adjudicate on an issue concerning international investment and he/she faces a problem that they cannot solve through conventional or customary rules then, instead of trying to discover the laws of every country in that field and deduct a common denominator out of all, the judge should try to make his/her decision systematically compatible with the General Principles that govern international financial transactions.⁴⁵

Thus, Ford rightly grasps the need for „representativeness“⁴⁶ but there is a further need to shift from the state sovereign system to a system where non-state actors participate in the formation of international law. International law particularly in the past two decades has moved progres-

43 *Id.*

44 *Id.* at 69.

45 *Metalclad Coperoration v. United Mexican States*, Final Award, 25 Aug. 2000 par. 70-71,76; *Pope & Talbot Inc. v. Government of Canada*, Award on the Merits of Phase 2, 10 Apr. 2001 par. 43-44,111 footnote 105,116, *S.D. Myers, Inc. v. Government of Canada*, Partial Award, 13 Nov. 2000 par 311-319, *S.D. Myers, Inc. v. Government of Canada*, Second Partial Award, Oct 2002 par. 123-136.

46 Ford, *supra* note 42, at 81.

41 See among many Jalet, *supra* note 27 *passim*.

42 Christopher Ford, *Judicial Discretion in International Jurisprudence: Article 38 (1) (C) and „General Principles of Law“* 5 DUKE J. COMP. & INT'L L. 35, 66 (1994-1995).

sively from a state-centered production of legislation to an institutional one, with the crucial participation of non-state actors.⁴⁷ The expectation that seemed normal during the Cold War that a certain form of legislation was the product of the one side or the other is no longer a plausible way of classifying legal rules. This factual shift not only helps us locate General Principles more easily, since they derive from a group of relevant legal rules but also enhances their effectiveness since they come not from domestic legislatures or alliances of states, but their source seems to be more geographically expanded and diverse (shown *inter alia* by the almost global participation in many important international organizations and the ongoing voicing of the civil society). They are not connected solely to the negotiation of legislation in national parliaments and the agreement between „like-minded states“ but they seem to be the product of a more expanded coordination of various regimes, central or peripheral to the international system.⁴⁸

This places the legitimacy of General Principles in a new perspective. On one hand, the participation of interest groups and the civil society, even in a consultative role gives a more democratic basis in decision-making, since as many as possible involved parties are invited to participate.⁴⁹ This, one would say makes the General Principles deriving from expanded systems of normative rule production⁵⁰ more solid and supported by a broader consensus. On the other hand, issues of accountability are often raised vis-à-vis the involved parties and simultaneously, this creates a new aspect of skepticism asking how solid exactly these new principles are and how their legitimacy is connected to the democratic legitimacy of the interest groups, NGOs, civil society groups etc involved in any possible way in decision-making.⁵¹

B) The notion of „civilized‘ nations“ in article 38

Even though General Principles of Article 38 is the least examined source of law, there is one issue that scholars often comment on, namely the inclusion of the term „civi-

lized“ in the provision. The trends range from disapproval for the wording of article 38, or the claim that this notion is abolished, to claims that it is still valid and efforts to re-define and determine anew the concept of „civilized“ nations.

International lawyers that criticize this provision claim that it reflects a pre-WWII standard that no longer exists, thus constituting the term „civilized“ void⁵². Bassiouni for instance, starts by identifying two elements in the provision, the element of „General Principles“ and the element of „civilized nations“ and then he dismisses the entire discussion on whether a nation is or is not civilized by saying that all UN members today are considered to be civilized.⁵³ That thought however seems to introduce a simplification, and also it brings out an obvious question about non-UN members. For instance Switzerland only became a UN member in 2002. Of course, this does not mean that only then Switzerland became a „civilized nation“. Yugoslavia’s membership was put in a special status during the nineties, which according to the Bassiouni standard would mean that Yugoslavia was civilized until a certain point, and then it stopped, and re-established its civilized status after reacquiring its seat. This is logically flawed.

