

Let's Disagree to Disagree. Relevance as the Rule of Inter-Order Recognition

Filippo Fontanelli*

Abstract

Santi Romano's intuitions on legal pluralism ring truer now than ever. This article explains the notion of inter-order relevance and repositions it in the current scenario of global legal disorder. Drawing from a series of recent episodes of high stakes clashes between legal orders, the article demonstrates that, ultimately, there is no normative robustness to pluralism. Orders react to each other and manipulate each other's legal materials according to their internal point of view. The resulting arrangements might occasionally approximate a reasoned order – but it is a contingent *κόσμος*, not *τάξις*. Legal orders select which external elements are legally relevant, which elements count as facts and which do not count at all.

I. Introduction

This year marks the one-hundredth anniversary of the publication of Santi Romano's *L'Ordinamento Giuridico* (hereinafter, *The Legal Order*) in book form. Last year, Mariano Croce published the English translation of this work,¹ an accomplishment long overdue, yet not one that comes too late. Both circumstances offer an opportunity to test the current relevance of Romano's 1918 work. This article sets out to do so, with specific reference to one aspect of Romano's thought on pluralism (tackled in the second part of *The Legal Order*). The central claim of this essay is that Romano's notion of 'relevance' retains analytical and heuristic value to explain and understand the conflict between legal orders in the contemporary world.²

I had the occasion a few years ago – when no English translation existed – to carry out a study on the continued relevance of *The Legal Order* in EU, international and transnational legal studies.³ That work contained an overview

* Senior Lecturer in International Economic Law, School of Law, University of Edinburgh; rapporteur, ILA Committee on the Procedure of International Courts and Tribunals.

¹ S. Romano, *The Legal Order* (Abingdon: Routledge, 2017), edited and translated by M. Croce. All excerpts used in this article are taken from this edition.

² See M. Croce, 'Il diritto come morfologia del sociale. Il pluralismo giuridico di Santi Romano' *Diritto Pubblico*, 841, 858 (2017), defining the notion of 'relevance' as a 'very underrated innovation of Romano's theoretical construction' (*innovazione assai sottovalutata dell'edificio teorico di Romano*).

³ F. Fontanelli, 'Santi Romano and L'ordinamento giuridico: The Relevance of a Forgotten

of the book's main ideas. That overview might still be helpful as an introduction but, in the wake of Croce's translation, there is no need to offer a similar summary as a necessary courtesy to Anglophone readers. Moreover, that article proposed to acknowledge and broadcast the oft-ignored position of Romano in the genealogy of ideas. It was therefore apt to discuss in detail the first part of *The Legal Order*, setting out the tenets of his institutionalist theory.

The present article has a narrower objective. I do not try to set the record straight about the size of the intellectual debit that contemporary scholars, unbeknownst to many of them, owe to Romano. The only objective of this work is to distil from *The Legal Order* some ideas that still retain distinct value and surpass competing theories. This article does not deal with the historical authority of *The Legal Order*. It deals with its contemporary significance.

In recent months, several vivid instances of inter-system conflict have occurred. Some of them make for excellent case-studies: those for which no single rule of conflict exists or applies. In these cases, *two* orders of disagreement are at play. The first-order disagreement is about the legality of certain conduct. The second-order disagreement is about how to solve the first-order one, or whether a solution in a proper sense is possible: the rulebook contains no answer. Judges, scholars and practitioners called upon to interpret or explain these cases might fail to find an appropriate heuristic model in their toolkit.

Part II of this article briefly presents the concept of inter-system relevance that Romano introduced in the second part of *The Legal Order*. Part III reviews some recent instances of inter-system collisions begging for analytical clarification. Part IV applies the notion of inter-systemic relevance to these cases. Part V explores the wider helpfulness of this notion, and extols its heuristic value.

II. The Notion of Inter-Order Relevance in *The Legal Order*

The Legal Order, in its first part, advocated institutionalism as the correct model to describe and analyse law. According to this model, every organised social institution is inherently a legal order. *Ubi societas, ibi jus*. Law constitutes the order, and the order is constituted to observe its ordering principle. The law is the foundation and the realisation of any organised order/institution/society.⁴ The idea was not unprecedented: the adage '*populus est collectio multorum ad iure vivendum, quae nisi iure vivat, non est populus*'⁵ contains in essence the

Masterpiece for Contemporary International, Transnational and Global Legal Relations' 2 *Transnational Legal Theory*, 67 (2011).

⁴ S. Romano, n 1 above, 20: 'That such an order is always and necessarily legal can be attested by noting that the characterizing purpose of law is that of social organization'.

⁵ See 'De verbis quibusdam legalibus', in F. Patetta ed, *Scripta anedocta antiquissimorum glossatorum* (Bologna, 1892), II, 129, para 39. Translation: 'a people is the gathering of many persons for the purpose of living together under the law. If they do not live under the law, they are not a people'.

same intuition,⁶ and dates back to the twelfth century. These earlier occurrences of the equivalence between people, order, and law foreshadowed the function and essence of statehood. In Romano, this intuition is developed further and justifies the legal autonomy of non-state orders.

The direct corollary of institutionalism is the existence of non-state law and, as a result, of multiple legal orders beyond (and within) states. Their existence and dignity as full-fledged legal orders does not rule out, and rather sets the hypothesis for, their interaction. Often, different legal orders relate to each other, without that relation implying a form of absorption or subsumption. In Romano's example, the international legal community clearly shows that states maintain their autonomy even when they partake in the international community, a literal 'institution of institutions'.⁷

That legal orders interact is commonplace, yet how that process occurs and how it is governed requires analysis. The trite example of organised crime as an autonomous legal order shows clearly that the relationship between legal orders could amount to outright rejection:

'a revolutionary society or a gang (of criminals) are not law for the state they aim to wipe out of whose laws they infringe; likewise, a schismatic sect is declared to be outlaw by the Church. But this does not exclude the fact that in these cases we are presented with institutions, organizations, orders, which, taken in isolation and in their own right, are legal'.⁸

The interplay between state law and a criminal institution is extreme but revealing. It signals the possibility that one order's relational mode towards another is the outright refusal to acknowledge it, or its action, as legal.

Inter-order allegations of sheer illegality occur in reality. In September 2018, US National Security Advisor John Bolton threatened the judges and the staff of the International Criminal Court (ICC),⁹ in the wake of the ICC Prosecutor's request for authorisation of an investigation into the behaviour of US personnel in Afghanistan.¹⁰ Bolton questioned and rejected the legality of ICC's action

⁶ According to F. Calasso, this motto encapsulates the 'true essence of legal order'. See *I glossatori e la teoria della sovranità – Studio di diritto comune pubblico* (Milano: Giuffrè, 2nd ed, 1953), 92-93, as cited in M. Lupoi, *The Origins of the European Legal Order* (Cambridge: Cambridge University Press, 2000), 79. On the relevance of this adage and Calasso's commentary thereon, see M. Croce, *Self-Sufficiency of Law: A Critical-institutional Theory of Social Order* (Dordrecht: Springer, 2012), 69.