Another argument Bassiouni uses is that the notion of „civilized“ signifies a blend between positivism and naturalism, or even a compromise between civil and common law. This, in one sense, could be correct. The „general“ element of General Principles implies a deduction of contested notions in order to make them general and acceptable. Consequently, it is a compromise, but it is not certain whether it is one between positivism and naturalism, or between civil law and common law. This last classification of the world’s legal systems into common and civil is fairly accurate so it seems plausible that General Principles would be the means to bring the two systems together by finding notions that are common to both.⁵⁴ His claim that principles are not value-free and thus is a tool for prioritizing⁵⁵ is also a good guide to the principles’ functional significance. Practically in a case where proliferation of legal rules makes a judgment more difficult, the rules that are more compatible with the General Principles linking legal systems will outrank those who are less harmonious, and might create conflict or even simple misinterpretations in either of the systems.

47 See, among many, Philip Alston (ed.), *Non-State Actors and Human Rights* (Oxford University Press 2005).

48 See, for instance: Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004) and Jose Alvarez, *International Organizations as Law-Makers* (Oxford University Press, 2006).

49 Frances Stewart and Michael Wang, *Poverty Reduction Strategy Papers within the Human Rights Perspective*, in P. Alston & M. Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (OUP, forthcoming, 2005) especially part 15.3.

50 Gunther Teubner, *Global Private Regimes: Neo-Spontaneous Law and Dual Constitution of Autonomous Sectors?*, in: *Public Governance in the Age of Globalization*, Karl-Heinz Ladeur (ed.), 71 at 75, 76-82 (Ashgate Publishing Ltd, 2004).

51 *Id.* at 83-85.

52 See David P. Fidler, *The Return of the Standard of Civilization*, 2 CHI. J. INT’L L. 137 (2001).

53 Bassiouni, *supra* note 20, at 773-774.

54 *Id.* at 774.

55 *Id.* at 775.

However, according to another approach by Fidler⁵⁶, this provision is still applicable, but with a fresh interpretation of what this standard of civilization is. Fidler's argument is based on the scheme of an old and a new standard of civilization. The old standard was operative for a certain time and after it stopped satisfying certain criteria, a new standard was formulated. The original meaning of the „standard of civilization“ as Fidler calls it was the structuring principle for the expansion of what can be called „the Western civilization“ and the proliferation of its standards into the non-Western world.⁵⁷ European and American legal standards provided for basic rights for foreigners, an organized and predictable bureaucracy, a „rationalized“ legal system, diplomatic resources as a means of participation in international relations, the obligation to respect international law as well as customs and norms accepted and followed in developed societies.⁵⁸ These evolutionary achievements of the Western world societal and state organization and its „rationalized“ legal system were, according to Fidler the primary basis for the creation of specific principles of law of the civilized nations.⁵⁹

III. General Principles of International Economic Law

A) General principles and the modern market economy

In the field of the market and the economy, the old standard of civilization provided for liberalized commerce, it empowered private actors and it limited the government's role in trade and commercial activities. It also affected interstate relations by forcing non-Western countries into economic intercourse with the West, requiring at the same time obedience to international law. This system mainly worked though imperialism and capitulations that triggered a further legal and economic harmonization.⁶⁰ Another approach to the expansion of Westphalian civilization is through international relations theory and in particular, through the concept of solidarism which holds that the society of States rests upon political, economic and cultural likemindedness within States. According to solidarism, domestic homogeneity means that States share important values, principles and interests and can use this homogeneity as a basis for more effective cooperation.⁶¹ This is

extended beyond the domestic realm and more states are adopting the same or similar values progressively. Moreover according to the old standard of civilization as Fidler sees it, a state did not have to be fully Western but only „Westphalian“ at its ability to interact in the international system and the international society.⁶²