⁷ S. Romano, n 1 above, 50.

⁸ *ibid* 21.

⁹ The transcript of the speech is available at *Full text of John Bolton's speech to the Federalist Society*, 10 September 2018, available at <https://tinyurl.com/y98wdcu3> (last visited 27 December 2018).

¹⁰ International Criminal Court, Public redacted version of '*Request for authorisation of an investigation pursuant to article 15*', 20 November 2017, ICC-02/17-7-Conf-Exp. See in particular para 4: 'the information available provides a reasonable basis to believe that members

over US citizens. In two paragraphs of his speech, he juxtaposed the claim to legal relevance advanced by the ICC order and how the US order intends to handle it.

First, on how the ICC seeks to be relevant to the US, Bolton noted:

‘According to the Rome Statute, the ICC has authority to prosecute genocide, war crimes, crimes against humanity, and crimes of aggression. It claims “automatic jurisdiction”, meaning that it can prosecute individuals even if their own governments have not recognized, signed, or ratified the treaty’.¹¹

Then, he informed the audience on how the US in fact accords little or no relevance to the ICC’s claims to effectiveness. In his view, the US should rather treat the consequent ICC actions as facts, possibly amounting to criminal conduct:

‘in 2002 Congress passed the American Service-Members’ Protection Act, or ASPA, which some have branded ‘The Hague Invasion Act’. This law (...) authorises the president to use all means necessary and appropriate, including force, to shield our service members and the armed forces of our allies from ICC prosecution. It also prohibits several forms of cooperation between the United States and the court. (...) We will respond against the ICC and its personnel to the extent permitted by US law. We will ban its judges and prosecutors from entering the United States. We will sanction their funds in the US financial system, and we will prosecute them in the US criminal system. We will do the same for any company or state that assists an ICC investigation of Americans’.¹²

These examples are helpful for signposting: they remind us that all instances of order-interaction develop, essentially, from each order’s internal perspective. Inter-order relevance is not (necessarily) the function of some overarching moderating regime or dialogic exchange. If the gang of criminals’ example seems a bit extreme, bear in mind how John Bolton characterised the actions of the ICC.

In *The Legal Order*, Santi Romano coined a notion that would denote the effects that one order has on another order, or more than one: legal relevance.¹³ One order’s relevance to another can take many forms, but they do not come in a pre-determined catalogue of ideal types. Romano’s effort went to clarify more

of United States of America (‘US’) armed forces and members of the Central Intelligence Agency (‘CIA’) committed acts of torture, cruel treatment, outrages upon personal dignity, rape and sexual violence against conflict-related detainees in Afghanistan and other locations, principally in the 2003-2004 period’. The possibility of prosecuting US nationals, in spite of the US not being party to the ICC Statute, depends on the nexus between the alleged crimes and the Afghan conflict, see *ibid* paras 248-252.

¹¹ Bolton’s speech, n 9 above.

¹² *ibid*.

¹³ S. Romano, n 1 above, 69: ‘My analysis of the relations between different legal orders necessarily dovetails with the analysis in which one of them can be relevant to the other’.

precisely what can be relevant to what, without prejudging how that would have to happen in specific cases:

‘To condense my thinking into a quick formula, I can say that in order for legal relevance to obtain, the *existence* or the *content* or the *effectiveness* of an order has to be conditional on another order on the grounds of a legal title’.¹⁴

This open-ended notion of relevance is pliable and has tremendous descriptive power. In some circumstances, one legal order is superior to another,¹⁵ or presupposes it.¹⁶ In other cases, more likely to arise, inter-order relevance derives from a third order that ‘coordinates them’:¹⁷ unilateral openings of one order to the other,¹⁸ or the circumstance of an order being ‘transfused’ into the other.¹⁹ These scenarios (superiority, presupposition, external coordination, unilateral opening, succession) amount to as many ‘titles’ that ‘make an order relevant to another’, with respect to its existence, content and effectiveness.²⁰

Romano’s toolkit of institutions was not as rich as ours. There are only so many ways in which the laws of states, municipalities, states of a federation, international law and the Church order can interact. We are familiar with the existence of countless legal regimes, of national, supranational, transnational and international character. For the most part, the difficulties of explaining and interpreting this ‘global Bukowina’²¹ derive from two of the various titles of relevance discussed above: the title of superiority and that of unilateral opening. In the first case, what is at stake is not so much the existence of the inferior order, but its content. Moreover, unilateral openings are possible. Legal orders continuously advance claims of relevance onto other orders from which they are

¹⁴ *ibid* 69, italics in the original, footnote omitted.

¹⁵ An apt example would be the condition of superiority of the central state over the regions. Importantly, a situation of superiority ‘must be affirmed by both orders’, see *ibid* 74.

¹⁶ Examples of presupposition could be the international legal order, which presupposes the existence of states, or the federal state, which presupposes the existence of the member states. Again, the presupposition of states for the existence of international law is not just a factual proposition, but also a legal one that ‘is addressed by international law’ (*ibid* 76). In other words, the inter-system relevance operates not only because states have postulated it, but also because international law has internalised it.

¹⁷ S. Romano, n 1 above, 71. The example here is again states of the international community, which are independent from each other but rely on international law to determine how to behave towards each other in certain matters (for instance, with regard to the laws of war, or the principles of land and maritime delimitation).

¹⁸ That is, an order spontaneously decides to condition part of its content or effectiveness to the content of another order.

¹⁹ Whereby the succession process determines the content and structure of the resulting order. The dynamics of state creation through succession fits this category.

²⁰ S. Romano, n 1 above, 71. For a fuller discussion see *ibid* 71-78 (regarding existence), 78-88 (regarding content), 88-93 (regarding effects).

²¹ G. Teubner, ‘Global Bukowina: Legal Pluralism in the World-Society’, in G. Teubner ed, *Global Law without a State* (Aldershot: Dartmouth, 1996), 3-28.

otherwise disconnected; the assumption there is that the receiving orders have somewhat agreed to recognise – and host – that relevance:

‘if there were no norm (to impose such relevance across orders), even if the state order had the legal possibility of completely abstracting from the order of the other states, this does not exclude the points that, for whatever reason, even as a matter of convenience, the state order could decide to take them into account. By dint of this *determination*, the foreign order becomes relevant to the state order’.²²

Even when a legal order cannot or does not affect the *content* of another one, it might still claim to retain *effectiveness* in the receiving order. Domestic laws on the recognition of foreign judgments and international awards constitute a clear example of unilateral openings towards the effectiveness of extraneous legal materials. Even when these openings are embedded into the law of a superior order, the domestic order can carry out its gatekeeper function and close the door.

A case in point can be made by examining the recent decision²³ of the Swiss Federal Supreme Court regarding the enforcement of an international arbitration award issued by a Paris-based tribunal against Uzbekistan.²⁴ The assignees of the victorious claimants intended to enforce the award attaching some Uzbek assets in Switzerland, and sought the assistance of the local courts. Since Switzerland is party to the New York Convention,²⁵ in the absence of one of the grounds for refusal exhaustively listed in Art V thereof, enforcement should have been granted. The Swiss court, however held that enforcement could not proceed, since the underlying dispute bore no ‘substantial domestic link’ (*genügende Binnenbeziehung*).²⁶ Without such link, Swiss courts would not be even competent to consider an attachment application regarding the assets or a foreign State. Ultimately, the Swiss judge created an internal condition for the effectiveness of foreign awards, in addition to the negative conditions of Art V of the New York Convention. It disregarded the understandable objection that, by design, international arbitration is ‘delocalised’²⁷ and therefore cannot be subject, for its

²² S. Romano, n 1 above, 83.

²³ Swiss Federal Supreme Court (*Bundesgericht*) Judgment no 5A_942/2017 of 7 September 2018, available (in German) at <https://www.bger.ch>. For a comprehensive commentary, see J. Hepburn and L. Bohmer, ‘Swiss Federal Supreme Court declines enforcement of investment treaty award, finding no ‘substantial link’ to Switzerland in underlying dispute’, 14 October 2018, available at www.iareporter.com.

²⁴ *Oxus Gold v Republic of Uzbekistan*, UNCITRAL, Award of 17 December 2015.

²⁵ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York of 10 June 1958, entered into force on 7 June 1959.

²⁶ Swiss Federal Supreme Court Judgment n 23 above, para 6.4.2.

²⁷ On the notion of delocalisation of international arbitration, see J. Paulsson, ‘Delocalisation of International Commercial Arbitration: When and why It Matters’ 32 *International & Comparative Law Quarterly*, 53 (1983) and J. Beatson, ‘International Arbitration, Public Policy Considerations, and Conflicts of Law: The Perspectives of Reviewing and Enforcing Courts’ 33

effectiveness, to a domestic link requirement.²⁸ It insisted that, irrespective of the where the tribunal sits, it is the place of the execution that must bear a link with the underlying dispute and legal relationship.

This case showed the ultimate power of each order to manage its door policy *vis-à-vis* external legal materials. Irrespective of whether this additional requirement breached the New York Convention, it was applied and effectively erected a barrier to the Convention's effectiveness and, in turn, to the effectiveness of the arbitral award.

One order's law could be relevant to another one if it shapes the latter's content, or if it deploys some direct effect therein and – crucially – if the receiving order *recognises that relevance*. With this simplified remark in mind, the analysis then turns to some inter-order incidents in which inter-order relevance was contested. The suggestion, hitherto only foreshadowed, is that relevance is the rule of recognition between orders, through which inter-legality prospers or fails.

III. The Cases

1. A Familiar Occurrence...

The selection of the cases for the present study has no pretense of exhaustiveness. After all, since the claim of this article refers to the possibility of a phenomenon (the *ad hoc* coordination of legal monads), some instances will suffice. In all the cases of next section, the conflict has peaked at some point between 2017 and 2018. In some inferential sense, these episodes chronicle the state of disjointment of legal post-modernism. Perhaps, these episodes indicate a circumstantial weakening of the rule or law operating between and across legal orders. Perhaps, more accurately, these episodes reflect the thinness of inter-legality safeguards. My predilection for non-normative notions of pluralism suggests, quite simply, that these instances of conflict are just normal occurrences that mark the constant and spontaneous re-organisation of, and re-posturing between, legal orders. Other examples could be selected.

In the past, I have selected two cases in which the notion of inter-system relevance had a better heuristic value than that of competing doctrines. These are primacy of EU law over national law and the use of international standards as benchmarks in the interpretation of WTO law obligations.

- As regards the former, the member states claim to ascribe EU law primacy to

Arbitration International, 175 (2017).

²⁸ Swiss Federal Supreme Court, Judgment, n 23 above, para 6.4.3: '(the applicant) argues that by concluding an arbitration agreement, the parties seek to "delocalise" any litigation by deliberately choosing an arbitration venue unrelated to their contract' (original: '*Sie argumentiert, dass die Parteien mit dem Abschluss einer Schiedsvereinbarung eine "Delokalisierung" allfälliger Rechtsstreitigkeiten anstreben, indem sie bewusst einen Schiedsort wählen, zu dem ihr Vertrag in keiner Beziehung steht*').

a choice of unilateral opening that is conditionally valid, while the Union sees it as a benchmark of superiority. The two views are incompatible, and scholars have formulated *sui generis* doctrines²⁹ to explain how this apparent misunderstanding operates and keeps EU law afloat. The simple notion that each order determines for itself how it responds to the content of other orders would explain better the dynamics between the Union and its member states, and would bring to the fore its delicate balance.

- With respect to WTO law's use of international standards, the notion of relevance is vastly preferable to the competing ideas of incorporation or 'hardening'.³⁰ WTO law refers to certain international voluntary standards, observance of which grants states a presumption of compliance with international trade obligations.³¹ Yet this operation distorts and upsets the original normative function of the standards. If a standard prescribes a *minimum* percentage of cocoa for chocolate products, it does not rule out, and actually encourages, higher percentages. When the WTO grants a presumption of compliance with trade obligations, it acknowledges that the percentage codified in the standard reflects a plausible public interest and tolerates the trade restriction that it entails. It actively discourages higher percentages – inherently more restrictive – by removing the presumption of WTO-compliance. In other words, WTO turns a minimum (floor) indicator into a maximum (ceiling) one. There is no incorporation³² into WTO law or 'attribut(ion) of legal force'³³ to soft norms. To say that 'this piece of soft law (the standard), despite its flexibility and somewhat ambiguous status, can be applied in WTO dispute settlement'³⁴ is misleading: what is applied is not the standard, but its reversed content. A better explanation is that the WTO order has decided, unilaterally, to consider international standards only relevant as facts, and has used their content as a reversed benchmark to set up a system of legal presumptions. This is not a *renvoi*; it rather recalls Duchamp's

²⁹ M. Poiares Maduro, 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker ed, *Sovereignty in Transition* (Oxford: Hart, 2003), 521; J.H.H. Weiler, 'In Defence of the *Status Quo*: Europe's Constitutional Sonderweg', in Id and M. Wind eds, *European Constitutionalism beyond the State* (Cambridge: Cambridge University Press, 2003), 7, 26 (talking of 'constitutional tolerance').

³⁰ M.G. Desta, 'GATT/WTO Law and International Standards: An Example of Soft Law Instruments Hardening Up?', in A.K. Bjorklund and A. Reinisch eds, *International Investment Law and Soft Law* (Cheltenham: Elgar, 2012), 148.

³¹ For a general overview, see J. Kurtz, 'A Look behind the Mirror: Standardisation, Institutions and the WTO SPS and TBT Agreements' 30 *University of New South Wales Law Journal*, 504 (2007).

³² S. Charnovitz, 'The Supervision of Health and Biosafety Regulation by World Trade Rules' 13 *Tulane Environmental Law Journal*, 271, 286-287 (2000).

³³ P. Delimatsis, 'Global Standard-Setting 2.0: How the WTO Spotlights ISO and Impacts the Transnational Standard-Setting Process' 28 *Duke Journal of Comparative and International Law*, 273, 277 (2017).