The new meaning of the term „civilized“ was introduced progressively after the end of the Cold War, when the bipolar system based on the existence of two super powers slowly faded away and was replaced by a globalized system of multiple actors (states, NGOs, international organizations, multinational corporations, credit rating agencies) interacting with each other within a liberalized framework. The term „civilized“ was redefined as we entered the phase of liberal globalized civilization. The new standard of civilization necessarily includes market-oriented reforms.⁶³ Free trade, market economy, democratic governance, good governance, the rule of law and human rights are now the characteristics of the „new standard of civilization,“ which forms into General Principles of international economic law. This translates in the relationship between the state and the market with the following features: liberalization of trade in goods and services and protection of intellectual property rights under international trade law, liberalization of foreign investment regimes under a network of bilateral investment treaties, use of structural adjustment policies by international financial organizations to promote liberal economic policies and development of international anticorruption legislation.⁶⁴ General principles of International Economic Law are in effect structural legal principles that guarantee the regular operation of the market economy.

B) Examples of areas where General Principles emerge

An important distinction that should be made is between patterns or regularities of the market and General Principles of international economic law. A pattern or interpretative method, or regularity can develop into a general principle, but not every pattern does. Only when law assigns some normative role to a pattern, then we can classify it as in fact being a general principle. An example of how of this are credit rating agencies. They exist independently of legal regimes, they make economic evaluations

56 Fidler, *supra* note 52 and Alan Audi, *Note: Iraq's New Investment Laws and the Standard of Civilization: A Case Study on the Limits of International Law*, 93 GEO. L. J. 335, 335-347 (2004).

57 Fidler *id.*, at 140.

58 *Id.* at 141.

59 For the opposite argument in this dialogue, see among many: Balakrishnan Rajagopal, *International Law From Below, Development, Social Movements and Third World Resistance* (Cambridge University Press 2003).

60 Fidler, *supra* note 52, at 142-144.

61 *Id.* at 145-146.

62 *Id.* at 146.

63 Audi, *supra* note 56, at 338-339.

64 Fidler, *supra* note 52, at 148-150. See also Bruce Markell, *A View from the Field: Some observations on the Effect of International Commercial Law Reform Efforts on the Rule of Law*, 6 IND. J. GLOBAL LEGAL STUD. 497 passim, in particular 505-508 (1998-1999).

and assessments and they determine how credit worthy a party/firm/state is. That does not translate into a legal rule, and if another institution wants to lend money to some party that was rated badly, that is perfectly acceptable. However there is a way for the credit rating process to become a form of law, if the IMF for instance mentions one of those systems in its decision to give or deny credit. In this case, what was just a pattern of the market, receives some legal significance. Perhaps the most reasonable manner of classification and characterization of such a regulation would be to name it a general principle of international law. We will proceed to examine three areas where such examples have been observed. The first is International Trade Law. The second is International Investment Law, and the third is International Commercial Law.

International Trade Law:

The WTO panels have a crucial role in the development of International Trade Law.⁶⁵ The WTO today has 151 members⁶⁶ out of 191 states in the world. Membership that reaches almost 80% of states shows that we give further consideration to WTO jurisprudence and see whether there are General Principles of International Trade Law emerging from there.

It is interesting to see how WTO panels have used as precedent previous WTO reports. The panels refer to and consider prior reports, but this happens in a form of persuasive authority. There is no legal requirement for them to follow precedent; there is no *stare decisis*. However, rules are crystallized every time a new case comes before the court and then, through interpretation, the court, by referring to other decisions, does not just copy what a previous panel said, but it uses preexisting definitions, interpretations, logical methods and schemes to find a solution to a different problem. Thus, new aspects of the same provisions are highlighted and progressively, some form of a „rule of thumb“ emerges. The greater the number of decisions with respect to one issue, the more concrete the rule that emerges from it. But if in a legal system an expectation develops on the repetition of previous interpretations, then they receive a normative effect that goes beyond the two or more parties before the Court and becomes a principle. In the case of WTO, principles refer to international trade law and market regulation.