³⁴ M.E. Footer, 'The (Re) turn to Soft law in Reconciling the Antinomies in WTO Law' 11 *Melbourne Journal of International Law*, 241, 270 (2010).

way of calling ‘Hedgehog’ a bottle rack.³⁵

Between the publication of my previous article on Santi Romano and the 2017-18 period analysed here, several other instances of regime collisions occurred. One is the conclusive chapter of the *Kadi affaire* in the courts of the EU, whereby the Court of Justice of the European Union refused – again – to defer to the hypothetically supreme authority of the United Nations Security Council.³⁶ Next was Opinion 2/13 issued by the EU Court of Justice, refusing to authorise the EU’s accession to the European Convention of Human Rights, in spite of the Council of Europe, the EU member states and the European Commission’s draft agreement to that effect.³⁷ Another is the judgment of the Italian Constitutional Court of October 2014,³⁸ where it indicated that Italy’s compliance with a judgment of the International Court of Justice on sovereign immunities³⁹ would be unconstitutional and, therefore, must be avoided.⁴⁰ Another story of inter-order collision regards the UK’s refusal to obey to the judgments of the European Court of Human Right on the right to vote of prisoners.⁴¹ Other cases could be recited from memory, to show that the 2017-18 episodes do not have merely anecdotal quality; they are part of a constant and recurring phenomenon of high-stakes friction between legal orders.

2. ... And the 2017-18 Season

In this section, I will present three case studies. In section (a), I will discuss the Russian Constitutional Court’s decision regarding the *Yukos* judgment issued by the ECtHR. In section (b), I will examine the reaction of investment tribunals to the EU Court of Justice’s judgment in the *Achmea* case. In section

³⁵ R.T. Doepel, ‘Marcel Duchamp’s Bottlerack (1914/1964)’ 23 *De arte*, 28 (1988).

³⁶ See, respectively, Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* (Kadi I), [2008] ECR-06351 and Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *European Commission and others v Kadi* (Kadi II), [2013] ECLI:EU:C:2013:518. For a comprehensive study, see G. Martinico, F. Fontanelli and M. Avbelj eds, *Kadi on Trial* (Abingdon: Routledge, 2014).

³⁷ Court of Justice of the European Union, *Opinion 2/13 pursuant to Article 218(11) TFEU on Access of the EU to the ECHR* of 18 December 2014, ECLI:EU:C:2014:2454.

³⁸ Corte costituzionale 22 ottobre 2014 no 238. An English translation is available on the website of the Court at <https://tinyurl.com/ycw64l88> (last visited 27 December 2018).

³⁹ International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, ICJ Reports 2012, 99.

⁴⁰ For an introduction, see F. Fontanelli, ‘I know it’s wrong but I just can’t do it right. First impressions on Judgment no. 238 of 2014 of the Italian Constitutional Court’, 27 October 2014, available at <https://tinyurl.com/yaklaxcz> (last visited 27 December 2018). On the wide-reaching repercussions of this decisions and on how to overcome the stall it caused, see V. Volpe, A. Peters and S. Battini eds, *Remedies against Immunity? Reconciling International and Domestic Law after the Italian Constitutional Court’s Sentenza 238/2014* (forthcoming 2019).

⁴¹ Eur. Court H.R. (GC), *Hirst (n° 2) v the United Kingdom*, Judgment of 6 October 2005, available at www.hudoc.echr.coe.it. M. O’Boyle, ‘Electoral disputes and the ECHR: An Overview’ 30 *Human Rights Law Journal*, 1 (2009); G. Slapper, ‘The Ballot Box and the Jail Cell’ 75 *The Journal of Criminal Law*, 1 (2011).

(c), I will consider the judgment of the Brussels' Court of Appeal regarding the jurisdiction of the Court of Arbitration for Sport (CAS) over FIFA-regulated matters.

a) The Russian Constitutional Court's Reaction to *Yukos* ECtHR Judgment

In 2011, the European Court of Human Rights (ECtHR) found that Russia had breached the rights of the applicant, the oil company Yukos, under the European Convention on Human Rights (ECHR).⁴² Specifically, it held that Russia had breached Yukos's right to property and to fair trial by subjecting the company to disproportionately severe and retroactive tax assessments, and by subsequently imposing excessive and inflexible tax penalties. In June 2014, the ECtHR determined the amount of compensation owed by Russia: roughly EUR one point eight billion.⁴³ The Russian Ministry of Justice asked the Russian Constitutional Court (RCC) whether Russia could execute the ECtHR's decision.

The RCC, with a judgment delivered in January 2017, found that the Russian Constitution did not allow Russia to comply with the ECtHR's decision.⁴⁴ In its view, the state measures that the ECtHR had found to be in breach of the Convention were compatible with the Russian Constitution. Their constitutionality had been confirmed by the RCC itself, before the applicant launched proceedings in Strasbourg. Thus, the RCC concluded that, since the contested measures were in line with the spirit of the Constitution, the execution of the ECtHR's *Yukos* decision (that is, the payment of monetary damages) would contradict the principle of equality in fiscal matters. This, in the RCC's view, would constitute an example of high-stakes conflict that occasions when ECHR law, as interpreted in Strasbourg,

‘comes into conflict with the provisions of the Constitution of the Russian Federation, having their grounds in the international public order and forming the national public order’.⁴⁵

Interestingly, the RCC took upon itself the right to decide which ECtHR

⁴² Eur. Court H.R., *OAO Neft yanaya Kompaniya Yukos v Russia*, Judgment of 20 September 2011, available at www.hudoc.echr.coe.it.

⁴³ Eur. Court H.R., *OAO Neft yanaya Kompaniya Yukos v Russia* (Just satisfaction), Judgment of 24 June 2014, available at www.hudoc.echr.coe.it.

⁴⁴ RCC, Judgment of 19 January 2017 no 1- Π /2017 in the case concerning the resolution of the question of the possibility to execute in accordance with the Constitution of the Russian Federation the Judgment of the European Court of Human Rights of 31 July 2014 in the case of *OAO Neft yanaya Kompaniya Yukos v Russia* in connection with the request of the Ministry of Justice of the Russian Federation. A translation is available on the website of the RCC at <https://tinyurl.com/y787ksrq> (last visited 27 December 2018). For a fuller discussion on this judgment and its significance, see K. Dzehtsiarou and F. Fontanelli, ‘Unprincipled Disobedience to International Decisions: A Primer from the Russian Constitutional Court’ *European Yearbook on Human Rights*, 319 (2018).

⁴⁵ RCC Judgment, n 44 above, part 2, 8.

judgments attract the exceptional stigma of non-executability. In other words, and using a terminology that is by now familiar, the RCC determined the lack of legal relevance of the ECtHR decision in the Russian legal order. What strikes the eye in this case is the RCC's contention that the ECtHR's judgment was mistaken. The RCC essentially took its own prior pronouncements on the Russian measures' constitutionality as evidence of their lawfulness *across* Russian and ECHR law. In so doing, it replaced an external standard of review (compliance with the ECHR) with an internal one (compliance with the Constitutional core provisions).

The move was unwarranted and, patently, politically motivated. Therefore, the close analysis of legal reasons that paper over the genuine motivations might be ultimately pointless. Nonetheless, this is an excellent instance of apparent disagreement over a disagreement. The interaction between the ECHR and the domestic legal order should, in principle, operate through other legal devices immune from the possible arbitrariness of state bodies. The legal relevance of the ECHR into Russian law should be determined by the rules of international law (Art 27 of the Vienna Convention on the Law of Treaties)⁴⁶ and by the ECHR itself (Art 46(1) on the binding nature of ECtHR's decisions).⁴⁷ However, the RCC chose an altogether different benchmark to regulate the conflict, an internal one. As a result of using this internal benchmark of ECHR's relevance, compliance with the Russian Constitution can trump an infringement of the ECHR, and deprive ECtHR's judgment of effectiveness.

Granted, the rule of conflict in international law – which should have applied without any doubt – pointed to the opposite solution. International obligations bind states; domestic law, even that having constitutional in rank, is irrelevant. However, the legal order is ultimately capable of withdrawing any offer of open-ended observance of other orders' instructions. An order's promise to maintain the inter-systemic relevance of other orders is always contingent and quickly revocable. The consequences in the 'other order' if such withdrawals – namely, the determination state responsibility – are ultimately unable to penetrate the original order.

The weakness of the RCC's judgment, in effect, is not so much in its invocation of the Constitution as a barrier to the effectiveness of the ECtHR's decision. Incidents of sudden dualism are not uncommon. The Italian Constitutional Court took a similar posture *vis-à-vis* the International Court of Justice's judgment in *Germany v Italy*, and so did the UK legal order when it did not execute the ECtHR's decisions on prisoners' voting rights.⁴⁸ Italy and the UK formulated

⁴⁶ Reading: 'A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

⁴⁷ Reading: 'The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties'.

⁴⁸ For an overview of national resistance to ECtHR's decisions, see P. Popelier, S. Lambrecht and K. Lemmens eds, *Criticism of the European Court of Human Rights* (Cambridge: Intersentia,

additional conditions, of domestic origin, that would prevent the domestic effectiveness of international decisions interfering with some fundamental national interests.

What is striking about the RCC's decision is that it failed to apply the device of its own choosing. The RCC expressly announced that its task was to

‘solv(e) constitutional-law collisions, which may arise in connection with interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms as an international treaty of the Russian Federation’.⁴⁹

Even admitting that the Russian Constitution could prevail over ECtHR's decisions, there is no evidence that the Russian measures contested had constitutional rank. The acts which engaged Russia's state responsibility had statutory nature. That they were *permitted* by the Constitution (in proceedings about their constitutionality) does not entail that they were *required* by the Constitution. These measures were in other words incapable of triggering a ‘constitutional-law collision’.

A compelling challenge to the RCC's handling of the interplay between the ECHR and the Russian legal order, in fact, would adopt the internal point of view of the latter. The RCC identified some benchmarks within Russian law, according to which, relevance to the rulings of the ECtHR could be accorded or denied. Yet, the RCC apparently misused these benchmarks.

b) The Reaction of Investment Tribunals to *Achmea* CJEU Ruling

In December 2012, an arbitral tribunal constituted under the UNCITRAL rules handed down the award in the *Achmea v Slovak Republic* case.⁵⁰ The claimant, a company incorporated in the Netherlands and providing health insurance policies in Slovakia, sued Slovakia under the Dutch-Czechoslovak Bilateral Investment Treaty (BIT), for some alleged unfair actions against its business.⁵¹ Resort to arbitration was ostensibly ensured by an arbitration clause of the BIT.⁵² The investment tribunal, sitting in Frankfurt, upheld the investor's claim. Prior to the decision on the merits, the tribunal had rejected the

2017).

⁴⁹ RCC Judgment, n 44 above, part 2, 7.

⁵⁰ *Achmea B.V. v The Slovak Republic*, UNCITRAL, PCA Case No 2008-13 (formerly *Eureko B.V. v The Slovak Republic*), Award of 7 December 2012.

⁵¹ Namely, the Slovak Republic had passed a law that, for five years, prohibited the distribution of profits from the sale of private health insurance services.

⁵² See Art 8 of the BIT: ‘Each Contracting Party hereby consents to submit (all disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter) to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date on which either party to the dispute requested amicable settlement’.

respondent's preliminary objections to its jurisdiction, supported by the European Commission. According to Slovakia and the Commission, the arbitration clause of the BIT, which entered into force in 1992, has been inapplicable since the Slovak Republic's accession to the EU in January 2004. The objections hinged on a claim of *ineffectiveness* of the treaty clause due to the *content* of EU law. This inter-system argument was rejected.

The respondent sought to have the arbitral award set aside in domestic proceedings and sought the assistance of the German courts to that purpose by invoking the relevant provision in the German arbitration law.⁵³ The German court of first instance rejected the annulment action.⁵⁴ The Federal Supreme Court,⁵⁵ convinced that the determination of the case implied a question of EU law (that is, the effectiveness of the arbitration agreement under the applicable EU norms), lodged a preliminary question to the EU Court of Justice. The German judges asked whether infra-EU investment arbitration is compatible with EU law, in particular the EU Treaties and the general principles of EU law.

In March 2018, the Court of Justice issued the *Achmea* ruling. The ruling stated that EU law's autonomy and founding features rule out infra-EU investor-State arbitration, with the latter constituting a method of dispute resolution disconnected from the judiciary of the EU and its member states. This conclusion was premised on the inevitable application of EU law in arbitration cases. Accordingly, the Court of Justice of the European Union (CJEU) noted that:

‘to ensure that the specific characteristics and the autonomy of the EU legal order are preserved, the Treaties have established a judicial system intended to ensure consistency and uniformity in the interpretation of EU law ... (I)t is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member State ... (T)he judicial system as thus conceived has as its keystone the preliminary ruling procedure ... which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties’.⁵⁶

⁵³ See Section 1059(2) of the *Zivilprozessordnung* (Code of Civil Procedure). Under this provision, an award can be set aside for specific reasons, including the invalidity of the arbitration agreement under the applicable law, and when the award's recognition or enforcement would be against public policy.

⁵⁴ Judgment of the Higher Regional Court of Frankfurt (Germany) of 18 December 2014, available at <https://tinyurl.com/ydhlfyox> (last visited 27 December 2018).

⁵⁵ The *Bundesgerichtshof* (Federal Court of Justice, Germany), decision of 3 March 2016, available at <https://tinyurl.com/y8t6nllf> (last visited 27 December 2018). An English translation is available at <https://tinyurl.com/yce5kwx8> (last visited 27 December 2018).

⁵⁶ Court of Justice of the European Union, Case C-284/16 *Slowakische Republik v Achmea*

The exclusive jurisdiction of tribunals over investment disputes would contravene, in the CJEU's view, the principles on which the effectiveness of EU law relies.⁵⁷ Obviously, the implications of the ruling exceeded the specific *Achmea* controversy. The CJEU's dictum cast a shadow on all cases of arbitration between an investor from an EU member state and another member state. Tribunals' jurisdiction in pending and future cases would be challenged, as would be the recognition and enforcement of past awards.