The legal nature of such an emerging rule cannot be customary law, since there is no *opinio juris* escorted by state

practice. Even the „customary practices“ mentioned in article XVI.1 of the WTO Agreement are not escorted by *opinio juris*, and subsequently cannot be considered to be custom.⁶⁷ The legal nature of such practices though, even if they are named „customary“, leading us to the second source of Article 38, could very well be closer to General Principles of International Law.

States entered the GATT/WTO probably without suspecting the course its jurisprudence would take. In the case of the United States, even the name of the judicial body of the WTO had to be changed into „panels“ during the negotiations of the text establishing the Dispute Settlement Body (and not anything near to „Court“), which would have made Congress not ratify it.⁶⁸ However, in the process, when jurisprudence was produced, and the Dispute Settlement Body adopted the panel reports, states developed a reasonable expectation for certain rules to be a form of law, what Todd Weiler calls „the GATT acquis“ that creates „legitimate expectations“ about the resolution of future disputes and may be considered by future panels.⁶⁹ Therefore, if there exists some normative quality to rules emerging from previous panel and Appellate body reports that, as article 3.2 of the Dispute Settlement Understanding puts it, are there to provide „security and predictability to the multilateral trading system“, and these rules are neither custom nor treaty law, then they very well could be General Principles of international trade law.

International Investment Law:

Numerous Bilateral Investment Treaties have been signed since 1959. The treaties that have been signed so far are well over than one thousand, and more than eight hundred have been signed in the past twenty years only.⁷⁰ Certain provisions of these treaties that are found to be analogous or even identical in them, even if they do not constitute customary international law as Guzman claims, they develop at least to become General Principles of international investment law.⁷¹

Scott Gundeon says that „the existence of a growing network of treaties that now links half the countries of the

65 Palmeter, Mavroidis, *supra* note 18, at 405.

66 Source: WTO website www.wto.org accessed on September 18, 2006.

67 Palmeter, Mavroidis, *supra* note 18, at 407.

68 John Jackson, William Davey, Alan Sykes, *International Economic Relations* (WestGroup 2002) 214, 238-241 about terminology that downplays the role of the organization.

69 Todd Weiler, *NAFTA Article 1105 and the Principles of International Economic Law*, 42 Colum. J. Transnat'l L. 35, 54 (2003).

70 Andreas Lowenfeld, *International Economic Law*, at 473 (Oxford University Press Paperback ed. 2003).

71 Andrew Guzman, „Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties, 38 Va. J. Int'l L. 639, *passim* and in particular at 646 *et seq.* (1998).

world [...] constitutes an important new element of State practice to be factored into the twenty-five year-old debate about the state of health of traditional international investment law.⁷² This proliferation of treaties is crucial to the development of international law. They contain a significant amount of legal obligations, binding for states. They are applicable law only between the parties, but when a provision appears in every BIT, then there is a heightened normativity in this rule, because we can infer a consensus on its existence.

One of these provisions is, for instance, fair and equitable treatment, which means that a foreign investment will at least receive the same treatment in access to administrative and adjudicative procedures regardless of its nationality.⁷³ Fair and equitable treatment is usually accompanied by the assurance of full protection and security. Another category of provisions, very important and consequently contested is provisions relevant to expropriation. Stephen Schwebel looking at the United States 2004 Model Bilateral Investment Treaty and says on article 6 on expropriation that even though it is supposed to reflect customary international law, the content of such a rule regarding expropriation is highly controversial. Looking a little further into the issue of the expropriation provisions it can be also said that in most BITs the wording is „closely parallel, if not identical“.⁷⁴