Immediately, parties in pending cases were asked to brief the tribunals on the *Achmea* issue. The tribunals in *Masdar*,⁵⁸ *Vattenfall*⁵⁹ and *UP and C.D.*,⁶⁰ with slightly different arguments, all took upon themselves the challenge to determine the legal relevance of the *Achmea* ruling in the disputes at hand. As the *Vattenfall* tribunal put it, the question was precisely 'whether, and, if so, how, the ECJ Judgment can legally come into play'⁶¹ in the analysis of the objections to its jurisdiction.

These tribunals ultimately considered that the *Achmea* ruling did not affect their jurisdiction.⁶² They held that their competence had been validly established under the applicable clauses of the bilateral or multilateral investment treaties invoked by the investor. EU law, in a nutshell, could do nothing to affect that determination, even if it might have considered the resulting proceedings to breach EU law. Consider, for instance, the statement of the *Vattenfall* tribunal, which addressed the risk that its award would be unenforceable for breach of EU law:

'In respect of Respondent's allegations relating to the three breaches of EU law, the Tribunal considers it important to clarify that in this Decision,

BVCJUE, Judgment of 6 March 2018, ECLI:EU:C:2018:158, 35-37.

⁵⁷ *ibid* 58: '(The BIT arbitration clause) is such as to call into question not only the principle of mutual trust between the Member States but also the preservation of the particular nature of the law established by the Treaties, ensured by the preliminary ruling procedure provided for in Article 267 TFEU, and is not therefore compatible with the principle of sincere cooperation'.

⁵⁸ *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain*, ICSID Case no ARB/14/1, Award of 16 May 2018.

⁵⁹ *Vattenfall AB and others v Federal Republic of Germany*, ICSID Case no ARB/12/12, Decision on the *Achmea* issue of 31 August 2018.

⁶⁰ *UP and C.D. Holding Internationale v Hungary*, ICSID Case no ARB/13/35, Award of 9 October 2018. The award is confidential. A reliable report is provided by IAREporter, see 'In a striking new award, ICSID tribunal rules that *Achmea* judgment does not cast shadow over ICSID-based arbitration; but efforts to empanel ad-hoc committees to review such intra-EU bit awards keeps getting harder,' 11 October 2018, available at www.iareporter.com.

⁶¹ *Vattenfall* n 59 above, 129.

⁶² The *Masdar* tribunal essentially distinguished *Achmea*, holding that its reasoning would not translate to arbitration under a multilateral investment treaty like the Energy Charter Treaty (see 678-682). The *CD* tribunal also relied on a distinction: the *Achmea* arbitration was under the UNCITRAL Rules, whereas the case at hand was an ICSID one (see IAREporter, n 60 above). These decisions show, in their simplicity, how ultimately it is for each legal order to decide when, and under which terms, other orders can deploy legal effects on and within them. The *Vattenfall* tribunal invoked a diverse host of reasons to reject the infra-EU objection and the relevance of the *Achmea* ruling. Some are discussed in the body of the article.

the Tribunal is concerned only with the implications of the ECJ Judgment on the jurisdiction of the Tribunal over the dispute between Claimants and Respondent. The Tribunal is not concerned with whether Claimants' actions, either of continuing this arbitration or of seeking an enforcement of an award of compensation, if any, would amount to a breach of EU law'.⁶³

In other words, the *Vattenfall* tribunal refused to draw from the *Achmea* ruling a lesson about the effects of EU law within the investment treaty, or on its content. EU might have some relevance for the Energy Charter Treaty (ECT), but that relevance is determined internally, not by the EU itself; conversely, the tribunal did not care at all about the possible repercussions of its decision on the EU legal order.⁶⁴ Arguably, the CJEU's insistent use of its unmitigated point of view outside the remit of EU law (that is, to define its legal relevance for non-EU orders) did not help.⁶⁵

The better argument raised by Germany, in fact, regarded the *internal* point of view of the treaty regime that the tribunal oversaw. Art 26(6) ECT codifies a unilateral opening to the norms of other orders, which expands the content of the law applicable in the arbitration:

'A tribunal (...) shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law'.

The tribunal's failure to apply EU law, therefore, was not just an unsurprising refusal to defer to an external order. It also represented, on its face, a refusal to acknowledge the relevance that the treaty order had unilaterally and expressly accorded to EU law.

On 31 October 2018, the Federal Supreme Court found that no arbitration agreement existed between *Achmea* and the Slovak Republic, and set aside the investment award.⁶⁶

c) The Reaction of the Belgian Courts to the *Seraing* CAS Award

⁶³ *Vattenfall* n 59 above, 231.

⁶⁴ As the *Vattenfall* tribunal noted, other tribunals faced with the same inkling of inter-order conflict had tried to address it in different ways. See *ibid* 147: '(...) tribunals that have considered the relationship between EU law and the ECT have attempted to resolve conflicts, if any, between them. They have done so, for example, by (i) endorsing a harmonious interpretation, (ii) prioritising international law over EU law, or (iii) finding that there is no conflict that requires resolution'. (footnotes omitted).

⁶⁵ For a critical reading of the *Achmea* ruling, and in particular of the narrowing overture of the EU legal order to external law, see C. Cantore and P.C. Mavroidis, 'Another One BITes the Dust The Distance between Luxembourg and the World is Growing after *Achmea*' (2018) *Working Paper RSCAS 2018/47*, 9: 'While we are waiting for the CJEU to state some (probably) definitive words in Opinion 1/17, we cannot be certain of anything anymore'.

⁶⁶ The *Bundesgerichtshof* (Federal Court of Justice, Germany), decision of 31 October 2018, available at <https://tinyurl.com/y7r2pc2g> (last visited 27 December 2018).

A Belgian football club (RFC Seraing) transferred to a multinational equity fund a quota in the rights of some of its footballers, in exchange of money. Clubs use this form of transaction, called third-party ownership (TPO), to raise funds to sign players. Investors, conversely, engage in TPO seeking to profit from future re-sales of these players. FIFA, the international association regulating football, frowned upon these transactions and included a prohibition in the Regulations on the Status and Transfer of Players (Regulations), fearing that TPOs give to third subjects undue power of influence over the management of football clubs, undermining their independence.

Under this clause in the Regulations, FIFA issued a sanction in September 2015 against the Belgian club. This sanction consisted of a monetary penalty and a temporary ban on purchasing new players. In January 2016, the club impugned the sanction and launched CAS arbitration, requesting the tribunal to declare the illegality of the Regulations' prohibition of TPOs. The tribunal considered that the EU law on the four freedoms in the single market would apply to the dispute, insofar as they would constitute imperative norms – and thus could not be contracted out by the parties –⁶⁷ under the Swiss law on private international law.⁶⁸

The CAS tribunal, in March 2017, found that the FIFA prohibition did not breach the principle on the free movement of capital,⁶⁹ workers and services;⁷⁰ the Regulations also were compatible with the Treaty rules on competition⁷¹ and the other standards invoked by the applicant. The CAS tribunal thus confirmed the FIFA sanction almost in full.⁷²

RFC Seraing then turned to the Belgian courts to challenge the FIFA penalties. The respondents invoked the clause of exclusive arbitration of the FIFA and UEFA Regulations, prescribing recourse to arbitration and barring access to domestic courts. The Belgian court noted that, under Belgian law, valid arbitral clauses can cover disputes 'regarding a specific legal relationship'.⁷³ However, the FIFA and UEFA arbitral clauses did not contain any specific indication about the legal relationship covered:

The intention of the drafters of this clause is clearly to cover all kinds of dispute between the subjects indicated. Accordingly, this is a general clause that cannot apply, because it does not constitute an arbitration clause

⁶⁷ Arbitrage TAS 2016/A/4490 *RFC Seraing c Fédération Internationale de Football Association (FIFA)*, award of 9 March 2017, 73.

⁶⁸ Art 19 of the *Loi fédérale sur le droit international privé du 18 Décembre 1987*.

⁶⁹ *Seraing* award n 67 above, 125.

⁷⁰ *ibid* 129.

⁷¹ *ibid* 144.

⁷² *ibid* 179: the tribunal shortened slightly the duration of the purchasing ban.

⁷³ The original text of Art 1681 of the Belgian Judicial Code reads: '*au sujet d'un rapport de droit déterminé*'.

recognised by Belgian law'.⁷⁴

In so doing, the Belgian court overrode the jurisdictional indication in the FIFA rules, and upheld competence on the claim.

The International Council of Arbitration for Sport (ICAS) immediately issued a press release trying to narrow down the implications of the judgment.⁷⁵ The CAS noted that the decision revolved on the non-specificity of the arbitration clause invoked and thus did not rule out the possibility of CAS exclusive jurisdiction in the abstract.⁷⁶ It also noted that the Belgian judges had not declared CAS arbitration 'illegal' or invalidated the CAS award in the underlying matter. It also pointed to a practical problem, that might aggravate the impact of this inter-system conflict:

'The main difficulty is that one may potentially end up with two contradictory decisions: one issued by the Belgian courts, enforceable in Belgium only, and the original one issued by CAS (and which was confirmed by the Swiss Federal Tribunal), enforceable in the rest of the world'.⁷⁷

On its face, the Belgian court limited itself to the application of Belgian law. Yet, to maintain that the arbitral clause in the FIFA rules was open-ended is a matter of interpretation – it would have been possible to construe the clause as covering only disputes based on the law of the FIFA order; this construction would have vested the provision with an acceptably specific meaning.

In opting for the interpretation that made the clause inapplicable, the Belgian court vindicated the internal point of view of a legal order (the state) about the relevance of another one (the FIFA rules). The FIFA clause intended to produce certain effects in, and shape the content of, Belgian law – carving out from the jurisdiction of its courts a certain category of disputes. However, this unilateral aspiration met with the usual impediment: the legal relevance of one order onto another is conditional on the terms of the latter. In this case, Belgian law requires that the arbitration clauses be re-drafted, to acquire legal relevance.

⁷⁴ Cour d'Appel de Bruxelles, 18^{ème} Chambre F (affaires civiles) 2016/AR/2048, Judgment of 29 August 2018, 14 the original reading: '*La volonté des rédacteurs de la clause est visiblement d'appréhender tout type de litige entre les parties désignées, ce qui en fait une clause générale, qui ne peut recevoir d'application, car ne constituant pas un clause d'arbitrage reconnue en droit belge*'. The text of the decision is available at <https://tinyurl.com/y828x3v7> (last visited 27 December 2018).

⁷⁵ International Council of Arbitration for Sport ICAS / CAS, Media release statement of the International Council of Arbitration for Sport (ICAS) regarding the case *RFC Seraing/Doyen Sport /FIFA /UEFA /URBSFA*, Lausanne, 11 September 2018.

⁷⁶ *ibid*, had that specific CAS clause been more detailed, the arbitration exception would have been upheld and the Brussels Court of Appeal could have denied its jurisdiction. Accordingly, the problem lies only with the wording of the CAS clause in the FIFA Statutes; such drafting issue does not affect the jurisdiction of CAS globally'.

⁷⁷ *ibid*.

IV. Disagreements over the Disagreements

As discussed above, these cases share one aspect: the uncertainty about which legal device can arbitrate an inter-order conflict. In each case, the recalcitrant order points to an internal rule of relevance, which displaces the external one. Thus:

- In *Yukos*, the RCC pointed to the Constitution, and its duty to protect it from external threats, to ignore the rules of the Vienna Convention on the Law of Treaties and the ECHR. In principle, these international rules would clarify the effects of the ECtHR's judgments over domestic law, even in the case of conflict. The RCC disagreed.

- In *Achmea*, the EU Court of Justice pointed to the EU legal principles and Treaty law: these norms would clarify, in the case of conflict, the prevailing obligations of member states and individuals in the European Union. The arbitration tribunals disagreed.

- In *Seraing*, the FIFA rules clearly prescribed for exclusive arbitral jurisdiction – they pointed to a clear solution in the opportunity of competing *fora*. The Belgian court disregarded that instruction, stating that it was defective under another – internal – rule of conflict found in the Belgian arbitration law. FIFA though its rule would indicate the outcome, the court of Brussels disagreed.

In all these cases, the lesson learned is that the outcome of the conflict was not dictated by the law of the external order, but by the law of the receiving one. The scenario bodes well with Teubner's warning: 'there is just one way remaining to handle inter-constitutional conflicts – a strictly heterarchical conflict resolution'.⁷⁸ The specific reasons behind each instance of 'inhospitality'⁷⁹ are beyond the scope of this article. Of course, the case studies selected evince some kind of 'ethical moment' that underpins the 'irreducible conflict'.⁸⁰ But – inevitably – the invocation of high values must go largely unchallenged across legal orders. Therefore, FIFA cannot dispute the Belgian courts' interpretation of Belgian law; the International Court of Justice and the ECtHR cannot dispute the interpretation that the Italian and Russian Constitutional Courts give of their

⁷⁸ G. Teubner, *Constitutional Fragments: Societal Constitutionalism in Globalization* (Oxford: Oxford University Press, 2012), 81. See also G. Teubner and P. Korth, 'Two Kinds of Legal Pluralism: Collision of Laws in the Double Fragmentation of World Society', in M.A. Young ed, *Regime Interaction in International Law: Facing Fragmentation* (Cambridge: Cambridge University Press, 2012), 23-54, 29: '(T)he post-national constellation is characterized by the juxtaposition of a number of structurally closed legal systems, all of which principally claim to be applied pre-eminently within their respective realms. Neither a hierarchical construction of the law nor a Grundnorm nor a common point of final reference can hold these heterarchical systems together'.