These rules might *prima facie* create obligations only for the states involved, but in another level, their repetition in other treaties, the similarities among interpretation of relevant provisions by courts and the expectance of investors for a minimum of treatment, as it is set out in them, creates a guideline with normative significance. Additionally, almost two thirds of the treaties endorse the Hull formula that asks for „prompt, adequate and effective“ remedies.⁷⁵ One cannot say that formula Hull is custom, since it is a rule that not all states agree on. However, part of it creates an umbrella for investors, an expectation of similar treatment for the other one third of treaties not endorsing it. The Hull formula might not be the rule in these treaties, but these contracting states cannot abstain from it for two reasons: first, investors expect such a treatment in order to invest, or feel more eager to invest when this rule is included in the treaty; second, it is easier for states especially in the periph-

ery of the globalized system of states to make an effort for uniformity with larger states, because in this case they can enter into the global market more dynamically and expand their international trade and investment with states that have stable and solid economies. Therefore, even if Hull is not customary law, it might very well be part of a general principle of international investment law.

Andreas Lowenfeld observes this very correctly:

„To this writer, the debate need not be answered conclusively. There can be no doubt that bilateral investment treaties are relevant to the development of international law of international investment. [...] Courts and arbitral tribunals, whether national or international, may rely on the common principles in the bilateral investment treaties.“⁷⁶

At the same time he clearly distinguishes between what has ripened into having a general normative validity, and what is still only binding *inter partes*. He says:

„For example, an agreement to arbitrate under a particular set of rules or a prohibition of specified performance requirements would not be regarded as general principles, but would depend on the applicability and text of a given treaty. But the understanding that international law is applicable to the relation between host states and foreign investors, that expropriation must be for a public purpose and must be accompanied by just compensation, and that disputes between foreign investors and host states should be subjected to impartial adjudication or arbitration are general principles, and do not depend on the wording or indeed on the existence of any given treaty.“⁷⁷

However, Lowenfeld moves a little further, to say that BIT provisions have ripped into customary international law⁷⁸, while he also challenges the traditional notion of how customary international law is defined.⁷⁹ We will not look into the second part of his argumentation, namely his disagreement with the current definition of international custom, but we will focus on the first one, that has caused some questions. In any case, customary international law is rather more concrete and it is likely for states to contest this approach. However, General Principles of International Investment Law have a bigger flexibility and the element of

72 K. Scott Gundeon, *Valuation of Nationalized Property Under United States and Other Bilateral Investment Treaties*, in R. Lillich, ed., *Valuation of Nationalized Property in International Law* (Conclusion) (1987).

73 Lowenfeld, *supra* note 70, at 475.

74 *Id.* at 476.

75 Gundeon, *supra* note 72.

76 Lowenfeld, *supra* note 70, at 487.

77 *Id.* at 488.

78 Andreas Lowenfeld, *Investment Agreements and International Law*, 42 Colum. J. Trans. L. 400, 400(2003).

79 Stephen M. Schwebel, *The United States 2004 Model Bilateral Investment Treaty: An Exercise in the Regressive Development of International Law*, in *Global Reflections on International Law, Commerce and Dispute Resolution*, Liber Amicorum in honour of Robert Briner, *passim*. (published Nov. 2005 ICC publishing, Publications 693, www.iccbooks.com).

opinio juris escorted by state practice is not necessary for us to conclude that they exist. Therefore, if we want to recognize some normativity in BIT provisions, then that could very well be General Principles of International Law. Of course, the debate is still open, and one could plausibly claim that they are custom, but if this causes reaction to scholars, we can start by establishing some sort of common ground, and accept they at least create principles.

Todd Weiler makes another interesting observation in this respect. He sees these rules, especially NAFTA article 1105 and the NAFTA system as one of many trends that demonstrate „the existence of a unified body of international economic law principles.“ He continues: „These principles permit one to speak of international economic law as a coherent set of norms, rather than a loosely associated set of treaty rules focused primarily on the regulation of trade in goods.“⁸⁰

International Commercial Law:

Lex mercatoria is another source of law that regulates international commerce. It has been defined as generally accepted international commercial law principles⁸¹ and it is viewed as a field of alternative norms that adapt at the needs of the market. The area of commerce is so dynamic and it changes constantly, and it has a multinational character at the same time so national law has proven not quite adequate to regulate it completely. National legislations also often leave a window open for lex mercatoria. For example the US Uniform Commercial Code⁸² in defining usage of trade provides that: „A usage of trade is any practice or method of dealing having such regularity of observance in a place vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.“