⁷⁹ The metaphor is borrowed from H. Muir Watt, 'When Societal Constitutionalism Encounters Private International Law: Of Pluralism, Distribution, and 'Chronotopes'' 45 *Journal of Law and Society*, 185-203, 191-192 (2018), which in turns draws from J. Derrida, *De l'Hospitalité, interview by Anne Dufourmantelle* (Paris: Calmann-Lévy, 1997).

⁸⁰ *ibid* 202, referring to A. Riles, 'Cultural Conflicts' 71 *Law and Contemporary Problems*, 273-308 (2008).

constitutions.⁸¹

Conversely, the reasons for one order's clamming up can be weighed and discarded by another one, when called upon to assess their inter-order relevance. Consider the mixed fortunes of the principle of autonomy of the EU legal order. In Opinion 2/13, the EU Court of Justice invoked this principle to declare the unlawfulness of the project of EU's accession to the ECHR. The principle of autonomy was used to motivate a choice of autarky,⁸² and deny the relevance of the (draft) Accession Agreement. A few years later, instead, the EU Court of Justice's attempt to repeat this move only achieved so much. Through reference to the principle of autonomy, the EU Court of Justice tried to over-impose the relevance of EU law to the specific *Achmea* post-award proceedings in Germany. However, several other tribunals (see above: *Masdar*, *Vattenfall*, *UP & CD*) decided for themselves what to make of this principle and, in essence, ruled out its relevance outside the EU legal order. Each order in a pluralist legal world is potentially responsible for, and the victim of, legal protectionism.

Unilateral openings can allow the circulation of legal materials, but they cannot be taken for granted. As Paulus noted, with respect to the use of international law in domestic courts, when the latter

‘apply international law or implement international decisions, they do so because domestic law requires it, not because they are organs of the international community’.⁸³

Similarly, when an order retracts from certain matters and leaves them to the regulation of another order, coordination occurs *de facto*, by way of choice made within the receiving order. Talking about the relevance of foreign law, which can operate under the rules of private international law, Roman noted:

‘(It is not) the state that confers a legislative competence on the foreign state. This is a process that takes place within the domestic law of the state that limits itself, on its own, and attributes some validity to the order of another state without entering in any relationship with the latter’.⁸⁴

Fundamentally, the EU law and FIFA legal order could not claim legislative power over investment treaty regimes and Belgian law. However, they could plausibly expect that their indications would be accepted by these receiving orders

⁸¹ See A. Paulus, ‘National Courts and the International Rule of Law – Remarks on the Book by Andre Nollkaemper’ 4 *Jerusalem Review of Legal Studies*, 5 (2012).

⁸² P. Eeckhout, ‘Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky’ 38 *Fordham International Law Journal*, 955 (2015).

⁸³ A. Paulus, n 81 above, cited in G. Palombella, ‘Inter-legality – Theory, Realities and Promises: A Manifesto’, in G. Palombella and J. Klabbbers eds, *The Challenges of Interlegality* (Cambridge: Cambridge University Press, forthcoming 2019).

⁸⁴ S. Romano, *The Legal Order* n 1 above, 85.

and cause them to decide – unilaterally – to accordingly retract their normative reach. Think of the function of FIFA and its aspiration to deploy its legal effects into domestic law, and consider this sober remark by Romano:

‘social life, which is more empowering and more imposing than state law, took its revenge by constructing, along state law and against it, a series of partial orders within which those necessary relationships can unfold more comfortably and conveniently. For sure, insofar as they are not recognised by the state, these orders are not practically able to attain complete effectiveness’.⁸⁵

The last sentence describes accurately the failed claim to relevance of the FIFA arbitration clause. It can also be abstracted into a more general warning: inter-order effectiveness is desirable, when society is regulated by, and constituted into, several legal orders. But legal relevance across orders, ultimately, depends on the recognition of the receiving order.

V. Conclusions

Understandably, one might wonder whether this ‘morphologic’⁸⁶ approach yields any useful insight. Naturally, that orders can do as they please, when it comes to recognise and accommodate each other’s legal relevance might be an accurate snapshot of pluralism, but it does not offer a taxonomy.

Ultimately, this is already a valid lesson.⁸⁷ A non-essentialist vision of pluralism is a better predictive model than essentialist ones. Furthermore, the breakdown of relevance into its possible manifestations (existence, content, effects) lays the foundation of a

‘methodology of confrontation among legal orders (which) can result from interweaving separate rules of recognition and practices and will be as concrete, in the end, as those practices will be’.⁸⁸

This sketch of a methodology – drawn by Palombella in 2009 – hinted to a specific function of the rules of recognition, that Michaels also identified, at roughly the same time:

‘Recognition, so despised by early legal pluralism, re-enters the analysis, but the focus is now on recognition as *a practice of the recognizing law* rather

⁸⁵ *ibid* 98.

⁸⁶ M. Croce, ‘Il diritto come morfologia del sociale’ n 2 above.

⁸⁷ F. Fontanelli, n 3 above, 114-115.

⁸⁸ G. Palombella, ‘The Rule of Law beyond the State: Failures, Promises, and Theory’ 7 *International Journal of Constitutional Law*, 442–467, 467 (2009).

than as a universal criterion of validity for the recognized law'.⁸⁹

In a truly pluralist context, the rule of recognition that matters is the one used by an order to recognise the *relevance* of other orders. There is a spontaneous ordering (κόσμος) of legal institutions, rather than an organised one (τάξις). The best approach is that of the entomologist: map and classify the instances of interaction, knowing that they are for the most part the function of each order's preference. There will be patterns, forms of prolonged reciprocity, comity, cooperation, harmonisation, voluntary and accidental coordination.⁹⁰ And yet, all these phenomena will not define the essence of pluralism: they can only emerge from it by convenience and, very often, by necessity.⁹¹

An invisible hand, which will function and thrive better in coordination than isolation operates between legal orders. The resulting set of arrangements might resemble a reasoned order of its own – but it is a contingent κόσμος, not τάξις. Legal orders select, within each other's range of social relationships and elements, which deserve recognition as legally relevant and which are mere facts. That selection is an act of willingness exercised from within each legal order. As it was noted:

‘universalists stress the potential of law as reason, while pluralists stress law as *voluntas*: while to the former law is a point of departure, to the latter it is the arrival point of a vision of law instrumental to the creative political will’.⁹²

The powerful lesson of Santi Romano might be relatively underwhelming for the post-modern scholarship of universalism, but it certainly captures what really goes on within and among legal orders. *Voluntas* governs the interplay between order, *ratio* does not.

⁸⁹ R. Michaels, ‘Global Legal Pluralism’ 5 *Annual Review of Law and the Social Sciences*, 243, 256 (2009) (emphasis added).

⁹⁰ S. Romano, *The Legal Order* n 1 above, 99: ‘when it comes to institutions with a large scope pursuing ends that cover a broad area of social life – on account of the countless links among its various manifestations, often inseparable from each other – those relations between the institutions’ orders might be appropriate or necessary’.

⁹¹ G. Palombella, n 83 above: ‘the unavoidable interconnectedness of legalities’.

⁹² *ibid*, referring to N. Walker, *Intimations of Global Law* (Oxford: Oxford University Press, 2014), 195-205.