Lex mercatoria is seen as a set of principles in other instances too. The Iran-US Claims Tribunal, among the law it is called to apply, it can apply „such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable.“⁸³ Moreover, the determination of applicable law will be done by „taking into account relevant usages of the trade, contract provisions, and changed circumstances“, thus reintroducing *lex mercatoria*.⁸⁴ Crook cites a scholar expressing the hope that

the Tribunal might „augur well for the possible elaboration...of normative commercial law principles having a transnational legal dimension.“ Then he encouraged the Tribunal to create through its jurisprudence a „corpus of commercial law principles form the statutory and decisional law of various national legal systems, allowing it to resolve disputes according to a principled substantive consensus among legal systems.“ The Tribunal indeed invoked General Principles of law such as unjust enrichment, *force majeure*, account stated and *clausula rebus sic stantibus*.

Another example of *lex mercatoria* introduced as possible applicable law but defined as a set of principles of trade is Article 13(5) of the ICC Rules. This article provides that in all cases, „the arbitrator shall take account of the provisions of the contract and the relevant trade usages.“ Arbitrators, even while deciding based on national law, they must take into account the provisions of the contract and relevant trade usages.⁸⁵ John Crook’s phrase is very indicative of the relationship between *lex mercatoria* and General Principles (or at least of its view by scholars): „Indeed, Rule 13 (5) could be read to permit ICC arbitrators to decide wholly on the basis of generally accepted international commercial law principles (the celebrated *lex mercatoria*).“⁸⁶

Conclusion

Globalization as a social phenomenon had effects in multiple levels of human activity. Law inevitably is one of the areas most affected by it, since it is the primary tool of regulation of social phenomena. The economy changed radically and the fear for economic crises that follow a pattern of dominoes is greater now than ever before. A failure in one part of the world (such as the currency crisis in East Asia) will not just affect one state and its neighbors. It will spill over other corners of the world not expected and geographically far away.⁸⁷ This is the result of economic coordination through globalized regimes and the almost universal membership in international financial institutions. There is no local economic crisis. International markets are to a very large extent coordinated with each other.

According to Oswald Spengler, who makes this observation as early as 1922, „[w]orld-economy is the actualized economy of values that are completely detached in thought from the land, and made fluid.“⁸⁸ If this statement was true

80 Weiler, *supra* note 69, at 36.

81 John Crook, *Applicable Law in International Arbitration: The Iran-US Claims Tribunal Experience*, 83 A.J.I.L., 278, 285 (1989)

82 § 1-303. Course of Performance, Course of Dealing, and Usage of Trade. Under c.

83 Crook, *supra* note 81, at 282.

84 *Id.* at 281-286.

85 *Id.*

86 *Id.* at 285.

87 Joseph Stiglitz, *Globalization and its discontents*, (W.W. Norton & Company, 2002) at 106-109.

88 Oswald Spengler, *The Decline of the West*, trans. Charles Francis Atkinson, Vol. 2 at 485 (George Allen and Unwin, 5th Impression, 1954).

in 1922, then the modern world economy has long ago ceased being fluid; it is so complex that it consists of values only comparable to untamable vapors. Consequently the progressive consolidation of General Principles of International Economic Law will provide with the necessary common starting point in preventing and dealing with the legal problems arising as a result of the complexity of globalized markets, consequently transforming the traditional notion of General Principles of international law. Luhmann once deliberated about the supremacy of the social system of economy among the other social systems arguing that the economic system gives the pace to the process Luhmann calls „world-society building.“ The same seems to hold true also for the General Principles of economic law, as illustrated in the aforementioned examples, as they are becoming the cardinal point for the further development of the notion of the General Principles of international law. Whether this is for better or for worse, is something that only time can tell.